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Democratic oversight of the security sector in member states

Recommendation 1713 (2005)

Reply from the Committee of Ministers
adopted at the 969th meeting of the Ministers' Deputies (21 June 2006)

1. The Committee of Ministers has studied the Parliamentary Assembly's Recommendation 1713 (2005) on the democratic oversight of the security sector in member states (armed forces, police, intelligence services, security services at the borders and private security services) with interest and has transmitted it to the governments of its member states for information. It considers that the recommendation raises a number of important issues which merit further study, not least in the context of the follow-up to the Report of the Secretary General under Article 52 of the European Convention on Human Rights (document SG/Inf(2006)5 of 28 February 2006). The Committee of Ministers has transmitted the recommendation for opinion to the European Commission for Democracy through Law (Venice Commission), the European Committee on Crime Problems (CDPC) and the Committee of Experts on Terrorism (CODEXTER) (see Appendices 1 to 3).

2. The Committee of Ministers has already paid due attention to the role and responsibilities of internal security services with a view to the possible elaboration of recommendations. The matter was examined in the framework of the CDPC in 2003.

3. In its opinion, the Venice Commission refers to the fact that following a number of serious terrorist attacks in the last years, the need to increase the efficiency of internal security services has become apparent. However, it underlines also that the parallel strengthening of democratic intelligence oversight should be seen as necessary and a priority. The Committee of Ministers takes notes of this and believes that relevant legislation should be adapted to the task of combating the current level of terrorist threats while protecting human rights, the rule of law and democracy. It considers that a study of the legislation on and the practice in respect of democratic oversight of national security in the Council of Europe member states as proposed by the Commission, would be a useful tool for defining how the accountability of these services can best be achieved in a democratic society, due regard being paid to the need for them to be efficient. It therefore invites the Venice Commission to carry out such a study giving special emphasis to the role of parliaments and their specialised committees as well as to that of national courts in carrying out this task. It also invites the Commission to take account of the study previously carried out by the CDPC insofar as it is relevant.

4. The Committee of Ministers notes that some of the issues raised in the Assembly's recommendation have been dealt with in various contexts, for example in its Recommendation Rec(2005)10 on "special investigation techniques" in relation to serious crimes including acts of terrorism. It would also like to draw the Assembly's attention to a recent Council of Europe publication entitled "Terrorism: special investigation techniques"¹ including an analytical report, which examines special investigation techniques in relation to law enforcement and prosecution, the control of their implementation, human rights and international co-operation in this field.

¹ ISBN: 92-871-5655-7.

5. The Committee of Ministers recalls that its Recommendation Rec(2001)10 to member states on the European Code of Police Ethics includes provisions regarding the need for a legal basis of the police and its operations, for transparency and accountability to the public, for use of force only when strictly necessary and in a proportional manner, and for the training of police personnel, which should be based on the fundamental values of democracy, the rule of law and the protection of human rights. The Council for Police Matters (PC-PM), an advisory body to the CDPC, assists the CDPC in reviewing the implementation of the Code, which it does on a regular basis.
6. With respect to the principles that should inspire governments in respect of defence, the Committee of Ministers considers, like the Assembly and the Venice Commission, that the armed forces must be kept under the control of the national democratic institutions. It notes that the need to ensure civilian command authority over the armed forces in their national and international operations remains an important issue in member states and invites the Venice Commission to undertake a study of the constitutional issues involved, as suggested in its opinion.
7. As regards freedom of the press and the audiovisual media in this context, the Committee of Ministers also agrees with the Assembly that it must be preserved in law and in practice, and that any restrictions imposed must not entail any infringement of the international principles of fundamental rights. It refers, *inter alia*, to its Declaration on freedom of expression and information in the media in the context of the fight against terrorism and to the Assembly's Recommendation 1706 (2005) on media and terrorism.
8. The Committee of Ministers agrees that the increased use of private security companies for policing activities merits serious attention. It recalls that it has approved draft ad hoc terms of reference for the Council for Police Matters (PC-PM) relating to the regulation of private security services, whereby the PC-PM is requested to draw up a report identifying recent developments in this field, including examples of good practice and ways and means to exchange those good practices.
9. The Committee of Ministers will keep the Assembly informed of the developments of these initiatives.
10. The above-mentioned report of the Secretary General (see paragraph 1) concludes *inter alia* that "The existing legislative and administrative framework for the activities of secret services appears to be inadequate in many of our member states. While there are some mechanisms in place in a number of countries regarding the activities of national secret services, the activities of foreign secret services appear to be insufficiently controlled. We need an appropriate regulatory framework providing for effective safeguards against abuse, democratic oversight by national parliaments and judicial control in cases of alleged human rights violations" (cf. para. 101, i).
11. In this respect, the Committee of Ministers further notes that the Secretary General has informed it that he will be submitting recommendations as to the way to address this and other shortcomings identified in his report, and that in drawing his recommendations, he will draw not only on his report but also on the findings of the Rapporteur of the Parliamentary Assembly, Mr Dick Marty, and on the opinion of the Venice Commission on the international legal obligations of Council of Europe member states in respect of secret detention facilities and inter-state transport of prisoners, of 17 March 2006 (Opinion No. 363/2005, CDL-AD(2006)009). The Committee of Ministers will carefully examine recommendations as regards the security sector (see paragraph 1), with a view to taking decisions for follow-up at the intergovernmental level.

