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Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)

Honouring of obligations and commitments by Ukraine

Information note by the co-rapporteurs on their fact-finding visit to Kyiv¹ (5-8 April 2009)

Co-rapporteurs: Ms Renate WOHLWEND, Liechtenstein, Group of the European People's Party, and Ms Sabine LEUTHEUSSER-SCHNARRENBERGER, Germany, Alliance of Liberals and Democrats for Europe

¹ This information note has been made public by decision of the Monitoring Committee dated 5 June 2009.

I. Introduction

1. The previous visit of the co-rapporteurs to Ukraine in the framework of the monitoring procedure of the Parliamentary Assembly took place from 14 to 16 January 2008.² While we had originally planned to visit the country in the second half of 2008, we decided to postpone this visit in the light of the political uncertainty as a result of the possibility of early parliamentary elections in December 2008. The discussions on these pre-term parliamentary elections were ultimately abandoned.

2. In January 2008, Ms Hanne Severinsen, who had been co-rapporteur with respect to Ukraine since 1997, left the Parliamentary Assembly and was replaced, on 22 January 2008, by Ms Sabine Leutheusser-Schnarrenberger.

3. Our fact-finding visit took place from 5 to 7 April 2009. The main aims of this visit were to familiarise ourselves with the recent political developments in Ukraine as well as with the state of affairs regarding of the constitutional reform, electoral reform and reform of the judiciary and justice system since the last visit. During our visit, we met with the President of Ukraine, Mr. Viktor Yushchenko; the Speaker of the Verkhovna Rada, Mr Volodymyr Lytvyn; the First Vice Prime Minister, Mr Oleksandr Turchynov; the Minister of Justice, Mr Mykola Onishchuk; the acting Minister for Foreign Affairs, Mr Volodymyr Khandogiy; the President of the Constitutional Court, Mr Andriy Stryzhak; the Procurator General, Mr Oleksandr Medvedko; the Secretary of National Constitutional Council, Ms Maryna Stavniychuk; the Chairman and members of the Working Group of Verkhovna Rada on the preparation of the draft Election Code; as well as representatives of civil society and the diplomatic community in Ukraine. Due to time constraints, our meeting with the members of the Ukrainian Delegation to the Parliamentary Assembly was postponed until the April part-session of the Assembly and took place on 28 April 2009. We are very grateful to the members of the Ukrainian delegation for offering us this opportunity to meet at a later date. The programme of our meetings is attached in Appendix I.

4. We would like to express our gratitude to the Verkhovna Rada and the Representative of the Secretary General, as well as the Director of the Information Office, of the Council of Europe in Kiev for the excellent programme and support extended to the delegation. In addition, we would like to thank the German Ambassador in Kiev for his kind hospitality.

5. Our visit took place against the backdrop of the presentation by the President of his proposals for a new constitution, as well as the political controversy with regard to the decision of the Verkhovna Rada to call for presidential elections on 25 October 2009. The President is contesting the legality of this decision and has filed an appeal with Constitutional Court. As a result, these issues played an important role during our discussions with the different political actors. The statement issued following our visit is attached in Appendix II.

II. Recent political developments

6. In our last information note, we already expressed our serious concerns with regard to the systemic constitutional crisis in Ukraine, due to the unclear separation of powers and resulting political tug of war between the President, Prime Minister and Parliament of Ukraine, as well as the effect this is having on the democratic consolidation of the state institutions. Regrettably, this crisis and accompanying infighting has continued dominating the political landscape for most of the time since the last visit to the country. This political instability has in turn seriously hampered the coherent implementation of the many reforms needed and requested by the Assembly.

7. On 4 September 2008, a new political crisis broke out after President Yushchenko's Our Ukraine – People's Self Defence Bloc (OU-PSD) withdrew from the governing coalition with Prime Minister Yulia Tymoshenko's party (BYuT), following the adoption, with the support of BYuT, of a law to limit the presidential powers. In the weeks that followed, the country was without a working coalition or Speaker of the Parliament, which made the passing of laws impossible. On 8 October, President Yushchenko, stating that the formation of a new governing coalition was impossible, dissolved the parliament and called for pre-term parliamentary elections on 7 December 2008. However, his decision was challenged by several parties and parliament failed to approve the funding required for the organisation of the elections. The elections were subsequently postponed by the President, first to 14 December 2008, and then to an unspecified date in early 2009, in order to deal with the effects of the global financial crisis which was hitting Ukraine harder than most countries.

