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Reconsideration on substantive grounds of previously ratified credentials of the Ukrainian delegation (Rule 9 of the Assembly's Rules of Procedure)

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Dick MARTY, Switzerland, Alliance of Liberals and Democrats for Europe

Summary

Judges on the European Court of Human Rights are elected by the Parliamentary Assembly on the basis of a list of three candidates provided to it by each state party to the European Convention on Human Rights. When a candidate withdraws, the state must replace him or her. This the Ukrainian authorities refused to do, after a candidate had withdrawn in late 2007. Instead, Ukraine has transmitted a new list of three candidates which the Assembly decided not to accept since there exists no exceptional circumstances to justify this.

The persistent refusal, by the Ukraine, to provide the name of a third candidate to the Assembly is considered by the Committee on Legal Affairs and Human Rights to be contrary to the country's obligations under the European Convention and constitutes a serious violation of basic principles of the Council of Europe's Statute. In the absence of a Ukrainian judge on the Court, the appointment in the meantime of *ad hoc* judges, not elected by the Assembly, aggravates the present unsatisfactory situation by circumventing the election procedure laid down by the Convention and threatens to undermine the credibility of the Court.

That said, the Ukrainian authorities have recently indicated to the Assembly that they have requested the Committee of Ministers to seek an Advisory Opinion from the Strasbourg Court on this subject. In these circumstances, the Committee on Legal Affairs and Human Rights proposed that the Assembly confirm the credentials of the Ukrainian parliamentary delegation, on the understanding that this matter be resolved quickly.

The committee also proposes that the Assembly recommend to the Committee of Ministers that such an Advisory Opinion be sought without delay. However, the request should not only deal with the purported right of a state to withdraw a list of candidates, once submitted, but should also cover the issue of the conformity, with the European Convention on Human Rights, of the Assembly's refusal to accept a new list of candidates and the Assembly's insistence on being provided with the name of a third candidate.

1. Reference to committee: Doc. 11921, Reference No. 3573 of 29 May 2009.

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A. Draft resolution

1. Judges on the European Court of Human Rights are elected by the Parliamentary Assembly on the basis of a list of three candidates provided to it by each state party to the European Convention on Human Rights (hereinafter "the Convention"). When a candidate withdraws, the state must replace him or her. This the Ukrainian authorities refused to do, after a candidate had withdrawn in late 2007. Instead, Ukraine has transmitted a new list of three candidates which the Assembly decided not to accept since there exist no exceptional circumstances to justify this.

2. Article 22, paragraph 1, of the Convention requires each State Party to submit a list of three candidates to the Parliamentary Assembly to enable the Assembly to elect a Judge in respect of the state concerned. The persistent refusal, by the Ukrainian authorities, to provide the Assembly with the name of a third candidate has so far prevented the election of a Judge in respect of Ukraine and is contrary to country's obligations under the Convention. It also constitutes a serious violation of basic principles of the Council of Europe mentioned in Article 3 of, and the Preamble to, the Organisation's Statute.

3. The appointment, in the meantime, of *ad hoc* judges, for a prolonged period of time, not elected by the Assembly, is an abuse of a procedure that has been specifically set-up to provide democratic legitimacy to the judges of the European Court of Human Rights, who are elected by the Assembly. To so circumvent the election procedure foreseen by the Convention threatens to undermine the credibility of the Court.

4. It is incumbent, in particular, upon the authorities of Ukraine and its parliamentary delegation, as well as the statutory organs of the Council of Europe, the Committee of Ministers and the Parliamentary Assembly, to ensure that this situation is resolved without further delay.

5. As the Assembly indicated in Resolution 1646 (2009) on the nomination of candidates and election of judges to the European Court of Human Rights, it is crucial to ensure that the authority and credibility of the Court are not put at risk by *ad hoc* and politicised interventions in the nomination of candidates. In the same vein, the Assembly has established clear rules preventing the partial or complete modification by states of lists of candidates once submitted, unless the Assembly finds exceptional reasons that can justify such modification (as specified in paragraph 1 in the Appendix to Assembly Resolution 1432 (2005)).

6. The Assembly notes that the Ukrainian authorities have, only after the tabling of a motion for a resolution proposing the annulment of the Ukrainian parliamentary delegation's credentials (Doc. 11921), and just before the Assembly's 2009 June part-session, decided to inform the President of the Assembly that they have requested that the Committee of Ministers, by virtue of Article 47 of the Convention, seek an Advisory Opinion from the European Court of Human Rights on the right of a state to withdraw a list of candidates once submitted. This question should enable the Court to determine whether the Assembly's refusal to accept a new list of candidates and its insistence on being provided the name of a third candidate is in conformity with the requirements of the Convention.

7. Consequently, the Assembly decides, for the time being, not to annul and therefore to confirm the credentials of the Ukrainian parliamentary delegation, on the understanding that disregard – by Ukraine – of its basic obligations under the Convention and the Organisation's Statute must be resolved without further delay.

