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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

66th PLENARY SESSION
Friday, 17 March (9.30 a.m.) –
Saturday, 18 March 2006 (1.00 p.m.)

MEETING REPORT

1. Adoption of the Agenda

The agenda was adopted unchanged.

2. Communication by the Secretariat

Mr Buquicchio drew the Commission's attention to certain new features introduced from this session on. For instance, for the first time, the agenda set specific times for the items on the agenda. Members were asked to keep to these times so that more time could be devoted to the more significant items and so as to have a better idea of when particular items would be discussed. Footnotes had also been added to some of the items on the agenda suggesting their adoption without discussion. The aim was to try to gain a little time, which did not, of course, prevent any member from requesting discussion of any such item if he or she had good reason to do so.

As far as logistical matters were concerned, members now had access to an online computer, set aside for them in the secretariat's small room on the ground floor. Members were asked to use it sparingly so that as many people as possible could take advantage of it.

Lastly, on the subject of developments since the previous session, the member representing Hungary, Mr Peter Paczolay, had recently been elected as a Constitutional Court judge.

3. Co-operation with the Committee of Ministers

As part of its co-operation with the Committee of Ministers, the Commission exchanged views with the Permanent Representative of the United Kingdom to the Council of Europe, Mr Stephen Howarth, who chaired the Rapporteur Group on Democracy (GR-DEM).

Having reiterated the United Kingdom's support for the Venice Commission, Mr Howarth described the work of the GR-DEM, which was the Committee of Ministers body responsible, among other things, for monitoring new member states' compliance with commitments entered into on joining the Council of Europe and preparing replies to questions from the Parliamentary Assembly – two areas in which the links with the Commission were obvious. To do its job properly and offer the soundest possible political advice, the GR-DEM relied on serious, objective reports providing in-depth analyses of situations. The Venice Commission's many reports meeting those requirements on subjects of interest to the GR-DEM were a great reassurance for the Committee of Ministers and enhanced the credibility of its work of promoting democracy. Recent examples were the opinion on the independence referendum in Montenegro and opinions from the Commission on Bosnia and Herzegovina, Ukraine, Georgia and Azerbaijan, relating in particular to electoral and constitutional law.

4. Co-operation with the Parliamentary Assembly

The Commission exchanged views on co-operation with the Parliamentary Assembly with two Assembly members, Mr Peter Schieder and Mr Erik Jurgens.

Mr Schieder's statement centred on three matters.

Firstly, from now on any Assembly member taking part in an activity as a representative of the Assembly was expected to make a detailed report to the Bureau of the Assembly reviewing co-operation with the body or partner concerned. He himself would be writing a report on co-operation between the Assembly and the Commission and could already say that it would be a

positive one. He would also stress that the agreement between the two institutions was working very well.

Secondly, with regard to the allegations of secret detentions in member states of the Council of Europe, the Secretary General had invited 37 countries to reply to a questionnaire prepared under Article 52 of the ECHR by 7 April 2006. In the light of these developments and the progress of its own work on the subject, it was clear that the Assembly would not be in a position to discuss the allegations of secret detention at its April session. Despite intense pressure to speed up its work, the Assembly would not be resuming discussion of the matter until its June session, which would enable it to take account of the results of the Secretary General's further inquiries.

Lastly, complaints had reached the Assembly from some members of national parliaments that Venice Commission opinions on their countries had not been sent to them at all or sent only in outline form. This problem had to be attended to straight away as it was essential for members of parliament to be able to consult such documents so as to perform their legislative duties properly. It might be worth the Assembly's considering distributing certain opinions to members of national parliaments itself.

Mr Erik Jurgens described the latest activities of the Assembly that had more specifically involved the Committee on Legal Affairs and Human Rights. The Assembly had recently adopted a recommendation on the concept of "nation" which was in some respects a follow-up to the report adopted by the Venice Commission in 2001 on preferential treatment of national minorities by their kin-state. In future the Assembly might usefully consult the Venice Commission more often to clarify terminological questions of this type.

The question of the allegations of secret detention in Council of Europe member states had been discussed once again by the Committee on Legal Affairs and Human Rights at its meeting in Paris on 13 March. At that meeting views had been exchanged with members of the European Parliament temporary committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners (TDIP). He had some doubts whether the TDIP's inquiries were adding anything to the investigation. There was a risk of its activities overlapping with those of the Assembly.

The plan to set up a European Union Fundamental Rights Agency had also been discussed at the meeting of 13 March in Paris. The Committee on Legal Affairs and Human Rights had shown considerable scepticism about this project. The functions of such an agency would extensively coincide with those of both the Council of Europe and the Venice Commission. It was important to ensure that the Council of Europe retained its fundamental role as the guardian of human rights in Europe.

