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**THE PREVENTION OF HUMAN RIGHTS
VIOLATIONS: MONITORING MECHANISMS
OF THE COUNCIL OF EUROPE**

The present study is an up-dated version of a paper presented at an international colloquy entitled "The Prevention of Human Rights Violations" which was held at the Panteion University in Athens, Greece, on 24 and 25 May 1999 to celebrate the 20th anniversary of the Marangopoulos Foundation for Human Rights. The colloquy proceedings will be published in 2000 (editor-in-chief A. Sicilianos).

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I. Some general observations

The Colloquy title “The Prevention of Human Rights Violations” reminds us of why the Council of Europe was created: “Never Again!” was the slogan in 1949¹. That individuals can successfully plead their cases before the European Court of Human Rights, that war between France and Germany is no longer possible and that democracy is well-embedded – since the late 1970’s – on the Iberian Peninsular and, more recently, in a number of countries in Central and Eastern Europe, are surely clear indicators of the historical role the Council of Europe has played in *preventing* human rights violations and in consolidating pluralistic democracy and respect for the Rule of Law. But can this momentum be maintained? We are no longer in the privileged situation of being a club of relatively sophisticated and economically – more or less – comfortable States which reflect liberal-democratic Western European standards and achievements.

After the initial euphoria of 1989 and 1990, our continent is now again faced with difficult, serious challenges, new fears and anxieties. The recent tragedies of Bosnia and Kosovo – on the parameters of the Organisation – remind us of the fragility of ‘democracy’ as perceived by the Organisation’s founding fathers. We have not rid ourselves of (potential) barbarities which we had mistakenly considered to be confined to the annals of history of our

¹ See A. H. Robertson *The Council of Europe. Its Structure, Functions and Achievements* (1961), *passim*.

‘civilised’ continent. The situation in South East Turkey² and the more recent Chechen crisis in Russia are obvious examples of unacceptable and tragic situations. But could the Council of Europe have been able to prevent, or at least limit, the human suffering caused by these conflicts? Should or could have other regional or international organisations been able to do so? History will judge.

Over the last few years the Council of Europe’s capacity – and with it the Organisation’s credibility – to *prevent* (major) human rights violations has been put to a severe test³. That being said, it is too simplistic and unfair to try to place, onto the shoulders of the Council of Europe, blame for all the recent ills of Europe which are the collective responsibility of many actors.

On a related matter: has the Council of Europe adequate means at its disposal, in terms of logistics, infrastructure and support from capitals (at least from the major contributors, as concerns the Organisation’s budget), to consolidate respect for the Rule of Law and to take appropriate *preventive measures* in order to appropriately “monitor” human rights violations in a manner *commensurate* with the tasks assigned to it⁴? If not, why not? What exactly are the political and legal parameters within which the Organisation is meant to

² See Interim Resolution DH (99) 434 of the Committee of Ministers adopted on 9th June 1999 (entitled “Human Rights. Action of the security forces in Turkey: measures of a general character”) and article “Legal system to be overhauled” in *Turkish Daily News*, of 27th September 1999. Allegations of serious violations of human rights have been documented: see, for example, P. Mahoney, in vol. 20 *Human Rights Law Journal (HRLJ)* at pp. 3-4 (in which the Strasbourg Court’s case-law is cited).

See also critical comments by M. T. Kamminga “Is the ECHR Sufficiently Equipped to Cope with Gross and Systematic Violations?” in vol. 12 *Netherlands Quarterly of Human Rights (NQHR)* (1994), pp. 153-164 and A. Reidy, F. Hampson and K. Boyle “Gross Violations of Human Rights: Invoking the ECHR in the Case of Turkey”, in vol. 15 *NQHR* (1997), pp. 161-173.

³ See, for example, *Le Monde* of 6th November 1999, front page article entitled “Tchéchénie: l’honneur perdu du Conseil de l’Europe”, or Ralph Dahrendorf’s comments, in the Polish weekly *Wprost*, of 18th July 1999, pp. 19- 21 at p. 20, that the ECHR’s influence on countries such as Russia, Ukraine and more recently Georgia, is non-existent (“the Council of Europe – nominally guarantor of the [ECHR] – no longer has any influence on the latter” [with respect to the countries cited]). See also *The Economist*, of 8th March 1999 “Europe’s council of correctness”, at p. 29 & A. Gimbal “Europarat und Europäische Menschenrechtskonvention” in *Jahrbuch der Europäischen Integration 1998/99* (W. Weidenfeld & W. Wessels, eds., 1999), pp. 411-418, *passim*.

⁴ See, for example, *Official Gazette of the Council of Europe, passim*, in which the Organisation’s multi-faceted work is regularly reported, the Organisation’s Intergovernmental Programme of Activities for 2000, and document SG/INF (2000) 4 in which the Council of Europe’s Activities for the Development & Consolidation of Democratic Stability (ADACS) Programme for 2000 are enumerated.

