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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

MEETING OF THE SUB-COMMISSION

ON DEMOCRATIC INSTITUTIONS

Venice, 12 October 2006

SYNOPSIS

On 12 October 2006, in Venice the sub- commission for democratic institutions held a meeting in order to discuss the scope of the **study (study 389) on the constitutional issues involved in the need to ensure civilian command authority over the armed forces in their national and international operations.**

Background information

On 21 June 2006, in its reply to the Parliamentary Assembly Recommendation the Committee of Ministers of the Council of Europe has requested the Venice Commission to carry out this study in its reply to the Parliamentary recommendation 1713 (2005) on democratic oversight of the security sector in member States.

It is worth mentioning that the Committee of Ministers had also, in the same reply to the Parliamentary Assembly Recommendation 1713 (2005), mandated the Venice Commission to carry out a study on democratic oversight of national security in the Council of Europe member states.

Three documents had been made available to the members of the sub-commission for democratic institution. A preliminary report on the democratic oversight over armed forces was prepared by Mr Carlos Montero (CDL-DEM(2006)001) who also gave in document CDL-DEM(2006)002 a brief overview of the constitutional rules on democratic control of armed forces in Council member States.

A preliminary report on civilian command authority over the armed forces in their national and international operations (CDL-DEM (2006)003) was drafted by Mr Hans Born, expert and senior fellow in democratic governance of the security sector at the Geneva centre for democratic control of the Armed forces (DCAF). Mr Hans Born attended the sub-commission's meeting and was able to present his paper and give a valuable contribution to the discussions.

The sub-commission went through the six central issues identified in document CDL-DEM (2006)001 on democratic control of armed forces and discussed on those which appeared to be the most important and the priorities to be dealt with in the study.

Specific issues discussed

The working group agreed upon several points:

- *The scope of the study : definition of armed forces*

Some countries have police units with a military status or a status which could be assimilated to the military, those specific units can intervene within the framework of armed forces within a territory or outside the national territory, like the European Gendarmerie Force (EGF). It was decided not to deal with those type of police units nor to touch upon the issue of security services activities which might lead to the use of military forces and therefore to focus only on regular armed forces per se.

The study would cover the oversight of regular armed forces while the competencies of military polices with regard to civilians should nevertheless also be addressed.

- *Why to control armed forces*

In addition to the reasoning outlined in the document, it was also decided to identify extensively in the study the consequences of the type of constitutional regime, whether presidential or parliamentary, on the possibilities of control and modalities over armed forces.

The increase in international interventions of armed forces is also of paramount importance in this regard and calls for particular attention since one could reasonably question whether national control exercised country by country can be considered as satisfactory particularly for those international interventions not controlled by the Western European Union for instance, or other international organisations.

- What acts or issues are under control

The sub-commission decided to pay particular attention to the control of sending troops abroad, the conditions and modalities of requisitioning the army in domestic issues, the use of public funds with regard the military budget and military expenditures, the political neutrality of armed forces, the appointment of top commanders and emergency powers and martial law.

- Who controls

The sub-commission fully agreed with the layout proposed in document CDL-DEM (2006)001. At the international level, international control is of particular importance when considering the issue of sending troops abroad. At the national level, parliamentary control is of paramount importance, even though one should take into consideration that it could be unconstitutional, like in Russia where it would be unconstitutional for the parliament to control the armed forces. Concerning the judicial control, the role of ordinary courts should also be addressed by the study. One should also bear in mind that ombudsmen can play an important role.

- When to control

An a priori parliamentarian control should be privileged, particularly in cases of sending troops abroad.

- How to control

This issue is closely linked with that of who controls. While budget control is essential the issue of independence of each body should be firmly guaranteed too. Moreover, if the means of control have to be listed the remedies, the accountability, the access to information and sanctions available should also be mentioned.

- The intensity of the control

The members of the sub-commission decided to deal with this issue provided that policy issues and operational issues are distinguished, considering that the latter should benefit from a greater margin of appreciation left to the military and that the overseeing of operational issues might not only be difficult but also unsuitable to some extent.

A distinction should also be made between ordinary control and exceptional control when for instance a specific parliamentary commission has been set up in order to clarify a specific problematic issue or action. The legitimacy and the extent of "official secret" should also be examined.

Moreover, one should bear in mind that the intensity of the control depends largely on the delegation of powers which has been given by the Parliament to the Executive; issues that cannot be delegated could be also identified. The study would focus on the civilian control of the military forces and the role of the Ministry of Defence in this respect; the role of military courts specially with regard to armed forces abroad being excluded from the scope of the study.

Conclusions

It has been agreed that the members of the working group will inform the Secretariat of the topic/item they would like specifically to deal with in view of the study's drafting . These topics were identified in document CDL-DEM (2006)001 and further discussed during the first meeting of the sub-commission.

The next meeting of the sub-commission will be convened in February or March in order to discuss the Members' written contributions. Mr Born's assistance will continue.

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