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## **Investigation of crimes allegedly committed by high officials during the Kuchma rule in Ukraine – the Gongadze case as an emblematic example**

Report

Committee on Legal Affairs and Human Rights

Rapporteur: Mrs Sabine LEUTHEUSSER-SCHNARRENBARGER, Germany, Alliance of Liberals and Democrats for Europe

### *Summary*

The committee stresses the importance it attaches to the safety of journalists and political activists, especially those linked to opposition groups, in all member states of the Council of Europe. Crimes against them must be investigated as a matter of priority, without political interference. The authorities must strive to identify and prosecute not only the actual perpetrators of these crimes but also their instigators and organisers, without regard to the rank and position of the suspects.

The committee welcomes the recent conviction of three former Ministry of Interior police officers for the murder of Georgy Gongadze. But it remains deeply concerned that no progress has been achieved in holding to account those who instigated and organised the murder of Georgy Gongadze.

Other high-profile crimes, such as those committed against Verkhovna Rada deputy O. S. Yelyashkevich, journalist I. Aleksandrov, political activist O.I. Podolsky, as well as the death in custody of I. Honcharov, the alleged leader of a criminal gang within the Ministry of the Interior, further illustrate the severe dysfunctioning of different law enforcement bodies during the Kuchma era and beyond.

The committee makes a number of concrete proposals as to investigative actions that could still be performed, and stresses in particular the need to examine the recordings allegedly made in the President's office of conversations pertaining to various criminal acts ("Melnichenko recordings") without further delay, in such a way as to allow the results of this examination to be used as evidence in court, as the case may be.

## **A. Draft resolution**

1. The Parliamentary Assembly, recalling its Resolution 1466 (2005) on the honouring of obligations and commitments by Ukraine, stresses the importance it attaches to the safety of journalists and political activists, especially those linked to opposition groups, in all member states of the Council of Europe.
2. Crimes against journalists and political activists must be investigated by the competent authorities as a matter of priority, without political interference. The authorities must strive to identify not only the actual perpetrators of these crimes but also their instigators and organisers, without regard to the rank and position of the suspects.
3. As regards the Gongadze case, the Assembly welcomes the clear language used by the European Court of Human Rights in finding violations of Articles 2, 3 and 13 of the European Convention on Human Rights in its judgment of 8 November 2005 and stresses the importance of the timely and comprehensive execution of this judgment, which must include carrying out, without further delay, those investigations the authorities had failed to perform.
4. The Assembly also welcomes the recent conviction of three former Ministry of Interior police officers for the murder of Georgy Gongadze. However, it regrets the release from custody of their immediate superior, General Pukach, and his escape from being arrested again, as well as the untimely death of the former Minister of the Interior, Yuriy Kravchenko, all in unclear circumstances.
5. The Assembly remains deeply concerned that no progress has been achieved in holding to account those who instigated and organised the murder of Georgy Gongadze and reiterates its position that the case cannot be considered as solved until the instigators and organisers are held to account in addition to the actual perpetrators of the crime.
6. The authenticity of the recordings allegedly made in the President's office of conversations pertaining to various criminal acts ("Melnychenko recordings") should be examined without further delay, in such a way as to allow the results of this examination to be used as evidence in court, as the case may be.
7. The Assembly welcomes the readiness of the Ukrainian Prosecutor General's Office to allow foreign experts to participate in the examination of the recordings and of the equipment used, a fact which should encourage the witness in question to surrender these items to the authorities in due course. Whilst regretting that it took the Ukrainian authorities so long to launch an official request for legal cooperation, it invites the requested authorities to favourably consider this request, taking into account the technical feasibility of undertaking such an expertise at this late stage.
8. Independently from their authentication, these recordings can provide valuable leads to witnesses or other evidence which should be exploited. Other investigative acts such as those proposed by a team of investigators in October 2005 also still remain to be carried out, including an investigation of the circumstances in which two senior officials, Mr Fere and Mr Dagaev, suffered strokes that killed the latter and permanently incapacitated the former in 2003.
9. Regarding the crime against political activist O.I. Podolsky, the Assembly welcomes the conviction of the former police officers who admitted their guilt. However, in view of the parallels with the Gongadze case, it considers that the instigators and organisers of this crime must still be identified and brought to justice.
10. Other high-profile crimes, such as those committed against Verkhovna Rada deputy O. S. Yelyashkevich and journalist I. Aleksandrov, as well as the death in custody of I. Honcharov, the alleged leader of a criminal gang within the Ministry of the Interior, further illustrate the severe dysfunctioning of different law enforcement bodies during the Kuchma era and beyond.
11. Consequently, the Assembly invites
  - 11.1. the Ukrainian Prosecutor General's Office to use all possible avenues of investigation to identify those who instigated and organised the murder of Giorgiy Gongadze and the other crimes mentioned in paragraphs 9 and 10 above, in particular to:
    - 11.1.1. vigorously pursue the authentication of the so-called "Melnychenko recordings", with the participation of foreign experts;

11.1.2. pursue other available methods of establishing the authenticity of these recordings, such as the interrogation as witnesses of persons whose voice was allegedly recorded, and comparisons between discussions allegedly recorded and actual events;

11.1.3. open a criminal investigation into the responsibilities for the failure to protect Georgy Gongadze and to properly investigate his disappearance, as established by the European Court of Human Rights, as requested by the Assembly in Resolution 1466 (2005);

11.1.4. investigate the circumstances in which General Pukach was released from custody in 2003, and was later reportedly able to escape arrest in Israel, and to open criminal cases against those responsible, as appropriate;

11.1.5. re-examine the circumstances of the death of the late Minister of the Interior, Yuriy Kravchenko, and to also investigate a possible crime of inciting a person to commit suicide;

11.1.6. interrogate as witnesses other senior staff members or former staff members of the Ministry of Interior who may have information on the special unit headed by General Pukach;

11.1.7. investigate the exact circumstances in which two former senior officials allegedly linked to the Gongadze case suffered strokes within a short period of time, resulting in the death of Mr Dagaev and Mr Fere's falling into a coma;

11.2. all the persons whose voices allegedly appear on the "Melnychenko recordings", to fully cooperate with the Prosecutor General's Office by providing voice samples for purposes of comparison and as witnesses;

11.3. the political leadership of Ukraine to refrain from interfering with the investigation into the instigators and organisers of the murder of Mr Gongadze and other Kuchma-era crimes.

11.4. the Committee of Ministers of the Council of Europe to continue to follow closely the implementation of the judgment of the European Court on Human Rights in the Gongadze case and to ensure, in cooperation with the Ukrainian authorities, that all necessary investigative measures are speedily carried out, including those listed in paragraph 11.1. above.

12. The Assembly resolves to continue following the above-mentioned cases in the framework of its monitoring procedure concerning Ukraine.

**B. Draft recommendation**

1. The Parliamentary Assembly, stressing the importance of the vigorous prosecution of crimes against journalists and political activists, refers to its Resolution ... (2008).
2. It invites the Committee of Ministers to continue to follow closely the implementation of the judgment of the European Court of Human Rights in the Gongadze case and to ensure, in cooperation with the Ukrainian authorities, that all necessary investigative measures are speedily carried out, including:
  - 2.1 the vigorous pursuit of the authentication of the so-called "Melnychenko recordings", with the participation of foreign experts;
  - 2.2. the pursuit of other available methods of establishing the authenticity of these recordings, such as the interrogation as witnesses of persons whose voice was allegedly recorded, and comparisons between discussions allegedly recorded and actual events;
  - 2.3. the opening of a criminal investigation into the responsibilities for the failure to protect Georgy Gongadze and a proper investigation into his disappearance, as established by the European Court of Human Rights;
  - 2.4. an investigation into the circumstances in which General Pukach was released from custody in 2003, and was later reportedly able to escape arrest in Israel, and to open criminal cases against those responsible, as appropriate;
  - 2.5. the re-examination of the circumstances of the death of the late Minister of the Interior, Yuriy Kravchenko, and an investigation also into a possible crime of inciting a person to commit suicide;
  - 2.6 the interrogation as witnesses of other senior staff members or former staff members of the Ministry of Interior who may have information on the special unit headed by General Pukach;
  - 2.7. an investigation into the exact circumstances in which two former senior officials allegedly linked to the Gongadze case suffered strokes within a short period of time, resulting in the death of Mr Dagaev and Mr Fere's falling into a coma.
3. Finally, it invites the Committee of Ministers to encourage all member and observer states of the Council of Europe to consider favourably any request for legal cooperation they may have received or may still receive from the Ukrainian authorities with a view to elucidating the full circumstances of the murder of Georgy Gongadze.

**C. Explanatory Memorandum**

by Mrs Leutheusser-Schnarrenberger, rapporteur

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**I. Introduction*****i. The Gongadze case – a litmus test for the Ukrainian political class***

1. The Gongadze case and other crimes allegedly involving high officials of the Kuchma regime in Ukraine have been on the agenda of the Assembly for an unusually long time – for a reason: the official investigations also took an unusually long time, and they are still far from being completed, some eight years after the disappearance of the journalist. As noted by the European Court of Human Rights *"the facts of the present case show that during the investigation, until December 2004, the State authorities were more preoccupied with proving the lack of involvement of high-level State officials in the case than by discovering the truth about the circumstances of the disappearance and death of the applicant's husband."*<sup>1</sup>

2. The importance of this case, for Ukraine and beyond, stems from the fact that the long list of journalists killed in the exercise of their profession, in Ukraine and in other Council of Europe member states, requires a clear political signal that such crimes are not tolerated.

3. The particularly cruel circumstances of the murder of this young, outspoken journalist and the authorities' obvious failure to investigate made the Gongadze case one of the triggers of the "Orange revolution" in Ukraine and a test case for the determination of the international community to crack down on crimes against journalists, whose safety and freedom of expression are a key condition for the development of human rights and democracy in Europe.

4. With the backing of the Committee on Legal Affairs and Human Rights, I have undertaken to maintain as long as possible the momentum generated by continued international attention and to keep offering to the different "players" in Ukraine my assistance as a go-between in order to encourage and facilitate the investigation under all possible angles – always insisting on moving up the chain of command and refusing to settle for the condemnation of only those who executed the orders.

5. The first of the two motions underlying the present report was motivated by the failure of the investigations conducted until then to shed any light on the circumstances of the disappearance and murder of the journalist Georgy Gongadze, despite – and some say, because of – widely-publicised information pointing to the possible involvement of high government officials<sup>2</sup>.

6. The second motion drew attention to the fact that the investigations into other crimes allegedly committed by high officials during the Kuchma era were equally stalled, possibly for similar reasons<sup>3</sup>.

<sup>1</sup> *Gongadze v. Ukraine* judgment (Application No 34056/02), 08.11.2005, final 08.02.2006, § 179.

<sup>2</sup> Doc 10330, Reference No 3044 du 24.01.2005.

<sup>3</sup> Doc 10653 rev, Reference No 3142 of 03.10.2005, extended on 01.10.2007 and 25.01.2008.

7. A common thread between the two topics consists in the recordings of many hours of conversations in the President's office allegedly produced by one of his bodyguards, Mykola Melnychenko ("Melnychenko recordings"). These recordings could provide important clues to the political, and possibly also the criminal responsibility of a number of high-ranking officials surrounding the former President. These recordings, their treatment, and the political games played around them, may shed light not only on the political culture which prevailed in Ukraine under the Kuchma regime, but also on the seriousness and determination of the "Orange Revolutionaries" to make good on their earlier promises that, once in power, they would investigate and expose the whole truth, without regard to the rank and political role of the suspects.

