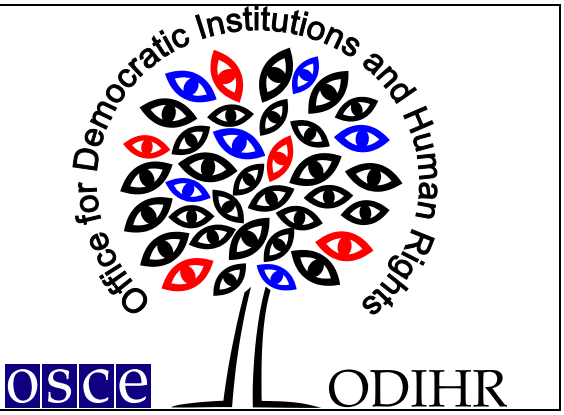
Warsaw, 7 October 2015 Opinion-Nr.: GEN-SRB/275/2015 [AlC] www.legislationline.org	

OPINION
ON THE DRAFT LAW ON POLICE
OF SERBIA

based on an unofficial English translation of the draft law provided by the OSCE Mission to Serbia

This Opinion has benefited from contributions made by the OSCE Strategic Police Matters Unit, Transnational Threats Department, of the OSCE Secretariat and by Dr. Andy Aitchison, Lecturer in Criminology (University of Edinburgh) and Researcher on Criminal Justice in Transitional States

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Annex: **Draft Law on Police of Serbia** *(this Annex constitutes a separate document available at www.legislationline.org)*

I. INTRODUCTION

1. *On 1 June 2015, the Head of the OSCE Mission to Serbia forwarded to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "OSCE/ODIHR") a letter from the Serbian Minister of Interior requesting the OSCE/ODIHR to review the draft Law on Police of Serbia (hereinafter "the Draft Law").*
2. *On 5 June 2015, the OSCE/ODIHR Deputy 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 by the Serbian Minister of Interior.*

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 Serbia.
5. The Opinion raises key issues and provides indications of main 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 OSCE Mission to Serbia, 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 Serbia, 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 equality and non-discrimination in relation to the performance of police duties and the composition of police forces; the adoption of a Code of Police Ethics (Article 48); and a mechanism for systematic timely reporting of the use of any means of enforcement (Article 30).
9. At the same time, despite the Draft Law's attempt to address police reform in a comprehensive and detailed manner, certain provisions of the Draft Law could potentially lead to serious interferences with human rights and fundamental freedoms. In particular, the Draft Law fails to clearly state that criminal investigative activities of the

police should be carried out in accordance with the provisions of the Criminal Procedure Code, which would help ensure compliance with the substantive and procedural safeguards contained therein. The Draft Law also fails to provide adequate legal safeguards to protect any person deprived of his/her liberty by the police from acts of torture and other forms of ill treatment.

10. Further, the Draft Law lacks precise and clear provisions relating to authorization procedures for the use of certain forms of force and for independent investigation. Additionally, the Draft Law should expressly include some overarching principles to ensure that the policing of assemblies is carried out in accordance with international standards. In light of the latest recommendations from human rights monitoring bodies, the Draft Law should also provide for the establishment of an overall independent police complaint body with comprehensive oversight responsibilities over the entire police system. This body should be competent to investigate *ex officio* all cases involving allegations of torture, ill-treatment and excessive use of force, corruption and/or discriminatory behaviour and other violations of laws, and to handle individual complaints. Finally, given the key role that the police should play in providing assistance to victims and preventing victimization, the Draft Law should also adopt a more victim-centred approach, which would involve protecting and assisting victims of crimes.

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

    A. to clearly state that all activities of the police carried out in the context of criminal proceedings should comply with the provisions of the Criminal Procedure Code, to avoid overlap with such provisions in the Draft Law, while including cross-references to relevant sections of the Code as appropriate; [pars 20-26, 47, 62, 83, 85 and 87]

    B. to define and expressly prohibit ethnic profiling, while expressly providing that stops, identity checks and searches shall never be based on ethnicity and other personal characteristics in the absence of a specific suspect description; to ensure that effective investigation and complaints mechanisms are in place in case of violation; [pars 35-37]

    C. to remove the complete ban on union membership for members of specialized units and special units provided in Article 167 par 4 of the Draft Law; [par 51]

    D. to introduce adequate substantive and procedural safeguards to reduce the risk of possible acts of torture or ill treatment during any kind of police detention, which would include clear reference to criminal liability of police officers in cases where such acts were committed and their immediate suspension pending investigations, the right of detained persons to be examined in full confidentiality by a doctor of their choice, the obligation for police officers to maintain comprehensive police registers, and disciplinary sanctions against them in case of non-compliance with such safeguards; [pars 59-66]

    E. to provide for clearer authorization procedures for the use of certain forms of force by the police, while specifying the circumstances and limits of such use of force, and providing procedures for independent investigations and ensuing criminal liability in cases of illegal or disproportionate use of force; [pars 67-76]

    F. to ensure that the rules on policing of assemblies are clear and specific, and in accordance with international standards; [pars 77-81]

G. to introduce the possibility for the police to issue temporary emergency orders to protect victims of crimes, subject to later confirmation by a court, and require the police to inform victims/injured parties of their rights in a comprehensive manner ; [pars 90 and 92]

H. to list the key principles regarding the protection of personal data recorded and processed by the police; [pars 95-98] and

I. to consider the establishment of an overall independent police complaints body with comprehensive *ex officio* oversight responsibilities over the entire police system, in particular for cases involving allegations of torture, ill-treatment and excessive use of force, corruption and/or discriminatory behaviour. [pars 105-107]

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

IV. ANALYSIS AND RECOMMENDATIONS

1. International Standards on Democratic Policing

12. The main duties of the police are habitually to maintain public tranquility, law and order; protect and respect the individual's fundamental rights and freedoms; prevent, detect and combat crime; and provide assistance and services to the public.[1] In order to fulfil these duties, police forces may, where necessary, intrude in people's lives and interfere with individual human rights.[2] Any such interference must, however, be in compliance with international human rights and rule of law standards.

13. Key general international human rights instruments applicable in Serbia and relevant to democratic policing are the International Covenant on Civil and Political Rights[3] (hereinafter "the ICCPR"), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[4] (hereinafter "the UNCAT"), and the European Convention on Human Rights and Fundamental Freedoms[5] (hereinafter "the ECHR"). In addition, Serbia has also ratified, among others, the UN Convention on the Elimination of All Forms of Discrimination against Women[6] (hereinafter "CEDAW"), the UN Convention on the Elimination of All Forms of Racial Discrimination[7] (hereinafter "CERD"), the UN Convention on the Rights of Persons with Disabilities[8]

[1] See part A par 1 of the Council of Europe Declaration on the Police (1979); Articles 1 and 2 of the UN Code of Conduct for Law Enforcement Officials (1979); and par 2 of the CSCE Charter of Paris (1990). See also par 2 of the OSCE Guidebook on Democratic Policing, May 2008 (hereinafter "2008 OSCE Guidebook on Democratic Policing"), available at http://www.osce.org/spmu/23804?download=true.

[2] See pars 15-17 Opinion of the Council of Europe Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police, CommDH(2009)4, 12 March 2009, available at https://wcd.coe.int/ViewDoc.jsp?id=1417857.

[3] UN International Covenant on Civil and Political Rights, adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. Serbia became a State Party to this Covenant on 12 March 2001.

[4] UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution A/RES/39/46 on 10 December 1984. Serbia became a State Party to this Convention on 12 March 2001.

[5] Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force on 3 September 1953. The Convention was ratified by Serbia on 3 March 2004.

[6] UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW"), adopted by the UN General Assembly by resolution 34/180 of 18 December 1979. Serbia became a State Party to the CEDAW on 12 March 2001 and to its Optional Protocol on 31 July 2003.

[7] UN International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD"), adopted by the UN General Assembly by resolution 2106 (XX) of 21 December 1965. Serbia became a State Party to this Convention on 12 March 2001.

[8] UN Convention on the Rights of Persons with Disabilities (hereinafter "CRPD"), adopted by the UN General Assembly by resolution A/RES/61/106 of 13 December 2006. Serbia ratified this Convention and its Optional Protocol on 31 July 2009.

(hereinafter "CRPD"), and the Council of Europe Framework Convention for the Protection of National Minorities.[9]

14. Additionally, Serbia recently ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter "the Istanbul Convention").[10] This is the first legally binding 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; certain protective measures included therein are also of relevance to police work.

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).[11] 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".[12] 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.[13] Moreover, the 2003 OSCE Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area also provides a range of recommended actions for OSCE participating States aimed at improving the relationship between police and Roma and Sinti communities.[14]

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 details. These include, amongst others:

- the UN Code of Conduct for Law Enforcement Officials (1979);[15] and the UN Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials (1989);[16]
- the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990);[17]

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[9] CoE Framework Convention for the Protection of National Minorities (ETS No. 157), 1 February 1995. Serbia acceded to this Convention on 11 May 2001, available at http://conventions.coe.int/Treaty/en/Treaties/html/157.htm.

[10] CoE Convention on preventing and combating violence against women and domestic violence (ETS No. 210), Council of Europe Committee of Ministers, CM(2011)49 final, 7 April 2011 (hereinafter "the Istanbul Convention") which entered into force on 1 August 2014, and its Explanatory Report, available at http://conventions.coe.int/Treaty/EN/Reports/Html/210.htm. Serbia ratified the Istanbul Convention on 21 November 2013.

[11] See par 21.1 of the CSCE Moscow Document (1991).

[12] See par 45 of OSCE Charter for European Security, Istanbul Summit, November 1999, available at http://www.osce.org/mc/17502?download=true.

[13] OSCE Brussels Declaration on Criminal Justice Systems, MC.DOC/4/06 of 5 December 2006, available at http://www.osce.org/mc/25065?download=true.

[14] Annex to Decision No. 3/03 on Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area, MC.DEC/3/03 of 2 December 2003, available at http://www.osce.org/odihr/17554?download=true.

[15] UN Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly in its resolution 34/169 of 17 December 1979, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx.

[16] UN ECOSOC Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials adopted by the Economic and Social Council in its resolution 1989/61 of 24 May 1989 and endorsed by the UN General Assembly in its resolution 44/162 of 15 December 1989, available at http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/cy%20activity%20Interface2006/un%20Guidelines%20CoC%20Law%20Enforcement%20Officers.pdf.

- the European Code of Police Ethics (2001);[18]
- the Opinion of the Council of Europe Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police (2009);[19]
- the OSCE Guidebook on Democratic Policing (2008);[20]
- the OSCE TNTD/SPMU Publication on "Police Reform within the Framework of Criminal Justice System Reform" (2013);[21]
- the Standards developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter "CPT");[22] and
- the OSCE/ODIHR-Venice Commission Joint Guidelines on Freedom of Peaceful Assembly (2010).[23]

2. General Comments

2.1. Purpose and Scope of the Draft Law

17. The title of the Draft Law suggests that it will exclusively deal with the police, and hence regulate the organization and functioning of the police service and police activities. However, the content of the Draft Law itself seems to address the organization and functioning of the Ministry of Interior and human resource management of its employees as a whole,[24] and not only of the police.

18. This may create confusion as to the relationship between the executive and the police. While it is important that the relationships between the police and the Government and the Ministry of Interior are clearly stated in the Draft Law, legislation on the police should seek to underline the police's operational autonomy with respect to the executive. In particular, there should be a clear separation between the Government/Minister responsible for policy setting, oversight and review, and police leadership, which should exercise competency and control over the operational management of the police.[25] Consequently, in order to avoid the impression that the Ministry and the police are interlinked and that the executive may influence police activities in individual cases, **the provisions of the Draft Law should be revised to cover exclusively the police and its activities** (see Section 3 *infra* on Police Organization and Human Resources Management).

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[17] UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx.

[18] Council of Europe Recommendation Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics (hereinafter "2001 European Code of Police Ethics"), available at https://wcd.coe.int/ViewDoc.jsp?id=223251.

[19] Opinion of the Council of Europe Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police, CommDH(2009)4, 12 March 2009, available at https://wcd.coe.int/ViewDoc.jsp?id=1417857.

[20] OSCE Guidebook on Democratic Policing, May 2008, available at http://www.osce.org/spmu/23804?download=true.

[21] OSCE TNTD/SPMU Publication on "Police Reform within the Framework of Criminal Justice System Reform", July 2013 (hereinafter "2013 OSCE Publication on Police Reform"), available at http://www.osce.org/secretariat/109917?download=true.

[22] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Standards, [CPT/Inf/E (2002) 1 - Rev. 2015], available at http://www.cpt.coe.int/en/docsstandards.htm, (hereinafter "2015 European CPT Standards").

[23] OSCE/ODIHR-Venice Commission Joint Guidelines on Freedom of Peaceful Assembly (2010, 2nd Edition), available at http://www.osce.org/odihr/73405.

[24] See e.g., Article 4 of the Draft Law referring to the work of the Ministry; see also Article 17 on the Employees of the Ministry and Article 18 on Information on the Ministry's Work; Section IV on the Organization, Competence and Activities of the Ministry; Section IX which concerns work and labour relations within the Ministry; and Article 198 on the disciplinary responsibility of the employees of the Ministry.

[25] *Op. cit.*, footnote 20, par 113 (2008 OSCE Guidebook on Democratic Policing).

19. Moreover, while the OSCE/ODIHR is aware that the current Draft Law sent for review is still a working document, certain provisions duplicate one another, or contain very similar wording, particularly those under Section VII on Police Duties and Section VIII on Police Powers.[26] Repetition and inconsistencies could be avoided, for instance by using umbrella clauses (where appropriate), which could then be referred to in later provisions. Furthermore, certain provisions of the Draft Law seem to overlap with and/or duplicate the provisions of other legislation (see also comments on criminal proceedings in pars 21-25 *infra*). This should be avoided to the extent possible, preferably by including cross-references to the relevant provisions/sections of the Criminal Procedure Code of the Republic of Serbia or other legislation as appropriate. Also, certain individual provisions appear to be overly detailed[27] and could probably be addressed in a separate act or secondary legislation. In light of this, **the drafters and lawmakers should review the Draft Law as a whole and seek to avoid repetition and duplication, shorten and simplify its provisions and ultimately seek to render the text more accessible**.

