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## Functioning of democratic institutions in Ukraine

### Report

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

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### *Summary*

The Parliamentary Assembly is concerned by the current political crisis in Ukraine which culminated in President Yushchenko's decision to dismiss the Verkhovna Rada (parliament) by a decree issued on 2 April 2007.

The Assembly considers that the ground roots of the current deadlock lie in the hasty and incomplete constitutional and political reform of 2004, which failed to settle the crucial issues of separation of powers and the mandate of national deputies; the systematic failure by the successive Ukrainian governments to establish coherent policies backed by substantial legal, administrative and economic reforms; and the failure by the lawmakers to introduce complementary constitutional laws that would set "the rules of the game" and enable law-based institutions to guarantee democratic rights and freedoms and promote political competition.

The Assembly is convinced that today's complex crisis can only be effectively resolved through strict adherence to the Constitution and the legal avenues it offers, and through a broad-based, sustainable and acceptable-to-all political compromise that would eliminate the causes that have led to the current political impasse.

To this end, the Assembly recommends to the Ukrainian leaders a number of concrete steps be taken in order to address the roots of the crisis and prevent further dysfunction of the democratic institutions in Ukraine.

The Assembly is confident that the political leaders of Ukraine are fully capable of resolving their internal conflict in a quick, democratic and legitimate manner. All the same, it stands ready to offer its many-sided assistance to help Ukraine overcome its problems.

## A. Draft resolution

1. The Parliamentary Assembly is concerned by the political developments in Ukraine which have evolved in recent months and culminated in President Victor Yushchenko's decree of 2 April 2007 announcing the early termination of powers of the Verkhovna Rada (Parliament) of Ukraine. The continuing political instability is the result of the systematic failure by the successive Ukrainian governments to establish coherent policies backed by substantial legal, administrative and economic reforms. The political reforms that would set "the rules of the game" and enable law-based institutions to guarantee democratic rights and freedoms and promote political competition have not been completed to date.
2. The Assembly stresses that the current crisis in Ukraine is also the result of the hasty and incomplete constitutional and political reform of 2004, under which a number of changes have been introduced to the Constitution of Ukraine without taking into account the reservations of the Venice Commission and without holding a comprehensive public debate in the country. The Assembly regrets that the strong criticism expressed in its Resolution 1466 (2005) and its repeated calls on the Ukrainian authorities to address these issues as a matter of urgency, in order to secure the legitimacy of the constitutional changes of 2004 and their compliance with European standards, have gone unheeded.
3. In this context, the Assembly recalls its numerous earlier appeals to reform the institutions in Ukraine as expressed in Resolutions 1179 (1999), 1239 (2001), 1244 (2001), 1346 (2003), 1364 (2004), 1466 (2005) and Recommendations 1395 (1999), 1416 (1999), 1451 (2000) and 1722 (2005). It recognises the achievements of the Orange Revolution that have allowed for key democratic freedoms to take root in Ukraine: the country now enjoys freedom of speech and of the media, freedom of assembly, freedom of political competition and opposition, and a vibrant civil society. Moreover, a year ago the country proved its ability to conduct free and fair legislative elections. What Ukraine lacks today, however, are guarantees built into its democratic institutions that would consolidate those newly acquired freedoms.
4. Personal rivalries and short-sighted fights for personal gain, linked to posts and positions, have led to various attempts by some political forces to take advantage of the constitutional vacuum that emerged with the coming into effect of the controversial 2004 constitutional amendments in January 2006. The Assembly regrets that the absence of independent counterweights allows the key state bodies to feel themselves above the law. This has seriously tarnished the reputation of all the political leaders in Ukraine.
5. The Assembly launches an urgent appeal to the President, the members of Parliament and the Government of Ukraine to resolve their current crisis in a legitimate, strictly constitutional and peaceful manner. In this process, all political forces should abstain from sharp and biased public statements in support or condemnation of any political force in Ukraine.
6. In this regard, the Assembly notes that the top leaders of the country have maintained dialogue throughout the ongoing crisis. It also takes note of the fact that the Ukrainian leadership has so far succeeded in maintaining stability and civil peace in the country, which testifies to the existence of an internal potential to overcome the current crisis. Furthermore, it is a positive sign that the law enforcement agencies have so far performed their function of sustaining public order and safety without direct involvement in the political struggle.
7. However, the Assembly is concerned by the reports of engaging minors by some political forces in mass political actions, which is in violation of the UN Convention on the Rights of the Child. It stresses that such practices are unacceptable and calls upon all political forces in Ukraine to honour the said Convention to which Ukraine is a party.
8. The Assembly calls on the political forces of Ukraine, as a matter of urgency, to resume working on the improvement of the Constitution of Ukraine and the related legislation in order to establish at last an effective system of checks and balances and bring constitutional provisions in line with European standards. Constitutional reform should be part of the discussions aimed at the resolution of the current political crisis. The Assembly expresses its expectation that the Venice Commission will be actively involved in the process of drafting constitutional reform proposals.

9. The Assembly reaffirms that the recall of people's representatives by the political parties ("imperative mandate") is unacceptable in a democratic state. The relevant constitutional provisions need to be abrogated in line with the recommendations of the Venice Commission in 2004; similar provisions also need to be deleted from ordinary legislation. The Assembly believes that a consistent political programme, responsible and committed party membership and scrupulous screening of parties' candidates are more effective tools for encouraging party and faction discipline.

10. The Assembly recognises that both regular and pre-term elections constitute a legitimate democratic instrument for the people to choose and control the authorities that act in their name. Early elections are a normal practice in all democratic countries of the Council of Europe and as such could be accepted as a key building block of the political compromise. However, the Assembly underlines that for any elections to be considered democratic, they should be conducted according to a legitimate procedure that allows fair campaigning and free choice for voters.

11. In this respect the Assembly notes with concern that, according to the Constitution, early parliamentary elections should be organised within 60 days of the presidential decree dissolving the parliament. Financing needs to be allocated so that the Central Election Commission can start to operate.

12. The Assembly also urges the Ukrainian authorities and political forces to address as soon as possible the problem of the parliamentary election system of Ukraine which may represent one of the causes of the weakness of the political system.

13. The Assembly deplores the fact that the judicial system of Ukraine has been systematically misused by other branches of power, which is a sign of erosion of this crucial democratic institution. Independent and impartial judiciary is a precondition for the existence of a democratic society governed by the rule of law. Hence the urgent necessity to carry out a comprehensive judicial reform, including through amendments to the Constitution.

14. The Assembly reiterates that the authority of the sole body of constitutional justice – the Constitutional Court of Ukraine – should be guaranteed and respected. Pressure in any form on the judges is intolerable and should be investigated and criminally prosecuted. On the other hand, it is regrettable that in the eight months of its new full composition, the Constitutional Court has failed to produce judgments, thus failing to contribute to solving the crisis in its earlier stages. There is an urgent need for the judgment concerning the constitutionality of the Presidential Decree of 2 April 2007 to be delivered. Once delivered, it should be accepted as binding by all sides.