² See the information note on that visit, Doc. AS/Mon(2008)06 rev, declassified in March 2008

8. After attempts to form a governing coalition between BYuT and the Party of Regions failed, a new coalition was formed between Our Ukraine and Bloc Yulia Tymoshenko with the addition of the Lytvyn Bloc of Volodymyr Lytvyn, who was also elected Speaker of Parliament. The coalition agreement was officially signed on 16 December 2008. The formation of this governing coalition ended the spectre of early parliamentary elections and ushered a period of relative political stability and renewed legislative activity.

9. A new crisis broke out on 1 April 2009, when the Verkhovna Rada passed a Resolution which called for regular presidential elections on 25 October 2009. This decision is contested by the President, who has filed an appeal against the decision of the Verkhovna Rada with the Constitutional Court of Ukraine. The Constitution stipulates that *“Regular elections of the President of Ukraine are held on the last Sunday of the last month of the fifth year of the term of authority of the President of Ukraine”* (Article 103 of the Constitution). In his appeal, the President therefore asserts that, as his inauguration was on 23 January 2005, the elections should take place on the last Sunday before 23 January 2010, that is on 17 January 2010.

10. However, while contesting the decision to call for regular presidential elections on 25 October, the President has indicated that he would be willing to call for pre-term³ presidential elections if, inter alia, parliamentary elections were to take place on the same date. There are a number of legal issues that are of serious concern to us in relation to the forthcoming presidential elections, especially if they were to coincide with parliamentary elections. We will discuss our concerns in more detail in the section on electoral reform in this note. However, we would like already to stress our position that, under the current legal framework, the organisation of presidential and parliamentary elections on one and the same day would be potentially disastrous, if not outright impossible.

11. In what seems to us an attempt to strengthen his negotiating position in this respect, the President has demanded a decision of the Constitutional Court on whether the new governing coalition was formally established⁴. In his view, the coalition did not formally propose a new Prime Minister and government for appointment by the Verkhovna Rada as it is constitutionally obliged to do. This, again in his opinion, would imply that the governing coalition is not formally established.

12. On 13 May 2009, the Constitutional Court of Ukraine ruled that the Resolution of the Verkhovna Rada calling for Presidential elections on 25 October 2009 was unconstitutional and invalidated this decision. At the moment of writing, the Constitutional Court of Ukraine has not yet reached a decision on the request of the President to decide whether a governing coalition has been formally established by the Verkhovna Rada.

13. As already mentioned, Ukraine was hit especially hard by the global financial crisis, with its GDP falling by more than 14% in November 2008 and its industrial production nearly twice as much. In addition, the local currency, the Hryvnia, lost more than 50% of its value against the Euro and lay-offs in the industrial sector sent its unemployment spiralling. On 29 October 2008, setting aside its differences in the ensuing political crisis, the Verkhovna Rada approved a series of emergency measures in order to secure a \$ 16.4 billion IMF emergency loan to deal with the financial crisis.

14. In addition, on 1 January 2009, the energy dispute between Ukraine and Russia escalated when Russia turned off the gas supply to Ukraine over differences with regard to the payment of \$ 2 billion in outstanding gas bills by Ukraine and the Russian demand that Ukraine should pay \$ 450 per 1000 cubic meters of gas, more than twice as much as it had been paying until that moment. As a result of this dispute, gas supplies to a number of European countries were disrupted in mid-winter. The dispute was finally resolved in an agreement signed, on 18 January 2009, between Prime Ministers Putin and Timoshenko, which included the monitoring of the gas transit lines in Ukraine by European Union Monitors.

III. Constitutional Reform

15. In Resolution 1549 (2007), adopted in April 2007, the Assembly recommended the Ukrainian authorities to re-launch the constitutional reform project, in close co-operation with the European Commission for Democracy through Law (Venice Commission), in order to improve the Constitution of Ukraine and bring it in line with European standards, in particular as regards the provisions on the separation of powers, the imperative mandate, the judiciary and the procurator, as stipulated in various opinions of the

³ According to the President, any presidential elections before 17 January 2010 should be considered as pre-term elections which, if the post is not vacant due to other circumstances, can only be called for by the President on his own initiative.

⁴ According to the Constitution, the Verkhovna Rada has three months to form a ruling coalition and appoint a government. If it fails to do so the President should dissolve parliament and call for new parliamentary elections.

Venice Commission and Assembly Resolutions. In our information note of March 2008, we noted our concerns that the discussions on the introduction of a new constitution seemed to be driven by the political agendas on redistribution of powers, rather than by the desire to reform the political and legal system with a view to bringing it further in line with European standards.

16. Regrettably, it appears that the constitutional reform process since the last visit has continued to be a victim of the almost perpetual political in-fighting and political strife and resulting succession of political crises.