2.2. Linkages between the Draft Law and the Code of Criminal Procedure

20. Generally, the Draft Law addresses the powers of the police in the context of (pre-) investigations of criminal offences and misdemeanors as well as other duties of the police.[28] However, criminal investigation activities of the police should in principle be carried out in accordance with the provisions of the Criminal Procedure Code of Serbia, especially since Article 287 of the Criminal Procedure Code provides that evidence obtained through actions that are not carried out in accordance with criminal procedure rules is not admissible before a court of law. **The principle that 'criminal police' action shall fully comply with the provisions of the Criminal Procedure Code should be stated more clearly in the Draft Law.**

21. In addition, **certain provisions on criminal investigation measures should *prima facie* not be included in the Draft Law, because they are or should rather be regulated by provisions of the Criminal Procedure Code**. This applies to provisions relating to, e.g. polygraph testing, search and seizure and detention,[29] insofar as they concern criminal (pre-) investigations.[30] Where necessary, adequate cross-references to sections of the Criminal Procedure Code should be introduced to the Draft Law.

22. In particular, it is noted that Article 43 of the Draft Law refers to the modalities for polygraph testing, which is however not mentioned in the Criminal Procedure Code. Apart from the fact that the reliability of such tests has at times been questioned, this technique is in some countries considered to potentially violate the right not to

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[26] For instance, this seems to be the case for Article 125 of the Draft Law on checking the identity of persons, which seems to overlap with Article 69; Article 126 on establishing identity, which overlaps with Article 71; Article 127, which overlaps with Article 72 on identification of objects; Article 130 on temporary seizure of objects and inspection of premises, which overlaps with Article 86; and Article 133 on the receipt of documents and object found, which overlaps with Article 97. Additionally, certain provisions, for instance those relating to qualification requirements for holding certain positions (Articles 24 to 28) appear to be quite repetitive and are at times inconsistent, which renders the text of the Draft Law more difficult to comprehend.

[27] See e.g., Article 142 on the different levels of security checks, Article163 on police grades and ranking, and more generally all provisions under Section IX relating to working conditions and salaries, which may already be covered by other regulations.

[28] i.e., those relating to the maintenance of public tranquility, law and order; the protection of individuals' fundamental rights and freedoms; the prevention and detection of crime; and the provision of assistance and services to the public.

[29] See the relevant articles of the Draft Law, namely for polygraph testing (Article 43), searches of persons or objects linked to a criminal offence (Article 50), targeted search measures against persons suspected of having committed certain criminal offences and wanted internationally (Article 51), detention (Articles 80-81), search of premises, facilities and documentation and anti-terrorism search (Articles 89-90) and the temporary seizure of objects and inspection of premises, facilities and documentation (Article 130).

[30] E.g., while the provisions relating to the protection from explosive devices or other hazards could remain in Articles 89 and 90 of the Draft Law, other provisions dealing with the prevention, detection and solving of criminal offences or misdemeanours should be removed since they are already addressed under Article 152 of the Criminal Code.

incriminate oneself or human dignity.[31] Although there is little guidance from the European Court of Human Rights (hereinafter "the ECtHR") on the use of these devices, the Court did note in one judgment that the absence of a lawyer during polygraph testing was 'regrettable'.[32] This would appear to imply that **the presence of a counsel of one's choice during polygraph testing should be guaranteed.** Additionally, while it is welcome that Article 43 expressly requires the consent of the person subjected to such measures, **he or she should also be clearly informed about the possibility of discontinuing the test at any time, without this incurring any negative consequences.** Finally, the Draft Law does not elaborate on the evidentiary value of information collected in this way. **It is assumed that such information is to be used as evidence in criminal proceedings; if this is correct, then Article 43 should be removed from the Draft Law and included in the Criminal Procedure Code, with adequate safeguards.**

23. Regarding the role of the police during search operations aimed at finding evidence about the whereabouts of a suspect wanted internationally (Article 51), it is not clear **how such powers relate to the provisions of the Criminal Procedure Code and the powers of the prosecution services. This should be clarified.**

24. Article 37 of the Draft Law refers to the possibility to carry out surveillance and recording in public spaces using video, photo and audio recording devices. This is generally acknowledged to be an efficient tool for crime prevention and detection. However, given the potential to interfere with the right to private life, all cases of video surveillance and other photo and audio recording of public places shall always respect the requirements laid down by Article 8 of the ECHR on the right to respect for private life (see pars 82 and 96-97 *infra*).[33]

25. Article 38 then specifies how the collected evidence can be used in proceedings, but does not clarify whether this would also include "criminal proceedings". At the same time, this is implied in the following paragraphs of Article 38, which refer to a 'suspect' and/or 'defendant'. If evidence is to be used in criminal proceedings, then it should comply with the provisions of the Criminal Procedure Code. Particularly, **if actions contemplated under Article 38 include covert measures of surveillance**, **a cross-reference to the relevant provisions of the Criminal Procedure Code[34] should be added, which contains specific safeguards regarding such measures, including the need to require the authorization of an investigation judge**.

26. Article 38 par 6 of the Draft Law also governs the use of photo and video evidence in public premises, defined widely to include buildings of government authorities and similar facilities where video recording is performed regularly for security reasons. This would also appear to include police stations and custody facilities. In these types of facilities, however, the police should not use covert measures to obtain information from a suspect under custody or use collected information in identification procedures, as this would violate the detainees' right to silence and privilege against self-incrimination, as well as their right to privacy, under Articles 6 and 8 of the ECHR

[31] See e.g., pages 399-404 in Tade Matthias Spranger, *International Neurolaw: A Comparative Analysis* (2012).
[32] See par 102 in the case of *Bragadireanu v. Romania*, ECtHR judgment of 6 December 2007 (Application no. 22088/04).
[33] See par 82 of the Venice Commission Opinion on Video Surveillance in Public Places by Public Authorities and the Protection of Human Rights, CDL-AD(2007)014, 23 March 2007, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)014-e.
[34] Articles 161 to 177 of the Criminal Procedure Code on Special Evidentiary Actions, which includes the covert interception of communications, covert surveillance and audio and video recording.

respectively.[35] **Such limitations should be reflected in provisions governing the collection and use of photo and video evidence at police premises.**

2.3. Gender, Diversity and Non-Discrimination

27. It is welcome that several articles of the Draft Law refer to equality and non-discrimination in relation to the performance of police duties and the composition of police forces.[36] However, such provisions are unlikely to yield actual results without additional provisions to ensure their implementation.

28. First, in terms of the composition of police forces, it is positive that gender equality and diversity are mentioned in Article 4 par 7 and Article 139 respectively. However, the former provision mentions only gender equality, while the latter focuses only on representation of national minorities. Given that recommendations at the international level call for the police to be representative of the community as a whole,[37] **it is important that both diversity and gender aspects are addressed in a consistent manner under both Articles 4 and 139, and generally throughout the Draft Law**.

29. In particular, the **equal representation of men and women as well as the proportionate representation of minorities should be ensured at all levels and functions of the police, including in leadership positions**.[38] This generally enhances public trust, improves the performance of the police, and also equips the police with the knowledge and skills required for working in a multi-ethnic environment.[39] **Article 139 of the Draft Law and other relevant provisions should be supplemented accordingly**.

30. Articles 23 to 28 of the Draft Law setting out eligibility criteria and appointment procedures for managerial positions within the police should also attempt to attain more gender balance in these positions. In these processes, the minimum number of years of work experience required in law-enforcement *in managing positions* may also prevent women candidates from applying. Although management experience constitutes a legitimate requirement for leadership positions, a mechanism to encourage more gender balance over time should be considered, given the current composition of police forces in Serbia.[40] In this context, it is noted that **provisions setting clear and time-bound**

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[35] See par 52 in the case of *Allan v. the United Kingdom*, ECtHR judgment of 5 November 2002 (Application no. 48539/99), available at http://hudoc.echr.coe.int/eng?i=001-60713#{"itemid":["001-60713"]}. See also pars 41-43 in the case of *Perry v. the United Kingdom*, ECtHR judgment of 17 July 2003 (Application no. 63737/00), available at http://hudoc.echr.coe.int/eng?i=001-61228#{"itemid":["001-61228"]}, where the ECtHR held that where the police had adjusted a camera in custody to collect higher quality images for use in identification procedures, this represented a breach of the applicant's right to privacy.

[36] See e.g., Article 2 par 3, Article 4 pars 5 to 7, Article 5 par 2, Article 14, Article 15 par 1 (2), Article 56 and Article 139 par 3 of the Draft Law.

[37] *Op. cit.*, footnote 20, par 124 (2008 OSCE Guidebook on Democratic Policing); see also *op. cit.*, footnote 18, par 25 (2001 CoE European Code of Police Ethics).

[38] *Op. cit.*, footnote 20, pars 125 and 127 (2008 OSCE Guidebook on Democratic Policing). See also Strategic Objective G.1. "Take measures to ensure women's equal access to and full participation in power structures and decision-making" of the UN Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), available at http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en. See also pars 9-10 of the Appendix to the CoE Recommendation Rec(2003)3 of the Committee of Ministers to CoE Member States on the balanced participation of women and men in political and public decision-making adopted on 30 April 2002, available at https://wcd.coe.int/ViewDoc.jsp?id=2229, which calls for gender-balanced representation in all public committees and other public-appointed posts or functions. See also pars 1-3 of the OSCE Ministerial Council Decision MC DEC/7/09 on Women's Participation in Political and Public Life, 2 December 2009, pars 1-3.

[39] *Op. cit.*, footnote 20, pars 125 and 127 (2008 OSCE Guidebook on Democratic Policing). See also par 4 of the Recommendations of the OSCE Office of the High Commissioner on National Minorities on Policing in Multi-Ethnic Societies (2006), available at http://www.osce.org/hcnm/32227?download=true; and the Section 3.2 "Creating a representative and more effective police service" of the Gender and Security Sector Reform Toolkit - Tool 2: Police Reform and Gender (2008), developed jointly by the OSCE/ODIHR, the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the United Nations International Research and Training Institute for the Advancement of Women (UN-INSTRAW), available at http://www.osce.org/odihr/30662?download=true.

[40] See pages 72-73 of the 2010 Report on Gender and Security Sector Reform in Serbia, co-drafted by the Belgrade Centre for Security Policy and the Belgrade Fund for Political Excellence with the support of DCAF, available at http://www.dcaf.ch/Publications/Gender-and-Security-Sector-Reform-in-Serbia.

targets, including a gradual increase of the target quote, have been seen to work[41] and could perhaps also be included in the Draft Law.[42] For instance, such provisions could first focus on the lower managing positions i.e., heads of police stations (Article 28) and set targets for other higher-level provisions at a later date. This should create proper incentives to gradually, over time, reach gender balance up to the highest levels of the police.

31. The drafters should also consider introducing certain gender balance criteria in relevant nomination processes. For instance, **Articles 23 to 28 could require that the proposals made by the nominating authorities include an equal number of male and female candidates.[43] The same should be considered regarding the rules governing the appointment to the above-mentioned posts.[44] Moreover, appropriate sanctions would help render the new provisions effective,[45] e.g. the proposed nominations for candidates could be rejected if the pool of candidates is not gender balanced**.

32. To be effective, measures to ensure more gender equality within police forces should not only address recruitment, but also retention, career advancement and more generally human resource management (see also comments on human resources in the police sector in pars 54-55 *infra*).[46] Tools developed at the international level to ensure that human resources policies and practices are not discriminatory[47] could serve as useful resources in the context of police reform in Serbia. This would also help address one of the recommendations from the 2013 Concluding Observations of the CEDAW Committee on Serbia, which recommended encouraging women's participation in occupational areas where they are traditionally underrepresented,[48] such as the police and the Ministry of Interior.[49]

33. Furthermore, as recommended by the 2003 OSCE Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area, OSCE participating States should also encourage Roma and Sinti to work in law-enforcement institutions.[50] While Article 139 of the Draft Law mentions the representation of national minorities, this article will be more effective if combined with other measures. The Draft Law could thus, at a minimum, **state that secondary legislation or a special act of the Ministry of Interior will further define recruitment, retention, career development and more generally human resources management policies to ensure adequate inclusion of national minorities in the police and in police leadership**. In that respect, the 2010 OSCE manual *"Police and Roma and Sinti: Good Practices in Building Trust and*

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41 See Paragraph VI of the Explanatory Memorandum on Recommendation Rec (2003)3 of the Committee of Ministers to CoE Member States on the balanced participation of women and men in political and public decision-making adopted on 30 April 2002, available at https://wcd.coe.int/ViewDoc.jsp?id=2229.

42 For instance, Article 28 of the Draft Law could provide that the proposals made by the police district head to the Director General of Police should include a balanced number of female and male candidates. Five years after the entry into force of the Draft Law, a similar obligation could be applicable for higher level positions and so on.

43 See e.g., the example in Denmark, Appendix IV to the Explanatory Memorandum on CoE Recommendation Rec (2003)3.

44 E.g., by stating that in cases of equal competence, preference ought to be given to the candidate from the under-represented sex.

45 See par 39 of the 2013 Report of the UN Working Group on the issue of discrimination against women in law and in practice (A/HRC/23/50) adopted on 19 April 2013, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.50_EN.pdf.

46 *Op. cit.*, footnote 20, par 128-133 (2008 OSCE Guidebook on Democratic Policing).

47 See e.g., *op. cit.* footnote 40, Sections 4.6 to 4.10 (2008 Gender and Security Sector Reform Toolkit - Tool 2: Police Reform and Gender). See also 2010 OSCE Publication on *"Police and Roma and Sinti: Good Practices in Building Trust and Understanding"*, available at http://www.osce.org/odihr/67843?download=true.

48 See par 31 (c) of the Concluding Observations of the CEDAW Committee on Serbia (30 July 2013), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fSRB%2fCO%2f2-3&Lang=en.

49 See pages 72-73 of the 2010 Report on Gender and Security Sector Reform in Serbia, co-drafted by the Belgrade Centre for Security Policy and the Belgrade Fund for Political Excellence with the support of DCAF, available at http://www.dcaf.ch/Publications/Gender-and-Security-Sector-Reform-in-Serbia.

50 *Op. cit.*, footnote 14, par 32 (2003 OSCE Action Plan on Roma and Sinti).

