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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**PACE RECOMMENDATION 1801(2007)
ON “SECRET DETENTIONS
AND ILLEGAL TRANSFERS OF DETAINEES
INVOLVING COUNCIL OF EUROPE MEMBER STATES:
SECOND REPORT”**

**VENICE COMMISSION’S COMMENTS
IN VIEW OF THE REPLY BY THE COMMITTEE OF MINISTERS**

**On the basis of comments by
Mr Jan HELGESEN (member, Norway)**

A. Introduction

1. On 5 July 2007, the Committee of Ministers of the Council of Europe decided to ask the Venice Commission to provide comments on PACE Recommendation 1801 (2007) on "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report", before 30 October 2007.

2. These comments were prepared by Mr Jan Helgesen (CDL(2007)082). The Commission took note of them at its 72nd Plenary Session (Venice, 19-20 October 2007).

B. Background

3. In its Recommendation 1801 (2007) on "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report", adopted on 27 June 2007, the Parliamentary Assembly of the Council of Europe invited the Committee of Ministers to prepare a recommendation concerning **the concepts of state secrecy or national security** in order to: ensure that information and evidence concerning the civil, criminal or political liability of the State's representatives for grave human rights violations committed are excluded from protection as state secrets; introduce appropriate procedures ensuring that the culprits are accountable for their actions while preserving lawful state secrecy and national security, when secrets unworthy of protection are inextricably linked with lawful state secrets.

4. PACE also invited the Committee of Ministers to look into the **need for member states to provide democratic oversight of the activities of national intelligence services in respect of, in particular, military intelligence services as well as those foreign intelligence services operating in their territory.**

5. On 5 July 2007, the Committee of Ministers decided to bring this Recommendation to the knowledge of the Venice Commission and to seek its possible comments thereon before 31 October 2007.

C. Previous work of the Venice Commission in this area

6. The Venice Commission has previously carried out two studies on the internal security services, in which it had stressed the need for national constitutions and legislation to state the accountability of the Security Services for undue human rights infringements.¹

7. The Venice Commission, in its report on the democratic oversight of the security services, highlighted the difficulties of holding the security services accountable, mostly on account of the "subjectivity and flexibility of the term 'national security'". It also pinpointed, in relation to the possibility of redressing undue human rights infringements by the services, that a court's ability to consider all the evidence or to go to the heart of the issue may clearly be limited by invoking the "state secret". It noted that, for this reason, certain States have alternative, specialist tribunals or ombudsman-like systems, or allocate complaint functions to parliamentary committees².

¹ Venice Commission, Internal Security Services in Europe, CDL-INF(1998)6 and Report on the Democratic oversight of the Security Services, CDL-AD(2007)016.

² CDL-AD(2007)016, (paras. 195-217;241-250).

8. The Commission has so far not dealt with the oversight of foreign intelligence services or of military intelligence services, except insofar as these perform internal security functions. In its report on the Democratic Oversight of the Security Services, the Commission considered that “the diffuse boundary between these services and the function of internal security, especially as regards the fight against terrorism, merits further study³.”

D. Future perspectives

9. It appears relevant and useful to examine more in detail:

- a) the national legislation and practice relating to the concepts of “national security” and “state secret”;
- b) the need for the democratic oversight of the foreign intelligence services and of military intelligence services.

10. The Venice Commission is ready to assist in the examination of these matters, if so requested.

³ Venice Commission, Report on the democratic oversight of the security service, CDL-AD(2007)016, footnote 6. The Venice Commission addressed instead in detail the issue of the international co-operation between Intelligence Agencies: paras. 115-121; 177-189.