Appendix 1 to the reply

Opinion by the European Commission for Democracy through Law (Venice Commission)**I. Introduction**

1.. At its 934th meeting of 7 July 2005, the Committee of Ministers of the Council of Europe decided to request an opinion of the Venice Commission on Recommendation 1713 (2005) of the Parliamentary Assembly “on democratic oversight of the security sector in member states”.

2. Mr Dimitri Conostas was appointed as Rapporteur. The present opinion, which was drawn up on the basis of his comments, was adopted by the Commission at its 64th Plenary Session (Venice, 21-22 October 2005).

II. The scope of the Venice Commission’s analysis

3. The opinion of the Venice Commission on PACE Recommendation 1713 (2005) is meant to assist the Committee of Ministers in preparing its reply to the Parliamentary Assembly: the Commission’s task is thus limited to providing the Committee of Ministers with some useful elements to this end.

4. The Parliamentary Assembly has recommended “(...) that the Committee of Ministers prepare and adopt guidelines for governments setting out the *political* [sic!] rules, standards and practical approaches required to apply the principle of democratic supervision of the security sector in member states (...)”. It has further identified certain principles in the following areas: Intelligence Services; Police; Border management; Defence and National Security and Democracy.

5. The Venice Commission will confine itself to commenting on the principles pertaining to intelligence services² and defence.³

III. The principles which should inspire governments in respect of intelligence services

6. In 1998, the Venice Commission was requested by the Committee on Legal Affairs of the Parliamentary Assembly to examine the question of the constitutional relations between internal security services (hereinafter: “ISS”) and other organs of the state.⁴

7. The Commission came to the following main conclusions:

- ISS by their own nature sometimes have to act outside the accepted standards of an ordinary police force;
- whatever their position in respect of the Executive, they must be made accountable for their actions with the provisions of the laws which regulate them;
- the role, functions, powers and duties of the ISS must be clearly defined and delimited by the legislation setting them up or by the constitution;
- rules concerning ISS should be laid down in the legislation or even in the constitution; at any rate, the legal basis should be clear and concise as to their tasks and in harmony with the constitution and the international obligations, in particular those on human rights protection;
- the norms applicable to ISS should only be kept secret to the extent that it is absolutely necessary;
- the budget allocated to ISS must be appropriately monitored, and there should be at least one government member responsible for it;
- ISS must only be used in the national interest;
- a close control of ISS is necessary, be it by the Executive, or by parliament and/or the judiciary;
- the administrative/legal structures of ISS must allow for an adequate judicial control of their activities;
- in order to allow for pursuing the overriding state interest when necessary, provision should be made to ensure confidentiality, lack of publicity, protection of preserved information and data, protection of witnesses and so on;
- access from other state authorities to the information held by ISS must be regulated in detail;
- the possibility for ISS to monitor persons belonging to other state services must be duly regulated by law;

² PACE Recommendation 1713 (2005), § 10, i.

³ § 10, iv.

⁴ Internal Security Services in Europe, CDL-INF(1998)6.

- in the operation of ISS, derogations of fundamental rights and freedoms must be kept to a minimum, and accountability of ISS for undue infringements of human rights must be stated;
- the use by ISS of extraordinary measures must be proportionate to the danger incurred and must not be unduly prolonged in time.

8. The Commission's study was carried out prior to the tragic events of 11 September 2001 and the bombings, *inter alia*, in Madrid, Bali, London and Sharm el Sheikh.

9. The need to increase the efficacy of ISS has since become apparent. The parallel strengthening of democratic intelligence oversight should however be also seen as necessary and a priority.

10. The Assembly has rightly urged the Committee of Ministers to focus on this important question. Indeed, the Council of Europe has been active in the analysis of non-military aspects of security within the framework of the notion of "democratic security".

