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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<sup>1</sup>**

**Information note by the co-rapporteurs on their fact-finding visit to Ukraine (14-16 January 2008)**

Co-rapporteurs: Mrs Hanne Severinsen (Denmark, ALDE)<sup>2</sup> and Mrs Renate Wohlwend (Liechtenstein, EPP/CD)

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<sup>1</sup> This information note has been made public by decision of the Monitoring Committee dated 18 March 2008.

<sup>2</sup> Mrs Severinsen has since retired from the Parliamentary Assembly and is now replaced by Mrs Sabine Leutheusser-Schnarrenberger (Germany, ALDE).

## I. INTRODUCTION

1. The fact-finding visit in question took place from 14 to 16 January 2008, nine months after the Assembly held an urgent debate on the functioning of democratic institutions in Ukraine and three months after the early parliamentary elections of 30 September 2007. Because of the Assembly's active involvement in the resolution of the recent political crisis<sup>3</sup> and its participation in the election observation, we made it our priority to meet the new government right after its formation in order to discuss its new goals and challenges, and share our views on stepping up the much-desired reform process in the country.

2. During our two-and-a-half-day visit, our delegation held open and frank discussions with President Victor Yushchenko, Prime Minister Yulia Tymoshenko, Speaker of the Verkhovna Rada Arseniy Yatseniuk, Minister of Foreign Affairs of Ukraine V. Ogrzyzko, Minister of Justice of Ukraine M. Onischuk, Minister of Internal Affairs of Ukraine Yu. Lutsenko, Head of the Constitutional Court of Ukraine A. Stryzhak, First Deputy Head of the Supreme Court of Ukraine P. Pylypchuk, Head of the Higher Administrative Court of Ukraine O. Pasenyuk, Head of the National Commission on Freedom of Expression and Mass Media Development T. Petriv, Head of the State Penitentiary Department V. Koshchynets, Ombudsman N. Karpachova, Head of the National Council of Ukraine on TV and Radio Broadcasting V. Shevchenko and Acting Head of Security Service of Ukraine V. Nalyvaychenko.

3. In addition to the official programme organised by the Verkhovna Rada secretariat, we also met with NGO and media representatives, as well as with the representatives of the international community in Kyiv. On the margins of this visit, we also participated at a conference on "the European Democratic Heritage and the Development of Electoral Legislation in Ukraine" and in discussions on constitutional reform organised by the Venice Commission on 16 and 17 January.

4. We are grateful to the Speaker of the Verkhovna Rada and the Ukrainian delegation for having accommodated all our wishes for meetings. We extend our personal thanks to the Ukrainian delegation secretariat for having put all their resources into adapting the programme when necessary. We also thank Mr Ake Peterson, new Representative of the Secretary General of the Council of Europe in Ukraine, and his office for facilitating our meetings with civil society and media representatives. Our special gratitude goes to H.E. Mr Uffe Balslev, Ambassador of Denmark, for organising a fruitful exchange of views with representatives of the diplomatic corps in the form of a farewell dinner for Hanne Severinsen.

5. Our visit took place at a moment of apparent calm a month after the coming-into-power of the new coalition government. Similarly to previous elections, the negotiations for forming the new government took almost three months. The new government, headed by Yulia Tymoshenko, was finally confirmed in mid December 2007 and enjoys a very slim majority.

6. Nevertheless, as we have noted in our previous reports, the political under-currents move at such speed in Ukraine that many of the observations we made during our visit no longer apply to the political realities on the date of drafting this report. Albeit the political crisis having abated when President Yushchenko and the then Prime Minister Yanukovich agreed to hold snap parliamentary elections on 30 September, **the inherent flaws in the Ukrainian political system – constant sources of legal chaos and systemic constitutional crisis - have not been remedied. All political debates continue to be overshadowed by the internal tug of war over the redistribution of political authority, both inside the coalition and between different power institutions. Thus the political environment remains extremely volatile and susceptible to tumbling back into crisis unless a solution is urgently found through an inclusive dialogue between all political forces on the issues of constitutional reform, balancing powers and political orientations.** In such a political context, it is unrealistic to expect any substantial progress on other reforms in the months to come.

7. While strongly urging the Ukrainian authorities to use their political wisdom and common sense to avoid any escalation of tensions, and underlining that it is entirely in the hands of the Ukrainian political elites to work out an appropriate lasting solution to their recurrent internal impasses, we wish to offer them our vision and guidelines on how to best tackle the problematic issues and steer the country towards further consolidation of democracy, the rule of law and human rights. We note that the Assembly's contribution to finding a political

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<sup>3</sup> Assembly Resolution 1549 (2007)

solution in April 2007 was well appreciated by all political forces in Ukraine and hope that our fruitful co-operation in the framework of the monitoring process will continue.