8. There are striking parallels between the Gongadze case and that of the high-profile disappearances in Belarus, which were the subject of a report prepared by Christos Pourgourides and adopted by the Assembly in June 2004. Similarly to the cases of Yuri Zakharenko, Victor Gonchar, Anatoly Krasovsky and Dmitry Zavadsky in Minsk, the Gongadze case has become, in Ukraine and beyond, a powerful symbol for the struggle between civic movements in defence of freedom of expression on the one side, and what is often perceived as the repressive forces of a certain political establishment on the other.

9. The Gongadze case was clearly one of the catalytic events leading up to the "Orange Revolution" brushing aside the Kuchma regime. Not surprisingly therefore, President Yushchenko, during his historic visit to the Parliamentary Assembly in January 2005, replied to a parliamentary question on this topic by stressing the political importance he attached to this case and pledging that he would push forward the investigation to the best of his ability, as a matter of priority. I was struck by the enormous public attention given to my modest initial fact-finding visit at the end of March 2005, and by the excellent cooperation with the Ukrainian authorities.

10. Given the symbolic importance of the Gongadze case for ordinary Ukrainians, it is my view that President Yushchenko would be well advised to act in such a way that cannot give rise to any suspicion that he is no longer on the side of those who want to see not only the perpetrators of the crime against Gongadze brought to justice, but also all those who ordered and organised it. The award by President Yushchenko, in February 2007, of the Order of Prince Yaroslav the Wise to former Prosecutor General Mikhail Potebenko has given rise to doubts in this respect<sup>4</sup>, as Prosecutor General Potebenko is widely regarded as responsible for the disastrous conduct of the crucial initial phase of the investigation<sup>5</sup>.

11. Prime Minister Yulia Tymoshenko has also promised publicly several times that the elucidation of the Gongadze case was a priority for her administration<sup>6</sup>. I was therefore surprised that she failed to answer two parliamentary questions on this matter that were addressed to her following her speech before the Parliamentary Assembly during its April 2008 part-session.

## ***ii. The Assembly's procedure to date***

12. The motion for a resolution by Hanne Severinsen (Denmark/ALDE) and others, dated 15 October 2004 (Doc. 10330), was referred to the Committee on Legal Affairs and Human Rights for report, following the Committee's specific request supported by the Monitoring Committee, at the Bureau meeting in Vienna on 10 January 2005 (ratification at the beginning of the January 2005 part-session). I was appointed Rapporteur at the Legal Affairs Committee meeting on 25 January 2005 and visited Kyiv for the first time from 30 March to 1 April 2005. At the Committee meeting on 26 April 2005, I presented an introductory memorandum (document AS/Jur (2005) 23 dated 25 April 2005). During the Assembly's June 2005 part-session, I met two witnesses (Mr Melnychenko and Mr Ivasiuk) in Strasbourg.

13. The original motion was merged with that on the Investigation of crimes allegedly committed by high officials during the Kuchma rule in Ukraine (Reference No 3142 of 3 October 2005, specifying that the report shall also cover the Gongadze case), following which I was appointed Rapporteur at the Legal Affairs Committee meeting on 6 October 2005. I carried out another fact-finding visit to Kyiv on 11 and 12 July 2006, the results of which I reported to the Committee at its meeting on 15 September 2006. At the meeting of the Legal Affairs Committee on 26 June 2007, I presented my ongoing cooperation with the Ukrainian Prosecutor General, and obtained the Committee's support for the prolongation of the mandate, aimed at providing more time for this purpose.

<sup>4</sup> Cf. International Federation of Journalists (IFJ)/ Institute of Mass Information (IMI)/ National Union of Journalists of the UK and Ireland (NUJ)/ Gongadze Foundation, "The Gongadze Inquiry, an investigation into the failure of legal and judicial processes in the case of Georgy Gongadze", Report no. 3: "Official obstruction is rewarded", September 2007, p. 3; I have written to President Yushchenko concerning this decoration, but I have not received a reply.

<sup>5</sup> See § 27 below.

<sup>6</sup> E.g. on 12.03.2008: the Prime Minister regretted that only lowest level people would be punished, not the instigators and organisers including "political public figures" (source: <http://pravda.com.ua/news/2008/3/12/72948.htm>).

14. The Gongadze case was also the subject of a report dated 16 June 2003 commissioned by the Bureau of the Assembly and prepared by an independent expert, Mr Hans Christian Krüger<sup>7</sup>. Mr Krüger concluded that in the first two years after the murder, “[p]erhaps in view of the allegations made against the President, Ministers and officials of the Government, there seems to have been a certain hesitation to conduct criminal investigations in an open, transparent, and effective manner. This changed following the election of the new Prosecutor General”, Mr Piskun. Mr Piskun was fired by President Kuchma soon after Mr Krüger presented his report, and was re-instated just before the handover of power to President Yushchenko, following a court decision declaring his destitution unlawful. He remained in his post in President Yushchenko’s new administration. But subsequently there were further changes in the post of Prosecutor General, which may well have contributed to delays in completing the investigation.

### **iii. Purpose of the report**

15. It is neither possible nor desirable for a rapporteur of the Parliamentary Assembly to take the place of domestic investigators or prosecutors and carry out an investigation herself or himself. But, in appropriate cases, such as this one, an Assembly rapporteur can usefully help along domestic investigations by encouraging certain investigative measures to be taken by the competent authorities, by offering an independent assessment of measures taken and, last but not least, by generating international public attention for the investigative process – attention that may help overcome entrenched domestic resistances.

16. In this spirit, I have conducted two fact-finding missions to Kyiv, met several times with the key players of the investigation – the different prosecutors general in office during the time of my mandate, the Minister of the Interior, members of the Verkhovna Rada’s committee of inquiry on the Gongadze case, and last but not least, the widow of the murdered journalist, Myroslava Gongadze, and his mother, Lesya Gongadze, as well as their lawyers.

17. During the June 2005 part-session of the Assembly, I had an extensive meeting with Mykola Melnychenko, who explained to me in detail how, and for which reasons, he had made the recordings that will be the subject of further developments below, and why he hesitated to simply hand his materials over to the Prosecutor General’s Office.

18. Subsequently, I have done my best to broker an arrangement between Mr Melnychenko, the Prosecutor General, and the US Department of Justice aimed at making the recordings available to the investigation into the crime against Gongadze as well as other crimes allegedly committed by high officials of the Kuchma regime. Mr Melnychenko had informed me that he hesitated to fully cooperate with and hand over his original data and recording equipment to the Prosecutor General’s Office (PGO) without the involvement of international experts whose presence would exclude any “foul play”. The successive prosecutor generals, ever since my visit to Kyiv in March/April 2005, agreed with me that foreign experts should be involved in order to enable Mr Melnychenko to overcome his hesitations. After sounding out the American authorities, who declared that they were willing to cooperate to the extent technically possible provided they would receive a proper request for judicial cooperation, I engaged in an extensive correspondence with the PGO in order to help bring about such cooperation. I even asked for a prolongation of my mandate in order to give this process sufficient time. But whilst the PGO had publicly accused the Council of Europe and the US authorities of dragging their feet, it had taken several years before making the required official request.<sup>8</sup>

19. Enough time has now passed to conclude this mandate by presenting a final report – assessing the investigative measures taken to date, the outcome of the criminal proceedings against the perpetrators of the murder of Gongadze and other crimes covered by my mandate, and drawing my own conclusions as to the efforts made by the competent authorities to find out the whole truth and to identify not only the actual perpetrators, but also the instigators and organisers of the crimes. Whilst the cases in question are still not closed, the Assembly will be able to demonstrate its continued interest in the investigation in the framework of the ongoing monitoring procedure.

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<sup>7</sup> AS/Bur (2003) 50; Mr Krüger is a former Deputy Secretary General of the Council of Europe.

<sup>8</sup> Cf. §§ 63-67 below.

**iv. Fact-finding visits to Kyiv**

20. From 30 March to 1 April 2005, I visited Kyiv for a first round of talks aimed at familiarising myself with the legal and political implications of the Gongadze case, and transmitting the message that the Gongadze case cannot be considered as solved before all those responsible – the perpetrators as well as those who ordered and organised the crime – have been brought to justice. I am grateful for the hospitality of the Ukrainian authorities, in particular the Verkhovna Rada's delegation to PACE.

21. I had extensive and fruitful meetings with Mr Fedur, the lawyer for Mr Gongadze's mother, Mr Moroz, leader of the Socialist Group in the Verkhovna Rada, Mr Martyniuk, First Deputy Chair of the Verkhovna Rada, Ms Yemelianova and Mr Marmazov, Deputy Ministers in the Ministry of Justice, Mr Lutsenko, Minister of Internal Affairs, Mr Omelchenko, Chair of the Verkhovna Rada's Ad Hoc Commission on the investigation of the Gongadze and other high-profile cases, Prosecutor General Mr Piskun, and Ambassador Motsyk, Deputy State Secretary of Ukraine.

22. On 11 and 12 July 2006, I returned to Kyiv in order to obtain an update on the progress of the investigation and to discuss with Prosecutor General Medvedko ways and means of advancing the investigation up the chain of command that had just been seriously jeopardised by the death of the former Minister of the Interior Jury Kravtchenko and the continued reticence of Mr Melchnychenko to make his recordings available for evidentiary purposes. I also met again with a number of political leaders, including Mr Moroz and Mr Holovaty, and with relatives of Mr Gongadze and their lawyers.

23. On the occasion of a meeting of the Monitoring Committee in Kyiv on 26 and 27 May 2008, I had another meeting at the Prosecutor General's Office with Sergiy Vynokurov, Acting Prosecutor General of Ukraine, Mykola Golomsha, Deputy Prosecutor General of Ukraine, Olexander Kharchenko, Investigator for especially important cases, Sergiy Kravchuk, Deputy Head of the International Law Department and Olga Lytvynchuk, Head of International Cooperation Division of the International Law Department, in order to complete and update my information in view of the preparation of this report.

**II. The conduct of the investigation into the disappearance of Georgy Gongadze and the outcomes to date**

24. In my view, two phases of the investigation can be distinguished, which roughly coincide with the period before and after the so-called "Orange Revolution" in December 2004. I tend to share the point of view of the authors of the "Gongadze Inquiry" reports,<sup>9</sup> who summed up the evolution of the political will as follows: whilst under the Kuchma regime efforts were made to hamper, delay and block the investigation at all levels, the political interferences after the "Orange Revolution" were aimed at focusing public attention on the prosecution of the actual perpetrators of the crime whilst diverting attention as much as possible from the organisers and instigators of the crime.

25. After the initial investigation, which was riddled with mistakes and lacked transparency, important progress was made in the form of the arrest and trial of three police officers working for the Ministry of the Interior, V.M. Kostenko, O.V. Popovych and M.K. Protasov for the killing of Georgy Gongadze. Their immediate superior, who according to their testimony was personally present at the scene of the crime, General Pukach, is now wanted, although he had been in custody at the end of 2003. General Pukach's own superior, Interior Minister Yuri Kravchenko, was found dead in March 2005, the day after Prosecutor General Piskun had publicly announced that he would be heard as a witness the next day, and very shortly after the arrest of the three above-mentioned policemen and the arrest warrant against General Pukach.

26. On 15 March 2008, the three policemen were convicted – of premeditated murder committed following a conspiracy, and of abuse of official functions with severe consequences. But the investigation aimed at identifying the organisers and instigators of the crime has barely progressed since 2005 – in particular as regards the possible evidentiary use of the "Melnychenko recordings" and the inquiry into the responsibilities for the blunders committed during the crucial initial phase of the investigation.