17. In February 2008, on the initiative of the President of Ukraine, a National Constitutional Council was established and composed of members of the presidential administration, members of the different factions in the Verkhovna Rada, judges, members of the civil society and independent legal experts. However, the work of the National Constitutional Council was de facto boycotted by a number of political forces. After what seemed to be a period of limited activity in the second half of 2008, the President presented to the Verkhovna Rada, on 31 March 2009, a draft Constitution based on the concept prepared by the National Constitutional Council.

18. The draft constitution, inter alia, seems to a large extent to preserve the mixed presidential-parliamentary system and current balance of powers, as well as the prerogative of the President in the foreign relations and security fields. It introduces a bi-cameral parliament and the right of popular initiative to introduce into the parliament new draft laws or amendments to the Constitution. Judges to the Supreme Court and higher specialised courts are appointed by the new Senate on proposal of the High Council of Judges; other judges are appointed by the President on the proposal of the High Council of Judges. Moreover, judges to the Constitutional Court are appointed by the senate on proposal of the President of Ukraine. With regard to the procuratura, the proposed draft removes the oversight function, as well as the right to conduct pre-trial investigations, from the general prosecutor's office powers.

19. In parallel to the work of the National Constitutional Council, a draft constitution was prepared by BYuT and the Party of Regions (PoR), but this draft has not (yet) been introduced in the parliament. In addition, a draft constitution was prepared by a group of scholars headed by Professor Shapoval. Although the latter is not an official draft supported by any state organ, it was an important element in the discussions in the National Constitutional Council. The Monitoring Committee, therefore, at its meeting on 12 March 2008, decided to ask the Venice Commission for an opinion on this draft. This opinion was adopted by the Venice Commission at its plenary session in June 2008.

20. In our meeting with the Speaker of the Verkhovna Rada, the latter suggested that the Rada could establish a special working group to review the different drafts for a new constitution with the aim of consolidating them into a single unified draft that would then be sent to the Venice Commission for opinion.

21. We would like to reiterate our doubt about adopting a completely new constitution instead of amending the existing one where necessary, especially in the light of the unclear legal procedure for adopting a totally new constitution and taking into account that the current Constitution, in the opinion of the Venice Commission, is very comprehensive in its protection of fundamental rights and freedoms and "shows willingness to protect the full scope of rights guaranteed by the European Convention on Human Rights"⁵. In addition, amending the current constitution would also have the advantage of being able to prioritise the most urgent issues, such as the unclear balance of powers between state organs, judicial reform, independence of the judiciary and reform of the election system.

22. A major issue of potential concern is the manner in which a totally new constitution should be adopted and the possibility that the legitimate role of the parliament in amending the Constitution could be circumvented by attempting to adopt a new constitution by a people's initiative. While the process for adopting amendments to the Constitution is clear – including adoption of the amendments by a two-thirds majority of the members of the Verkhovna Rada -, the process for adopting a completely new constitution is not clearly defined.

23. In the view of the Venice Commission, the adoption of an entirely new constitution would have to be in full compliance with the provisions in the current Constitution⁶ for amending the Constitution, including the approval by two thirds of the members of the Verkhovna Rada. On 18 April 2008, the Constitutional Court of Ukraine, while confirming the right of the people of Ukraine to change their constitution by way of an all-

⁵ CDL(2008)072

⁶ Chapter XIII of the current constitution

Ukrainian referendum, held that the adoption of a new constitution should fully respect the amendment procedure of the existing Constitution.

24. The fact that the presidential draft for the new constitution has been submitted in the form of a draft law on amending the current constitution ensures that the constitutional role of the Verkhovna Rada will be respected in this regard.

25. The President has submitted his draft constitution to the Venice Commission for opinion. We will therefore reserve our comments on his draft until this opinion has been adopted. However, we note that a number of interlocutors indicated that his proposal is a workable draft for further discussion, even if they would feel that a number of its provisions should be changed or adapted.

IV. Electoral Reform

26. The last two parliamentary elections in Ukraine were organised in conformity with international democratic standards, a fact which underscores the progress made by the country in this area. However, as we have noted in several reports, the current election system, based on closed lists in a single national constituency, has inherent flaws that hinder the further consolidation of a genuinely democratic election process in the country. Moreover, further provisions that strengthen party democracy and enhance their transparency need to be implemented. We therefore strongly recommended further electoral reform, particularly the adoption of an election system based on open lists with regional representation, as well as the adoption of a proper law on political party and campaign financing that is in line with European standards and that would provide state funding for political parties.