Understanding",[51] can serve as a useful guidance. Further, Roma women require particular support, as they are generally both under-represented, and have limited access to job opportunities, including within the police.[52]

34. A number of provisions of the Draft Law, although drafted in a seemingly neutral manner, may also have a direct or indirect discriminatory effect on certain persons or groups.

35. First, while the provisions relating to identity checks, search and control, surveillance or investigation activities are drafted in a neutral manner, it often happens in practice that police officers target persons with specific physical or ethnic characteristics. For instance, the discriminatory practice of profiling Roma and Traveler groups is widespread in the OSCE region.[53] While generally unacceptable due to its discriminatory character, 'ethnic profiling'[54] is also counterproductive since it does not necessarily increase the detection of criminal offences. At the same time, such profiling alienates entire communities, whose co-operation is necessary for effective crime detection and prevention.[55]

36. In that respect, and following the recommendations of the Council of Europe's European Commission against Racism and Intolerance (hereinafter "ECRI")[56], **the Draft Law should clearly define and prohibit ethnic profiling. Moreover, the provisions of the Draft Law relating to stops, identity checks and searches should clearly state that such measures shall never be based on ethnicity and other personal characteristics in the absence of a specific suspect description**.[57]

37. Alleged cases of racial or other discrimination or racially motivated misconduct by the police should be investigated effectively and the perpetrators adequately punished[58] (see also comments relating to oversight and complaint mechanisms in pars 106 and 111-112 *infra*, and to the question of addressing discrimination and harassment within the police in par 54 *infra*). Proper training and awareness-raising for police and law enforcement officials of all forms of harassment or discriminatory behaviour are also important (see par 57 *infra* on education and capacity development).[59]

38. Second, several provisions of the Draft Law refer to "citizens" or the "safety of citizens" as one of the objectives pursued by the police.[60] To ensure that all individuals,

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51 *Op. cit.* footnote 47 (2010 OSCE Publication on Police and Roma and Sinti).

52 OSCE/ODIHR "Summary Report of the Expert Meeting: Police and Roma and Sinti - Current Challenges and Good Practices in Building Trust and Understanding", 8 April 2014 Warsaw, page 14, available at http://www.osce.org/odihr/119653?download=true.

53 *Op. cit.* footnote 47, page 33 (2010 OSCE Publication on Police and Roma and Sinti).

54 i.e., "when police officers, with no objective and reasonable justification, use the characteristics of race, ethnicity, religion, or national origin rather than behaviour as the basis for making decisions about who has been or may be involved in criminal activity when they conduct search and control, surveillance or investigation activities", see ibid. page 7 (2010 OSCE Publication on Police and Roma and Sinti).

55 See ibid. page 58 (2010 OSCE Publication on Police and Roma and Sinti).

56 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.

57 See *op. cit.* footnote 47, page 58 (2010 OSCE Publication on Police and Roma and Sinti). See also page 9 of the Open Society Institute, *Addressing Ethnic Profiling by Police. A Report on the Strategies for Effective Police Stop and Search Project*, New York 2009, available at https://www.opensocietyfoundations.org/sites/default/files/profiling_20090511.pdf.

58 *Op. cit.* footnote 59, par 9 (ECRI's General Policy Recommendation No. 11 on combating racism and racial discrimination in policing). See also UN Committee against Torture, *Mr. Besim Osmani v. Republic of Serbia*, Communication No. 261/2005, U.N. Doc. CAT/C/42/D/261/2005 (2009), available at http://www1.umn.edu/humanrts/cat/decisions/261-2005.html.

59 *Op. cit.*, footnote 14, par 26 (2003 OSCE Action Plan on Roma and Sinti), which calls upon OSCE participating States to "[d]evelop policies that promote awareness among law enforcement institutions regarding the situation of Roma and Sinti people and that counter prejudice and negative stereotypes."

60 See e.g. Article 2 par 1 on the concept of internal affairs and police duties which refers to the "safety of citizens"; Article 4 par 6 mentions the "the responsibility to serve citizens"; Article 14 par 4 refers to the "safety of citizens"; Article 18 refers to the "the dignity of citizens"; Articles 34 and 97 refer to "the safety of citizens"; Article 44 refers to the protection of "citizens' lives"; Article 151 on the oath to be pronounced by police officers upon entering into duty which includes reference to "responsibly serve the citizens of the Republic of Serbia"; Article 202 on misconduct which includes the "unprofessional treatment of *citizens*".

regardless of their nationality or citizenship, are treated and protected equally, **terms such as "the individual", "everyone" or "person" instead of "citizen" should be used throughout the Draft Law**.

39. Finally, Article 140 on the conditions for working for the Ministry of Interior, including the police, makes references to one's "mental and physical capacity, proven by a medical certificate of a healthcare institution determined by law". Under Article 173 par 2, a police officer's failure to meet the conditions listed in Articles 140 and 141 may lead to the termination of his/her contract. These provisions may have a disproportionate and thus discriminatory impact on persons with disabilities. Some limitations may be legitimately imposed where persons lack the mental and physical capabilities to carry out police duties. However, it would be preferable, and more in line with Serbia's obligations under the CRPD if the **Draft Law would contain a provision on the duty to provide reasonable accommodation in such cases (which should be compatible with other legislation on persons with disabilities)**.[61]

2.4. General Principles governing Police Activity

40. Various articles of the Draft Law outline general principles on police services and the use of police powers,[62] and make explicit references to international and regional human rights standards (Articles 4 par 6 and 54 par 5); such principles are thus overall in line with international and regional standards on democratic policing. However, certain key principles of democratic policing are either not clearly stated, or not addressed in an adequate or coherent manner throughout the Draft Law.

41. Article 3 par 2 provides that "[t]he Minister shall prescribe the manner of performing police duties, and issue guidelines and mandatory instructions for their performance". Article 15 further states that "[t]he Ministry shall ensure that the police remains operationally independent from other government authorities in the fulfilment of police duties and other statutory activities", with Article 16 expressly reiterating the principle of operational independence of the police. However, Article 31 par 2 states that "the Minister shall prescribe the manner of performing police duties in the security sector". Such vague wording leaves room for interpretation and would appear to allow the Minister to influence operational matters of police work. In this context, it is noted that the police's independence from such influence is an important feature of the rule of law, as this guarantees that the police operates exclusively in accordance with the law and is fully accountable for its actions.[63] From the current wording of the Draft Law, it is not clear how the operational independence of the police from the Minister of Interior will be ensured. **The Draft Law should thus separate, in a clearer manner, the Ministry of Interior's competency in terms of policy and oversight from the operational management competency of the General Police Directorate.**

42. Moreover, there are certain areas where **the executive may not, under any circumstances, influence the performance of police activities, i.e., during the**

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[61] See also the example of the North Yorkshire Police Federation Policy Guidelines on Recruitment of Persons with Disabilities in the Police, available at http://www.nypolfed.org.uk/assets/uploads/PDFs/disability2.pdf.

[62] These include in particular references to the principle of equality in the provision of services and equal opportunity in employment (Article 4 par 3 and par 7), respect for human rights and assistance to victims (Article 4 par 6), the operational independence of the police (Articles 15 and 16), the principle of legality (Article 54), the principle of impartiality (Article 56), the principle of non-discrimination and respect for dignity (Article 56), the principle of proportionality when exercising police powers (Article 57), and the proportionate representation of national minorities in employment within the police (Article 139).

[63] *Op. cit.* footnote 18, par 15 (2001 European Code of Police Ethics).

investigation of individual criminal cases. This point should be clearly stated under Article 15 or 16 of the Draft Law. Furthermore, Article 16 par 2 permitting the Minister to request reports, data and other documents pertaining to police work should specifically exclude all information pertaining to the (pre-) investigation of individual criminal cases; the decision to disclose such information should be taken by a prosecutor, as the body responsible for leading criminal pre-trial proceedings.

43. More generally, the principle of confidentiality of information gathered in the context of criminal investigations is of the utmost importance. Indeed, the publication of such information could potentially compromise police investigations, as well as public security, victims' and witness rights to privacy and confidentiality,[64] and/or the presumption of innocence.[65] In this regard, it is positive that Article 4 par 6 of the Draft Law refers to safeguarding confidential data and that under Article 203 (11) the disclosure of such data constitutes a serious violation of police duties. Article 18 of the Draft Law provides that the Ministry shall disclose information to the public about its work "without disclosing confidential information". However, the Draft Law does not define the term "confidential information". **The Draft Law, and in particular its Article 18 should clearly prohibit the Ministry of Interior and the police from communicating any information gathered during the (pre-) investigation of criminal cases. This provision should likewise set out clearly defined exceptions where such communication is necessary to apprehend a suspect or to ensure progress in the investigation, provided that the security and privacy of victims and witnesses is safeguarded**. Otherwise, as stated above, only the prosecutor leading the investigation should be permitted to disclose or allow disclosure of such information (Articles 43-44 of the Criminal Procedure Code of Serbia). See also comments on data processing in pars 95 and 99 *infra*.

44. As regards the integrity of the police, Article 224 of the Draft Law refers to "integrity tests" that shall be carried out by the 'Sector for Internal Control', the form and manner of which the Minister shall prescribe in more detail. Such integrity tests may take a variety of forms, including theoretical/psychological questionnaires, the use of publicly available information, and the monitoring of public complaints against the police. They may also involve more proactive under-cover/covert investigative measures including the use of *agents provocateurs*.[66] Such actions could potentially violate the "tested" individual's fair trial rights under Article 6 and his/her right to private life under Article 8 of the ECHR, and the ECtHR has thus imposed certain limitations on the use of such methods.[67] In particular, reasonable grounds to suspect that the targeted person is or has been involved in a similar criminal activity need to already exist beforehand.[68] Moreover, the undercover agent's activity must have been formally authorized prior to the testing, and **the person being tested shall not be persuaded or talked into committing the criminal offence by state officials**; on the contrary, it is essential that the person was already ready and willing to commit a crime before his/her interaction

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64 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 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.

65 *Op. cit.*, footnote 20, par 97 (2008 OSCE Guidebook on Democratic Policing).

66 An "*agent provocateur*" is a person employed to commit, or acting to entice another person to commit an illegal act.

67 See e.g., pars 81-82 and 96 of the Venice Commission Amicus Curiae Brief for the Constitutional Court of Moldova on Certain Provisions of the Law on Professional Integrity Testing, CDL-AD(2014)039, 15 December 2014, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)039-e.

68 ibid. (2014 Venice Commission Amicus Curiae Brief for the Constitutional Court of Moldova on Professional Integrity Testing).

with state agents.[69] **Article 224 of the Draft Law should be supplemented to reflect these limitations**.

45. Finally, it is welcome that the Draft Law expressly refers to the adoption of a Code of Police Ethics (Article 48). This is considered a good practice of democratic policing, as such a code usually provides guidance on how to ensure greater professionalism and integrity in the police's conduct.[70] Article 48 par 1 states that such a code should be adopted by the Government, without specifying which body shall draft the code. In order to guarantee its proper implementation, **it is important that the Code of Police Ethics is prepared in an inclusive manner, to achieve a general consensus within the police; moreover, adequate training and dissemination among all employees should be ensured.[71] Article 48 should be revised to reflect these principles**.

2.5. Terminology and Legislative Drafting

46. It is noted that Article 14 of the Draft Law, which provides a number of definitions, appears relatively late in the text and would be better placed under Section I on Basic Provisions. Moreover, the definition of "police officer" under Article 14 par 1 is not fully in line with the one provided by Article 17;[72] similarly, the definition of "immediate family member" mentioned under Article 178 par 3 is not consistent with the one mentioned under Article 191 par 3.[73] There should be only one definition of each term in the Draft Law. At the same time, certain definitions which are relevant for a proper understanding and implementation of the Draft Law seem to be missing in Article 14, for instance the definition of a "child" or of a "minor".

47. Finally, many provisions of the Draft Law make general references to "cases stipulated by this law" or "in the manner established by law" or "in accordance with law",[74] but do not include specific cross-references to relevant provisions of the Draft Law, the Code of Criminal Procedure or to other specific Serbian legislation. **To avoid legal uncertainty and discretionary interpretation of such provisions, it is recommended to explicitly refer to the exact provision or legislation in such cases**.

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69 See e.g., pars 46-53 in the case of *Furcht v. Germany*, ECtHR judgment of 23 October 2014 (Application no.54648/09), available at http://hudoc.echr.coe.int/eng?i=001-147329; and par 73 in the case of *Ramanauskas v. Lithuania*, ECtHR [GC] judgment of 5 February 2008 (Application no. 74420/01), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84935#{"itemid":["001-84935"]}.

70 See e.g., *op. cit*., footnote 20, par 20 (2008 OSCE Guidebook on Democratic Policing).

71 See page 9 of the Council of Europe Expert Opinion on the Serbian Code of Police Ethics (January 2015), available at http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/PACS-Serbia/Technical%20Paper/ECCU%20-%20PACS%20-%20eng%20-%2015%20-%202015%20Exp%20Op%20CodeLL.pdf.

72 Article 14 of the Draft Law provides that a police officer is an "employee who has the right and obligation to exercise police powers" while Article 17 refers to "officers who exercise police powers, as well as officers who do not directly exercise police powers, who may have the status of officers with special and specific duties depending on the type and complexity of tasks".

73 Article 178 par 3 defines an immediate family member as "a spouse, children, siblings, parents, adoptee, adopter, guardian and other persons living in the common family household with the employee" while Article 191 par 3 states that members of the immediate family are "the spouse, extramarital partner, children, siblings, parents, stepchild, adopter, adoptee, guardian, spouse's parents and other persons living in the common household with the police officer".

74 See e.g., Article 23 par 2 of the Draft Law ("envisaged by law"); Article 68 ("other such measures and actions prescribed by law"); Article 80 which refers to the possibility to detain a person when this is "prescribed by other law"; Article 86 which refers to temporary seizure of objects if "determined by other law"; Article 87 which refers to cases "envisaged by another law"; Article 219 ("other rights defined by law"); and Article 239 referring to funds collected "in accordance with law and other regulations".