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<sup>9</sup> Cf. IFJ/IMI/NUJ/GF, "The Gongadze Inquiry, An investigation into the failure of legal and judicial processes in the case of Georgy Gongadze, Report no. 2: the instigators are getting away" (September 2005) (henceforth: IFJ Report no. 2), p. 14.



**i. Mistakes and lack of transparency of the initial investigation (2000-2004)**

27. The investigation carried out by the authorities following Mr Gongadze's disappearance is riddled with errors and omissions to the point that many suspected that the investigation was intentionally 'derailed' in order to hide the truth, which must have been particularly embarrassing to the authorities.

28. When a headless body was found in Tarashcha on 2 November 2000, indications that the body was probably Gongadze's were known within three days, after police investigator Harbuz had contacted Gongadze's widow Myroslava and his colleague Olena Prytula and learnt from them that the jewellery found on the body was identical to Gongadze's. But the authorities tried for many months to convince the public that Gongadze was still alive.<sup>10</sup> Whilst Chief coroner Yuri Schupyk had the stomach contents removed, he did not have the body put into cold storage, and when Mr Gongadze's widow Myroslava was finally allowed access to the body for purposes of identification, it had reached such a state of decomposition that it was impossible for her to be certain. Confusing and contradictory statements as to the identity of the Tarashcha body were made by top law enforcers even after the first DNA tests carried out in January 2001 by Russian forensic experts yielded a 99.6% likelihood<sup>11</sup> that the body was Gongadze's.

29. Furthermore, the Prosecutor General refused to recognise Gongadze's mother Lesya as an aggrieved party in the case, thereby preventing her and her lawyer from having access to the case file and independently observing the investigation. On 9 February 2001, judge Zamkovenko ruled this refusal to be unlawful (but see paragraph 47 below: he ended up being prosecuted and fired himself).

30. The Gongadze case was conducted as a murder investigation only many weeks, if not months, after the Prosecutor General's Office found that there was sufficient evidence that the Tarashcha body was indeed Gongadze's. Meanwhile, much time and the opportunity to collect evidence was lost by the authorities looking in the wrong direction. An article in "The Independent" (London)<sup>12</sup> revealed that leaked documents pertaining to the General Prosecutor's investigation showed that senior government officials had deliberately obstructed the investigations.

31. The contradictory announcements concerning citizens "K", "D" and "G" are a further example of confusing and contradictory statements by the Ukrainian authorities: in a document distributed by the Ukrainian delegation to the Council of Europe on 1 March 2001,<sup>13</sup> the Council of Europe was informed that "information about the circumstances of the murder of G. Gongadze could be possibly known to Citizen K. who is currently in custody [...] for committing a number of grave crimes, including premeditated murders by order, and that Citizen K. had been ordered to murder a 'famous oppositional journalist in Kyiv'". The "Citizen K." version reappeared when Prosecutor General Vasylyev's press department announced on 21 June 2004 that a suspect, "Citizen K", had admitted to the killing of Gongadze by beheading. But on 13 August 2004, the Prosecutor's office replied to an official inquiry by the International Federation of Journalists (IFJ) and others that Citizen K had not been arrested as part of the Gongadze case. On 14 July 2004, the lawyer for Gongadze's mother also received a letter from the Prosecutor General's Office stating that "at the present moment there are no suspects in the criminal case of the murder of Gongadze." Similarly, the paper submitted to the Council of Europe on 1 March 2001 stated that the Prosecutor General's Office was analysing the possible involvement in Gongadze's murder of two known criminals whose bodies had been found and identified: Igor Dubrovsky ("Cyclops") and Pavlo Gulyuvaty ("Sailor"). President Kuchma, the Interior Minister and his deputy, the Prosecutor General and his deputy all announced that the case had been practically solved and that citizens D and G had murdered Gongadze.<sup>14</sup> But it was later shown that "Cyclops" and "Sailor" had been filmed at a wedding on the day of Gongadze's disappearance and that "Sailor" was safe and sound in Dnipropetrovsk and had not even been arrested. The authorities subsequently retracted their claims, which the International Federation of Journalists report believes were made for the purpose of gaining time with the Council of Europe, which was at the time discussing possible sanctions against Ukraine. The numerous contradictory public statements during the investigation point to

<sup>10</sup> Statements inter alia by Deputy Interior Minister Dzhyha on 16.11.2000, Prosecutor General Potebenko on 10.01.2001, and Deputy Prosecutor General Bahanets in late April 2001 (cited in the preliminary report "The Gongadze Inquiry, an investigation into the failure of legal and judicial processes in the case of Georgy Gongadze" of January 2005 (henceforth IFJ Report no. 1), pp. 10-11.

<sup>11</sup> The same experts raised their estimate to 99.9% on 22 February, cf. IFJ Report no. 1, p. 11.

<sup>12</sup> Askold Krushelnicky, « Pressure piles on Ukrainian leaders after leaks reveal attempts to cover up killing », 19.06.2004.

<sup>13</sup> At the 739th meeting of the Ministers' Deputies; document signed by Oleksandr Lavrynovych, head of the parliamentary ad hoc committee of inquiry and subsequently Minister of Justice.

<sup>14</sup> IFJ Report no. 1, pp. 15-16.

the possible collusion of senior officials aimed at diverting attention from the actual perpetrators and should therefore be also be investigated.

32. Another negligent feature of the original inquiry is the long delay in properly identifying the body found in Tarashcha, by way of forensic tests and in particular, DNA analysis. Whilst the first forensic examination of the corpse by the coroner in Tarashcha on 8 November 2000 concluded that the time of death corresponded approximately to the time of the disappearance of Gongadze in mid-September, and colleagues and relatives identified Gongadze with the help of jewellery and an old shrapnel wound on 15 November, the corpse was transferred in unclear circumstances from the local morgue to Kyiv and the Deputy Minister of the Interior declared on 16 November 2000 that the body had been buried in soil for two years.

33. In December 2000, the Prosecutor General announced that the Tarashcha corpse was not Mr Gongadze's, whilst on 10 January 2001, he announced that it was highly probable that the corpse was Mr Gongadze's, and announced at the same time that there were witnesses who had seen him alive after his disappearance<sup>15</sup>. Russian forensic experts issued test results in January 2001 showing 99.6% probability that the body was Gongadze's. But the Prosecutor General's Office confirmed this only on 26 February 2001, after the Russian experts upped their estimate to 99.9%. Only then did the Prosecutor General's Office launch an official murder investigation. But as late as August 2002, the Deputy Prosecutor General told Ukrainian television that "we don't know for sure whose body this is."<sup>16</sup> Only in September 2005 the GPO announced that the latest DNA test conducted in Germany proved that the body found in Tarashcha was that of Georgy Gongadze.

34. The Verkhovna Rada's Commission of Inquiry commissioned another DNA analysis in Germany, which concluded that the DNA from the soft tissues submitted by the Commission does *not* correspond to the blood specimen of Georgy and his mother<sup>17</sup>.

35. More DNA tests have meanwhile been commissioned by the Prosecutor General's Office, which, as Prosecutor General Medvedko confirmed in July 2006, show beyond doubt that the body found in Tarashcha is indeed Gongadze's. His widow, Myroslava Gongadze, confirmed that she is certain about the identity of the body, not only because of the DNA analysis (the tests done in Germany could have been performed on genetic material that did not come from the corpse in question or that was contaminated because of inappropriate retrieval and transport conditions), but also because she had been able to confirm the presence of shrapnel wounds and a broken finger in the corpse that corresponded exactly to wounds that Georgy Gongadze had suffered long before his death. The stubborn refusal of Georgy's mother, Lesya Gongadze, to accept that the Tarashcha corpse was that of Gongadze may be an understandable psychological reaction – a refusal to give up hope that her only son may still be alive.

36. The European Court of Human Rights, in its judgment of 8 November 2005<sup>18</sup>, found a violation of the right to life (Article 2 ECHR), both in the form of failure to fulfill the positive obligation to protect Georgy Gongadze from a known risk to his life, after he addressed himself to the Prosecutor General's Office in his open letter of 14 July 2000 complaining about being shadowed<sup>19</sup>, and in the form of failure to investigate his disappearance. I fully subscribe to the Court's devastating assessment of the authorities' intentions throughout 2004<sup>20</sup> and also to its additional comment that "*the fact the alleged offenders, two of them active police officers, were identified and charged with the kidnap and murder of the journalist just a few days after the change in the country's leadership raises serious doubts as to the genuine wish of the authorities under the previous Government to investigate the case thoroughly.*"<sup>21</sup>

37. The Court also found a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) against Gongadze's widow, as the attitude of the investigating authorities towards Myroslava Gongadze and her family caused her serious suffering. The Court describes in some detail how the state authorities, whilst raising doubts as to the identity of the Tarashcha corpse and therefore the fate of the applicant's husband, at the same time constantly refused Myroslava Gongadze full access to the relevant materials in the case file, until August 2005, i.e. almost five years after the disappearance of her husband<sup>22</sup>.

<sup>15</sup> Cf. Gongadze judgment of the European Court of Human Rights (note 1), § 185.

<sup>16</sup> IFJ Report no. 1, pp. 11-12 with further detail.

<sup>17</sup> During the June 2006 part-session of the Assembly in Strasbourg, I met with the Committee of Inquiry's forensic expert, Mr Ivasyiuk, who reiterated the doubts as to the identity of the Tarashcha corpse and put into question the scientific validity of the conclusions drawn from the other DNA tests.

<sup>18</sup> Gongadze judgment (note 1).

<sup>19</sup> Gongadze judgment (note 1), §§ 167-170.

<sup>20</sup> § 2 above.

<sup>21</sup> Gongadze judgment (note 1), § 170.

<sup>22</sup> Gongadze judgment (note 1), §§ 185-186.

38. In the light of the Court's highly critical assessment of the political will of the Ukrainian leadership before the "Orange Revolution", a good litmus test for the authorities' intentions is their attitude towards the implementation of the judgment. Whilst the payment of the "just satisfaction"<sup>23</sup> was made without delay, the proper execution of this judgment, which finds that necessary investigations were not carried out, clearly requires additional individual measures – in particular that the investigations be carried out without further delay, to the extent possible.

39. The judgment came into force on 8 February 2006 and on 17 February, the then Minister of Justice of Ukraine, Serhiy Holovaty, wrote to Prosecutor General Medvedko drawing his attention to the judgment, describing the court's findings with particular emphasis on the lack of effective investigation<sup>24</sup>. As a concrete measure to execute this judgment, he proposed the opening of a criminal case concerning the ineffective investigation into the disappearance of Gongadze, in particular by officials of the PGO whose duty was to take relevant measures.

40. The GPO replied on 28 February 2006<sup>25</sup> in a letter signed by the Deputy Prosecutor General, refusing to act on the judgment as suggested by the Minister of Justice, considering the Minister's letter a personal interpretation of the judgment.

41. After the Ukrainian Law on the Execution of Judgments of the European Court of Human Rights was passed in February 2006 and a Government resolution confirming the authority of the Minister of Justice over the execution of the judgments of the European Court of Human Rights, another letter was sent to Prosecutor General Medvedko in July 2006 explaining in detail the procedure of the execution of judgments and insisting that the PGO was required to "*conduct relevant investigation in order to ascertain the persons whose actions (inaction) had caused prolonged ineffective investigation of the criminal case on the disappearance and death of the husband of the applicant*". This letter was not answered<sup>26</sup>.

