

PROPOSED MECHANISM

**FOR ENHANCEMENT OF THE SYSTEM FOR
EXTERNAL CONTROL OF
THE LAW-ENFORCEMENT BODIES**

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**PREPARED BY THE MEMBERS OF THE EXPERT WORKING GROUP
FOR DEVELOPMENT OF A MECHANISM FOR
EXTERNAL OVERSIGHT OF THE LAW-ENFORCEMENT BODIES**

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Office

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Second pillar - Strengthened role of the Ombudsman's
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Third pillar - Independent Commission for control of the
work of the police and other bodies with police
authorizations

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INTRODUCTION

During the course of the second half of 2006, the OSCE Spillover Monitor Mission to Skopje (the OSCE SMMS), started a background and needs assessment process of the legislative and institutional mechanisms, established in the country, for investigating alleged cases of abuse of power by law-enforcement officials with a special focus on those cases that have resulted in serious human rights violations.

The main aim of that research was to assess the compatibility of the domestic legal and institutional system with the requirements of the article 2 and 3 of the European Convention of Human Rights (ECHR), its case law and other applicable international standards. These research and assessment revealed that the existing mechanisms run short of some of the key requirements, such as the principles of impartiality, effectiveness, independence and transparency.

In addition, the OSCE SMMS supported a public opinion survey – „Citizens' knowledge and perception of the current system for investigation of allegations of ill-treatment or abuse of power by law-enforcement officials". The survey was administered in November 2006 via phone to a representative segment of the population. Specifically, were interviewed 1220 citizens, randomly selected to be representative for the target audience – the sample was stratified by gender, age (18 and older), ethnicity, urban and rural residence of the interviewed persons, throughout the country. The sample was also differentiated regionally, and according to the educational background. The main finding of the conducted survey *inter alia* was that the citizens were not satisfied with the existing system for oversight of the law enforcement bodies, and that they would favour creation of an independent external oversight mechanism.

In December 2006, the OSCE SMMS facilitated an expert level round table,¹ dedicated to the need of establishment of an external oversight mechanism of the law-enforcement bodies in the country. Following the conclusions, reached at that round table, the OSCE SMMS supported the establishment of a working group composed of local experts, state officials, and NGO representatives for developing a system for external oversight of the law-enforcement bodies, which would better serve the country in achieving the compliance with its international obligations and the European best practices.

The working group, supported by the OSCE SMMS, conducted analysis of the applicable international standards, as well as analysis of the domestic legislative framework related to the mechanisms, institutions and practice for investigation of cases of abuse of power by law-enforcement officials.

The OSCE SMMS further supported the working group in conducting the necessary comparative analysis and research. Namely, the OSCE SMMS organized two study visits for the working group members. One group of experts visited Northern Ireland to study the oversight and complaint mechanisms related to the law-enforcement bodies. Second group of the experts visited the Max-Planck Institute for Foreign and

¹ The round table was attended by representatives of the Parliament of the Republic of Macedonia, the General Secretariat of the Government of the Republic of Macedonia, the Ministry of Interior, the Ministry of Justice, the judiciary, the Public Prosecutor's Office, the forensic institute, the Ombudsman's Office, NGOs handling police abuse complaints as well as academics and representatives of the international community present in the country.

International Criminal Law in Germany and studied the prosecutorial control over the law-enforcement bodies.

Based on the conducted background and needs assessment, the comparative analysis, the research and analysis of the domestic legal framework and the applicable international standards, the working group members produced:

Proposed mechanism for enhancement of the system for external control of the police and other bodies with police authorizations

The proposed mechanism is comprised of the following three pillars:

1st pillar: Enhanced role of the Public Prosecutor's Office (PPO);

2nd pillar: Strengthened role of the Ombudsman's Office;

3rd pillar: Independent Commission for control of the work of the police and other bodies with police authorizations.

The OSCE SMMS provided the working group with the required secretarial and logistical support, throughout the whole process of the development of the proposal mechanism.

I. TYPE OF THE PROPOSAL

To pass legislative decisions for strengthening the external control through establishment of a complete, comprehensive and consistent system of external control over police and other bodies with police authorisations.

The working group prepared comprehensive and complex amendments and changes to the existing legislative framework. They envisage interventions in the Law on Criminal Procedure (LCP) and respective laws of institutions that are in charge for control of the police: PPO, Ombudsman and the new oversight commission. Herewith, this matter will be fully regulated in both its segments: procedural and substantive.

II. BASIS FOR THE PROPOSED MECHANISM

The appropriate legislative amendments and changes are required for the harmonization of the penal and other legislation with the international standards for effective investigation of cases of police misuse and brutality. Also, these amendments and supplements are initiated due to elimination of certain weaknesses in the existing legislation which was also one of the conclusions of the Committee for Prevention of Torture (CPT), the case-law of the European Court for Human Rights (ECtHR) as well as a conclusion from the analysis of domestic legislation, institutions and practice in cases of abuse of power by law enforcement officials.²

² See: Analysis of domestic legislation, institutions and practice in cases of abuse of power by law enforcement officials.
CPT's reports could be found at: <http://www.cpt.coe.int>.

It is to be noted that in its reports, the CPT is remarkably criticizing the relevant authorities for not undertaking actions on allegations and other information indicative to maltreatment. The CPT concludes that judges and prosecutors show low interest even when there is undisputable evidence of the maltreatment. Very frequent there is a tendency among relevant authorities to avoid the undertaking of indispensable steps for the effective investigation of such cases. It is not a rarity of these authorities to show affection for protection of the law enforcement officers that are subject of the allegations. It is unarguable that there will be a need of intensive action within the criminal-justice system and Mol in order to overpass the inertia and the apparent bias that currently undermine the system of accountability of the officials.

So, in the context of the question of effective control in cases of police brutality in the Republic of Macedonia (RM), ECtHR has concluded that in the cases when an individual claims a violation of art 3 of the ECHR by the police or other state agent with similar authorizations, the state has the responsibility to undertake effective official investigation. The aim of the investigation is to identify and punish the one who has violated the rights from the ECHR, in the concrete case, the right to prohibition from torture. Without such investigation, the protection of this right will not be effective in the practice, and that would promote the perception of impunity among the law-enforcement officials. **The ECtHR requests from the state to conduct prompt, thorough, effective, efficient and independent investigation, which implies prompt response in regards to the alleged violation of the right to prohibition of torture.**

In the analysis of the cases of Jashar and Dzeladinov against RM, according to ECtHR, the possibility for initiation of disciplinary or internal investigation for alleged maltreatment by the police, could not be considered as efficient legal remedy available for the person whose right has been violated. The Court considers that the Sector for Internal Control and Professional Standards (SICPS) of the Ministry of Interior (Mol) or the institutions hierarchically connected to the alleged perpetrators are lacking the required independence. The Court also considered that **the Ombudsman of RM could not be perceived as efficient legal mean** that would be at disposal of the alleged victim of police brutality due to the fact that the Ombudsman has no authorizations to bring binding decisions, except to indicate the possible violation of rights.

Similarly, the analysis on the domestic legislation, institution and practices in cases of abuse of power by the law enforcement officials, which was conducted within the frames of this project, confirmed the above mentioned conclusions, and further concluded that the existing system of control neither satisfies the international standards nor the standards developed by the ECtHR's case-law. Additionally, with the ratification of the Optional Protocol to the UN Convention against torture, the Republic of Macedonia would need to identify and designate national independent body which will have access to the places where the freedom of movement is limited. The proposed mechanism, especially its third pillar – the new Independent Commission – would satisfy the international obligations emerging for the country, and *inter alia* the requirements from the above mentioned Protocol.

III. ASSESSMENT OF THE CONDITIONS IN THE FIELD SUBJECTED TO REGULATION

Internal control in the Mol. The Mol's SICPS has significant realistic authorizations and capacities for thorough and efficient investigation of the cases of abuse of power

by law-enforcement officials. So, regardless the problems with its independence and impartiality that is acknowledged in the ECtHR's case-law, the SICPS is indispensably the most competent body that usually intervenes first. Its „services“ are used by the PPO and the Ombudsman, when they are handling the reported cases. The human rights NGOs are also addressing their requests to the SICPS, for obtaining information regarding citizen complaints. Besides, analyzes of the comparative law show that the internal control everywhere is an irreplaceable instrument in fight against abuse of power by law-enforcement officials. Because of the independence, impartiality, professionalism, the human resources and technical equipment of the SICPS should be promoted systematically. The ability of the Mol to process and to solve effectively majority of the cases of the police abuse, would greatly facilitate for other controlling entities to perform their own role in an effective manner.

The CPT also insists that the „Fight against impunity must begin at home, i.e. in the frames of the concerned institution, in this case Mol“. The team spirit among the law enforcement authorities leads to willingness to help each other when there are allegations of misuses, in order to cover illegal activities of the colleagues. Therefore, the authorities and stakeholders must create atmosphere that would encourage reporting of the maltreatment, performed by the colleagues. It must be clearly understood that the guilt of the maltreatment is not stopping only with the offenders, but is expanded over those persons that have knowledge that maltreatment is ongoing and do not report or not act to prevent it”.³

It is necessary to strengthen the selection criteria for the employees, emphasizing the principles of competence and professionalism. It is of essential importance to ensure the technical preconditions, IT and software in order to appropriately manage the work of the SICPS. Also, it is important to start with analytical and research work over the SICPS, in order to identify the shortcomings in its work, for the designing and implementation of the appropriate training and capacity building measures for its personnel. An important segment for the implementation of the Minnesota rules is the transparency of the SICPS and its cooperation with the Ombudsman's Office, NGOs and the PPO. The ensuring of these preconditions is the key for fulfilment of these rules.

Judiciary and Public Prosecutor's Office. Whatever progress is achieved with the SICPS, in every democratic state the key role in the control over the police lies within the criminal justice system – courts and public prosecutors office. They should undertake decisive actions in the cases of the information, indicating possible cases of torture and inhuman and degrading treatment. They also have to conduct the proceedings in a way that would enable the involved individuals to make statements about the alleged maltreatment, thus providing them with the right to an effective remedy. The main deficiency until now was that public prosecutors were sending the cases back to the Mol for additional actions, instead of conducting detailed investigation into the cases of the alleged police misconduct. Such practice is contrary to the requests of the CPT and ECtHR.⁴

³ See: Report to the Government of "the Former Yugoslav Republic of Macedonia" on the visit carried out by the CPT from 12 to 19 July 2004 (CPT/Inf (2006) 36 paragraphs 31-36; CPT/Inf (2003) 3, paragraphs 28, 34, 56 - 64, CPT/Inf (2003) 5, paragraphs 13 - 32; CPT/Inf (2004) 29, paragraphs 28 - 33. (<http://www.cpt.coe.int>).

⁴ See: CPT's 14th General Report, paragraphs 25-42 (CPT/inf (2004) 28), The CPT standards, CPTINF/E

Ombudsman: If certain solidarity within the Mol and the solidarity between the police and the prosecutors could be understood, having in mind their partnership in fight against criminality, the lack of efficiency of the Ombudsman institution still is hard to comprehend. The Ombudsman himself and the entire institution demonstrated their increased aggressiveness while confronting Mol and especially in the cases of police misconduct in the last two years. However, instead of going out in the field and actively collecting evidence by interviewing the involved parties, hearing the witnesses, securing forensic and autopsy, they await information from Mol and correspond with the SICPS.

Applicable international standards

Basic standard for the domestic institutions and other entities in charge for control of the police and similar bodies with special authorisations are established by the law and practice of the ECHR and those established within the UN. In this regard, the so called Minnesota Protocol and the Istanbul Protocol are of special importance, since they determine in details the measures that are to be undertaken when investigating cases of death or serious injuries at the hands of law-enforcement officials.

The basic requirements imposed by the international standards on the body responsible for conducting investigation of cases of death or serious bodily injuries are as follows:

The investigation must be:

1. Conducted by a competent, independent and impartial body

- **Competent** – those conducting the investigation must be capable of evaluating and weighing evidence and exercising sound judgement. If possible, the investigation should include individuals with expertise in law, medicine and other appropriate specialized fields;
- **Independent** - those carrying out the investigation are to be independent of those implicated in the events (lack of hierarchical or institutional link and practical independence). In addition, their job positions should be isolated of political influence;
- **Impartial** – those conducting the investigation should not be closely associated with any individual, State entity, political party or other organization potentially implicated in the cases.

2. Effective

- the investigation must be in a position to establish the factual situation;
- to collect evidence for possible criminal prosecution of perpetrators;
- to identify witnesses and obtain statements from them;
- to identify suspects and to take statements from them, and to undertake adequate procedure against them leading to criminal, disciplinary and substantive punishment.

3. Subjected to public scrutiny

- investigation or its results must guarantee accountability in practice;
- the nature and degree of public scrutiny depends on the circumstances of the particular case;
- in all cases, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard/protect his/her legitimate interests.

4. Prompt and expedient

- investigations must be expedient and prompt;
- prompt response by the authorities in investigating the use of lethal force is regarded as essential in maintaining public confidence in their respect of the rule of law and preventing any appearance of collusion in, or tolerance of illegal acts.

5. Initiated on their own motion “proprio motu”

- the authorities must act on their own motion once the matter has come to their attention. They cannot leave it to the initiative of the decedent’s next-of-kin.
- when the facts are largely or whole known to the state authorities, it is the state’s responsibility to provide a satisfactory and convincing explanation of how the death or injury occurred.⁵

In order for the state to guarantee impartial, independent, thorough, prompt and effective investigation, those conducting the investigation should be authorized to the following:

- To necessary budgetary and technical resources for effective investigation;
- To obtain all information necessary to the inquiry, to issue summonses to witnesses, including any officials allegedly involved in the cases;
- To demand the production of evidence, including state and medical files;
- To be in a position to protect complainants, witnesses, those conducting the investigation and their families from violence;
- To conduct on-site visits, including at the location where the torture is suspected to have occurred;
- To receive evidence from witnesses and organizations located outside the country;
- To have available technical expertise in areas such as pathology, forensic science, psychiatry, psychology, gynaecology and paediatrics;
- To have its own investigators to pursue and develop evidence.

International documents with which the proposal mechanism for enhancement of the system for external control is harmonised

- UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;

⁵ See: Requirements of the ECHR as Regards the Investigation of Death or Serious Injury at the Hands of State Officials.

- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;
- UN Standard Minimum Rules for the Treatment of Prisoners;
- UN Code of Conduct for Law Enforcement Officials;
- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Optional Protocol to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- International Convention on the Elimination of all Forms of Racial Discrimination;
- International Covenant on Civil and Political Rights;
- UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;
- Universal Declaration of Human Rights;
- Declaration on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment;
- UN Basic principles on the role of lawyers;
- UN Guidelines on the role of prosecutors;
- UN Basic principles on the independence of the judiciary;
- UN Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment;
- UN Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions;
- UN Declaration on the Police;
- CoE Rec (2001)10;
- Convention for the Protection of Human Rights and Fundamental Freedoms;
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- European Code of Police Ethics.

IV. GOALS TO BE ACCOMPLISHED WITH THE PROPOSAL

The domestic experts, who make part of the expert level working group established within the frames of the project, conducted analyses of the domestic legislative framework related to the functioning of the existing mechanisms in the Republic of Macedonia and their compatibility with the requirements of ECHR, recommendations of CPT and the rest of the applicable international standards, principles and recommendations for effective and independent investigations in cases of police misconduct and abuse of power resulting in death or severe bodily injury (according to art 2 and 3 from the ECHR). This analysis, the research and the analysis of the applicable international standards, principles and recommendations, the case-law of the ECtHR, as well as the conducted background and needs assessment, revealed that the existing mechanisms and practices run short of some of the key requirements such as the principle of impartiality, effectiveness, independence and transparency.

The “Proposed mechanism for enhancement of the system for external control over the police and other bodies with police authorizations” is aimed at harmonizing the domestic legislative framework with the requirements under art 2 and 3 from the

ECHR for conducting effective investigation, as well as with the CPT's recommendations, the Optional Protocol to the UN Convention against torture and the rest of the applicable international standards, principles and recommendations. Furthermore, this system will contribute towards and will enable, complete, coherent and consistent regulation of the subject matter. Due to that, the legislative amendments and changes are proposed in package with the amendments of all relevant laws.

V. BUDGETARY IMPLICATIONS FOR IMPLEMENTATION OF THE PROPOSAL

The implementation of the proposal mechanism will have certain financial implications. Consequently, the required financial means for implementation of the proposal are presented in the tables below.

Table 1

Financial implications for establishment of the first pillar of the proposal mechanism – Enhanced role of the PPO		
Specification	Gross price per unit	Total costs
Salaries		
Salary for 2 PPs	80.000x2	1.920.000
Salary for 2 junior advisors	50.000x2	1.200.000
Salary for two investigators	80.000x2	1.920.000
Salary for support staff	30.000	360.000
Services and goods		
Per diems	900x120 +3000x60	288.000
Utilities	4.500x12	54.000
Heating	4.000x12	48.000
Communication and transportation (2)	69.000x12	828.000
Materials (3)	50.000x12	600.000
Maintenance (4)	28.000x12	336.000
Contractual services (5)	210.000x12	2.520.000
Other operational expenses	74.000x12	888.000
Capital		
Provisioning of office equipment, furniture, and vehicle	7 personal computers 210.000 Lap top 60.000 Field vehicle 112.000 Office furniture 372.000	754.000
Maintenance of premises (6)	Offices/premises (adaptation of current) Video-audio equipment 360.000	670.000 -no financial means are foreseen for construction of renting of premises
Basic and special maintenance (7)	82.000	82.000

Costs related to the training of the PPs and the investigators. Source: The Training Academy for judges and PPs.