## II. OBSERVATIONS

### 1. Concerns and issues raised

#### 1.1. Post-election political environment

8. The early parliamentary elections of 30 September 2007 were triggered by a political crisis following President Yushchenko's decree of 2 April 2007 to dissolve the parliament after dozens of politicians from the pro-presidential opposition parties had defected to a coalition headed by the President's political rival, Prime Minister Victor Yanukovich. Any further defections could have led to the government coalition (Party of Regions, Communist Party and Socialist Party) obtaining a two-thirds majority, constitutionally empowering it to override presidential veto and introduce amendments in the Constitution. The tensions subdued after the key political forces found a political agreement on 27 May to hold early elections. The constitutionality of the decree was never ruled on by the Constitutional Court.

9. Regardless of its doubtful politics and perpetual political instability, the recent elections engendered a third peaceful and democratic change of power in three years. This is an outstanding achievement when compared to many other transitional countries in the post-Soviet space. Political culture may be disturbingly low in the country, but political pluralism is flourishing and fundamental freedoms are guaranteed. All key political forces have taken their turn in opposition and survived politically. The opposition today recognizes the legitimacy of the new government.

10. Another positive development is that, although the government coalition is currently formed by the so-called "orange" forces, the orange-blue East-West split is no longer that strongly marked among the population. The recent elections showed that both camps gained position on each other's turf. Compared with the previous two elections, the recent election showed that the population was no longer that clearly split. Rather, the two camps rallied on two squares, and the supporters walked from one square to another, listening to what the other camp had to offer. For the civil society, that was a new benchmark.

11. In a previous information note last year (AS/Mon (2007)02 rev.) we observed that the diminution of the regional divide and the reconstruction of today's political blocs was vital for political success in Ukraine. We predicted that the short-term effect of this process was likely to be incoherent and turbulent but in the long run it could positively lead to breaking the mould of Ukrainian politics and contribute to a more constructive basis for political decision-making. We are convinced that the developments we experience today are part of this process.

12. Ukraine will undoubtedly continue to experience an unsettled domestic political situation for the months to come. The struggle for power between various factions, however, has remained a struggle between the elites only, thus decreasing the possibility of violence breaking out among the population.

13. The snap election in 2007 helped resolve the political crisis. Yet it did not contribute to the establishment of a responsible political system. The political leadership pursues heated debates which are not focused on systemic reforms. The undecided question on competencies and limits of different branches of power continue to haunt this government; the unaccomplished constitutional reform continues to be the Achilles' heel for any government-in-office in Ukraine.

14. The governing coalition holds a very slim 2-vote majority of 227 seats in the 450-member Parliament. The new-old coalition is inherently weak - not only by the narrow margin of majority but because of internal tensions and old competition between the President and the new Prime Minister. Two months after power-sharing, the political honeymoon between President Victor Yushchenko and Prime Minister Yulia Tymoshenko appears to be over. Both politicians have started campaigning for presidential elections in 2010. They are trying to win future voters by pulling in more power and resources.

15. Pursuing the same goals as during her previous term of government, Prime Minister Yulia Tymoshenko is reintroducing vigorous reforms in the energy sector, the fight against corruption, privatisation of state assets and agricultural lands, and re-privatisation of the so-called „illegally“ privatised properties. Furthermore, she has

started to carry out her electoral promise to compensate those who lost their savings in state banks as the result of the collapse of the Soviet Union. There is a danger that her extensive social programmes may bring inflation and rapid increase of prices. However, should the Prime Minister's social programmes be successful, this may boost her chances, in case she decides to run against President Yushchenko in the upcoming presidential elections.

16. In response, President Yushchenko has blocked planned appointments to her government, failed to react on the request by the parties of the Prime Minister (BYuT) and Minister of Interior (People's Self-Defence – coalition partner of President's Our Ukraine (NUNS)) to remove the Prosecutor General from his office, disagreed with her privatisation plan, thwarted the Prime Minister's planned visit to Moscow, and come up with a draft law amending the 2007 law on the Cabinet of Ministers, which diluted presidential powers. If Parliament passes the amendments, the President will be authorised to disagree with the parliamentary majority's choice for Prime Minister; the Parliament will not be allowed to dismiss the Ministers of Foreign Affairs and Defence – the only two Cabinet ministers whom the President appoints; the Cabinet will have to obey decisions made by the National Security and Defence Council – a body chaired by the President; and regional Governors – who are appointed by the President – will have the right to veto the Cabinet's appointments to the regional administrations. In addition, the President wants the Interior Forces, which have so far been subordinated to the Interior Minister, to be subordinated to him<sup>4</sup>. He also believes that the President, rather than the Cabinet, should appoint the Chief of the Special Communications and Information Protection Service.

17. This widening split in the executive power and the lack of a stable coalition unified by a common reform agenda nurtures instability and makes further political crises predictable.