For an excellent overview, see D. Huber *A Decade which made History. The Council of Europe 1989-1999* (1999), *passim*, as well as the Council of Europe’s Web Site <http://www.coe.int>.

– or otherwise – with which new democracies have carried out compatibility studies prior to the ratification of the ECHR ⁹.

The ambit of the present survey, however, invites the author to go much further than this. The title intentionally chosen by the Conference organisers asks the author to deal not only with the Organisation’s core human rights mechanisms – important as they obviously are – but also solicits discussion of ‘political’ monitoring mechanisms put into place principally, but not exclusively, by the Parliamentary Assembly and the Committee of Ministers subsequent to the historic events of 1989/90. So this is the wider context within which this survey is undertaken.

The specific mandate assigned to the Council of Europe – in so far as “monitoring” is concerned – has been clearly delineated: the Organisation has had to become more pro-active. The Heads of State and Government of the member States of the Council of Europe, meeting for the first time in the Organisation’s history at the Vienna summit conference in 1993, solemnly reaffirmed that:

“... accession [to the Organisation] presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect for human rights. The people’s representatives must have been chosen by means of free and fair elections based on universal suffrage. Guaranteed freedom of expression and notably of the media, protection of national minorities and observance of the principles of international law must remain, in our view, decisive criteria for assessing any application for membership. An undertaking to sign the European Convention on Human Rights and accept

⁹ See, *inter alia*, P. Leuprecht “Innovations in the European System of Human Rights Protection: is enlargement compatible with reinforcement?” in vol. 8 *Transnational Law & Contemporary Problems* (1998, University of Iowa, College of Law journal), pp. 313-336 and F. Sudre “La Communauté européenne et les droits fondamentaux après le traité d’Amsterdam: vers un nouveau système européen de protection des droits de l’homme?” in *La Semaine Juridique, JCP* (1998), I, pp. 9-16. Further research can be undertaken on this subject by consulting reports undertaken in the context of accession procedures, listed in vol. 20 *HRLJ* (1999) at pp. 112-113; see also vol. 14 *HRLJ* (1993), at p. 248 together with Council of Europe documents. Monitor/Inf (99)1 of 18 February 1999 and Addendum thereto and Monitor/Inf (2000)3 of 22 May 2000 (with respect to Georgia).

As to compatibility exercises, see Council of Europe doc. H (96)12, prepared by P. Titun, and A. Drzemczewski “Ensuring Compatibility of Domestic Law with the ECHR prior to Ratification: the Hungarian Model” in vol. 16 *Human Rights Law Journal (HRLJ)* (1995), pp. 241-260 (a shorter, French-language version, can be found in vol. 7 *RUDH* (1995), pp. 195-212.

the Convention's supervisory machinery in its entirety within a short period is also fundamental. *We are resolved to ensure full compliance with the commitments accepted by all member States within the Council of Europe*"¹⁰.

II. Prevention of human rights violations: the statutory framework

The Council of Europe was founded in 1949 as a European organisation for intergovernmental and parliamentary co-operation. It is considered to be a democratic "club", often referred to as 'the conscience of Europe'. It is now geographically the most extensive European political organisation comprising of 41 member States (including all 15 European Union(EU) member States and the States which have posed their candidature to join the EU)¹¹. Today, its principal *political* role is the consolidation of democratic security in Europe¹².

Article 3 of the Statute of the Organisation provides that every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms. Read together with Article 1 of the Statute, it further provides that members must collaborate sincerely and effectively, by discussion of questions of common concern and by agreements and common action, in the realisation of the aim of the Council of Europe as set out in Article 1 (a), namely "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and

¹⁰ Vienna Declaration, 9 October 1993, emphasis added. (The full text of the Declaration can be found in D. Huber's book, *supra*, note 4, at pp. 247-255).

See also "Respect des engagements pris par les Etats membres: évolution de la procédure de suivi du Comité des Ministres [du Conseil de l'Europe]" in vol. 10 *RUDH* (1998), pp. 371-382, *passim*.

¹¹ Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Georgia, Greece, Hungary, Ireland, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, 'The former Yugoslav Republic of Macedonia', Turkey, Ukraine and the United Kingdom.

Six States have applied for membership, namely, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Monaco and Yugoslavia (although procedures with respect to Belarus have been suspended).

¹² As stipulated/confirmed in the Final Declaration of the Strasbourg (Second) Summit of Heads of State and Government, 11th October 1997 (the full text of which can be found in D. Huber's book, *supra*, note 4, at pp. 257-263). See, on this subject, J.-L. Laurens "Democratic security for Europe" in vol. 15 *Ritsumeikan Law Review* (1999), pp. 73-78; H.-P. Furrer and J. Gützkow "The Concept of Democratic Stability and its Implementation by the Council of Europe" in vol. 2, *International Affairs* (Romanian Institute of International Studies), 1996, pp. 13-23 and *The Challenges of a Greater Europe. The Council of Europe and Democratic Security* (Council of Europe Publishing, 1996), *passim*.

facilitating their social and economic progress”. Hence, by joining the Organisation, States make a firm commitment to abide by the principles espoused therein.