Table 2

**Financial implications for establishment of the second pillar of the proposal
mechanism – Strengthened role of the Ombudsman’s Office**

Title	Gross costs per month	Gross costs per year MKD	Gross costs per year EUR
Advisor	36.500,00	438.000,00	7.060
Criminologist	35.000,00	420.000,00	6.700
Total	71.500,00	858.000,00	13.760

Required technical means

Description	Price MKD	Price EUR
Vehicle	992.000	16.000
Laptop	50.000	800
Digital camera	10.000	160
Recorder	3.000	50
Camera	30.000	500
Total	1.085.000	17.510

**Financial implications for establishment of the third pillar of the proposal
mechanism – Independent Commission**

	Unit	Number of units	Unit price	Costs in EUR
1. Human Resources				
Commission's personnel				
1.1. Commission's members	Per month	5	405.00	2,025.00
1.2. Administrative/ support staff				
Secretary	Per month	1	350.00	350.00
Support Staff	Per month	2	290.00	580.00
Technical Assistant	Per month	1	200.00	200.00
Subtotal				3,155.00
2. Office costs				
2.1. Utilities	Per month	6	300.00	1,800.00
2.2. Communication	Per month	6	300.00	1,800.00
2.3. Office Supplies	Per month	6	200.00	1,200.00
2.4 Office Rent	Per month	6	350.00	2,100.00
Subtotal				6,900.00
3. Travel expenses				
3.1. Fuel/Maintenance of the vehicle	Per month	6	100.00	600.00
Subtotal				600.00
4. Work Preparation				
4.1. Translation (in two languages)		2	600.00	1,200.00
4.2. Design and Printing of the Promotional Materials		2	550.00	1,100.00
4.3. Research		1	3,000.00	3,000.00
Subtotal				5,300.00
Total				15,955.00

VI. CONCLUSION

The issue of external control of the law-enforcement bodies over the police is a problem of all modern democratic states, and it cannot be researched beyond the question: how to make the police and other bodies with police authorisations accountable to those who are representing the community, and not to be subjected to political pressure which could reduce their capacity to enforce the law equally and impartially towards all communities and individuals in the society. The answer to such question that is contradictory in its base, determines the approach towards the development of an effective model for external control of the police and other bodies with police authorisations.

The actual concept for strengthening the system of external control over the police and other bodies with police authorisations is focused on development of democratic mechanisms through which the police and other bodies with police authorisations will be more accountable in respecting, promoting and protecting the human rights and obeying the principle of rule of law. It has to be pointed out that the external control over the police and other bodies with police authorisations is closely linked to the matter of protection of the rights of the minorities in the society. Racial and ethnic discrimination or accusations for practising them, in ethnically divided societies, is an additional argument in the development of mechanisms for control of the law-enforcement bodies and it represents strong motivation for the society to face the problems in this sphere and to formulate solutions for that condition.

The police and other bodies with police authorisations in a democratic society must function pursuant to the principle of rule of law, to respect and to protect human rights, to be fair, independent and service oriented. This is the framework based on which the accountability of the police and other bodies with police authorisations in the delivery of the security service in the society is evaluated and assessed. The development of the mechanisms for control over these bodies is inter-related with the need of the community to protect from the possibility the same to violate citizens' rights and freedoms and the accepted democratic principles of the society.

The working group proposes to base the accountability and transparency of the police and other bodies with police authorisations on establishment of a comprehensive and consistent system of the external control, comprised of 3 pillars. Namely, enhanced role of the PPO, enhanced role of the Ombudsman's Office, and Independent Commission for oversight of the work of the police and other bodies with police authorizations. The multidisciplinary of the external control of these bodies is very important and essential in the guarantying of the application of the democratic principles in their functioning.

The goal of such multilevel system of the control of the police and other bodies with police authorisations is the identification of the systematic problems these bodies face in the process of their reform. This system would be in position to investigate and bring to justice the alleged cases of human rights violations. The advantages of the external control over the police are described in few points:

1. The external control is a good guarantee that in the complaint handling procedure the influence of the command personnel will be excluded;
2. The external control provides wider acceptance of decision by the public, even when they are in favour of the police;
3. The external control is the best possible method to protect the interest of the citizens, and provides impartial fairness in procedures for police misconduct;
4. The external control enhances the public trust in the objectivity and fairness in the complaint handling proceedings.

The development of the comprehensive and consistent system of external control of the police and other bodies with police authorisations is a process of shaping and changing the awareness for the position of these bodies in the justice-administration system of the society. The process itself is difficult for developed democracies, and even more for the ones which are in its nascency. In order to create and make effectively functional the proposed 3 pillars of the comprehensive and consistent system of external control of the police and other bodies with police authorisations they have to have political and public support, the support of the police and other bodies with police authorisations, as well as the required financial means and effective management and leadership.

VII. CONTENTS OF THE PROPOSAL

The proposed mechanism presents a comprehensive and consistent system for external control of the police and other state bodies with police authorizations, and it is based on 3 pillars:

I pillar: Enhanced role of the PPO

II pillar: Strengthened role of the Ombudsman's Office; and

III pillar: Independent Commission for control of the work of the police and other bodies with police authorizations.

The three pillars of the proposed mechanism are presented in details below.

A. FIRST PILLAR: ENHANCED ROLE OF THE PUBLIC PROSECUTOR'S OFFICE

Introduction: Weaknesses of the PPO

The question, who detects and investigates criminal acts of police officers or others members of repressive bodies, is a legal problem that occurs in many European countries. It is the classical questions: "Who will guard us from the guardians?"

From the analysis made in the frames of this project it is concluded that the public prosecutor's office and other institutions for control over police are not using their authorizations entirely nor are seriously committed and consistent in solving police misuse. The CPT in its reports concludes that prosecutors show small interest even in indisputable evidence for maltreatment. .

Even though the existing constitutional and legislative set up of the PPO in principle satisfies the basic criteria for impartial and independent investigative entity, as well as the existence of basic legislative fundament for active involvement of the public prosecutor in the detection of the criminal acts in cases of police misuse, in practice, the prosecutor's office is depending from other bodies, especially from Mol. Namely, instead of the PP to collect the necessary information about cases by itself, in principle the PPO addresses back to Mol although that is not the intention of the LCP. Especially in the cases of police misuse, where the practice shows that Mol respectively the SICPS has not shown will for thorough and effective investigation of these cases. The PPO currently does not have sufficient human and technical recourses required for professional, thorough, and prompt investigation.⁶

Due to this, the aim of this proposal is to give directions for enhancement of the existing legal regulations and practice, aiming at PPO's independence as a body able to competently and actively investigate police misuse and cases of exceeded use of force pursuant to the standards set by the Istanbul and Minnesota Protocol as well as with the requirements of the ECHR.⁷ Additionally, this analysis is in line with the CPT's recommendations starting from the visit to RM in 2001, for strengthening the competences and the authorisations of the PPO in regard to cases of death or severe bodily injury at the hands of law-enforcement officials.

1. Justification for the first pillar – Enhanced role of the PPO

Specialized manner of prosecution of the perpetrators of the criminal acts, when they are law-enforcement officials is established. The reason behind such a decision is the ECtHR's judgment in the case of Jashar v. the Republic of Macedonia. The ECtHR, inter alia decided that the Republic of Macedonia, i.e. state body has violated article 3 of the ECHR (prohibition of torture, inhuman or degrading treatment or punishment) due to the fact that the state did not undertake effective and thorough investigation in relation to the applicant's claim that he was ill-treated by the police.

⁶See: G. Kalajdziev, Z. Jankuloski, V. Zafirovski, V. Gavrovski, U. Pirovska, Z. Ibraim, Analysis of the domestic legislation, institutions and practices in cases of abuse of power by law-enforcement officials, Analysis of international standards, domestic legislation, mechanisms, institutions and practice, Skopje, December 2007.

⁷ See: Requirements of European Convention of Human Rights in relation to the investigation of cases of death and severe bodily injury at the hands of official persons, OSCE Skopje, 2007.

1.1. New relations between the PPO and the police – greater authorizations and responsibilities of the PPO

With the amendments stipulated by the Law on PPO (LPPO), the PPO will have the same authorizations as the police, which will work under directives of the PPO, as well as some additional special authorizations that the police does not have. Theoretically, all investigative activities could be undertaken by the public prosecutor, thus the police authorizations in the criminal investigations are public prosecutor's authorizations as well. In this way the police are clearly and explicitly subordinated to the PPO.⁸ In this way the police either execute immediate orders or work under control of the PPO. In order, the PPO practically to play more important role, apart of the provision that the PPO **manages** the pre-investigative procedure, more explicit provisions on the relationship between the PPO and the police are introduced in the domestic legislation. For instance, not only that the *"PPO manages the pre-investigative procedure"*, but *"the financial police, the crime scene police, and the custom officials are at PPO's disposal"*. Now, **"the PPO has the authorizations of the police and other law-enforcement bodies with reference to the detection of the criminal acts and perpetrators"** and **"it can undertake all activities required for detecting and prosecution of the criminal act and the perpetrator to which the police, the financial police and the customs office are authorized by law"**. If there is a collision, i.e. competition between them, "the PPO will undertake the activities assigned to the police or to other state body". Based on some comparative examples (for instance, as in Italy) stricter legally prescribed sanctions should be introduced for cases when the police does not inform the PPO for all cases, and especially when the goal of it is to conceal incidents in which officials were involved. Should this be stipulated as a criminal act, there is no consensus within the community. Thus additional discussions are required.

These provisions are not providing for more radical solution, parts of the police to be directly and fully at disposal of the PPO as it is in some European states, but its supremacy over the police is more clearly emphasized. Namely, these provisions are stronger than the existing provisions of the LCP, where it is stipulated that the PPO "takes care", "manages", "coordinates", "instigates" etc.

Pursuant to this, two solutions by which the system of control of the PPO over the police will be improved, and simultaneously the capacities of the PPO will be strengthened. The possible two paths for promotion and improvement of the investigative capacities of the PPO for such cases are fully complementary. Firstly, introduction of special investigators with police authorizations within the PPO are proposed. Besides this it is possible to "borrow", i.e. temporary designate law-enforcement officials for the need of the PPO.

The new investigators within the PPO will have the same authorizations as the law-enforcement officials, and they will be hierarchically and organizationally directly under the PPO. In order to enable the investigators to conduct the investigation promptly and efficiently the required logistical, personnel, and technical pre-conditions should be provided (please see below point 3). The provisioning of these pre-conditions is essential, because although the PPO has had some authorizations to conduct certain investigation, practically these provisions almost never have been applied, inter alia due to limitations of logistically-technical character. Such capacity

⁸ In practice the police has great autonomy. See: Delmas-Marty / Spencer, sup. cit.

building of the PPO and its' empowering as supervisor of the pre-investigative procedure, beside the mentioned solution in the LPPO is also a goal of the recently adopted Strategy for reform of the criminal law and the accompanying action plan for its implementation.

The idea behind this is neither to paralyze the police and other bodies of detection, nor they to rely on the PPO in the detection and investigations of crimes. Of course, the police should have certain degree of autonomy in the police investigations and clear accountability which will not hinder its initiative. The procedural provisions contained in the LCP and the Law on police should more precisely regulate the obligation of the police to notify promptly the PPO as well as the obligation to comply with its instructions and orders. The PPO will have to effectuate this role more actively, which does not depend only on its good will and ambition but it also depends on the real capacities (sufficient number of trained personnel, equipment etc)

1.2. Control of the PPO over the police and other bodies with “police” authorizations as stipulated by the LPPO

Important step forward is made with the LPPO, which introduces clear responsibility for the PPO to protect the legality and the human rights, and to ensure the lawfulness of the measures and activities undertaken in the course of the pre-investigative procedure. In this way the PPO monitors the protection of the human rights by the police and other bodies with special authorizations.⁹

In order to prevent impunity and concealing of police abuse, the LPPO stipulates an automatic control of the PPO over all cases of use of force or firing weapons resulting to serious consequences. Thus, in all cases when the PPO will learn about police abuse and/or about human rights violations, the public prosecutor must be informed whether appropriate procedure was initiated.¹⁰ What is of special importance for us is the obligation of the PPO in cases of use of force or firing weapons with lethal consequences or serious bodily injuries, to initiate ex officio procedure, stipulated by the law, for determination of the legitimacy of the use of the firing weapon. Moreover, pursuant to the current practice and conditions, we propose the PPO always to be informed when there is a suspicion of a committed criminal act pursuant to the CC.

The basic shortcoming was the fact that the PPO was forwarding the investigation to the Mol, instead of undertaking and conducting detailed investigation in all cases of allegations of abuse of power by law-enforcement officials, as the CPT and ECHR require.¹¹ Namely, the public prosecutor will ex officio receive the report by the Mol's SICPS on the determination of the legitimacy and justification of the use of firing weapon by the police officers and other law-enforcement officials, if the use resulted to death or serious bodily injury. The public prosecutor shall inspect all evidences

⁹ This pursuant to the international standards: Recommendation to Member States on the role of public prosecution in the criminal justice system (2000), 19.

¹⁰ It refers to the procedure for determination of the legitimacy of the use of the authorizations and disciplinary procedure or pre-investigative procedure (depending on the gravity of the act), because the criminal proceedings are initiated by the PPO. If appropriate procedure for determining the responsibility is not initiated, the PPO requests the initiation of the proceeding.

¹¹ See: CPT's 14th General Report, paragraphs 25-42 (CPT/Inf (2004) 28), The CPT standards, CPT/INF/E (2002/1-Rev-2006).

and files on the grounds of which the legality and the justification of the use of the firing weapon were assessed.

This concept for control over the police in cases of serious abuse of power constituting criminal acts pursuant to the CC¹² as set by the LPPO, should be upgraded with the above-proposed solutions for overcoming the established weaknesses.¹³

1.3. Required amendments to the LPPO

We are proposing establishment of a **specialized Unit**¹⁴ within the specialized Basic PPO for fight against organised crime and corruption, which will exclusively prosecute criminal acts committed by law-enforcement officials. Head of the Unit will be appointed by the public prosecutor managing the specialized Basic PPO. The smallest number of public prosecutors and the associate assistants within the specialized unit should be determined.

With reference to the “pool” of law-enforcement officials who can be subjected to prosecution by the specialized unit, article 24, paragraph 2 of the Law on internal affairs and article 145 of the LCP have been accordingly applied. So, law-enforcement officials are:

- Police officers;
- Employees performing affairs directly linked to police and operational activities;
- The Minister of Interior, his/her deputy, managers of organization units within the MoI and the Army;
- Financial police; and
- Customs officers.

Regardless of the unit’s exclusive authority to solely prosecute criminal acts committed by law-enforcement officials, this authority is not an absolute one, thus a case that is under exclusive authority of the specialised unit could be redistributed to the locally competent PPO due to procedural economy.

The investigators of the PPO will have all police authorisations and will be under direct supervision of the PPO. Namely, they will make part of the PPO by which the independence and impartiality of the investigation will be ensured. In this manner the investigation upon such cases will be practically conducted by the PPO. This solution has certain financial implications, because it requires provisioning of premises, personnel and technical conditions for conducting the procedural activities including interrogation, gathering of evidence, questioning witnesses, etc. In this manner specialisation of these investigators will be enabled, and the “blue code culture” will be influenced, because these investigators will not act upon other cases and in their work they would not depend on the cooperation with the police and other law-

¹² See: S. ZIKOV, sanctioning of police misconduct by the court and the prosecution, Macedonian magazine of criminal law and criminology year 9, no. 1-2, Skopje, 2002; M. Maricic, PP’s control over the legality of police authorizations, Macedonian magazine of criminal law and criminology year 9, no. 1-2, Skopje, 2002.

¹³ S. ZIKOV: Sanctioning police misconduct by the Court and Public Prosecutor’s office, Macedonian magazine for penal law and criminology year 9, no. 1-2, Skopje, 2002. M. MARICHICH: The control of the PP on the legitimacy of police authorizations, Macedonian magazine for penal law and criminology, year 9, no. 1-2, Skopje, 2002.

¹⁴ Although the same could be set up by a bylaw, pursuant to the Rules of operation of the PPO, we do consider that it is better to be established by law, and especially in light of the already started process of drafting a new law, this solution is really feasible.

enforcement officials. Moreover, this solution could be applied and for other investigations conducted by the PPO pursuant to the new role as set by the Strategy for reform of the criminal law and the LPPO, and therefore the foreseen reforms should be accompanied by appropriate budgetary implications in the PPO's budget.

As second alternative to the above-stated solution is to determine by law concrete rules related to the transfer of the specialized police officers who will be transferred to the specialized unit and directed by the specialised PPO for detection of criminal acts and perpetrators of criminal acts under their jurisdiction. It practically means creation/introduction of persons with special authorizations to conduct the investigations. In order to ensure the transparency of the transfer in the unit it is determined that the police officers will be transferred in a procedure upon public announcement or internal competition or in arrangements between the state public prosecutor and the Director of the bureau for public security, in this case consent of the transferred police officer will be required. The provisions regulating the types of transfer should ensure greater degree of operational cooperation between the PPO and the police in terms of "staffing issues". This transfer should be mandatory stipulated and for the other investigations, which pursuant to the LPPO will be conducted by the PPO, as well as for effectuation of certain provisions of the current LCP.

In this case, the new LCP will have to include provisions that will more closely stipulate the transfer of the law-enforcement officials to the PPO, and especially the duration of the transfer; the relationship between PPO management and the superiors within the Mol or other bodies; the manner in which the performance of those officials will be evaluated within the PPO and by whom; who will be in charge to decide for the disciplinary responsibility; how they will be protected from possible retribution by the law-enforcement officials subjected to investigation, etc.

The police are obligated to provide and ensure technical assistance, i.e. assistance to the transferred police officers or to the authorized officials of the unit in the execution of their police authorizations. For instance in the cases of execution of the so-called "special investigative measures" pursuant to the LCP, assistance in the field of forensic expertise, access to information from the registry pursuant to the LP, data entering pursuant to the LP, etc.

The Government of the Republic of Macedonia will pass a regulation – order, based on the PPO's request by which the number the transferred police officers and the required years of working experience for work in the unit will be determined.

1.4. Required amendments of the LCP

Certain procedural provisions in LCP would have to precise the **procedural aspects** of the unit's functioning in the pre-investigative (previous) procedure. Thus, the responsibility for detection, investigation and prosecution of the criminal acts, that are committed by Police members, by the Law determined body in the Ministry of Defence, which in accordance with the provisions of the LCP has authorizations in the pre-investigative procedure (i.e. Financial Police and Customs Office of RM), will be transferred to a investigator and to the new specialised unit Specialised PPO for prosecution of Organized Crime.