18. The now oppositional Party of Regions does not conceal its plans to play up the differences between the President and the Prime Minister in order to destroy the current coalition. However, it is also facing a possible split, with a small but influential group under Renat Akhmetov moving closer to President Yushchenko's circles. On 18 January, the President appointed Mrs Bohatyryova from this group to the post of Secretary of the National Security Council<sup>5</sup>. The same group is also showing a degree of receptiveness to the ultimate goal of NATO membership. The resurging tug of war within the country's leadership and political splits within the parties<sup>6</sup> confirm that new alignments are being produced in the Ukrainian political landscape.

19. Regrettably, the political culture in Ukraine continues to be extremely low. Rather than playing by the rules, Ukrainian politicians keep on playing with the rules, and stretch them as they wish. Ukrainian politics being primarily run by powerful businesses and their lobby groups does not help the situation. The recent 1,5-month-long blocking of the Parliament's work by the opposition under the pretext of the authorities' decision to request NATO Membership Action Plan is a good example of lack of political responsibility and inconsistency<sup>7</sup>. Even though the wisdom of timing by the new leaders for coming out with the request vis-à-vis the domestic political fragility may be disputable, NATO accession was directed by the 2003 Law on National Security, which was voted for by the very same people who now fiercely oppose an upgrade in NATO-Ukraine relations.

20. The history of relations between political actors and centres of power shows that ***there should be further reform of the constitutional system of balancing power.*** The constitutional amendments of 2004

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<sup>4</sup> We are seriously concerned about the President building up a competing and ever increasing-in-size administration, similar to that of ex-President Kuchma's time.

<sup>5</sup> Stepan Havrysh, legal adviser to Victor Yanukovich's 2004 presidential election campaign, was also appointed Deputy Secretary of the NCDC. On the other hand, it is believed that these appointments together with maintaining Prosecutor General Medvedko in his position conclude the deal reached between the President and the Party of Regions to end the spring 2007 political crisis.

<sup>6</sup> Presidential Chief of Staff Victor Baloha has quit the pro-presidential Our Ukraine party he was once leader of, reportedly with a view to creating a coalition with the part of the Party of Regions close to Mr Akhmetov. At the same time, Prime Minister Yulia Tymoshenko and Party of Regions leader Viktor Yanukovich are likely to retaliate by joining forces to pass a bill on the opposition.

<sup>7</sup> The blocking of the work of the Verkhovna Rada, lasting from 18 January to 5 March, nearly brought the country to new early elections.

introduced half measures that left much to be settled through political consensus. Ukraine has come to a point in its development where it has to decide which system to choose – either to return to concentrated presidential powers or to establish a basically parliamentary system with properly defined checks and balances and guarantees of parliamentary opposition and competition.

21. The democratisation and EU enlargement process of Central and Eastern European countries in the last decade has shown that states with strong parliamentary powers have been most successful. We understand that Ukraine has its historic reasons to avoid any accumulation of power in the hands of one political force. In that respect the current bi-polar model whereby no single power can dominate over the political landscape, in particular when considering that the Parliament is perceived as not the least corrupt institution in the country, may seem reasonable. However, the current model can only function if the political colours and personalities of the different leaders of the executive branch match. The current experiment has not benefited political stability to Ukraine. **Therefore, we believe that in the long run the country needs a system where the government has room to govern and where the president guarantees the constitutional stability and represents the state. There should not be two centres of power in the executive branch, which only creates unhealthy duplication and competition between the two administrations.**

## 1.2. Electoral reform and legislation on referenda

22. The last two parliamentary elections have shown that the proportional representation system for national elections has been a step in the right direction. Successive elections have been regarded as democratic by Council of Europe standards. And yet, few people are content with the outcome of the recent elections. Not because of one or another political faction having won or lost, but because of the electoral system which gives the political parties' leadership full freedom in determining the composition of their list.

23. The current election system of closed party lists in a single national constituency is inherently flawed: a) it deprives the voters of any influence over or "ownership" of the lists; b) it is conducive to creating circles with common commercial interests rather than political parties; and c) it stifles internal party democracy and leads to weak parties-corporations, in particular in a young transformation society like Ukraine.

24. This faulty situation is reinforced by intentions to introduce the so-called imperative mandate, which is seen to be incompatible with the principles of democracy and of the rule of law by the Venice Commission, as well as by our Assembly.

25. **It is therefore time for Ukraine to modify its electoral system and allow people to show their preference to candidates inside proposed party lists. At national level, we deem the introduction of a proportional system of open lists, including a territorial element to be most appropriate.** This could bring parties closer to people, break the pattern of one-leader parties and allow admittance to the legislature of capable politicians and professionals who will strengthen both their party factions and the parliament in general.

26. At regional and local level as well, although the change from the previous mixed system in 2002 was understandable, **the purely proportional system of today needs to be changed to reflect a fair representation of citizens.**

27. In this context, it is worth noting that Ukraine recently decided to suspend state funding of political parties, introduced back in 2001. The recently adopted Law on the State Budget deleted relevant provisions from Ukrainian legislation. This move is most likely to further foster political corruption and make parties susceptible to influence of their financial sponsors. As such it constitutes a step back in Ukraine's honouring of its obligations to the Council of Europe.

