



COMMISSIONER FOR HUMAN RIGHTS  
COMMISSAIRE AUX DROITS DE L'HOMME



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## REPORT

**by Nils Muižnieks**  
**Commissioner for Human Rights of the Council of Europe**

**Following his visit to Ukraine**  
**from 4 to 10 February 2014**

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## Introduction

1. The Council of Europe Commissioner for Human Rights visited Ukraine from 4 to 10 February 2014. This was a special mission to assess the human rights aspects of the events taking place in Ukraine since the end of November 2013<sup>1</sup>. Since the Commissioner's visit, Ukraine has been engulfed by political turmoil, which continues at the time this report was finalised (28 February 2014). While the ongoing crisis means any report is immediately overtaken by events on the ground, the Commissioner remains convinced of the utility of documenting the human rights situation up to this stage. In addition to analysing the excessive use of force by a now disbanded police unit and the absence of effective investigations to date, this report also highlights a core challenge for the Ukrainian authorities – the need to restore public trust in the law enforcement authorities. This report also analyses several long-term human rights challenges that contributed to the current crisis – the need to enhance the independence and impartiality of the judiciary and prosecutor's office, deficiencies in access to justice and the lack of equality of arms, and the lack of a legislative framework governing peaceful assembly.
2. The decision to visit Ukraine was taken in light of events taking place in Kyiv and other regional cities. The police interventions into protests against the government's decision to suspend preparations for the signature of the Association Agreement with the EU were accompanied by reports alleging numerous human rights violations. In line with his mandate, the Commissioner looked into the humanitarian and human rights aspects of the crisis, while leaving aside its political and/or geopolitical aspects.
3. The aims of the visit were to obtain concrete information on the circumstances of the use of force by State agents, as well as by certain civilian groups who were allegedly working with them, and to assess the overall human rights situation during and following the events unfolding since the end of November 2013, in particular as regards any on-going investigations into allegations of serious human rights violations. The Commissioner paid particular attention to information indicative of breaches of the right to life, and the prohibition of ill-treatment, as well as reports of abductions and missing persons. Furthermore, he examined issues related to access to justice and the legislative framework governing assemblies.
4. During his visit, the Commissioner met with the Acting Minister of Foreign Affairs, Mr Kozhara, the Acting Minister of the Interior, Mr Zakharchenko; the Deputy Minister of Justice, Mr Rayko, the First Deputy Head of the Presidential Administration, Mr Portnov, as well as heads and members of various parliamentary committees (rule of law and justice; legal policy; legislative provision of law enforcement activity; human rights, national minorities and inter-ethnic relations; freedom of expression and information; and the *ad hoc* commission on the events which took place in Kyiv on 18 May 2013). The Commissioner also had a meeting with the judges of the Constitutional Court of Ukraine, as well as with the Chairman of the Supreme Court and Chairmen of the High Specialised Courts (on Civil and Criminal Matters, and the Administrative and Commercial Courts). He met a group of senior prosecutorial authorities, including two Deputies of the Prosecutor General, Mr Sereda and Ms Frolova. In addition, the Commissioner had meetings with the Parliamentary Commissioner for Human Rights (Ombudsperson), defence lawyers of the persons detained/accused in relation to the events since the end of November 2013, civil society activists, journalists and medical staff.
5. The Commissioner and/or members of his delegation also visited the Emergency Hospital in Kyiv and its closed ward, the Private Clinic Borys in Kyiv, the Temporary Detention Isolator (ITT) in Zaporizhzhya, the Mechnikov hospital in Dnipropetrovsk and the SIZO (pre-trial detention centre) in Dnipropetrovsk.
6. The Commissioner would like to thank the Ukrainian authorities for their co-operation and efforts to ensure that his visit was carried out in full compliance with his mandate. In particular, he would like to express his gratitude to the Permanent Representation of Ukraine to the Council of

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<sup>1</sup> During the visit, the Commissioner was accompanied by Ms Bojana Urumova, Deputy to the Director of his Office, and by two Advisers, Ms Olena Petsun and Mr Vahagn Muradyan. The delegation also included a forensic medical doctor and former member of the European Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT), Ms Marija Definis-Gojanović.

Europe, as well as Ministry of Foreign Affairs for facilitating this mission. The Commissioner would also like to thank the Council of Europe Office in Kyiv for their valuable help and assistance provided in the course of this visit.

### Context of the visit

7. A number of demonstrations started on 21 November 2013 in Kyiv and other cities in Ukraine, after the government announced it was suspending preparations for the signature of the EU-Ukraine Association Agreement at the EU Eastern Partnership Summit, which took place in Vilnius on 29 November. The demonstrations were initially peaceful. On the night between 30 November and 1 December, the first clashes with the *Berkut* riot police forces were reported, together with reports of excessive use of force by state agents. Since then, clashes between the riot police forces and protesters were reported on a number of occasions, most notably during the protests which took place near the building of the Presidential Administration in Kyiv on 1 December; and the events on 11-12 December on the *Maidan Nezalezhnosti*, or Independence Square. The adoption by the Parliament of the package of the laws, popularly referred to as “anti-protest laws” on 16 January 2014, contributed to a further escalation of tensions, and in the days which followed violence ensued on the streets in Kyiv and other cities and the first death cases were reported. The Commissioner for Human Rights, along with other institutions of the Council of Europe, expressed concerns about several provisions of these laws, since they were not in conformity with the principles and standards enshrined in the European Convention on Human Rights.<sup>2</sup> Several of these laws were revoked by the Parliament on 28 January 2014.
8. An even more serious escalation of violence began on 18 February 2014, when more than a dozen people, including several policemen, were killed. On 20 February 2014 the worst violence yet erupted, with a high number of deaths and casualties among the protestors attributed to uniformed snipers. On 22 February 2014 protestors took control of presidential buildings without resistance and Parliament voted a resolution to remove from office President Yanukovich, who had fled the capital. The following day, parliament named an interim president, began the process of forming a new government, and announced the holding of new elections on 25 May. The crisis took a new dangerous direction on 27 February, when armed men seized key buildings in Crimea.
9. According to the Ministry of Healthcare, as of 28 February 2014, the death toll since 18 February was 82 persons, 876 persons asked for medical help, and 588 were hospitalised. The Ministry of Internal Affairs announced that by 21 February 16 police officers had died, 565 had sought medical help and 410 were hospitalised. On 26 February the Ministry announced that 72 law enforcement officers were in the Ministry’s hospital. That same day the Acting Minister of Internal Affairs disbanded the *Berkut* riot police.
10. The Commissioner would like to unequivocally condemn any use of violence as a means to resolve the ongoing crisis. It is a fundamental obligation of any member state of the Council of Europe to protect human life. The Commissioner also wishes to pay his respects to those who died and extend his deep sympathies to their families, as well as to acknowledge the suffering of those who were injured.