3. Police Organization and Human Resources Management

3.1. Overall Structure and Organization of the Police

48. Article 2 provides that the "General Police Directorate" is established within the Ministry and is tasked with performing police duties. Article 17 further refers to the Directorate for Extraordinary Situations; however, aside from Article 19, which refers to setting up "narrower self-contained organizational units", the Draft Law does not specifically mention other directorates or units. In particular, there is no specific mention of the Serbian Gendarmerie, which is problematic given that it also maintains public order, and thereby complements the work carried out by the police. **If the "self-contained organizational units" under Article 19 include the Gendarmerie, this should be clarified. Moreover, information on the governance of the Gendarmerie and coordination with police activities should be included, or, at a minimum, a cross-reference to relevant legislation pertaining to the Gendarmerie**.

49. In addition, apart from the broad reference in Article 19, and general mention of "specialized units" and "special police units",[75] the text of the Draft Law does not outline the specialization of police forces on specific matters (i.e., well trained, competent investigators and support staff with specialized skills for addressing/investigating certain crimes).[76] Good practices have shown that the specialization of police services tends to increase reporting, trust and engagement of victims, and more generally the efficiency and effectiveness of the criminal justice system.[77] **The actual policing needs, both in the country and by community/region should be reviewed, in order to define priorities and decide on the required specialization of police forces, subject to the availability of adequate funding**. Separate specialized investigative units would then also require clear co-ordination and intelligence/information-sharing mechanisms.

3.2. Fundamental Rights and Freedoms of Police Personnel

50. Article 167 of the Draft Law protects the right of the police to union membership (except for members of specialized units) but excludes police officers from joining political parties and undertaking other political activities. This is overall in line with ECtHR case law, which recognizes the legitimacy of measures to ensure a politically neutral police force, particularly in certain states in transition.[78]

51. The ban on "members of the specialised unit and special units" from organizing in trade unions and from being active in them (Article 167 par 4) may, however, be too rigid. In a recent case, the ECtHR has held that banning military personnel from forming and joining any associations, including trade unions, could not be justified under Article 11 of the ECHR on the right to freedom of association, although the activities of trade

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[75] See e.g., Articles 20 and 21 on General Police Directorate; Articles 167 and 168 on Rights to Union and to Strike; and Articles 186, 236 and 241.

[76] Specialization could be envisioned regarding e.g., financial matters, narcotics, domestic violence, child abuse, sexual violence, human trafficking, organized crime, homicide, robberies, digital forensics, and traffic collision investigations.

[77] See, for instance, in cases of domestic violence, page 10 of the draft of the European Union Handbook of Best Police Practices on Overcoming Attrition in Domestic Violence Cases, December 2012, available at http://www.eucpn.org/download/?file=EUHndbookAttritionDomViol.pdf&type=3). Regarding juvenile justice, see also Section 12 on "Specialization within the Police" of the UN Minimum Rules for the Administration of Juvenile Justice (or "Beijing Rules"), adopted by UN General Assembly resolution 40/33 of 29 November 1985, available at http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf.

[78] See pars 44-50 in the case of *Rekvényi v. Hungary*, ECtHR judgment of 20 May 1999 (Application no. 25390/94), available at http://hudoc.echr.coe.int/eng?i=001-58262#{"itemid":["001-58262"]}. See also pars 117-118 of the OSCE/ODIHR-Venice Commission Guidelines on Political Party Regulation (2010), available at http://www.osce.org/odihr/77812?download=true.

unions themselves could be restricted;[79] this would appear to apply to special police forces as well. Hence, **the drafters should re-consider and ideally remove the complete ban on union membership provided in Article 167 par 4**.

52. At the same time, insofar as the right to strike is concerned, the case law of the ECtHR has recognized that the need for law-enforcement agents to provide an uninterrupted service and the fact that they may be armed could justify a complete ban of such right, to ensure national security, public safety and prevent disorder.[80] Thus, while the Draft Law does not provide for such a complete ban, the restrictions on the right to strike of police officers, as mentioned in Article 168 of the Draft Law, would most likely be overall justifiable. However, limiting the gathering of strikers to the Ministry's premises (Article 168 par 11) would considerably limit their ability to convey messages regarding their working conditions and profession in general to people and/or institutions beyond the Ministry. Such restrictions may also not be strictly necessary to ensure the proper discharge of police responsibilities and to maintain confidence in police neutrality;[81] the drafters should thus re-consider this restriction in light of the national context.

3.3. Status of Police Personnel and Human Resources Management

53. Article 218 of the Draft Law provides that "[r]egulations on civil servants, general labour regulations and special collective agreements concluded based on these regulations shall apply to rights and duties, work and labour relations of police officers". This is welcome in that it clearly states that the Draft Law constitutes a *lex specialis* in this respect.

54. However, nothing is said in the Draft Law as to the need to ensure that **the working environment is free from discrimination, harassment and sexual harassment**, in accordance with international recommendations[82] (with relevant cross-references to applicable legislation or, alternatively, a definition of "harassment"[83] in the Draft Law itself). **Any such conduct should also be included as serious violations of duty under Article 203, and should lead to the initiation of disciplinary proceedings** (see also pars 111-112 *infra*). Further, **police officers must have the right to file complaints against their colleagues or superiors and such cases should be promptly and adequately investigated; the Draft Law should be supplemented accordingly**.

55. Moreover, the drafters should also consider introducing provisions that may as such contribute to a family-friendly working environment within the police sector, which should also address the special needs of women.[84] Further, as mentioned in par 32

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79 See par 75 in the case of *Matelly v. France*, ECtHR judgment of 2 October 2014 (Application no. 10609/10), available at http://hudoc.echr.coe.int/eng?i=001-146695#{"itemid":["001-146695"]}. See also pars 144-146 of the OSCE/ODIHR-Venice Commission Guidelines on Freedom of Association (2014), available at http://www.osce.org/odihr/132371?download=true.

80 See pars 28-44 in the case of *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain* (case referred to the Grand Chamber), ECtHR judgment of 21 April 2015 (Application no. 45892/09), available at http://hudoc.echr.coe.int/eng?i=001-153921#{"itemid":["001-153921"]}.

81 *Op. cit.* footnote 23, par 60 and Principle 3.5 (2010 OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly).

82 *Op. cit.* footnote 20, par 133 (2008 OSCE Guidebook on Democratic Policing).

83 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 "EU Employment Equality Directive"), calling it "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 the 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".

84 See e.g., *op. cit.* footnote 40, Section 4.9. (2008 Gender and Security Sector Reform Toolkit - Tool 2: Police Reform and Gender). Family-friendly human resources include e.g., flexible working hours for shift work and leave options; part-time and job-sharing

supra, it is important that policies, regulations and the organizational culture provide equal opportunities to all, especially to women and ethnic minorities.[85] Regular assessments should be conducted to determine the impact of policies and practices on women and men, as well as minorities, so that necessary adjustments to ensure equitable application can be made.

56. Article 164 of the Draft Law addresses the performance evaluation of the Ministry's employees, including police officers. However, it does not contain clear performance indicators linked to the job description of each officer, and **should be supplemented accordingly; this would of course require that specific job descriptions are developed for each position**. Moreover, Article 164 does not provide police officers with the right to appeal the decision of the evaluator. Although the procedure, criteria and manner of evaluating performance will be regulated by a special act prepared by the Ministry, the right to appeal should be expressly stated in the Draft Law, given the impact that performance evaluation can have on career development.

3.4. Education and Capacity Development

57. It is positive that the Draft Law addresses education requirements and training (Articles 142-144). While a ministerial act will further detail the content and modalities of such training (Article 144), it would be advisable **to expressly mention in the Draft Law that gender, human rights and fundamental freedoms will form an integral part of basic, advanced and specialized training courses or educational programmes, as well as evaluation, for police personnel**.[86] Next to training on non-discrimination and equality, such courses should also go into gender-specific needs and rights of victims,[87] prevention and detection of cases of violence, the specific needs of children, "secondary victimization", juvenile justice, and multi-agency co-ordination and co-operation.[88]

58. Moreover, the recent recommendations issued by the UN Committee against Torture on the **need to ensure effective training of law enforcement officials on hate-motivated crimes and the systematic monitoring of such crimes[89] should also be reflected in capacity development activities**. This would help ensure that police officers systematically investigate possible bias motives of crimes in line with ECtHR case law.[90]

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opportunities for men and women; clearly defined pregnancy policies that are flexible, fair and safe – including light work or modifications of current duties; adequate maternity and paternity leave; day care facilities on or off site; nursing facilities; stress-management training; access to psychological support; and appropriate uniforms – including during pregnancy.

85 *Op. cit.* footnote 21, page 61 (2013 OSCE Publication on Police Reform).

86 ibid. page 23 (2013 OSCE Publication on Police Reform).

87 See Article 16 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985 (hereinafter "1985 UN Basic Principles of Justice for Victims of Crime"), available at http://www.un.org/documents/ga/res/40/a40r034.htm. See also *op. cit.* footnote 21, page 132 (2013 OSCE Publication on Police Reform).

88 See pars 98 to 101 of the Explanatory Report to the Istanbul Convention, available at http://conventions.coe.int/Treaty/EN/Reports/Html/210.htm.

89 See par 19 (c) of the UN Committee against Torture Concluding Observations on the Second Periodic Report of Serbia (3 June 2015), CAT/C/SRB/CO/2, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fSRB%2fCO%2f2&Lang=en. See also the 2012 OSCE Programme on Training against Hate Crimes for Law Enforcement (TAHCLE), available at http://www.osce.org/odihr/tahcle, which is a programme designed to improve police skills in recognizing, understanding and investigating hate crimes.

90 See pars 160-168 in the case of *Nachova and Others v. Bulgaria*, ECtHR judgment of 6 July 2005 (Application nos. 43577/98 and 43579/98), available at http://hudoc.echr.coe.int/eng?i=001-69630. See also par 66 in the case of *Šečić v. Croatia*, ECtHR judgment of 31 May 2007 (Application no. 40116/02), available at http://hudoc.echr.coe.int/eng?i=001-80711#{"itemid":["001-80711"]}.

4. Police Powers and Duties

4.1. Fundamental Legal Safeguards against Torture and other Forms of Ill-Treatment by the Police

59. From the outset, it is important to reiterate that the prohibition of torture and ill-treatment is absolute and non-derogable.[91] This 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 under criminal law.[92] While Article 4 of the Draft Law states the prohibition of torture and inhuman and degrading treatment as a principle guiding policing activities, the Draft Law does not further address this issue. It is recommended **to clearly state that any act of torture or inhuman, cruel and degrading treatment by police officers is subject to criminal liability in accordance with Articles 136 and 137 of the Criminal Code**.

60. In addition, Article 4 of the UN Convention against Torture covers acts such as incitement, instigation, superior order or instruction; consequently, **superior officials ordering or instructing others to practice torture or other ill-treatment, or who know or should have known of such acts committed by persons under their command, shall thus be held accountable for complicity (or acquiescence) to such acts.[93] The Draft Law should be supplemented in that respect**.

61. Furthermore, in its latest Concluding Observations on Serbia (2015), the UN Committee against Torture urged Serbia to ensure that every person deprived of his or her liberty is afforded legal safeguards against torture and other forms of ill treatment. Such protection applies from the moment when he/she is deprived of his/her liberty, i.e., from the moment when a person is in police custody, irrespective of whether he/she has been charged with a criminal offence or not.[94] Human rights monitoring bodies generally consider that such safeguards (such as prompt access to a lawyer, the right to have the fact of one's detention notified to a third party of choice (relative, friend, consulate) and the right to request a medical examination) are conducive to the effective prevention of torture and other breaches of fundamental human rights during detention.[95]

62. Articles 80 and 81 of the Draft Law regulating the "conditions for detention" refer to the right to an attorney and to the right to request that next of kin be informed about the detention. Such provisions are not fully consistent with the rights of arrested persons under Article 69 of the Criminal Procedure Code of Serbia. In particular, the right to request a medical examination, including by a doctor of one's own choice is not mentioned, nor is a guarantee of doctor-patient confidentiality.[96] Refugees, asylum-seekers and stateless persons should also have the right to contact a competent international organization or other entity, such as national refugee bodies, ombuds offices, human rights commissions or NGOs.[97] **Article 80 or 81 should specify the**

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[91] See pars 1 and 3 of General Comment No. 2 of the UN Committee Against Torture Committee (hereinafter "UNCAT Committee") on the Implementation of Article 2, UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (23 November 2007), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en.

[92] Article 2 of UNCAT and ibid. par 26 (General Comment No. 2 of the UNCAT Committee).

[93] ibid. par 26 (General Comment No. 2 of the UNCAT Committee). See also par 26 (d) of the Report of the Special Rapporteur on the question of torture (2003) E/CN.4/2003/68, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/160/49/PDF/G0216049.pdf?OpenElement.

[94] *Op. cit.* footnote 89, par 9 (2015 UNCAT Committee Concluding Observations on Serbia).

[95] See par 11 of the UN HRC General Comment 20 of 10 March 1992; and par 13 of the UN Committee Against Torture General Comment 2 of 24 January 2008. See also *op. cit.* footnote 22, page 6 (2015 European CPT Standards).

[96] See also *op. cit.* footnote 22, page 6 (2015 European CPT Standards).