28. Having observed many elections in the course of the monitoring procedure, **we also see it highly necessary to harmonise the electoral legislation – preferably in a single unified election Code.**

29. The voters' register is another issue where major improvements should be made. We were satisfied to see that all political leaders in Ukraine attach much importance to this issue. According to President Yushchenko, the creation of a proper voters' list is of highest priority and should be accomplished by the end of 2008. However, it is not only a matter of the quality of the voters' list; we remind the Ukrainian authorities that **the Law on the State Register of Voters should be implemented without any further delay.**

30. The legislation pertaining to national and local referenda needs to undergo serious revision. The Law on Referenda currently in force dates from the Soviet times, most of its provisions having become unconstitutional. Its updating has become a matter of urgency within the current debate over the political reform (see chapter 1.3.) because of numerous suggestions to have direct popular involvement in decision making, up to adoption of the new Constitution (see below). No clear procedure exists today on how a national referendum should be organised and held, which allows manipulation of the whole process. We have been informed that three draft laws have been proposed by different lawmakers and political forces, which have recently been submitted for opinion to the Venice Commission by the Speaker of the Verkhovna Rada. We urge the Ukrainian authorities **to adopt the new Law on National Referendum before considering launching any process of referendum of such kind. The latter should comply with democratic standards and be reviewed by the Venice Commission prior to its adoption.**

### 1.3. The status of constitutional reform

31. We have recurrently pointed out over the years that the 2004 constitutional reform was an unsuccessful attempt to adjust the system of relations and balance of powers in Ukraine at the central level, which caused a systemic constitutional crisis. The latest PACE Resolution 1549 (2007) and its explanatory memorandum noted that *“the success of the future political changes will largely depend on the completion of the constitutional reform. This process should be **guided by a vision of the future and be based on both proper consultative process and political compromise.**”*

32. The recent extraordinary parliamentary elections have spurred a lively discussion both of the content of constitutional changes and of the form of their approval. The President has urged all leading political forces to join efforts and draft a new Constitution. To this end, he called on 27 December 2007 for setting up a National Constitutional Council composed of representatives of all political forces represented in the Verkhovna Rada, judges, human rights organisations, representatives of the academia and a number of well-known public figures. The composition of this Council was confirmed on 19 February 2007. It has been mandated to work out **a new draft constitution.**

33. Under the general provisions of the current Constitution, people are the source of power; only the people can change the constitutional order. A controversial interpretation by the Constitutional Court in 2005 says that this power of changing constitutional order can be realised by the adoption of the Constitution at a referendum<sup>8</sup>. Another interpretation stems directly from the Constitution in force the preamble of which stipulates that the Verkhovna Rada was delegated by the people to adopt the Constitution and to change it, but not to adopt a new one. Opinions on these interpretations diverge.

34. The President explained us his plans, according to which the Verkhovna Rada should adopt the draft new Constitution prepared by the Constitutional Council at first reading (requires qualified majority of 226 votes), after which the draft will be presented to European institutions for consultation. After consultation, the draft will be put to referendum. In his opening remarks at the first meeting of the Constitutional Council on 20 February and in a recent article in leading national newspaper, however, President Yushchenko mentioned that, in case the parliament fails to endorse the new Constitution, a referendum could be launched by people's initiative.

35. Our major concern in this regard is that all discussions on the introduction of a new Constitution are driven by the political agenda of redistributing powers rather than by the desire to reform the political and legal system so as to bring them closer to European standards. There is reason to suspect that the decision to propose the new Constitution for popular vote is motivated by willingness to bypass the parliament.

36. All in all, **it seems highly questionable why Ukraine should need a new Constitution as opposed to simply amending the current Constitution where appropriate.** The current Constitution provides for proper safeguards to protect fundamental rights and freedoms and to ensure a legitimate and lawful constitutional revision process, the latter being stipulated in Articles 154-159 (including adoption at several sessions, opinion by the Constitutional Court and final vote by 2/3 of Parliament's majority or adoption by 2/3 of Parliament's majority and final approval at the national referendum for amendments).

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<sup>8</sup> adoption meaning that no involvement by the parliament is needed.

37. Also, we believe that ***it is better in the current political context to aim for less but to achieve more.*** The process should get underway as soon as possible. The country is already under the spell of upcoming presidential elections; in 6 months' time it would be even more difficult to reach any constructive agreement. To this end, ***the current momentum should be seized to forward the reform as much as possible.***

38. We recall that an opinion of the Venice Commission adopted in March 2000 put in doubt the admissibility of a consultative referendum at the people's initiative. The Assembly Resolution 1451 (2000) further insisted on strict respect for constitutional provisions and stressed that a valid referendum could not be organised until a new law on referendum has been passed by the Verkhovna Rada.