15. In the light of the above, the Assembly recommends to the Ukrainian authorities the urgent adoption of the following concrete measures to address the causes of the crisis and prevent further dysfunctioning of democratic institutions in Ukraine:

15.1. to re-launch the constitutional reform project, in close co-operation with the Venice Commission, in order to improve the Basic Law 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 prosecutor's office as stipulated in various opinions of the Venice Commission on the subject and Assembly Resolutions 1364 (2004) and 1466 (2005);

15.2. to adopt and enact without further delay basic constitutional laws (laws on the Rules of Procedure of the Verkhovna Rada of Ukraine, on the parliamentary temporary special and investigatory commissions, on central bodies of the executive power, on the parliamentary opposition, on referendum, etc.) and to bring the Law on the Cabinet of Ministers of Ukraine in line with the Constitution of Ukraine, taking into account relevant European standards and the opinion of the Venice Commission;

15.3. to amend the Law on the Elections of People's Deputies of Ukraine in order to improve procedures for the organisation of pre-term elections in case of dissolution of the Parliament;

15.4. to envisage changing the system of elections to the Parliament, e.g. by introducing open party lists whereby voters could indicate their preferences as to particular candidates included in the

election lists proposed by political parties (blocs) and by dividing the country into different constituencies;

15.5. to carry out the reform of the judiciary on the basis of the Judicial Reform Concept adopted by the President of Ukraine in May 2006 with the aim of establishing an independent and effective judiciary in Ukraine, taking into account the recent opinion of the Venice Commission;

15.6. to launch the reform of the criminal justice system and law enforcement agencies and to take active legislative and practical measures to tackle all forms of corruption, including the political one.

16. The Assembly believes that in order to effectively implement the above recommendations, all parties involved in the conflict should be engaged in an open and constructive dialogue on the settlement of the situation in Ukraine.

17. The Assembly calls upon the Secretary General of the Council of Europe, as a matter of priority, to take all appropriate measures in his competence to contribute to the process of settlement of the crisis in Ukraine. It also considers that the activities relating to the Council of Europe Action Plan for co-operation with Ukraine should be stepped up in order to achieve a noticeable strengthening of democratic institutions in Ukraine.

18. The Assembly confirms its readiness to help Ukraine overcome its current deadlock either through its assistance mechanisms or other specific arrangements. Nevertheless, it is up to the Ukrainian political leaders to work out the most appropriate solution for its internal problems. The Assembly believes that not all domestic avenues for a quick, efficient and legitimate political compromise have been exhausted as yet. It therefore calls upon the Ukrainian leaders to build up new political confidence through establishing sound safeguard mechanisms for national unity, fair political competition and coherent and comprehensive reforms, the main directions of which are outlined in the Assembly's Resolution 1466 (2005).

## **B. Explanatory memorandum by Mrs Severinsen and Mrs Wohlwend, co-rapporteurs**

### **1. Introduction**

1. Upon accession to the Council of Europe more than eleven years ago, Ukraine undertook to respect its statutory obligations as a member State of the Council of Europe and agreed to comply with a number of specific commitments, including building up democratic and well-functioning institutions.

2. However, since accession to the Council of Europe hopes of democratic breakthrough have alternated with serious political standoffs. Since 1999, the Assembly has held nine debates related directly or indirectly to the problems of functioning of Ukraine's democratic institutions, four of which have ended in the adoption of resolutions and recommendations<sup>1</sup> that have threatened Ukraine with serious sanctions unless progress is made. During previous political crisis, notably in 1999-2000 and 2004, Ukraine leaders promised to undertake serious reforms, and yet – to our utmost regret – to this day the same ground problems persist and Ukraine still has few institutions that are effective and whose authority is respected by all.

3. The failure to establish clearly defined and law-based institutions to guarantee in practice separation of power, democratic rights and freedoms, by providing for an effective system of checks and balances is at the very heart of the political struggle that has unfolded in the country over recent months and sparked into an open crisis upon the dissolution of the Verkhovna Rada (parliament) by the President of Ukraine on 2 April 2007.

4. As co-rapporteurs of the Assembly's Monitoring Committee, we are deeply concerned about the political and legal implications of President Yushchenko's decision and the constitutional, institutional and political crisis that has unfolded thereafter. Even more worrying is the fact that the crisis has paralysed many already seriously ailing institutions which should be guaranteeing democracy, rule of law and human rights.

5. This crisis must find a peaceful, democratic and constitutional solution reached through constructive negotiations and mature political compromises. In this regard, we commend both President Yushchenko and Prime Minister Yanukovych for having maintained dialogue so far and not having allowed peaceful demonstrations to derail into violence. This allows us to hope that Ukraine will keep on its democratic course, regardless of how the current crisis is resolved.

6. We appreciate the fact that the Ukrainian leaders of all key political forces have requested the assistance of the Council of Europe and its Assembly in order to find a positive outcome to the crisis. We take this as a sign of appreciation of years-long assistance through the monitoring procedure. All the same, we wish to underline that it is not for the international community but for the Ukrainian political elite to work out the most appropriate solution for its internal problems. Our role is to observe, to remain vigilant and to offer political and legal guidance where appropriate.

7. In the chapters that follow, we shall try to contribute to this debate through a comprehensive analysis of the roots of the problem, the issues at stake and the possible solutions to resolve the current crisis. Time has not allowed us to pay a visit to Kyiv at the peak of this crisis; therefore much of the information is based on our discussions with Ukraine's leaders during our two recent visits from 9-12 October 2006 and 28 February - 6 March 2007 and materials published in the press. Some of the current issues had already been raised in the information note that we issued in January 2007 (AS/Mon(2007)02R – declassified).

### **2. Roots of the current crisis**

8. On the evening of 2 April 2007, President Yushchenko issued Decree No 264/2007 "On the Early Termination of Powers of the Verkhovna Rada of Ukraine" (see Appendix). This brought Ukraine once again to the centre of the world's news. However, for many observers of developments in the country, the current crisis was predictable and even unavoidable.

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<sup>1</sup> Resolutions 1179 (1999), 1194 (1999) and 1364 (2004) and Recommendations 1395 (1999), 1416 (1999) and 1451 (2000).

9. Six main causes have in our opinion contributed to the escalation of tensions:

10. **First, the constitutional reform of 2003-2004 and its aftermath have created legal chaos and a systemic constitutional crisis**, thus facilitating the current political confrontation. Although the constitutional reform package adopted as a compromise deal on 8 December 2004 helped to halt the turmoil over the 2004 presidential election crisis, it was adopted hastily and without a thorough examination of the effect of individual provisions on the operation of the government, despite the successive negative opinions issued on the draft amendments by the Venice Commission throughout the year 2004 and its very clear message that the constitutional amendments, as adopted, did not "*yet fully allow the aim of the constitutional reform of establishing a balanced and functional system of government to be attained*"<sup>2</sup>. Also the Assembly has repeatedly rung the alarm bell over the incompatibilities with the principle of democracy and the political imbalances which the irresponsible adoption of the political reform introduced<sup>3</sup>.

11. In fact, since the constitutional reform entered into force on 1 January 2006 before all necessary legal norms were harmonised or even adopted, the political and legal collision has been unavoidable. The undecided question on competencies and limits of different branches of power first led to a considerable confusion over the formation of the majority coalition and the new government following the March 2006 legislative elections, and has ever since evolved into an incessant tug of war between the President and the Prime Minister.