[97] See e.g., Article 172 par 3 sub-par (g) Model Code of Criminal Procedure (2008) developed by the United States Institute of Peace in cooperation with the Irish Centre for Human Rights (ICHR), the Office of the UN High Commissioner for Human Rights (UNOHCHR), and the UN Office on Drugs and Crime (UNODC) (hereinafter "Model Code of Criminal Procedure (2008)"), available at http://www.usip.org/model-codes-post-conflict-justice-/publication-the-model-codes/english-version-volume-2. See also par 58 of the

need to comply with Article 69 of the Criminal Procedure Code, where detentions fall under the scope of the Code. Further, **to reduce the risk of possible acts of torture or ill treatment during any kind of police detention, legal safeguards similar to those listed under Article 69 of the Criminal Procedure Code should be included in the Draft Law. When amending Article 81, regard should also be paid to the recent recommendations made by the UN Committee against Torture, including those on medical examination records and their contents, and those on the protection of health-care professional against undue pressure or reprisals, which may also require amendments to other relevant legislation**.[98]

63. Moreover, to ensure that these fundamental legal safeguards are respected in practice, **systematic and comprehensive custody registers should be maintained in all places of detention.**[99] These should, at a minimum, mention the date, time and location of detention, the name of the detainee, the reasons for the detention and the name of respective police officer. The register should also include a property inventory and information on meals provided, the time of the medical examination, the time of the notification of family members or an attorney, or of the free phone call by the suspect, and the time and duration of the meeting with legal counsel.[100] The custody record should also be communicated to the detainees or to their legal counsel. Moreover, **clear rules or guidelines should exist on the manner of conducting police interviews, and on recording the start and end times of interviews, and requests made by detainees, or other persons present during an interview**.[101] **It is recommended to supplement Article 81 of the Draft Law in that respect.**

64. The electronic (i.e. audio and/or video) recording of police interviews also represents an important additional safeguard against the ill-treatment of detainees. The UN Committee against Torture specifically recommended that Serbia ensure enhanced audio-video monitoring of interrogation rooms in police stations.[102] **Consideration should thus be given to adding such a requirement under Article 81 of the Draft Law; a proper financial assessment of the costs involved should also be carried out** (see par 116 *infra* on financial impact assessment of the draft legislation). It would also be helpful if the Draft Law would **include a provision stating that all persons detained on police premises shall be informed in writing of the procedure of lodging a complaint against the police upon their release**.[103]

UN HRC General Comment No. 35 on Article 9 of the ICCPR (28 October 2014), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en; and the Guideline 7 (vii)) of the UNHCR Detention Guidelines (2012), available at http://www.refworld.org/pdfid/503489533b8.pdf.

98 See *op. cit.* footnote 89, par 9 (a) (2015 UNCAT Committee Concluding Observations on Serbia), which states that "detained persons undergo an independent medical examination from the outset of the deprivation of liberty, which should be conducted out of hearing and, unless the doctor concerned explicitly requests otherwise in a given case, out of sight of police staff. The State party should also ensure that the record drawn up after the medical examination contains, inter alia: (i) an account of statements made by the person that are relevant to the medical examination (including his or her state of health and any allegations of ill-treatment); (ii) a full account of objective medical findings based on a thorough examination; and (iii) the health-care professional's observations in the light of (i) and (ii), indicating the consistency between any allegations made and the objective medical findings. The results of the examination should also be made available to the detained person concerned and his or her lawyer. Health-care professionals should not be exposed to any form of undue pressure or reprisals from management staff when they fulfil this duty, nor should the detained persons concerned".

99 ibid. par 9 (c) (2015 UNCAT Committee Concluding Observations on Serbia). See also page 50 of the CoE Handbook for police officers and other law enforcement officials on the European Convention on Human Rights and Policing (2013), available at http://www.coe.int/t/dghl/cooperation/capacitybuilding/source/documentation/europeanconventionhandbookforpolice.pdf.

100 See par 125 in the case of *Kurt v. Turkey*, ECtHR judgment of 25 May 1998 (Application no. 24276/94), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58198#{"itemid":["001-58198"]}.

101 See also *op. cit.* footnote 22, page 7 (2015 European CPT Standards). The Guidelines and protocols should for instance address the following matters: informing the detainee of the identity (name and/or number) of those present at the interview; the permissible length of an interview; rest periods between interviews and breaks during an interview; places in which interviews may take place; whether the detainee may be required to stand while being questioned; interviewing persons who are under the influence of drugs, alcohol, etc.

102 See *op. cit.* footnote 89, par 12 (c) (2015 UNCAT Committee Concluding Observations on Serbia); see also *op. cit.* footnote 22, page 9 (2015 European CPT Standards).

103 *Op. cit.* footnote 19, par 43 (2009 Opinion of CoE Commissioner for Human Rights on Complaints against the Police).

65. Generally, **police officers who fail to comply with the above-mentioned legal safeguards shall be duly disciplined; this should be added as an example of serious violation of duty under Article 203 of the Draft Law**.[104]

66. Finally, Article 214 of the Draft Law deals with the suspension from duty "on reasonable proposal of the superior, when an order was adopted against them to conduct investigation for a criminal offence subject to public prosecution, or a disciplinary procedure was initiated due to serious violation of duty and if their presence at work would damage the interests of the service, with a special explanation". However, the specific situation where public officials are under criminal and/or disciplinary investigation for allegedly having committed acts of torture or ill-treatment is not expressly mentioned. As recommended by the UN Committee against Torture, **such situations should lead to the immediate suspension of police officers from their duties throughout the investigation, subject to the observance of the principle of the presumption of innocence.[105] Article 214 of the Draft Law should reflect this**.

4.2. Use of Force

67. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials focus on restraint, proportionality, and minimization of damage and the preservation of life, and also foresee punishment for arbitrary and abusive use of force.[106] The Council of Europe has also issued further guidance on human rights and the use of force by law enforcement officials including the police.[107] While the Draft Law is generally in line with these standards, it should **provide for clearer authorization procedures for certain forms of force and should ensure that procedures for independent investigation are in place**.

68. Article 63 of the Draft Law expressly provides that police officers shall have the right and duty to carry official weapons and ammunition, but does not distinguish between different types of weapons and/or the potential harm that they may cause. Generally, only specifically selected officials, and/or those who have undergone adequate training, should be permitted to use those weapons which may cause grave consequences to people's health; this is particularly important in the case of certain weapons listed under Article 99, such as firearms, 'special types of weapons and devices', chemical agents and electrical discharge weapons, to avoid abuse.[108] It is thus recommended **to specify in Article 63 that only specifically selected and/or trained officials shall be allowed to use these weapons, following specific authorization procedures**.

69. Article 99 refers to certain key principles guiding the use of force, including necessity, restraint and proportionality, which are overall in line with international standards.

70. Article 104 of the Draft Law then details the circumstances when physical force may be used, including in cases of passive resistance. Read together with Articles 107, 110 and 111, this provision may be read to imply that in situations where the use of physical force is unsuccessful, police batons, police dogs and police horses may also be used in cases involving passive resistance. Given the violent nature of these measures, this may be considered to constitute an excessive use of force. **It is recommended to clarify that in cases of passive resistance, police batons, dogs or horses may never be used.**

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[104] ibid. par 9 (d) (2015 UNCAT Committee Concluding Observations on Serbia).
[105] ibid. par 10 (d) (2015 UNCAT Committee Concluding Observations on Serbia).
[106] See *op. cit.* footnote 17, Principle 5 (1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials).
[107] *Op. cit.* footnote 100 (Council of Europe Handbook for Police Officers and Other Law Enforcement Officials on the European Convention on Human Rights and Policing (2013)).
[108] See in this context *op. cit.* footnote 22, pages 108-109 (2015 European CPT Standards).

71. Article 105 of the Draft Law contains clear guidelines on the use of pepper spray. Given its potentially grave effect on people's health,[109] the ECtHR has specified that pepper spray should only be used where the subjects' behavior represents a serious risk to public order or the physical integrity of police officers.[110] Additionally, it is not clear whether Article 105 extends to the use of tear gas grenades; if so, this would require further conditions of usage, particularly that tear gas should never be fired directly at persons. **The above clarifications and limitations should be added to Article 105**.

72. Article 106 of the Draft Law refers to the use of "electromagnetic means" including electroshock devices, but does not in any way limit their use. According to the European CPT's view, electrical discharge weapons may only be used in situations where there is a real and immediate threat to life or risk of serious injury and where other less coercive methods have failed or are impracticable; such weapons should never be used for the sole purpose of securing compliance with an order.[111] **The permitted use of electromagnetic devices should be clarified in Article 106 in accordance with the above limitations**.

73. Certain other means of police enforcement are also not clearly defined in the Draft Law, nor are the circumstances in which they may be used; this may leave too much space for interpretation or police discretion. For example, Article 115 of the Draft Law governs the use of water cannons, which are recognized by the ECtHR as an important non-lethal tool to prevent the escalation of unrest.[112] Nonetheless, **the Draft Law should be clearer on the level of authority required for the use of such devices**. Article 115 par 4 also states that, exceptionally, water sprayed from cannons may contain "non-allowed concentrations of harmless chemical agents"; **the level of concentration allowed is not clear in this provision, nor are the circumstances in which this exception would apply. It is recommended to clarify these aspects of Article 115**.

74. Additionally, Article 118 of the Draft Law on the use of firearms is not fully in line with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officers which specify that the "intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life".[113] **Article 118 should be supplemented accordingly**.

75. It is positive that Article 102 of the Draft Law obliges police officers to systematically report to their superior officers, in writing and within 24 hours, the use of any means of enforcement, which is overall in line with Principle 11(f) of the UN Basic Principles. Article 102 further indicates that where a police officer or evaluation commission subsequently deems the use of force to have been unjustified or inappropriate, they shall "propose to the manager of an organizational unit that legally prescribed measures be taken". The nature of such measures is not clear and should be specified, while differentiating between cases of misconduct, and criminal cases. Moreover, the ECtHR has stressed the need for adequate and *independent* investigations into the use of force,

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[109] See e.g., pars 18 and 25 in the case of *Oya Ataman v. Turkey*, ECtHR judgment of 5 December 2006 (Application no. 74552/01), available at http://hudoc.echr.coe.int/fre#{"itemid":["001-78330"]} where the ECtHR expressly mentions that the use of pepper spray or tear gas could produce "effects such as respiratory problems, nausea, vomiting, irritation of the respiratory tract, irritation of the tear ducts and eyes, spasms, chest pain, dermatitis and allergies. In strong doses it may cause necrosis of the tissue in the respiratory or digestive tract, pulmonary oedema or internal hemorrhaging".

[110] See par 70 in the case of *Gramada v. Romania*, ECtHR judgment of 11 February 2014 (Application no. 14974/09), available at http://hudoc.echr.coe.int/eng?i=001-140776#{"itemid":["001-140776"]}.

[111] See *op. cit.* footnote 22, pages 109 and 112 (2015 European CPT Standards).

[112] See e.g., the case of *Şimşek and others v. Turkey*, ECtHR judgment of 26 July 2005 (Application nos. 35072/97 37194/97), available at http://hudoc.echr.coe.int/eng?i=001-69915#{"itemid":["001-69915"]}.

[113] See *op. cit.* footnote 17, par 9 (1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials).

especially in cases involving firearms, where civilians are injured or killed,[114] to ensure full accountability. **The drafters should consider amending the Draft Law so that cases involving a potentially excessive use of force are investigated by an independent body** (see pars 105-107 *infra* on oversight and accountability).

76. Finally, the Draft Law does not specify that **the illegal or disproportionate use of force by the police will trigger criminal liability;[115] this should be expressly stated, with cross-references to relevant provisions of the Criminal Code**.

4.3. The Policing of Assemblies

77. The Draft Law contains few provisions relating directly to the policing of assemblies, to which the provisions relating to the use of force are relevant. In that respect, it is worth mentioning the OSCE/ODIHR-Venice Commission Joint Opinion on the Public Assembly Act of the Republic of Serbia (2010).[116] In particular, it is important to reiterate that the costs of providing adequate security and safety measures (including traffic and crowd management, and first-aid services) should be fully covered by the public authorities; adequate and appropriate policing should not depend on the payment of an additional financial charge by the organizers.[117]

78. Article 3 par 7 of the Draft Law notes the police duty to ensure security at public gatherings. However, this provision and the Draft Law in general do not mention the **State's positive duty to take reasonable and appropriate measures to enable peaceful assemblies**. The OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly recommend that this positive duty be expressly stated in any relevant domestic legislation pertaining to freedom of assembly and police powers.[118] **Article 3 par 7 should be enhanced accordingly**.

79. Furthermore, the rules governing the policing of assemblies should be expanded upon. In particular, **some overarching principles to ensure that the policing of assemblies is carried out in accordance with international standards should be added to the Draft Law**.

80. First, the Draft Law should specify which police body shall be in charge of policing assemblies; in this context, it is noted that international good practices recommend **to clearly define law-enforcement command structures to ensure accountability for operational decisions taken when policing assemblies**.[119] Second, unless there is a clear and present danger of imminent violence, **law-enforcement officials should not intervene to stop, search or detain protesters *en route* to an assembly**.[120] Third, **if assemblies remain peaceful, they should not be dispersed by law-enforcement**

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[114] See e.g., the case of *Ramashai and Others v. Netherlands*, ECtHR judgment of 15 May 2007 (Application no. 52391/99), available at http://hudoc.echr.coe.int/eng?i=001-80563#{"itemid":["001-80563"]}. See also the case of *Ciorcan and Others v Romania*, ECtHR judgment of 27 January 2015 (Applications nos. 29414/09 and 44841/09); and *op. cit.* footnote 20, par 74 (2008 OSCE Guidebook on Democratic Policing).

[115] *Op. cit.* footnote 20, par 74 (2008 OSCE Guidebook on Democratic Policing).

[116] OSCE/ODIHR-Venice Commission Joint Opinion on the Public Assembly Act of the Republic on Serbia, 16 October 2010, available at http://www.legislationline.org/topics/country/5/topic/15.

[117] ibid. par 26 (2010 OSCE/ODIHR-Venice Commission Joint Opinion on the Public Assembly Act of the Republic on Serbia). See also *op. cit.* footnote 23, Principle 5.2 (2010 OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly).

[118] ibid. par 31 (2010 OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly). See also pars 31-37 in the case of *Ärtze für das Leben v. Austria*, ECtHR judgment of 21 June 1988 (Application no. 10126/82), available at http://hudoc.echr.coe.int/eng?i=001-57558#{"itemid":["001-57558"]}.

[119] ibid. par 151 (2010 OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly).

[120] See e.g., case *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 to protest against the possible intervention of United States forces in Iraq (Article 11 of the ECHR was considered to have been violated).

officials.[121] Finally, **the dispersal of an assembly should be a measure of last resort[122] and a wide range of progressive measures should be applied before termination or dispersal, or the use of force. All three of these measures should underlie clear criteria and circumstances**.[123]

81. Moreover, 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".[124] If dispersal is deemed necessary, the police shall inform assembly organizers and participants clearly and audibly about the order to disperse prior to any intervention. Participants should also be given reasonable time to disperse voluntarily; only if they then fail to do so may law enforcement officials intervene.[125] Under no circumstances should force be used against peaceful demonstrators who are unable to leave the scene. Finally, any suspected unlawful use of force by the police during assemblies, including dispersal of the assemblies, should be investigated promptly and thoroughly, and lead to subsequent prosecution, if required.[126] **The Draft Law should be supplemented to reflect the principles set out in this, and the previous paragraph**.