5. Exchange of views with the Union of Arab Constitutional Courts and Councils

Mr Boualem Bessaïh, President of the Constitutional Council of Algeria and Mr. Mohamed Abdel Kader Abdallah, Vice-President of the Constitutional Court of Egypt and Secretary General of the Union of Arab Constitutional Courts and Councils informed the Commission about the Union, which was created in 1997 and unites courts from 13 member and two observer countries. The seat of the Union is in Cairo. Its objectives are to promote co-operation and exchange of ideas between the courts, to encourage research in the constitutional field and in particular in the human rights area and to establish contacts with similar organisations. The Union publishes books and a legal journal in the Arab language,

which is to be translated at a later stage. The case-law of its member courts is available on its web-site. The latest conferences of the Union on the limits of constitutional control and on constitutional interpretation took place in Khartoum and Kuwait in 2004 and 2006 respectively. Upon request, the Union also gives opinions as was the case on the retroactive effect of decisions of Arab constitutional courts. The Union's organs are the General Assembly (composed of the judges of the member courts), the Council (composed of their presidents) and the Secretariat General.

The delegation offered to establish co-operation with the Venice Commission based on exchanges in the field of documentation, mutual participation in meetings and seminars and possibly the joint organisation of seminars and conferences.

Mr. La Pergola welcomed the offer and expressed the Commission's wish to co-operate with the Union along the lines suggested.

Mr. Buquicchio pointed out that President Bessaïh's predecessor, Mr Bedjaoui, who was now Minister of Foreign Affairs, had shown interest in the accession of Algeria to the Venice Commission. Mr. President Bessaïh confirmed that there was continuing interest in this possibility.

6. Follow-up to earlier Venice Commission opinions

a) Opinion on the compatibility of the existing legislation in Montenegro concerning the organisation of referendums with applicable international standards (CDL-AD(2005)041)

Mr Markert recalled that in this opinion the Commission had called for negotiations between the government and the opposition in Montenegro, to be facilitated by the European Union, in order to reach a consensus on the rules applicable to the referendum. The opinion had been adopted on 16 December 2005 and the very same day High Representative Solana appointed a personal representative to facilitate such negotiations, Ambassador Lajčák from Slovakia. Ambassador Lajčák succeeded in brokering a consensus among the main political forces in Montenegro both on a special law applicable to the independence referendum, dealing with issues such as the composition of the referendum commissions, campaign financing, the role of the media and referendum observation, and on the main issue of the majority required for independence. The law required 55% of the votes cast for independence to be successful. This was in line with the Venice Commission opinion that there should be a clear majority for such an important decision although from the Venice Commission's point of view a requirement based on a percentage of registered voters would have been preferable. Politically it proved however impossible to agree on a figure based on registered voters and therefore this solution was chosen.

As regards participation in the referendum, the law followed the Venice Commission's recommendation to stick to the previous rules and not to give the right to vote to Montenegrin citizens living in Serbia. During his mission Ambassador Lajčák maintained close contacts with the Venice Commission Secretariat and OSCE. Thanks to this negotiated solution all political forces would now participate in the referendum and recognise its legitimacy.

Messrs Darmanović and Nick pointed out that there would be a politically difficult situation if less than 55 % but more than 50 % vote in favour of independence.

b) *Opinion on the draft law on the status of national minorities living in Romania (CDL-AD(2005)026)*

Mr Chablais said that the Romanian Senate had rejected the draft law on the status of national minorities living in Romania shortly after the adoption of the Commission's opinion on the draft, in October 2005. The draft was now being examined in the Chamber of Deputies, where work had been somewhat delayed because a large number of amendments had been tabled. Currently, it was the whole of chapter V of the draft law on the cultural autonomy of national minorities that was being questioned, even by a party that was a member of the government coalition.

Against this background, the Venice Commission had been invited by the NGO "Project on Ethnic Relations" to take part in a seminar held in Bucharest on 8 February 2006, which had been attended by members of parliament and representatives of the government, the administrative authorities and NGOs. It had discussed models of cultural autonomy in Europe and current international standards, highlighting certain aspects of the Commission's opinion (CDL-AD(2005)026) with regard to cultural autonomy and confirming that that opinion was still a relevant and authoritative document that was often quoted in the political context of parliamentary debates.

7. Albania

The Commission exchanged views with the Speaker of the Parliament of Albania, Ms Jozefina Topalli, and the Vice-Speaker, Mr Ylli Bufi, as part of a discussion on the draft opinion on parliamentary immunity in Albania (CDL(2006)023), drawn up on the basis of comments by Mr Bartole and Mr Nolte (see also the draft decision of the Albanian parliament, CDL(2006)002).

