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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

R E P O R T

ON THE LEGAL FOUNDATION FOR FOREIGN POLICY

1. This report was adopted by the Sub-Commission on International Law at its meeting in Venice on 11 June 1998, and was approved by the Commission at its 35th meeting (Venice, 12–13 June 1998).

2. The purpose of the report is to present the legal foundations of foreign policy in a large number of States with different legal cultures, in order to show their diversity and identify the main trends in this sphere. It primarily consists of replies to the sub-committee's questionnaires, received from the following countries: Albania, Armenia, Austria, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Italy, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Norway, the Netherlands, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine and United States of America.

3. Foreign policy unquestionably serves the national interest in the broadest sense. However, nowadays it is no longer left entirely to the discretion of governments. It has ceased to be uncontrollable. On the contrary, it obeys certain legal rules which are, in a sense, its foundations and which act as curbs on States' freedom of action, in the interests of the international community and of all the countries belonging thereto. The legal foundations of foreign policy are therefore made up of both rules of international law and rules of domestic law.

4. Although the report was above all intended to be a study of the aspects of domestic law that affect foreign policy, it very quickly became apparent that a comparative study confined to domestic law alone would be incomplete, so closely do national legal systems mesh with the international one, in particular in the context of European integration. It therefore proved necessary to take into consideration the cardinal principles of international law and certain facets of the European Union's common foreign policy. The Sub-Committee consequently devoted part of the round-table on the legal foundations of foreign policy, held on Santorin on 26 and 27 September 1997, to those matters.

5. It is only natural that foreign policy concerning relations between States should, first and foremost, be governed by international law, the very purpose of which is to regulate inter-State relations. As members of the international community, States enter into an obligation to conduct their foreign policy with due regard for and in full compliance with international law, that is to say treaties binding them, international custom, the general principles of law, the binding decisions of international organisations and even, under certain conditions, unilateral decisions by States, which may also give rise to international obligations. To be more precise, States must observe the three cardinal principles of the present international system instituted by the Charter of the United Nations: the principle of settlement of international disputes solely by peaceful means (Article 2, paragraph 4), the principle of refraining from the threat or use of force in international relations (Article 2, paragraph 4), and the obligation to comply with resolutions passed by the Security Council in matters of international security under Chapter VII of the Charter of the United Nations. In their mutual relations States are likewise required to observe the principles and rules of good-neighbourliness. These obligations, incumbent on all States, serve a higher legal interest of the international community, that of restoring global peace and security. At a time when the spectre of war has again begun to haunt Europe, posing a threat to democratic societies and to the process of European integration, the European Commission for Democracy through Law cannot overstate the need for scrupulous observance of these

fundamental obligations arising from the present international system, which should moreover constitute the main thrust of States' foreign policy.

6. The primary focus of the foreign policy of Council of Europe member States, and of other States sharing the same values, should be to defend the democratic ideal and all that it entails: the rule of law and protection of human rights and individual freedoms. These objectives are not just pursued and developed within States' national legal systems under the supervision of the judiciary, in particular the constitutional courts, but also increasingly at an international level, above all in the context of European integration. It is the very same principles which make up the common constitutional heritage on which the European integration process is founded. In its 1993 study on the relationship between international and domestic law, the Venice Commission recommended that "more encouragement should be given … to the incorporation of the principles of democracy, human rights and the rule of law in the international legal system" (recommendation 7.5.e). It can but reiterate that recommendation, while stipulating that these values must also be reflected in States' foreign policy.

7. As to national law, the main focus of the study, the report sets out the rules applicable, country by country. The aim is to make it easier to compare different countries' legal systems and to allow an assessment of present trends in this sphere. It was decided to present the legal foundations of foreign policy in each of the different States according to a standard layout, corresponding to the main themes addressed. Therefore, for each country, a first section describes the principles observed when defining foreign policy (A. Principles). The aim is, firstly to identify those principles (1. Identification), their sources, their scope and their substance, and, secondly, to consider their effectiveness, in particular by examining the control mechanisms guaranteeing their observance (2. Control mechanisms). Since this facilitates comparisons between the different countries' legal systems, conclusions might be drawn as to the existence of higher legal principles binding on the public authorities, which lead them to define foreign policy not only with regard to political considerations but also in the light of legal constraints. A second section describes the legal standards governing the implementation of foreign policy (B. Implementation). It deals with the respective responsibilities of the legislature (1.), the executive (2.), the people (3.) and decentralised authorities (4.).

8. By analysing the replies it is possible to make an inventory of the legal foundations of foreign policy and, hence, to bring to light a dual trend.