82. In addition, Article 37 par 2 of the Draft Law provides that police officers are authorized to record and photograph gatherings; Article 37 par 5 sets out that the collected data shall be kept in prescribed records. This may sometimes discourage individuals from exercising their right to freedom of peaceful assembly.[127] While a separate law will regulate data processing by the police (Article 242), the broad principles governing the processing and retention of data collected in this manner should be stated in the Draft Law. Generally, such measures will not be considered intrusive as long as the data collected remains in an administrative file and is not placed in a data system process to identify individuals.[128] Private data should only be retained and processed in state databases where it relates to the commission of possible criminal acts; if an assembly occurred peacefully, and with no incidents, then the relevant footage should be permanently deleted. **It is recommended to supplement Article 37 to reflect such principles**.

4.4. Deprivation of Liberty, Search Measures and other Police Measures

83. Sections VI and VII of the Draft Law detail the range of the police's duties and powers. As already mentioned in pars 21-25 *supra*, certain duties or powers relating to criminal

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121 *Op. cit.* footnote 23, par 165 (2010 OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly).

122 ibid. pars 159 and 165 (2010 OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly). This is also in line with the recommendation made in *op. cit.* footnote 116, par 49 (2010 OSCE/ODIHR-Venice Commission Joint Opinion on the Public Assembly Act of the Republic on Serbia).

123 ibid. par 156 (2010 OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly).

124 *Op. cit.* footnote 17, pars 13-14 (1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials).

125 *Op. cit.* footnote 23, par 168 (2010 OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly).

126 *Op. cit.* footnote 116, par 51 (2010 OSCE/ODIHR-Venice Commission Joint Opinion on the Public Assembly Act of the Republic on Serbia).

127 See *op. cit.* footnote 23, par 169 (2010 OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly). See also e.g., pars 65-67 in the case of *Amann v. Switzerland* [GC], ECtHR judgment of 16 February 2000 (Application no. 27798/95), available at http://hudoc.echr.coe.int/eng?i=001-58497#{"itemid":["001-58497"]}, stating that the compilation of data by security services constituted an interference with the applicants' private lives, despite the fact that covert surveillance methods were not used. See also the European Commission of Human Rights decisions in *X v. UK* (1973, admissibility) and *Friedl v. Austria* (1995) regarding the *use* of photographs.

128 *Op. cit.* footnote 33, par 28 (2007 Venice Commission Opinion on Video Surveillance in Public Places by Public Authorities).

investigation measures **should be removed from the Draft Law and should be exclusively dealt with in the Criminal Procedure Code**.

84. Articles 80 and 81 dealing with police detention **should expressly provide for the separation of minors (although the detention of minors should, as a rule, be avoided)[129] from adults[130] and of women from men while in custody, as required by international standards.[131] Additionally, persons in pre-trial detention shall be kept separate from convicted prisoners.[132] Furthermore, the place and conditions of detention should be appropriate; and detention should continue only as long as it is reasonably required for the purpose pursued**.[133] It is recommended to specify these requirements under Articles 80 and 81.

85. Moreover, the deprivation of liberty should be as short as possible and detained persons shall be brought promptly before a judicial authority to have the lawfulness of their detention reviewed (Article 9 par 3 of the ICCPR and Article 5 par 3 of the ECHR). Special rules apply in juvenile cases, where detainees shall gain access to a judge within up to 24 hours.[134] Article 69 par 2 of the Criminal Procedure Code provides that an arrested person should be brought before a judge within 48 hours, or released; **this provision should be referenced in the Draft Law where individuals are detained in the context of criminal proceedings**. Article 80 of the Draft Law also refers to cases of detention prescribed "by other law", which is very vague and, as recommended in par 47 *supra*, should be clarified. In any case, it is noted that the ECtHR has held that the maximum duration of deprivation of liberty should be clearly provided in legislation.[135] Articles 80 and 81 should be supplemented accordingly. Further, the detention of persons/deprivation of their liberty should be conducted with consideration for the dignity, vulnerability and personal needs of each detainee.[136]

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[129] See also UNICEF Guidance for Legislative Reform on Juvenile Justice (2011), available at http://www.unicef.org/policyanalysis/files/Juvenile_justice_16052011_final.pdf.

[130] Article 37 (c) of the UN CRC and Article 10 (b) of the ICCPR. See also UN HRC General Comment No. 13 on Article 10 of the ICCPR which states that "[u]nder article 10, paragraph 3, juvenile offenders shall be segregated from adults and accorded treatment appropriate to their age and legal status in so far as conditions of detention are concerned"; see also Rule 8 of the 1955 Standard Minimum Rules for the Treatment of Prisoners Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, available at http://www.ohchr.org/Documents/ProfessionalInterest/treatmentprisoners.pdf.

[131] *Op. cit.* footnote 20, par 62 (2008 OSCE Guidebook on Democratic Policing). See also ibid. Article 8 (a) and (d) (1955 Standard Minimum Rules for the Treatment of Prisoners) which states that "[m]en and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate"; Article 37 (c) of the UN CRC; Article 29 of the UN Guidelines for the Protection of Juveniles Deprived of their Liberty (1990).

[132] See ibid. Article 8 (b) (1955 Standard Minimum Rules for the Treatment of Prisoners).

[133] See par 74 in the case of *Saadi v. the United Kingdom*, ECtHR judgment of 29 January 2008 (Application 13229/03), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84709#{"itemid":["001-84709"]}. See also par 49 in the case of *Kim v. Russia*, ECtHR judgment of 17 July 2014 (Application no. 44260/13), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145584#{"itemid":["001-145584"]}.

[134] See par 83 of the UN CRC Committee General Comment No.10 on "Children's rights in Juvenile Justice" (2007), CRC/C/GC/10; and par 33 of the UN Human Rights Committee General Comment No. 35 on Article 9 of the ICCPR (14 December 2014), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en.

[135] See the case *Amuur v. France*, ECtHR judgment of 25 June 1996 (Application no. 19776/92), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57988#{"itemid":["001-57988"]}.

[136] See UN Human Rights Committee General Comment No. 13 on Article 10 of the ICCPR which states that "Under article 10, paragraph 3, juvenile offenders shall be segregated from adults and accorded treatment appropriate to their age and legal status in so far as conditions of detention are concerned"; Rule 8 of the Standard Minimum Rules for the Treatment of Prisoners, approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 which states that "The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus, (a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate; (b) Untried prisoners shall be kept separate from convicted prisoners; (c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence; (d) Young prisoners shall be kept separate from adults" (available at http://www.ohchr.org/Documents/ProfessionalInterest/treatmentprisoners.pdf). See also *op. cit.* footnote 22, page 85 (2015 European CPT Standards).

86. Articles 73-79 of the Draft Law on summons and transport of persons summoned leave open whether these actions amount to a deprivation of liberty within the meaning of Article 5 of the ECHR. The ECtHR's case law suggests that there are circumstances where this may be the case, and where the summoned individual should benefit from certain protection.[137] Article 73 of the Draft Law stipulates that he/she must be informed of the reasons for the summons; however, par 5 of this provision could go further when specifying the rights of the summoned person once brought in. Such protection, along with the right of access to a lawyer and notification of a third party is provided to detained persons by Article 81 of the Draft Law. It would be advisable to **either clarify that a summoned person should be free to leave police premises at any time and notified of his/her rights beforehand, or to alternatively apply the rights of detained persons to summoned persons as well**.

87. Articles 86 to 88 of the Draft Law deal with the temporary seizure of objects, including objects linked to the commission of a criminal offence or misdemeanour. The seizure of objects is also regulated in Articles 147 to 151 of the Criminal Procedure Code. To avoid legal uncertainty**, it is recommended to include in the Draft Law a cross-reference to these provisions of the Criminal Procedure Code, where such seizure is carried out in the context of criminal proceedings**. Article 86 par 1 sub-par 4 further refers to cases of seizure "determined by other law". Such wording is vague and should ideally be replaced with express references to the relevant legislation. In particular, it is not clear whether the provisions of the Draft Law refer also to non-conviction based asset forfeiture (i.e., legal mechanisms that provide for the restraint, seizure, and forfeiture of stolen assets without the need for a criminal conviction).[138] Such measures are particularly relevant in cases where criminal prosecution becomes impossible (for instance if the accused escapes, dies or is unknown) or is unsuccessful.[139] In any case, the relationship between a non-conviction based asset forfeiture case and criminal proceedings, including during pending investigations, should be clearly defined in the Draft Law or other relevant legislation.[140]

88. Further, police checks and examinations/searches shall be exercised consistently with ECHR obligations; particularly, examinations/searches shall be **carried out with full respect for human dignity and the principles of proportionality and non-discrimination**.[141] The ECtHR has found that the detailed search of a person, and his/her clothing and belongings interferes with his/her private life, while the *public* nature of a search may also humiliate and embarrass him/her and thereby compound the seriousness of the interference.[142] The lawful grounds for stop and search are defined very broadly in Article 91 of the Draft Law (i.e., when necessary to find persons, objects and traces, which may serve as evidence for the successful conduct of the procedure, as well as objects that may harm others or oneself). **It would be advisable to**

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[137] See pars 46-57 in the case of *Shimovolos v. Russia*, ECtHR judgment of 21/06/2011 (Application no. 30194/09), available at http://hudoc.echr.coe.int/eng?i=001-105217#{"itemid":["001-105217"]} where a period of 45 minutes spent at a police station upon police order was deemed to constitute a deprivation of liberty.

[138] See Part A Section 3 of the International Bank for Reconstruction and Development (BIRD)/ The World Bank Publication "Stolen asset recovery: a good practices guide for non-conviction based asset forfeiture" (2009), available at http://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Non-conviction-based_Asset_Forfeiture_E.pdf.

[139] ibid. page 29 (BIRD-World Bank Publication on Stolen Asset Recovery (2009)).

[140] ibid. page 30 (BIRD-World Bank Publication on Stolen Asset Recovery (2009)).

[141] See par 67 in the case 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/453883f922.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.

[142] See par 63 in the case 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"]}.

specify in this provision that stop and search shall only take place where there is a reasonable suspicion that a crime may have been or is about to be committed (see also comments on ethnic profiling in pars 35-36 *supra*).

4.5. Assistance to Victims

89. It is welcome that Article 4 par 6 of the Draft Law expressly refers to assistance to victims as one of the principles that should guide police activities. However, not much is said in the Draft Law about the practical aspects of such assistance, apart from the need to protect victims in case of a "threat from perpetrator" (Article 41). International recommendations highlight the importance of adopting a victim-centered approach[143] in policing to strengthen crime prevention and criminal justice responses, particularly in relation to violence against women and domestic violence.[144]

90. Article 35 of the Draft Law on general police measures provides that "the police shall take emergency measures as necessary to remove immediate threats to people and property when other competent authorities are unable to respond in a timely manner". However, such emergency powers are not further detailed under Section VI on Police Duties. In its latest Concluding Observations, the UN Committee against Torture recommended introducing emergency protection orders to ensure effective protection of victims of gender-based violence.[145] Article 52 of the Istanbul Convention also requires that the competent authorities be equipped with the possibility to issue emergency protection or restraining orders.[146] The **Draft Law should thus be supplemented so that where necessary, the police may issue temporary emergency orders on the spot to protect victims (including the removal of perpetrators from their home irrespective of the ownership title to the property),[147] subject to later confirmation by a court**.[148]

91. To ensure a victims-centered approach by the police service, the Draft Law should also make reference to the adoption of gender-sensitive and child-sensitive processes for dealing with victims.[149] These should help avoid "secondary victimization".[150] In cases

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[143] Such an approach focuses on assisting victims in their engagement with the criminal justice process, rather than holding them responsible for any "reluctance" to co-operate (see page 34 of 2014 UNODC Blueprint for Action: an Implementation Plan for Criminal Justice Systems to Prevent and Respond to Violence against Women (hereinafter "2014 UNODC Blueprint for Action on VAW"), available at http://www.unodc.org/documents/justice-and-prison-reform/Strengthening_Crime_Prevention_and_Criminal_Justice_Responses_to_Violence_against_Women.pdf.

[144] ibid. page 34 (2014 UNODC Blueprint for Action on VAW).

[145] *Op. cit.* footnote 89, par 16 (c) (2015 UNCAT Committee Concluding Observations on Serbia).

[146] See also Section 3.10.4. of the 2012 UN Women Handbook for National Action Plans on Violence against Women, available at http://www.unwomen.org/~/media/Headquarters/Attachments/Sections/Library/Publications/2012/7/HandbookNationalActionPlansOnVAW-en%20pdf.pdf.

[147] See Section 3.10.3 of the 2012 UN Women Handbook for Legislation on Violence against Women, available at http://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women.

[148] 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. 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. The nature and scope of these measures could include e.g., 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 member, the confiscation of weapons and, granting the victim possession or use of an automobile, or other essential personal effects; granting temporary custody of children to the non-violent parent, requiring the perpetrator to vacate the family home irrespective of ownership status, compelling the offender to pay the victim's medical bills. This is in addition to other longer-term measures that could be adopted by a court.

[149] This should include e.g., searches carried out by a police officer of the same sex. When questioning victims of sexually related offenses or domestic violence, the intake interview or the questioning, and examination (Article 174) should also be carried out by a police officer or investigator of the same sex (wherever possible) unless the victim requires otherwise. As regards child victims and witnesses, information related to a child's involvement in the justice process should be protected, e.g., by maintaining confidentiality and restricting disclosure of information that could lead to the identification of a child victim/witness, anonymizing the child's personal data in

where key provisions are provided by other legislation or by the Criminal Procedure Code, cross-references should be included in the Draft Law.

92. More specifically, the Draft Law currently does not include a specific duty of the police to inform the victims/injured parties about their rights,[151] and about available social and legal protection and support services at their disposal. In that respect, Article 4 of the 2012 EU Directive 2012/19 establishing minimum standards on the rights, support and protection of victims of crime provides detailed guidance as to the nature of the information to be provided to victims. Such information should be provided without unnecessary delay, when the victims first enter into contact with competent authorities, including the police.[152] The **Draft Law should thus outline the police's duty to inform victims/injured parties of their rights, which should at a minimum reflect the type of information listed in Article 4 of the 2012 EU Directive**.