Ms Topalli emphasised the priority the Government gave to combating corruption, which could be achieved by measures such as limiting parliamentary immunity. Immunity was an exception to the principle of equality and should be interpreted restrictively in the light of carefully specified cases.

Mr Bufi said that the Constitution and the Code of Criminal Procedure contained procedural principles which parliamentary rules of procedure were not allowed to contravene. There was no constitutional basis for taking by a qualified majority a decision such as the one under discussion.

Mr Bartole presented the draft opinion. The European standards on which it was based were the principle of the hierarchy of norms and the practice of European states with regard to immunity. Some countries such as France and Italy had done away with immunity from prosecution but this had been achieved by means of a constitutional revision. In Germany, a general decision was taken by the Bundestag at the beginning of each legislative period on the basis of a consensus. It could be argued that the draft submitted to the Commission was unconstitutional. One solution might be to insist that the act limiting immunity had to be adopted by a qualified majority of the parliament. It was for the Constitutional Court to give the final interpretation of the Constitution on this point.

Mr Omari said that the draft decision was worthless as the majority could lift immunity on a case-by-case basis. In his opinion, the Constitution (Article 73) required a separate decision in each case. Ms Stănoiu felt that a revision of the Constitution was the only possible solution, as had been the case in Romania.

Mr Nolte explained that the Commission could not offer a definitive view as to whether the Constitution required a separate decision in each case. The German Constitutional Court had not ruled on this matter with reference to the German Basic Law. In Germany, members of the Bundestag agreed to a general decision so as to avoid public debate, which attracted the attention of the media.

Mr Nicolatos said that in Cyprus, the decision to lift immunity was left to the Supreme Court and this precluded political decisions. Mr Mifsud Bonnici supported the draft but suggested that parliamentary immunity should be limited to statements made in parliament.

The Commission adopted the opinion on parliamentary immunity in Albania, with one amendment (CDL-AD(2006)005).

8. Bosnia and Herzegovina

Mr Malinverni presented the draft Opinion on the different proposals for electing the Presidency of Bosnia and Herzegovina (CDL(2006)19rev). This opinion had been requested urgently by the Chairman of the Presidency, Mr Tihić, on 2 March in order to enable the leaders of the main political parties to arrive at an agreement on the overall constitutional reform package. The draft Opinion was therefore sent to the Presidency on 7 March 2006 under the responsibility of the reporting members. None of the three proposed options corresponded to the long-term preference of the Venice Commission for a single, indirectly elected President. Two of the three proposals were however improvements on the present situation and removed the discriminatory provision criticised in the Commission's previous Opinion on the constitutional situation in the country. Among these two options Proposal III for an indirect election of the Presidency through the BiH parliament seemed more in line with the overall aims of constitutional reform although certain flaws of the Proposal, in particular the strong role of the House of Peoples in the election process, should be corrected.

Mr Nick and Mr Sadikovic supported the conclusions of the draft Opinion.

The Commission endorsed the draft Opinion on different proposals for the election of the Presidency of Bosnia and Herzegovina (CDL-AD(2006)004).

Mr Markert informed the Commission that the leaders of the main political parties in Bosnia and Herzegovina had not yet reached an agreement on the full text of the constitutional reform. It remained however possible that such an agreement could be reached within the next few days. The amendments would then have to be adopted quickly by parliament and thereafter be reflected in the electoral law in order to make it possible to hold the general elections scheduled for October on the basis of the new constitutional rules. Having regard to these time constraints, it was not certain that the Commission would be consulted. If so, it would have to act with the utmost speed to present its comments before the adoption of the respective texts.

The Commission authorised the reporting members on constitutional reform (Messrs. Helgesen, Jowell, Malinverni, Scholsem and Tuori) and the reporting member on the election law, Mr Sanchez Navarro, to send as necessary preliminary opinions to the authorities without waiting for their adoption at the next plenary session.

9. Croatia

The Commission examined the draft joint opinion by the Venice Commission and OSCE/ODIHR ([CDL-EL\(2006\)008](#)) on the draft law of the State Electoral Commission of the Republic of Croatia ([CDL-EL\(2005\)053](#)), drawn up on the basis of comments by Messrs Finn and Torfason ([CDL-EL\(2006\)006](#)).

Mr Nick thanked the rapporteurs and informed the Commission that the law on the State Electoral Commission of the Republic of Croatia would be submitted to the Croatian parliament in April 2006.

The Commission adopted the joint opinion of the Venice Commission and OSCE/ODIHR on the State Electoral Commission of the Republic of Croatia (CDL-AD(2006)012).