42. On 5 June 2008, the Committee of Ministers adopted an interim resolution on the execution of the Court's Gongadze judgment, putting emphasis, as far as individual measures are concerned, on the need to proceed with the international expertise on the "Melnychenko recordings".<sup>27</sup>

43. Throughout my mandate, I have asked the different prosecutors general about the progress, if any, of their inquiries into the responsibilities for the obvious failure to carry out a proper investigation following the disappearance of Georgy Gongadze. It is clear to me that the chain of command leading to the errors and omissions in the inquiry would also provide important clues as to the chain of command concerning the crime itself. Despite repeated, clear questions, I have not received any answer. I must conclude that no serious investigation into the responsibilities for these initial failures has taken place. The decoration by President Yushchenko, in 2007, of the Prosecutor General in charge at the crucial time, Mr Potebenko, has widely been interpreted as a political signal that the political leadership is not or no longer interested in holding to account the perpetrators of the violation of the state's duty to investigate found by the European Court of Human Rights. Another signal in this sense was the award of the title of "Lawyer of Honour of Ukraine" to judge Maria Prindiuk in December 2007. Judge Prindiuk was instrumental in helping General Pukach – the superior of the three policemen convicted of the murder and who, according to their testimony, directed their actions and personally participated in the execution of the murder – to escape justice<sup>28</sup>. On 21 February 2008, I wrote to the President to protest against the award by his administration of the above-mentioned decorations, but my letter has remained without response.

## **ii. Intimidation and harassment of individuals investigating the Gongadze case; multiple staff changes**

44. Ihor Vorotyntsev, district coroner of Tarashcha, conducted the first autopsy on the body found in Tarashcha and issued a death certificate in Gongadze's name. Mr Vorotyntsev was allegedly mistreated and put under pressure because he tried to carry out his duties in line with his job description rather than with the wishes of the General Prosecutor's Office (both under Mr Potebenko and Mr Piskun). Mr Vorotyntsev has reportedly suffered a heart attack.<sup>29</sup>

<sup>23</sup> € 100 000, as requested by the applicant.

<sup>24</sup> Letter has reference no. 1-25/73.

<sup>25</sup> Reference No 06/1-9310-01.

<sup>26</sup> Source : interview with Dmytro Kotlyar, then Deputy Minister of Justice of Ukraine.

<sup>27</sup> Interim resolution adopted by the Committee of Ministers on 05.06.2008 at the 1028<sup>th</sup> meeting of the Ministers' Deputies (press release no. 417/2008: Interim resolution).

<sup>28</sup> Cf. §§ 94-95.

<sup>29</sup> According to the IFJ Report no. 1, p. 31.

45. Andriy Fedur, lawyer for Lesya Gongadze (Georgiy's mother), says he faced harassment from state officials from the moment he started representing Mrs Gongadze. When I met him on 30 March 2005, he told me that he had recently received threats to his security and was still being shadowed by unknown persons travelling in cars. He told me that he had communicated the license plate numbers to the Prosecutor General's Office, but had not yet received a reply. In October 2002, he had been arrested on suspicion of forgery, and two months later was excluded from representing Mrs Gongadze. Although he is still being prosecuted for what he assured me are trumped-up charges, he was re-admitted to the case as lawyer for Lesya Gongadze in early 2005. But during the same period, he was barred from joining the case of the murder of Alexandrov, which he said was related to that of Gongadze<sup>30</sup>, in which a secret (and unauthorised) recording made in Düsseldorf/Germany is presented as evidence by the Prosecution. The reason given for Mr Fedur's exclusion from this case was once again the ongoing criminal investigation against him – which is apparently no longer an obstacle to Mr Fedur representing Lesya Gongadze.

46. Oleksandr Zhyr, former chair of the parliamentary committee of inquiry into the Gongadze case, was disqualified on 12 July 2002, by a local court, from standing in the second round of an election for parliament on 14 July. It is widely believed that the results of the first round were rigged in Zhyr's disfavour. Zhyr maintains that the Governor, Mr Shvets, had not hidden from him that President Kuchma had told the Governor: "It's either you or Zhyr." At the time, Ukrainian media frequently linked Zhyr's mistreatment to his role in investigating the Gongadze case.<sup>31</sup>

47. Mykola Zamkovenko, former chair of the Pechersky District Court in Kyiv, was prosecuted in May 2001 for cases he had adjudicated several years earlier. He was fired in July 2001 by presidential decree, at the request of the Supreme Council of Justice. He had ruled in February 2001 that the refusal of prosecutor Bahanets to recognise Gongadze's mother as an aggrieved party was against the law. Mr Zamkovenko publicly linked his mistreatment to the Gongadze case, and Prosecutor Bahanets stated, according to media reports, that his appeal to the judicial qualification commission to discipline Mr Zamkovenko was indeed linked to the Gongadze case.<sup>32</sup>

48. Svetlana Karmelyuk, a medico-legal expert involved in DNA tests on the body found in Tarashcha, who was due to fly to Germany at the end of December 2000 to examine the results of an independent DNA analysis commissioned by the parliamentary committee of inquiry, was visited at her home by two policemen at 9 pm on 30 December 2000. The policemen tried to seize her passport.<sup>33</sup>

49. Hryhoryi Harbuz, investigator in charge of the Gongadze investigation at the outset, was taken off the case in early November 2000, then hospitalised, put on leave, and finally retired. According to Myroslava Gongadze's lawyer, Valentina Telychenko, Mr Harbuz was very experienced and had acted appropriately. A week after Gongadze's disappearance, he realised that the SBU (secret service) was interested in the case. He met with Mrs Telychenko and Mrs Gongadze in a café, explained that the case was very serious and that the SBU was heavily implicated in it. According to the report by the International Federation of Journalists<sup>34</sup>, Harbuz had advised Mrs Telychenko not to give evidence that the head of the presidential administration Lytvyn and businessman Volkov had had a motive to kill Gongadze, saying that this would "ruin her life".

50. Pressure on media reporting on the Gongadze case: the IFJ report<sup>35</sup> documents numerous cases of pressure from police and SBU officers on media reporting on the Gongadze case, in particular in the period immediately after the discovery of the body in Tarashcha, and following the publication of the "Melnychenko recordings". Interestingly to me, the methods used to put pressure on unruly media included a raid by the tax police.<sup>36</sup>

51. Changes in the post of Prosecutor General: given the importance of this position in Ukraine, the succession of firings and "comebacks" of prosecutors general is rather impressive: Prosecutor General Potebenko resigned in April 2002, to be replaced by Vyatyslav Piskun (who rapidly fired Deputy Prosecutor General Bahanets, who had been working on the Gongadze case); Mr Piskun was in turn dismissed in

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<sup>30</sup> Cf. §§ 103-106 below.

<sup>31</sup> IFJ Report no. 1, p. 33.

<sup>32</sup> Cf. IFJ Report no. 1, p. 34; in March 2001, judge Zamkovenko had also ordered Yulia Tymoshenko, then a prominent opposition leader and businesswoman, now Prime Minister of Ukraine, to be released on bail. This may also have contributed to his fall into disgrace.

<sup>33</sup> IFJ Report no. 1, p. 34.

<sup>34</sup> *Ibid.*, p. 35.

<sup>35</sup> *Ibid.*, pp. 36-37.

<sup>36</sup> According to the IFJ Report (*ibid.*), Matlid Publications, publisher of "Eastern Economist" magazine, was raided by tax police on 13.12.2000, a week after it published a critical editorial on the Gongadze case.

October 2003 (shortly after announcing to the Council of Europe expert Krüger that the investigation was “at the final stage”), to be replaced by Mr Vasylyev (who in turn dismissed Mr Piskun’s deputies working on the Gongadze case). In November 2004, Mr Vasylyev was fired. In December 2004, shortly before the hand-over of power to President Yushchenko, a court declared Mr Piskun’s dismissal unlawful and ordered him to be re-instated. The next day, President Kuchma, without using his right to appeal against this court decision, re-appointed Mr Piskun as Prosecutor General, and Mr Piskun re-appointed the deputies who had been working on the case before. He also remained Prosecutor General in President Yushchenko’s new administration<sup>37</sup>.

52. The reasons for Mr Piskun’s dismissal in October 2003 are not entirely clear to me. In an interview with *Zerkalo Nedeli* weekly in February 2005 Mr Piskun said that the decree on his dismissal was published just hours after he reported to President Kuchma on the arrest of General Pukach. During our meeting in Kyiv, Mr Piskun told me that he was fired shortly after President Kuchma was informed by a letter from another high-ranking prosecutor that Mr Piskun’s investigation was moving closer to linking the President or his entourage to the murder.

53. Mr Piskun was again dismissed – now by President Yushchenko – in October 2005, and Oleksandr Medvedko was appointed as new Prosecutor General. The President never publicly explained his decision, which came shortly after the publication of an ambitious action plan by PGO investigators<sup>38</sup>. Mr Piskun again appealed against the dismissal, but lost his court case through the different instances.

54. However, during the political crisis in April 2007, when the President dissolved parliament, Mr Piskun once again appealed against his dismissal before the first instance court, and won. The President immediately (without appealing against the first-instance decision) re-instated Mr Piskun to the post of Prosecutor General – a post he then held for the third time. In his introductory speech for Mr Piskun before senior PGO staff on 26 April 2007, President Yushchenko recognised the beginning of the investigation of the Gongadze case, but criticised the PGO team for not having had enough courage to go “further”<sup>39</sup>.

55. Soon after, a strange event occurred: an attempt (allegedly by the Presidential secretariat) to “overthrow” Prosecutor General Piskun, whose premises were “defended” by forces of the Ministry of the Interior, whose forces even had a brief clash with the “State Guard Service” under the orders of the President. The ensuing stalemate was ended only on 1 June 2007, when President Yushchenko re-instated Oleksandr Medvedko as Prosecutor General as part of a comprehensive political deal with then Prime Minister Yanukovych<sup>40</sup>.

### **iii. Treatment of the “Melnychenko recordings”**

56. In November 2000, Mykola Melnychenko, one of ex-president Kuchma’s guards, released recordings he claims to have made in the President’s office, with the help of a remote-controlled digital dictaphone hidden under a sofa in the President’s office. The recordings, totalling over 700 hours, cover at least five occasions between 12 June and 3 July 2000 on which President Kuchma, the head of the presidential administration, Volodymyr Lytvyn (later Speaker of the Ukrainian Parliament, now leader of a new party and parliamentary group), the late Minister of the Interior, Yuriy Kravchenko, and the then head of the Ukrainian

<sup>37</sup> There was speculation in the Ukrainian media at the time that there was an informal “deal” between Yushchenko and Kuchma – the former promising not to have Kuchma prosecuted and the latter agreeing to step down.

<sup>38</sup> The *Ukrainska Pravda*, in an editorial published at <http://pravda.com.ua/news/2005/10/14/34490.htm> suggested that Piskun’s dismissal was long expected by supporters of the Orange revolution who viewed Piskun as Kuchma’s ally, the “last straw” having been the criticism by PACE of Ukraine’s treatment of the Gongadze case during the October 2005 session; the IFJ Report no. 3 (p. 23) seems to draw a link between the dismissal of Piskun and the “Shubin plan” published in October 2005. At this time, a group of investigators of the PGO headed by Mr Shubin drew up a comprehensive plan of additional investigative actions including ascertaining the persons who had ordered Gongadze’s surveillance, before his disappearance, by officials of the Ministry of Interior; operative measures to step up the search for General Pukach; establishing the circumstances of the transfer of the body from the murder site to the Tarashcha forest where it was found; establishing the persons who obstructed the investigation of the Gongadze murder; investigating the circumstances of the surveillance and kidnapping of Mr Podolsky; and establishing the circumstances of the acquaintance between Mr Melnychenko and Mr Moroz.