B. Draft recommendation

1. The Parliamentary Assembly refers to its Resolution … (2009) in which it decided, for the time being, to confirm the credentials of the Ukrainian parliamentary delegation in the light of information recently provided by the Ukrainian authorities that they have requested the Committee of Ministers to seek an Advisory Opinion from the European Court of Human Rights on matters raised in the Resolution.

2. The Assembly therefore recommends that the Committee of Ministers seek, without delay, an Advisory Opinion from the European Court of Human Rights. The request should not only deal with the purported right of a state to withdraw a list of candidates, once submitted, but also ought to cover the issue of the conformity, with the European Convention on Human Rights, of the Assembly's refusal to accept a new list of candidates and its insistence on being provided the name of a third candidate.

C. Explanatory memorandum, by Mr Dick Marty

1. Introductory remarks

1. Article 22, paragraph 1, of the European Convention on Human Rights (hereinafter "the Convention") requires each state party to submit a list of three candidates to the Parliamentary Assembly in order to enable the Assembly to elect a judge in respect of the state concerned. The persistent refusal, by the Ukrainian authorities, to provide the Assembly with the name of a third candidate has prevented the election of a judge in respect of Ukraine, which has been due for nearly two years, and is contrary to the country's obligations under the Convention. This also constitutes a serious violation of basic principles of the Council of Europe mentioned in Article 3 of, and the Preamble to, the Organisation's Statute.[2]

2. This unacceptable situation has led a number of parliamentarians to table a motion for resolution, entitled "Ukraine disregarding basic obligations under the European Convention on Human Rights: annulment of the Ukrainian Parliamentary Assembly's delegation's credentials" (Doc. 11921), proposing the annulment of the credentials of the Ukrainian delegation to the Parliamentary Assembly.

2. The problem: an overview[3]

3. In the spring of 2007, the Ukrainian authorities submitted to the Council of Europe a list of three candidates for the position of judge at the European Court of Human Rights. This list was included in a document issued by the Parliamentary Assembly on 26 July 2007 (Doc. 11359). The Secretary General of the Assembly then, as is usual practice, invited the three candidates to interviews with the Sub-Committee on the Election of Judges in Paris on 17 September 2007. Interviews were held with two of the three candidates. Mr Marmazov, the third candidate, was unable to attend; he subsequently withdrew his candidature on 28 September.

4. Just one working day before the interviews, on Friday 14 September 2007, the President of Ukraine wrote to the President of the Assembly indicating he withdrew the initial list of candidates submitted and that a new list would be submitted by 20 December 2007.[4]

5. On 1 October 2007 – basing itself on paragraph 1 of the Appendix to Assembly Resolution 1432 (2005)[5] – the Parliamentary Assembly considered that there existed no exceptional circumstances justifying the withdrawal of the list transmitted to the Assembly in the spring of 2007 (confirming the position taken by the Assembly's Bureau, the Committee on Legal Affairs and Human Rights and its Sub-Committee on the Election of Judges to the European Court of Human Rights). Once the list of candidates had, by virtue of Article 22 of the Convention, been submitted to the Assembly, the competence to determine if there exist any

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2. Article 3 of the Statute of the Council of Europe (1949) stipulates "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I". Also, the Preamble to the Statute, third paragraph, reads: "Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy".

3. Based on the memorandum prepared for the Committee on Legal Affairs and Human Rights by Mr Cilevičs, Chairperson of the Committee's Sub-Committee on the Election of Judges to the European Court of Human Rights, document AS/Jur (2009) 30, declassified by the Committee on 22 June 2009.

4. I am somewhat puzzled why between April, when the list was forwarded to the Council of Europe, and 14 September 2007, just before the interviews, the Ukrainian authorities did not provide the Assembly with any information that might suggest (alleged) irregularities in the national selection procedure; just to specify the alleged existence of significant procedural irregularities and the alleged lack of "high moral character" of a candidate is simply too vague. See also, in this connection, the observations of two eminent experts, Messrs Wildhaber and Caflisch, to be found in Appendix I to this report, esp. paragraphs 20 to 22 (and 25), indicating that the withdrawal of the list must be seen as a belated attempt to remove a candidate from the list. The document by Messrs Wildhaber and Caflisch, AS/Jur (2009) 10, of 2 January 2009, was declassified by the Committee on 22 June 2009.

5. Appendix to Assembly Resolution 1432 (2005), paragraphs 1 and 2, read as follows :

"1. In principle, the list of candidates for the election of judges, once submitted to the Parliamentary Assembly, should not be modified. The Assembly shall only exceptionally accept partial or complete modification of the list on the initiative of the government concerned.

2. The Assembly shall interrupt the procedure if one of the three candidates on a list for the post of judge or Commissioner for Human Rights withdraws before the first ballot. In such cases, it shall ask the government concerned (in respect of judges) or the Committee of Ministers (in respect of the Commissioner) to complete the list of candidates."

exceptional reasons for withdrawing the list was transferred to the Assembly - as was accepted by all members of the Assembly including the Ukrainian delegation. No member of the Assembly questioned the decision that no "exceptional circumstances" justified the withdrawal of the list of three candidates.