### Policing of demonstrations and accountability for serious human rights violations

11. The recent events have put in sharp focus the issues of policing of demonstrations and respect for human rights by the police in Ukraine, due to the numerous serious allegations of excessive use of force against demonstrators and the perceived lack of accountability for such violations. During his visit to Ukraine, the Commissioner focused his attention on the following issues of particular concern: excessive use of force by the police against protesters; impunity for serious human rights violations; and co-operation by law enforcement agencies with civilian groups. Issues related to excessive use of force by the local police in Ukraine and the need for an independent, impartial and transparent inquiry into such allegations have already been raised by the Commissioner’s predecessor in a [letter](#) dated 20 August 2010 and addressed to

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<sup>2</sup> [Statement](#) of 17 January 2014.

Mr Mykhailo Dobkin, Head of Kharkiv Oblast State Administration and Mr Henadi Kernes, the Secretary of Kharkiv City Council.

*a) Excessive use of force by the police and ill-treatment*

12. At the time of the Commissioner's visit in early February 2014, the exact numbers of people who had been injured as a result of violent clashes up to that point were disputed.<sup>3</sup> There have been credible reports of several abductions – in some instances, from hospitals - by groups allegedly working with the police. The persons abducted were allegedly ill-treated and turned over to the police or abandoned to their fate. One such person – Yuri Verbitsky - was found dead on 22 January 2014. By the time of Commissioner's visit to Kyiv, at least 4 other deaths were linked to the violent events (apart from the above-mentioned case, three people died from gunshot wounds, and another after being hit with a water cannon in sub-zero temperature). There were also numerous claims about persons missing, some of whom may have been in hiding. In this regard, the Commissioner was informed by the Deputy Prosecutor General that no official complaints by the families of those missing have been registered.
13. During the visit, the Commissioner and members of his delegation interviewed various persons who had in one way or another been affected by the violent events. Many were victims of police violence (including current and former detainees), and a significant number of interviewees had received or were still receiving treatment for their injuries in hospitals. Other persons interviewed included eyewitnesses and medical staff. One person met by the Commissioner's team was the employee of a private security company who had reportedly been assigned to provide security for a government building in the context of demonstrations, and was receiving medical treatment for injuries sustained.
14. The Commissioner's delegation received many allegations that persons were physically ill-treated – including severely - by the police and persons in plain clothes. A number of victims alleged that excessive force was used during apprehension. Many claimed that they were beaten when they were already on the ground, and that beatings continued inside police and unmarked cars during transportation to police stations. According to many accounts, the severity of beatings – which included blows with truncheons, wooden sticks and kicks to the head - often led to loss of consciousness. Allegations of threats of execution and/or infliction of serious bodily harm were also received.
15. In addition, a number of allegations were received of persons apprehended by security forces being stripped fully or partially of their clothing in sub-zero temperatures in an improvised "distribution point" in Mariinsky park in Kyiv, forced to kneel on the ground with their hands behind their backs and further beaten.
16. The medical expert accompanying the Commissioner reviewed medical records of injuries provided by individuals and interviewed medical staff and/or patients in public and private hospitals as well as the improvised hospital in the Trade Union building on Maidan. Many medical histories contained statements about physical abuse by *Berkut* riot police. Injuries described in the medical records were consistent with the accounts of physical ill-treatment, and, in some cases, the medical expert directly observed physical marks still visible on the victims consistent with the allegations concerned. In a number of cases, the injuries recorded consisted of open and closed head injuries (e.g. brain concussions/contusions), fractured teeth and ribs, and blunt force injuries of the soft tissue of the body.
17. Medical staff and paramedics connected with the Maidan movement claimed that firearms (including those using rubber bullets) were used to target the head and the eyes. Many protesters were injured in the head because of the use of rubber or "elastic" bullets. At the time of the Commissioner's visit, at least 10 people had lost at least one eye. The Commissioner finds that, even in the context of dispersal of violent protests, targeting the head and face is

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<sup>3</sup> The Commissioner did receive official data concerning Dnipropetrovsk, according to which 46 people, 22 of whom were police officials, sought medical help after the clashes on 26 January 2013 in that city. The medical staff of Mechnikov Hospital in Dnipropetrovsk indicated that five patients had been admitted to the hospital, all of them with head injuries.

completely unnecessary and disproportionate. Severe injuries had been inflicted due to the use of stun grenades. Water cannons were apparently used in a time of very cold temperatures.

18. There were also many reports of security forces specifically targeting journalists and medical staff. Those injuries, too, revealed a clear pattern of targeting the head and face. The Commissioner was provided with photographs showing injuries on the head received by Maidan medical staff. In addition, the Commissioner's medical expert met a surgeon who worked as a volunteer and had been injured with a rubber bullet on the face (between his left eye and nose) on 22 January 2014. He was reportedly wearing a Red Cross uniform when he was shot. The person provided a photograph taken afterwards which clearly corresponded to a bullet injury, and the marks of his healing wound could still be observed by the Commissioner's medical expert 16 days later (7 February). Moreover, the First Deputy Head of the Presidential Administration acknowledged that attacks on journalists contributed to the deterioration of public confidence in the police. The Commissioner wishes to underline that deliberate targeting of medical personnel and journalists is totally unacceptable, and those responsible must be held to account.
19. The legislative framework governing the use by police of special means to protect public order, as well as regulations governing the action of anti-riot police, should at the very least be profoundly revised and brought in line with the applicable international standards<sup>4</sup> and the case-law of the European Court of Human Rights.<sup>5</sup> The rules governing the use by police of special means to protect public order were initially promulgated in 1991,<sup>6</sup> and subsequently underwent several revisions. The latest revision of those rules took place only recently - 22 January 2014 - when the Government issued Resolutions N 13 and 14, which expanded the list of special means to include hand aerosol grenades Dreif-2, stun grenades and hand smoke grenades. The revised rules also allow the use of water cannons at any temperature (while the relevant provision initially did not allow the use of water cannons in temperatures below 0° C).
20. The Regulation on the anti-riot police "*Berkuť*" was approved through Decree N1011 of the Ministry of the Interior dated 24 October 2013, registered by the Ministry of Justice of Ukraine on 11 January 2014. The question arises as to which legal or regulatory provisions governed the actions of this anti-riot police force before the date of official registration of the above-mentioned Decree. As noted above, the Acting Minister of Internal Affairs disbanded "*Berkuť*" on 26 February 2014.