39. Furthermore, we see a number of political and legal problems arising from the unclear constitutional process:

40. First, the composition of the National Constitutional Council, as established by the President on 19 February, is clearly pro-presidential and not representative. Most of the representatives of civil society are hand-picked and some are almost unknown. There is a potential risk that the Council may be used to imitate public endorsement of a pre-drafted text of a new constitution. ***We recall that any constitutional revision, even more so adoption of a new constitution, should be based on a broad public and cross-party consensus.***

41. Second, it is legally undefined what the extent of changes to the existing Constitution should be in order to be called a "new" Constitution.

42. Third, the question of how to abrogate the current Constitution after a referendum is not defined.

43. Fourth, at today's date Ukraine still does not have proper legal framework for holding referenda (see paragraph 29).

44. In light of the aforementioned, ***it is our strong belief that the current Constitution of Ukraine offers valid and reasonable instruments for implementing the constitutional reform through the involvement of all political parties within the Verkhovna Rada, as well as through broad-based and direct consultation with the Ukrainian population.*** Any referendum 'by people's initiative' should reflect genuine popular will to enact constitutional reform and not be used as a tool in achieving one's political goals.

45. In this constitutional reform context, we also reiterate our long-standing call on the authorities ***to closely engage the Venice Commission in any efforts to revise constitutional provisions and not to launch any referendum until clear procedures on holding referenda are adopted.***

46. In addition, ***we recommend that the constitutional reform process should be accompanied by a simultaneous adoption of the constitutional framework laws that should clearly delineate the functions and competences of the executive and the legislative branches in line with to-be-agreed principles of power-sharing.***

## 2. Stepping up relevant reforms

47. Political competition can be regarded as healthy only if it does not hinder reform activities being carried out in the country. Unfortunately this is not the case in Ukraine where reforms remain in the shadow of political fighting. Legal reforms serve as an example. Several positive initiatives in this area launched in 2005-2006 have been stalled due to political instability. In our previous reports and in Assembly documents the urgency of reform of the judiciary, the criminal justice system, free legal aid as well as adoption of media and of anti-corruption legislation has been stressed. These activities should have been guided by the Action Plan for the Honouring by Ukraine of its Obligations and Commitments to the Council of Europe, adopted by the President in January 2006.

48. The new government coalition appears willing to step up key reforms. However, whenever we discussed more concrete steps to be taken, we got the impression that there is eagerness to progress but global concerns bog down more concrete steps. ***We strongly urge the government to anchor on small steps while progressing in working out wider concepts of reforms. Otherwise the momentum will be lost.***

49. **Judicial reform.** The reform of the judiciary is of particular concern. The strategy of transformations in this area was defined by the Concept Paper on the Reform of the Judiciary, approved by the President in May 2006. Its realisation resulted in preparation and submission to the Parliament of two draft laws with new wordings of basic laws on the judiciary and on the status of judges. These draft laws, even though not endorsed by the Supreme Court leadership, if adopted would cause major overhaul of the judicial system and lead to a more transparent and accessible justice system to the extent allowed by the current constitutional framework. Council of Europe experts, as well as the Venice Commission positively assessed these drafts in 2007.

50. The draft laws were passed in the first reading on 3 April 2007, the day after the President disbanded the Parliament. Therefore the validity of this reading is legally contested. During our visit we received controversial information as regards the outcome of those drafts. While the President mentioned that he had recently suggested the five parties to put it on the table and have a 2nd reading on it in the parliament, the National Commission on Strengthening Democracy and the Rule of Law is apparently elaborating another draft. We are glad to hear nevertheless that the newly elected parliament has decided to proceed with consideration of these drafts in the further readings. We also hope that these important pieces of legislation will be finalised quickly and will soon be considered by the parliament.

51. We are concerned, however, by recent statements from the new Minister of Justice<sup>9</sup> who announced his **intention to initiate subordination of the State Judicial Administration (SJA) and Academy of Judges to the Ministry**<sup>10</sup>. In this regard we would like to recall that the creation of the Administration “*was purported to bolster the independence of the judiciary, since previously courts were funded through the Ministry of Justice and local authorities thus making them dependent and susceptible to undue influence*”.<sup>11</sup> In our explanatory memorandum to the 2005 report on honouring of obligations and commitments by Ukraine (Doc. 10676) we assessed a similar proposal made by one of the previous ministers as “*a false step as it might undermine the independence of judiciary*”. Also the Assembly in its Resolution 1466 (2005) specifically called on the Ukrainian authorities to subordinate State Judicial Administration to the judiciary.

52. Besides, this proposal of the new Minister of Justice contradicts the 2006 Concept Paper on the Reform of the Judiciary which stated that specialised bodies should be responsible for maintenance of court activity and should be subordinate to the judicial self-government. It is also not in line with opinions of the Consultative Council of European Judges (see, *inter alia*, paragraph 12 of CCJE Opinion No. 2). The same concerns the Academy of Judges, since – according to the CCJE Opinion No. 4 – responsibilities for organising and supervising training of judges should, in each country, be entrusted, not to the Ministry of Justice or any other authority answerable to the Legislature or the Executive, but to the judiciary itself or another independent body.