6. On 3 October 2007, the Ukrainian government, following a request by the President of the Assembly, provided the Assembly with the name of a (new) third candidate, Mr Shevchuk (see Doc. 11446, issued on 29 October 2007), who in turn withdrew his candidature on 5 November 2007. Since then, the Ukrainian authorities have repeatedly been invited to complete the list of candidates, but have not done so. It is interesting to note, that the Ukrainian authorities, having purportedly withdrawn the list of candidates (see paragraphs 4 and 5 above), nevertheless still submitted the name of a third candidate to the Assembly at the time (i.e. 3 October 2007). By forwarding the name of a third candidate, it could be said that the Ukrainian authorities are estopped from arguing that the list forwarded in spring 2007 has been withdrawn.

7. I would make an additional, general comment in this respect. Whereas, on 10 October 2007, the Ukrainian Permanent Representative in Strasbourg indicated that Ukraine would "*not complete the list by new candidatures",*[6] I and my colleagues of the Assembly's Monitoring Committee were given a different response by both the Ukrainian Minister of Justice and the Deputy Head of the Secretariat of the President of Ukraine, when we met them in Kyiv, in May 2008. They clearly indicated to us that the name of a third candidate would be transmitted to the Assembly *"soon, in the coming days".*[7] I am thus somewhat perplexed by these contradictory statements. Whereas the Assembly has meticulously abided by clear, pre-established rules (see paragraph 5, above), the manner in which this important subject has been treated in Ukraine suggests that what had initially been an excellent open nomination procedure[8], has turned into an issue dependent on "*fluctuating political appreciations by state authorities*", a term I have borrowed from a text prepared on this subject in September 2008 by our highly respected former Chairperson of the Sub-Committee on the Election of Judges, Mrs Bemelmans-Videc. It is essential, as has always been so eloquently underlined by Mrs Bemelmans-Videc, for the Assembly to act in strict conformity with the requirements of the Convention and the pertinent resolutions of the Assembly. I believe that the Assembly has done so in this case.

8. On 21 December 2007, the Ukrainian authorities transmitted a completely new list of three candidates, which has not been accepted by the Assembly. It was clear to the Assembly already back on 1 October 2007 that no exceptional circumstances existed to justify the withdrawal of the list provided to the Assembly in the spring of 2007 (Doc. 11359).

9. As already indicated, Article 22, paragraph 1, of the Convention specifies that the Assembly must elect a Judge from a list of three candidates. Despite many reminders addressed to the Ukrainian authorities by the President of the Assembly and others, including an intervention by the Chairperson of the Committee on Legal Affairs and Human Rights at the Joint Committee meeting on 2 October 2008, the name of a third candidate to complete the existing list has not been provided. This lack of co-operation and persistent refusal, by the Ukrainian authorities, to provide the Assembly with the name of a third candidate in my view is contrary to the country's obligations under the Convention and the Assembly's relevant Rules. It is also in breach of basic principles of the Council of Europe, as specified in Article 3 of, and the Preamble to, the Statute.

10. In an attempt to get out of this *impasse,* the Sub-Committee on the Election of Judges decided, on 11 December 2008, to seek the legal advice of two eminent jurists, Messrs Wildhaber and Caflisch, respectively former President and former Judge of the European Court of Human Rights. They were asked whether, in the situation in which the Ukrainian authorities have refused to complete the list, the Sub-Committee could not ask the third candidate, who had withdrawn, to reconsider his decision. Having obtained a favourable response (see document AS/Jur (2009) 10, of 29 January 2009, appended to this report), the Sub-Committee mandated its Chairman to write to Mr Shevchuk to ask him to reconsider his decision. To date, Mr Shevchuk has not responded to a letter and e-mail sent to him, on 6 February 2009, by the Sub-Committee's Chairperson, nor to subsequent reminders.

11. Thus, as explained above, the Sub-Committee – which already interviewed two candidates on 17 September 2007 – is in the untenable situation of not being able to complete the process of interviews of candidates.

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6. See Legal Opinion of the Eminent Experts, appended to this report, paragraph 6.
7. See, in this connection, letter of 28 June 2008, sent by the Chairperson of the Committee on Legal Affairs and Human Rights to the President of the Assembly.
8. See Assembly Doc. 11359, at pp. 193-194, and Doc. 11446, pp. 23-28.

12. This situation has in the meantime been compounded by a further element. Since the post of Judge in respect of Ukraine fell vacant at the end of November 2008[9], the Ukrainian authorities designated Mr Shevchuk (who had withdrawn his candidature, see paragraph 6 above) as *ad hoc* judge for all cases brought before the Strasbourg Court against Ukraine. Mr Shevchuk has been regularly participating in the Court's work since January 2009. He will now, so we were informed today, 22 June 2009, be succeeded by Mr Buromenskiy, for a period lasting from September to November 2009. Ukraine has thus appointed *ad hoc* judges who have not been elected by the Parliamentary Assembly. As Ukraine is the 'fourth-largest client'[10] of the Court in terms of applications received, the appointment, for a limited period of time, of an *ad hoc* judgemay be understandable. However, given the *impasse* created by the Ukrainian authorities in blocking the election of a judge in respect of Ukraine, the normal procedures foreseen by the Convention have in effect been circumvented for an indefinite period. This is an abuse of a procedure that has been specifically set-up to provide democratic legitimacy to judges of the European Court of Human Rights, who are elected by the Assembly. Such arrangements therefore threaten to undermine the credibility of the Court.