#### *b) Impunity for serious human rights violations*

21. Apart from highlighting the need to take immediate and effective action against torture and ill-treatment by the police, the above-mentioned events also put into focus the long-standing problem of impunity. The lack of effective investigations into such matters is amply evidenced in the case-law of the European Court of Human Rights concerning Ukraine.<sup>7</sup> Most notably, in the *Kaverzin v Ukraine*<sup>8</sup> judgement, the Court indicated that "systemic problems at the national level [...] call for the prompt implementation of comprehensive and complex measures".<sup>9</sup> It stressed that Ukraine must "urgently put in place specific reforms in its legal system in order to ensure that practices of ill-treatment in custody are eradicated, that effective investigation is conducted in accordance with Article 3 in every single case where an arguable complaint of ill-treatment is raised and that any shortcomings in such investigation are effectively remedied at the domestic level".<sup>10</sup> The establishment in 2012 of the National Preventive Mechanism according to the

<sup>4</sup> Such as [UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials](#).

<sup>5</sup> Such as, for instance, the ECtHR judgment in the case of *Abdullah Yaša v. Turkey* (judgment of 16 July 2013).

<sup>6</sup> Regulated by Decree of the Council of Ministers of the Ukrainian Soviet Social Republic, dated 27 February 1991 N 49.

<sup>7</sup> There is currently a group of cases pending for the execution in the Committee of Ministers (the lead case is *Kaverzin v Ukraine*). Another group of cases (*Afanasyev* group) have been pending before the Committee of Ministers since 2005.

<sup>8</sup> Judgment of 15 May 2012. The case concerns inhuman and degrading treatment in prison due to the systematic handcuffing of the blind applicant when taken out of his cell.

<sup>9</sup> *Ibid*, § 180.

<sup>10</sup> *Ibid*, §182.

Ombudsman+ formula was a positive development. However, it was not sufficient to ensure effective protection against large-scale abuses by the police as has been revealed in the course of recent months.

22. During his February 2014 visit, the Commissioner received numerous allegations from persons who had been apprehended and their lawyers about inaction of judges and prosecutors in the face of defendants' visible injuries and/or allegations of ill-treatment; as well as refusal of judicial and prosecutorial authorities to grant defendants' motions aimed at obtaining a forensic medical examination related to the above. In this context, it should be mentioned that such actions appear to contravene Article 206, paragraph 6, of the Criminal Procedure Code, which obliges the investigating judge to commission a forensic medical examination of the person allegedly injured, order an inquiry into the allegations of ill-treatment and ensure the security of that person.<sup>11</sup>
23. In his [report](#) on the administration of justice and protection of human rights in the justice system in Ukraine, published in February 2012, the Commissioner's predecessor urged the Ukrainian authorities to take urgent measures to reinforce a message of "zero-tolerance" of ill-treatment by police officers and to demonstrate an unequivocal commitment to combating impunity for such acts. Furthermore, he recommended to ensure that persons who have a legitimate complaint against those institutions should be able to seek redress before an independent body. The report also stressed that "allowing violent criminal acts by the police to go unpunished can greatly undermine public trust in the authorities responsible for upholding the law".
24. Some of the Commissioner's official interlocutors in Kyiv acknowledged that a violent dispersal by special anti-riot police ("*Berkuť*") forces of the peaceful protests on 30 November 2013, a documented and widely-viewed incident of a naked protester humiliated by the policemen outdoors in freezing weather, and attacks against journalists exacerbated the already tense situation and worsened the image of the police in the eyes of the general public. The Acting Minister of the Interior informed the Commissioner that internal investigations into the actions of the law enforcement officials had been completed by his institution and the corresponding findings transmitted to the Prosecutor's Office. During a meeting with the representatives of the Prosecutor's Office, however, no mention was made of any criminal proceedings related to cases of excessive use of force by the police in the period concerned. Moreover, on 12 February 2014, the media reported that a few days previously - 7 February - the court had already ruled to acquit at least two of three persons who were allegedly giving orders to the police to forcibly disperse the demonstrations at the end of November. Later on, media also reported that one of the officials concerned - who had, according to official announcements, been dismissed earlier over those matters - was continuing to perform his functions in the state institution concerned.
25. According to official information provided to the Commissioner's Office by the Prosecutor General's Office on 10 February 2014, there were 139 criminal proceedings related to the events unfolding in the period between 26 December 2013 and 10 February 2014 (13 investigations were carried out by prosecutorial authorities, 120 by the police and 6 by the investigators from the Security Service of Ukraine). The number of persons detained in the course of the above-mentioned period of time was 236. In relation to most of them, the courts initially authorised remand in custody as a preventive measure, however later this preventive measure was changed to house arrest and/or other non-custodial measures available under the Code of Criminal Procedure.
26. During his meeting in the Prosecutor General's Office, the Commissioner was informed that seven investigations were pending against police officers, four of which concerned events in Kyiv (exceeding authority and hindering the work of journalists), two in Dnipropetrovsk (including one related to unlawful detentions), and one in Zaporizhzhya (this appeared to be the only case of criminal proceedings which related not only to allegations of excessive use of force by the police, but also by other persons working with the police). When presented with photographic

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<sup>11</sup> See also Article 214 of the Criminal Procedure Code, which clearly states that the investigator or prosecutor is under a legal obligation to institute criminal proceedings within a period of 24 hours from the moment of receiving information as to the alleged criminal act.

material showing a senior police official in Dnipropetrovsk in the company of ununiformed person in masks and with truncheons, the officials from the Prosecutor General's Office confirmed that there was no legislative framework allowing for this kind of co-operation between the police and such individuals and promised to look into this matter.