12. In fact, regardless of the teething phase of the current political reform in Ukraine, the parliamentary–presidential system opted for by the Ukrainian lawmakers in 2004 has an in-built structural problem: it can work smoothly only if the presidential and parliamentary powers represent the same political vision. Cohabitation works in the case of highly mature democracies, which is not the case in Ukraine. Largely because of this structural cohabitation dilemma, all established European democracies apart from France have opted for the fully parliamentary form of governance. What we have also seen since the establishment of the current parliamentary majority coalition and the formation of PM Yanukovich's government is the struggle to move towards a fully parliamentary system, which in the existing constitutional order has been perceived by the opposition as usurpation of power by the majority. ***Although Ukraine understandably has its own historic reasons to avoid the accumulation of power into the hands of one political force, it should nevertheless consider in the course of future constitutional amendments whether it would not be better for the country to switch to a full parliamentary system with proper checks and balances and guarantees of parliamentary opposition and competition.***

13. **Second**, more than two years from the Orange Revolution, **the foundations for truly democratic institutions have not been built**. The state machinery can still be used for administrative leverage in political struggles, the Constitutional Court has proved ineffective, the judiciary is not carrying out its functions, the rights of the opposition are not enshrined in law, the organisation of political parties remains far from democratic standards, and the levers of political influence available to civil society exist only on paper<sup>4</sup>.

14. None of the successive post-revolution governments has carried out the necessary reforms. They have failed to work on the basis of public policy standards or to institute a democratic system of decision making that would allow the opposition and civil society to have an input into state policy. This in turn has allowed the government to feel itself above the law, while the opposition feels marginalised. This has gradually led to radicalised tactics of political competition, using means of political struggle that move away from democratic principles and the rule of law<sup>5</sup>.

15. This negative evolution was vividly seen in January 2007 when the Verkhovna Rada (as part of a trade-off deal between the coalition and opposition bloc of Yulia Tymoshenko) overruled the President's veto on the Law on the Cabinet of Ministers, which the latter had proclaimed

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<sup>2</sup> CDL-AD(2005)015.

<sup>3</sup> see the Assembly Resolutions 1346 (2003), 1364 (2004) and 1466 (2005).

<sup>4</sup> Presaniakov, I. and Chumak, V., "In search of a way out: how to find a democratic country in this political crisis", International Centre for Policy Studies, ICPS Newsletter No 360, Kyiv, Ukraine, 9 April, 2007.

<sup>5</sup> Idem.

unconstitutional. On the other hand, President Yushchenko refuses to reinstate one of the oblast governors despite a ruling from the Supreme Court that requires it.

16. **Third, the popular expectations of the Orange Revolution have remained largely unattained.** The Presidential elections in December 2004 brought about some basic democratic changes such as freedom of assembly, freedom of expression and of media, freedom of political competition and a vibrant civil society. This led to legislative elections in March 2006 that were globally considered free and transparent. However, the President and the new successive governments have failed to deliver on their promises to introduce clean, honest and competent governance and to promote the rule of law and transparency at all levels. Nor have the President or the "orange forces" lived up to their promises to bring to justice the perpetrators and masterminds of the election frauds in 2004 (although the Supreme Court ruled on 3 December 2004 that those involved in mass fraud should be criminally charged) or to advance the investigation of largely symbolic cases such as that of the Gongadze murder or of the President's poisoning in September 2004.

17. Rather the reverse, even though the "orange forces" together won some 45% of the votes at the March 2006 elections compared to the 32% obtained by the Party of Regions, they failed to form a functional second Orange coalition. After protracted negotiations, the coalition-making process finally resulted in July-August 2006 in the nomination by the President of his arch-rival Viktor Yanukovich from the Party of Regions as the Prime Minister. This came as a shock to many who found it hard to understand that the loser of the 2004 presidential elections and man who embodied for many what the Orange Revolution had fought against had been selected to head the government with powers that exceeded those of the President according to the constitutional amendments that entered into force in January 2006.

18. The unwillingness of the Party of Regions to accept responsibility for election fraud of 2004, coupled with President Yushchenko's lack of political will to prosecute, has raised scepticism in large parts of society. Also, the coalition and the government have reinstated many of the officials of the Kuchma era. For example, the Head of the Central Election Committee who had been perceived as responsible for the massive frauds in 2004 now chairs the Verkhovna Rada Committee on Justice. Furthermore on the day of the official publication of the Presidential Decree, the Verkhovna Rada voted to reinstate the 2004 Central Election Commission. This has fuelled popular fears that the undemocratic practices of the pre-2004 era could return.

19. The latter have been further nourished by many complaints by the civil society we have received during our recent visits about non-transparent government actions, restrictions on media and increasing reported cases of violence and harassment against journalists, the cancellation of the popular "Toloka" television programme, the recent police raids of former Interior Minister Lutsenko's apartment, etc. Those tendencies plus the alleged illegal methods used in "buying" large numbers of opposition MPs and the lack of progress in adopting badly needed reforms contributed to the gathering of over 100,000 peaceful demonstrators of the opposition in Kyiv's central square on 31 March demanding new elections, an event that appears to have turned the tide and pushed the hesitant President to sign the Decree.

20. **Fourth, the status of the constitutional reform still remains questionable linked as it is to the political dependence and paralysis of constitutional justice.** The limits and irreversibility of the reform have been a constant source of conflict and confusion from day one of the adoption of the "package deal" of 8 December 2004. From the very beginning, the central issue at stake of the political reform has not been the "balance of power" but the struggle for the "control of power". Besides, it is common knowledge that the procedure of constitutional amendments since 2003 has been marred by gross violations of the constitutional procedure, which makes it vulnerable to criticism. Nor has its incomplete nature and questionable constitutionality added to the respect and easy acceptance of the reform by different political forces. In fact, as we remarked already in our observations a year ago, the constitution has been virtually used as a football that has been kicked from one political group to another.

21. The Assembly's Resolution 1466 (2005) underlined that the constitutional changes were adopted without prior consultation with the Constitutional Court, as envisaged by Article 159 of the Ukrainian Constitution and interpreted in the Constitutional Court of Ukraine decision of 1998, and

urged the Ukrainian authorities "to address these issues as soon as possible in order to secure the legitimacy of the constitutional amendments and their compliance with European standards".

22. However, to this day, despite the numerous political declarations by President Yushchenko and Yulia Tymoshenko, the entire package has never been submitted to the Constitutional Court for consideration, although the Court was able to render a decision on this aspect of the political reform until 5 October 2005.

23. Since the latter date, the Verkhovna Rada has directly interfered in the functioning of the Court, first by deliberately refusing to renew the composition of the Constitutional Court for nearly nine months (by holding up the swearing in of the nominees appointed by the President and the Congress of Judges and to vote on its own quota of appointments) and then by passing a bill prohibiting the Constitutional Court from deciding on the amendments of the Constitution passed as part of the political reform. President Yushchenko, for some reason or another, signed the bill into law on the same day. The law is unquestionably unconstitutional itself.