<sup>39</sup> Cited in *Ukrainskaia Pravda*, <http://pravda.com.ua/news/2007/4/26/58044.htm>

<sup>40</sup> In addition to the frequent changes of the Prosecutor General and Deputy Prosecutor Generals in charge of the investigation of high-profile cases, including that of Mr Gongadze, the groups of investigators working on the case were changed several times. Substantial progress in the investigation had been attributed to PGO investigators Roman Shubin, Yuriy Stolyarchuk and Yuriy Hryshchenko, but they were taken off the case several times (last time in November 2006) and new investigators were appointed by every new (old) Prosecutor General.

Security Service, Leonid Derkach, discussed what to do about the annoying journalist Gongadze, using terms such as “crushing” him, “taking care of” him, and “throwing him to the Chechens”, or use of “alternative methods”. I was told that the total length of the recordings concerning the fate of Mr Gongadze, at least as far as they have been made public to date, is less than 20 minutes.

57. Before the examination of the recordings by the US company BekTek, the Prosecutor General’s Office consistently dismissed the tapes as fabrications. In particular, Prosecutor General Potebenko, following a search of the apartment of Mykola Rudkovskiy, an aide to Socialist Party leader Oleksandr Moroz, stated on 18 January 2001, that the search had revealed an “underground laboratory” related to the audio tape scandal. The investigators had found several hours of records of speeches by different Ukrainian political leaders that could have been used for fabrication by “superimposition”. In October 2002, Prosecutor General Piskun returned to this issue and stated that the Gongadze episodes on the recordings were edited on Mr Rudkovskiy’s computer. But despite these serious allegations – implying that the opposition had fabricated the recordings and possibly themselves murdered Gongadze in order to frame Kuchma – no charges were ever brought against Mr Rudkovskiy.

58. By September 2004, several laboratories had conducted tests to establish the authenticity of the recordings:

59. An expert assessment by IPI (International Press Institute, Vienna), commissioned by the Verkhovna Rada’s Committee of Investigation in December 2000, was inconclusive – the experts found that, in view of the digital nature of the recordings, it would be practically impossible to exclude the possibility of the recordings being manipulated with a degree of certainty required for evidence to be used in criminal proceedings. In their letter dated 22 February 2001 addressed to the Committee, they also found it highly unlikely that such a huge volume of recordings could be “doctored” and recommended to proceed with a method of authentication consisting in comparing the content of the conversations recorded with events actually taking place during the relevant period, a method followed by the Committee of Investigation in multiple instances and leading to “authentication” of numerous passages.

60. In February 2002, Bruce Koenig, former supervisor of the FBI’s audio/video forensic laboratory and founder of the BekTek laboratory, also commissioned by the Parliamentary Committee of Inquiry, examined those parts of the recordings that concern illegal weapon sales to Iraq (the delivery of high-tech radar equipment). I was informed by a representative of the US Department of Justice that these test results were not “official”, as BekTek is a private research laboratory, but he recognised the excellent reputation and high technological standing of this group. On the basis of these test results, American officials strongly criticised the Kuchma administration for the illegal export of radar equipment to Iraq and the United States cancelled \$ 55 million of aid<sup>41</sup>, which can be interpreted as a form of official endorsement of the BekTek findings.

61. Prosecutor General Piskun also said that he took the BekTek findings seriously and announced, in July 2002, that he had ordered an additional test. However, for a long time, no results were announced. In March and September 2003, Piskun announced again that additional examinations would be carried out<sup>42</sup>. On 10 September 2004, the head of the Kyiv Forensic Science and Research Institute, commissioned by Mr Piskun’s successor, Vasylyev, announced the result of the tests carried out by this institute: namely that the recordings were a “doctored” copy, and the voices on them unrecognisable. Three days later, the Prosecutor General’s Office admitted that the tests had indeed been performed on copies.

62. On 1 March 2005, Mr Piskun announced that the Prosecutor General’s Office had ordered a new expert examination of the recordings with the participation of US and British experts. But during my first visit to Kyiv, I was informed by Mr Fedur, the victim’s mother’s lawyer, and by Mr Omelchenko, the Chair of the Rada’s Committee of Inquiry, that Major Melnychenko was still reluctant to hand over to Mr Piskun the “originals” of the recordings and the recording equipment used, which would be necessary for a credible expert examination. To break the deadlock caused by mutual suspicions, I suggested to Mr Piskun during our meeting on 1 April 2005 to negotiate with Mr Melnychenko and his lawyers an arrangement enabling an expert assessment to be carried out in the United States, by American and Ukrainian experts, in such a way that the very possibility of manipulations by either side would be excluded. Mr Piskun confirmed that Ukrainian law would allow the use – as evidence in court – of the results of an expert assessment carried out

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<sup>41</sup> Cf. Maryann Bird, No News Is Bad News, in Time Magazine Sunday, 15.12.2002.

<sup>42</sup> Including a joint examination of the original recordings concerning Gongadze with the US Department of Justice (cf. IFJ Report no. 1, p. 20) ; it remains to be seen whether such an examination has ever taken place, and if not, why not. The question of why it took so long for another test to be commissioned by the Public Prosecutor’s Office needs to be clarified further.

abroad<sup>43</sup>, provided that representatives of the Ukrainian Prosecutor General's Office could participate in the procedure. As the need for a mutually acceptable procedure excluding the suspicion of manipulation by either side is obvious, I have since then many times offered my support for the conclusion of such an arrangement.

63. As early as during my first visit to Kyiv in March/April 2005, Prosecutor General Piskun agreed to an arrangement involving the participation of American as well as Ukrainian experts, in order to ensure that any results of the investigative measures in question could be used in court<sup>44</sup>. In order for this to be possible, the originals of the recordings and the recording equipment had to be examined (also) by Ukrainian prosecutors, and Mr Melnychenko would have to provide valid testimony explaining his *modus operandi* and his motives. The agreement reached in Kyiv was confirmed in a telephone conversation with Prosecutor General Piskun<sup>45</sup> and several exchanges of letters with Prosecutors General Piskun and Medvedko<sup>46</sup> and with Mr Melnychenko<sup>47</sup>. I was informed by Mr Gongadze's widow that requests for legal assistance had indeed been addressed by the Prosecutor General's Office to the US Department of Justice, but that they did not include a specific request to jointly examine Mr Melnychenko's recordings.

64. At the Committee meeting on 26 June 2007, I asked for (and subsequently obtained) the prolongation of my mandate in order to give extra time to this potentially decisive process.

65. As I enquired about the best possible international experts capable of determining the authenticity of the (digital) recordings allegedly made by Mr Melnychenko<sup>48</sup>, I was directed to the U.S. Department of Justice. As mentioned above, American experts linked to the FBI had gained relevant experience when they had examined (and found authentic) some extracts of the recordings documenting a conversation in which President Kuchma and his collaborators had discussed the sale of high-tech radar equipment to Iraq, in breach of the embargo against the regime of Saddam Hussein.

66. In July 2007, the representative of the US Department of Justice in Kyiv, who was most familiar with the Gongadze case and the "Melnychenko recordings", informed me that the US side was ready to "examine favourably" any official request for legal cooperation they would receive from the Prosecutor General's Office on this matter, and I lost no time in informing the Prosecutor General of this.

67. Unfortunately, it took a very long time again for such an official request to actually reach the United States Department of Justice. Again, I wrote repeatedly to the Ukrainian Prosecutor General, finally asking him for a copy of the official request, as his office had announced to the press that such a request had been made, while the American counterpart had apparently still not received it.

68. At the end of 2007 and during the first months of 2008, the Prosecutor General's Office, with the cooperation of Mr Melnychenko, but without the presence of US experts (whose absence was blamed on the Council of Europe by collaborators of the Prosecutor General in some interviews) carried out some "investigative experiments" verifying the technical possibility of making recordings in the President's office using the equipment and techniques indicated by Mr Melnychenko.

69. These "experiments" are a step in the direction that had been rightly indicated by the Rada committee of investigation and the International Federation of Journalists: to use the recordings (leaving open for the time being the question of their "authenticity") as a source of circumstantial evidence. The recordings provide the investigators with many leads they can follow up, in particular by comparing actual events with what had allegedly been discussed previously in Mr Kuchma's office. This line of investigation would benefit greatly from the active cooperation of the persons whose voices can allegedly be heard on the recordings. Having inquired with the PGO about the willingness of these persons to cooperate, I have received contradictory

<sup>43</sup> Mr Piskun jovially said that if need be, the expert assessment could even be carried out "on the moon".

<sup>44</sup> It should be noted that in 2003 the Artemivsk District Court (Lugansk region) reportedly ruled to admit a compact disc with extracts from Melnychenko's recordings as evidence in the trial against Borys Feldman and Bank Slovyanskiy. The court also included in the proceedings an affidavit from Mykola Melnichenko confirming that the recordings documented actual conversations which had taken place in President Kuchma's office and a certified copy of an expert assessment of the recordings carried out by the US-based BekTek laboratory (source: <http://pravda.com.ua/archive/2003/july/2/news/2.shml>).

<sup>45</sup> On 13.07.2005 – call on the initiative of Mr Piskun.

<sup>46</sup> I wrote to Mr Piskun on 29 June, 5 July and 22.07.2005, on 04.05.2007 and to Mr Medvedko on 22.11.2005, on 15 June and 31.07.2007 and on 21 February and 28.04.2008; Mr Piskun wrote to me on 05.07.2005 and 14.05.2007 and Mr Medvedko on 8 June and 14.08.2007 and 07.03.2008.

<sup>47</sup> Meeting with Mr Melnychenko in Strasbourg in June 2005; my letter of 05.07.2005; letter of Mykola Melnychenko of 30.03.2007.

<sup>48</sup> Through the German Federal Ministry of Justice, I had contacted certain German experts.

information: Prosecutor General Medvedko wrote in his letter of 7 March 2008 that they relied on their constitutional rights to refuse their participation in an “experiment” planned for 27 January 2008<sup>49</sup>; his Deputies, to whom I spoke in Kyiv on 27 May, said that none of the persons concerned refused to provide voice samples. In any case, as Mr Medvedko stressed in his letter, the PGO can work with voice samples of the persons concerned that are available from public archives.

70. On 11 April 2008, I finally received confirmation that an official request for legal cooperation had been received by the United States Department of Justice, and was currently being examined by the competent authorities in Washington, D.C. On 6 June 2008, this examination was still continuing.

71. As the Prosecutor General’s Office continued to publicly blame the delays in the appointment of an international (i.e. American) expert on the Council of Europe<sup>50</sup> or the American side, I wrote to Prosecutor General Medvedko on 28 April 2008 to clarify matters<sup>51</sup>.

72. Given that almost three years have gone by since the original agreement in principle with the Prosecutor General on the need to involve American experts in order to overcome Mr Melnychenko’s distrust and the actual transmission of the required official request for legal cooperation to the US authorities, I have come to the conclusion that both prosecutors general in office during the period in question – Mr Piskun and Mr Medvedko – did not do everything in their power to enable the recordings to be used as evidence. As co-rapporteur on Ukraine in the Monitoring Committee, I intend to continue following this matter attentively.