93. Finally, Section II of the Draft Law deals with the co-operation of the police with "other entities", while Article 13 on community policing specifically refers to cooperation with non-governmental organizations and other organized groups, which is very positive. Reference to co-operation with other institutions of the criminal justice system would also be a useful addition since at the international level, this is generally considered to be an essential element to enhance the effectiveness of police activities.[153] Further, particularly in the context of prevention and protection against violence against women and domestic violence, co-operation with a broader range of state and other entities/bodies[154] is critical.[155] Positive lessons learned such as inter-agency protocols[156]

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documents and records, and protecting him/her from undue exposure to the public. It would be advisable to supplement the Draft Code accordingly; moreover, 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 (see pars 26-28 of the 2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime). See also par 54 of the General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (hereinafter "CRC Committee General Comment No. 14 (2013)"), available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

150 i.e., when the victims suffer further harm not as a direct result of the criminal act but due to the manner in which the institutions and other individuals deal with the victim. Secondary victimization may be caused, for instance, by repeated exposure of the victim to the perpetrator, repeated interrogation about the same facts, the use of inappropriate language, unintentionally insensitive comments made by all those who come into contact with victims, or insensitive media reporting of cases.

151 See the 1985 UN Basic Principles of Justice for Victims of Crime; see also the Annex to the UN Economic and Social Council (ECOSOC) Resolution 2005/20, 22 July 2005 (hereinafter "2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime"), available at http://www.un.org/en/pseataskforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf.

152 EU Directive 2012/29/EU adopted on 25 October 2012, which EU Member States are held to incorporate into their national laws by 16 November 2015, available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=en. See also the DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/19 (December 2013) available at http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf. Article 4 of the EU Directive 2012/29/EU states that "Member States shall ensure that victims are offered the following information, without unnecessary delay, from their first contact with a competent authority in order to enable them to access the rights set out in this Directive: (a) the type of support they can obtain and from whom, including, where relevant, basic information about access to medical support, any specialist support, including psychological support, and alternative accommodation; (b) the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures; (c) how and under what conditions they can obtain protection, including protection measures; (d) how and under what conditions they can access legal advice, legal aid and any other sort of advice; (e) how and under what conditions they can access compensation; (f) how and under what conditions they are entitled to interpretation and translation; (g) if they are resident in a Member State other than that where the criminal offence was committed, any special measures, procedures or arrangements, which are available to protect their interests in the Member State where the first contact with the competent authority is made; (h) the available procedures for making complaints where their rights are not respected by the competent authority operating within the context of criminal proceedings; (i) the contact details for communications about their case; (j) the available restorative justice services; (j) how and under what conditions expenses incurred as a result of their participation in the criminal proceedings can be reimbursed.

153 *Op. cit.* footnote 21, Section VII on Enhanced Collaboration among Criminal Justice System Institutions (2013 OSCE Publication on Police Reform).

154 E.g., local government representatives, social and health service providers, education bodies, non-governmental organisations, child protection agencies.

155 See e.g., pars 64-65 of the Explanatory Report to the Istanbul Convention.

156 See also, for instance, the example of Belgium with the designation of an independent case manager (not related to the police, justice or welfare), pages 36 and 40 of European Crime Prevention Network, Toolbox Series No. 4 on "Tackling Domestic Violence in the EU: Policies and Practices" (December 2013), available at http://www.bukstipri.lt/uploads/1112.pdf. See also *op. cit.* footnote 146, Section 3.3.3.1. (2012 UN Women Handbook for National Action Plans on VAW).

and various handbooks and tools developed by international organizations may be useful and help improve coordinated institutional responses in Serbia.[157]

4.6. Data Collection and Processing

94. The legal tasks of police and criminal justice authorities often require the processing of personal data which may entail serious consequences for the rights to private life of the individuals concerned. Hence, legislation on these matters should be compliant with international standards, particularly the CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.[158] The Draft Law only briefly mentions the collection of data in Article 242, which specifies that a special law will deal with police records and processing of personal data in detail; such legislation is apparently being developed. While a special law on these matters is welcome in principle, the Draft Law itself should set out the main principles guiding the handling of such data by the police.

95. Generally, under international law, the following key principles regarding the protection of personal data should be respected:[159] (i) the principle of lawful processing;[160] (ii) the principle of purpose specification and limitation;[161] (iii) the principles of data quality, including data relevance,[162] data accuracy,[163] and the limited retention of data, particularly that retention shall be limited in time;[164] (iv) the fair processing principle;[165] and (v) the principle of accountability.[166] The CoE's 1987 Police Data Recommendation gives useful guidance to State Parties on how the police should implement the CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.[167] Relevant domestic legislation should specify how data should be kept, who should be allowed access and the conditions for transferring data to other services, including foreign police authorities. Moreover, it should outline how data subjects may exercise their data protection rights and how control by an independent authority should

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[157] See par 75 of the European Parliament Report on Women's Rights in the Balkan Accession Countries, 4 April 2013, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0136+0+DOC+XML+V0//EN. See also *Op. cit.* footnote 143 (2014 UNODC Blueprint for Action on VAW); and the 2010 UNODC Handbook on Effective Police Responses to Violence Against Women, available at https://www.unodc.org/documents/justice-and-prison-reform/Handbook_on_Effective_police_responses_to_violence_against_women_English.pdf.

[158] See also CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28 January 1981, Article 5, ratified by Serbia on 6 September 2005, available at http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm, and CoE Committee of Ministers, Recommendation R (87) 15E on regulating the use of personal data in the police sector, Strasbourg, 17 September 1987, available at https://wcd.coe.int/ViewDoc.jsp?id=704881&Site=CM. See also par 46 of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report to the UN Human Rights Council, 17 May 2010, A/HRC/14/46, available at http://www.un.org/Docs/journal/asp/ws.asp?m=A/HRC/14/46.

[159] See Section III of the EU Fundamental Rights Agency (FRA) Handbook on European Data Protection Law (2014), available at http://fra.europa.eu/sites/default/files/fra-2014-handbook-data-protection-law-2nd-ed_en.pdf.

[160] i.e., in accordance with the law, pursuing a legitimate purpose, and necessary in a democratic society in order to achieve the legitimate purpose.

[161] i.e., the purpose of processing must be explicitly defined by law, meaning that processing for undefined purposes is not compliant with data protection principles; further use of data for another purpose (including transfer to third parties) requires an additional legal basis.

[162] i.e., that only such data shall be processed as are "adequate, relevant and not excessive in relation to the purpose for which they are collected and/or further processed" (Article 5 of the CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data).

[163] This means that a controller holding personal information shall not use that information without taking steps to ensure with reasonable certainty that the data are accurate and up to date (see *op. cit.* footnote 159, Section 3.3.2 (2014 EU FRA Handbook on European Data Protection Law).

[164] i.e., the retention of data to be proportionate in relation to the purpose of collection and limited in time, particularly in the police sector (see e.g., the case of *S. and Marper v. the United Kingdom*, ECtHR judgment of 4 December 2008 (Application nos. 30562/04 and 30566/04)).

[165] i.e., transparency of processing, especially *vis-a-vis* data subjects; unless specifically permitted by law, there must be no secret and covert processing of personal data (see *op. cit.* footnote 159, Section 3.4 (2014 EU FRA Handbook on European Data Protection Law).

[166] This means that the data controllers shall ensure the active implementation of measures to promote and safeguard data protection in their processing activities (see *op. cit.* footnote 159, Section 3.5 (2014 EU FRA Handbook on European Data Protection Law).

[167] See *op. cit.* footnote 158 (1987 CoE Recommendation R(87)15 on Regulating the Use of Personal Data in the Police Sector).

be exercised. **Article 242 could be supplemented to reflect the above principles, while referring to the special law on data recording and processing**.

96. As mentioned in pars 24-26 *supra*, Articles 37 and 38 of the Draft Law state that surveillance and recording may take place in public spaces via video, photo and audio recording devices. Given the potential interference with the right to private life of individuals, which is also protected in public places,[168] adequate safeguards should be in place regarding the processing and use of data collected as a result.[169] In general, the main problem here lies with the recording of data and their processing, for instance in a data system, for the purposes of identification and/or the gathering of intelligence in the absence of any criminal offence and/or threat to national security.[170] In particular, the collected data should only be kept as long as this is required for the purposes for which it was collected. In general, people should be notified of surveillance in public places or at least surveillance systems should be out in the open.[171]

97. While Article 37 par 6 of the Draft Law provides that the police must publicly announce the intention to record in public places, it is not clear how this will be done. Certain countries, like the Netherlands and France, have adopted specific regulations concerning the installation of video surveillance systems in public places, including clear criteria and authorization processes as well as explicit provisions regarding the duration and use of data collected.[172] It is recommended **to clarify in the Draft Law the circumstances and modalities for authorizing surveillance and recording in public spaces, as well as rules regarding the duration of data retention and data processing**.

98. Finally, it is common practice for the police to proceed with the collection and retention of fingerprints, cellular samples and DNA profiles of persons. These are closely linked to certain personal characteristics of an individual and intimate sphere, and thus highly sensitive.[173] The collection and retention of such data is not directly addressed in the Draft Law, but may be addressed in the upcoming legislation on data recording by the police. Generally, provisions requiring individuals to undergo fingerprinting, and other extractions of body samples should distinguish between grave and less serious offences. Also, the public interest in conducting an investigation and preventing crimes always needs to be balanced against the protection of individuals' rights to respect for private life.[174] Future legislation should specify the modalities of retention and destruction of fingerprints and body samples, in particular their timely or immediate removal or

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168 See par 56 in the case of *P.G. and J.H. v. United Kingdom*, ECtHR judgment of 6 February 2001 (Application no. 44787/98), available at http://hudoc.echr.coe.int/eng?i=001-59665#{"itemid":["001-59665"]}.

169 *Op. cit.* footnote 33, pars 79 to 83 (2007 Venice Commission Opinion on Video Surveillance in Public Places by Public Authorities).

170 ibid. pars 28-29 (2007 Venice Commission Opinion on Video Surveillance in Public Places by Public Authorities).

171 See ibid. par 70 (2007 Venice Commission Opinion on Video Surveillance in Public Places by Public Authorities); notification of video surveillance devices can be done by putting up street signs or by otherwise ensuring that the public is aware of the practice of surveying specific public places.

172 See ibid. par 71 (2007 Venice Commission Opinion on Video Surveillance in Public Places by Public Authorities). According to the French legislation (now codified in Title V of Part II on Public Security and Order of the French Code on Internal Security, available at http://www.legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI000025505406&idSectionTA=LEGISCTA000025508190&cidTexte=LEGITEXT000025503132&dateTexte=20150901), a video surveillance system may only be set up in a public area if there is a clear security concern; the installation of such devices also needs to be approved by the Prefect, following the positive decision of a departmental commission headed by a magistrate. To respect people's privacy, the video devices must be set up in a manner that does not allow any view into the interior or entrance of a house. Except in the context of criminal proceedings, records can be stored for a maximum of one month. The public must be clearly and permanently informed of the presence of video surveillance devices and of the legally responsible authority or person.

173 See e.g., Opinion 3/2012 on Developments in Biometric Technologies by the European Advisory Body on Data Protection and Privacy (set up under Article 29 of Directive 95/46/EC), available at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2012/wp193_en.pdf.

174 See e.g., pars 41-46 of the case of *M.K. v. France*, ECtHR judgment of 18 April 2013 (Application no. 19522/09).

destruction following the dismissal of a case or acquittal.[175] The ECtHR requires that a clear maximum period of storage is indicated in the legislation; moreover, persons concerned by the retention should in principle have information, access and deletion rights in order to effectively remedy possible infringements.[176] The CoE Recommendation also requests states to distinguish, when storing personal data, between administrative data and police data, as well as between different types of data subjects (suspects, convicted persons, victims and witnesses). **These aspects should be borne in mind when drafting the legislation on data recording and processing by the police.**

99. Further, regarding the processing of data collected by the police, Article 10 provides for mutual notification, exchange of data and intelligence between the Ministry of Interior and the Security-Information Agency, which allegedly would also include data and information collected in the context of criminal (pre-) investigations. Such information/data is usually confidential and should only be disseminated according to clear rules, and with the involvement of the competent prosecution agency, as the leader of criminal investigations. Similarly, Article 134 vaguely mentions international data exchange, but also without providing clear limitations. **The transfer or communication of such data, within Serbia and internationally, should be addressed in the upcoming law on data recording and processing, while bearing in mind the above-mentioned principles and safeguards**.

100. Finally, the collection of criminal justice statistics and the police's role in this area is not mentioned in the Draft Law. Unless provided by other legislation, it would be advisable to revert to good practices on data collection in criminal cases.[177] 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 offence, while indicating the relationship between the perpetrator and the victim, for instance in cases of domestic violence,**[178] and as appropriate the existence of a bias motive (see par 58 *supra*).

5. Oversight and Accountability of the Police

5.1. Oversight and Complaint Mechanism

101. For a police 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, independent bodies such as national human rights institutions and civil society oversight.[179] Without external oversight mechanisms, police leaders would have complete discretion in deciding whether to investigate or punish misconduct, which would render internal control ineffective.[180] An

[175] Regarding the indefinite retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, see e.g., pars 105-126 in the case of *S. and Marper v. the United Kingdom*, ECtHR judgment of 4 December 2008 (Application nos. 30562/04 and 30566/04).

[176] ibid. pars 105-126 (*S. and Marper v. the United Kingdom*, ECtHR judgment of 4 December 2008). See also pars 42-45 in the case of *Brunet v. France*, ECtHR judgment of 18 September 2014 (Application no. 21010/10), available at http://hudoc.echr.coe.int/eng?i=001-146389#{"itemid":["001-146389"]}.

[177] See e.g., Bastick, Megan, *Integrating Gender into Oversight of the Security Sector by Ombuds Institutions & National Human Rights Institutions* (Geneva: DCAF, OSCE, OSCE/ODIHR, 2014), available at http://www.osce.org/odihr/118327?download=true.

[178] ibid. Recommendations on pages 21-23 (2008 CoE Study on Administrative data collection on domestic violence).