3. Urgent need to resolve the problem

13. It is incumbent, in particular, upon the government and the parliament of Ukraine, the latter represented by its parliamentary delegation, as well as the statutory organs of the Council of Europe, the Committee of Ministers and the Parliamentary Assembly, to ensure that this situation is resolved without further delay. Indeed, I believe such lack of co-operation with the Assembly is a violation of a member state's obligation under the Convention and the Organisation's Statute. More importantly, this situation, if it is allowed to continue, will undermine the proper functioning of the Court in Strasbourg.[11]

14. As far as the Assembly is concerned, the situation is crystal clear. As indicated in its recent Resolution 1646 (2009) on the nomination of candidates and election of judges to the European Court of Human Rights, it is crucial to ensure that the authority and credibility of the Court are not put at risk by *ad hoc* and politicised interventions in the nomination of candidates. In the same vein, it has established clear rules preventing the partial or complete modification by states of lists of candidates once submitted, unless it finds exceptional reasons that can justify such withdrawal or modification (as specified in paragraph 1 in the Appendix to Assembly Resolution 1432 (2005). Once a list has been transmitted to the Assembly, the manner in which the election process is handled is within the competence of the Assembly. The possibility for states to change lists that have been transmitted to the Assembly, for example, by deciding to withdraw or exchange names on a list, does not respect the logic of the Assembly's rules. Those rules have been put in place to ensure an objective 'legal framework' and to avoid that the Assembly's important task of electing judges to the Court is subjected to fluctuating, extraneous political considerations.

15. Before making a specific proposal as to the issue of the credentials of the Ukrainian delegation, I believe I should refer to the letter the President of the Assembly received from the Ukrainian Minister of Justice a few days ago, on 17 June 2009 (dated 15 June 2009 – text in Appendix II), as well as the information provided to the Committee on Legal Affairs and Human Rights by the Ukrainian delegation to the Assembly. As can be seen in the Appendix to the "information note" presented by Mr Boriss Cilevičs, Chairperson of the Sub-Committee on the Election of Judges[12], and from the exchange of views we had with members of the Ukrainian delegation today, at which we also heard a statement by the Ukrainian Deputy Minister of Justice, Ms Valeria Lutkovska, no real progress has been made, with one exception: the initiative aimed at asking the Strasbourg Court for an Advisory Opinion on the matter. Even here, the Secretariat of the Committee of Legal Affairs and Human Rights was only able to obtain, in the afternoon after our meeting, a copy of a letter, dated 12 June 2009, which the Ukrainian Minister had addressed to the Chairman of the Committee of Ministers.

16. Although the idea of requesting an Advisory Opinion put forward by the Ukrainian Minister of Justice must be welcomed, I note that it has taken him nearly one year to do what he said he would do in a letter to the President of the Assembly of 9 July 2008. Indeed, this was only done after the motion for a resolution proposing the annulment of the Ukrainian parliamentary delegation's credentials (Doc. 11921) had been tabled, and just before the Assembly's June part-session 2009. That said, I propose that the Assembly takes formal note of the Ukrainian authorities' initiative in this respect. The Ukrainian authorities have asked the

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9. The term of office of Judge Butkevych actually expired on 31 October 2007, but he agreed to extend his stay in office until the end of November 2008: see Article 23, paragraph 7 of the Convention.
10. See Eminent experts' report, in Appendix, paragraph 24 and statistics issued by the Court.
11. See, in particular, comments of Messrs Wildhaber and Caflisch on this subject in Appendix I, especially paragraph 24.
12. Document AS/Jur (2009) 30, of 17 June 2009, declassified by the committee on 22 June 2009.

Committee of Ministers to seek an Advisory Opinion on this subject, as it is envisaged by Article 47 of the Convention. I propose that the Assembly indicates its support for this proposal, both in a resolution and in a recommendation addressed to the Committee of Ministers. Nevertheless, in so doing, we should make it clear that the Committee of Ministers does not limit itself to a general and vague question "*on the right of a State to withdraw the list of candidates once submitted",* as is suggested in the letter of the Minister of Justice of 15 June 2009. I also do not believe that the text proposed in the letter of the Ukrainian Foreign Minister, of 12 June 2009 (see paragraph 15 above) – which I have just seen – appropriately covers the essence of what the disagreement is principally about: namely, whether the Parliamentary Assembly's insistence on being provided the name of a third candidate and its refusal to accept a new list of candidates is in conformity with the requirements of the Convention.