10. Georgia

Mr Gia Kavtaradze, Minister of Justice of Georgia, thanked the Commission for the draft opinion on the draft Law on the rehabilitation and restitution of property of victims of the Georgian-Ossetian conflict, which he presented as a part of President Saakashvili's peace plan for South Ossetia. Georgia was committed to become part of the solution rather than the problem. Since it had received the draft opinion, the Ministry of Justice had already prepared a revised draft, which took into account a large number of the recommendations made by the Commission and by UNHCR. Nevertheless, further improvements to this draft were envisaged. The Georgian Government was committed to consulting the Ossetian side. The draft law had already been handed to the South Ossetian *de facto* authorities in November but the reply had been that this was an internal matter of Georgia. At the end of March, a Georgian delegation would meet refugees in North Ossetia to gather information and to receive recommendations for the draft law. The upcoming JCC meeting would also be used for consultations. During the visit of the Venice Commission's delegation to Tbilisi, narrowing the scope of the draft law by excluding non-property damages had been discussed. The Minister hoped for an active participation of international organisations (UNHCR, EU, OSCE, Council of Europe) as well as governments of various foreign states in the process of nominating the Restitution Commission. The chairmanship of the Commission should rotate between the parties. Refusal by one party should not delay the restitution scheme. No constitutional amendments were envisaged for double citizenship and the avoidance of appeals to Georgian courts.

Mr van Dijk presented the draft opinion ([CDL\(2006\)004](#)) on the draft Law on the rehabilitation and restitution of property of victims of the Georgian-Ossetian conflict ([CDL\(2006\)003](#)), drawn up on the basis of comments by Messrs van Dijk, Aurescu, Bartole and Hamilton ([CDL\(2006\)014](#), [006](#), [015](#) and [005](#)). A number of points needed further improvement. He welcomed the intention of the Georgian authorities to submit a revised draft law for further opinion. In this future draft, not only property related damage but also other serious human rights violations should be taken into account. An internal appeal within the Commission should allow for avoiding recourse to Georgian courts. A constitutional amendment might be necessary to this end. The international organisations should not be named explicitly in the draft. The benefits of the draft law should apply irrespective of citizenship and status as refugees. The criteria for compensation should be clearly identified.

Mr. Nolte asked whether this opinion would set standards for future similar situations. The rapporteurs replied that this opinion only related to the specific situation of the Ossetian minority. Mr. Aurescu pointed out that only practice could show whether this solution would become a success.

Mr. Bartole insisted that the right to a fair trial needed to be safeguarded in proceedings before the Restitution Commission. Mr. Hamilton pointed out that, so far, there had been very little contacts between the sides and no real consultation had taken place.

The Commission adopted the interim opinion on the draft Law on the rehabilitation and restitution of property of victims of the Georgian-Ossetian conflict (CDL-AD(2006)007).

11. Kyrgyzstan

Ms Baekova informed the Commission that the President of Kyrgyzstan had issued a decree in January which provided for a referendum on the form of government, presidential or parliamentary, in late 2006. Work on constitutional reform had therefore been interrupted.

12. Moldova

The Commission examined the draft opinion (CDL(2006)010) on the law on the information and security service of the Republic of Moldova (CDL(2006)001rev), drawn up on the basis of comments by the rapporteur, Mr Matscher. Mr Matscher said that the opinion related to a law which had been in force for several years and only two provisions of which had been amended in July 2005. Consequently, the Commission could confine itself to a general assessment of the law in the light of relevant international standards and the study prepared by the Commission in 1998. Seen from this angle, the law seemed satisfactory on the whole, although the list of the security service's tasks was too detailed and allowed far too much interference in the private sector. As to the control and supervision mechanism, it was right that it provided for subsequent involvement of the parliament, the principal state prosecutor's office and the courts. It should, however, be suggested to the Moldovan authorities that they consider making arrangements for an independent body to keep the service's operational activities under review.

Mr Iain Cameron agreed with most of the rapporteur's comments. He suggested, however, that the draft opinion be amplified in some areas so as to give the Moldovan authorities useful guidance if they chose to amend the law in the future. After some discussion, it was agreed that the secretariat would amend the draft opinion to include the main additions proposed by Mr Cameron, which suggested both ways of clarifying the responsibilities for supervision of the security service's activities and means of strengthening control mechanisms.

The Commission adopted the opinion on the law on the information and security service of the Republic of Moldova, with amendments (CDL-AD(2006)011).

At its previous session, the Commission had adopted the joint opinion of the Venice Commission and OSCE/ODIHR on amendments to the electoral code of Moldova. It had asked the Secretariat to amend the opinion in co-operation with OSCE/ODIHR so as to take account of the legislative amendments of 17 November 2005 and comments by the Congress of Local and Regional Authorities of the Council of Europe, and to forward the revised text to the Moldovan authorities. This had already been done.