27. The Commissioner would like to recall once again that it is a fundamental duty of member states of the Council of Europe to combat impunity for ill-treatment and other types of misconduct by representatives of the state. Bringing those responsible to justice is essential to the deterrence of future offences and will have beneficial effects for victims and will reassure the general public that no one is above the law.
28. The role of prosecutors in combating impunity and ill-treatment is crucial. They should be encouraged to investigate and prosecute promptly any allegation of human rights violations in accordance with Section VIII.1 of the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations. While the authorities are under obligation to investigate any criminal acts, allowing human rights violations committed by law enforcement officials to go unpunished poses a direct threat to the rule of law. Therefore, they must be a priority for the criminal justice systems of all member states.
29. In this context, the Commissioner would like to reiterate that the political leadership plays a key role in this process, as law enforcement is often very hierarchical – signals sent by politicians, particularly ministers of interior and other high-level officials, are of crucial importance. Pardons or amnesties of law enforcement officials responsible for serious human rights violations, inadequate sanctions, or political rhetoric justifying any such offences or misconduct sabotages all efforts to promote human rights principles. The Commissioner is of the opinion that the failure of the political leadership to confront the problem of impunity for police violence in all its seriousness, and the corresponding lack of political will to ensure accountability for such violations, have led over the past few months to an increase in public outrage and frustration and contributed to the escalation of violence.
30. It is important also to ensure that there is a clear legislative and policy framework that reduces the chances for misconduct and punishes it when it occurs. There should be clear guidelines on the use of force by police, which should only take place as a last resort (see paragraphs 19 and 20 above). In the selection, recruitment and promotion of police, special attention should be paid to reports of past misconduct and the ability of individuals to withstand stressful situations.
31. Law enforcement should also have clear and strict guidelines on police identification numbers, which should always be worn in the field, failing which it is very difficult to identify those police officers who may have been involved in violence. In this context, it should be noted that there appears to be a legislative gap in Ukraine with regard to the obligation by riot police officers to wear their identification numbers during policing of demonstrations. This issue had been raised during a meeting between a delegation of the European Committee for the prevention of torture (CPT) with the Minister of Interior in Kyiv on 19 December 2013.<sup>12</sup> During his own meeting with the same Minister on 10 February 2014, the Commissioner was informed that amendments aimed at rectifying this shortcoming had been drafted and transmitted to the Ukrainian Parliament. The Commissioner would like to urge the authorities to bring the relevant legislation in this field in line with the applicable international standards.
32. Investigations of violations by internal security services within the police force are often ineffective, as it is often members of the same force who are investigating their colleagues and there is sometimes a “code of silence” about protecting one's own. Therefore, the Commissioner would like to once again urge the Ukrainian authorities to consider the establishment of an independent police complaints mechanism. In the meantime, he would like to express his support for the proposal by the CoE Secretary General to establish an

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<sup>12</sup> <http://mvs.gov.ua/mvs/control/main/uk/publish/article/944257>

independent advisory panel to supervise the investigations of the cases of excessive use of force by police during the protests<sup>13</sup> and other human rights violations.

33. Police work is very challenging, especially when demonstrators turn violent or police are outnumbered, unprepared, or overworked. To lessen the likelihood of police misconduct, it is important to ensure that the social and economic rights of police officers, such as adequate pay, sufficient rest, and psychological support. Police personnel should also be provided with the appropriate and adequate means, including necessary equipment, enabling them to carry out their functions properly. Of particular importance is rigorous, human rights-based training throughout their career path. In particular, "practical training on the use of force and limits with regard to established human rights principles, notably the European Convention on Human Rights and its case law, [should] be included in police training at all levels".<sup>14</sup>
34. The Commissioner would further like to reiterate the importance of continuously reminding police personnel of the need to respect the following principles, which should guide any police action/intervention, as prescribed by the European Code of Police Ethics: "Police must always verify the lawfulness of their intended actions"<sup>15</sup> and "Police personnel shall carry out orders properly issued by their superiors, but they shall have a duty to refrain from carrying out orders which are clearly illegal and to report such orders, without fear of sanction."<sup>16</sup>

*c) Co-operation with civilians*

35. There have been an increasing number of credible reports about police co-operation with unidentified civilians in the course of policing of demonstrations. Those civilians were frequently armed with truncheons, bats or "traumatic" firearms and wore masks. In Dnipropetrovsk the delegation was shown a photo of a regional police chief surrounded by masked men bearing wooden sticks and yellow armbands. Some delegation members interviewed a man being treated for head injuries at a local hospital, who said that he was among those civilians ensuring security for the regional administration in the area concerned and was wearing a yellow armband. In Zaporizhzhya, the local police representative indicated that the police was assisted by local Cossack associations. During his meetings with civil society activists in the regions, the Commissioner also received allegations about local authorities' co-operation with organised criminal groups, as well as allegations of a sniper being seen in a city on the morning after protests were dispersed.
36. During his meeting with the Commissioner in Kyiv, the Minister of Interior acknowledged that during a certain period of time the police sought reinforcements among former law enforcement officials, former army officers and Afghan war veterans, who acted together with current law enforcement officials to protect public order; however, this practice was eventually abandoned. In Zaporizhzhya, reference was made to the Law of Ukraine on the Citizens' Participation in Protecting Public Order and the State Border<sup>17</sup> - which provides for the establishment of volunteer civic formations - as providing the legislative basis for this kind of co-operation.<sup>18</sup> This was also confirmed by the Minister of Interior, who nevertheless stressed that the law does not allow any such persons to wear masks or to carry non-standard issue weapons. He said that allegations of such cases – or of any other kinds of groups using force in the guise of protecting public order - should be examined by the prosecutorial authorities. When the Commissioner had raised this question during his meeting with the Deputy Prosecutors General, the latter expressed strong doubts about the existence of any violations related to such cooperation, but

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<sup>13</sup> [http://hub.coe.int/en/web/coe-portal/press/newsroom?p\\_p\\_id=newsroom&\\_newsroom\\_articleId=1680824&\\_newsroom\\_groupId=10226&\\_newsroom\\_tabs=newsroom-topnews&\\_pager.offset=30](http://hub.coe.int/en/web/coe-portal/press/newsroom?p_p_id=newsroom&_newsroom_articleId=1680824&_newsroom_groupId=10226&_newsroom_tabs=newsroom-topnews&_pager.offset=30)

<sup>14</sup> European Code of Police Ethics, §29.