27. Ukraine does not have a unified Election Code and different elections are governed by different laws: Law on elections of the Ukrainian President, Law on elections of People's Deputies, Law on the Election of Local Councils, Law on the All-Ukrainian and Local Referenda, as well as the Law on the State Register of Voters and relevant provisions in the Constitution and other legal acts. As mentioned by international election monitors, including those from the Assembly, these laws are not coherent and are at times in contradiction to each other, and are too complex and detailed. The Assembly, as well as the Venice Commission of the Council of Europe and other international bodies, have therefore strongly recommended that the Verkhovna Rada adopt a Unified – and simplified – Election Code that would govern all aspects of the different election processes in the country.

28. Some progress has been made in this respect. The Verkhovna Rada has established a special working group, composed of members of each of the parliamentary factions as well as outside experts, which is tasked with drafting a Unified Election Code.

29. During our visit, we met with the Special Working Group of the Verkhovna Rada for the drafting of a Unified Election Code and were heartened to see the constructive and consensual working atmosphere in this group. We welcome the fact that, after initially declining to participate, a representative of the Party of Regions has now also joined the group, which means that all parties and factions are included in the working group. All members assured us that an agreement on a new Unified Election Code, including a consensus on a new election system, would be possible in the near future. We therefore call upon the leaders of all political forces to follow the example of, and give their full backing to, their members in this working group in order to ensure that a consensus on the election system and the legal framework for elections can now be achieved without further delay.

30. Besides the special working group on the drafting of a Unified Election Code, several individual MPs from different parties have presented amendments to the Law on the Election of People's Deputies. By January 2009, a total of 8 different draft laws on parliamentary elections were prepared by different political parties. Most of these drafts aim to introduce a regional element in the election system and propose different mechanisms for voters to express their preferences for candidates on the ballot. In February 2009, the Venice Commission participated in a round table with the proposers of the different drafts with the aim of finding common ground between these proposals which could then be introduced in the work of the special working group on the drafting of a new Unified Election Code. We welcome the apparent consensus among the different parties that the current election system based on closed party lists in a single national constituency is flawed and that a regional component as well as an open list need to be introduced into the election system in Ukraine, as recommended by the Assembly.

31. However, one of the draft laws raises serious concerns. This draft proposes the creation of a new system of allocating the seats in the Verkhovna Rada, which entails two Rounds of elections based on a

proportional system in a single national constituency. The first round determines which parties and blocs will enter the new parliament. A second round of voting is then organised between the two parties which received most votes in the first round. The winner of the second round is automatically allocated the majority of seats in the new parliament. The remaining seats are then allocated on the basis of the results in the first round of voting. In its opinion on this draft law⁷, the Venice Commission concluded that this proposed system would be problematic in the light of international standards, would create an artificial majority that would not reflect the real will of the voters and would only further exacerbate the division within the country. We were informed during our visit that there is currently very little political support for this proposal, which we welcome.

32. Another fundamental flaw that needs to be addressed, is the intention, contained in Article 85 of the Draft Constitution of Ukraine as adopted by the Verkhovna Rada in 2004, to introduce the so-called imperative mandate, by which the mandate of the members of the Rada pertains to the parties on whose ticket they were elected and not to the individual members themselves. Furthermore, in 2007, BYuT presented a proposal for amendments to the Law on the Status of People's Deputies of Ukraine that would deprive those members of their mandate who would not join their nominating party faction or those who would split from their parties or even participate in other parties' activities. In a draft report on the Imperative Mandate for the Venice Commission⁸, the writer of the report concluded that these models of a party administered mandate⁹ run counter to the principle of a free and independent mandate and are thus incompatible with European standards.

33. In our discussions with the members of the working group, a number of important issues in relation to the forthcoming elections were brought up. After the flawed second round of presidential elections in 2004, special legislation was adopted to address the shortcomings - which had led to serious irregularities in the election process - noted in the two previous rounds. These amendments entailed, inter alia, changes to the composition of the election commissions, abolition of the absentee voter certificates, as well as changes to the manner in which the electoral lists were drawn up and amended. However, this legislation was of a temporary nature and has since expired. This means that, if no urgent action is taken by the Verkhovna Rada, the forthcoming presidential elections will take place under the same flawed legal framework as that governed the first two rounds of the presidential elections in 2004.

34. The members of the working group were well aware of this problem, but informed us that their mandate did not allow them, as a group, to take the initiative to propose the necessary amendments to the Rada. The temporary legislation adopted in 2004 should therefore be urgently re-enacted, or the timeframe for its validity extended, so that the changes remain in force for the upcoming presidential elections. We were informed that the special working group has already reached an agreement on several proposals to be included in the new Unified Election Code, that would address the shortcomings noted in the first two rounds of the 2004 presidential elections. These proposals could therefore be adopted as amendments to the current Law on the Election of the President of Ukraine, on the understanding that they would be integrated in the future Unified Election Code. The latter option would strengthen the coherence with the future Unified Election Code. We urge the Verkhovna Rada to amend, without delay, the Law on the Election of the President of Ukraine in line with the temporary changes agreed upon for the third round of the presidential elections in 2004.