[179] *Op. cit.* footnote 20, par 84 (2008 OSCE Guidebook on Democratic Policing).

[180] *Op. cit.* footnote 20, par 86 (2008 OSCE Guidebook on Democratic Policing).

external oversight mechanism would also improve public trust in police services. Internal and external oversight mechanisms should generally complement one another[181] and include the possibility to effectively investigate allegations of wrongdoing, and as appropriate, recommend disciplinary sanctions or refer cases for criminal prosecution.[182] Furthermore, the media can play an important role in providing the public with information on police activities.

102. Various articles of the Draft Law identify principles and mechanisms for certain forms of internal and external oversight.[183] However, these articles are vaguely worded and taken together do not provide for a comprehensive structure for effective police oversight as described above. This could be ensured by a separate inspectorate, an independent mechanism for external oversight of the entire police complaints system and/or by unannounced inspections of police stations, among others. **More precise cross-referencing to other laws mandating certain bodies to conduct oversight, or clearer specifications of those bodies and their powers, and how they complement each other particularly in terms of information-sharing, reporting and potential collaboration, should be provided in the Draft Law. In particular, the above-mentioned independent mechanism for external oversight of the entire police complaints system should be contemplated** (see pars 105-108 *infra*).

103. According to Article 228 par 1 of the Draft Law, any person shall have the right to file a complaint to the Ministry against a police officer for alleged violations of his/her rights or freedoms due to unlawful or improper police action or behaviour. In other jurisdictions, the right to submit such complaints is not limited to persons whose rights have been violated, but include others adversely affected by or witnessing improper behaviour towards a third party by police officers. Such a wide scope of the provision would ensure that more cases involving allegedly improper conduct are raised, particularly in cases where the victims themselves are unable or unwilling to come forward, or do not know about the possibility of initiating a complaint. It is thus recommended **to redraft Article 228 of the Draft Law to also allow third parties, including NGOs, to initiate complaints**.

104. Every complaint is then considered first by the manager of the responsible organizational unit. If the complaint implies that a criminal offence may have been committed, the 'Sector for Internal Control' reviews the complaint. If the Sector suspects that a criminal offence may have been committed, the complaint is submitted to the competent public prosecutor and the complainant is informed accordingly (Article 228 par 4). Article 228 par 6 of the Draft Law further refers to "Complaint Committees" which shall be set up to handle complaints filed with the Ministry. The respective roles and responsibilities of the manager of the organizational unit and of the complaint committees are unclear.

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[181] ibid. par 87 (2008 OSCE Guidebook on Democratic Policing).

[182] See page iv of 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.

[183] In Article 4, the principle of public inspection of the work of the Ministry is established. This is elaborated further in a series of other articles, such as Article 5 which refers to the legislature and executive at all levels as being responsible for examining security reports; Article 15 par 3 which makes reference to bodies legally mandated to provide external oversight (but with no further specification); and Article 16 which covers ministerial authority and oversight. Article 135 of the Draft Law elaborates on internal oversight functions of the General Police Directorate, while Article 219 again identifies the national legislature and executive as performing external oversight alongside judicial authorities, public administration authorities and other legally authorised bodies; however, the nature of oversight is to be defined by another "unspecified" law. Articles 220 to 226 of the Draft Law refer to internal oversight by the Sector for Internal Control, while Articles 228 to 234 deal with a public complaints mechanism.

105. Moreover, as stated above, this complaints-handling mechanism is not fully in line with recommendations made at the international level and good practices. Generally, international and regional standards recommend that any such complaint system be independent (i.e., there should be no institutional or hierarchical connections between the investigators and the responsible officer and there should also be independence in practice).[184] Furthermore, it should be adequate, prompt, subject to public scrutiny (open and transparent), and should ensure the victim's/complainant's involvement in the process.[185] Moreover, the UN Committee against Torture specifically recommended to Serbia that an *independent* body that is not connected to or under the authority of the police shall conduct investigations into all allegations of torture, ill-treatment and excessive use of force allegedly perpetrated by the police.[186] Given that the Sector for Internal Control is overseen by and accountable to the Ministry (Article 226) and that the Minister may request the submission of a wide range of data and other documents (Article 227), this body cannot be said to be independent. Similarly, the composition of the complaint committees, which include two members appointed by the Government among employees of the Ministry nominated by the Ministry (Articles 228 par 7 and 230 par 4) and one civilian representative also appointed by the Government based on proposals from professional organizations and NGOs (Article 228 par 8), is also unlikely to guarantee the independence of the complaint-handling mechanism.

106. The stakeholders should rather **consider the establishment of an independent police complaint body with comprehensive oversight responsibilities over the entire police system that would be competent to investigate *ex officio* all cases involving allegations of torture, ill-treatment and excessive use of force, corruption and/or discriminatory behaviour and other violations of laws, and to handle complaints.[187] At a minimum, such an independent body should handle the most serious complaints, i.e., when Articles 2 or 3 of the ECHR are engaged; or where criminal or disciplinary culpability arises**.[188] It must be highlighted that a variety of systems exist at the international level. However, regardless of the system chosen, it is essential that the stakeholders clearly define the mandate and powers of the relevant entity, as well as its relationship with internal oversight bodies. The UNODC Handbook on Police Accountability, Oversight and Integrity can be a useful reference document in that respect.[189] Nonetheless, it must be noted that including independent police oversight bodies in a law on the police may compromise the public perception of such body's independence.[190]

107. Additionally, the Draft Law should also clarify how such a body shall co-operate with the police, while bearing in mind the independence principle, the seriousness of the complaint and resource management implications.[191] The Opinion of the Council of Europe Commissioner for Human Rights concerning Independent and Effective

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[184] See par 135 in the case of *Bati v Turkey*, ECtHR judgment 3 June 2004 (Application nos. 33097/96 and 57834/00), See also *op. cit.* footnote 19, par 30 (2009 Opinion of CoE Commissioner for Human Rights on Complaints against the Police).

[185] *Op. cit.* footnote 19 (2009 Opinion of CoE Commissioner for Human Rights on Complaints against the Police). See also *op. cit.* footnote 18, par 61 (2001 European Code of Police Ethics) which states that "[p]ublic authorities shall ensure effective and impartial procedures for complaints against the police".

[186] *Op. cit.* footnote 89, par 10 (b) (2015 UNCAT Committee Concluding Observations on Serbia).

[187] *Op. cit.* footnote 19, pars 29 to 31 (2009 Opinion of CoE Commissioner for Human Rights on Complaints against the Police). See also *op. cit.* footnote 22, page 86 at par 38 (2015 European CPT Standards) where it is stated that: "*Inquiries into possible disciplinary offences by public officials may be performed by a separate internal investigations department within the structures of the agencies concerned. Nevertheless, the CPT strongly encourages the creation of a fully-fledged independent investigation body. Such a body should have the power to direct that disciplinary proceedings be instigated*".

[188] *Op. cit.* footnote 19, par 40 (2009 Opinion of CoE Commissioner for Human Rights on Complaints against the Police).

[189] *Op. cit.* footnote 182, particularly pages 51-54 (2011 UNODC Handbook on Police Accountability, Oversight and Integrity).

[190] ibid. page 49 (2011 UNODC Handbook on Police Accountability, Oversight and Integrity).

[191] ibid. Section 6 (2009 Opinion of CoE Commissioner for Human Rights on Complaints against the Police).

Determination of Complaints against the Police (2009)[192] may serve as useful guidance in this respect. Moreover, complaints statistics (including the number of complaints received, their nature and consequences) should be disclosed to the public to ensure transparency.[193]

108. Further, the Draft Law should specify that where there is a suspicion that a criminal act may have been committed, this body shall refer such cases to criminal prosecution. At the same time, regard should be paid to valid concerns indicating that the close working relationship between the police and prosecution authority in standard criminal proceedings may undermine the independence and impartiality of the prosecution service when dealing with alleged police misconduct or abuse.[194] The drafters and stakeholders should debate this point, and **consider establishing certain mechanisms to ensure that local prosecutors, who direct local police actions, are not involved in investigations of possible criminal acts of local police officers**.[195]

109. In any case, in order to fulfil their oversight mandate effectively, external oversight institutions require sufficient resources and legal powers.

5.2. Disciplinary Proceedings

110. It is welcome that the Draft Law provides for the possibility to bring criminal or disciplinary proceedings against a police officer in cases of misconduct. This constitutes an important protection against impunity and is essential to ensuring public confidence in the police complaints system.[196]

111. Articles 202 and 203 of the Draft Law detail which acts may constitute misconduct and which would constitute serious violations of duty. Regarding misconduct, **Article 202 lists as one type of misconduct the "unprofessional treatment of citizens or employees during working hours"; this wording is unclear, as it may encompass a wide array of conduct ranging from inappropriate answers and insults to discriminatory treatment, or even physical assaults. Hence, this provision should be clarified**.

112. Moreover, as mentioned in pars 54-55 *supra*, an adequate internal complaints-handling mechanism should be in place to ensure that the working environment is free from discrimination, harassment and sexual harassment. **These grounds for bringing internal complaints should be expressly mentioned under Article 203 of the Draft Law**.

113. Article 206 pars 2 and 3 provides that disciplinary procedures are carried out by a police officer with at least five years of work experience, who is designated by the relevant manager or supervisor. Such a person, if working within the police/Ministry, **should, at a minimum, not work for the same service as the officer under investigation.[197] At the same time, the European CPT also noted that adjudication panels for police**

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192 *Op. cit.* footnote 19 (2009 Opinion of CoE Commissioner for Human Rights on Complaints against the Police).

193 *Op. cit.* footnote 182, page 36 (2011 UNODC Handbook on Police Accountability, Oversight and Integrity).

194 See the case of *Ramashai and Others v. Netherlands*, ECtHR judgment of 15 May 2007 (Application no. 52391/99), available at http://hudoc.echr.coe.int/eng?i=001-80563#{"itemid":["001-80563"]}, where the ECtHR considered, in a case involving a death resulting from police action, that the connections between the local prosecution service and police service was deemed to undermine the independence of the subsequent investigation. See also *op. cit.* footnote 19, par 85 (2009 Opinion of CoE Commissioner for Human Rights on Complaints against the Police).

195 See *op. cit.* footnote 19, par 85 (2009 Opinion of CoE Commissioner for Human Rights on Complaints against the Police).

196 *Op. cit.* footnote 19 (2009 Opinion of CoE Commissioner for Human Rights on Complaints against the Police).

197 *Op. cit.* footnote 22, page 105 at par 32 (2015 European CPT Standards). See also *op. cit.* footnote 182, page 41 (2011 UNODC Handbook on Police Accountability, Oversight and Integrity).

disciplinary proceedings should include at least one independent member,[198] but that preferably, an independent body should handle disciplinary proceedings. The independent police complaint body already mentioned in pars 106-107 *supra* **could also be in charge of disciplinary proceedings, if it is equipped with adequate human and financial resources**.[199]

114. Finally, a disciplinary decision may be appealed before a disciplinary commission composed of three members appointed by the Minister, one of which may not be employed by the Ministry (Article 206 pars 5 to 8). International and regional documents generally recommend that disciplinary decisions against police staff shall be reviewed by an independent body or a court.[200] Given the above appointment modalities, the disciplinary commission is not independent from the executive. Further, Article 206 only mentions that one member of the commission may not be employed by the Ministry, but does not specify the selection procedure, nor does it state the minimum criteria that he/she should fulfil. In any case, **there should be no institutional or hierarchical connections between the members and the officer lodging the appeal. Article 206 should be supplemented accordingly and the requirements and procedure for the selection of the external member should also be specified in greater detail, to enhance transparency and openness in this regard.**

6. Final Comments

115. Regarding the final provisions of the Draft Law, it is laudable that Article 244 lists the secondary legislation/special acts that are mentioned throughout the Draft Law, which should help ensure its effective implementation. However, given the large number of these acts, the timeline of 6 months for the Government and one year for the Minister (Article 244) to adopt such texts may be unrealistic. It may be helpful **to already prepare/develop all secondary legislation and other relevant documents earlier and to append them to the Draft Law, so that they can be adopted at the same time.**

116. Additionally, if not done already, policy-makers and other stakeholders should carry out a full impact assessment of planned legislation, including of its financial impact. Such assessment should also look at gender and social impacts of the Draft Law, particularly on minorities, including Roma and other ethnic, linguistic or religious minorities, foreign nationals, stateless persons and asylum seekers or internally displaced persons.

117. Moreover, 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. These should involve the general public, community groups, including the most vulnerable and marginalized groups, women's organizations, survivors of violence, and other sectors such as health, education, justice and penal systems.[201] **These groups of people should be fully informed and consulted prior to the adoption of the Draft Law,[202] and of secondary legislation**. Public discussions and an open and inclusive debate will

198 *Op. cit.* footnote 22, pages 102-107 (2015 European CPT Standards).
199 See *op. cit.* footnote 182, page 42 (2011 UNODC Handbook on Police Accountability, Oversight and Integrity).
200 *Op. cit.* footnote 18, par 33 (2001 European Code of Police Ethics). See also *op. cit.* footnote 20, par 143 (2008 OSCE Guidebook on Democratic Policing).
201 *Op. cit.* footnote 21, page 13 (2013 OSCE Publication on Police Reform).
202 See also the 2015 Recommendations on Enhancing the Participation of Associations in Public-Decision Making Processes (including lawmaking), available at http://www.osce.org/pc/151631?download=true.

increase all stakeholders' understanding of the various factors involved and enhance confidence and trust in the adopted legislation, and in relevant institutions. Community and civil society participation in any future amendment process will also be essential.

118. Finally, any reform of the police sector should include a thorough review of the respective roles and responsibilities of all actors of the criminal justice system; the new provisions should be checked with regard to their impact on the relations and co-operation between different criminal justice system institutions.[203] Also, given the inter-dependency of the work of all entities of the criminal justice system, the adoption of the Draft Law should be complemented and synchronized with reforms in other related sectors,[204] in particular as regards the criminal and criminal procedure codes.

[END OF TEXT]

[203] *Op. cit.*, footnote 21, pages 75-76 (2013 OSCE Publication on Police Reform).
[204] See *op. cit.* footnote 20, par 18 (2008 OSCE Guidebook on Democratic Policing); and ibid. page 13 (2013 OSCE Publication on Police Reform).