24. ***Prohibiting the Constitutional Court from considering the constitutionality of the political reform is clearly unlawful and, to our utmost disappointment, not a single political force has held up the rule of law and the principle of separation of powers in this process.*** As pointed out by Judge Bohdan A. Futey, "it is inconceivable that reforms of such magnitude would be 'immune' from constitutional scrutiny"<sup>6</sup>.

25. The other side of the coin is the weakness written into the very function of the Constitutional Court itself whereby the Constitutional Court cannot act *ex officio* but only upon appeals lodged. In addition, ever since the Court became operational in August 2006, it has chosen not to deliver a single judgment despite the fact that since the new government was installed, a real "legal fight" between the Cabinet of Ministers and the President has commenced in which the Court was expected to be the ultimate authority for numerous constitutional law disputes between the different authorities.

26. As of 6 April 2007 the Constitutional Court had received 72 constitutional appeals from various subjects, including 12 from the President, 4 from the Cabinet of Ministers and 33 from MPs. The Court has been used by the rivalling parties as the last resort in the legal and often political arguments. This has put the Court under political pressure even before the Presidential Decree on the dissolution of the parliament was approved.

27. ***However, in a society that claims to be democratic, the justice system should be able to resist political interests. It is not acceptable that the country's constitutional justice continues to be paralysed for more than 18 months!***

28. ***Fifth, the failure of Ukraine to "integrate into itself"***. Six months ago, during our visit to Kyiv in October 2006, we observed as a positive development that the collapse of the experiment in unity between the Orange-Blue rivals of 2004 seemed to be producing a new and more complex alignment in Ukrainian politics, with new lines of cleavage emerging between the more democratically oriented self-interested proponents of the European future for Ukraine and the eastern Ukrainian "paternalists" propagating a multi-vector approach. Instead of the Orange-Blue division that has always over-emphasized the geographical East-West division and the split in Ukrainian identity, the new political landscape seemed to find its roots and resources in the same turf, i.e. in big business in the Donetsk region. ***We are convinced that for the internal peace and stability in Ukraine, the diminution of the regional divide and the reconstitution of today's political blocs are absolutely vital.*** For this reason, we were ready to accept the turbulent short-term effects of the internal splitting up of the political forces if that was for the benefit of breaking the mould of two-polar system of Ukrainian politics today and if it contributed to a more constructive basis for political decision-making.

29. However, facing the reality of being practically stripped of his veto power (after the "joint" overriding of his veto right by the Verkhovna Rada on the adoption of the Law of the Cabinet of Ministers in January) and under the threat of defection of many opposition MPs which could have sooner or later resulted in the governing coalition obtaining the constitutional majority to proceed with

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<sup>6</sup> quoted in "The Constitutional Crisis in Ukraine: Legal and Political Ramifications in a Comparative Context", by Judge Bohdan A. Futey, George Washington University, Washington, D.C., 11.04.2007



his impeachment or constitutional changes, President Yushenko and his Our Ukraine Bloc decided to renew the "orange" alliance with Yulia Tymoshenko's Bloc. The first point of this agreement became the clause long propagated by Yulia Tymoshenko – i.e. early dismissal of the parliament and organisation of early elections.

30. In Ukraine's unpredictable political system without fixed rules, moral umpires or political traditions, where agreements between political forces are signed only to be broken on the following day, coupled with the lack of strategy and transparency, disinterest in reforms and weak political party programmes, it is not evident how lasting the Our Ukraine – ByuT marriage will be. However, ***the immediate effect has been a new polarisation of the society and weaker national unity, which will affect the possibility of reaching consensus or compromise to get out of the current political deadlock.***

31. **Sixth, the lack of democratic traditions and understanding of parliamentary pluralism** are probably the overarching grounds of all the above reasons that have led to the political impasse of today. 15 years following the demise of the Soviet Union, it is difficult to bring the leading Ukrainian politicians into a situation where they obey the rules of the game. Rather than playing **on the basis of** the rules, they prefer playing **with** the rules. It is also linked to the mentality of the elites and the broader population, which favour leaders and not law. Following the Orange Revolution, Ukraine tried to move away from a powerful executive and to build a true parliamentary system. However, it has so far failed to understand that in a parliamentary democracy decision-making and policy-setting are based on parliamentary leadership and not on the leadership of one single person. Unfortunately, especially when faced with difficulties, the Ukrainian leaders have chosen to fall back on what they know best – attempting to rule with a strong hand and through authoritarian means, using and abusing Ukraine's democratic institutions and laws in order to promote their own political ends.

32. The effect of short-sighted political goals of individual politicians is also felt behind the current crisis. PM Yanukovych signed the *Universal* in August 2006 only to come to power and then use it to usurp the President's power, and has resorted to non-constitutional means in underhanded efforts to recruit deputies away from the opposition factions. Yulia Tymoshenko joined the coalition forces in overriding the President's veto on the controversial Law on the Cabinet of Ministers that diminished Presidential powers, which makes her accusations of Prime Minister's power usurpation less than plausible. Mrs Tymoshenko and more recently President Yushchenko have been promoting the imperative mandate not only for the deputies of the Verkhovna Rada but also for those of local councils knowing full well that this is an ineffective and undemocratic mechanism of forced loyalty and that the Venice Commission has recommended to abrogate the constitutional provisions pertaining to the imperative mandate in 2004. We very much regret that the law on the imperative mandate for deputies of local representative bodies was adopted in January 2007 by the Verkhovna Rada and promulgated immediately by the President. We equally disapprove the proposals to adopt the law on the imperative mandate also for members of the national parliament. ***We are convinced that strong ideology, committed party members and scrupulous screening of candidates' lists are more effective means for encouraging party and faction discipline.***

33. ***By way of conclusion, in order to define the nature of today's crisis, we believe that it is a political rather than legal crisis, but it is a crisis that is accompanied by a systemic constitutional crisis and an institutional paralysis. All these elements must be taken into account when looking for an appropriate solution that would enable the country to come out of the deadlock without further damaging the fragile democracy and rule of law in Ukraine.***

### 3. President Yushchenko's decree of 2 April 2007

#### 3.1. Legal arguments

34. President Yushchenko's decree gives three main reasons for the dissolution of the Verkhovna Rada: illegal formation of party factions, ineffectiveness of the parliament and adoption of non-constitutional legislation by the parliament. As to its legal basis, the Decree refers, in particular, to Article 83 of the Constitution of Ukraine which defines the procedure for formation of a coalition of deputy factions and to Article 102 which obliges the President to guarantee state sovereignty and territorial indivisibility of Ukraine, the observance of the Constitution of Ukraine and human rights and

freedoms. The decree also calls for extraordinary elections of the Verkhovna Rada to be held on 27 May 2007.

35. The reasoning of the Decree is based on the logic of the Constitution, as amended in 2004, according to which, after fully proportional parliamentary elections, the political parties or their blocs create factions who in turn form a majority coalition which proposes a candidate for the Office of Prime Minister to the President (Article 83 of the Constitution). After the March 2006 parliamentary elections, the 'Anti-Crisis Coalition' (comprising 238 MPs out of 450) was formed comprising the Party of Regions, the Socialist Party and the Communist Party.