In this context, the relationship that this unit will have with the Mol's SICPS is of special importance. Having in mind the role of the SICPS and its obligation to mandatory inform the PPO for cases of abuse of power by law-enforcement officials, the PPO and the SICPS will have to cooperate in order appropriate sanction to be

imposed to the culpable officials. Moreover, the PPO and the SICPS should especially cooperate for analysis of cases of torture etc. in order to establish whether certain violations are result of systematic omissions and in which way they should be responded in order to prevent such cases in the future. In that way, similar organisational units for internal control within other state bodies (Customs, Financial Police, Army of the Republic of Macedonia, Penitentiary-correctional institutions) should be established. These bodies will be also obliged to notify the PPO for all cases of possible abuse of power by the officials, as well as to cooperate with the PPO in order to prevent certain conduct and activities that are repeated and which constitute violation of the authorisations and could also cause violation of the procedure and the guaranteed human rights and freedoms. In addition, these organisational units will have to comply with the applicable European and international standards in this field, and especially with the ECtHR case-law in order to promptly initiate amendments for harmonisation of particular laws and regulations.

The circumstances under which the authorizations of the police in the pre-investigative procedure are conducted by the assigned police officers in the specialised unit of PPO for prosecution of the Organized Crime (hereinafter: police officer of the specialized unit) are to be determined by the LCP.

Explicitly the LCP will determine the responsibility of the law-enforcement officials to immediately inform the specialised unit for existence of grounded suspicion that an ex-officio prosecuted criminal act has been committed. This provision is essential so that the authorised public prosecutor could guide and oversee the pre-investigative procedure in relation to criminal acts implicating law-enforcement officials. In addition, the police officers of the specialized unit are obliged to immediately inform the competent public prosecutor, and without any delays to bring the person deprived from liberty in front of an investigative judge.

It is preferable some finesses of the procedures and the cooperation between the police and the unit according to the example from Slovenia to be regulated with special Decree for Cooperation between the State Prosecutor and the Police in the detection and prosecution of perpetrators of criminal acts. In accordance with the provisions of the LCP, the manner of effectuation of the public prosecutor's authorisations for guidance of the work of the police with mandatory directives, expert opinions and proposals for gathering of notifications and implementation of other measures for detection of the criminal act and the perpetrator should be stipulated by the Decree. Furthermore, the Decree should stipulate the proceedings, cases, deadlines and manner of guidance, as well as the manner in which the PPO will oversee the police in the pre-investigative procedure.

2. Advantages and disadvantages of the first pillar

2.1. Advantages

The first essential goal and benefit of the proposed changes is to **secure protection of the basic human rights and freedoms** as a legal entity, in a new and efficient way by introduction of a specialized unit within the PPO for prosecution of organized crime, with authorisation to prosecute the perpetrators of the criminal acts who are officials from different repressive bodies and would have opportunity to direct the Police, in a way that the violation of rights and freedoms of individuals by the authorized officials of the repressive organs to be prosecuted more efficiently and in a higher extent.

Second, little less substantial, but also important goal of the proposal is **increasing the trust of individuals and legal persons in the legal system i.e. legal certainty**, because it will secure more efficient way of detection and prosecution of the perpetrators of certain criminal acts within the Police and other repressive bodies. The public trust in the law is also an element of the legal certainty (principle emerging from the principles of a legal state and rule of law, stipulated by article 8 of the Constitution of the Republic of Macedonia).

Additionally, by forming a specialized unit within the PPO for prosecution of organised crime, **specialization** and continuous education of the prosecutors, contributing to more efficient and qualitative proceedings will be enabled. The current problem of prosecutors' acting upon all types of criminal will be surpassed.

4.2. Advantages and disadvantages of the first pillar pursuant to the ECHR requirements

The advantages of the first pillar of the proposed mechanism for enhancement of the system for external control of the law-enforcement bodies will be also assessed from the aspect if they comply, i.e. if they are satisfying the criteria and the requirements set by the ECHR and its case law. As it was mentioned in the analysis "Requirements of the ECHR as Regards the Investigation of Death or Serious Injury at the Hands of State Officials", it is obligation of the State to provide thorough and efficient investigation in cases of death or severe injuries caused by state bodies, i.e. whether the authorities that are responsible for conducting these investigations – in our case the PPO - is "independent and impartial" body i.e. not to have any hierarchical, institutional or practical connections with the officials whose conduct is subject of the investigation. Furthermore, the investigative body should be authorized to compel witnesses, to bring a decision and its proceedings should be public.

Having in mind that the PPO is independent body, whose primary duty is to prosecute the perpetrators of punishable acts, we consider that with the enhancement of its authorizations and with the changes of the organizational structure by creating a specialized unit, the conditions set by the international law will be met. The arguments for every criterion are given below.

2.2.1. "Effectiveness" of the investigation/inquiry

Independence and impartiality

According to the ECtHR case-law, the individuals conducting the investigation should be independent of those implicated in the events.¹⁵ This means not only hierarchical and institutional, but practical independence as well.¹⁶ Pursuant to the Constitutional amendments of December 2005, the Council of public prosecutors is a body competent for election of the public prosecutors, without any limitations of the duration of the mandate as well as for their dismissal. However, the solution regarding the selection and the dismissal of the state public prosecutor (highest level) is still in place, i.e. nominated by the Government, and approved and dismissed by

¹⁵ *Güleç v Turkey* (Appl. no. 21593/93) (1998), paragraph 81-82; *Öğur v Turkey*, [FK] (Appl. no. 21954/93) (1999), paragraph 91-92; и *Anguelova v Bulgaria*.

¹⁶ *Ergi v. Turkey* (Appl. no. 23818/94) (1998), paras. 83-84; *Hugh Jordan v. the United Kingdom*, cited above, para. 120; *Kelly and Others v. the United Kingdom* (Appl. no. 30054/96) (2001), para. 114; and *McKerr v. the United Kingdom* (Appl. no. 28883/95) (2001), para. 112.

the Parliament.¹⁷ In addition, the PPO is independent and it performs its functions on the grounds of the Constitution, laws and international agreements ratified in accordance with the Constitution. Consequently, besides the justified critics regarding the influence of the executive power over the selection of the state PP, the current constitutional and legal position of the PPO in principle satisfies the basic criteria for independent and impartial investigative body as set by the ECHR in regard to the investigations under article 2 and 3.¹⁸

Nevertheless, we have to point out that in cases when a criminal charges has been submitted to the PPO, but the perpetrator of the criminal act is unknown, the investigation conducted by the public prosecutor must include investigative activities as well, including autopsy and exhumation, directed towards identification of the perpetrator. Otherwise it would not satisfy the standards in regard to the hierarchical independence of the investigative body.¹⁹ Practically problematic are the current provisions of the LCP, pursuant to which in cases when the criminal charges have been submitted with the PPO and the perpetrator is unknown, only the Investigative Judge could request autopsy and exhumation, while the public prosecutor is not entitled to do so. Additional loophole is the provision of the LCP, pursuant to which neither the public prosecutor nor the Investigative Judge can compel testimony of a law-enforcement official, but they are requesting the institution or the supervisor of the official to provide him/her for interrogation, art. 177, paragraph 5 of the LCP. Furthermore, there is no deadline in which the supervisor is obligated to provide the implicated official.

Determination of the cause of death²⁰

Pursuant to this criterion established by the ECtHR, the purpose of the investigation is to identify the victim, to determine the cause of death, to distinguish between natural death, accidental death, suicide and homicide, to identify the person involved in the death and to bring him/her before a competent court established by law. This criterion is not that disputable in the current performance of the PPO, because it acts in cases of grounded suspicion that a criminal act has been committed. The grounded suspicion for committed criminal act is the minimum threshold. It seems that this is not sufficient for compliance with this criterion, because investigation which will determine the cause of death even for instance of case of accidental death is required. The public prosecutor should always undertake all investigative activities proprio motu, conducting thorough investigation for all cases and always to establish the legality of the cause of the death. Any death that has occurred at the hands of state officials must be investigated as possible homicide. Therefore, in the LPPO should particularly be point out that in all cases of death at the hands of the state officials, the PPO should presume that a criminal act has been committed, but the real cause of the death to be determined through an independent investigation.

Collecting reasonable evidence

Concerning the types of evidence that an investigative entity should collect in order to conduct an “effective” investigation, the ECtHR admits that specific standards cannot be set forth due to the particularities of each case. However, the ECtHR does

¹⁷ Although the mandate of the public prosecutor is 6 years, since the independence of the Republic of Macedonia, there is not a single state public prosecutor, who has not been changed with the change of the government. It seems that until now the state public prosecutor was not in position to ensure independence of political influence.

¹⁸ ECtHR has never found violation of the ECHR based on partiality of a public prosecutor.

¹⁹ See: ECHR case law, and especially: *Gulec v Turkey*.

²⁰ UN Manual on Extra-legal, Arbitrary and Summary Executions.

describe investigative acts that should have or could have been taken in the course of an “effective investigation.” For instance, the ECtHR has noted a list of activities that the investigation entity should do, such as to:

- (a) Collect sufficient evidence;
- (b) Conduct on-site tests/collect evidence at the scene;
- (c) Take statements from eye-witnesses, members of the security forces involved in the incident;
- (d) Create an independent reconstruction of the events;
- (e) Run tests for gunpowder and fingerprints;
- (f) Create an Autopsy Report;
- (g) Perform an on-scene post-mortem and forensic examination;
- (h) Conduct ballistics tests (number of bullets, firing distance);
- (i) Check whether custody records match the official’s version.

This is in line with the basic function of the PPO as prosecution entity. There is a legal ground for active inclusion of the public prosecutor in the detection of criminal acts and their perpetrators and provisioning of quality evidence. But the required technical, personnel and financial conditions have to be ensured in order to implement art. 144, para 3 of the LCP, pursuant to which the public prosecutor can obtain expert opinions from relevant fields necessary to decide upon the criminal charges, based on which effective procedure and provisioning of relevant evidence will be ensured. In this way, the current practical PPO’s dependence by other bodies, especially the MoI will be avoided.

In addition, pursuant to the LCP the public prosecutor could summon the submitter of the criminal charges as well as the suspect in presence of his defence attorney and other persons for whose cognizance the public prosecutor considers that can contribute to the evaluation of the credibility of the allegations listed in the charges. For this analysis it is important that a police officer can be summoned as any other individual, but though promptly and properly summoned, they do not show up. Namely, the PP can not render direct order for forceful apprehension, but the authorised official could be forcefully delivered only through the IJ.²¹ Therefore, the PPO should be given the authorization and obligation to compel testimony under legal sanctions, especially of those implicated in torture or maltreatment.

The MoI and other state bodies, institutions that have public authorizations and other legal entities are obligated to act upon public prosecutor’s request immediately, but at latest within 30 days after receiving the request. Only in exceptionally complex cases of criminal acts committed by more persons at larger territory or by organised criminal group, MoI, other state bodies, and legal entities are obligated to act upon the public prosecutor’s request within deadline not exceeding 90 days starting from the day the request was received.

Justification of the use of force by the law-enforcement officials

The use of lethal force by state officials must be subjected to examination that will be in position to determine whether the used force was justified or not under the given circumstances, and whether it was lawful, proportional and legitimate. Also, the investigative entity must be in position to determine whether the use of force was unlawful. It seems that this is the greatest weakness in Republic of Macedonia, because the ECHR does not distinguish among the bodies entitled to use lethal weapons, but on the contrary it starts from the interest for effective human rights

²¹ The ECtHR has noted the same in the *McShane* case: “The effectiveness of the investigation was undermined by the lack of compellability of security force witnesses.”

protection. Therefore, the problem of inconsistency and incompatibility of the domestic system for regulation of the grounds for exclusion of the unlawfulness of the use of weapon, must be immediately solved by law amendments, which will implement the ECHR standards into the LCP, Law on internal affairs, Law on police, Law on the army service, Law on defense, Law on execution of sanctions, Law on customs office, Law on financial police.²² In addition, because the specialized unit will act upon all cases of abuse of power by use of force or firing weapons, of particular importance is article 80 of the Law on police, which stipulates the means of coercion/force by which use a violation can be made and will be subjected to investigation by the specialized unit.

Identification and punishment of the responsible individuals

The investigation must also be effective in the sense that its results can identify the culpable state official and lead to his or her eventual punishment. It seems that the PPO meets this criterion, because the PPO following the undertaken activities can decide to issue indictment or dismiss the criminal charges. In the second case, the damaged party is entitled to private charges.

2.2.2. Public scrutiny

The ECHR requires that there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.²³ So, the investigation must enable the victims to state their version of the events, to present evidence, and to question witnesses.

Based on the analysis of the domestic legal framework it is observed, though there is a certain degree of public scrutiny of the investigation²⁴, the public prosecutor's investigations are not subjected to public scrutiny. Therefore, the next-of-kin of the victim should have access to all procedural activities within the scope of the investigation and the criminal prosecution and to have full access to the case file. The relatives should have the rights of a formal party in a civil procedure. In addition, the PPO should publish its reports, especially those when it withdraws from prosecution. The results of the conducted investigations upon cases of torture should also be published.

Moreover, the amendments with reference to the public scrutiny of the investigation, will contribute to more effective investigation, because the analysis of the domestic legislation established that in 70 % of the cases the victims are submitting the criminal charges, which implicates that in the Republic Macedonia the victims are

²² For more detailed analysis, see: V. KAMBOVSKI, Compatibility of the legal use of firing weapons and its validity in relation to the ECHR and its case law.

²³ Analysis of international standards.

²⁴ For instance, when the PP summons other persons for whose cognizance the PP considers that can contribute to the evaluation of the credibility of the allegations reported in the charge, and the perpetrator is known, the suspect and his defense attorney are also summoned. The minutes on the gathered notifications, made before the public prosecutor, the suspect or his defense attorney, and signed by the summoned person could be used as evidence in the course of the criminal proceeding. In addition, pursuant to the LCP, the citizens can request the IJ to examine the legality of the activities undertaken by the Mol's authorized officials, and to establish whether their rights have been violated. However, further proceeding in this case is not stipulated by the LCP.

requesting the initiation of an investigation. Promotion of their rights in relation to the investigation would foster the effectiveness of the investigation of such cases.

2.2.3. Prompt and expedient investigation

The ECtHR also requires that death investigations proceed promptly and expeditiously. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating the use of lethal force is regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in, or tolerance of, unlawful acts.

Unfortunately, current practices of the Basic PPOs in relation to gathering of evidence in cases of grounded suspicion that such criminal acts have been committed indicate that the cooperation with the Mol is not always satisfactory due to the fact that it has not been answered upon the submitted requests for information and notification, fully and within a reasonable deadline. This also contributes to delay of the procedure as well as to concealing of the use of force by the authorised officials.

Pursuant to the LCP for ex officio prosecuted crimes the PPO is in charge of undertaking the necessary measures for detection of the criminal acts, identification of the perpetrators, and guidance of the pre-investigative procedure. Consequently, the PPO besides other state bodies and institutions is also an entity for detection. The analysis of the constitutional and legal provisions indicate that the PPO prosecutes all perpetrators of criminal acts, including all law-enforcement officials who will commit criminal act by use of force or firing weapons and other means of coercion that has resulted to death or severe bodily injury of a person.²⁵

The LPPO should guarantee that the specialised unit will complete these investigations promptly, through reinforcement of the authorizations to do so. For instance, the LCP and the Law on internal affairs should be amended in a way to guarantee the presence of the Mol's authorized officials during the hearings. Furthermore, when the information would not be delivered to the public prosecutor within reasonable time, disciplinary measures should be introduced for the officials in charge.

4.2.4. Initiation of the investigation proprio motu

The essential purpose of the death investigations is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The PPO must act on their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the decedent's next of kin to lodge a formal complaint or to take responsibility for the initiation of investigative proceedings.²⁶

²⁵ Analysis of the domestic legislation.

²⁶ This is especially of concern for Republic of Macedonia, taking into consideration that the analysis of the cases demonstrated that 70 % of the cases have been initiated by the victims or their relatives.

Taking into consideration the current practice of the PPO²⁷, in the LPPO initiation of the investigation proprio motu has to be stipulated. Once the PPO has learned that somebody died at the hands of state officials, i.e. for any case of death or prima facie excessive use of force or torture at the hands of authorized officials must initiate the investigation proprio motu. The PP must interview the authorized officials present at the time of the death or other eyewitnesses.

2.2.5. Requirement for criminal proceeding

According to the ECtHR, the investigative entity must have the power to determine criminal responsibility. This is in line with the public prosecutor's competence. After receiving the criminal charges the public prosecutor can act depending on the material evidence as follows: to reject the criminal charges, to request collecting of necessary notifications through other bodies, and to request undertaking of investigative activities.

3. Description of the required capacity-building measures

3.1. Required human resources

Pursuant to the LPPO and the Rules of operation of the PPO, there is a possibility for establishment of a specialized unit (pursuant to the experience with the PPO for prosecution of organised crime). The specialized unit will be clearly structured. There is a need to be managed by a head and to be composed of certain number of public prosecutors. The Minnesota protocol's principles do not contain guidelines on the number of members, but there are some indications that it should be three or more, but the investigation should be never conducted by one person. The public prosecutors should be supported by legal advisors and administrative personnel.

The need of a specialised unit is also observed in the current statistics related to such cases.²⁸ Based on the statistics it is observed that during the course of 2005 and 2006 a total number of 54 criminal charges at different regions of the country have been submitted. Therefore, it is most appropriate for the country to have one unit competent for the territory of the state.

Number of submitted criminal charges with the PPO

BPPO	Art. 139, para 3		Art. 140, para 4		Art. 142		Art. 143	
	2005	2005	2005	2006	2005	2006	2005	2006
Bitola							4	8
Prilep		5					1	2
Ohrid						4	10	11
Kicevo					2		3	
Struga								
Resen								
Total		5			2	4	18	21

3.2. Required material and technical means

²⁷ Currently, the public prosecutors requests (or requests the IJ to request) the Mol to deliver a report on the incident. In case, Mol do not provide answer the case is delayed.