17. If there is again undue delay in this procedure or if the Strasbourg Court were not seized (the Committee of Ministers may not wish to follow up the Ukraine authorities' proposal), or were the Court to decline to provide an Advisory Opinion, I believe that the Assembly has no choice but to find an appropriate solution. Bearing in mind the *impasse* in which the Assembly finds itself and the time that has elapsed since the interviews, back on 17 September 2007, the Assembly could consider instructing the Sub-Committee on the Election of Judges to the European Court of Human Rights to convoke the three candidates for interview and – irrespective of whether the third candidate agrees to turn up for the interview – make proposals to the Assembly so that it can elect a judge in respect of Ukraine.

4. Conclusion

18. In the light of recent developments explained above, I suggest that, the Committee on Legal Affairs and Human Rights proposes to the Assembly, for the time being, to confirm the credentials of the Ukrainian Parliamentary delegation on the understanding that disregard – by Ukraine – of its basic obligations under the Convention and the Organisation's Statute are resolved without further delay.

19. The situation in which we find ourselves today is serious. It is having an adverse effect on the country concerned and the Council of Europe. We must ensure, at all costs, that it does not adversely affect the work of the European Court of Human Rights.

Appendix 1 – Text of Legal Opinion prepared by Eminent Experts upon the request of the Parliamentary Assembly's Sub-Committee on the Election of Judges to the European Court of Human Rights[13]

Election, by the Parliamentary Assembly, of a Ukrainian Judge to the European Court of Human Rights

by Mr Luzius Wildhaber and Mr Lucius Caflisch[14]

I. Mandate

1. We have been asked, by letter of 19 December 2008, to indicate whether the Parliamentary Assembly of the Council of Europe "is correct in assuming that it has the right not to accept the withdrawal of a list of candidates submitted by a government when the Assembly considers that there exist no 'exceptional circumstances' for so doing"; and, if so, in the specific Ukrainian context, whether the Assembly is "at liberty to contact a candidate who had withdrawn his name from the list of candidates submitted to the Assembly by the Ukrainian Government, in the situation in which Ukraine does not intend to complete the said list", and to ask the candidate "to reconsider his decision".

II. Facts

2. On 29 April 2007, the Permanent Representative of Ukraine to the Council of Europe, acting in the name of the Ukrainian Ministry of Justice, submitted a list of three candidates for the position of a judge at the European Court of Human Rights (ECtHR). The candidates were Mr Serhiy Holovaty, Mr Vasyl Marmazov and Mrs Ganna Yudkivska.

3. On 17 September 2007, the Assembly's Sub-Committee on the Election of Judges to the ECtHR conducted interviews with Mr Holovaty and Mrs Yudkivska. Mr Marmazov did not attend and, by letter of 28 September 2007, announced his withdrawal as a candidate "due to … personal matters". Immediately before the interview date, on 14 September 2007, the Permanent Representative of Ukraine submitted a decree and a letter of the President of Ukraine, V. Yushchenko, who announced the withdrawal of the list of Ukrainian candidates because it did "not correspond to the requirements of Article 21 of the (European Convention on Human Rights, ECHR) and (the) aforementioned recommendations of the Council of Europe". Also, "significant procedural violations (had been) committed". "In particular", a "transparent voting procedure for the candidates ha(d) not been ensured", and the Council of Judges of Ukraine had considered that Mr Holovaty "was lacking in 'high moral character'". On 1 June 2007, the Council of Judges of Ukraine had indeed opposed Mr Holovaty on account of his "previous activity" and particularly of incidents which had occurred in 2005.

4. On 1 October 2007, the plenary of the Parliamentary Assembly agreed with its Sub-Committee on the Election of Judges and with the Assembly Bureau that there were "no exceptional circumstances justifying the acceptance, by the Assembly, of the withdrawal of the Ukrainian list in accordance with § 1 of the Appendix to Resolution 1432" (2005). The Assembly President R. van der Linden announced this decision on 2 October 2007 to President Yushchenko and Justice Minister O. Lavrynovych and asked them "to complete the list by replacing the candidate who withdrew his candidature", i.e. Mr Marmazov.

5. On 3 October 2007, Minister of Justice Lavrynovych announced to the Assembly President van der Linden that the Government of Ukraine had "decided to replace the candidate who withdrew his candidature, namely Mr Vasyl Marmazov, with (the) candidature of Mr Stanislas Shevchuk".

6. Nevertheless, on 10 October 2007, at a meeting of the Deputies of Ministers, the Permanent Representative of Ukraine stated that his Government did not accept the decision of the Assembly regarding the absence of exceptional circumstances which would justify the withdrawal of the list. That withdrawal "fully correspond(ed) to Article 22 of the ECHR and to the sovereign right of the member state to submit and to withdraw the nominated candidates". The fact that the Assembly did not recognize the withdrawal of the list was considered as "neglect of the expression of the state's will; attempt to intervene in the internal affairs of Ukraine; violation of the norms and principles of modern international law". Ukraine would therefore "not complete the list by new candidatures".