#### **iv. Activities of the Verkhovna Rada commission of investigation**

73. The Verkhovna Rada set up an *ad hoc* commission of investigation on 21 September 2000, as mentioned previously, to look into the case of Gongadze and some others<sup>52</sup>. From the beginning, the Commission had to face numerous difficulties due to the fact that a law creating a legal basis for the work of committees of investigation did not exist. Several texts adopted by the Verkhovna Rada were vetoed by President Kuchma. The first Chair, Oleksandr Lavrynovich (Rukh party), strongly criticised the official investigation<sup>53</sup>.

74. In October 2001, the socialist Oleksandr Zhyr took over the chairmanship. In December 2001, he made an interim report to the Verkhovna Rada on the Commission’s findings, strongly accusing the Prosecutor General’s Office of legal violations. After Mr Zhyr failed to be re-elected in a contest he claims was manipulated against him<sup>54</sup>, Mr Omelchenko became chairman. The Commission listened to many hours of recordings made available by Mr Melnychenko<sup>55</sup>, and heard witnesses, including (in the United States) Mr Melnychenko himself and a number of Interior Ministry employees.

75. On 2 September 2002, the Commission unanimously adopted its conclusions, which directly accuse President Kuchma, former Interior Minister Kravchenko, then Speaker of the Verkhovna Rada (and former head of the Presidential administration), and current leader of the “Lytvyn’s Block” in the Verkhovna Rada, Volodymyr Lytvyn, and the former Chief of the Security Service, and current Rada deputy Derkach, of being criminally responsible for the kidnapping of Gongadze.

76. On 4 September 2002, the Commission’s conclusions were transmitted to Prosecutor General Piskun, and re-transmitted to his successor Medvedko in March 2003. The conclusions, including a summary of the evidence considered, were also published in an open letter addressed to foreign governments and

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<sup>49</sup> “The individuals whose voices had been allegedly recorded in 2000, enjoyed their constitutional rights and took the final decision that made it impossible to carry out the investigative actions with their participation, planned to be undertaken on 27 January 2008 – taking samples of voices and speech in the way and conditions showed by M.I. Melnychenko.”

<sup>50</sup> Cf. interview Deputy Prosecutor General Mykola Holomsha (UKRINFORM 24/25.04.2008 available at [www.ukrinform.com/eng/](http://www.ukrinform.com/eng/).)

<sup>51</sup> Letters on file with the Committee secretariat.

<sup>52</sup> Inter alia, the suspect deaths of another journalist, Mr Alexandrov, and of five parliamentarians (Shcherban, Hetman, Boyko, Myaskovskiy and Drahomaretskiy), and attacks against two other parliamentarians (Yelyashkevych and Khara).

<sup>53</sup> Cf. IFJ Report pp. 37-38 with references to media interviews.

<sup>54</sup> See § 46 above.

<sup>55</sup> Mr Omelchenko explained to me that the recordings were divided into three categories : one relating directly to crimes and other violations of Ukrainian law ; another concerning the political relations between President Kuchma and prominent politicians belonging to all political parties, and finally “dirty talk” including denunciations before Kuchma, racist and sexist insults etc.. The Committee, according to Mr Omelchenko, decided to make only the first category public, in order to avoid abuses of the recordings for settling political accounts.



international organisations, including the Secretaries General of the Council of Europe and its Parliamentary Assembly, dated 2 September 2002<sup>56</sup>.

77. But the report of the Commission of Investigation, which was for a long time not put on the agenda of the plenary Verkhovna Rada, despite frequently repeated requests of the Commission and its Chair, and despite the existence of a rule, similar to the rules of procedure of other parliaments, that a Commission must report on its activity within six months after its creation, as a matter of course.

78. I was surprised to hear, during my first visit to Kyiv in 2005, that the hearing of the report in the plenary was again rejected after the change of government. Mr Moroz, leader of the socialist group, had unsuccessfully introduced a proposal to include the item on the agenda, and he asked me as a fellow parliamentarian to help push for such a debate to finally take place. Mr Martynuk, of the communist group, explained that his party supported the proposal, but I could not help detecting a certain lack of enthusiasm. Most importantly, Mr Lytvyn<sup>57</sup> had publicly announced that President Yushchenko himself had asked not to put the item on the agenda, in order to avoid overly "politicising" the matter. Mr Omelchenko strongly objected to this decision and accused Mr Lytvyn of simply trying to escape having to answer for his own role in the Gongadze case. He said that, whilst the content of the Committee's findings was well-known to the members of the Rada and to the public at large, only the plenary parliament could decide on motions such as the destitution of the Speaker. Mr Lytvyn and others, fearing for their political future in view of the Committee's findings, wanted to avoid at all costs, in Mr Omelchenko's opinion, forcing all parliamentarians into an open vote in which they would have to take sides, for all to see.

79. As it is only normal that a report adopted by a parliamentary Committee is placed on the agenda of the plenary parliament, the Parliamentary Assembly of the Council of Europe, in Resolution 1466 (2005) did indeed call on the Verkhovna Rada to hold a parliamentary hearing on the Gongadze case<sup>58</sup>. The argument that this would "politicise" the case was weak: it was already highly "politicised" in the sense that it has become a symbol of the Ukrainian people's impatience with official disregard for the law and one of the triggers of the "Orange Revolution". An open debate in parliament could only have positive effects in providing the necessary political backing for the competent authorities to do their job without regard to the rank and status of the persons they are obliged to investigate.

80. On 20 September 2005, Hryhoriy Omelchenko, chair of the Committee of Investigation, was finally allowed to present the committee's conclusions as last deliberated in March 2004 before the Rada's plenary, in the absence of Speaker Volodymyr Lytvyn. But the proposed vote on the dismissal of Prosecutor General Piskun was not held, and the conclusions as presented dated back to March 2004 and did thus not cover more recent events, such as the "splitting" of the cases against the suspected perpetrators and the instigators and organisers<sup>59</sup>. The parliament then resolved to disband the commission.

81. In 2006, the Verkhovna Rada set up a new committee to investigate the Gongadze case, chaired by Volodymyr Moysyk (Our Ukraine). On 20 December 2006, Mr Moysyk presented the committee's findings to the parliament, pointing out the following factors hindering the effective investigation of the case:

- the five changes of prosecutors general during the investigation, and several replacements of the investigation teams in a case involving more than 150 volumes of files;
- the failure of cooperation between the PGO and Mykola Melnychenko;
- the release of General Pukach from detention, and his subsequent absconsion, and
- the failure to investigate senior officials of the Ministry of the Interior when there was still time (Mr Kravchenko, Mr Fere, Mr Honcharov).

82. The Moysyk committee demanded in particular the investigation of the responsibilities for the obstruction of the initial investigation and a proper examination of the "Melnychenko recordings".

<sup>56</sup> Dossier no. 30/TCK (copy available upon request from the Committee secretariat).

<sup>57</sup> Who was unable to meet with me because he was abroad, in Lithuania, during the duration of my stay in Kyiv.

<sup>58</sup> Cf. explanatory report (Doc 10676), §§ 294-296.

<sup>59</sup> Cf. transcript of a Channel 5 TV programme featuring Mr Holovaty, Mr Omelchenko and Mr Piskun (<http://pravda.com.ua/news/2005/9/29/33994.htm>). In the discussion, Mr Omelchenko confirmed that the conclusions he read out in the Rada were those of March 2004; Mr Piskun, when confronted with the suggestion that he should open criminal cases against Kuchma, Lytvyn, Derkach and Kravchenko according to the findings of the committee of inquiry said that he could not do so as Prosecutor General Potebenko had signed in 2001 a resolution refusing to open such a case, which had been challenged in court and upheld through the instances.

**v. *The conviction of three Ministry of Interior policemen for the murder of Gongadze and the tragic fates of senior officials of this Ministry: Minister Kravchenko, and senior staffers Fere, Dagaev and Honcharov***

83. The surveillance of Gongadze by Interior Ministry staff in the weeks prior to his murder seems established now, although it had been strongly denied by the authorities for many years<sup>60</sup>. As we know, Mr Gongadze had – to no avail – complained in an open letter addressed to the Prosecutor General on 14 July 2000 that he felt threatened by persons following him around Kyiv in cars whose license plates numbers he indicated to the Public Prosecutor's Office. The incompetent reaction by the Prosecutor General's Office was one of the elements justifying the finding of a violation of Article 2 ECHR (right to life) by the authorities in the Gongadze judgment of the European Court of Human Rights.<sup>61</sup>

84. Prosecutor General Piskun explained to me that, in 2003, his team had pushed ahead to investigate the role of Interior Ministry officials, and arrested General Pukach<sup>62</sup>. Shortly afterwards, on 29 October 2003, Mr Piskun was fired<sup>63</sup>, and with him, according to Mr Piskun, a total of 1,900 members of the prosecution service who had been in any way connected with the Gongadze investigation.<sup>64</sup> Mr Piskun said that following his re-instatement (and that of his entire team) in December 2004, quick progress was made leading to the arrest first of an officer belonging to a special unit in the Interior Ministry who the Prosecution already knew had last seen Gongadze and who gave a detailed account of how Gongadze was captured and how and where he was murdered. Then his two accomplices were also arrested, whilst the third – General Pukach – was again at large, after having been released by the Kyiv City Court on 5 November 2003 on the strength of his undertaking not to abscond.

85. The three police officers arrested in early 2005 – Mr Popovych, Mr Protasov, Mr Kostenko – made detailed depositions, corroborated by other results of the investigation, and were charged with murder in March 2005. Their cases were brought to court separately from those against the instigators and organisers of the crime. Whilst this was at first strongly criticised by the widow and the mother of Gongadze and their lawyers, who feared that this would make it less likely that the instigators and organisers would ever be held to account, Myroslava Gongadze now believes that this may have been necessary in order to ensure that at least the actual killers could be punished.

86. Preliminary court hearings took place on 19 December 2005, the trial started on 9 January 2006, and the three men were convicted by the Kyiv Court of Appeal on 15 March 2008 – of having murdered Georgy Gongadze. Mr Protasov was sentenced to 13 years imprisonment and the deprivation of the rank of colonel; Mr Kostenko and Mr Popovych were sentenced to 12 years imprisonment with deprivation of their respective ranks of colonel and major.

87. The trial was subject to some criticism on the political scene<sup>65</sup>, especially as regards the fact that part of it was held in camera, and the length of the proceedings. Initially, public access to the trial was handled very restrictively, which aroused much suspicion and public protest. But as Myroslava Gongadze told me in May 2008, the situation improved as the trial went on and the secrecy was limited to hearings in which witnesses (including under-cover agents of the Ministry of Interior) needed to be protected. Most importantly, the civil parties and their lawyers were fully informed of these hearings.

88. The convicted persons appealed against the sentences (not against the conviction as such, having entered a guilty plea themselves). The Ukrainian Supreme Court will hear the appeals on 17 June 2008<sup>66</sup>.

89. One key person in the Ministry of Interior – former Minister Yuriy Kravchenko, who appears on the “Melnychenko recordings” as having discussed with President Kuchma and others different possibilities of “dealing with” Gongadze – was found dead in the garage of his dacha on the morning of 4 March 2005, shortly after the arrests of the three policemen who were later convicted as Gongadze's killers, and on the

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<sup>60</sup> The IFJ Report no. 1 (pp. 23 pp.) gives an impressive account of contradictory statements of the authorities over the years.

<sup>61</sup> Cf note 1.

<sup>62</sup> The arrest took place on 22.10.2003.

<sup>63</sup> Cf § 51 above.

<sup>64</sup> Mr Piskun said that they were all brought back when he was re-instated in December 2004; see §§ 51-54 above for more details on Mr Piskun's dismissal and reinstatement.