<sup>15</sup> Ibid, §38.

<sup>16</sup> Ibid, §39.

<sup>17</sup> № 1835-III, dated 22 June 2000.

<sup>18</sup> According to Article 10.1 of this Law, the civil formations and its members participate in ensuring the protection of the public order and the state border together with the members of the police, military servicemen from the State Border Service of Ukraine, and in the rural area – on their own through executing concrete orders of the head of the relevant body of internal affairs or sub-division of the State Border service of Ukraine.



nevertheless accepted that any information should be investigated. All of the Commissioner's official interlocutors clearly confirmed that there was no legal basis in Ukraine allowing for co-operation between the police and groups of masked civilians bearing non-standard weapons.

37. According to official information provided to the Office of the Commissioner by the Ministry of Interior on 13 February 2014, as of 1 January 2014, there were 3713 civic formations for protecting public order acting in Ukraine, comprising more than 76000 members, 2887 of them (78%) in rural areas. Out of the total number of civic formations, there were 74 students' associations; 163 Cossacks' associations; and 130 were established as security companies. The Commissioner took note that there appeared to be little public information or awareness about this Law and the rights and responsibilities of the above-mentioned civic formations, at least among those activists whom he met in Kyiv and the regions.
38. In this context, the Commissioner would like to draw the attention of the Ukrainian authorities to the existing jurisprudence of the European Court of Human Rights, which is of relevance to the aforementioned issues. Most notably, in the case of *Seyfettin Acar and Others v Turkey*,<sup>19</sup> the Court reiterated its misgivings as regards the use of civilian volunteers [such as village guards] in a quasi-police function. In particular, the Court noted that, since the village guards operated outside the normal structure of discipline and training applicable to gendarmes and police officers, it was not apparent what safeguards there were against wilful or unintentional abuses of position carried out by the village guards either on their own initiative or under the instructions of security officers.<sup>20</sup> The Court has therefore established that the State must bear responsibility for the actions of the village guards.
39. According to the Court's case-law, a State's responsibility under Article 3 can be engaged by its failure to provide methods by which protection against torture, and inhuman and degrading treatment or punishment can be ensured, and under which incidents of torture, inhuman and degrading treatment can be verified. These obligations apply regardless of whether the conduct in question is that of State agents or private parties. The same approach has been applied by the Court under Article 2.
40. In the light of the Court's case-law, the authorities are directly responsible for the action of private bodies involved in any exercise of public policing functions (such as the use of force, arrests, detentions, use of firearms or any other kinds of arms or weapons; ill-treatment; or breach of the right to privacy, etc.). Any such private bodies – whether they are called private policing organisations, security companies, civic formations for the protection of public order, or any similar designation - are under the same obligations to respect human rights as are ordinary policemen, and even more so when they participate and/or perform any kind of policing function together with the police.
41. For the police to be able to carry out its functions effectively, it has to enjoy a great degree of trust by society as a whole, as well as by each of its different constituent groups and communities. Endowing civilians with police-like functions always entails a certain risk. This is especially so when the groups concerned, either openly or tacitly, support certain political forces and/or advocate certain political preferences to the detriment of others. Such practices are all the more dangerous in a fragile situation such as the one in Ukraine at the end of 2013 and start of 2014, because they distort perceptions about the police as a neutral institution established to uphold the rule of law, and are highly likely to lead to the escalation of violence by exacerbating fault lines within society.

### **Peaceful assemblies and access to justice**

42. Following his talks with the authorities and other interlocutors in Kyiv and in the regions, the Commissioner would like to make the following observations concerning some important issues which are of direct relevance to the crisis in Ukraine: respecting the right to peaceful

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<sup>19</sup> Judgment of 6 October 2009.

<sup>20</sup> The ECtHR made a similar assessment in the case of *Avşar v. Turkey*, judgment of 10 July 2001.

assemblies; functioning of the judiciary; and the situation of human rights defenders and the role of the Ombudsperson's office.

a) *Protection of the right to peaceful assemblies*

43. The right to assemble peacefully, together with freedom of association and freedom of expression, are central to the effective functioning of a democratic society. The right to peaceful gatherings is guaranteed by Article 39 of the Constitution of Ukraine. In 2001, the Constitutional Court of Ukraine by its Decision No 4-rp/2001 of 19.04.01 provided that "the determination of specific dates of advance notification and specific forms of peaceful gathering, their mass nature, venue, time, etc., are subject to legislative regulations". The same Decision defined the right to peaceful gathering as "inalienable and inviolable", and "one of the constitutional guarantees of the civil right to freedom of ideology and conscience, thought and speech, the right to freely express one's opinions and convictions, to use and disseminate information, the right to free development of one's personality, etc." That decision of the Constitutional Court has remained unimplemented to date, which illustrates the continuing problem of non-execution of domestic courts' judgments (see below).
44. In the case of *Vyrentsov v Ukraine*,<sup>21</sup> the European Court of Human Rights, on its part, drew attention to the existing legislative lacunae concerning freedom of assembly in the legal system of Ukraine,<sup>22</sup> and found a violation of Article 11<sup>23</sup> and Article 7. The Court in particular held that while the applicant's conviction had a legal basis (the Code on Administrative Offences), the application of this provision was not foreseeable because Parliament had still not established a procedure in this respect, despite the fact that the country's Constitution (Article 39 and 92) clearly required it. The Court also held that in the absence of a clear and foreseeable law for the holding of peaceful demonstrations, the applicant's conviction for violating a non-existing procedure was incompatible with Article 7. There are two draft laws, which have been pending in the Parliament since July 2013, but neither of them has been adopted.
45. In spite of the fact that there is no national legislation regulating the procedures for holding public assemblies, the administrative courts in Ukraine regularly impose bans on public gatherings, at the request of local public authorities. The Commissioner was informed that up to 85% of all public assemblies are banned by courts in Ukraine.
46. The Commissioner would also like to recall that according to the well-established case-law of the European Court of Human Rights, a notification requirement "should not represent a hidden obstacle to the freedom of peaceful assembly as it is protected by the Convention", and that "it goes without saying that any demonstration in a public place may cause a certain level of disruption to ordinary life and encounter hostility."<sup>24</sup> Moreover, the Court has clearly highlighted in several of its judgments that the State has a positive obligation to uphold the freedom of peaceful assemblies.
47. While the need to ensure public order and to protect the rights and freedoms of others during an assembly may be legitimate grounds for restrictions, the presumption in favour of holding peaceful assemblies is the overarching principle which should be followed. The Commissioner

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<sup>21</sup> Judgment of 11 April 2013.