11. National oversight practices vary greatly in the different Council of Europe member states, in terms of the amount of power which is granted to the intelligence services and of the manner in which they are held responsible for their actions.

12. The Venice Commission considers that a comparative analysis of the legislation on and the practice in respect of democratic oversight of national security in the Council of Europe member states would be interesting and appropriate, as it would reveal the weaknesses and strengths of each system and would help the Committee of Ministers define how the accountability of ISS can be best achieved in a democratic society, due regard being paid to the need for ISS to be efficient. This comparative analysis should give special emphasis to the role of parliaments and their specialised committees as well as to that of national courts in carrying out this task. An additional area of concern should be the intensification of the international functions of national intelligence agencies and the risk, in view of the absence of clear standards for their extraterritorial conduct, to evade national rules.

13. The Venice Commission is ready to assist the Committee of Ministers on this matter, if so requested.

IV. The principles which should inspire governments in respect of Defence

14. Armed forces must be kept under the control of the national democratic institutions, especially in times where security challenges become increasingly transnational and the traditional distinction between armed forces and police has blurred. This is a topic which has so far not been the object of in-depth reflection within the Council of Europe.⁵

15. The need to ensure civilian command authority over the armed forces in their national and international operations remains an important issue in several member states and raises important constitutional issues.

16. In addition, the Venice Commission shares the concerns expressed by PACE that a decision-making role of parliaments has to be safeguarded in the area of defence even though many decisions are taken at the international level.⁶

17. If so requested by the Committee of Ministers, the Venice Commission is ready to undertake a study of this question.

⁵ Other specialised bodies, such as the Geneva Centre for the Democratic Control of Armed Forces (DCAF), have focussed on this matter and have strived to assist the international community in pursuing good governance and reform of the security sector.

⁶ See, *mutatis mutandis*, the Venice Commission's report on the legal foundation for foreign policy, CDL-INF (1998)013, III.

*Appendix 2 to the reply***Opinion by the European Committee on Crime Problems (CDPC)**

1. The European Committee on Crime Problems (CDPC) notes in general that Recommendation 1713 (2005) deals with matters largely outside its scope. The exceptions, which do fall within its competence, are the point dealing with the police (item 10.ii.) and that dealing with private security services (item 10.v.e).

2. The CDPC broadly supports the recommendations concerning the police sector and notes that the European Code of Police Ethics, as adopted by the Committee of Ministers in their Recommendation Rec(2001)10, deals with some of the issues cited in the Parliamentary Assembly's recommendation. For example, the Code of Ethics includes provisions regarding the need for a legal basis of the police and their operations, for transparency and accountability to the public, for use of force only when strictly necessary and in a proportional manner, and for training of police personnel, which should be based on the fundamental values of democracy, the rule of law and the protection of human rights.

3. Furthermore, the mandate of the Council for Police Matters (PC-PM), an advisory body to the CDPC, includes the duty to assist the CDPC in reviewing the implementation of Recommendation Rec(2001)10, which it does on a regular basis.

4. Finally, the Council's co-operation activities in this domain ensure that numerous activities are carried out every year with a view, *inter alia*, to disseminating the European Code of Police Ethics and encouraging its application through national legislation and/or codes.

5. The CDPC also notes the reference in item 10.v.e to private companies. It considers that the increasing use of private security companies for policing activities merits serious attention. In this regard it recalls that the Committee of Ministers has approved the draft ad hoc terms of reference for the Council for Police Matters (PC-PM) relating to the regulation of private security services whereby the PC-PM is requested to draw up a report identifying recent developments in this field including examples of good practice and ways and means to exchange those good practices.

*Appendix 3 to the reply***Comments of the Bureau of the Committee of Experts on Terrorism (CODEXTER)**

The Bureau of the CODEXTER notes that a number of the issues raised in this recommendation are effectively dealt with in Committee of Ministers' Recommendation Rec(2005)10 on "special investigation techniques" in relation to serious crimes including acts of terrorism (see paragraphs 4 to 9 of Recommendation 1713 (2005)) and, in particular, an operative paragraph 10.i. points *c.* and *d.* are the subject of a study on member states' law and practice, which was recently published by the Council of Europe (ISBN: 92-871-5655-7).

The Bureau further recalls that both the European Convention on the Suppression of Terrorism as amended by its Amending Protocol (Article 5) (ETS Nos. 090 and 190) and the Council of Europe Convention on the Prevention of Terrorism (Articles 3.1, 12, 21) (CETS No. 196) contain conditions and safeguards aimed at the protection of fundamental rights and freedoms.