The Commission endorsed the final version of the joint opinion of the Venice Commission and OSCE/ODIHR (CDL-AD(2006)001) on amendments to the electoral code of Moldova (cf. CDL-EL(2006)001).

13. Romania

Mr Cardoso da Costa presented the draft opinion ([CDL\(2006\)013](#)) on two draft Laws ([CDL\(2006\)007](#) et [008](#)) amending Law no. 47/1992 on the Functioning and Organisation of the Constitutional Court of Romania, drawn up on the basis of comments by Messrs Cardoso da Costa, Mazak and Paczolay ([CDL\(2006\)009](#), [012](#) et [016](#) respectively).

He pointed out that by referring to the provisions of the Code of Civil Procedure on the withdrawal of judges, one of the drafts might result in a situation of *non liquet*, even if this was unlikely in practice. The rapporteurs suggested that a second, lower quorum be introduced. Should the number of judges fall below that lower quorum, all judges should participate in the case however any incompatibilities should be stated transparently in the judgement and the judges would make a declaration that they would make every effort to remain unbiased.

The other draft law was found to be excessive in excluding persons who are or have been members of a political party or whose family members belong or belonged to the leadership of political parties during the last five years. Furthermore, the requirement of twelve years of practice as a judge or prosecutor would exclude important groups of qualified persons and might even be unconstitutional.

The Commission adopted the Opinion on two draft Laws amending Law no. 47/1992 on the Functioning and Organisation of the Constitutional Court of Romania (CDL-AD(2006)006).

14. Serbia and Montenegro

The Commission examined the draft joint recommendations by the Venice Commission and OSCE/ODIHR ([CDL-EL\(2006\)005](#)) on the electoral law and administration of elections in Serbia, drawn up on the basis of comments by Messrs Pilgrim and Torfason (cf. [CDL-EL\(2005\)025](#), [026](#) and [027](#)).

Mr Torfason informed the Commission that the opinion was a long document since it had to deal with the law on the parliamentary, presidential and local elections at the same time. Among the main shortcomings of the text he mentioned the absence of the intermediary level of electoral commissions, the unclear provisions on voters' lists, some aspects of access to the media and the publication of the election results.

Some members expressed doubts as to the participation of judges in the work of the electoral commissions. After an exchange of views between the members it was decided that the Commission would not express its opinion on this issue since judges participate in electoral management bodies in a number of Council of Europe Member States and their participation in electoral administration could be a guarantee of its impartiality.¹

¹ See also the Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, II.3.1.d.i.

The Commission adopted the draft joint recommendations by the Venice Commission and OSCE/ODIHR (CDL-AD(2006)013) on the electoral law and administration of elections in Serbia and instructed the Secretariat to transmit it to the Serbian authorities.

15. International legal obligations of Council of Europe member States in respect of secret detention facilities and inter-state transport of detainees – report of the Joint Meeting of the Sub-Commissions on International Law and Democratic Institutions (16 March 2006)

Mr Tuori, Chair of the joint meeting of the sub-commissions on Democratic Institutions and on International Law, informed the Plenary that the members of the sub-commissions had examined and discussed the draft opinion in great detail. After deciding to proceed with certain amendments, they had unanimously endorsed the text which was now being submitted to the Plenary.

Mr Helgesen, chair of the working group, recalled that the PACE Legal Affairs Committee had requested an assessment from the Commission of the legality of secret detention and a description of the legal obligations of Council of Europe member states in respect of such detention and of inter-state transfer of prisoners.

The Rapporteurs were aware of the political sensitivities and had avoided being dragged into the political debate. As a consequence, the opinion contained no assessment of the facts and no judgment as to whether secret detention facilities exist in Europe or as to whether the CIA has carried out irregular transports of prisoners through European skies. The opinion contained a sober legal analysis of the existing legal norms.

In the first section of the opinion, the rules of public international law, human rights law, international humanitarian law and air navigation law were identified and described. In the second section of the opinion, the working group had used the previously identified norms in order to establish the legal obligations of member-States.

It was the first time that the Venice Commission had to deal with air navigation law. There were two kinds of aircraft : civil aircraft, which had overflight rights over the territories of the state-parties to the Chicago Convention, which regulates international civil aviation, but could be searched and inspected at will by the territorial state, and state aircraft, which needed to receive specific overflight authorisation prior to entering the airspace of a State, but were subsequently immune from search and inspection. The distinction was not always easy to apply in practice, in the first place in the light of the unclear definition of “state aircraft” and also because it happened that civil aircraft perform state functions. The difficulty in this respect was to establish whether in such a case the civil aircraft would benefit from immunity from search or not. In the Commission’s opinion, an airplane would only be entitled to immunity if it had presented itself as state aircraft according to the applicable rules and had thus sought the relevant authorisation prior to entering the airspace of a State. If it had pretended to be civil, it would not be in a position to claim later that it was state aircraft benefiting from immunity.