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13. Document AS/Jur (2009) 10, of 29 January 2009, declassified by the Committee on 22 June 2009.
14. Respectively former President and former Judge of the European Court of Human Rights.

7. On 5 November 2007, Mr. Shevchuk announced that he could "not but comply" with the Edict of the President of Ukraine of 14 September 2007 withdrawing the list and opening a new selection procedure. He would "participate in this newly opened procedure" and, if elected, would "be honoured to continue my cooperation with you in the future". The letter arrived shortly before the interview with Mr Shevchuk, which was scheduled for 12 November 2007.

8. On 20 December 2007, the Permanent Representative of Ukraine submitted, in the name of Minister of Justice Onischuk, a new list of candidates, composed of Mr Vasyl Marmazov, Mr Stanislaw Shevchuk and Mrs Ganna Yudkivska. In response, Assembly President van der Linden reiterated, on 21 December 2007, the position of the Assembly Bureau that it expected the Ukrainian "authorities to submit the name of a new third candidate to complete the list and not an entirely new list".

9. Positions have not changed in 2008. On 8 April 2008, the Permanent Representative of Ukraine sent an Aide-Mémoire to the Chairman of the Ministers' Deputies according to which Assembly Resolution 1432 (2005) had "a character of recommendation, and (was) not legally binding". "It (was) clear that under no circumstances it could substitute or dispute respective provisions neither of the ECHR nor national legislation of the member-state". Since the decision of the President of Ukraine to withdraw the (first) list of candidates, this list "ha(d) lost all legal validity". Insistence on the completion of a document which had lost its legal effect for Ukraine would "bring the situation into a dead-end" and would "also lay the foundation of a divergence with the judicial corpse (sic) of Ukraine".

10. In a letter of 9 July 2008, Minister of Justice Onischuk confirmed these views and added that an advisory opinion might be requested from the ECtHR on the question of whether and up to what point a list of candidates can be withdrawn by a member State.

III. Legal Opinion: General Principles

11. Articles 21 and 22 ECHR are the relevant provisions dealing with the election of judges to the ECtHR. In a first step, a High Contracting Party designates three candidates possessing the qualifications required by Article 21 ECHR. In a second step, the Assembly elects a judge from the list of three candidates.

12. Two instances are therefore entrusted with the election of judges to the ECtHR. Both must contribute in good faith to the proper functioning of the Court. The High Contracting Parties must nominate the three candidates in a transparent and non-manipulative way. They must supply the Court with candidates of the highest quality. They must submit their proposals expeditiously so as not to impair the effectiveness of the Court, since the presence of a national judge is needed. And they must accept that the Convention entrusts the Assembly, not the national governments, with the choice between the three candidates.

13. The obligations to conduct a transparent and non-manipulative procedure, to look for a candidate of the highest quality and to elect judges expeditiously so as not to impair the effectiveness of the Court, are also incumbent on the Assembly.

14. The Assembly may enact rules with respect to the national procedures but is not empowered to select the three candidates itself; that right belongs to the State concerned. The State, by contrast, is not entitled to take the place of the Assembly when it comes to the actual election of a judge.

15. According to the relevant recommendations and resolutions of the Assembly, governments should ensure:

– that candidates are prepared to submit a standard curriculum vitae and to participate in personal interviews conducted by the Assembly's Sub-Committee on the Election of Judges to the ECtHR;

– that a call for candidatures has been issued through the specialised press;

– that candidates have experience in the field of human rights;

– that every list contains candidates of both sexes (cf. Advisory Opinion of 12 February 2008 on Certain Legal Questions Concerning the List of Candidates Submitted with a View to the Election of Judges to the ECtHR);

– that candidates have a sufficient knowledge of at least one of the two official languages;

– that the names of candidates are placed in alphabetical order;

– that as far as possible no candidate should be presented whose election might result in the necessity to appoint an *ad hoc* judge.

16. The recommendations and resolutions of the Assembly are not legally binding, but all of them must be in conformity with the ECHR. However, given the concision of Articles 21 and 22 ECHR, the Assembly may make reasonable additions. It may also be desirable, and a useful contribution to ensure the predictability of the law, to explain to the High Contracting Parties how the Assembly wishes the election procedure to be organised.

IV. Legal Opinion: Election of the Ukrainian Judge

17. Coming now to questions submitted to us, the Ukraine presented a list of three candidates, and the Assembly organised interviews with them. Three days before the interviews were to take place, when the Assembly Sub-Committee members, their staff and the candidates had presumably all been convoked, had made their travel and hotel arrangements and had adjusted their work schedules, the President of Ukraine announced the withdrawal of the list of three candidates. The reasons given were unspecific and in no way related to facts that had come up since the presentation of the list. The Council of Judges of Ukraine which later opposed Mr Holovaty criticised his earlier activities. The Government and the Council of Judges of Ukraine must have been aware of these activities when they submitted the first list of three candidates.

18. One of the three candidates, Mr Marmazov, did not attend the interviews and subsequently stepped down as a candidate, again without giving specific reasons. Nonetheless his name was also included in the second list of candidates.

