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**BUREAU OF THE CONSULTATIVE COUNCIL
OF EUROPEAN JUDGES
(CCJE-BU)**

**Comments by the CCJE Bureau on the complaint from Ukraine
addressed to the Secretary General of the Council of Europe
and also on the open letter of the Council of Judges of Ukraine
sent to the President of the CCJE**

I

Mr Pavlo Vovk, President of the District Administrative Court of Kyiv, Ukraine, has addressed to the Secretary General of the Council of Europe a letter dated 20 February 2015.

The principal issues raised in the letter are the following:

- Officers of the Kyiv District prosecutor's office and police are alleged to have executed a search on 16 to 17 February 2015 of certain courtrooms, judges and court personnel of the District Administrative Court of Kyiv, where the stated purpose was to secure evidence that certain court decisions were made by judges who were not present in the territory of Ukraine at the time the judgments were given.
- It is alleged that this action was without foundation and was intended to put pressure on the judiciary to give a judgment favourable to the prosecutor's office in a particular case.
- It is further alleged that the actions by the prosecutor's office by, inter alia, not proceeding by way of appeal of the questioned decisions, called into question the legality of court decisions and undermined the independence and impartiality of the courts.

Mr Viktor Gorodovenko, Ukrainian member of the CCJE, by a letter of 30 March 2015, has brought to the attention of the President of the CCJE an open letter by the Council of Judges of Ukraine, as well as Decision No. 1 of the Council of Judges, dated February 5, 2015.

Among the principal issues reported and raised in this letter of the Council of Judges are:

- Several incidents which occurred throughout January 2015 when groups of unknown persons with intent to influence judgments in particular cases attacked and intimidated judges before or after they had rendered judgments.
- Incidents of criticism of courts and judgments by members of parliament, senior officials of the executive and public prosecutors, comments which are disparaging of judicial decisions, although such decisions had not been overruled or even challenged on appeal.
- Initiation of criminal proceedings against judges under Article 375 of the Criminal Code of Ukraine (rendering by a judge (or judges) a knowingly wrongful sentence, decision, ruling or order) for the delivery of judicial decisions, which have not been overruled.

The Council of Judges, inter alia, accepts that it is possible to understand and excuse negative statements on judicial performance made by community leaders, but unsubstantiated allegations against judges, outright contempt, subjective criticism of judgments, sometimes made with signs of legal nihilism, that are made by officials are unacceptable in a civilised society.

II

The Bureau of the CCJE wishes to underline that it is in no position to examine and investigate the factual basis of the events which are alleged to have taken place as reported in these two letters.

With this in mind, the CCJE wishes to recall that the fundamental principles of the separation of powers, of the independence of the judiciary and of the personal independence of judges are necessary pre-requisites for a democratic society that is governed by the rule of law. These principles have been expressed in many constitutions of member states of the Council of Europe, they are the basis of the European Convention on Human Rights and they have been frequently recalled or used as a basis for further elaboration in many Opinions of the CCJE. According to Article 1 of the UN Basic Principles of the Independence of the Judiciary, the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. According to paragraph 13 of Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities, all necessary measures should be taken to respect, protect and promote the independence and impartiality of judges.

It follows from this that the executive and legislative powers are under a duty to guarantee the constitutional framework which will enable the judicial duties of courts and judges to be properly fulfilled. Furthermore the executive and legislative powers are under a duty to provide all necessary and adequate protection where the functions of the courts are endangered by attacks or intimidations directed at members of the judiciary.

III

Against this background the Bureau of the CCJE is of the opinion that, if there is substance in the complaint expressed in the letter of the Council of Judges of Ukraine, there would be grave violations of the duty to protect members of the judiciary and to enable them to conduct their official functions uninhibited, without fear of retaliation and intimidation.

Although criticism of court decisions is acceptable and even desirable in a democratic society, it is equally essential that all judicial decisions can be rendered free from undue influence and, above all, free from fear of personal attacks on judges.

Where the official performance of judges may give rise to criticism or even to disciplinary or criminal investigations, such proceedings must invariably follow the procedure set down by relevant acts of parliament, in accordance with the due process that is set out in such laws and carried out with the necessary procedural guarantees for all parties involved. To replace such formal proceedings by anything which permits or condones individual outside pressure on judges, especially if such improper actions are aimed at sanctioning individual judges because of judgments they have rendered or of inducing them to render specific judgements in the future, is absolutely unacceptable. The CCJE will speak out strongly against any such actions wherever they may occur.

IV

With respect to the letter of the President of the District Administrative Court of Kyiv, the CCJE again emphasises that it cannot examine the facts alleged in this letter and that it is in no position to judge whether there was sufficient ground to order the search which was apparently authorised by a judicial decision.

The CCJE observes that, although criminal investigations with respect to judges and courts are not illegal and there is no immunity of judges or courts, the legislative and the executive powers at the same time are under a duty to observe, guarantee and provide for the proper functioning of the judiciary as the third power of state. It follows from this that the greatest care should be taken before investigatory measures are employed by any prosecution authority which may have the effect of impeding or obstructing the functioning of judicial business. Only

in absolutely exceptional cases might the arrest of a judge in court or the conduct of a search in court offices and during office hours be unavoidable.

In the opinion of the CCJE, this approach also follows from the overriding principle of proportionality, which, as developed by the European Court of Human Rights, is a fundamental principle of the European Convention on Human Rights. All measures taken by the state and in particular all measures taken by the executive power of the state that affect human rights, must, in a democratic society, be done according to law. All measures will only be justifiable and justified in so far as they are apt and necessary to achieve a legitimate goal which is, itself, one which has a legal foundation. Finally, if there is substance to the assumptions stated in the letter with respect to the underlying motives of the searches, this would be clearly in violation of European principles. Influencing and intimidating judges as individuals or as a group (and even driving them to recuse themselves in certain cases) would be absolutely unacceptable and clearly illegal under the laws of all the member states of the Council of Europe.

The CCJE is willing to provide further assistance in this matter, according to its Terms of Reference.