The opinion underlined three general principles. The first one was that, while CoE member-States were under an obligation to combat terrorism, in doing so they had to fully respect human rights. The second general principle was that that human rights obligations, namely under the ECHR, must prevail over any other treaties, including bilateral treaties, the NATO treaty or the

Chicago Convention: thus, in interpreting and applying any treaty obligation, States had to respect *jus cogens*, notably the absolute prohibition on torture and inhuman and degrading treatment and on “incomunicado” detention, which includes the obligation not to expose to the risk thereof and the positive duty to investigate into allegations thereof. The third principle was that States, as subjects of international law, were to be held accountable for the conduct of any branch of their powers, including when any of their agents had acted *ultra vires*.

Mr Jurgens and Mr Schieder expressed their satisfaction with the opinion and requested certain clarifications, notably in respect of the powers of territorial states in respect of aircraft changing their status while flying over different States. The rapporteurs considered that this conduct was not in itself illegitimate under the Chicago Convention and underlined that any suspicion of possible abuse of the status of a plane could be communicated to other States in order to exercise the different powers, such as request to land, interception, search and inspection or protest through diplomatic channels.

Mr Schieder further raised the question of the applicability of the norms and principles outlined in the opinion in respect of Kosovo. The rapporteurs underlined that the opinion dealt with legal obligations of *States* only. They were ready to examine the specific situation of Kosovo, if the Venice Commission received such a request.

Mr Aurescu underlined the importance of the principle, contained in the opinion, of mutual trust and good relations between States.

The Commission adopted the opinion on the international legal obligations of Council of Europe member States in respect of secret detention facilities and inter-state transport of prisoners (CDL-AD(2006)009).

16. “The former Yugoslav Republic of Macedonia”*

The Commission examined, with a view to adoption, the joint opinion of the Venice Commission and OSCE/ODIHR (CDL-EL(2006)007) on the draft electoral code of “the former Yugoslav Republic of Macedonia” (CDL-EL(2006)003), drawn up on the basis of comments by Mr Finn, Mr Kask and Mr Mifsud Bonnici. The draft opinion had already been sent to the authorities of “the former Yugoslav Republic of Macedonia”.

The Commission adopted the joint opinion of the Venice Commission and OSCE/ODIHR (CDL-AD(2006)008) on the draft electoral code of “the former Yugoslav Republic Macedonia”.

17. Ukraine*

At the last session, the Commission adopted the draft joint opinion by the Venice Commission and OSCE/ODIHR on the law of 7 July 2005 on amendments to the law on elections of people’s deputies of Ukraine. The Commission authorised the Secretariat, in co-operation with OSCE/ODIHR, to modify the text taking into account amendments concerning

* *To be adopted without discussion.*

media and to forward the revised text to the Ukrainian authorities. This has already been done.

The Commission endorsed the final version of the joint opinion by the Venice Commission and OSCE/ODIHR ([CDL-AD\(2006\)002rev](#)) on the law on the elections of people's deputies of Ukraine (cf. [CDL-EL\(2005\)054](#)).

18. *Amicus curiae* opinion at the request of the European Court of Human Rights on political parties receiving financial contributions from abroad

The Commission examined the draft opinion at the request of the European Court of Human Rights on political parties receiving financial contributions from abroad, drawn up on the basis of comments by Messrs Lapinskas and Vogel ([CDL\(2006\)020](#)).

Some participants suggested that the text should be amended in order to take into account situations when restrictions are needed to prevent interferences from foreign political forces and distortions of the electoral process. The report should clearly indicate that in each concrete case of limitations of financing from abroad due consideration should be given to the political and economic situation and national interests of the State. It was also stated that in some countries of Eastern Europe limitations were necessary to protect their territorial integrity.

Another opinion was that if the conclusions are amended as proposed by the previous speakers the report should include more examples from national experience. Making reference to necessary measures to prevent tax evasion was also suggested. The registration of donations could be one of the possible solutions to this problem.

As a result of the exchange of views it was agreed to strengthen the conclusions by making reference to some other cases when the formal prohibition of financing of political parties from abroad could be justified in a democratic society.

Messrs Vogel and Lapinskas agreed to make these additions to the document, however they pointed out that the intention of the text was to answer the questions from the European Court of Human Rights rather than to make a general study on this topic.