19. The Assembly Sub-Committee on the Election of Judges examined the above events in the light of paragraph 1 of the Appendix to Resolution 1432 (2005), which specifies:

> *"In principle, the list of candidates for the election of judges, once submitted to the Parliamentary Assembly, should not be modified. The Assembly shall only exceptionally accept partial or complete modification of the list on the initiative of the government concerned".*

20. The Sub-Committee took the view that in the instant case there were no "exceptional circumstances" justifying the complete modification and withdrawal of the list of three candidates. We agree with that view because no new important and material facts unknown before the submission of the first list of candidates were established or alleged to exist. Since the names of Mr Marmazov and Mrs Yudkivska can also be found on the second list of candidates, it would seem that the withdrawal of the first list was based on the presence of Mr Holovaty on it. We do not know the reasons therefore. But surely Mr Holovaty, twice Minister of Justice of Ukraine, and a long-time member of the Verkhovna Rada and the Assembly, was a well-known Ukrainian politician whose merits or demerits must have been a matter of common knowledge, so that the Ukrainian Government which had proposed him as a candidate must have known him well and must – at least at that point in time – have found him an acceptable candidate. Of course, the Assembly is free to form its own opinion on all these points.

21. The withdrawal of the list can hardly be justified merely by procedural mistakes because, whatever new procedure different from the earlier one may have been conducted by Ukraine, it led to the renewed candidatures of Mr Marmazov and Mrs Yudkivska on the second list of candidates. The only change was that Mr Holovaty was replaced by Mr Shevchuk. This confirms our view that the withdrawal of the list must be seen as a belated attempt to remove Mr Holovaty.

22. In our opinion, these events have nothing to do with the sovereignty or the will of Ukraine and do not constitute an interference in the internal affairs of Ukraine. Ukraine was free to evaluate potential candidates for the election as judges of the ECtHR. She exercised her sovereignty and expressed her will when submitting her first list of three candidates. At that point Ukraine had contributed her part to the election of a judge to the ECtHR, and there were no exceptional circumstances allowing for a different conclusion.

23. Article 22 ECHR calls for the submission of lists of candidates. It does not provide, either expressly or implicitly, for the withdrawal of lists at any time when they are already in the hands of the Assembly. Inasmuch as Ukraine is concerned, to read Article 22 ECHR as permitting the withdrawal of a list already placed before the Assembly would be in contradiction with the general rule of treaty interpretation codified in Article 31.1 of the Vienna Convention on the Law of Treaties, of 23 May 1969. Under that rule treaties shall be interpreted, *inter alia*, "in accordance with the ordinary meaning to be given to the terms of the treaty in their context" and in the light of their "object and purpose". As suggested by the case-law of the ECtHR (see for instance *Wemhoff* v. *Germany*, judgment of 27 June 1968, Series A, No. 7, § 8; *Mamatkulovand Askarov* v. *Turkey*, GC, Nos. 46827/99 and 46951/99, judgment of 4 February 2005, § 101), that element is of particular relevance for the interpretation of law-making treaties, such as instruments for the international protection of human rights.

24. What is the main purpose and object of the ECHR, especially as far as Ukraine is concerned? Undoubtedly, that object is the proper functioning of the system of protection created by it, particularly of the mechanism of individual applications established by its Article 34. This is particularly true for Ukraine, one of the Court's main "clients" (8,250 pending applications out of a total of 97,000, which means that Ukraine is the fourth-largest user). The longer the absence of an Ukrainian judge on the bench, the longer the Court's inactivity regarding such applications and, consequently, the weaker the protection of the human rights alleged to have been infringed by Ukraine. For this reason, recourse to Article 31.1 of the 1969 Vienna Convention, and consideration of the "object and purpose" of the ECHR and especially of its Article 22, strongly suggest that the latter should be interpreted as not authorising the withdrawal of the Ukrainian list at any time if the latter is already in the hands of the Assembly .

25. The basic rule under Article 22 ECHR must be that once a government has submitted a list of candidates to the Assembly, there is a transfer of competence to the Assembly. There may be circumstances, however, where there are good reasons for the withdrawal of a list, provided the government concerned acts promptly, explains its action adequately and adduces specific reasons. This is why it seems desirable to allow for the withdrawal of a list in "exceptional circumstances", as is done in the Appendix to the Assembly Resolution 1432 (2005). However, no such "exceptional circumstances" can be made out in the instant case.

26. The Assembly Sub-Committee on the Election of Judges to the ECtHR was confronted with the refusal of Ukraine to name a third candidate. Initially, the name of Mr Shevchuk was proposed, but he stepped down in view of the decree of the Ukrainian President calling for a completely new list of candidates. The question that arises is whether the Assembly could approach Mr Shevchuk and invite him to an interview.