35. Another concern is the possibility that presidential and parliamentary elections would be organised on the same day. As mentioned above, presidential and parliamentary elections are governed by two different legal frameworks with make different requirements on the election process and its organisation. The members of the special working group were therefore unanimous in their opinion that, under the current legal framework, it would be impossible to organise these elections on one and the same day. As it is impossible to adopt, in a proper fashion, a Unified Election Code that is in line with European standards before the next presidential elections, we strongly urge the Ukrainian political leadership not to organise the presidential and parliamentary elections in conjunction with each other.

36. As regards legislation pertaining to national and local referenda, the Law on Referenda currently in force dates back to the Soviet era and most of its provisions are in the meantime unconstitutional. Its updating has become a matter of urgency within the current debate over the political reform, during which ideas to promote direct popular involvement in decision-making in matters affecting the nation as a whole have emerged. Currently, no clear procedure exists on the legal principles, organisation and procedure

⁷ CDL-AD(2009)019

⁸ CLD- EL(2009)005

⁹ In the draft report, the writer is of the opinion that the Ukrainian cases can not be seen as equalling an imperative mandate in stricto sensu, but come closer to the model of party administered mandates.

applicable for a national referendum. Two draft laws on the All-Ukrainian Referendum were submitted to the Venice Commission for opinion (proposed by Mr Kliuchkovskiy and Mr Lavrynovich). The Venice Commission endorsed individual comments of Mr Paczolay and Mr Sanchez Navarro on the draft laws. Although the Verkhovna Rada rejected Mr Kliuchkovsky's draft law in May 2008, it adopted Mr Lavrynovich's draft law in a first reading in September 2008. The Venice Commission's position is that the legislation could clarify certain provisions of the Constitution as to the procedure on the legal principles, organisation and procedures applicable, but that it should not contradict the procedure foreseen by the current Constitution, (which is rather restrictive on the possibility of initiating a referendum), and which the Venice Commission feels should be respected.

37. We call upon the Verkhovna Rada to adopt as soon as possible a new law on national and local referenda, in line with the recommendations of the Venice Commission. In this respect, we would like to stress that an opinion should be sought from the Venice Commission on the final draft law before its adoption in parliament.

V. Reform of the judiciary and justice system

38. A number of initiatives have been developed since the adoption of Resolution 1549 (2007) and some limited progress has been made. However, the many concept papers and policy initiatives have not been implemented, or only partially, and therefore have only produced limited results. In addition, a considerable number of draft laws are still pending in parliament. In general, we can therefore conclude that progress in this field falls short of the expectations of the Assembly when adopting Resolution 1549 (2007).

39. We welcome the fact that the opinion of the Venice Commission is frequently and regularly sought during the preparation of draft laws. However, we note that the recommendations expressed in these opinions are not always reflected in the final texts, and proposed amendments either do not take into account, or even contradict these recommendations. We therefore call upon the Verkhovna Rada to ensure that the Venice Commission's recommendations are reflected in the amendments to the several draft laws and that an opinion of the Venice Commission is also sought on the final text before its adoption in parliament.

40. The reform of the judiciary remains of particular concern. In general, courts are paralysed by the high volume of cases, leading to unreasonable delays in the examination of cases and issuance of judgments. Moreover, judgments are frequently not enforced. As with regard to the independence of the judiciary, judges at all levels remain dependent on political figures of authority or those responsible for the judiciary. In October 2008, the Chairman of the Supreme Court, Mr Onopenko, stated that there is "unlawful interference in the work of the judiciary, disregard for the legal foundations of the work of the justice system and the courts being dragged into the political struggle" and that the "struggle and the methods of the parties in conflict have been transferred into a sphere off limits for politics - the justice system."

41. The President adopted the Concept Paper on the Reform of the Judiciary in May 2006, which resulted in two draft laws on the reform of the judiciary being submitted to parliament. These two drafts were passed by the Verkhovna Rada in a first reading in April 2007. However, very little has been achieved since then and the two drafts are still pending adoption by the parliament. In addition, the two draft laws were substantially revised in the Legal Affairs committee of the Rada and reportedly no longer comply with the opinion of the Venice Commission on them. We therefore insist that the Verkhovna Rada should submit the revised text to the Venice Commission for opinion and implement any recommendations that this opinion may contain, with the aim to adopt these two draft laws on the reform of the judiciary without further delay.