²⁸ Analysis of the domestic legislation, institutions and practice for investigation of cases of abuse of power by law-enforcement officials.

In order to ensure efficient functioning of the specialised unit, required material and technical means should be secured. The needs of the specialised unit should be carefully examined:

Premises, IT and office equipment

Provisioning of appropriate premises at the territory of city of Skopje, where the unit is to be placed. Re-adaptation of the existing premises is not excluded, but if there are conditions to readapt them. Necessary office equipment, appropriate for the daily work of the public prosecutors should be ensured, but it should be in accordance with the number of expert associates and technical personnel of the specialized unit.

Communication equipment, including vehicles

Due to the territorial jurisdiction of the unit, it should be equipped with communication equipment and vehicles. It should have at least three vehicles out of which at least one to be a field vehicle in order to ensure the unit's members access to the crime scene (insight). Communication equipment (telephone lines, fax machine, internet etc) that will ensure unlimited communication of the unit with the remainder of the PPOs, Mol and domestic and international organisations with which they will cooperate.

Security measures

Due to the unit's authorization to prosecute law-enforcement officials implicated in cases resulting to the death and serious violations, the investigation and the proceeding conducted by the specialized unit must be secured. In order to protect the confidential and sensitive data, to avoid any damage as well as to regulate the access, security measures must be introduced. Also, procedures for reducing threats and influence over the members of the unit should be established. Based on the current experience, assessment of the required equipment must be conducted.

3.3. Required training and additional expertise

In order to ensure efficient and effective functioning of the specialized unit, comprehensive training programme for its members should be introduced and implemented. The training programme is to be defined in cooperation with the PPO, and the Judicial Training Academy. The training is to be implemented by the Academy.

The training goal, inter alia will be:

1. To increase the knowledge of the public prosecutors on the standards and requirements emerging from the ECHR in relation to investigation of cases of death and bodily injuries at the hands of state officials;
2. Practical training on conducting the investigative activities, including interrogation, hearing of witnesses and summoning;
3. To study the methods and practices for effective investigation and examination of evidence and files of the Mol;
4. Work with witnesses and victims;
5. Cooperation with other bodies overseeing the work of the police (SICPS, Ombudsman, investigative judges, Parliamentary Standing Inquiry Committee).

4. Description of the recruitment rules and procedures

The recruitment procedure for the members of the specialised unit must be carefully developed. It should be based on the UN Guidelines on the role of prosecutors.²⁹ The procedure must guarantee that the members will be elected based on their independence, competence and impartiality. This procedure should be regulated by a Rulebook, by which the organisation and systematisation within the unit will be stipulated.

The rulebook should contain provisions by which the unit is organised as special organisational unit within the specialised PPO for prosecution of organised crime. Furthermore, the rulebook should contain provisions regarding the seat, composition, number of members, their mandate, manner of election of the head and the members, the required expertise and working experience of the head and the members, etc.

Based on the experience with the specialised PPO for prosecution of organised crime, the elected public prosecutors and their deputies should have at least 4 year of working experience, and computer literacy. Knowledge of the languages spoken by the communities should be an asset, because these public prosecutors will act upon cases against all law-enforcement officials at the territory of the Republic of Macedonia. While electing the public prosecutor, the expertise and the conduct of the public prosecutor should be taken into consideration, based on opinion given by the immediate supervisor, i.e. by the immediate supervisor of the law-enforcement officials for the investigators of the PPO.

The members of the specialised unit should have fix-term mandate or at least 5 year mandate with right to be re-elected. The public prosecutor should be given the right to request reallocation, and the provisions for dismissal of a public prosecutor should not differ from the legally prescribed terms for dismissal of a public prosecutor and a deputy public prosecutor. The rulebook should also stipulate the duration of the procedure for assignment of these public prosecutors, which should be neither less than 60 nor longer than 90 days.

A vacant position should be internally advertised in a way accessible to all public prosecutors and deputy public prosecutors, in the PPO as well as in all state bodies in charge of prosecution for the vacant investigators' positions. The deadline for application of the candidates should be specified and it should not be shorter than 15 nor longer than 30 days. The rulebook should also include provisions for repetition of the procedure in case the required number of candidates is not met. The public prosecutors and the deputies should be elected by the Council of public prosecutors.

²⁹ Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

4.1. Impartiality

The members of the specialised unit should be fully independent of the Government and/or of political parties. In addition, the exemption of the unit's members in case they are linked with an individual or organization implicated in the case, or organization or association whose member the victim was, must be guaranteed.

4.2. Competence

The members of the unit must be trained and competent of evaluating and weighing of evidence and for that purpose it should include individuals with expertise in law, medicine, forensics and other appropriate specialized fields. They should have more than 5 years of working experience.

4.3. Independence

The members of the unit must be well-known in the community for their integrity and fairness.

5. Conclusion

The role of the public prosecutor is irreplaceable, and it should not depend on the fact, if an additional mechanism for control, such as independent commission as well as strengthening of the role of the Ombudsman's office will be proposed. This is so because ECtHR's requirements mentioned in the previous analysis within this project, and CPT's recommendations, insist investigations upon such incidents to result to appropriate criminal prosecution – which is in jurisdiction of the PPO.

At the end, we would like to recall the recommendations for enhancement of the functioning of the PPO with reference to the control over the police and other bodies with police authorisations, already presented in the "Analysis of the domestic legislation, institutions, and practices in cases of abuse of power by law-enforcement officials". Those recommendations are of great importance and should be implemented. The proposal "Enhanced role of the PPO", does not exclude those recommendations, but it is developed based on them.

B. SECOND PILLAR: STRENGTHENED ROLE OF THE OMBUDSMAN'S OFFICE

Introduction

The Ombudsman of RM is established by the Constitution of RM as state body authorised to protect the constitutional rights and freedoms of the citizens when they are violated by state bodies and other bodies and organisations that have public authorisations.

Considering the Ombudsman's constitutional position, the Law on Ombudsman determines the competencies of the institution that in accordance to Paris Principles and other applicable international documents.

The Law, besides the competencies, determines the methods for submission of a complaint to the Ombudsman as well as the complaint handling. Namely, the procedure is initiated based on citizen's complaint, but also ex officio upon received information either from media or by other sources, but only if the Ombudsman assesses that there is a need to initiate a procedure based on its own initiative.

The law also determines the completion of the procedure, as well as other actions and activities that the Ombudsman can undertake in order to deal with the violation and its consequences. Namely, the Ombudsman can initiate a procedure for determining of the liability – disciplinary, misdemeanour, or criminal. In case when the constitutional and legal rights of the citizens were violated the Ombudsman can submit to the respective body or organisation, recommendation, opinion and directions on the method how to deal with the determined violations, proposal for repetition of the procedure in accordance to the law, request for initiation of disciplinary procedure and in case when having reasonable suspicion for committed criminal act – to request initiation of criminal proceedings to the public prosecutor.

The law determines the obligation and the duty of the state administration bodies and the other bodies and organisation with public authorisations to collaborate with the Ombudsman and to give at its disposal all the needed information and documents that are essential for to accurately establishment of the factual situation. In order to investigate the submitted complaint the Ombudsman can invite selected or appointed person for interview. These persons are obliged to attend and provide the necessary information regarding the submitted complaint.

The Ombudsman is following the conditions of adherence and protection of the constitutional and legal rights of people in the bodies, organisations and establishments where the freedom of movement is limited.

The current experience of the Ombudsman's case-law related to this subject matter show that the legally prescribed authorisations are not sufficient to determine the factual situation and conduction of the complete procedure that will result with adequate finalisation in the sense to determine the truth and sanction the misuse of the official authorisations.

The causes for this condition can be divided in two groups: *causes of subjective and objective nature*.

As cause of *subjective nature* most frequently appears the behaviour of the involved bodies and persons, i.e. hiding the information and other evidentiary material needed

to determine the factual situation. Such behaviour is often manifest by state officials with police authorisations and due to reasons of collegiality, they are taking the stance to protect those officials that had exceeded their authorisations and had break the law.

Cause of *objective nature* is the lack of adequate instruments and authorisations to investigate the cases of violation or exceeding of authorities by the officials.

Considering this it is essential to:

- Complement, i.e. expand the working methodology of the institution;
- Amend the legislation, i.e. to broaden the authorisations;
- Structural and organisational changes in the institution;
- Employ personnel of adequate profile and development with additional education and trainings;
- Strengthen the cooperation with the NGO in this field.

1. Working methodology

While acting upon cases of abuse of power by law-enforcement officials there is no possibility for the Ombudsman to be included from the actual beginning of the procedure that is conducted by the Mol. Namely, the entire procedure is based on the received information, acts, documents and data by the concerned body. Time wise the Ombudsman is entering those procedures at much later stage of the event and often after a very long period, when the traces or certain evidence is destroyed or were not ensured. There is lack of authorisation in cases of death of severe body injuries at the hands of law-enforcement officials, the Ombudsman to be mandatory invited to take part in the first phase of the investigation with aim along with the police and the investigative entities to observe the course of the procedure and the activities related to obtaining evidentiary material. This would not mean interfering or overlapping of authorisations of the Ombudsman with the competencies of the public prosecutor and other bodies in charge for the investigation.

The insight as method to collect evidence should be obligatory for such cases and should be conducted immediately following the event due to its efficiency, effectiveness and proper enforcement. The authorisation during the insight must be clear and unambiguously determined by listing each activity that will be undertaken by the Ombudsman.

When the Ombudsman will initiate a procedure upon law-enforcement official's misconduct in order to accurately determine the factual situation the following measures and activities should be undertaken:

- to visit the establishment;
- to interview the complainant;
- obligatory to interview the manager and the authorised officials;
- if necessary to invite witnesses and other people that are familiar with the data and facts that are of importance in determination of the factual situation;
- to conduct insight in the required documentation;
- the records of the day and hour of deprivation of liberty, the cause for deprivation of liberty, the cause for police custody, the time when the detainee was informed of the rights, the signs of visible injuries, sickness, mental disorder and similar, when were the family, attorney, doctor, diplomatic-consular representative and similar contacted, time when interviewed, if the detainee was transferred in another police station, released or taken in front of a judge and other important data should be mandatory given to the Ombudsman for insight.

If the person deprived of liberty is not registered in the record regarding the time and date of deprivation of liberty, and the time and date of release and the right to an attorney, as well as in the record in general, the reception officer will have to explain the same.

In order to provide relevant proofs that in the procedure, in any case when fire arms were used, severe injuries or death at the hands of law-enforcement officials the Mol's SICP should have the obligation, i.e. the duty to inform the Ombudsman immediately with aim to conduct an investigation by the institution that will be a guaranty that the evidence will not be hidden by the police.

In cases of severe injuries or death, the Ombudsman will request independent forensic opinion by a competent institution.

For the cases that will be subject of investigation, the Ombudsman after the closure of the investigation will provide information for the established factual situation to the Mol, which will be obliged to implement the recommendations. Otherwise, the Ombudsman will inform the Public Prosecutor and will request instigation of procedure in accordance to the existing authorisation with the law.

Furthermore, from torture prevention perspective, the Law on Ombudsman stipulates a competence for the Ombudsman to follow the conditions in the establishments where the freedom of movement is limited and also contains provisions allowing undertaking unannounced visits to those institutions and contacting convicted and detained persons without the presence of the officials. Even the same are in accordance to the Optional Protocol, it is needed to more concretely determine the institutions that are within the frame of its competence and the Ombudsman shall visit either by request or ex officio:

- Penitentiary Correctional establishments;
- Police stations;
- Detention centres for foreigners;
- Premises for detention of persons with right to asylum;
- Care establishments;
- Establishment for social care of people;
- Psychiatric institutions;
- Establishments for care of children and juveniles;
- Mental health Institute.

2. Proposed legislative and structural amendments

Pursuant to the Constitution of the Republic of Macedonia and the Law on Ombudsman, the Ombudsman is impartial and independent state body, in regard to its practise and decision making in the performance of its function. An exception is the financial independence that is one of the crucial elements that provides security from eventual obstructions by the executive government in the functioning of the institution.

Due to that, it is essential to amend article 48 of the Law on Ombudsman. The amendments of this article would be as follow:

“The resources for the function of the Ombudsman are provided by the budget of Republic of Macedonia designed for the Ombudsman.

The Ombudsman independently manages the utilisation, allocation and assignment of the resources provided by the budget of RM aimed for the Ombudsman. The competent body (Parliamentary Commission for Budget and Finance) that reviews the budget proposal submitted by the Government designed for the Ombudsman is obliged prior its submission and adoption in the Parliament submit it to the Ombudsman for its opinion.

The opinion from paragraph 3 of this article should be submitted to the Parliament of RM along with the budget proposal designed for the Ombudsman.

The Parliament of RM votes separately for the budget designed for the Ombudsman.

Only the State Audit Institute conducts regular audit and insight in the execution of the budget of the Ombudsman.

The part of the Law on the Ombudsman which regulates the procedure for following the situation in the institutions where the freedom of movement is limited, should be changed i.e. should precisely list the closed institutions which the Ombudsman will be authorised to visit.

Also, a new article that will determine the procedures for examination of cases of abuse of power by law-enforcement officials should be added. For the same procedure, a Rulebook that will precisely determine the manner of conducting the investigation will be brought.

The activities that the Ombudsman will undertake after receiving notification by the SICPS or upon complain from a citizen or ex officio, would also be precisely determined in the same article.

Article 32 of the Law on Ombudsman stipulates the measures that the Ombudsman can undertake if assessing that is a matter of human rights violation, but no sanctions are determined in cases when the body will not act upon the same. Considering this is necessary to complement the article, making mandatory the obligation of the body to conduct a procedure for determining the liability of the authorised person in accordance to the Law on civil servants or the Law on labour relations. Quite often the authorities are concealing such cases of torture or excessive use of force that result in death or severe body injuries, which is a reason to strengthen the sanctions and the obligations for cooperation with the Ombudsman. Such sanctions shall concern not only the managerial structures but also the lower structures that quite often by hiding behind the authority of the person managing the body do not collaborate or partly collaborate with the institution.

Due to this, in the Law on civil servants in the part "Rights and duties of the civil servants", should be stipulated a provision that will determine obligation and duty of the civil servant to act upon the request from the Ombudsman and the same should be added in the Law on Internal Affairs. Sanctioning the non-compliance to the Ombudsman's recommendations shall be determined in both Laws in the part of disciplinary liability.

In order to have appropriate functioning of the Institution as mechanism for protection and prevention of torture it is also needed to have structural changes in the institution, because the current condition from human recourse point of view (number and expertise) does not provide the conditions to conduct objective determination of the factual situation in these cases. Pursuant to article 45 of the Law on Ombudsman, the Ombudsman could establish units to work in certain areas.

Therefore, it is needed to amend the Rules of procedure of the Ombudsman i.e. to insert a provision that will foresee establishment of a special unit for prevention of torture that will function as special organisational unit. The same amendments should be made in the Rulebook for the organisation and scope of work of the expert's services of the Ombudsman and the Rulebook for systematization of the working posts in the expert's services of the Ombudsman.

3. Proposed capacity building measures

In order to effectively provide protection of the citizens from torture, i.e. abuse of power by the law-enforcement officials it is needed to accordingly amend and improve the organisational structure of the Ombudsman institution. Namely, new organisational unit that will handle cases of abuse of power by law-enforcement officials should be stipulated by the Ombudsman's Rules of procedure.

The organizational unit would be managed by one of the existing deputies of the central office of the Ombudsman in Skopje.

Within this unit, new working posts for professional profiles who are educated for handling such cases would be foreseen. To fulfil this it is needed to employ: one State councillor (psychologist or social worker) and one Councillor – criminologist.

In order to function and achieve the goals, this unit shall have the necessary material conditions that will guarantee adequate and complete protection and ensuring of the evidence. To conduct the investigation there is a need to provide appropriate technical means especially: field vehicle, Lap – Top, and other electronic equipment for mobile conducting of minutes/record and taking statements, digital camera as well as video recorder, Dictaphone and other technical appliances that will assist the insight.

With aim to correctly and adequately investigate these cases education and training for the deputy and other persons acting in such cases are required. Consequently, it would be required to develop training programme which would capture the matters related to conducting investigation (investigative techniques) in accordance to the domestic legislation, and especially to the international standards. Within these frames it is necessary to implement theoretical and practical training of the persons that will conduct the investigation.

4. Rules and procedures for employment

The employment procedure for the personnel in the new unit will be conducted in accordance to the Law on civil servants and the Ombudsman's Rulebook for systematisation of the working posts.

Namely, according to the Law on civil servants that is a base for the employment procedure in the Ombudsman institution, article 7 stipulates that the State Councillor is at the range of managerial state servants, and the councillors and junior councillors are at range of expert state servants.

In accordance to article 14 of the Law on civil servants the Ombudsman submits the request for new working posts to the Agency for civil servants.

The State servants, except the general secretaries, state secretaries, the secretary of city of Skopje, secretaries of the municipalities with the head offices in the city or in

the village are employed via public advert that is announced by the agency and that is in minimum two daily newspapers, one in Macedonian and one in the language of language spoken by at least 20% of the population, which is different from the Macedonian language.

The deadline for application can be no shorter than 5 days.

The secretary as well as the managing authority of the body, establishes a Commission for conducting the employment procedure for civil servant. The Commission is comprised of three members, whereas not to violate the criteria proscribed by law, adequate and equitable representation of citizens that belong to all communities will be ensured.

The Commission is comprised of one managerial civil servant, one expert civil servant from the Ombudsman office and a member from the Agency.

The candidates that have applied will undergo a test examination, exception to this are the posts for junior associate and junior assistant.

The test examination takes place within the Agency.

The Agency prepares a list of five most successful candidates that had passed the test for each working post that is submitted to the Commission. With exception the list is extended with candidates who have the same results as the last candidate of the list.