9. Firstly, there are a growing number of increasingly tangible rules governing who is responsible for foreign policy, how it is implemented and the options taken. At the same time, a certain tendency to enforce compliance with the rules in question is becoming perceptible. The judiciary was long reluctant to review decisions taken by the public authorities in the foreign policy sphere. In a number of countries the "Actes de Gouvernement" theory has meant that action taken by the public authorities in foreign policy matters lies outside the courts' supervision. Under that theory, where the government takes action at an international level which is recognised as coming within its prerogative it is not fulfilling administrative functions, and the exercise of governmental authority therefore does not fall under the supervision of the courts, but under the political supervision of parliament. This applies in France, Greece, Croatia and Slovenia, for instance. In yet other countries judicial review of action taken by certain organs is banned. This is the case in Finland with regard to presidential decisions and Acts of

Parliament. In the Netherlands, the constitution forbids the courts to rule on the constitutionality of international treaties. In Switzerland, they are prohibited from performing any constitutional review of federal laws and international treaties.

10. However, the ban on judicial review is becoming less absolute in nature. Firstly, it is open to review whether in taking a foreign policy decision a given organ of the State exceeded the powers conferred on it by the constitution. The case-law of the United States Supreme Court is of significance here (see the US contribution in section 38 of the report). Secondly, certain constitutional courts have established precedents for reviewing not only whether decision-makers acted within the bounds of their authority, but also the very substance of the decision itself. This is true of preventive review of treaties' conformity with the constitution but also - and above all – of the concept whereby the executive is deprived of its traditional freedom of action whenever fundamental human rights are in issue. An example of this unobtrusive but important development is to be found in the constitutional case-law relating to transfers of sovereignty to the institutions of the European Union and in particular to ratification of the treaty of Maastricht by certain EU member States (such as Germany and France). The unprecedented boom which constitutional law is undergoing at the end of the 20th century can but strengthen this trend.

11. Secondly, as a corollary to the emergence of legal rules governing foreign policy and its supervision, there is a move towards a degree of democratisation and decentralisation of the conduct of foreign affairs. As globalisation progresses, the number of legal standards laid down within international organisations or as a result of multilateral negotiations is on the increase. Nowadays, conduct of foreign policy sometimes has direct, immediate repercussions on the lives of ordinary citizens and can hence no longer be left to the executive's sole discretion. This tendency is apparent from the arrival of new players on the foreign policy stage. The executive naturally continues to have chief responsibility in this sphere but it is being joined by other actors, such as parliament and sometimes the people themselves. Long excluded from the conduct of political affairs, in strict compliance with the principle of representative democracy, the grass roots have gradually succeeded in obtaining a direct say in such matters. Their arrival on the political scene is *inter alia* reflected in the forms of semi-direct democracy introduced by many States, including with regard to determination of foreign policy. Moreover, in response to demand that power be exercised at a level closer to the citizen, greater responsibilities have been assigned to decentralised authorities and, sometimes, to socio-professional groups or non-governmental organisations, including in the foreign policy sphere. The emergence of these new players on the international scene is a sign of the present tendency to overstep the traditional limits within which foreign policy was conducted.

12. On the strength of the information which it has gathered, the Venice Commission considers that it is in a position to draw a number of conclusions in the form of guidelines for member States of the Council of Europe and other States sharing the same values concerning the implementation of their foreign policy. These have their basis in both international law and the fundamental values of the democratic societies making up the Council of Europe and also reflect the trends of national law in the field of foreign policy. Those conclusions are as follows:

I. International law

States are under an obligation to respect and to implement international law in good faith,

including *jus cogens* rules, treaties binding them, customary law, general principles of law and binding decisions of international organisations. In particular:

- In the conduct of their foreign policy States shall respect the three fundamental principles of the international legal system, namely resolution of international disputes solely by peaceful means, refraining from the threat or use of force in international relations and compliance with resolutions passed by the United Nations Security Council in matters of collective security.

- In their mutual relations States shall act in accordance with the principles and rules of friendly, neighbourly relations, which must guide their action at the international level, particularly in the local and regional context.

II. Democracy, Human Rights, the Rule of Law

In determining their foreign policy member States of the Council of Europe and all States sharing the same ideals shall take due account of the essential values on which they are founded, namely democracy, the rule of law and protection of human rights.

III. Democratisation of foreign policy

In their activities relating to foreign policy States shall enforce compliance with the constitutional system and the law, and facilitate supervision of government action by the relevant constitutional institutions, namely the legislature and, if need be, the judiciary.

Parliaments' interest in their countries' foreign policy is, at first glance, a positive phenomenon which should be given approval and encouragement. In particular, parliaments shall be fully informed of such policy and examine it periodically in order to participate in setting its principal directions.

The judiciary, especially the higher courts, shall enforce compliance with the above-mentioned essential principles of foreign policy, in particular as regards the application of international law in the domestic legal system.

States shall inform individuals, as widely as possible, of the main lines of their foreign policy and shall not impede free circulation of information about foreign affairs and international relations. They shall inform them of any action they can take to defend their rights before the international courts.

It is desirable that States take steps to ensure that the people and the relevant decentralised authorities or non-governmental organisations are consulted about and, when necessary, even directly involved in the determination and implementation of foreign policy.