42. The reform of the Bar and the establishment of a professional bar association is one of original commitments that Ukraine agreed to when acceding to the Council of Europe that still remains to be implemented. Various draft laws have been introduced but none of them has been adopted. We regret that no co-operation from the Council of Europe has been sought in the preparation of these drafts. We therefore strongly recommend that the Minister of Justice and the parliament prepare and adopt a new draft Law on the Bar, in close consultation with the relevant Council of Europe departments.

43. In the field of the reform of the criminal justice system, some progress has been achieved. On 8 April 2008, President Yushchenko adopted the Concept Paper on the Reform of the Criminal Justice System of Ukraine, and in August 2008 the government approved the action plan to implement this concept paper. On 15 April 2008, the parliament adopted a Law on Amendments to the Criminal Code and Code of Criminal Procedure. However, the adoption of a new Code of Criminal Procedure, as well as further amendments to the Criminal Code are still necessary.

44. The National Commission on Strengthening Democracy and the Rule of Law, which was established in 2006, finalised its draft for a new Code of Criminal Procedure and submitted it to the President on 10 March 2009. This draft, which, *inter alia*, introduces the adversarial procedure in the criminal procedure, limits the use of pre-trial detention and strengthens the role of judges in the criminal procedure, was positively assessed by Council of Europe experts, but it has not yet been submitted to the Verkhovna Rada by the President. However, there is a second draft for a new Code of Criminal Procedure under consideration in parliament. This draft was reviewed by the Venice Commission in 2004 and considered not to be in line with European standards. We therefore urge the President to present his draft as soon as possible to the Verkhovna Rada, and for the latter not to consider the draft prepared by Mr Moysyk that was negatively assessed by the Venice Commission.

45. On 14 April 2009, the parliament adopted in a first reading the draft Law on the Office of the Public Prosecutor. This draft, which is very much supported by the Prosecutor General, reportedly does not address the concerns of the Venice Commission expressed on an earlier version of this draft¹⁰. We were informed that the Minister of Justice has suggested to the Speaker of the Verkhovna Rada that the latter submits the draft law to the Venice Commission for opinion before the law is considered in a second and third reading. We very much support this proposal. We would like to stress that the reform of the General Prosecutor's office is one of the commitments of Ukraine when acceding to the Council of Europe and that therefore no law in this respect should be adopted without being reviewed by the Venice Commission and any possible concerns addressed.

46. One of the main concerns with regard to the Prosecutor General's Office is the general supervisory function, which is not in line with European standards. However, with the 2004 Constitutional amendments, this general oversight function was enshrined into the Constitution of Ukraine. The first step in the reform of the Prosecutors Office, before a new law on the public prosecutor can be adopted that is in line with European standards, should therefore be the adoption of constitutional amendments to remove this oversight function from the Constitution.

47. The subordination of the State Department for Execution of Criminal Punishments to the Ministry of Justice is one of Ukraine's commitments to the Council of Europe. While the Department was included in the Ministry of Justice in 2006, its status should also be updated in this respect in the Law on the Penitentiary Services, which therefore has to be amended.

48. In our previous note, we highlighted the importance of an effective system of free legal aid to ensure the right to a fair trial for all citizens. Although the President has adopted a concept paper on a Free Legal Aid System in Ukraine, no concrete progress appears to have been made in this regard.

49. With regard to the ongoing investigations into the murder of Georgiy Gongadze, the President stressed that this case had his personal attention and that he was ready to allocate funds from the Presidential budget to the Prosecutor General's in order to further the investigation into the responsibility for ordering Mr Gongadze's murder. During our meeting with the Prosecutor General, during which Mr Melnichenko was given the opportunity to meet with us, we stressed the need for the Prosecutor General to strengthen his efforts to obtain international expertise on the Melnichenko tapes which are at the basis of the case.

VI. Conclusions

50. The political landscape in Ukraine continues to be characterised by systemic instability and is dominated by political in-fighting and rivalries. This instability and strife have in turn seriously hampered the many reforms needed for the country and requested by the Assembly, as well as the implementation of the remaining commitments that Ukraine voluntarily agreed upon when it acceded to the Council of Europe.

51. The main cause of the political instability is the unclear division of powers between the main branches of the government in the current Constitution. The long overdue constitutional reform therefore needs to be urgently brought to a close. However, paradoxically, the constitutional reform process is hindered by the same political rivalries that the unclear division of powers has generated. We welcome the fact that the National Constitutional Council has now submitted a draft constitution to the parliament and call upon all actors to work constructively to come to a consensus on the necessary constitutional changes on the basis of this draft. However, we maintain our position that the constitutional reform process would be best served by the preparation of a set of focused amendments to the current Constitution as opposed to the adoption of an entirely new one.