<sup>22</sup> On behalf of a human rights NGO, the applicant notified the Lviv City Mayor that he would hold a series of demonstrations over several months to raise awareness about corruption in the prosecution service. On 12 October 2010 he organised a peaceful demonstration. The following day, after a complaint by the local council, the administrative court prohibited the holding of pre-announced further demonstrations with effect from 19 October 2010. The applicant was invited to the district police station, where he was accused in particular of breaching the procedure for organizing and holding demonstration. The next day he was brought before the district court, which found him guilty of the offences charged and sentenced him to three days of administrative detention. The applicant in this case was found guilty of "malicious disobedience to a lawful order by the police" and of "breaching the procedure for organising and holding a demonstration" (on the basis of the Code on Administrative Offices and the Decision of the Executive Committee of Lviv City Council of 16 April 2004 on the procedure for organising and holding meetings, rallies, street marches and demonstrations in the city of Lviv).

<sup>23</sup> The ECtHR has later repeated its conclusions related to the violation of Article 11 in the case of *Shmushkovych v Ukraine*, judgment of 14 November 2013.

<sup>24</sup> *Oya Ataman v. Turkey*, judgment of 5 December 2006, paragraph 38.

would recall the principle established by the Court that “an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour”.<sup>25</sup>

48. In a democratic society governed by the rule of law, the police should work towards maintaining public tranquillity and law and order, while at the same time protecting and respecting the fundamental rights and freedoms of each individual. The police have the obligation to protect peaceful demonstrations and to act in a neutral manner while providing equal protection of the life and health of all those who participate in protests. Any use of force by the police - on their own or in collaboration with another group - against a specific category of persons runs contrary to that obligation.
49. As a rule, the police should not delegate its core functions, such as the policing of demonstrations, to third parties and private entities. Furthermore, it is the responsibility of the State to ensure that any police operations are conducted both in accordance with the national law **and** international standards accepted by the country. Moreover, the police must be accountable to society as a whole - the state, the citizens and their representatives - and be subject to efficient external control.<sup>26</sup>

*b) Functioning of the judiciary*

50. The present crisis has brought into sharp relief the serious shortcomings in the functioning of the Ukrainian judicial system. During his meetings with various interlocutors, the Commissioner noted with concern that public trust in the rule of law was very low, and there were widespread perceptions that the judiciary does not serve the cause of justice or perform its function in an independent and impartial manner. This is a major problem which should be addressed without further delay.
51. An indirect indicator of the performance of the judicial system as guarantor of human rights is the number of applications pending before the European Court of Human Rights, as well as those where the Court found at least one violation of the European Convention on Human Rights. These numbers in relation to Ukraine have been growing at an alarming pace since 2010. Whereas in 2011, there were 4617 applications allocated to a judicial formation, in 2012 this figure was 7,796 and in 2013 – 13,145. In 2011 the number of applications decided by judgment was 107. By comparison, the corresponding figure nearly tripled for the following year (301 in 2012), and reached 2,281 in 2013 (a twenty-fold increase). As of 31 January 2014, there were 18,512 pending applications, 14,185 of those were pending before a judicial formation.
52. In a report published in 2012, the Commissioner’s predecessor already identified a number of issues impeding the independence and effective functioning of the judiciary in Ukraine. The adoption of the new Criminal Procedure Code, which entered into force on 20 November 2012, was a major step in the overall reform of the criminal justice system in Ukraine. However, its application up till now remains problematic (see paragraph 59 below).
53. Other important recommendations in the above-mentioned report include the need to undertake a comprehensive reform of the Prosecutor’s Office; to bring the composition of the High Council of Justice in line with international standards (at least half of its members should be judges chosen by their peers from all levels of the judiciary); to eliminate the prosecutorial bias in the way the justice system has been functioning; to provide for increased defence rights; and to ensure that fair trial guarantees and the principles of equality of arms are respected.
54. Moreover, in the same report the authorities were urged to streamline and clarify the procedures and criteria related to the appointment and dismissal of judges, as well as the application of disciplinary measures, with a view to instituting adequate safeguards to ensure fairness and eliminate the risk of politicisation in disciplinary procedures. In 2013, the Court issued a

<sup>25</sup> *Ezelin v. France* (no. 11800/85, judgment of 26 April 1991).

<sup>26</sup> See the [European Code of Police Ethics](#), §§3 and 59.

judgment in the landmark case of *Oleksandr Volkov v. Ukraine*,<sup>27</sup> where it found four violations of the applicant's right to a fair hearing on account of his unlawful dismissal from his post as a judge at the Supreme Court of Ukraine in June 2010 (Article 6§1).<sup>28</sup> The Court found that the dismissal amounted to a violation of the applicant's right to respect for private life (Article 8), inter alia because the domestic law did not meet the requirements of foreseeability and did not provide appropriate protection against arbitrariness. The Court in particular observed that "the present case discloses serious systemic problems as regards the functioning of the Ukrainian judiciary" and indicated that Ukraine should urgently put in place general reforms in its legal system aimed at reforming the system of judicial discipline.