53. Therefore, ***the subordination of the SJA and Academy of Judges to the Ministry of Justice will be considered as a step back in Ukraine’s honouring of its obligations and commitments to the Council of Europe.***

54. We also disapprove the new Minister’s **proposal that judges be appointed to the administrative posts** (presidents, deputy presidents of courts) **by the Minister of Justice**. This will restrict independence of the judiciary and breach separation of powers. This will also be contrary to the Concept Paper on the Reform of the Judiciary and Assembly’s Resolution 1466 (2005).

55. **Criminal justice reform.** The criminal justice system remains one of the areas in the Ukrainian legal system which requires significant and comprehensive changes. In our previous report we were encouraged by the progress made in elaboration of the national strategy for the criminal justice sector reform that was being prepared by the National Commission on Strengthening Democracy and the Rule of Law. However, the adoption of the Concept Paper on the Reform of Criminal Justice System that was finalised by the National Commission in April 2007, is still pending. The National Security and Defence Council, having several times postponed consideration of the Draft Concept, only provisionally approved the document at its 15 February 2008 meeting

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<sup>9</sup> These statements were later formalised in the Ministry’s official priorities for 2008 published on the Ministry’s web-site.

<sup>10</sup> The SJA is currently subordinated to the Cabinet of Ministers, and Academy of Judges – to the SJA.

<sup>11</sup> See Doc. 10676, report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Explanatory memorandum by rapporteurs, paragraph 124.

and ordered its further finalisation. **We therefore urge the President to approve the Concept Paper as soon as possible.**

56. This will allow realisation of important implementation measures, in particular finalisation of the new draft Code of Criminal Procedure, preparation of amendments to the Criminal Code and Administrative Offences Code, new laws on the Prosecution Service, on the Police and on the Security Service, etc. **Amendments to the legislation and changes in the institutional framework of law enforcement bodies should comply with Council of Europe standards, in particular Assembly Resolutions and Venice Commission opinions.**

57. We would like to draw particular attention to Ukraine's commitment to **reform the Prokuratura** in line with the rule of law principles and Assembly's recommendations. Reform of the prosecution service should include constitutional amendments as well as revision of the legislation on the system of prosecutor's offices and be accompanied by the reform of the criminal procedure.

58. **Legal aid.** Establishment of an effective system of free legal aid is a pre-condition for ensuring fair trial, in particular access to courts for indigent people. We are concerned by the fact that, since the adoption by the President in June 2006 of the Concept Paper on Free Legal Aid System in Ukraine, not much progress has been achieved in this direction. **A specific law on free legal aid in criminal, civil and administrative matters should be adopted as soon as possible in line with the Council of Europe's principles and rules in the field of access to justice and legal assistance and ECtHR case-law. Implementation of the law should be supported by adequate state financing.** We support the initiative of the new Minister of Justice to raise the fee for advocates who render state-covered legal assistance, which currently is at a ridiculously low rate. However this should be considered only as a necessary intermediary step pending establishment of efficient free legal aid system in the country.

59. **Fight against corruption.** Despite numerous political declarations, there is no substantial progress in tackling corruption in Ukraine. The main achievement is again limited to the adoption of the policy document – anti-corruption strategy approved by the President in September 2006 (Concept on the Fight Against Corruption in Ukraine “On the Road to Integrity”). **The Action plan to implement this Concept paper was adopted by the Government only in August 2007 but it appears to be very imprecise in wording of measures and their deadlines and should therefore be revised by the new government.** The anti-corruption legislative package, prepared by the Ministry of Justice and submitted to the Parliament by the President, was adopted at its first reading in December 2006 and its final consideration is still pending. The package in particular includes laws on ratification of the UN Convention against Corruption and Council of Europe Criminal Law Convention on Corruption<sup>12</sup>.

60. In February 2008 the President of Ukraine instructed the Cabinet of Ministers to assign to the Ministry of Justice several additional tasks in the sphere of combating corruption, in particular pertaining to analysis of legislation with further suggestions to eliminate corruption risks, review of draft legal acts as to their corruptness, collection and analysis of statistics and other data concerning anti-corruption measures, promoting better public participation in anti-corruption activities, etc. **We welcome this initiative and call for its prompt implementation.**

61. In October 2007, Council of Europe Group of States against corruption (GRECO) adopted its first report on Ukraine covering first and second rounds of State's evaluation. The report was promptly translated and published by the Ukrainian Ministry of Justice. **It is important that GRECO recommendations be implemented by Ukraine without delay<sup>13</sup>.**

62. Ukrainian authorities have declared their intention to set up **a new law enforcement agency specialised in investigation of corruption offences.** This step would be in line with provisions of international standards contained in the Council of Europe and UN conventions provided a number of conditions are met, i.e. independence of the body from undue influence, its accountability, adequate resources and powers. **The draft law on such an agency should be reviewed by international experts.**

<sup>12</sup> The ratification laws were adopted but they will enter into force only with enactment of connected amendments to the Ukrainian legislation

<sup>13</sup> First assessment of implementation is scheduled for September 2008.