36. However, at the time when the Coalition was established it included several MPs who belonged to the new opposition factions. Later on there were several other defections of individual MPs who joined the coalition. According to the Decree, *"to replace isolated instances of inclusion of some people's deputies into the composition of the deputy factions' coalition, which had taken place during the formation of the Anti-crisis Coalition in July 2006, a new practice of massive enlargement of the coalition on the basis of individual or group membership has appeared. Such practice is a flagrant violation of Article 83 of the Constitution of Ukraine which provides for formation of the deputy factions' coalition in the Verkhovna Rada of Ukraine, upon results of elections and on the basis of agreed political positions, exclusively by deputy factions."*

37. The Decree goes on, *"the violation of the constitutional provisions concerning the formation of the deputy factions' coalition in the Verkhovna Rada of Ukraine distorts results of people's expression of will, carried out in accordance with Article 69 of the Constitution of Ukraine through parliamentary elections in March 2006, is a negation of constitutional election rights of citizens of Ukraine, results in the neglect of the constitutional principle of people's sovereignty, provided for in Article 5 § 2 and 3 of the Basic Law of Ukraine. Such developments are a real pre-condition for usurpation of power in Ukraine which is prohibited by Article 5 § 4 of the Constitution of Ukraine. This also threatens national security, causes destabilisation of the political situation in the state, and creates potential risk to the state sovereignty."*

38. Finally, as provided for in the introductory part of the Decree, Article 102 § 2 of the Constitution of Ukraine, whereby the President of Ukraine is the guarantor of state sovereignty and territorial indivisibility of Ukraine, the observance of the Constitution of Ukraine and human and citizens' rights and freedoms, obliges him to take action *"to halt violations of the Constitution of Ukraine, of citizens' rights, to prevent threats to the state sovereignty and territorial integrity of the state. This, in particular, entails an obligation to effect early termination of powers of the parliament in the case of violation."*

39. Proponents of the Decree refer to the systematic interpretation of the Constitution and focus on Article 102 of the Constitution which establishes the President as the guarantor of the constitutional order whose duty is to take active measures when human rights and Constitution are under threat. Such interpretation raises the question, however, whether the letter of the Constitution can be neglected when a need arises to protect some other fundamental provision of the Constitution, in particular Article 90.

40. The Decree makes no references to Article 90 of the Constitution which contains a list of three grounds for early termination of powers of the Verkhovna Rada by the President<sup>7</sup> – none of which could be applicable in the present case. This fact, together with Article 106 § 1 (8) of the Constitution which provides for the power of the President to terminate powers of the Rada "in the cases envisaged by this Constitution", are the main grounds for public statements about the unconstitutionality of the Decree.

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<sup>7</sup> According to Article 90 paragraph 2, the President of Ukraine may terminate the authority of the Verkhovna Rada of Ukraine prior to the expiration of term, if:

1. there is a failure to form within one month a coalition of parliamentary factions in the Verkhovna Rada of Ukraine as provided for in Article 83 of this constitution;
2. there is a failure, within sixty days following the resignation of the Cabinet of Ministers of Ukraine, to form the personal composition of the Cabinet of Ministers of Ukraine;
3. the Verkhovna Rada of Ukraine fails, within thirty days of a single regular session, to commence its plenary meetings.

41. The Decree was not recognised by the coalition partners of the Verkhovna Rada of Ukraine or the Cabinet of Ministers of Ukraine, who claimed it unconstitutional. On 3 April, 53 MPs submitted an appeal to the Constitutional Court of Ukraine seeking abrogation of the Decree as contradicting Articles 90 and 106 § 1 (8) of the Constitution. Apart from that, the expert conclusions of the Institute of Legislation of the Verkhovna Rada of Ukraine of 3 April 2007 (No 22/214-1-19) which may be regarded as corresponding to the position of the majority in the Verkhovna Rada, contest the interpretation of Article 83 § 6 in the Decree according to which a coalition is formed according to the election results and "exclusively" by deputy factions. It refers to the wording of this paragraph containing only the requirement that the Coalition be "*composed of the majority of the People's Deputies of Ukraine from the constitutional composition of the Verkhovna Rada of Ukraine*". It also refers to § 9 of the same Article 83 stipulating that "*creation, arrangement of work and termination of the activities of the Coalition of Deputy Factions in the Verkhovna Rada of Ukraine are governed by the Constitution of Ukraine and Rules of Procedure of the Verkhovna Rada of Ukraine. According to Clause four of Article 61 of the rules of Procedure of the Verkhovna Rada of Ukraine (that was effective at the time of the Decree's issuance) the coalition of Deputy Factions could include both Deputy Factions and independent deputies*". It further underlines that changing the numerical composition of the Coalition after it has been formed including through the accession of independent People's Deputies of Ukraine does not mean changing the format of the Coalition.

42. The above expert opinion also considers Article 2 of the Decree which suggests to the People's Deputies to continue delivering their "authorities that are not directly connected with the powers of the Verkhovna Rada of Ukraine" as violating Article 19 § 2 and Article 76 § 4 on the grounds that a) the authorities of the deputies are determined by the Constitution and Laws of Ukraine and not by decrees of the President of Ukraine, b) the Constitution does not empower the Head of State to interfere with delivering authorities of the MPs and c) that the term "authorities that are not directly connected with the powers of the Verkhovna Rada of Ukraine" are not defined in the Constitution.

43. The opinion further finds that Article 4 of the Decree, ordering the Cabinet of Ministers of Ukraine to finance the extraordinary elections to the Verkhovna Rada of Ukraine, violates Articles 19 § 2, 85 § 1 (4) and 95 § 2 of the Constitution. It argues that the President is not authorised to give instructions to the Government to ensure the financing of the extraordinary elections as the said financing may only be applied by making changes to the Law on the State Budget of Ukraine by the Verkhovna Rada.

44. Similar arguments have also been brought forward in the legal expertise of the Decree drafted by the Minister of Justice Mr Lavrynovych upon the request by the Cabinet of Ministers.

45. In general, from the first minutes of the President issuing his Decree, a plethora of opinions have been published in the media taking sides on the constitutionality and consequences of President's decision. ***We wish to underline that as the case is sub iudice in the Constitutional Court of Ukraine, the latter is the sole authority to rule over the constitutionality of the Presidential Decree. As co-rapporteurs, we therefore refrain from any position that could be perceived as interfering in the judicial process.***

46. For the same reason, the President of the Venice Commission who has been called upon by the Speaker of the Verkhovna Rada and Minister of Justice on 9 April to give an opinion on the constitutionality of the Decree, has declined to give an opinion on the same grounds that the Venice Commission cannot act in a manner which would undermine the authority of the Constitutional Court. Nevertheless, the letter mentions that "*If Ukraine were to embark on a joint effort to reform the Constitution and relevant legislation as part of a political agreement to overcome the present crisis, our Commission would be pleased and honoured to provide assistance*".

47. It is also noteworthy to recall that already back in June 2005<sup>8</sup> the Venice Commission adopted a clear position on Article 83 § 6 of the Ukrainian Constitution on the formation of coalition, which is the strongest legal argument of the Presidential Decree in question. It notes that "*It may be questioned whether such a formalised procedure for forming a parliamentary majority would contribute to enhancing political stability in Ukraine. Furthermore, it could hardly be seen compatible*

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<sup>8</sup> CDL-AD(2005)015.