These candidates submit the following documents to the Agency for civil servants as stipulate in article 12 of the Law on Civil Servants; (basic conditions – citizenship, level of education, working experience, no prohibition for work performance and health condition).

Furthermore, the Commission interviews with the candidates and prepares the final list. The list is later on submitted to the secretary i.e. the authority that makes the selection.

The special conditions are determined in the Ombudsman's Rulebook for systematisation of the working posts.

Namely, conditions for State Councillor – managerial range civil servant are: High education, VII/1 Law Faculty, 4 years of working experience and knowledge of foreign language.

Conditions for the post Councillor are: High education VII/1 Philosophy Faculty/ psychology or sociology and social matters, 3 years of working experience and knowledge of foreign language.

Required conditions for the post Councillor – criminologist would be: High education VII/1 Law Faculty, Philosophy/unit sociology, psychology with completed postgraduate studies on criminology, 3 years of working experience in the police and knowledge of foreign language.

Conditions for junior associate are: High education VII/1 Law Faculty or Philosophy Faculty - unit sociology and social matters, no working experience required.

5. Financial implications

The ensuring of the personnel and material conditions for work and functioning of the new organisational unit will implicate certain financial implications. Within the frame of the budget one term and continuous expenses have to be foreseen.

One term expenses are:

- Resources for vehicle (or to procure it in another way, to borrow it from another state body)
- Resources to procure Lap-Top;
- Digital camera;
- Dictaphone ; and
- Camera.

Regular or continuous expenses are:

- Salary for State Councillor;
- Salary for Councillor - criminologist

Financial implications for establishment of the second pillar of the proposal mechanism – Strengthened role of the Ombudsman’s Office

Title	Gross costs per month	Gross costs per year MKD	Gross costs per year EUR
Advisor	36.500,00	438.000,00	7.060
Criminologist	35.000,00	420.000,00	6.700
Total	71.500,00	858.000,00	13.760

Required technical means

Description	Price MKD	Price EUR
Vehicle	992.000	16.000
Laptop	50.000	800
Digital camera	10.000	160
Recorder	3.000	50
Camera	30.000	500
Total	1.085.000	17.510

6. Advantages and weakness of the second pillar

The Ombudsman is already existing institution established by the constitution and the law and in principle it satisfies the requirements foreseen with the UN Paris Principles for National Human Rights and the Optional protocol to the UN Convention against torture. The institution has already developed complaint handling procedure, as well as developed modality for cooperation with state bodies. Also, the institution has secured access for deprived persons by installing in every Penitentiary Correctional establishment complaint boxes to which only the Ombudsman has access.

The technical equipment and the network linkage of the institution are on a satisfactory level.

The possible weaknesses of the second pillar can further remain of a subjective nature i.e. delay in sharing the information with the Ombudsman and inviting the institution while the investigation is being conducting by the SICPS.

C. THIRD PILLAR: INDEPENDENT COMMISSION FOR CONTROL OF THE WORK OF THE POLICE AND OTHER BODIES WITH POLICE AUTHORISATIONS

Introduction

As it is noted in the enclosed comparative analysis, there are no identical models of external control over the police misconduct. Even the actual terminology of the external control is different and not always reflects a special body or a control agency, but also directs towards a mechanism, procedure, oversight system. Furthermore, there are varieties of the procedures for control of the police with reference to the organisational structure, mission and functions. Sometimes two procedures of external control over the police can have the same formal organisational structure, but different missions and they can perform different functions.

In the Republic of Macedonia the responsibility of the police is problematic in practise. Very few of the police officers were held liable for exceeding their police authorisations in the use of legal force and on the other hand small number of victims of the police abuse has reported the incidents, due to not trusting the police system of internal control and the judiciary. The actual independence of the judiciary of the Republic of Macedonia is under serious sub question, thus reducing the possibility for effective control over the police misconduct. The Ombudsman of the Republic of Macedonia could request to be provided with information by the police for certain excessive use of authorisation, but cannot intervene in the internal investigation within the police, nor to request additional review and re-investigation of the case. In the same contest is placed the acting of the parliamentary commissions for protection of human rights and the control of the Security and Counter-Intelligence Directorate and the Intelligence Agency which in general makes more than necessary the **need of creation of a special independent body for external control** of police conduct. In this manner the legitimacy of the performance and delivery of the security service by the police in the Macedonian society, the public trust in the police service, efficiency of the police and what is most important, the democratic values of the police: their accountability and transparency would be increased and strengthened. In this direction are the 2001 Council of Europe's Committee of Ministers recommendations.³⁰

1. Mandate of the Commission

The third pillar of the comprehensive system of external control of the police and other bodies with police authorisations which is proposed as result of the conducted analysis is the **Commission for independent control of the police (Commission)**.³¹

It is proposed establishment of Commission as oversight body pursuant to the CoE Recommendation (2001)10, which at the same time contributes to enhancement of the institutional system created for investigation of cases of police abuse.³²

³⁰ For more see: <http://cm.coe.int/ta/rec/2001/20011r10.htm>

³¹ For the name of the Commission the authors leave space for redefinition of the title.

³² Robert Varenik, Human rights first

It is proposed the Commission to be comprised of five independent members with expertise, as specified below under point 2.2, with 5 years mandate.³³ The Commission's members would be authorised to:

- Oversee the investigation conducted by the SICPS in cases of death as consequence of maltreatment or misuse in the places of detention, or as result of excessive use of force by the law-enforcement officials;
- Oversee and audit all ongoing investigations of the SICPS as well as the completed ones;
- No investigation conducted by the SICPS will be closed without Commission's attestation that the procedure was complete, fair and equitable.

The Commission will be authorised to oversee and review the investigations undertaken by the Mol's SICPS. The report on a conducted investigation is forwarded to the Commission in order to review it and decide whether during the course of the investigation certain omissions, mistakes or failures have occurred. The Commission could also act upon citizen's complaints in relation to investigation completed by the Mol's SICPS. If the Commission is not satisfied with the conducted investigation it could require conducting of additional investigative activities in a manner that will enable its members to collect evidence for the case and for that purpose to summon people to testify, present relevant evidence, use relevant evidence presented in another procedure, to analyse the autopsy protocol, as well as to inform the family and the legal representatives of the victim for the results of the investigation and the gathered evidence. The Commission must provide the persons who could be subject of criminal responsibility during the course of the investigation with a legal representative, during the testimony before the Commission and must not force the witnesses to testify against themselves.

The Commission can engage impartial expert(s) – councillor who should not be part of the state administration. Furthermore, the Commission can seek technical expertise in the areas such as pathology, forensics, psychology, psychiatry, gynaecology, paediatrics, ballistic etc. Everything is for the purposes of increasing the credibility of the conducted investigation.

If the Commission finds that the presented evidences are leading to criminal responsibility of the law-enforcement official the case shall be transferred to the public prosecutor for further consideration, or, if exciding of authorizations constituting violation of rights and freedoms of citizens or violation of the police code of ethics, is established the case shall be returned to the Minister of interior with recommendation to impose disciplinary measure to the implicated law-enforcement official.

Considering the fact that the Commission should oversee the investigation of the Mol's SICPS with reference to cases of death and severe bodily injuries, **the Ministry of interior should be obliged to inform the Commission trough the SICPS for all such cases during police detention and action as well as for all the investigations initiated upon citizens' complaints related to violations of the rules and code of conduct. Also the Commission will instigate an investigation for cases acknowledged trough the media or trough direct approach from citizens complaining on police misconduct.**

³³ See NHRI, p. 12. International Council on Human Rights Policy and UN Office of the High Commissioner for Human Rights insist that the members of national human rights institutions have 5 years mandate.

Within reasonable time after the completion of the investigation, the Commission shall issue a public report which shall be comprised of:

1. The ToR/scope of the conducted investigation;
2. The procedure and used methods for evaluation of evidences;
3. List of questioned witnesses, except those whose identity should be protected and those testifying in camera;
4. Time and place of each Commission's meeting;
5. Short elaboration on the social, political and economical surrounding during the investigation;
6. Specificities of particular events during the investigation;
7. The legislation applied by the Commission;
8. The findings/conclusions reached by the Commission based on the applied law and established facts;
9. Recommendations based on the conducted investigation.

The Commission's reports for the completed investigation are public and they serve as tool for communication with the public regarding the method that the police conduct its function in the society. Furthermore, the purpose of these reports is to "open" the police to the public, since, historically viewed the police is a closed organization with quazi militant structure and culture of strong resistance to external control.

Besides the reports on the conducted investigation and the annual reports, the Commission will be obligated to produce two types of studies for the Parliament: the first study is related to the degree of public trust in its work (review of the public trust of particular social groups in the work of the Commission); and the second study is related to the statistics of deaths and severe bodily injuries during police custody and action during the course of the year, with aim to have comparative analysis for the successfulness of the functioning of the system for external control over the police.

For the purposes of cooperation with the public and building trust in its work, **the Commission will be obligated to cooperate with the local authorities and NGOs in the sphere of protection of rights, and especially will be obliged to produce informational materials for the mission, goals and the system of its functioning and the complaint handling procedure.** Furthermore, the Commission should be bearer of the activities in organising seminars, workshops, conferences, based on which will contribute in awareness raising for its position in the society, the role in the protection of the rights and freedoms of the citizens and the complaint handling procedure.

In addition, for the purposes of torture prevention, the Commission would have access to places of detention and apprehension as well as to the persons deprived of liberty. The Commission would publish special reports on the conducted visits to the places of detention and apprehension and the treatment of the detained/apprehended persons.

The Commission would also monitor the human rights compliance of the training provided to the law-enforcement officials, and will make recommendations for appropriate improvements.

The Commission would monitor the policing, for which will produce and deliver to the Mol annual reports with appropriate conclusions and recommendations.

2. Composition and appointment of the Commission's members

Having in mind that the third pillar of the external control of the police is an **independent and impartial body outside the police service** one of the key questions that are being imposed with reference to its functioning is the appointment procedure for the Commission's members. In order to avoid any political influence over the Commission and to ensure the public trust in its independence it is proposed **the members of the Commission to be appointed by the Parliament of the Republic of Macedonia, after previously announced advertisement.**³⁴ Although, formally with the appointment of the members the **Commission is established** by the Parliament, it **shall neither be a Parliamentary body nor a Governmental body. The Members of the Commission have the status of appointed persons**, and they will perform the function for which they are appointed in parallel with their ongoing working obligations at the job positions they have been employed prior to the nomination, i.e. they do not have **professional status of employees of the Commission.**

In order to ensure broader acceptance of decisions and reports of the Commission and in order to ensure impartiality in conducting the investigations it is suggested to secure larger political consensus during the selection of its members, as well as to respect the principle of equitable representation. Therefore, it is suggested that the Law on establishment of the Commission to be enacted in a regular procedure, and the **appointment of its members to be conducted with 2/3 majority thereby the Badinter principle will be respected.** Only in this way, the Commission will have full legitimacy to conduct its job effectively and efficiently, and its reports to be accepted as independent and impartial by the broader public.

The impartiality, competence, independence and the professional experience of the Commission's members, as well as the gender and ethnical balance should be taken by the State as guiding principles in the creation of the Commission.

Therefore, guiding principles that should be taken into consideration while composing the Commission are as follows:

2.1. Impartiality - the members of the Commission should not be connected with any individual involved in the case, with the government, political party or organization for which there is a belief that is involved in the case of execution or disappearance of the victim, association or organization whose member the victim was. Also, the Commission's members should not have personal links with the political leaders in the state or with members of the Government, as well as previous professional links with the same. For the purposes of objective and impartial acting of the Commission it is recommended the Commission to be exclusively entitled to develop its own terms of reference without any possibility of external modifications.³⁵

³⁴ For more see: "Principles relating to the status and functioning of national institutions for protection and promotion of human rights", UN General Assembly resolution A/RES/48/134 (Annex) of 20 December 1993 ("Paris Principles"). Also see: International Council on Human Rights Policy and Office of the High Commissioner for Human Rights publication, *Assessing the Effectiveness of National Human Rights Institutions* (Geneva, 2005) [here in after: NHRI]; and UN Centre for Human Rights Professional Training Series No. 4, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (Geneva, 1995) [here in after: "NHRI Handbook"].

³⁵ For more see: NHRI Handbook, p. 11, paragraph 71

2.2. Competence – the members of the Commission must be trained and competent to collect and evaluate the evidentiary material and for that purpose to involve individuals with special expertise in law, medicine, forensics etc. It is of utmost importance this body to involve wide range of expertise, such as lawyers (international human rights law, criminal law, refugee law, and humanitarian law), doctors, psychiatrists, psychologist, NGO representatives, individuals with expertise in management of prisons, work with detainees, with elderly people, children, women, youngsters, members of different ethnical communities, as well as social workers and anthropologists.³⁶

2.3. Independence – the member of the Commission should be respected in the community for their honesty and fairness. They should be personally and institutionally independent of the state authorities. Therefore, it is proposed the Commission's members to be persons who prior the appointment have not been active part of the state administration.³⁷ It is not recommendable persons with state or political background to make part of the Commission, as well as to be engaged as advisors to the Commission.³⁸ In order to ensure the independence of the Commissions members it is recommended they to have personal privileges and immunities with aim of their functional independence not for personal benefit.³⁹

2.4. Ethnical and gender balance – the ethnical and the gender balance as well as the representation of the persons with special needs will enhance the Commission's effectiveness.⁴⁰

Therefore, it is proposed the Commission to include five members, and to establish Secretariat as a technical service of the Commission The Secretariat will include: secretary general, technical secretary and two admin staff.

The Secretariat of the Commission should provide:

- Assistance in the function of the Commission;
- Communication with the Ministry of Interior and the persons involved in the investigation;
- Reception and distribution of complaints to the members of the Commission;
- Preparation of the Commissions' sessions;
- Sharing information with the public about the activities of the Commission;
- Information about the results of the conducted investigations;
- Budget management;
- Production of annual and periodical reports of the Commission;
- Conducting researches for the needs of the Commission;
- Production of the special reports and appropriate conclusions and recommendations;
- Conducting awareness raising activities on the complaint handling procedure;
- Strengthening the cooperation with the competent state bodies and international police oversight bodies.

³⁶ UN Special Rapporteur on Torture, 2006 Report to the General Assembly, UN Doc. A/61/259 (14 August 2006), paragraph 70.

³⁷ The International Council on Human Rights Policy and UN Office of the High Commissioner for Human Rights recommend this. See: NHRI, *ibid.*, p.13.

³⁸ For more see: Establishment and Designation of National Preventive Mechanisms Published by the Association for the Prevention of Torture, Geneva 2006.

³⁹ The privileges and the immunities should be taken from section 22 and 23 of the: Convention on the Privileges and Immunities of the United Nations of 13 February 1946.

⁴⁰ See: Art. 18 of the UN Paris Principles.

The recruitment procedure for positions in the Secretariat will be made in accordance to the Law on civil servants. It is highly recommended that the personnel of the Secretariat have legal background with many years of experience in policing or human rights protection matters.

3. Proposed legislative and structural changes

The establishment and the competences of the third pillar of external control of the law-enforcement bodies, i.e. the Commission should be regulated by a law.⁴¹

Pursuant to the Law, the Commission should be an independent and impartial body which will oversee and guide the procedure in cases of severe body injury and death at the hands of law-enforcement officials, and for that it should be granted with police authorizations. The Law should stipulate the Commission's status of a legal entity, and the financial means for its work should be secured from the state budget.

Also, the Law should stipulate the following:

- Selection procedure and criteria;
- Duration of the mandate of the Commission's members;
- Manner of dismissal and termination of the mandate, as well as the conditions that limit a person to apply for Commission's member;
- Authorizations;
- Budgeting;
- Accountability of the Commission's members;
- Complaint handling procedure;
- Relationship between the oversight body and the Mol, especially with the SICPS.⁴²

Furthermore, the Law should stipulate the work of the Commission, the decision making, the manner of scheduling of the sessions as well as the procedure of inclusion of the members of the Commission in the investigation of citizens' complaints by the SICPS.

Also, the Law by which the Commission will be established must ensure its independence of any Ministry or the Government, the President of the State or the Prime Minister. The Commission will report only to the Parliament.⁴³ For this purpose the Law has to clearly stipulate that ministers or other holders of public functions cannot influence the work of the Commission or to issue instructions (directly or indirectly) to the Commission.⁴⁴

In order to strengthen the responsibility of the police to cooperate with the Commission, amendments to the Law on police are required and recommended, especially with reference to the reporting on cases of death and severe bodily injuries during a police action as well as for other cases of criminal, corruptive or other police misconduct constituting human rights violations and violations of the code of police ethics. ***Non-cooperation of the Mol with the Commission should be sanctioned***

⁴¹ NHRI, *ibid.*, pp. 12–14 and NHRI Handbook, *ibid.*, pp. 10–11.

⁴² NHRI, pp. 12–14 and NHRI Handbook, *ibid.*, pp. 10–11

⁴³ NHRI, *ibid.*, pp. 12–14 and NHRI Handbook, pp. 10–11

⁴⁴ NHRI, *ibid.*, p. 12.

by the law in order to avoid discretion in the evaluation for the need of cooperation with the Commission.

4. Management and leadership

An effective management and leadership in the administration of the Commission are exceptionally important for its successful functioning. The effective leadership should provide politicians' and public's trust in the work of the Commission. Because of that it is recommended that not only the **professional and personal qualities of the suggested candidates, but also their acceptance from wider community to be the main criteria for the selection of the Commission's members.** While doing this parliament must be guided by the principle of ethnic and gender composition of the Commission. Examples from the practice are showing that long process of selection of members of these bodies, and their quick withdrawal from the function, because of financial restrictions and insufficient cooperation by the police, contributes to their unsuccessful functioning, as its broader acceptance by the public. Best example for this is the establishment of such body in Columbia.

In addition, ***financial implications of the work of the Commission are one of the main factors for its successful functioning.*** Problems in financing, limitations in the budget of the future Commission due to different reasons (from political to limitation of the powers of such body), necessary will bring to the decrease of the effectiveness, support and legitimacy in its dealing. As an example: well financed model on external control is the one in Northern Ireland (Police Ombudsman), that employees 78 persons that should serve 8.500 police officials and the one in South Africa that is functioning with 171 employees and budget of 40 million dollars.