63. Although most political forces claim that they are in favour of combating corruption, especially at election time, Ukrainians remain sceptical. According to the 2007 Transparency International survey, some 70% of Ukrainians do not believe that the authorities are effective in their struggle against corruption. The same survey found that the majority of the population believe that the judiciary is the most corrupt institution in Ukraine, followed by political parties, Parliament, and the Ministry of the Interior. 44% of Ukrainians do not believe there will be a breakthrough in the next three years, while 38% said that corruption would increase.

64. State efforts in eradicating corruption should therefore be urgently reinforced and include measures not only in the area of repression through effective law enforcement but also in **prevention and policy co-ordination**. ***Ukraine needs to introduce urgently several preventive measures, in particular to create mechanism for verification of assets declarations of public officials and resolution of conflict of interests, adopt new law on civil service and provisions on code of ethics, establish effective procedures for access to public information. There is also a lack of co-ordination with regard to anti-corruption policy formulation and implementation. Anti-corruption measures should comply with Council of Europe and international standards as well as recommendations of GRECO and OECD Anti-Corruption Network.***

65. **Media reforms**. No progress whatsoever has been achieved in transforming state TV and radio stations into public broadcasters and in privatising state owned/controlled print media outlets. This leaves Ukraine with an anachronism unacceptable for a democratic state.

66. New initiative to finally launch the process of setting up a public broadcasting system was announced in February by the President who instructed the Government to prepare relevant proposals to be discussed at the National Security and Defence Council. Although the latter does not look like a suitable venue for consideration of this topic, we ***hope the decision to transform state TV and radio companies into genuine public broadcasters, in line with Council of Europe standards, will soon be made and realised.*** The creation of a functioning public broadcasting system is one of the conditions for lifting monitoring procedure with regard to Ukraine.

67. ***We also call on the Cabinet of Ministers to re-submit as soon as possible draft law on privatisation of state/municipal owned or controlled press and support adoption by the Parliament in the final reading of the law on transparency of media ownership. It is also recommended that Ukraine accedes to the European Convention on Transfrontier Television without further delay.***

### 3. Key human rights and other outstanding issues

68. **Execution of ECtHR judgments**. Ukraine was urged by the Assembly Resolution 1516 (2006), *inter alia*, to establish an effective parliamentary control over execution of judgments of the European Court of Human Rights. In 2006 the Parliament Committee on the Judiciary created a relevant sub-committee, which however has not started working properly due to the political crisis and disbandment of the Parliament. ***We therefore call on the current Verkhovna Rada to set up the necessary mechanism to oversee timely and effective enforcement of the Strasbourg Court's judgments in cases against Ukraine.***

69. **Death penalty**: We are disturbed by the recent proposal by the Verkhovna Rada Committee for Legislative Support for Law Enforcement Activities to adopt at the first reading a draft law on reintroducing death penalty for most heinous crimes. The draft law was initiated in November 2007 by parliamentarians from the Ukrainian Communist Party, Petro Simonenko and Alexander Golub, under a pretext that whereas the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights ban death penalty, the International Covenant on Civil and Political Rights allows the capital punishment for most heinous crimes. It should be recalled that Ukraine committed itself to abolish death penalty when acceding to the Council of Europe in 1995, which has been effective since March 1997, and that since then Ukraine had become a party to Council of Europe treaties (Protocols no. 6 and no. 13 to the European Convention on Human Rights) abolishing death penalty in all situations.

70. **Human rights in the penitentiary system**. One area where the situation with regard to adherence to human rights causes grave concern in Ukraine is the penitentiary system. According to reports by NGOs, during the last three years, ***the situation with human rights in the prison system has significantly deteriorated.***

The lack of an effective complaint system and inaction by the penitentiary administration and the central authority (State Department on Execution of Punishments) has resulted in several cases of mass self-inflicted mutilations of inmates and disobedience.