55. On 15 January 2014, the Court communicated to the Ukrainian authorities complaints by 18 applicants<sup>29</sup> - all former judges of domestic courts - who had been dismissed from their posts following a decision by the High Council of Justice and unsuccessfully tried to challenge their dismissals before the Higher Administrative Court or other courts. Therefore, a reform of the institution of disciplinary procedures against the judges should be carried out as a matter of priority, in concert with the reform of the High Council of Justice.
56. In the recent period, legislative initiatives aimed at ensuring the physical protection of the judges in Ukraine have been proposed in the Parliament. While efforts to ensure such protection may be necessary in a democratic society, if they are taken on their own and not as part of a comprehensive reform of the judiciary in Ukraine – which has been advocated by the Council of Europe for some time already – they are likely to further exacerbate the public perception of judges as being completely dependent on the will of the executive branch of power and/or important political and economic groups. Therefore, any such legislative proposals should be considered as part of a larger package of laws related to the reforms in the judiciary.
57. Another important issue, which was examined at length in the above-mentioned report on the administration of justice of the previous Commissioner, is the abusive use of remand in custody.<sup>30</sup> The new Code of Criminal Procedure allows for an increased use of non-custodial measures (such as house arrest, release on bail, personal guarantees) in the justice system. The Commissioner was informed that official figures for 2013 indeed suggest that the courts increasingly applied non-custodial preventive measures, most notably house arrest. In the context of the events of recent months, judges initially authorised prosecutors' motions to place detained activists in custody, and later tended to change the preventive measure to house arrest and/or other non-custodial measures (several of the Commissioner's official interlocutors referred to such changes in the preventive measure being applied as an act of "amnesty" in relation to the protesters).
58. In this context the Commissioner wishes to caution against any (de facto) blanket replacement of remand in custody with house arrest as the most frequently-applied preventive measure. Each case of application of any preventive measure provided for by the Code of Criminal Procedure – be it remand in custody, house arrest or any less intrusive measures - should be duly reasoned by the courts. In this context, the Commissioner would like to recall that the adequacy of the reasoning in the court decisions has already been identified as an issue by the ECtHR in its judgments concerning Ukraine.<sup>31</sup> It would appear that this problem has yet to be fully addressed by the judiciary in Ukraine. Many lawyers met by the Commissioner complained

<sup>27</sup> Judgment of 9 January 2013.

<sup>28</sup> Most notably, the Court found the following: 1) dismissal proceeding not independent and not impartial and lack of effective judicial control; 2) Absence, in domestic legislation, of a limitation period for the proceedings against the applicant; 3) Different irregularities in the voting process before Parliament concerning the applicant's dismissal (absence of the majority of MPs, and those present deliberately and unlawfully cast multiple votes belonging to their absent peers); 4) Irregularities in the setting-up and composition of the special chamber of the High Administrative Court dealing with the applicant's case.

<sup>29</sup> No 5114/09 (Andriy Volodymyrovych KULYKOV against Ukraine and 17 other applications).

<sup>30</sup> This systemic problem has been dealt with by the ECtHR in its judgment in the case of *Kharchenko v. Ukraine* (judgment of 10 February 2011).

<sup>31</sup> For instance, in the case of *Benderskiy v Ukraine* (judgment of 15 November 2007), the Court found a violation of Article 6 of the Convention due to the local court's failure to properly examine and address the substantial arguments of the applicant.

that judges tend to support automatically the position of the prosecutor and do not take properly into account the arguments presented by the defence.

59. According to several of the Commissioner's interlocutors, the entry into force of a new Code of Criminal Procedure has not yet led to any noticeable change of practices. The Court has already received complaints related to this issue.<sup>32</sup> The events of the last few months have shown that effective safeguards such as notification of custody, access to a lawyer and access to a medical doctor were not fully respected in practice. Therefore, not only is it essential to ensure that judges at all court levels are aware of the provisions of the new Code of Criminal Procedure and properly trained to apply them, but that they also have the necessary knowledge and practical skills to apply the principles found in the case-law of the European Court of Human Rights, on all the issues of concern identified in the present report, in their daily work. Moreover, the compatibility of domestic rulings with the European Convention on Human Rights and the case-law of the Court should be included among the assessment criteria for judges' performance.
60. The Commissioner wishes to stress that there is an urgent need to undertake measures aimed at increasing public trust in the judiciary. At the same time, proper mechanisms should be in place to ensure that judges are shielded from external pressure, in particular in high-profile cases which generate intense debate and a high degree of media interest. Civil society input can be a useful factor in developing a constructive culture of debate in society concerning reforms in the judiciary, as well as in increasing transparency of the judiciary and its openness to public scrutiny. This would further contribute to building public confidence in the system.

*c) Role of the human rights structures and the situation of human rights defenders.*

61. This crisis situation presents an ongoing challenge to the work of human rights defenders on the ground. This was evident in Kyiv and even more so in the regions visited by the Commissioner's delegation. Human rights activists face serious obstacles in their work and there are widespread fears of possible retaliation and reprisals on the part of law enforcement authorities and/or those working with them. Instances of intimidation, harassment, or threats against human rights activists were reported during their meetings with the Commissioner and communicated to the Commissioner's Office afterwards. The Commissioner also wishes to express his serious misgivings about the existence of a separate register for those who were injured in clashes with the police in the Emergency Hospital in Kyiv. The establishing of a separate register, rather than keeping information on such patients in the general medical registers, makes it very easy to identify possible targets for retaliation.
62. The Commissioner would like to reiterate his long-standing recommendation about the need to promote safe and favourable conditions for the work of human rights NGOs and to provide them with protection, in line with international standards. An open and meaningful dialogue between the authorities and various civil society organisations, including human rights NGOs, is of critical importance for de-escalation of tensions, as well as averting and minimising harm in times of crisis. It would certainly contribute to promoting peace and reconciliation in Ukrainian society.
63. As part of his visit to Ukraine, the Commissioner had in-depth discussions with the Parliamentary Commissioner for Human Rights (Ombudsperson) and her team, who provided him with their insights into the particularly challenging and complex environment in which they had to operate. The Commissioner observes that, like in other places, the effectiveness of this institution and its ability to operate in full compliance with its mandate and purpose is linked to the degree of independence it is able to enjoy and to the attitude of the authorities to the ombudsman institution as such, most notably their willingness to respect its independence and integrity. In the present context, the Commissioner noted with concern that several of his interlocutors appeared to be reluctant to submit complaints to the Office of the Parliamentary

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<sup>32</sup> On 3 September 2013, the ECtHR communicated to the authorities application no 46193/13 (Yuriy Vasylyovych CHANYEV against Ukraine, lodged on 9 July 2013), whereby the applicant complains under Article 5§1 of the Convention that he was detained without any court order between 28 March and 15 April 2013 and that the penitentiary authorities failed to release him and the prosecuting and judicial authorities did not react to that fact of his unlawful detention.

Commissioner for Human Rights, since they tended to perceive this institution as lacking the required degree of independence from the authorities. The representatives of this Office in Dnipropetrovsk and Zaporizhzhya have also confirmed that they received few, if any, complaints with regard to the events in question.