*with the freedom of the choice and decision guaranteed to political parties by the Constitution, in conformity with European standards in this field. Generally speaking, alliances between political parties depend on the free choice of the parties concerned, and will last as long as the governing bodies of the parties find it convenient to stick to the negotiated agreements.*" (paragraph 16) It continues, *"The aim of ensuring political stability in Ukraine could also be attained without infringing the principles of the independent mandate of the deputies and the free choice of the political parties"* (paragraph 17), and concludes, *"In the light of these considerations and bearing in mind the new electoral system based on proportional representation /.../ which will further favour a stronger link between the parties and the elected deputies, the Commission considers the requirement to form a parliamentary coalition to be excessive and would strongly favour its removal from the Constitution".*

48. We hope that this advice of the Venice Commission will be followed in the process of future constitutional reform as indeed the application of the reform undertaken in 2004 has not contributed to the enhancing of political stability in Ukraine.

49. The principle of rule of law requires that there should be legal certainty and therefore the Presidential Decree should be deemed valid until otherwise declared by the relevant authority – the Constitutional Court of Ukraine. ***As long as the Constitutional Court has not imposed a suspension of the application of the Decree nor ruled it unconstitutional, the Decree is legally valid.***

### **3.2. Legitimacy of the Verkhovna Rada after the Presidential Decree**

50. Even if agreed that the Decree remains formally valid until overturned, there is lack of clarity as to the functioning of the parliament in between the decision on the dissolution and the convening of a new parliament. Some claim there should be no disruption in the functioning of the legislative body and make inferences from constitutional provisions on the Cabinet of Ministers which, according to Article 115 § 4 of the Constitution, is supposed to continue to exercise its powers until the new Cabinet is appointed. They make references to Articles 81 § 3 and 90 § 1; which provide that powers of the people's deputy, in case of early termination of powers of the Rada, terminate on the day of opening of the first meeting of the Rada of the new convocation. Another argument is that the Constitution contains several provisions on decision making in crucial matters where the parliament's involvement is necessary – e.g. approval of the presidential decree on introduction of the state of emergency, execution of certain presidential powers by the speaker of the parliament in case of early termination of the President's authority etc.

51. However, others claim that despite Article 90 § 1 providing that the powers of the Verkhovna Rada terminate on the day of the opening session of the new parliament, these provisions refer to the termination of power in case of ordinary elections after the parliament has served its full term of office. The case of early termination is dealt with in paragraph 2 of the said Article. Under this interpretation, the impossibility for the parliament's participation in some procedures (declaration of emergency situation, execution of presidential powers, etc.) can be viewed as a defect of the Constitution.

52. The President's Decree indicates quite clearly that he expects the deputies of the Verkhovna Rada to stop executing their legislative powers; he has therefore adopted the approach neither to sign nor to veto laws adopted by the Rada after the Decree was issued. At the same time the Government continues to implement decisions of the parliament. In the current political deadlock, the President has no power to coerce the coalition to comply with his Decree. Such annihilation of the institution of presidency in Ukraine and practice of legal nihilism by the government and lawmakers is unacceptable.

### **3.3. Dysfunctional Constitutional Court**

53. One of the disastrous developments for the fragile legal system of Ukraine is the continuous dysfunction of the constitutional jurisdiction – the Constitutional Court of Ukraine.

54. On 27 March President Yushchenko met judges of the Court to explain his views on the current political events in the country and the role of the Court in settling major disputes. In particular, he drew the attention of the judges to the issues of interpretation of the constitutional provisions on the imperative mandate, the constitutionality of the Law on the Cabinet of Ministers and the

"legitimacy of the Government". The President stated that "he believes its [Court's] rulings will help to end arbitrary interpretations of the constitution and political attempts to use the supreme law to benefit this or that group or party."<sup>9</sup>

55. Representatives of the Government and the coalition, although not meeting publicly with judges of the Court, also gave detailed account of the closed deliberations within the Court.

56. However, the situation has exacerbated even further once 53 MPs referred the matter of the constitutionality of the Presidential Decree to the Court. Most of the media and political attention is now focused on the latter. Apparent hope of the presidential allies that the Court would further pursue its abstinence policy (avoiding adoption of any judgments) has failed when the Court announced its decision to give priority to the matter of the Decree and scheduled its consideration on 10 April (then postponed until 17 April). This was followed by the statements of representatives of the opposition that the Court could not deliver a fair judgement in such short terms and that thus it would be politically biased. This and other statements have further undermined the credibility of the Court.

57. Under the pressure the President of the Constitutional Court has reportedly filed his resignation from the post of the president but it was not accepted by the majority of the Court. Information about his resignation was announced by the Prime Minister Yanukovich even before the resignation letter was formally filed with the Court.

58. On 10 April five judges of the Court announced their refusal to participate in the review of the Presidential Decree due to the pressure by political forces and requested state protection. This statement was criticised as politicised itself since no direct accusations were made either to the press or to the law enforcement agencies.

59. ***Pressure in any form on the judges is intolerable and should be properly investigated and criminally prosecuted. On the other hand, the Constitutional Court is deadlocked and unwilling to act to resolve the mounting dispute. By their unreasoned postponement of the plenary session from 11 to 17 April, the Constitutional Court has officially refused to act as the final arbiter in the current crisis.***

### 3.4. Paralysis of the Central Election Committee

60. The Central Election Committee (CEC) is another body that has refused to go along with the Presidential Decree. Between 3 and 6 April, four members of the Commission (representing Communist and Socialist parties) fell suddenly ill and took sick leave for an unidentified period. Their absence contributes to the absence of quorum in the Central Election Commission, which can be provided by 10 members out of 13. It is evident that the coalition supporters who are on sick-lists will not come back to work before the Constitutional Court verdict.

61. At the time of writing, altogether eight members of the CEC have refused to make preparations for the early parliamentary elections. Two keep neutrality and only three members are ready to make arrangements for early elections, including the CEC Chairman Mr Davydovych.

62. On 11 April the CEC published an open address to the Constitutional Court, the President and the Rada, signed by Deputy Chairman Mrs Stavniychuk and Commission's Secretary Mr Dubovyk. The CEC stated that there were a number of legal problems related to the extraordinary elections not solved by the election law; that the territorial election commissions were not set up in time, i.e. by 6 April (Our Ukraine and Yulia Tymoshenko's blocs who submitted their candidates to the commissions missed the deadline as well); that as of 11 April no funds were allocated to the CEC to organise elections; that the procedure for compiling voter lists did not correspond with the terms and procedure for extraordinary elections as provided in Article 102 of the Parliamentary Elections Law. At the same time, the CEC declared that it was ready to organise the election process provided all power institutions assist the Commission in this endeavour.

63. *"In the conditions of social confrontation, imperfect and controversial legislation and other legal acts it can be predicted that any acts, decisions of the CEC to organise and conduct elections*

<sup>9</sup> [http://www.president.gov.ua/en/news/data/1\\_14530.html](http://www.president.gov.ua/en/news/data/1_14530.html)

*will be subjected to doubts, appeals, which - with strict time limits and lack of proper legislative regulation of the election procedures - will practically make it impossible for CEC to ensure enforcement of the Constitution, law of Ukraine and other legal acts, including the said Decree of the President", the letter states. "We believe that the extraordinary elections is a democratic and legitimate way of solving political and legal problems, when such elections are conducted in accordance with active election legislation of Ukraine"*

64. To this end, the CEC requested the Constitutional Court to consider the submission concerning extraordinary elections as soon as possible.