Pursuant to the Paris Principles, financial autonomy of the Commission is recommended, without which its operational autonomy and independence in the decision-making process is not possible. The source and the nature of the financing of the Commission should be regulated by a law and the whole process should not be under governmental control. It is recommended the Commission to produce its yearly budget and to send it to the Parliament for adoption.⁴⁵

Therefore, and in order to avoid possible financial implications that would affect the functioning of the Commission, relatively modest budget, is proposed, especially, having in mind that the main burden for the investigation is on the Mol.

5. Advantages and disadvantages of the third pillar of the proposed mechanisms for strengthening of the system for external control of the police

5.1. Advantages

- The Commission will ensure higher degree of **independence** of the investigations of police misconduct, especially in cases of death and severe bodily injuries at the hands of law-enforcement officials. The independence is needed in order to promote credibility, legitimacy and objectivity of the complaint handling process in the eyes of the public. The fact that the individuals involved in the investigation are not police officials, should

⁴⁵ NHRI, p. 13 and NHRI Handbook, *ibid.*, p. 11

- increase the public confidence in the police and the impartiality of the investigation.
- The Commission will ensure a **complete, fair and analytical investigation** for accusations of police misconduct and should **eliminate or minimize** doubts in impartiality of the conducted investigation.
 - The Commission will serve as **check and balances** of the SICPS.
 - The Commission will increase **efficiency and impartiality** of the system of internal control of the police and it is strong motive in the creation of **culture of respect of the accountability** inside the police.
 - The Commission will **unable authoritarian tendencies** in police structure in the country and **will increase public trust** in the way in which the police conducts its function in the society.
 - The Commission will **promote and prevent** possible violations of the rights and freedoms of the citizens by the police service.
 - The Commission will contribute to the improvement of the law-enforcement officials' training .

5.2. Disadvantages

Experiences from the countries where same or similar model was created for the purposes of external control over the police are showing that police management structures are experiencing these bodies and mechanisms as insulting for their expertise and professionalism. There is a belief that someone who is not part of the police service and of the system of police work can not fairly and impartially judge the work of the same. Also one of the of the arguments against such an oversight mechanism is that in this way the **management and command system within the police is diminished**, by which the authority of the high management structures within the police is undermined.⁴⁶

In order to absorb this negative perception, high standards for selection, training and acceptance by the public of the Commission's members are proposed.

6. Evaluation of the successfulness of the Commission's performance

In general, the evaluation of the successfulness of the external oversight bodies including the proposed Commission is based on three criteria:

- **Integrity:** The integrity depends on :
 - The manner of examination of individual complaints on police misconduct;
 - The manner of recruitment and training of the members of the Commission;
 - Evaluation of the manner in which the Commission's work is managed and supervised;
 - Evaluation of the readiness of the members of the Commission to conduct independent investigation;
 - Public awareness for the Commission's complaint handling process.

⁴⁶ Robert O. Varenik Human Rights First: Exploring Roads to Police Reform: Six Recommendations "First Conference for a Rights-Respecting Culture in the Pursuit of Justice", convened by the office of the Attorney General of the Federal District to celebrate the 54th anniversary of the Universal Declaration of Human Rights, December 10, 2003., pp.: 50 – 51 (http://www.humanrightsfirst.org/mexico_policing/mxp_12_eng.htm)

- **Legitimacy** – the legitimacy is subjected to the perception of the complaint handling process by the public, the complainants and the police.
- **Upgrading (learning)**: The upgrading or learning directs towards the scope of the retrievable effect that the process of external control has upon the advancement of the delivery of the security service in the society. This criterion is connected to the scope of police acceptance of the decisions of the Commission and the changes resulting from the decisions.

The proposed criteria are the fundament for monitoring and evaluation of the successfulness of the performance and functioning of the external oversight bodies. These criteria shall secure identification of problems that the Commission might face in its functioning, weaknesses that will be manifested in terms of the process of review and handling individual complaints as well as to identify the ways for promotion of the complaint handling process and its work. What has to be taken into consideration during the evaluation of the Commission's work is that besides the others is only one more form of evaluation of police accountability and that it can not give answer or solution to all problems that the police is facing during its reform to a democratic one.⁴⁷

7. Summary of the Commission's authorisations

- The establishment of the Commission, the appointment procedure, the authorisations and the obligations of the Commission will be stipulated by a Law.
- The Commission is an independent and impartial body that oversees the investigation conducted by the SICPS in cases of death as consequence of maltreatment or misuse in the places of detention, or as result of excessive use of force by the law-enforcement officials.
- The Commission also oversee and audits all ongoing investigations of the SICPS as well as the completed ones. No investigation conducted by the SICPS will be closed without Commission's attestation that the procedure was complete, fair and equitable.
- The Commission is authorized to participate in the investigations undertaken by the SICPS in a manner that will enable its members to interrogate witnesses, to conduct and to participate during inspection/insight, to present and to review evidence and other relevant documents for the case.
- The Commission oversees and gives final opinion and recommendations for the investigation conducted by the SICPS on cases initiated upon citizens' complaints on police misconduct and violation of police code of conduct.
- The Mol is obligated to inform the Commission, through the SICPS, on all the cases of death or severe bodily injuries at the hands of law-enforcement, on the undertaken investigations on police misconduct and to forward to the Commission the complaints submitted by citizens.
- The Commission can present and collect evidence, interrogate witnesses and conducts insight/inspection at the place where the violation has been committed (death or severe bodily injury).
- The Commission may hire impartial expert(s) - adviser who should not be a member of the state administration. Also, the Commission can request

⁴⁷ For more, see: Supra 7, pp.: 13 – 14.

- technical expertise in the fields such as pathology, forensics, psychology, psychiatry, gynaecology, paediatrics, ballistics.
- The Commission has access to places of detention and apprehension as well as to the persons deprived of liberty for which it publishes a special report with appropriate conclusions and recommendations.
 - The Commission monitors the human rights compliance of the training provided to the law-enforcement officials, and makes recommendations for appropriate improvements.
 - The Commission monitors the policing, for which delivers to the MoI annual reports with appropriate conclusions and recommendations.
 - If the Commission after a completed investigation establishes that there are elements for criminal prosecution of a police officer, it will transfer the case to the public prosecutor for further procedure.
 - If the Commission determines disciplinary responsibility of the involved police officer, it informs the police senior through that is competent for pronouncing such a measure.
 - The Commission is composed of five members that are being selected from rows of eminent persons with relevant expertise.
 - The Commission is appointed by the Parliament on the principle of two-thirds majority and Badinter principle, following a public advertisement.
 - The members of the Commission are acting in personal capacity.
 - The mandate of the Commission's members is 5 years.
 - For its work the Commission produces periodical and annual reports and submits them to the Parliament for adoption.
 - The reports of the Commission on a conducted investigation are public.
 - The Commission has a Secretariat that conducts the administrative and technical affairs.
 - The Commission elects a president from its members on annual basis.
 - The Commission has a status of a legal entity.
 - The Commission is financed from the state budget.

Annex I

COMPARATIVE OVERVIEW OF THE PROSECUTORIAL CONTROL OVER THE POLICE IN OTHER LEGAL SYSTEMS

1. Harmonisations of the proposed regulation with the law of the EU

The proposed regulation is not directly connected with the EU law because the legal acts of European Union do not directly regulate the issues that are stipulated by this law. However, concrete obligations in that matter, are deriving from the obligations for respect of human rights, and even wider the concept of the rule of law in a democratic society.

Additionally, even though there are not developed models for prosecutorial control over police at level of the European Union, yet again the European Court of Justice has a developed case-law that envisages the role of the prosecutor as a defender of the fundamental rights within the community.⁴⁸

2. Overview of other legal systems

2.1. Austria

The complaints about criminal acts committed by police officers during their service are collected and examined by the Internal Affairs Department of the Federal Ministry of Internal Affairs. If needed, the Department may undertake measures as a general agency for public security. Its competences encompass the following:

1. Police and criminal investigations related to criminal acts of police officers,
2. Police and criminal investigations related to other serious violations of laws and regulations (example, sexual harassment within the organization).

The Department's competencies do not decrease the duties and responsibilities of the federal governments' oversight bodies. If the service or an individual is informed about the above mentioned actions, he/she is obliged to inform the Department in written without prior judgment of the investigating bodies unless the department issues other directives. If the department does not initiate procedure, it can engage a state body previously assigned for investigations to report on regular basis or prior to certain decisions about the progress of the investigation.

All state bodies are obliged to support the Department in all aspects. They are obliged to provide assistance, information, to propose documents and if needed to provide human and material resources.

2.2. France

In France, formally there is no judicial police which would be engaged in the public prosecutor's office or which would be located at the investigative judge. The „Judicial Police” is a part of the civilian police that belongs to the Ministry of Interior, “gendarmerie” (militarized police which belongs to the Ministry of Defense) and other institutions which are dealing with criminal cases, act upon technical control and

⁴⁸ See: Verdicts of European Court of Justice, especially Stauder 12 Nov.1999, Internationale Handellgesellschaft 17-12-70, Nold 14-5-74, Hauer 13-12-79.

oversight by the public prosecutors and investigative judges, but with regard to their administrative hierarchy, again, they belong to the competent ministry to which they are also administratively subordinated. In concrete pre-investigative procedures and criminal investigations that are led by public prosecutors and investigative judges, the „investigators” of the judicial police and gendarmerie under supervision of public prosecutors and investigative judges are obliged to respect the relevant provisions of the CC and the LCP.

The members of judicial police conduct their “investigative” authorities upon the order of the State Prosecutor (first degree prosecutor) or ex officio prior to the start of the judicial investigation. After the initiation of the criminal investigation, members of judicial police are obliged to act upon the orders of the investigative judge (art.14 paragraph 2 from the Law on Criminal Procedure), which is delegated authority. When the members of the judicial police act upon an order of the State Prosecutor, they are supervised by the general prosecutor of the Republic of France (second instance prosecutor).

When the judicial police acts upon the orders of the competent public prosecutor, in principle it can collect evidence only based on the prosecutor’s consent. The judicial police can act independently until the competent public prosecutor brings an order.

In France there is a special organizational unit –“Technical inspectorate of the state gendarmerie”. Organizationally, the Inspectorate is directly under the Director General of the French police, and is led by a police officer of the highest rank - Technical Inspector of the state gendarmerie. The Inspectorate can conduct any kind of police investigation, i.e. to assign an ongoing investigation in case of suspicion for criminal act of a police officer both in the frames of his service and out of it. Namely, the Inspectorate can be described as internal organizational unit of the police, and there is not a special organizational unit within the public prosecutor’s office particularly assigned to act upon police misconduct.⁴⁹

2.3. Germany

According to the LCP of Republic of Germany, the state prosecutor’s office is conducting the investigation and decides whether the accused will be indicted (art 152 paragraph 2, art 160 paragraph 1 and 2). In order to determine the material truth and in order to examine all aspects which are against or in favour of the accused, the state prosecutor’s office can conduct its own investigative actions or it can authorize the police service to undertake the required measures. They are obliged to act upon the case request (art.161 paragraph 1 from the LCP) The mentioned officers in such cases have the emblem “investigative staff of the state prosecutor’s office” (art. 152 from LCP) and in the legal system they have a special position and authorizations from the procedural law’s aspect such as for example in relation to the special investigative measures, search of premises, confiscation of items and blood tests. These competences are recognized as authorizations for immediate undertaking of actions. Certainly, the state prosecutor can direct the “police investigation” (art 163 from LPC). Functionality this means that the order of the state prosecutor’s office to the police in which way to be directed, having in mind the concrete circumstances, means initial initiation of “police investigation” or delegation of certain competences of the state public prosecutor to the officers assisting the state prosecution. The mentioned officers are obliged to execute the orders of the state prosecutor’s office

⁴⁹ See: V. Dervieux, The French system, in: M. Delmas-Marty / J. Spencer (ED.), *European Criminal Procedures*, Cambridge University Press, 2002, 218 and further.

and to report about it. Certainly, the mentioned legal competences of the state prosecutor's office do not mean that the officers, and first of all the police, act only upon the orders of the state prosecutor but the officers and the police still have all the classical independent police competences (apprehension of persons, filing criminal charges etc).

The described procedure i.e. the organization of the officers for assistance to the state prosecutor's office is applicable not only to criminal acts committed within the police or by the police but also to all other criminal acts.⁵⁰

2.4. Slovenia

Exceptionally important for our analysis are the recent changes in the legislation and practice of Republic of Slovenia, due to two reasons: 1. The organization of the Slovenian public prosecutor's office and of the criminal procedure are very similar to the Macedonian, taking into consideration the traditions of the past (common) system of former Yugoslavia, and also the fact that in the legal reforms, Slovenia was used as a model for our reforms during the last 2 decades i.e. after the dissolution of Federative Yugoslavia, and 2: the newest reforms in terms of the prosecutorial control over the police are motivated from the same reasons as in Macedonia. Due to understandable reasons we will not present here the inter-relation between the police and the prosecutor's office, instead we will go more in details to the recent amendments of the LCP and the Law on public prosecutor's office from 2006 and 2007.

Namely, in Slovenia, in the second half of 2006 significant propulsions went on in the area of protection of the fundamental human rights from police abuse. The Constitutional court has found violation of the right to effective protection, art 15 paragraph 4 from the Constitution of Republic of Slovenia in relation to art 13 from the ECHR, because a case of death at the hands of police officers did not have a court resolution. The ECtHR, has come up with a similar decision in the case of *Matko against the Republic of Slovenia*, February 2nd, 2006, inter alia deciding that *Slovenia i.e. its state body did not ensure effective protection of the rights from art 3 of the ECHR, because the authorities did not conduct a thorough and effective investigation in relation to the well-reasoned complainant of the applicant that he was ill-treated by the police.*

Considering the decision and the reasons in the mentioned verdicts by the highest courts for human rights protection – at domestic and international level, the Government of the Republic of Slovenia assessed that in the Slovenian legislation apparently exists a certain systematic deficit in terms of the manner of protection of the fundamental rights of the individual in cases of application of the police authorizations, due to which there is a need to pass certain legislation as an additional step to strengthen protection of human rights and fundamental freedoms and the basic principles of legal state. As a most efficient systematic solution for of the mentioned systematic shortcomings are proposed the Law on amendments and supplements to the Law on Public Prosecutor's Office and the correlated Law on amendments and supplements to the LCP, based on which it is expected to contribute towards efficient protection of the rights of the individuals.

⁵⁰ See more: R. Juy Birmann/ H. Jung, The German system, in: M. Delmas-Marty / J. Spencer (ED.), *European Criminal Procedures*, 292 and further.

With the amendments of the Law on Public Prosecutor's Office (Official gazette RS, no 50/60 - edited text) in the Group of the State Prosecution for combating organized crime within the Supreme state prosecution of Slovenia (art.10 of the Law on State Prosecution) specialised unit that is exclusively competent to prosecute criminal acts committed by official employed in the police i.e. other officials employed in the sphere of internal affairs, in a body within the Ministry stipulated by Law as in charge for defense, that has authorizations of the police in the pre-investigative procedure and the seconded officials in missions is established. State Prosecutors of the unit are authorized to direct the police, the police officers that are transferred in the unit as well as other persons in the unit regarding detection of criminal acts.

The general State Prosecutor upon proposal of the Head of the Group or the Head of the specialized unit can decide to assign a case that was assigned to the specialized unit to the locally competent state prosecutor, if asses that due to the nature of the case, the prosecution of the perpetrator of the criminal act and the directing of the police would be more efficient if conducted by the state public prosecution.

There are at least two state prosecutors and one assistant of the state prosecutor in the specialized unit. The general state prosecutor on the proposal of the Head of the Group determines which prosecutors i.e. assistants of the group are assigned to the unit for four years with a possibility for extension. The Head of the specialized unit is assigned by the Head of the group with consent of the general state prosecutor pursuant to the annual working schedule with possibility for re-assignment. The Head of the specialized unit could be dismissed by the Head of the group upon previous approval or by request of the state prosecutor.

The specialized unit is staffed with the needed number of police officers that are specialized in detection of criminal acts from art 10 paragraph 4 of this Law. The police are recruited for mandate of six years with opportunity to be re recruited based on public or internal announcement in accordance to the provisions of the law regulating the civil servants or based on agreement between the general state prosecutor and the general director of the police. In a case of a transfer based on agreement, the police officer is obliged to give written consent for the transfer.

Persons that have status of law-enforcement officials pursuant to the law regulating the internal affairs, and persons who have status of police officer pursuant to the law regulating the police (here and after referred to as: authorized persons) could be employed in the unit based on public or internal vacancy all in accordance to the provisions of the law regulating the civil servants. The candidates must have professional capabilities for disclosure of certain criminal acts and they must fulfil the conditions from the Law on police.

The Head of the specialized unit supervises the transferred police officers and the authorized persons. The transferred police officers retain their rights pursuant to the rules on police and wages in the public sector. During their work in the unit, their wages can be supplemented in accordance to the regulations for public servants. The transferred police officer, after the discontinuation of the transfer is entitled to work with the police at the same or equally worth job position. The provisions with reference to the responsibility, rights and obligations deriving from art 80 of the law which stipulates the police are accordingly applied to the police officers transferred pursuant to this law. The police is obliged to provide the transferred police officers and authorized persons with technical conditions and assistance for conducting their police authorizations.

Such legislative projects are also considered to be supplementary strengthening of the fight against corruption and prevention of potential corruptive environments. Namely, significant exemption of “police investigation” from the police itself will prevent the potential “solidarity” between the investigators and the investigated that in fact are all members of the same organization.

According to the amendments of the LCP from 2006, if there are reasons for suspicion that an ex officio prosecuted criminal act has been committed by official person employed in the police i.e. other official employed in the internal affairs, in a state body within the ministry competent of defense, that has police authorizations in the pre-investigative procedure, or a seconded official person in a foreign mission, the police officers of the specialized unit of the Group of state prosecutors for prosecution of organized crime have authorizations of the police in the pre-investigative procedure.