The Commission adopted the opinion on political parties receiving financial contributions from abroad ([CDL-AD\(2006\)014](#)) and asked the rapporteurs to complete the text as proposed during the discussions with the assistance of the Secretariat, in view of transmitting it to the European Court of Human Rights before 31 March 2006.

19. Human Rights protection in emergency situations

The Commission examined the draft opinion ([CDL\(2006\)022](#)) on human rights protection in emergency situations, drawn up on the basis of comments by Mr van Dijk and Ms Flanagan. Mr van Dijk said that although the draft opinion had been drawn up at the request of the Parliamentary Assembly following the repression of the protests of May 2005 in Andijan, Uzbekistan, the rapporteurs had not focused on any one national situation but adopted a general approach to the question of human rights protection in all emergency situations, regardless of whether they were covered by a derogation within the meaning of Article 15 of the ECHR.

After a general discussion on the main issues raised by the draft opinion, the Commission expressed its support for the text while deciding to add to it a number of references to leading decisions of the European Court of Human Rights and the UK House of Lords, at the suggestion of Mr Iain Cameron and Mr Jeffrey Jowell. In addition, with regard to the question of derogations within the meaning of Article 15 of the ECHR and Article 4, paragraph 1, of the International Covenant on Civil and Political Rights, it was decided, on a proposal from Mr Jan Helgesen and Mr Kaarlo Tuori, to harmonise the arguments and references in the draft opinion with the corresponding passages in the opinion on the international legal obligations of Council of Europe member States in respect of secret detention facilities and inter-State transport of prisoners (CDL-AD(2006)09).

The Commission adopted the opinion on human rights protection in emergency situations, with amendments (CDL-AD(2006)015).

20. Remedies to the excessive length of proceedings

Mr Desch, Chairman of the European Commission for the Efficiency of Justice (CEPEJ), recalled that the Venice Commission and the CEPEJ had worked in parallel, in a complementary and coordinated manner, in this matter since 2004. CEPEJ had set up a Task Force on Time-frames of proceedings, which had exchanged information with the Venice Commission. Amongst the latest achievements of this task force, Mr Desch mentioned the checklist of indicators for the analysis of lengths of proceedings in the justice system. Co-operation had been very satisfactory and would certainly continue in the future.

Mr van Dijk recalled that this study had been launched in Bucarest in July 2004, upon the initiative of the Romanian authorities. A questionnaire on the existing national remedies concerning the length of proceedings had been circulated amongst the Commission members and information concerning 36 countries had now been collected by the Secretariat. The members of the working group were now analysing the replies and intended to identify guidelines which could help Council of Europe member States to set up or improve the national remedies. The principles which had been identified were that the remedies aimed at avoiding the excessive length of proceedings must not a) prolong the proceedings; b) affect the independence and impartiality of the courts; c) affect the legitimate interests of third parties and d) cause society to lose confidence in the capacity of the system to react to crime and to prosecute criminals.

Mr van Dijk also recalled that the working group had been coordinating with and following the works of the CEPEJ.

Mr Aurescu informed the Commission that a conference on “Remedies for unduly lengthy proceedings : a new approach to the obligations of Council of Europe member States” would be held in Bucarest on 3 April, organised in the framework of the Romanian chairmanship of the Committee of Ministers of the Council of Europe, at which representatives of the Venice Commission, the CEPEJ, the European Court of Human Rights and other Council of Europe bodies would discuss possible guidelines and principles. The results of the discussions would be integrated into the study which the working group expected to be able to submit to the Plenary in June 2006.

21. Secrecy of the vote in the context of parliamentary elections

A questionnaire on the secrecy of voting in elections in parliament had been prepared on the basis of Mr Chagnollaud's comments (CDL-EL(2006)004). It was proposed that the Council for Democratic Elections should adopt it, along with any amendments, at its meeting of 18 March, after which it should be sent to all the members of the Commission.

The Commission instructed the Council for Democratic Elections to adopt the questionnaire on the secrecy of voting during elections in parliament and send it to all the members of the Commission.

22. Working methods of the Commission – Follow-up to the meeting of the Enlarged Bureau

Mr Mifsud Bonnici informed the Commission that the Enlarged Bureau had continued its discussions on the working methods of the Commission.

As regards the introduction of a time limit for interventions during the plenary sessions, the Bureau was of the opinion that such a time limit seemed justified, owing to the high number of participants in the sessions. A general time limit of 7 minutes was suggested. However the President would always have the possibility to grant exemptions from this time limit in justified cases.

The Bureau also discussed the restructuring of the sub-commissions. There was agreement that the present system is not very rational and out of date. Two different approaches were put forward: either to have thematic sub-commissions covering the main fields of activity or to have one permanent sub-commission. These approaches will be further discussed at the next session of the Bureau.