### **3.5. Pressure on courts**

65. Another major sign of the erosion of democratic institutions is the fact that courts of all levels are used by politicians and highest authorities as an instrument in political games.

66. Various general jurisdiction local courts have been used in the legal "war" by both sides which culminated on 4 April in the physical seizure, with involvement of MPs, of the Pechersk district court in Kyiv (the court deciding all disputes among central authorities located under its territorial jurisdiction) by one of the court's judges who claimed his right to be chairman of the court.

67. Several local courts have made decisions to suspend the Presidential Decree only to then withdraw them, allegedly under pressure from the presidential secretariat<sup>10</sup>. On 11 April, the President suspended his 2005 decree on the appointment to the post of Deputy President of the City Court of one of the judges who delivered a judgment against the Presidential Decree of 2 April.

68. ***This is a worrying tendency of legal nihilism that should not be tolerated. It is as clear as day that in a state governed by the rule of law judicial mistakes should be corrected through appeal procedures and not through threats or disciplinary sanctions.***

## **4. Possible ways out**

69. The continuing flagrant neglect of the principle of rule of law, manipulation of courts and political pressure on the Constitutional Court and other independent institutions render the further development of events surrounding the current crisis very unpredictable.

70. The possibility of violence cannot be ruled out although it remains very unlikely. The Ukrainian people have demonstrated before that they can, through non-violent protests and non-violent means, resolve political differences in their political system. We very much hope that the country's political leaders will show their wisdom and capacity to resolve this crisis in accordance with the Ukrainian Constitution and its laws and in a peaceful manner. To this end, all parties to the political disagreements should refrain from any violent actions or provocations to violence of the other side so that democracy in Ukraine can continue to develop and the hard-fought gains of the Ukrainian people two years ago are not put aside by the political manipulations and short-term vested interests of the country's politicians.

71. It should be underlined, however, that Maidan-2007 is not Maidan-2004. Whereas the Orange Revolution was based on genuine popular support driven by people's faith in better governance and a better tomorrow, the current demonstrations are, most probably, artificially orchestrated on both sides. Unlike the situation in 2004, the current political crisis is a crisis of the elite only. Ukraine's population is rather disillusioned by both sides and does not take an active part in the resolution of the crisis. We do not doubt that many of the protesters – especially many senior citizens – are sincere and they stand up for their political preferences. However, we are worried by the reports that many of the people – including minors – are being brought to those meetings for absolutely different motives. Such notions as "economically-based (business-like) Maidan", "paid democracy", "street business democracy" are unacceptable in a true democratic society. It should be absolutely clear to all political forces that ***involving under-aged schoolchildren in political struggle and campaigning is in***

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<sup>10</sup> It should be recalled here that in January 2007 a judge of the Mukacheve local court, upon application of one of Our Ukraine MPs, has prohibited the Speaker of the Parliament to sign the Law on the Cabinet of Ministers of Ukraine. This judge was dismissed by the Parliament on 5 April 2007.

**direct violation of the UN Convention on the Rights of the Child. Also, all attempts to buy political adherents, threats of reprisal or dismissal of workers/employees if they refuse to support are inadmissible in honest political competitions.**

72. Contrary to the tenor of current heated discussions about the legal quality of the President's Decree, the main question about his decision is **a political and moral one. It should therefore be resolved through political means, while strictly adhering to the letter of law and the constitutionality. It is also evident that there is an urgent need for the judgment of the Constitutional Court and that this possible judgment should be accepted as binding by all sides.**

73. And yet, we are aware that even if the Constitutional Court were to issue its ruling tomorrow on the constitutionality of the Presidential Decree, the implementation of the latter can not be effective and may eventually lead to further complaints. More specifically, should the Presidential Decree be proclaimed constitutional, the deadlines for organising the elections on the date foreseen by the Constitution and electoral law can not be respected. On the other hand, should the Constitutional Court overrule the Presidential Decree, it would stop its effect but would not solve the political deadlock. **It therefore appears inevitable that a political solution is needed on top of the legal one. It is obvious that for reasons of deep-rooted mistrust between the different political forces, the current parties and factions represented in the Verkhovna Rada today will find it difficult to work together effectively. Holding early elections therefore seems to be part of a possible political compromise.**

74. The use of pre-term parliamentary elections is a normal and widely-used practice in all democratic countries, provided this is stipulated in their Basic Law. However, Ukraine has had no experience of conducting early parliamentary elections as yet. Meanwhile, **major inadequacies in related legislation have been found out that would make it difficult to guarantee free and fair elections unless the legislation is amended and the date be postponed.**

75. Also, a real possibility of **fair political competition** should be guaranteed not only to the five political forces represented currently in the Verkhovna Rada, but to all political groups. In this regard, the current **3% threshold** level which is in line with the best European practices **should be maintained.**

76. Furthermore, the previous elections of March 2006 revealed that the fully proportional system with closed party lists did not guarantee the election of a parliament representing the Ukrainian society in its diversity. **We therefore deem it necessary that the election system be changed, either by introducing "open" party lists whereby voters could indicate their preferences as to particular candidates included in the election lists proposed by political parties or blocs, or through returning to a mixed system whereby a certain number of mandates could be elected from single-mandate constituencies.**

77. This would require constitutional changes, but in any case, **elections alone will not resolve the key problems with democracy in Ukraine today. They will not guarantee improved checks and balances or the resolution of political conflicts. Hence 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 proper consultative process and political compromise.** It should be carried out by a mixed constitutional commission representing different political forces, national and international experts and representatives of the civil society, who would draw up the draft changes and amendments in order to eliminate or compromise on all known differences and incompatibilities and bring it in line with European standards. Consideration should also be given to whether the presidential-parliamentary system is optimal for Ukraine. **The Venice Commission should be actively involved in the process of drafting of the constitutional reform proposals.**

78. The completion of the constitutional reform process should be accompanied by the **simultaneous adoption of the constitutional framework laws that would clearly outline the functions and competences of the two respective state institutions in line with agreed principles of power-sharing.**

79. The institutional reform process will not be able to succeed unless the status, independence and functioning of the court system is dramatically changed. We therefore urge the political forces **to carry out the reform of the judiciary on the basis of the Judicial Reform Concept adopted by the President of Ukraine in May 2006 and in line with the recent opinion of the Venice Commission.**

80. **We also urge the Ukrainian authorities not to lose track of their other obligations and commitments to the Council of Europe while engaged in seeking political solutions.** In this perspective, we recall that the Action Plan adopted by President Yushchenko on 20 January 2006 and the long overdue commitments **to reform the local self government in line with the European Convention on Self-Government, the criminal justice system, the prokuratura and law enforcement agencies and to embark on establishing a proper system of public service broadcasting need to be carried out.**