The police officers of the specialized unit are obliged to instantly inform the competent state prosecutor from the specialized unit of the Group of state prosecutors for prosecution of organized crime in regards to the reasons for suspicion that such criminal act has been committed and to regularly inform him/her on the planning and flow of pre-investigative procedure.

The state prosecutor directs and monitors the pre-investigative procedure and decides for its flow and closure. He/she is entitled to access to all writs, to cooperate in the collection of evidence and to directly conduct certain procedural activities. Assigned police officers are obliged to act in accordance to the directives given by the state prosecutor.

2.5. Italy

In the Republic of Italy the judicial police is established by the Constitution of the Republic of Italy from 1947 (art 109), whereas is stipulated that the judicial authority directly orders the judicial police. The judicial authority presents so called “unique magistrate”, encompassing judges and public prosecutors. The judicial police include 3 types of police that are administrative parts of separate ministries:

1. State police, part of Ministry of Interior Affairs;
2. Armed carabineer police, part of the Ministry of defense;
3. Financial police, part of the Ministry of Finance.

According to the decision of the Constitutional court of 1963, the judicial police are only functionally dependant from the judicial authorities. Its functional dependence is not in collision with its administrative and disciplinary subordination to the executive power (subordination to the above-listed ministries).

According to the LCP of 1988 (including the latest amendments) every Bureau of the public prosecutor has established a special unit of a court police in the court where police officers of the three above mentioned police forces are located. The public prosecutor directly monitors the persons in the mentioned unit, the executive power is forbidden to revoke any of the assigned police officers without prior approval by the Head of the Bureau of the public prosecutor. The number of designated police officers could not be twice smaller than the number of all judges in the court (judges and public prosecutors). By two legally binding decrees from 1991 and 1992 Counter mafia Directorate (prosecution) in the court of Casation, which has special department of judicial police acting upon the orders of the counter mafia prosecution is established.

A certain weakness of the presented organisation of the judicial police is that the executive power (the above mentioned ministries) in the department of judicial police within the Bureau of the public prosecutor can assign police officers who are not specialized for conducting duties and competencies of the judicial police. Also, it should be emphasized that in the criminal law system of Republic of Italy the judicial police is competent to identify all perpetrators of criminal acts regardless of their status. The judicial police in Italy conduct its competences and duties exclusively in accordance to the orders of the public prosecutor with exceptional emergency cases such as flagrant violations and in cases of risk to loose parts of evidence when they act independently.⁵¹

3. Conclusions from the comparative research

3.1. The relation between the police and the PPO in criminal investigations

Interrogations and investigations could be led by prosecutors, magistrates, judges, national institutions for protection of human rights (such as Ombudsman and Human Rights Commissions in some countries) or inspectorates, depending on the nature and structure of the national legal systems. Some countries could also develop specialized units for investigation of cases of torture – within certain institution - such as the public prosecutor's office.

Even when a torture or misuse complaint is not confirmed after the investigation, it is of utmost importance that the investigation is led in accordance to all standards and to be able to confirm that it has been conducted lawfully and in accordance with all standards. The submitter of the complaint has to receive written decision, with reasoning that will elucidate all facts, evidence and conclusions of the completed investigation. The reasoning must point out that independent investigative entity has been established, and explain that thorough, prompt, and independent investigation has been conducted, and why such conclusions have been brought. The conduct of each investigation should also be regularly examined and the findings should be written in order to be able to identify the best practices and "lessons learnt" that could additionally contribute towards the increase of the quality of the future investigation.

The investigations must clarify facts about alleged cases of torture, but further more they must identify the practical schemes by the law-enforcement officials in cases of torture in order to be able to recommend indispensable measures for overcoming and prevention of such cases. The investigation must have the aim not only to identify perpetrators and responsible for the cases of torture and abuse of power, but also their supervisors.

The aim of such investigation is to discover the truth behind the allegations. In case it is ascertained that the allegations are not only allegations, than the investigation must collect evidence for three separate objectives, such as:

- Disciplinary responsibility of the perpetrators;
- Criminal responsibility of the perpetrators; and
- Full compensation for the victims by the state.

⁵¹ See: A. PERRODET/ M. CHIAVARIO, The Italian system, in: *European Criminal Procedures*, 348 and further.

The standard for the collected evidence presumably would differ for each of the above mentioned objectives and even in case the investigation was conducted swiftly - there would be undoubtedly certain period in between the different phases of the investigation. It is of significant importance that the collected material is of sufficient quality in order to be efficiently used in the above mentioned procedures and in securing evidence of sufficient quality which will confirm or surely reject the allegations.

One of the most important aspects of whichever investigation of possible cases of torture or other forms of inhuman and degrading treatment is systematic writing of the reasons for why certain procedural activities of the investigation were or were not undertaken i.e. the flow of the investigation should be systematically followed and put in written. Detailed notes on these decisions as well as explanations why such decisions during the investigation have been brought should be made separately for each case in accordance with the flow of the investigation. All undertaken procedural activities as well as collected information should also be carefully noted in order to secure their accuracy and to preserve the evidentiary material for its usage in front of the court in the further phase of the procedure.

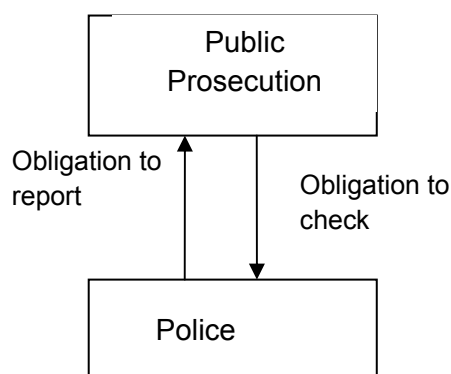
The investigations of torture should be conducted based on the principles of investigation for any other serious criminal acts. The main difference is that the alleged criminal act is committed by law enforcement officials, or other officials, which makes even more difficult the handling and identification of perpetrators than in other criminal acts. The acts of torture are also very often committed in closed institutions without independent witnesses. The evidence can be destroyed or hidden and there can be a culture of “confidentiality” by the official persons.

The investigators must document and respect the “chain of evidence” while collecting them with aim at their usage in the further procedure including also the potential criminal procedure. The investigators should be careful for the existence or absence of elements that confirm or negate the allegations of misuse, or any other evidence that proves certain established practices that cause misuse.

It is especially important, the persons tasked with the investigation to be independent from those involved in the events. Additionally, the PPO must conduct direct and effective control (oversight) on the operational activities within the investigation of alleged misuse by official persons. They must give clear directions on the manner in which the investigation should be led by the investigators.

3.2. Models of control – structure

Model 1: Traditional hierarchical relation



A. Advantages:

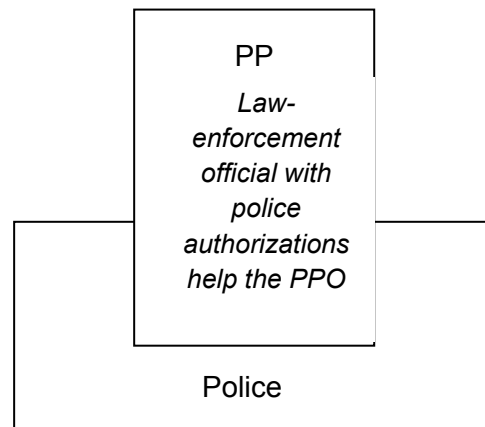
- Clear division of competences between two agencies that have different roles.

B. Disadvantages:

- Factual control depends fully on the existing resources;
- Risk of blockage of the procedure;
- Risk of misunderstanding between the institutions.

C. Exists in many countries excluding Sweden.

Model 2: Officials with police authorizations such as assistants of the prosecution



A. Advantages:

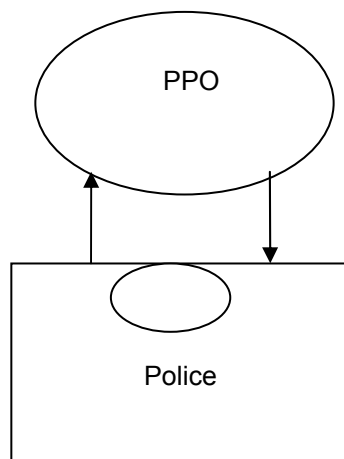
- PPO has direct access and power to give order to certain police officers.

B. Disadvantages:

- Conflict of interests for police officers who remain within the police structure and are accountable to the prosecution;
- Understanding the needs of the PPO remains as a topic for training;
- Limited impact by the PPO.

C. Exists in Germany, Holland, France, Italy.

Model 3: Public prosecutors in police stations



A. Advantages:

- The PPO is directly present and has a chance to advise the police;
- Information flow is less formal;
- Could contribute toward the increase of understanding between the two institutions.

B. Disadvantages:

- Prosecutors must maintain their different role.

C. Exists in England, Wales and Holland.

3.3. The role of the PPO in the investigation of abuse of power by law-enforcement officials⁵²

The research showed that there is a voluminous literature in regards to the relations between police and public prosecution,⁵³ but very little on the prosecutorial role in relation to investigation of serious police misconduct. What can be concluded from the existing sources is that indisputably there is a general tendency within relevant national authorities to avoid as much as possible to undertake necessary steps for efficient investigations, similar to the situation in the Republic of Macedonia.⁵⁴ This kind of „solidarity“ among the colleagues in the criminal-justice system is a sort of natural behaviour. It is a question to be answered how tolerant is this behaviour in a democratic country obeying to the rule of law principle. There is significant difference from country to country in terms of professionalism, responsibility, awareness and the value of human rights and principles of legal state.

Inefficiency of investigations in cases of police misconduct in sense of „hiding the cases in drawers“ in countries obeying to the rule of law, with highly developed professionalism and system of accountability, such is Germany, Austria and recently Italy is sanctioned as criminal act, and in comparison to the newly developed democracies and countries in transition it rarely occurs. Therefore it is understandable that there are no special measures required to handle the problem of solidarity which of course exists also in these countries where the police is the „hands and eyes“ of the prosecution, but there are no serious dimensions. There is a bit different situation in USA and Britain,⁵⁵ where this problem is seriously treated and

⁵² This encompasses all law enforcement officials. See art 24, paragraph 2 from the Law on Internal Affairs which determines that law enforcement officials are: 1) employees of police and operational employees, 2) employees that conduct tasks that are directly connected to police or operational issues and, 3) minister, his deputy, managers that lead certain organizational units. Further, according to art 145 from LCP law-enforcement officials of the Customs of Republic of Macedonia and financial police have the same authorizations as Mol has in the pre investigative and investigative procedure, in cases when working on identification of criminal acts and evidence gathering. However, this proposed system does not refer to private agencies for security, since for them the investigation conducted by police satisfies the conditions and criteria of independence, impartiality, promptness etc. The same will be conducted in regular procedure after which will follow action by public prosecution.

⁵³ See: S. Van den WYNGAERT, *Criminal Procedure Systems in the European Community*, Butterworths, London, 1993. See summary at webpage of Eurojustice (<http://www.eurojustice.org>).

⁵⁴ See reports of the Committee for prevention of torture for Republic of Macedonia: Report to the Government of "the Former Yugoslav Republic of Macedonia" on the visit carried out by the CPT from 12 to 19 July 2004 (CPT/Inf (2006) 36; CPT/Inf (2003) 3; CPT/Inf (2003) 5; CPT/Inf (2004) 29 (<http://www.cpt.coe.int>).

⁵⁵ See. A. SANDERS/ R. YOUNG, *Criminal Justice*, Second Edition, Butterworths, London, 2000; C. WALKER/ K. STARMER, (Eds.): *Justice in Error*, Blackstone, London, 1993;

investigated, but following the September 11, events and the „fight against terrorism“ the tolerance of police abuse is a controversial question.⁵⁶

The problem is perceived as something that requires serious attention almost in all countries but it is hard to recognize well thought action that is undertaken in certain countries in a planned manner within the entire criminal justice system, and particularly in the prosecutorial and police organizations, in order to overpass the inertia and the partiality that undermine the system of responsibility of persons with police or similar authorizations. This refers particularly to the relation prosecution – police. Namely, even besides the numerous standards and measures that are undertaken for enhancement of the internal control of police and civil control (including the significant role of the Ombudsman) except in few countries like Brazil and the newest measures in Slovenia, we did not succeed to recognize special measures and practices in other public prosecutorial organizations in Europe. So, for example, except in Slovenia, there are no special units of the public (state) prosecution competent for such offences

Different countries have differently organized and legally regulated the extent of dependence of the prosecution on the police in the criminal investigations (in general). Italy and other countries have so called „judicial police “ which is available and in a way under direct command of the public prosecution, while other prosecutions are more dependant from the activities and the capacity of the police (which is very much separated from prosecution). However, considering the huge legal authorizations and set up in the system, especially the supremacy over police (in functional but not in organizational sense), public prosecutions become sufficiently competent for detailed and efficient investigation, but in terms of independence and resources limited i.e. dependent of the police. With other words, they are more or less dependant from the police investigations and resources. This is so because the prosecution does not have its own investigators independent from the police. Due to that, they face with the usual obstacles in the investigations for police misconduct and deal with them in different ways.

The most difficult question is the overcoming of the solidarity in the collegial relations between police and prosecution, which is even more problematic in systems where mainly the investigations in the pre-investigative procedure are led by prosecutors but with essential support from police (Italy, Germany). These systems, alike others, with, if we may call them - „passive“ prosecutors (France, Macedonia) are not indeed active in the majority of cases where in practice are given to police inspectors. The way this is usually dealt is with a clear (legally prescribed) imposing of obligation to prosecutors for cases against police officers and others with similar authorizations to lead /deal with investigation themselves. That does not mean that they will have to do all on their own or with help of investigators that are assigned to work specially for them. For many issues certainly, there will be a need to engage resources from the police (special investigative measures etc). It is important the prosecution to conduct direct and efficient control (oversight) over the operational performance of criminal investigations against alleged police misuses. What seems to lack is the existence of clear guidelines for the way the prosecutors are expected to lead and monitor such investigations. It is also of essential need the prosecutors and investigators to be

WALKER/ STARMER (Eds.), Miscarriages of Justice, Blackstone, London, 1999. A. ASHWORTH, The Criminal Process, Second Ed., Oxford University Press, Oxford, 1998.

⁵⁶ See: P. B. HEYMANN/ J. N. KAYYEM, Protecting Liberty in the Age of Terror, MIT Press, Cambridge/ London, 2005.

particularly selected and trained for cases of police misuses, which issue also differs from country to country.

The essence (problem) is in the way how the prosecutorial and judicial authorities to be pushed to undertake decisional action while leading a procedure or when they came across information indicative to existence of torture or other police misuse. In that aspect it is very important whether the procedures are handled in the way that the involved persons have the real possibility to give statements and to present evidence in regards to the way how they have been treated.⁵⁷ This practice, in many countries is set with a systematic training and good practices but rarely regulated by explicit legal provision.

⁵⁷ See recommendations of CPT: CPT's 14th General Report, paragraphs 25-42 (CPT/Inf (2004) 28), The CPT standards, CPT/INF/E (2002/1-Rev-2006 (<http://www.cpt.coe.int>)).

Annex II

COMPARATIVE ANALYSIS OF THE EXISTING MODELS OF EXTERNAL CONTROL OF THE LAW-ENFORCEMENT BODIES

The history of establishment of external mechanism for control of the police is teaching us that is a matter of extremely difficult process, where the same or similar factors appear as obstacles or beneficial during its establishment. Among those general factors are:

1. **Political support** – is crucial in the establishment process of a body for external control over the police. This was especially visible during the establishment of such body in Northern Ireland in the context of the peacel process, whereas one segment of this process were the reform in the police. The same is the example from El Salvador, where in accordance to the peace agreement they establish an Ombudsman for Human Rights.
2. **Police cooperation** – Hostility of the police to each attempt to create external control over their work is the key factor that determines the success or failure of such mechanisms. For example in Canada in 1997 with an agreement between the conservative government and the police a weaker external mechanism oversight then the existing one (Office of Public Complaints Commissioner). The experience had showed that a ground for successful functioning of the external oversight mechanisms is the inclusion of the police in these processes. Good working relations with the police are precondition for efficient external oversight mechanism over the police.
3. **Public support** - Furthermore, the support of the public is of significant important in the establishment and functioning of the mechanisms for external control over the police. In this part also belong the NGOs specially those ones which prime target is protection of human rights and freedoms. Just as an example: the campaign of groups for human right defenders in Sao Paolo had contributed to serious reform of the police in Brazil and the creation of a mechanism of external control. Not having the NGO and the public support can easily undermine the efficiency in the functioning of such mechanisms. Therefore, for example in Colombo there was a lack of support for the external oversight control mechanism over the police because of insufficient transparency in the introduction of the NGO that work in the sphere of protection of the rights with the goals and the mission of such body.
4. **Budget** – It is obvious that external oversight mechanisms are requiring resources that will be sufficient and allow continues work in order to fulfil their function. Meanwhile, it must not be forgotten the political moment that can be encouraging in providing resources for the functioning of such mechanism or on the contrary to close the income valves undermining their efficiency and with it the support and legitimacy of their action.
5. **Management and leadership** – Effective management and leadership in administrating the bodies of the external control over the police is exceptionally important for the successful functioning. Effective leadership shall provide trust among the politicians and in the work of the bodies for external oversight.
6. **Public perception** – the public perception build through the media can be positive or negative support in the successfulness of the functioning of the external oversight mechanisms over the work of police. Usually, the creation of such mechanism is connected to the wide spread perception among the public that the police misuses its authorisations harming the rights and freedoms of the citizens and the justice for such misconduct is hard to reach.

Examples for this are the establishment of the Citizens Complainant Board in New York in 1953 year after the large number of accusations against police brutality, and in Great Britain after the bad investigation for the racially motivated murder committed by the police.

EXISTING MODELS OF EXTERNAL CONTROL OF THE POLICE

In regard to the structure and mission the following models of external control over the police are differed.