The Bureau welcomed the fact that the Secretariat will start preparing vade-mecums of the positions taken by the Commission in certain areas.

The Commission decided to introduce a general time limit of 7 minutes for interventions during its plenary sessions, it being understood that the President may grant exemptions from this time limit in justified cases.

23. Election of a member of the Bureau

Following the expiration of Mr Baglay's term of office as member of the Commission, the Commission elected his successor nominated by the Russian authorities, Mr Valery Zorkin, as new member of the Bureau.

24. Adoption of the annual report of activities 2005

The Commission adopted its annual report of activities 2005 ([CDL\(2006\)017](#)).

25. Exchange of views with the Southern African Judges Commission

The Permanent Representative of Ireland to the Council of Europe, Mr Sharkey, welcomed the participation of the SAJC members in the session and recalled the outstanding contribution of the Venice Commission to the transition of Central and Eastern European countries towards democracy. The Commission's role in this process was also appreciated by the European Union. At the same time, the Commission's action in the Southern African region, which had started in 1994, was less known but was developing fruitfully. The presence of the SAJC at this plenary session highlighted the success of this line of action of the Commission. The Ambassador stressed that Europeans could not only share their experiences with Africans but were also happy to learn from them.

The Permanent Representative of Italy to the Council of Europe, Mr Lonardo, welcomed the SAJC members on behalf of the Committee of Ministers, noting that the presence of the representatives of the Union of Arab Constitutional Courts and Councils was an opportunity not only for an exchange with Europe but even between these sub-regions.

Mr Buquicchio conveyed the gratitude of the Venice Commission to the governments of Norway, Ireland and Italy for their financial support of the Commission's activities in the Southern African region. Mr. La Pergola recalled his participation in the passage of South Africa from an apartheid regime to democracy and expressed his high appreciation for the Constitutional Court of South Africa.

Introducing the presentations on the constitutional review in common law countries and countries with specialised constitutional courts, Mr La Pergola noted that constitutional review had been 'invented' by the US Supreme Court and had spread to the common law countries. The scholar Kelsen had been the author of an alternative to the US system, by introducing centralised constitutional review. Today constitutional justice was spreading beyond Europe and became a universal phenomenon. The distinction between the two models was gradually diminishing. Mr La Pergola suggested organising a conference on this topic with the participation of *inter alia* the Constitutional Council of France and the Federal Tribunal of Switzerland, which showed some interesting particularities.

The President of the Constitutional Court of South Africa and President of the SAJC, Mr Langa, started his presentation (CDL-JU(2006)016) by thanking the participants for their generous remarks concerning his Court. He also expressed gratitude to the Commission for its support of the SAJC which he hoped would continue. He recalled the history of the creation of the Constitutional Court of South Africa and its competences as well as its exceptional role in the certification of the current, democratic Constitution. After the abolition of apartheid, the Constitutional Court had been the first judicial institution in which South Africans had confidence and which remedied the old legal culture where judges were not independent and proper judicial review was not exercised.

Mr Mazak outlined the advantages and disadvantages of centralised constitutional review (CDL-JU(2006)*), as well as providing a comparative analysis of the competences of specialised constitutional courts, which had the advantage of providing legal certainty as to the validity of legislation. The method of composition of the courts had to be balanced in order to give the court the necessary legitimacy to strike down acts of parliament. Drawbacks were an increase in the length of procedures and possible problems with ordinary courts. He pointed out that mixed models deserved a more extensive analysis and could be the subject of a future study.

The Chief Justice of Uganda, Mr Odoki, expressed the hope that the SAJC would lead to a yet more independent judiciary in Africa and that the Venice Commission could inspire judgments by the African courts. Mr Jowell and other participants noted that the exchange of views between Europe and Africa was a two way street, they had much in common and things to learn from one another. For example, tensions between the judiciary and other branches of state power were common to many jurisdictions. Competences in the field of socio-economic rights were an interesting feature of African courts.

During the discussion the representatives of the SAJC stressed the importance of the present enriching exchange of views, thanked the Commission for its support and informed the Commission of the particularities of constitutional review by their respective courts.

26. Other business

There was no discussion on this item.

27. Date of the next session

The Commission confirmed the date of its 67th Plenary Session: 9-10 June 2006.

The others sessions for 2006 are confirmed as follows:

68 th Plenary Session	13-14 October
69 th Plenary Session	15-16 December

Sub-Commission meetings and meetings of the Council for Democratic Elections will take place as usual on the day before the Plenary Sessions.

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Mr Vladislav GLASUNOV

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