81. Finally, we are convinced that regardless of the current impasse, the Ukrainian political forces have not exhausted all effective avenues for ending their current feuds and beginning to function within a normal well-regulated legal and moral environment. To find a balanced and sustainable democratic compromise is certainly difficult, notably in the prevailing atmosphere of mistrust. **It is therefore absolutely critical today to search for a way out of the crisis that would be acceptable to all key stakeholders in the conflict and, most importantly, to the rest of society. The solution lies in a broad, stable and conscious compromise that would focus on eliminating the real reasons for the current failures and building up common grounds for new political confidence through sound safeguard mechanisms for national unity, fair political competition and coherent and comprehensive reforms.**



## Appendix

### **DECREE of the President of Ukraine No. 264/2007**

#### **On the Pre-Term Termination of Powers of the Verkhovna Rada of Ukraine**

Recently a situation has emerged when the majority in the Verkhovna Rada of Ukraine was ignoring the constitutional requirements with regard to the formation of the coalition of deputy factions. To replace isolated instances of inclusion of some people's deputies into composition of the deputy factions' coalition, which had taken place during the formation of the Anti-crisis Coalition in July 2006, a new practice of massive enlargement of the coalition on the basis of individual or group membership has appeared. Such practice is a flagrant violation of Article 83 of the Constitution of Ukraine which provides for formation of the deputy factions' coalition in the Verkhovna Rada of Ukraine, upon results of elections and on the basis of agreed political positions, exclusively by deputy factions.

The violation of the constitutional provisions concerning the formation of the deputy factions' coalition in the Verkhovna Rada of Ukraine distorts results of people's expression of will, carried out in accordance with Article 69 of the Constitution of Ukraine through parliamentary elections in March 2006, is a negation of constitutional election rights of citizens of Ukraine, results in the neglect of the constitutional principle of people's sovereignty, provided for in Article 5 § 2 and 3 of the Basic Law of Ukraine. Such developments are a real pre-condition for usurpation of power in Ukraine which is prohibited by Article 5 § 4 of the Constitution of Ukraine. This also threatens national security, causes destabilisation of the political situation in the state, and creates potential risk to the state sovereignty.

According to Article 102 § 2 of the Constitution of Ukraine the President of Ukraine is the guarantor of state sovereignty and territorial indivisibility of Ukraine, the observance of the Constitution of Ukraine and human and citizens' rights and freedoms. Such constitutional status of the President of Ukraine obliges him to take actions to halt violations of the Constitution of Ukraine, of citizens' rights, to prevent threats to the state sovereignty and territorial integrity of the state. This, in particular, entails an obligation to effect early termination of powers of the parliament in the case of violation by the latter of the Basic Law of Ukraine, if there are no other means to prevent flagrant violations of the Constitution of Ukraine by the Verkhovna Rada of Ukraine.

Taking into account the above mentioned and being governed by Article 5 § 2-4, Article 77 § 2, Article 83 § 6, Article 106 § 1 (1, 7) and 3 of the Constitution of Ukraine, in order to implement Article 102 § 2 I hereby **decree**:

1. To terminate powers of the Verkhovna Rada of Ukraine of the V convocation before expiration of its term of office.
2. To propose to people's deputies of Ukraine to continue to carry out their powers which are not directly related to the powers of the Verkhovna Rada of Ukraine.
3. To designate extraordinary elections to the Verkhovna Rada of Ukraine on 27 may 2007.
4. The Cabinet of Minister of Ukraine shall ensure financing of the extraordinary elections to the Verkhovna Rada of Ukraine.
5. The Central Election Commission shall ensure the holding of the extraordinary elections to the Verkhovna Rada of Ukraine in accordance with the Constitution of Ukraine, Law of Ukraine "On the Elections of People's Deputies of Ukraine", and other laws of Ukraine.
6. This decree comes into effect from the day of its official publication.

**President of Ukraine**

**Viktor YUSHCHENKO**

**2 April 2007**

*Reporting committee:* Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee).

*Reference to committee:* Reference No. 3338 of 16 April 2007.

*Draft resolution* adopted by the committee on 17 April 2007 with 28 votes in favour and 1 against.

*Members of the committee:* Mr Eduard **Lintner** (Chairperson), Mrs Hanne **Severinsen** (1<sup>st</sup> Vice-Chairperson), Mr Tigran Torosyan (3<sup>rd</sup> Vice-Chairperson), Mr Aydin Abbasov, Mr Pedro Agramunt, Mr Birgir Ármannsson, Mr Jaume Bartumeu Cassany, Mrs Meritxell Batet Lamaña, Mr József Berényi, Mr Aleksandër Biberaj, Mrs Gülsün Bilgehan, Mrs Mimount Bousakla, Mr Luc Van den Brande, Mr Patrick Breen, Mr Mevlüt **Çavuşoğlu**, Mr Sergej Chelemendik, Ms Lise **Christoffersen**, Mr Boriss **Cilevičs**, Mr Georges **Colombier**, Mrs Herta Däubler-Gmelin, Mr Joseph Debono Grech, Mr Juris **Dobelis**, Mr John **Dupraz**, Mrs Josette Durrieu, Mr Mátyás **Eörsi**, Mr Per-Kristian Foss, Mr György **Frunđa**, Mrs Urszula **Gacek**, Mr Jean-Charles Gardetto, Mr József Gedei, Mr Marcel Glesener, Mr Charles Goerens, Mr Stef Goris, Mr Andreas Gross, Mr Michael **Hagberg**, Ms Gultakin **Hajiyeva**, Mr Michael **Hancock**, Mr Andres Herkel, Mr Serhiy **Holovaty**, Mrs Iliana Iotava, Mr Kastriot **Islami**, Mr Erik Jurgens, Mr Ali Rashid Khalil, Mr Konstantin **Kosachev**, Mr Andros **Kyprianou**, Mrs Darja Lavtižar-Bebler, Mrs Sabine Leutheusser-Schnarrenberger, Mr Tony Lloyd, Mr Mikhail Margelov, Mr Bernard Marquet, Mr Frano **Matušić**, Mr Miloš **Melčák**, Mrs Assunta Meloni, Mrs Nadezhda Mikhailova, Mr Neven Mimica, Mr Paschal Mooney, Mr João Bosco Mota Amaral, Mr Zsolt **Németh**, Mr İbrahim Özal, Mr Theodoros **Pangalos**, Mr Leo Platvoet, Ms Maria **Postoico**, Mr Christos **Pourgourides**, Mr Dario Rivolta, Mr Armen Rustamyan, Mrs Katrin Saks, Mr Oliver Sambevski, Mr Kimmo Sasi, Mr Samad Seyidov, Mr Vitaliy **Shybko**, Mr Leonid **Slutsky**, Mrs Elene **Tevdoradze**, Mr Egidijus **Vareikis**, Mr Miltiadis Varvitsiotis, Mr José Vera Jardim, Mrs Birutė Vésaitė, Mr Oldřich Vojtř, Mr David Wilshire, Mr Tadeusz Wita, Mrs Renate **Wohlwend**, Mr Andrej Zernovski, Mr Emanuelis Zingeris.

N.B.: The names of the members who took part in the meeting are printed in **bold**.

*Secretariat of the committee:* Mrs Ravaud, Mrs Chatzivassiliou, Mrs Odrats