<sup>65</sup> Cf. IFJ Report no. 3, pp. 6-7.

<sup>66</sup> On 8 July 2008, a panel of judges of the Supreme Court upheld the judgment of the Kyiv Court of Appeal against the three policemen and rejected all their cassation claims (<http://www.pravda.com.ua/news/2008/7/8/78497.htm>)

very day on which he had been – publicly – summoned to the Prosecutor General's Office for an interrogation.

90. Yuriy Kravchenko was found in the garage of his dacha with two bullet holes in his head, one through his chin, the other through the right temple. A letter was found on him in which he insisted on his innocence and accused persons close to former President Kuchma of framing him.

91. His former aide, Colonel Soroka, who was among the first to find Kravchenko's body, and who had spent much of Kravchenko's last day with him, gave an extensive interview published by IMI (Institute for Mass Information, Kyiv) in which he cast strong doubts on the "suicide" version<sup>67</sup>. Investigator Andriy Ralsky stated publicly that an expert commission of senior health ministry experts had concluded that Mr Kravchenko could have shot himself in the head twice<sup>68</sup>. But Mykola Polishchuk, a former health minister and expert on firearms injuries, publicly ruled out suicide. At the very least, Mr Kravchenko should have lost consciousness as a result of the trauma caused by the first shot. After such injuries, nobody, however strong-willed, could have held a weapon in his hand and shot himself again into the temple, from a close range (not point-blank), but without leaving a contact imprint of the barrel.<sup>69</sup>

92. Most of my interlocutors in Kyiv also doubted the official version that he had committed suicide. The Chair of the Commission of Inquiry, Mr Omelchenko, and others held Prosecutor General Piskun responsible for Mr Kravchenko's death, as he had failed to protect the former Minister, despite clear warnings from some MPs, after having made a public announcement, including the exact date, of his impending interrogation as a witness in the Gongadze case.

93. In my contacts with the successive prosecutor generals, I asked several times for information on further developments on this case. Whilst a criminal case for a possible homicide against Mr Kravchenko was opened and closed several times, also at the request of members of Mr Kravchenko's family who doubted the "suicide" thesis, the original finding of suicide was still confirmed. I continue to share the doubts as to the true cause of Mr Kravchenko's death and wonder at the same time why the PGO has not – as would have been logical from its own point of view – opened a case under the provision of the Ukrainian criminal code which penalises inciting a person to suicide<sup>70</sup>. The PGO should open investigations in all possible directions.

94. The escape of General Pukach still perplexes me. The immediate superior of the three convicted police officers, who according to their testimony directed the execution of the murder and was the one who strangled Gongadze, had been arrested on 22 October 2003 (for alleged forgery of official documents in the original phase of the official investigation of the Gongadze case), only to be released again on 6 November 2003, in return for an undertaking not to abscond<sup>71</sup>. The judge who ordered his release was recently honoured by the administration of President Yushchenko<sup>72</sup>. An international arrest warrant was brought against Mr Pukach on 28 February 2005 and he was charged with Gongadze's murder one week later, in close connection with the arrest and confessions of the three policemen.

95. In June 2005, Mr Pukach reportedly narrowly escaped arrest in Israel. His impending arrest had been leaked to the newspaper "Segodnia", allegedly from within the PGO. An in-depth analysis by the newspaper "Zerko Nedeli" implicates the PGO, Mr Porohshenko (then Secretary of the National Security Council) and President Yushchenko himself<sup>73</sup>.

96. Neither the exact circumstances of the release of Mr Pukach in October 2003, nor the responsibilities regarding the leak allowing him to escape arrest in Israel have been subject to proper investigation by the PGO. I consider that this is an omission that should be remedied without further delay.

97. According to the testimony of Aleksandr Popovich, one of the police officers convicted for the murder of Gongadze, two other senior officials, Mr Fere and Mr Dagaev, had met in a restaurant in late October

<sup>67</sup> <http://eng.imi.org.ua/?id=read&n=26&cy=2005&m=unfrm>, in which he cast strong doubts on the "suicide" version.

<sup>68</sup> Cf. IFJ Report no. 3, p. 26.

<sup>69</sup> Cited in IFJ Report no. 3, p. 27 (with further details).

<sup>70</sup> According to the IFJ Report (ibid.), Deputy Prosecutor General Holomsha said that prosecutors were "studying that issue".

<sup>71</sup> The cases against General Pukach had also been closed by Prosecutor General Vasilyev shortly after he replaced Mr Piskun (cf. IFJ Report no. 2, p. 8).

<sup>72</sup> Cf. § 43.

<sup>73</sup> See IFJ Report no. 2, pp. 6 and 7.

2000, five or six weeks after Gongadze's death, and discussed the need to rebury his body<sup>74</sup>. Mr Fere had allegedly been in charge of the Ministry of the Interior's 7<sup>th</sup> Directorate, responsible in Soviet times for surveilling dissidence and punishing them by means of "taking them out to the woods" – in exactly the same way as Mr Gongadze and Mr Podolsky<sup>75</sup>. Before they could ever be heard as witnesses, Mr Dagaev died of a stroke and Mr Fere fell into an irreversible coma after a stroke (both within three weeks in mid-2003). Allegations that they may have been poisoned were published in the Ukrainian media and should surely be considered by the PGO<sup>76</sup>.

### III. Other Kuchma-era crimes

98. The investigation of a number of other crimes is closely linked to that of the Gongadze case. Some of them were also allegedly discussed in President Kuchma's office, and documented by Major Melnychenko's recordings.

99. This is the case of the abduction and torture of Oleksiy Podolsky, a journalist and political activist, on 9 June 2000<sup>77</sup>. The crime against Podolsky has many parallels with that against Gongadze. In addition to the recordings, the *modus operandi* was very similar: a group of police officers, also led by General Pukach, abducted Podolsky, took him to a forest, severely beat him, strangled him with a belt and left him behind, seriously injured. Podolsky belonged to a group of political and human rights activists ("My") which had already complained publicly of a campaign of surveillance and harassment against it. Other members of the group had also been beaten by unknown assailants. The law enforcement authorities patently failed to investigate the crime, and opened a case only two months later, for "hooliganism".

100. Only after the "Orange revolution" of December 2004 was the Podolsky case successfully brought to court, by the same team of investigators headed by Shubin and Hryshchenko who found the killers of Gongadze and established the ambitious plan of investigative measures to identify the instigators and organisers of both crimes.<sup>78</sup>

101. On 8 May 2007, the Kyiv Court of Appeal pronounced its verdict of three years' imprisonment and the stripping of their ranks against former Interior Ministry colonel Mykola Naumets and former major Oleh Marynyak. Naumets had pleaded guilty and asked the victim and his family for forgiveness, as a result of which Podolsky had asked the court for a lenient sentence for him.

102. Another Kuchma-era crime falling under my mandate is the attack committed on 9 February 2000 against Mr Oleksandr Yelyashkevich, a member of the Verkhovna Rada who was attacked in a similar way shortly after he gave a speech in the Rada in which he strongly attacked President Kuchma. The crime against him was allegedly also discussed in President Kuchma's office in a conversation recorded by Major Melnychenko<sup>79</sup>. In my contacts with the PGO, I was informed several times in a categorical way that the case is "solved" following the verdict of the Pechersk District Court in Kyiv sentencing V.V. Vorobei to 5 years and 6 months imprisonment for "hooliganism" and inflicting bodily harm on Mr Yelyashkevich. New investigations carried out in the wake of PACE resolution 1466 (2005) did not give rise to the need to revise the decision of the court<sup>80</sup>. Mr Melnychenko told me during our second meeting on 27 May 2008 in Kyiv that he believes that Mr Vorobei had been "pressured" into admitting his guilt, and that the true perpetrators and the instigators and organisers of this crime are still going free.

103. Another high-profile crime against a journalist – Ihor Aleksandrov – still gives rise to concern, despite the fact that there is a guilty judgment against persons (in particular the Rybaks brothers) who had ordered, organised and executed his murder and another guilty judgment against two local police officers who falsified the case in such a way that an innocent person was accused – the late Yuriy Veredyuk, who died in

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<sup>74</sup> A journalistic inquiry suggests the possibility that Dagaev, then President Kuchma's chief of staff, had conspired with Fere, then chief of staff of the Interior Ministry, and General Pukach to organise the murder without the knowledge of President Kuchma and Minister Kravchenko (cf. IFJ Report no. 3, p.9).

<sup>75</sup> Cf. IFJ Report no. 3 *ibid*.

<sup>76</sup> As suggested by the IFJ Report no. 3, p. 10.

<sup>77</sup> The alleged conversation in President Kuchma's office covered the *modus operandi* of the crime and its motive – to put pressure on Serhiy Holovaty, with whom Mr Podolsky had worked at this time.

<sup>78</sup> Cf. note 38 above.

<sup>79</sup> In February 2002, the then head of the parliamentary committee of inquiry, O. Zhyr, announced at a press conference that the US-based BekTek laboratory had authenticated the recordings by Mr Melnychenko of the discussions between ex-President Kuchma and the former Head of the Security Service Leonid Derkach concerning the attack on O. Yelyashkevych and that the experts' conclusions had been forwarded by the committee to the Prosecutor General's Office (source: <http://telekritika.ua/news/2002-02-18/10467>).

<sup>80</sup> Letter from Prosecutor General Medvedko of 08.06.2007.

detention before his innocence was established, in December 2002. Another trial – against a group of policemen who had allegedly poisoned Mr Veredyuk – is still going on. The Rybaks brothers had often been mentioned in TV programmes by Ihor Aleksandrov, who had alleged that they were leaders of an organised criminal group that had higher protection in the local law enforcement bodies. Aleksandrov was killed just before the airing of his latest TV programme, which was to reveal the Rybaks brothers' connections with law enforcement agencies in the Donetsk region.

104. The two policemen who were found guilty in 2005 of falsifying evidence against Yuriy Veredyuk were low level employees who could hardly have acted on their own initiative. The same would seem to apply to those accused of the murder of Mr Veredyuk.

105. One of the witnesses – at the time of the investigation, the Deputy Minister of the Interior (General Volodymyr Melnikov), and participating in it on behalf of the Ministry of the Interior – testified that he had felt that the “Veredyuk version” was unduly given priority over the Rybaks brothers and that, for this reason he had been shunned, recalled from the investigation and forced to retire. The question arises how local police officers from Kramatorsk could have “shunned” a Deputy Minister of the Interior and guided the investigation in the wrong direction.

106. Several current high-level prosecutors and Ministry of the Interior officers were involved in the mishandled investigation of the Aleksandrov case and despite that were promoted and still remain in high posts<sup>81</sup>.

107. Last but not least, Ihor Honcharov, member of a gang including police officers involved in kidnappings and murders (known in the Ukrainian press as “Werewolves”), died in custody, in August 2003, under suspicious circumstances. He had previously alleged that his gang had abducted and killed Gongadze on the orders of Interior Minister Kravchenko, leaving letters with his lawyers to be published should he meet a violent end. Information published by the Prosecutor General's Office on the cause of Honcharov's death was contradictory: in December 2003, Prosecutor General Vasylyev said at a press conference that “a medical examination did not establish the cause of death as violent”<sup>82</sup>. It was not until after “The Independent” (London) published information based on leaked documents, according to which an autopsy had revealed an injection as the probable cause of death, that the Prosecutor General's Office presented a new version, according to which Mr Honcharov had died of a blow to the spine.<sup>83</sup>

108. In March 2005, a few days before Mr Kravchenko's death, Yuriy Nesterov, whom Mr Honcharov had implicated in the kidnapping, torturing and killing of Mr Gongadze, was reportedly wounded when an unidentified assailant threw a hand-grenade at him.