27. In our opinion, such a course of action seems legal and appropriate. Firstly, there should be three rather than two candidates, according to Article 22 ECHR. Secondly, Mr Shevchuk's name can be found on the second Ukrainian list, so that he continues to be an official candidate. Thirdly, if the Assembly was entitled not to accept the withdrawal of the entire list of candidates, it follows logically that it should look for a possible third candidate in as rational a way as possible. We agree that it would seem best, in the given circumstances, to approach Mr Shevchuck.

V. Conclusion

28. We answer both questions submitted to us in the affirmative.

Appendix 2 – Letter of 15 June 2009 sent to Mr Lluís Maria de Puig, President of the Parliamentary Assembly by Mr Mykola Onischuk, Ukrainian Minister of Justice

…

Further to my letter as of 9 July 2008 No.725-0-3-08-33 and taking note of the actual situation as to the election of the judge to the European Court of Human Rights in respect of Ukraine I, being the Minister of Justice, would like to inform that Ukraine has availed of its right provided for by Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms and asked the Committee of Ministers of the Council of Europe to lodge a request to the European Court of Human Rights (hereinafter – ECHR) to give advisory opinion on the right of the State to withdraw the list of candidates once submitted.

I consider that such advisory opinion will be additional mechanism capable to solve the problems which Ukraine asMember – State of the Council of Europe has faced while electing the candidates for the position of the judge to the ECHR.

Bearing in mind the abovementioned, I hope that within the time when the Court considers our request any procedural actions as to the election of the judge in respect of Ukraine will be halted.

Hereby, please accept the assurances of my highest consideration and satisfaction as to our meeting held on 28 April 2009.

…

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Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc. 11921, Reference No. 3573 of 29 May 2009

Draft resolution adopted unanimously, with one abstention, and *draft recommendation* adopted unanimously by the committee on 22 June 2009

Members of the committee: Mrs Herta **Däubler-Gmelin** (Chairperson), Mr Christos **Pourgourides**, Mr Pietro Marcenaro, Mr Rafael Huseynov (Vice-Chairpersons), Mr José Luis Arnaut, Mrs Meritxell Batet Lamaña, Mrs Marie-Louise **Bemelmans-Videc**, Mrs Anna **Benaki**, Mr Petru Călian, Mr Erol Aslan Cebeci, Mrs Ingrīda Circene (alternate: Mr Boriss **Cilevičs**), Mrs Ann Clwyd, Mrs Alma Čolo, Mr Joe Costello, Mrs Lydie Err, Mr Renato Farina, Mr Valeriy Fedorov, MrJoseph Fenech Adami, Mrs Mirjana Ferić-Vac, Mr György Frunda, Mr Jean-Charles **Gardetto**, Mr József Gedei, Mrs Svetlana Goryacheva, Mrs Carina **Hägg**, Mr Holger Haibach, Mrs Gultakin Hajibayli, Mr Serhiy Holovaty, Mr Johannes Hübner, Mr Michel Hunault, Mrs Fatme Ilyaz, Mr Kastriot Islami, Mr Željko Ivanji, Mrs Iglica Ivanova, Mrs Kateřina Jacques, Mr András Kelemen, Mrs Kateřina Konečná, Mr Franz Eduard **Kühnel**, Mrs Darja Lavtižar-Bebler, Mrs Sabine Leutheusser-Schnarrenberger, Mr Aleksei Lotman, Mr Humfrey Malins, Mr Andrija Mandic, Mr Alberto Martins, Mr Dick **Marty**, Mrs Ermira Mehmeti, Mr Morten Messerschmidt, Mr Akaki Minashvili (alternate: Mrs Chiora **Taktakishvili**), Mr Philippe Monfils, Mr Alejandro Muñoz Alonso, Mr Felix Müri, Mr Philippe Nachbar, Mr Adrian Năstase (alternate: Mr Tudor **Panţiru**, Ms Steinunn Valdís Óskarsdóttir, Mrs Elsa **Papadimitriou**, Mr Valery Parfenov (alternate: Mr Sergey **Markov**), Mr Peter Pelegrini, Mrs Maria Postoico, Mrs Marietta de Pourbaix-Lundin, Mr Valeriy Pysarenko (alternate: Mr Hryhoriy **Omelchenko**), Mr Janusz Rachoń, Mrs Marie-Line Reynaud (alternate: Mr René **Rouquet**), Mr François Rochebloine, Mr Paul Rowen, Mr Armen **Rustamyan**, Mr Kimmo Sasi, Mr Fiorenzo Stolfi, Mr Christoph Strässer, Lord John Tomlinson, Mr Tuğrul **Türkeş**, Mrs Özlem Türköne, Mr Viktor Tykhonov (alternate: Mr Ivan **Popescu**), Mr Øyvind Vaksdal, Mr Giuseppe Valentino, Mr Hugo Vandenberghe, Mr Egidijus Vareikis, Mr Luigi VItali, Mr Klaas **de Vries**,Mrs Nataša Vučković,Mr Dimitry **Vyatkin**, Mrs Renate **Wohlwend**, Mr Jordi Xuclà i Costa

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

Secretariat of the committee: Mr Drzemczewski, Mr Schirmer, Ms Heurtin