71. There is practically no external control over the system of the penitentiaries because of the system being closed for outside observation. In October 2005 the State Department on Execution of Punishments created an internal special force unit for "the fight against terrorism" in the prison establishments. This unit has apparently conducted numerous notorious searches in the prisons which in fact aimed at intimidation of inmates. According to human rights NGOs, these searches have been conducted in an extremely brutal way with gross violation of inmates' rights (in 2007 several cases became known to the public - in particular, beatings in Izyaslav, Bucha, Slavyanoserbsk colonies). This is accompanied by alleged serious financial violations in the system and incompetent management. ***The situation in the penitentiary system requires urgent response from the Government and the President who is responsible for appointment and dismissal of the head of the State Department. We urge the authorities to implement reforms in the system as soon as possible and ensure respect for human rights of inmates. All cases of alleged violations of rights of inmates should be investigated. Also, the May 2006 decision of the Government to include the State Department on Execution of Punishments within the structure of the Ministry of Justice should be reinforced through relevant changes in the law on the penitentiary system and introduction of effective provisions for control and supervision over Department's work by the Ministry of Justice (see accession Opinion No. 190 (1995) paragraph 11.vii).***

72. ***Freedom of Assembly and on the Freedom of Religion.*** One of Ukraine's initial commitments is to enhance its legislation on religious organisations and freedom of religion. We note that in 2006 the Ministry of Justice has started drafting new wording of the relevant law (draft law was examined by the Venice Commission) but the process has stalled since then. Similarly the law on freedom of peaceful assemblies should have filled the gap in Ukrainian legislation. ***We therefore call on the Ukrainian authorities to finalise the said draft laws as soon as possible and send them for additional review by international experts.***

73. ***The Gongadze case.*** Whilst the Gongadze case since 2005 is the subject of a separate report being prepared by a rapporteur of the Assembly Committee on Legal Affairs and Human Affairs, we have continued to keep track of the events in this case, as we have followed this since the disappearance of the Ukrainian journalist Georgiy Gongadze in 2000.

74. The Assembly has on numerous occasions stated that the murder of Mr Gongadze can be considered solved only when all those who ordered, organised and carried out the murder are brought to responsibility. The trial against three direct perpetrators of the murder is underway since 2006 and is close to its conclusion. However, this can be considered only as a minor success since organisers and instigators of the murder are still at large.

75. We welcome, however, the progress achieved in investigation, namely the conduct of several investigative experiments in the office of former President Leonid Kuchma with the participation of Mykola Melnychenko who had allegedly recorded conversations which can shed light on the role in the murder of ex-President and his aides. Also the Prosecutor's General Office, as reported, has finally requested the US Justice Department to provide assistance in examination of the so called Melnychenko tapes. ***We therefore call on the authorities to further intensify investigation regarding organisers and instigators of the murder so that indictments could be brought without additional delay.***

76. It is discouraging, however, that despite the judgment of the European Court of Human Rights which found Ukraine in violation of the European Convention on Human Rights due to the ineffective investigation of the case, no prosecution of officials responsible for the shortcomings of the previous investigations was ever initiated.

77. We are also deeply concerned by the recent decisions of President Yushchenko to decorate with state orders former Prosecutor General Potebenko, who was Prosecutor General at the time of disappearance of Gongadze and should be held responsible for initial lack of proper reaction and ineffective investigation, and judge Pryndiuk, who decided to release General Pukach, an alleged link between executors and organisers of the murder at large since then. These steps seem to be in contradiction with President Yushchenko's pledge to ensure that the crime is solved and perpetrators brought to justice.

### III. CONCLUSIONS

78. Year after year, from one visit to another, we are confronted with the question whether we are going to recommend the conclusion of the full-scale monitoring procedure. We maintain our position that twelve years is a long time for any country to be under monitoring and we would very much like to see this heavy procedure replaced by the lighter form of post-monitoring dialogue.

79. We also acknowledge that Ukraine is moving ahead on many accounts. We rejoice at Ukraine's recent conclusion of negotiations on accession to the World Trade Organisation (WTO) and we fully support the governing coalition's strive for more European and Euro-Atlantic integration.

80. However, we are deeply concerned that, while the early elections of 30 September 2007 helped to solve the months-long political struggle and impasse, the real reasons for the recent failures have not been eliminated. The country cannot afford yet another crisis or another early election. Ukraine has a very capable leadership and enough political stamina to tackle the root causes of their earlier failures, if they manage to put aside personal ambitions and agendas and concentrate on common interests of the nation for unity and prosperity. The latter can, however, only be achieved through political maturity, overall inclusiveness and broad-based compromise.

81. Furthermore, we also urge the Ukrainian leadership not to lose track of much-needed reforms while engaged in seeking political solutions and balances. Too much time and many opportunities have been lost by successive governments; it is time the governing coalition begin to deliver on the promises and step up the many good initiatives that were launched in 2005 – 2006 in particular in the fields of the reform of the judiciary and of criminal justice. Ukraine can only become a truly successful state when, regardless of differences of opinion and political combats for power positions, all political forces reach an understanding that combined efforts in building democratic institutions, implementing long overdue constitutional, judicial, legal, administrative and economic reforms, and effective fight against corruption can win more popular support than political mud-slinging, populism or personal agendas.

82. Finally, we remain convinced that we should propose a switchover to the post-monitoring dialogue as soon as tangible results are produced by the Ukrainian authorities in the areas of reforms mentioned in the above chapters and in line with the recommendations of the Assembly Resolutions 1466 (2005) and 1549 (2007).