¹⁰ CDL-AD(2004)038

52. Closely related to the reform of the Constitution is the electoral reform. We welcome the fact that most political forces now agree that the current election system based on closed party lists in a single national constituency is flawed and that a regional component as well as open lists need to be introduced into the election system in Ukraine. We are heartened by the constructive working relations in the Special Working Group of the Verkhovna Rada to draft a Unified Election Code, in which all political parties now participate. This opens up the prospect that a general consensus on an election system can soon be achieved and a Unified Election Code adopted. However, as it is unlikely that such a code could be adopted before the next presidential elections, we call upon the Verkhovna Rada to ensure that the changes made to the Law on Elections of the President of Ukraine after the controversial second round of the presidential election in 2004 and which have in the meanwhile expired, will remain valid for the forthcoming presidential election. Moreover, we stress that, under the current legal framework, the organisation of presidential and parliamentary elections on one and the same day would be potentially disastrous, if not outright impossible.

53. With regard to the reform of the judiciary and the justice system, we welcome the attempts to improve these system, however, the many concept papers and policy initiatives that have been developed since the adoption of Resolution 1549 (2007) by the Assembly, have not been implemented, or only partially, and therefore have only produced limited results. In addition, a considerable number of draft laws are still pending in parliament. In general, we can therefore conclude that progress in this field falls short of expectations.

54. We welcome the fact that the opinion of the Venice Commission is regularly sought during the preparation of draft laws. However, we note that the recommendations expressed in these opinions are not always reflected in the final text, and proposed amendments either do not take into account, or even contradict, these recommendations. We therefore have the feeling that requesting the opinion of the Venice Commission is sometimes seen as a mere formality and that the recommendations that are contained in these opinions are not always seriously considered by the authorities and the parliament. We therefore call upon the Verkhovna Rada to ensure that the Venice Commission's recommendations are reflected in the amendments to the several draft laws and that an opinion of the Venice Commission is also sought on the final text before its adoption in parliament.

55. We intend to continue our discussions with the Ukrainian authorities on these and other issues during a follow-up visit in the second half of 2009.

APPENDIX I

Programme of the fact-finding visit to Kyiv (5-8 April 2009)

Mrs Renate WOHLWEND, member of Parliament
Mrs Sabine LEUTHEUSSER-SCHNARRENBURGER, member of Parliament
Mr Bastiaan KLEIN, co-secretary of the Monitoring Committee

Sunday, 5 April 2009

19:30 Informal meeting with NGOs:
- Mr Evgen ZAHAROV, Kharkiv Human Rights Group Head
- Mr Vsevolod RECHYTSKYI, Union of Lawyers of Ukraine
- Ms Viktoria SJUMAR, Institute of Mass Information Head
- Mr Roman ROMANOV, International Renaissance Foundation (IRF),
Rule of Law Programme Director
- Mr Ivan LOZOVYI, Head of the Strengthening Democracy Institute
- Ms Iryna BEKESHKINA, Democratic Initiatives Fund Research Director

Monday, 6 April 2009

08:30 Briefing by Mr Ake PETERSON, Representative of the Secretary General
of the Council of Europe in Kyiv (breakfast meeting)

10:00-10:45 Meeting with Mr Volodymyr LYTVYN, Chairman of the Verkhovna Rada

12:15-13:00 Meeting with Mr Oleksandr TURCHYNOV, First Vice Prime Minister of Ukraine

13:00-14:45 Lunch

16:00-17:00 Meeting with Mr Viktor YUSHCHENKO, the President of Ukraine
and Ms Maryna STAVNIYCHUK, the Secretary of National Constitutional Council

17:30-18:30 Meeting with Chairman and members of the Verkhovana Rada working group on drafting a
unified election code, including representatives of the authors of parliamentary election
legislation proposals (2097, 3209, 3210, 3441, 3366 and 3150)

20:00 Informal dinner with Council of Europe Ambassadors, hosted by the German Ambassador to
Ukraine

Tuesday, 7 April 2009

08:30 Roundtable with NGO representatives:
- Mr Ihor KOHUT, Agency for Legislative Initiatives Head
- Ms Tetiana MAZUR, Amnesty International Executive Director
- Mr Ilko KUCHARIV, Democratic Initiatives Fund Head
- Mr Igor KOLIUSHKO, Centre for Political and Legal Reforms Head

10:30-11:15 Meeting with Mr Volodymyr KHANDOGIY, acting Minister of Foreign Affairs of Ukraine

11:45-12:30 Meeting with Mr Andriy STRYZHAK, Head of the Constitutional Court of Ukraine