109. It is clear now, as I already hinted in my introductory memorandum in 2005, that the “Werewolves” were not involved in the killing of Gongadze. But the existence of such a criminal structure within the Ministry of the Interior and the highly suspicious death of a lower-level ringleader is a good illustration of the degree of corruption prevailing in the central law enforcement structures during the Kuchma era.

#### IV. Conclusions

110. The Gongadze case and the related Kuchma-era crimes against journalists and political activists and their sluggish investigation, over many years, by the competent law enforcement bodies, must prompt a strong and clear political signal from the Parliamentary Assembly of the Council of Europe that such behaviour cannot be tolerated, and risks giving rise to strong public scrutiny, at the national and international level.

111. The 2005 judgment of the European Court of Human Rights in the Gongadze case finds violations of Gongadze's the right to life (article 2 ECHR) in the form of the authorities' failure to protect him when they

<sup>81</sup> In particular Deputy Prosecutor General Serhiy Vinokurov, whose candidature as judge of the Ukrainian Constitutional Court failed following a letter from the PGO describing his failure to fulfill his duties as the chief prosecutor in charge of the Aleksandrov case (reported by the newspaper *Zerkalo Nedeli* (<http://www.dt.ua/1000/1050/46322/>)). Another current Deputy Prosecutor General, Victor Pshonka, was allegedly reprimanded in December 2002 for “failure to ensure proper supervision over investigation of the murder of journalist Aleksandrov” (<http://www.zn.ua/1000/1050/42516/>). One year later, he was promoted to Deputy Prosecutor General of Ukraine. Finally, current Prosecutor General Oleksandr Medvedko was a senior prosecutor in the Donetsk region at the time of the botched Aleksandrov investigation; he had allegedly participated in the infamous press-conference when Vinokurov presented the “achievements” of the investigation leading to the accusation of Veredyuk and helped Vinokurov to answer questions.

<sup>82</sup> Interfax Kyiv, 18.12.2003 (according to IFJ Report no. 1, p. 29).

<sup>83</sup> references in IFJ Report no. 1, p. 29.

still could, as well as in the form of failure to investigate Gongadze's abduction and murder. The Court also held that the treatment of Gongadze's widow by the authorities amounted to inhuman and degrading treatment within the meaning of article 3 ECHR. The Court's clear findings, which cover the period until the "Orange revolution", do not require any additions or subtractions from the part of the Assembly: we can only welcome this judgment, and join the Committee of Ministers in insisting on its timely and comprehensive execution.

112. It is accepted practice that the execution of a judgment finding a violation of article 2 in the form of failure to investigate (procedural violation of article 2) requires that the investigations wrongfully omitted be carried out without further delay, as far as possible. We can therefore warmly welcome the interim resolution adopted by the Committee of Ministers on 5 June 2008, which goes a long way in this direction. This does not exclude that we address some additional recommendations to this body which is responsible, under the Convention, for supervising the execution of the Court's judgments.

113. After the "Orange revolution" at the end of 2004, much progress has been made. In particular, the actual killers – three Ministry of Interior policemen – have been convicted of Georgy Gongadze's murder. The trial gave rise to some interrogations at the beginning, especially as regards public access, and it may have taken too much time. But despite some criticism from the political sphere, relevant evidence was taken into account, in addition to the admissions of the killers themselves, and the civil parties were satisfied with the access they were given to relevant information.

114. But there are several circumstances which give rise to doubts as to the will of the Prosecutor General's Office and the political leadership of Ukraine to move up the chain of command and hold to account those who allegedly instigated and organised the crime.

115. The immediate superior of the convicted policemen, General Pukach, who was present at the site of the crime according to the testimony of the convicted policemen, had been arrested for a related offence and was released again in unclear circumstances. Whilst he is still wanted internationally, he narrowly escaped arrest in Israel due to an information leak allegedly originating in the PGO, with possible links to the Presidential administration. Both failures, which make it that much more difficult to move up the chain of command, are still awaiting proper investigation. Surprisingly, the judge who had authorised the release of Mr Pukach was even recently awarded a prestigious honour.

116. Similarly, the competent authorities have yet to launch a criminal investigation aimed at holding to account those responsible for the blatant failures of the Gongadze inquiry during the first four years after the murder, which the Court described so eloquently. The chain of command aiming to deflect the inquiry away from the Ministry of the Interior may well be linked to that concerning the crime itself. Again, whilst two low-level prosecutors were given symbolic penalties for falsification of case materials, the General Prosecutor in charge at the time, Mr Potebencko, recently received a prestigious decoration from the President.

117. The untimely death of Mr Kravchenko, Minister of the Interior at the relevant time, who allegedly committed suicide under very unusual circumstances on the morning of the day on which he was summoned – through the media ! – to be interrogated at the Prosecutor General's Office is another failure of the investigation that – conveniently ? – makes it much more difficult to move up the chain of command.

118. President Yushchenko's public announcement – after the arrest and admissions of the three policemen – that the case was now "solved"<sup>84</sup>, and the separation of the cases against the actual perpetrators of the crime and its instigators and organisers – are additional indications that many members of the political establishment of Ukraine may wish to prefer leaving matters at the conviction of the actual perpetrators.

119. The reason for this may well be that the full elucidation of this crime and others which have marred the Kuchma regime could be highly embarrassing for some who still hold senior positions in the Ukrainian establishment. Some have championed full elucidation, but failed to cooperate fully with the PGO when it came to the crunch. Others appear on the so-called "Melnychenko recordings" making statements which may not make them criminally responsible for what happened afterwards, but which would seriously damage their reputation – if the authenticity of the recordings can be proved beyond doubt.

120. Another important weak point of the official inquiry is the treatment of the so-called "Melnychenko recordings". These allegedly document conversations secretly taped by a bodyguard, Major Melnychenko, in

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<sup>84</sup> At a press briefing on 01.03.2005, President Yushchenko asserted that there was "reason to believe that the case has been solved" (source: IFJ Report no. 2, p. 12 (note 39)).

the President's office, between *inter alia* President Kuchma, Mr Lytvyn, his chief of staff, Mr Derkach, the head of the security service, Mr Kravchenko, Minister of the Interior, and many others. Extracts covering the authorisation of an embargo-breaking weapons deal with Saddam Hussein have been authenticated by a US-based laboratory and triggered a major diplomatic crisis between the United States and President Kuchma. Other recordings cover conversations on how to go about silencing Georgy Gongadze.

121. A special committee of inquiry of the Verkhovna Rada concluded that the recordings were authentic but had to struggle for years to be allowed to present its strongly accusatory findings to the plenary.

122. In order for the recordings to be used as evidence in court, Mr Melnychenko must hand over the original recordings and recording equipment to the Ukrainian authorities. To help overcome Melnychenko's – understandable – distrust, foreign experts must be enabled to participate in the official examination of the recordings. Whilst I was able to obtain an agreement in principle in this sense from all sides in 2005, the PGO dragged out submitting the required official request for legal cooperation to the US Department of Justice until late 2007 or even early 2008. We should now encourage the PGO and the US Department of Justice to complete this process rapidly so that the issue of the authenticity of the recordings can finally be solved one way or the other.

123. Independently from establishing the authenticity of the recordings in such a way that they can be used as evidence in court, the recordings hold many clues that can advance the investigation in other ways, e.g. by comparing actual events with plans allegedly discussed in the President's office. These leads should be followed vigorously, as recommended in the investigative action plan devised by a team of investigators in October 2005. We should also call upon all persons whose voices allegedly appear on the recordings to fully cooperate with the investigation, including by providing voice samples under the same conditions as when the recordings were allegedly made by Mr Melnychenko.

124. As this report intervenes at a time when crucial developments are still outstanding, the Assembly should instruct its Monitoring Committee to continue following the investigation of the cases in question in the framework of the ongoing monitoring procedure concerning Ukraine. The Assembly should also recommend to the Committee of Ministers to continue following attentively the execution of the Gongadze judgment of the European Court of Human Rights.

*Reporting committee:* Committee on Legal Affairs and Human Rights

*Reference to committee:* Doc 10330, Reference No 3044 of 24 January 2005; Doc 10653 rev, Reference No 3142 of 3 October 2005

*Draft resolution and draft recommendation adopted unanimously by the Committee on 24 June 2008*

*Members of the Committee:* Mrs Herta **Däubler-Gmelin** (Chairperson), Mr Christos **Pourgourides**, Mr Pietro Marcenaro, Mrs Nino Nakashidzé, (Vice-Chairpersons), Mr Miguel Arias, Mr José Luis **Arnaut**, Mrs Meritxell Batet, Mrs Marie-Louise Bemelmans-Videc, Mrs Anna Benaki, Mr Erol Aslan Cebeci, Mrs Ingrida **Circene**, Mrs Alma Čolo, Mr Joe Costello, Mrs Lydie Err, Mr Valeriy **Fedorov**, Mrs Mirjana Ferić-Vac, Mr Aniello Formisano, Mr György Frunda, Mr Jean-Charles **Gardetto**, Mr József Gedei, Mrs Svetlana **Goryacheva**, Mrs Carina **Hägg**, Mr Holger **Haibach**, Mrs Gultakin Hajiyeva, Mrs Karin **Hakl**, Mr Andres Herkel, Mr Serhiy **Holovaty**, Mr Michel Hunault, Mr Rafael **Huseynov**, Mrs Fatme Ilyaz, Mr Kastriot **Islami**, Mr Želiko Ivanji, Mrs Igllica **Ivanova**, Mrs Kateřina Jacques, Mr Karol **Karski**, Mr András **Kelemen**, Mrs Kateřina Konečná, Mr Eduard **Kukan**, Mr Oleksandr Lavrynovych (alternate: Mr Ivan **Popescu**), Mrs Darja Lavtižar-Bebler, Mrs Sabine **Leutheusser-Schnarrenberger**, Mr Humfrey **Malins**, Mr Andrija Mandić, Mr Alberto Martins, Mr Dick **Marty**, Mrs Assunta Meloni, Mr Morten Messerschmidt, Mrs Ilinka Mitreva, Mr Philippe **Monfils**, Mr Felix **Müri**, Mr Philippe Nachbar, Mr Fritz Neugebauer, Mr Tomislav Nikolić, Mr Anastassios **Papaligouras**, Mr Ángel Pérez Martínez, Mrs Maria Postoico, Mrs Marietta **de Pourbaix-Lundin**, Mr John Prescott, Mr Jeffrey Pullicino Orlando, Mr Valeriy **Pysarenko**, Mrs Marie-Line Reynaud, Mr François Rochebloine, Mr Francesco Saverio Romano, Mr Paul Rowen, Mr Armen **Rustamyan**, Mr Kimmo Sasi, Mr Ellert **Schram**, Mr Christoph Strässer, Lord John **Tomlinson**, Mr Mihai Tudose, Mr Tuğrul **Türkeş**, Mrs Özlem Türköne, Mr Vasile Ioan Dănuț Ungureanu, Mr Øyvind Vaksdal, Mr Hugo Vandenberghe, Mr Egidijus Vareikis, Mr Klaas de Vries, Mr Dimitry Vyatkin, Mrs Renate Wohlwend, Mr Marco Zacchera, Mr Krzysztof Zaremba, Mr Łukasz **Zbonikowski**

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, Mrs Maffucci-Hugel, Ms Heurtin, Ms Schuetze-Reymann.