The first model of the external control over the police refers to acceptance and review of citizens complains for police misconduct by entities that are not police officials. These persons are leading independent investigation and for that purpose they are constantly engaged by the councils of the municipalities or the state. Considering that the inquest of allegations in the citizens complains for police misconduct are not conducted by the members of the police forces in the state, this model of external oversight is perceived as the **most independent**. In the frame of the general model of reviewing citizens complains there are certain differences in the procedure, more precisely in relation to the body that is competent to review and act upon the reports of the investigator for alleged police misconduct. Certain models are created in such way that the reports are reviewed by council of independent experts that at later stage are voting for the merit of the case, and they introduce the Chief of the police with the outcome.⁵⁸ Other models of control are recognising external municipal or state established agencies with executive director that has to provide an opinion upon the received report by the independent investigator and to introduce the Chief of the police with the report (locally, regionally or state level).⁵⁹

The characteristic of the first model of the external control over the police is the authorisations of the bodies that conduct the investigation to submit only recommendations to the police in regard to the investigated case, and not having the possibility to open or lead disciplinary procedure against the police official(s) and to punish the same.

Advantages

- Independent control:
- Acting upon citizens complains by entities that are not police officials;
- Enhanced trust among the citizens in this kind of control as objective (only via public announcement of the reports for the complaint handling procedures establishment of early warning system);
- Participation of various elements of the local or state community in the control body.

Weaknesses

- Not sufficient expertise of the members of the control body to be able to conduct quality investigation in the case of police misconduct;
- Not sufficient funds for quality investigation and functioning of such control bodies;
- Inability to take disciplinary or criminal procedure against the police officials charged with misconduct;

⁵⁸ San Francisco Office of Citizen Complaints.

⁵⁹ Cincinnati Office of Municipal Investigation.

- Inability to influence the general policy in the police service regarding elimination of causes that generate police misconduct.

The second model of external control is linking the investigation upon the individual complains for police misconduct with the actual police – precisely with the unit for internal affairs or professional standards. The reports of the conducted investigation are sent to the bodies for external control established with aim to provide opinion and decide if there was a breach of police authorisations in the concrete case and introduce the Chief of the Police with the outcome. Considering that the investigation upon the complains is located within the police, whereas the external control appears only as complimentary mechanism in the review of the citizens complains, this model of external control over the police is considered less independent from the previous model.⁶⁰

Advantages

- Inclusion of citizens (limited) in the control of police misconduct;
- Improvement of the communications channels with the wider community via publication of regular reports.

Weaknesses

- Less independent because they do not conduct independent investigation;
- Weak control over the policy of the police service in the administration of the law;
- Not sufficient information towards the community for their work.

The third model for external control is a kind of complain procedure upon the report of the internal control body regarding the police misconduct. Namely the individual complaints are received, reviewed and the decision is made by the actual police. If the individual is not satisfied with the final decision by the police body authorised to review and decide upon the complaint, the complainant can then submit the case for a review and decision to an independent body established for that purpose. It is a matter of procedure of external control that has low level of independence and efficiency in the control of police misconduct.⁶¹

Advantages

- Low level of citizens control offering form of a complain procedure upon a decision by internal body for control over the police.

Weaknesses

- Less independent control system from the previous two;
- Not conducting independent investigation of the detected cases of police misconduct;
- It does not solve the concern of the community for the police misconduct;
- Weak and no influence on the policing method of the police service;
- Not sufficient information towards the community for their work.

The fourth model of external control over the police is known as “auditory”. The individual complaints on police misconduct are received, investigated and decided by the actual police. The “Auditor” (as external control mechanism) conducts regular checks over the work of the police internal control bodies and submits interim reports that are public. Furthermore, the “Auditor” also examines the complaint handling method and if there were certain omissions in the procedure that could influence the

⁶⁰ Kansas City Office of Citizen Complaints (OCC)

⁶¹ Omaha Citizen Complaint Review Board

final decision.⁶² Usually the “Auditors” are permanently employed in the municipalities or the state administration that are responsible to the body that had appointed them to this function. In certain cases it is a matter of lawyers engaged by a fix term agreement.

Advantages

- Monitoring the unit for internal control and the professional standards of the police;
- Identification of the problems and offering solution for their improvement;
- Providing public forum for discussion regarding the problems that the unit for internal control and professional standards in the police is facing with.

Weaknesses

- Weak or almost no independence;
- Does not offer significant form of control for police misconduct.⁶³

FEW CHARACTERISTIC MODELS OF EXTERNAL CONTROL

1. American example

The United States of America are certainly the first state that seriously considered the problem of control over the police in the 1960's. Different national commission were proposing internal changes in the police with aim to strengthen the traditional form of the hierarchically structured responsibility for police misconduct. The changes that occurred in the police were followed with a request to strengthen the mechanisms for external control, as a way that the public (the citizens) could gain greater control over the police conduct, with aim to improve the communication channels and to regain the trust in the police service.

With aim to illustrate how the external control over the police in the USA was developed, the example of establishment of a Board of Police Commissioners of Detroit, which was comprised of five members, appointed by the Mayor and approved by the City Council will be presented. Among the other competencies two are of utmost importance: the opportunity to receive and to act upon complaints regarding the police behaviour and to act as final instance in the initiation or conduct disciplinary procedure against the police officials. The members of such composed Board are functioning on part time working terms; they have executive secretary that is full time employee and coordinates the activities of the Board. Furthermore, the Board has an investigator with associates that conduct the investigation part for the police misconduct. The Board acts upon several kinds of complaints: those submitted directly to the police, municipal bodies, to the Mayor and to the Board. The same are sent to the executive secretary that assess if there is a possibility for informal resolution. If that is not possible, then the complaints are sent to the Chief of the investigation that acts upon them, determining if the complaint allegations are correct or not. If it is determined that there is a police misconduct, then a disciplinary procedure for the perpetrators is initiated. The Board can re-review and reassess the entire complaint procedure if the citizen considers that there were omissions that

⁶² Albuquerque Independent Council

⁶³ More for the models see: Merrick Bobb, Symposium: New Approaches to Ensuring the Legitimacy of Police Conduct – Civilian Oversight of the Police in United States, 22 St LOUIS U. PUB. L. REV. 151 (2003) Chapter 4
(<http://www.metrokc.gov/sheriff/downloads/sheriff/slumerrickpaper.pdf>)

influenced the final decision for the police misconduct. If there are grounds to reopen the complaint, the procedure starts from the beginning. Furthermore, the Council acts upon complaints of the police officials that were subjected to disciplinary procedures. This model is one of the representative mechanisms of the external control over the police in USA that are moving from limited role of the control bodies to their greater authorisations and independence while handling complaints for police misconduct.⁶⁴

2. English example

It must be considered that the American model for external control is not the unique in the world. Among the states that were active in the development of the external control mechanisms over the police are also Australia, Canada and England.

In England and Wales until 1976 the police was the one that entirely took care for the method upon which they perform their function in the society and for the sanctioning of the cases of police misconduct. Following public pressure in 1976, a Police Complaint Authority was established, comprised of members that were performing this duty on part time basis. This body in the beginning was functioning quite defensive with narrow authorisations in the complaint process and with very weak contacts with the police.

The Independent Police Complaint Commission that is currently operational (since 1st of April 2004) it is expected to be replaced with the Police Complaint Authority on 1st of April 2009. It is a matter of nongovernmental public body financed by the British government, but completely independent of the police and the political influence of the parties. Their decisions are released from any kind of influence by the government. The chairperson of the Commission is assigned by the Queen, while the other ten members (not less), are assigned by the State Secretary. For the Chairperson of Commission the requirement is total independence and not to belong to security structures of Great Britain. The new model of the Commission secures total independence and emphasises its role as protector or guardian of the complainant system against the police with aim to increase public trust for their own work. The Commission is managing and monitoring the police investigation of citizen's complaints and conducts independent investigation for serious cases of police misconduct. That includes accusations:

- Of dead and severe bodily injuries;
- Of organised cases of corruption;
- Against high ranking Police officers;
- Of racistically motivated cases;
- Of cases of obstruction of justice.

The investigations of the Commission are fair and proportional with the need to determine the truth in the case, and will consider the arguments of all involved parties. Informing the complainant for the flow of the procedure is continuous during

⁶⁴ Human Rights Watch, "Shielded from Justice: Police Brutality and Accountability in the United States," June 1998, <http://www.hrw.org/reports98/police/uspo22.htm> (last accessed Aug. 4, 2003); Kendall Stagg, "Who Should Police the Police?" *Reno News and Review*, Apr. 18, 2002, <http://www.newsreview.com/issues/reno/2002-04-18/guest.asp> (last accessed July 7, 2003).

the entire investigation, and the form of the investigation is independently decided by the Commission, considering the seriousness of the case and the public interest that needs to be protected.

The Commission as guardian of the police complaint system defines its function via four elements:

- Allocation, promotion, monitoring, inspection of the standards of police proceeding upon citizens complaints;
- Promoting the trust in the complaint system;
- Accessibility to the complainant system; and
- Promoting good police behaviour based on lessons learned by the work performed by the Commission.

The Commission has the authority to act upon all accusations for police misconduct, to propose changes in the police procedures and in the complaint procedure with aim to improve the efficiency of the same, as well as to prepare annual reports upon request of the State Secretary, and other reports that are targeting certain matters in the area of police procedures and authorisations and to enter and conduct inspections in the police stations.

It is expected to have changes in the composition of the new independent body in 2009. Namely, according to the proposal the members of the Independent Police Complaint Authority will be selected from the row of citizens (five) nominated by the State Secretary, five people will represent the association of police commanders, five people will represent the police Federation of England and Wales, five people will represent the National police Association of black people and five will be nominated by the row of law experts (advocates, judges, etc).

3. African example

Maybe the best example for independent mechanism control of police misconduct is the establishment of the Independent Complainant Directorate (ICD) of South – African Republic in 1967, as governmental body. The ICD is established with an aim to guarantee that never again the police authorities will misuse their authorisations. It is a matter of completely independent body from the police, that functions independently out of any influences by the government and the police. The beginning was very modest, and it became serious control mechanism over the police with 171 employees and budget of 40 million dollars.

It investigates all cases of death caused while police conduct, as well as all other cases of criminal and police misconduct that violate the rights of the citizens. In these contests are the investigations for inclusion of police officials in criminal activities, robberies, corruption, violence, as well as the investigations for violations of the police code of conduct and inappropriate conduct upon cases of family violence. The investigation is initiated upon citizen's complaint, the victim, witness or NGO or other organisation, that can be submitted directly, by fax or e-mail. Furthermore, this body has exclusive authority to conduct investigation mero motu, especially when for the police misconduct they found through the media or some other source. In case of death while in police custody, the ICD must be informed at once, and their investigators immediately are visiting the site event. The aim of the control conducted by this body is to determine the truth. If it is determined that the death was caused by the police then the concrete responsibility is located and the case is sent to the

prosecutor and the court. The complainant upon whose complaint the ICD acted is informed for the entire course of the procedure.⁶⁵

4. Police Ombudsman of Northern Ireland

The Police Ombudsman ensures the efficiency, effectiveness and independence of the police complaints system; and the confidence of the public and of members of the police force in that system. For this purpose all complaints about the police force are made to the Police Ombudsman, and if made to a member of the police force, the Police Authority or the Secretary of State will be referred immediately to the Ombudsman.

The Police Ombudsman provides an independent, impartial police complaints system for the people and police under the Police (Northern Ireland) Act 1998 and 2000. The institution is entirely independent of the police.

The Police Ombudsman is appointed by Her Majesty. The appointment as Ombudsman may be full-time or part-time, for a period of 7 years.

The complaints investigated by the Police Ombudsman may involve allegations of criminal behaviour by a police officer, or allegations that a police officer broke the police code of conduct. Even if a complaint has not been submitted to the Police Ombudsman, he or she can investigate a matter if there is reason to believe that a police officer may have committed a criminal offence or violated the police code of conduct. The Police Ombudsman can also investigate a matter based on a request from the Secretary of State, the Chief Constable or the Policing Board. The Police Ombudsman is also authorized to investigate a current practice or policy of the police.

Formal investigation by the Police Ombudsman - for matters that are formally investigated the Police Ombudsman appoints an officer of the institution to conduct the investigation. The employees of the Police Ombudsman for the purposes of conducting or assisting in the conduct of, an investigation have all the powers and privileges of a constable. At the end of the investigation the person appointed to conduct the investigation submits a report on the investigation to the Police Ombudsman.

Referral of complaint for formal investigation to the Chief Constable - the Chief Constable appoints a police officer to investigate it formally on behalf of the Police Ombudsman. The appointment is made only if the Police Ombudsman gives notice to the Chief Constable that he / she approves that person. Such investigations may be supervised by the Police Ombudsman, if he considers that it is desirable in the public interest for him to do so. The Chief Constable has to be notified of the decision. The Police Ombudsman may impose requirements as to the conduct of an investigation, and the police officer is bound to comply with any of the requirements imposed. At the end of the investigation a report is submitted to the Police Ombudsman.

⁶⁵ For more, see: <http://www.icd.gov.za/>

After the investigation is completed the Police Ombudsman may decide the following:

- Recommend to the Director of Public Prosecutions (the DPP) that the police officer should be prosecuted. It is for the DPP to decide whether they will prosecute the officer;
- Recommend that the Chief Constable should bring disciplinary proceedings against the officer involved. If the Police Ombudsman and the Chief Constable disagree about whether the police officer should be brought before a misconduct hearing, the Police Ombudsman can insist that the Chief Constable does so;
- Recommend compensation;
- Recommend that disciplinary proceedings should be brought by the Policing Board if the officer against whom a complaint has been lodged is an Assistant Chief Constable, a Deputy Chief Constable or the Chief Constable.

The Police Ombudsman does not investigate officer's conduct that has already led to criminal or disciplinary action, unless there is new evidence that was not available at the time of the original investigation; complaints that are "out of time"; complaints about an off-duty officer, unless the fact that he or she is a police officer is relevant to the complaint; and complaints about traffic wardens or other civilian employees of the police.

The Ombudsman has access to all information and documents which are required for the purposes of, or in connection with, the exercise of any of his functions.

The Ombudsman may, with the approval of the Secretary of State employ such persons as he thinks fit to enable him to carry out his functions. The Police Ombudsman and the Chief Constable may enter into arrangements for members of the police force to be engaged for a period of temporary service with the Ombudsman. Also arrangements can be made with the chief officer of a police force in Great Britain for members of that police force to be engaged for a period of temporary service with the Police Ombudsman.

The Police Ombudsman produces an Annual Report on the handled complaints, which is submitted to the Parliament, as well as reports on other issues of public interest. It also forwards copies of its reports to the Chief Constable and to the Policing Board, and provides the Policing Board with relevant statistics

5. Other models of external control

In **Australia** was established a Commission for criminal justice to control the police conduct, as a result of large number of cases of police violent and corruptive behaviour. In 1992 **Israel** establishes external complainant council, while **Columbia** as a country with the highest rate of state violence establishes Complaints Commissioner with elements of internal and external processing of cases of misuse of authority by the police. In 2003 the Parliament of Peru established the national civil security system with aim to make the police service responsible for the method of deliverance of the safety component in its work towards the citizens and to open the possibility for citizens participation in the affairs of the local security.

Overview of different models of external control of the police⁶⁶

Table 1

Independent investigation	Examples	Characteristics
	Northern Ireland – Police Ombudsman England/Wales – Independent Police Complaint Commission	Total independence from the police; Receives complains from citizens; The investigation is conducted by an independent investigator who is not a police official; For the findings of the investigation he/she informs the police.
	Minneapolis , USA – Citizens Authority for investigation	
	New York, USA – Citizens Complaint Council	
	Oakland, USA – Citizens Oversight Council	

Table 2

Police investigation with citizens oversight, or complaints to citizens oversight Boards	Examples	Characteristics
	South Africa - Independent Complaint Directorate	The complaint are received by Citizens Boards or the police; The investigation is conducted by the police; The Citizens Boards are reviewing the investigation reports; The Citizens Boards can request additional investigation if they are not satisfied with the police report from the investigation.
	Victoria, Australia – Deputy Ombudsman	
	San Diego, USA – Citizens Oversight Board for the relations between the police and the community	
	Ontario, Canada – Commission for public complains	

⁶⁶ For more, see: CIVILIAN OVERSIGHT OF POLICING - Lessons from the Literature, Joel Miller with the assistance of Cybele Merrick Vera Institute of Justice: Global Meeting on civilian Oversight of Police Los Angeles, May 5-8, 2002 (http://www.vera.org/publication_pdf/178_338.pdf), pp.: 3 -84;
Citizen Oversight of Police in the United States (<http://www.cabq.gov/council/abqrpt9.html>).

Table 3

General Auditors, Human Rights Commissions	Examples	Characteristics
	India - Human Rights Commission	Wide mandate for investigation and giving recommendations on the complaint handling process and detecting the conditions that lead to police misconduct; Undertaking investigation upon individual cases of police misconduct.
	San Hose, USA – Independent Police Auditor	
	Sao Paolo, Brazil - Auditor	
	Los Angeles, USA – Local Sheriff	

Table 4

Other models of external control	Examples	Characteristics
	Los Angeles, USA – Council of police Commissaries	Consultations and control over the implementation of the goals and policies of the police service.
	Chicago, USA – Meetings with citizens	

LIST OF ABBREVIATIONS:

CPT	Committee on Prevention of Torture
ECHR	European Convention for Human Rights
ECtHR	European Court of Human Rights
EU	European Union
LCP	Law on Criminal Procedure
LPP	Law on the Public Prosecutor's Office
Mol	Ministry of Interior
NGO	Non-governmental organisations
OSCE SMMS	OSCE Spillover Monitor Mission to Skopje
PPO	Public Prosecutor's Office
RM	Republic of Macedonia
SICPS	Mol's Sector for Internal Control and Professional Standards
UN	United Nations

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- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;
- UN Standard Minimum Rules for the Treatment of Prisoners;
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- UN Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment;
- UN Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions;
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