13:00-13:45 Meeting with Mr Oleksander MEDVEDKO, General Prosecutor of Ukraine

14:00-15:00 Meeting with Mr Mykola ONISCHUK, Minister of Justice of Ukraine

18:00 Press conference

19:00 Working dinner with Ambassador James GREENE of the NATO Mission and Ambassador
Lubomir KOPAJ of the OSCE Mission in Ukraine

Wednesday, 8 April 2009

Early morning: departure of the members of the delegation

APPENDIX II

Ukraine: consensus and implementation of reforms is now urgently needed, say PACE co-rapporteurs

Strasbourg, 15.04.2009 – “We welcome the work undertaken in the fields of legal and electoral reform in Ukraine, but it is now time that the different concept papers and draft laws are harmonised, adopted and implemented,” said the two co-rapporteurs on Ukraine of the Parliamentary Assembly of the Council of Europe (PACE), Renate Wohlwend (Liechtenstein, EPP/CD) and Sabine Leutheusser-Schnarrenberger (Germany, ALDE), speaking at the end of their visit to Kiev from 5 to 8 April 2009.

The co-rapporteurs welcomed that the opinion of the Venice Commission, the Council of Europe’s group of independent legal experts, is regularly sought during the preparation of these laws, but stressed that its recommendations should then be reflected in the draft laws that are debated and ultimately adopted by Parliament.

In relation to electoral reform, the co-rapporteurs said they were heartened to see the constructive and consensual discussions in the Special Working Group of the Verkhovna Rada for the drafting of a Unified Election Code, in which all political parties are represented. “We call upon the leaders of all political forces to follow the example of, and give their full backing to, their members in this working group in order to ensure that a consensus on the election system and the legal framework for elections can now be achieved without further delay,” the co-rapporteurs said.

They underscored that, in the view of the Assembly, such an election system for Ukraine should be based on open electoral lists and regional constituencies, a view that was shared by all members of the working group. “The voters should be able to influence who ultimately represents them in Parliament, which is not possible under the current system of closed party lists in a single national constituency,” they said.

Moreover, in the view of the co-rapporteurs, it would also be necessary to ensure that the voters have a full understanding of what the different political parties and elected representatives stand for. They therefore called for quick implementation of the Law of Financing of Political Parties, which would reduce the dependency of political parties on economic interests and ensure full transparency of their financing to the public.

The co-rapporteurs stressed that an agreement on the electoral system and the implementation of a core set of electoral reforms was especially urgent in the light of the forthcoming presidential election, which is now called for 25 October 2009, as well as suggestions that parliamentary and presidential elections could take place on the same day. “Under the current legal framework, the organisation of presidential and parliamentary elections on one and the same day would be potentially disastrous, if not outright impossible,” they said.

Furthermore, the changes made to the Law on Elections of the President of Ukraine after the controversial second round of the presidential election in 2004 have in the meanwhile expired, and the shortcomings identified during the first two rounds of those elections continue to exist. The co-rapporteurs therefore stressed that the changes made for the third round of the 2004 elections should also be valid for the forthcoming presidential election. Without these changes, the legal framework would be of serious concern and could also create confusion among the voters.

During their visit the co-rapporteurs were informed by the President of Ukraine about the contents of his proposal for a new Constitution for Ukraine. While the co-rapporteurs did not have the time to study his proposals in detail, they noted that many interlocutors felt that this proposal could be seen as a good starting point to reach consensus between all political forces on a new constitution. While realising that the constitutional reform would be affected by the scheduled elections, the co-rapporteurs urged all actors to continue searching for an agreement on the main principles of the new Constitution, especially with regard to a clear separation of powers, and independence of the judiciary, as the current ambiguity with regard to this is negatively affecting the democratic consolidation and political stability of Ukraine.

In addition, the two co-rapporteurs recommended that the authorities, in line with suggestions from the Venice Commission, explore the possibility of amending the current Constitution, instead of adopting a completely new one, as this would also solve the political controversy over how a totally new Constitution should be adopted.

With regard to judicial reform and reform of the judiciary, the rapporteurs were informed about the progress with regard to the implementation of the several concept papers and state of preparation of several required laws and legal instruments. While welcoming the progress made, the rapporteurs stressed that it was now time to complete these reforms in line with Council of Europe standards and principles.

In that respect they noted that, while the opinion of the Venice Commission is sought during the preparation of the law, their recommendations are not always reflected in the final text, and proposed amendments either do not take into account, or even contradict these recommendations. "We call upon the Verkhovna Rada to ensure the rapid adoption of the laws that are required to finalise the legal reform demanded by the Council of Europe," they said. Moreover, to ensure that they conform to European standards, the Venice Commission should be asked to provide an opinion on the amended versions that will be proposed for adoption in third reading in Parliament