### **Concluding remarks**

64. The present situation in Ukraine amounts to a major crisis with serious consequences for the respect of human rights in the country. Undoubtedly, this crisis and the response given to it by the authorities constitute a major test of the State's commitment to human rights principles. While state authorities have a clear duty to protect public order, the means used to do so should fully comply with human rights norms. The above-mentioned events brought to the fore a number of long-standing, serious human rights issues, which not only concern the functioning of the law enforcement bodies, but also the situation in the judiciary and protection of the right to peaceful assembly in Ukraine. These issues should be addressed by the authorities as a matter of priority, since they are essential requirements for restoring the public trust in state authority and safeguarding human rights and the rule of law. Taking immediate action against impunity for serious human rights violations will be the first important step.
65. The Commissioner will continue to follow closely the situation in Ukraine and to pursue his constructive dialogue with the authorities on the follow-up given to the recommendations contained in the present report. He stands ready to assist the government, in accordance with his mandate as an independent and impartial institution of the Council of Europe, to restore peace and promote reconciliation in the Ukrainian society in light of the Council of Europe standards related to human rights protection.

## **The Commissioner's main findings and recommendations**

### **Policing of demonstration and accountability for serious human rights violations**

66. The Commissioner received numerous allegations and other information indicative of excessive use of force and other human rights violations committed by law enforcement officials (including anti-riot police) and others working with them between the end of November 2013 and the beginning of February 2014. The information received included reports about targeting of journalists and medical personnel, as well as of abductions.
67. The Commissioner calls upon the authorities to publicly condemn all instances of torture, ill-treatment and other offences and misconduct by law enforcement officials and urges them to ensure that all such allegations and information are promptly, adequately and effectively investigated. The investigations should be treated with priority by investigative and prosecutorial authorities and conducted in full compliance with the principles established in the case-law of the European Court of Human Rights, in particular victim involvement and adequacy of proceedings. The proceedings concerned should result in dissuasive sanctions for those responsible. This is an essential step for restoring public confidence in the rule of law.
68. Impunity for human rights violations by law enforcement officials is a long-standing and entrenched problem in Ukraine, which has seriously interfered with the country's capacity to tackle such violations and their root causes. While the establishment of the National Preventive Mechanism was a positive development, this was clearly not sufficient to prevent the large-scale abuses which have been taking place in the course of recent months.
69. The Commissioner recommends that the authorities support the establishment and ensure the efficient functioning of the International Advisory Panel proposed by the Secretary General of the Council of Europe. In addition, he urges the Ukrainian authorities to accede to the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.
70. The Commissioner has urged the authorities in general, and law enforcement agencies in particular, to put a stop to any co-operation with civilians for the policing of demonstrations and other law enforcement functions, and to immediately distance themselves from such groups.

Reliance upon such groups greatly undermines public confidence in the police service as a politically neutral institution whose main function is to enforce the rule of law and to protect the rights and freedoms of all persons in the country, and can be highly dangerous in a context of pronounced tensions in society.

71. The Commissioner considers that the most effective way to address all the above-mentioned issues would be through a comprehensive and all-encompassing reform of the police in Ukraine, which should be undertaken immediately after the de-escalation of the present confrontation. Moreover, consideration should be given to establishing an effective and independent police complaints mechanism, which would enhance public trust and confidence in the police.

#### **Peaceful assemblies and access to justice**

72. The right to peaceful assemblies should be guaranteed both in law and in practice. To achieve this, the Parliament should enact as a matter of priority legislation governing peaceful assemblies, which should be based on the standards enshrined in the European Convention on Human Rights.
73. Reform of the Prosecutor's Office is urgently needed. It is imperative to ensure that this office is de-politicised. There should be clear and transparent criteria and procedures for the selection, appointment and promotion of individual prosecutors based on the qualifications and merits of individual candidates. The same principles should govern the procedure for selection and appointment of the Prosecutor General. In the performance of their duties, prosecutorial authorities should be protected from political interference and any other influence by powerful interest groups. The restoration of rights to those who suffered human rights abuses and bringing those responsible to justice – whether they be state agents or private individuals - should be one of the key priorities for the prosecutorial service in a democratic state, in line with the 2011 Guidelines of the Committee of Ministers on eradicating impunity for serious human rights violations.
74. The Commissioner urges the authorities to undertake solid and concerted efforts aimed at reforming the judiciary in Ukraine, with a view to protecting its independence from any undue influence, either from the outside (executive branch of the government, powerful political or economic interests) or inside (judicial hierarchy). It is of crucial importance that any measures undertaken towards this aim should not only ensure that judges are in law and in practice independent and impartial, but are also seen as such by members of Ukrainian society.
75. With regard to the charges brought against persons in connection to the protests in Ukraine which took place between the end of November 2013 until the end of January 2014, the Commissioner underlined that no criminal or any other judicial proceedings should be initiated against persons who participated in the anti-government demonstrations or were simply present on the site of the protests at the time of their apprehension, unless there was strong evidence that these persons have personally committed serious criminal offences. The Commissioner expressed his concern over several credible reports that the principle of equality of arms was not being respected in the course of ongoing judicial proceedings, and that there were numerous serious violations of procedural guarantees provided for in the Criminal Procedure Code, most notably related to notification of custody, access to a lawyer and undue obstacles for obtaining forensic medical expert opinions in alleged cases of ill-treatment.
76. Human rights defenders face serious challenges in their work, both in Kyiv and - in particular - in the regions. The Commissioner wishes to recall that in settings which present considerable challenges to the protection of human rights, it is of utmost importance to ensure that those persons and organisations which are engaged in human rights monitoring activities are able to pursue their work freely and without undue impediments.
77. During his visit, the Commissioner observed that there were widespread concerns, in particular among civil society actors and lawyers, about reprisals by police and civilian groups co-operating with them, as well as about harassment by administrative and judicial authorities for non-violent involvement in the ongoing demonstrations. He urges the Ukrainian authorities to

discontinue and reverse any measure which could contribute to a chilling effect on the exercise of the rights to freedom of assembly and freedom of expression.

78. The authorities should respect the integrity and independence of the Ombudsperson institution, so that it can play an effective and meaningful role in promoting awareness of European and international human rights standards and norms and foster their effective observance in practice for the benefit of all people in Ukraine.