It follows that all member States of the Council of Europe are required to respect their obligations under the Organisation’s Statute, the European Convention on Human Rights (ECHR) and other conventions to which they are Parties as well as to observe a series of principles, rules, standards and values which have been elaborated over the past 50 years within the Organisation with regard to democratic pluralism, human rights and the rule of law.

In addition to the obligations referred to above, the authorities of certain States which have become members since 1989 (principally from countries of Central and Eastern Europe) have also entered into additional and specific commitments during the examination of their request for membership. These commitments, undertaken in contacts with the Committee of Ministers (the Organisation’s executive organ), and in particular the Parliamentary Assembly of the Council of Europe, are explicitly referred to in the relevant Opinions adopted by the Assembly to which reference is, in turn, often made by the Committee of Ministers when it invites States to become members of the Council of Europe. For example, signature of the ECHR upon accession and its prompt ratification thereafter (including declarations pursuant to Articles 25 and 46, ECHR, ie., acceptance in full of the individual and inter-State complaints system before the Strasbourg Commission and Court, pending entry into force of Protocol No. 11 on 1st November 1998) was an essential undertaking which all new member States had to make when joining the Organisation¹³. Membership

¹³ For a study of this subject consult H. Klebes and D. Chatzivassiliou “Problèmes d’ordre constitutionnel dans le processus d’adhésion d’Etats de l’Europe centrale et orientale au Conseil de l’Europe”, in vol. 8 *RUDH* (1996), pp. 269-286 and publications cited therein. See also vol. 14 *HRLJ* (1993), p. 248 and *Le Conseil de l’Europe acteur de recomposition du territoire européen* (C. Schneider, ed., 1997), Cahier de l’Espace, No. 10, May 1997, Grenoble, *passim*. For additional commentaries on this subject consult, amongst others, see K. Drzewicki, “The Future Relations Between Eastern Europe and the Council of Europe”, *Legal Aspects of a New European Infrastructure* (A. Bloed and W. de Jonge, editors, 1992), pp. 41-60; J.-F. Flauss, “Les conditions d’admission des pays d’Europe centrale et orientale au sein du Conseil de l’Europe”, in vol. 5 *European Journal of International Law* (1994), pp. 401-422; E. Gelin, “Les critères d’admission des nouveaux Etats indépendants au Conseil de l’Europe”, in *Revue de droit international et de droit comparé* (1996), pp. 339-367; vol. 14 *NQHR*, Editorial (1996), pp. 3-4, and H. Winkler, “Democracy and Human Rights in Europe. A Survey of the Admission Practice of the Council of Europe”, in vol. 47 *Austrian Journal of Public and International Law* (1995), pp. 147-172. A complete list of specific commitments entered into by member States can be found in “Compliance with commitments entered into by member States: Undertakings entered into upon accession to the Council of Europe”, Council of Europe doc. Monitor/Inf (99)1, of 18 February 1999, and Addendum as well as Monitor/Inf (2000)3, of 22 May 2000 (as concerns Georgia).

does not necessarily entail compliance with all the criteria of membership, and especially requirements established by the Strasbourg ECHR control organs case-law *ab initio*: according to Article 4 of the Organisation's Statute, States must be 'willing and able' to abide by the conditions of membership¹⁴.

So, when human rights standards have been breached within one or more member State, the Council of Europe and its other member States – with a variety of “monitoring procedures” at their disposal – must try to ensure that the situation is put right and that the State concerned lives up to one of the Organisation's principal aims, namely that of “the maintenance and further realisation of human rights and fundamental freedoms” (Article 1 of the Statute of 1949).

Committee of Ministers

The Committee of Ministers has an inherent power to invite States to become members, to suspend them and to monitor the obligations of members as they derive from the Statute. For example, by virtue of Article 21 (b) of the Statute, the Committee of Ministers may determine what information shall be published regarding its discussions and conclusions, including any decision it may have taken under Articles 8 and 9 of the Statute¹⁵.

Articles 4 and 5 of the Statute provide that the ability and willingness to fulfil the provisions of Article 3 are a precondition to membership (or associate membership) of the Council, the only other criterion being that the applicant State be European¹⁶.

A member State which seriously violates Article 3 may, by virtue of Article 8, be suspended from its rights of representation and requested by the

¹⁴ For a critical analysis, consult F. Sudre “La Communauté européenne et les droits fondamentaux après le Traité d'Amsterdam: vers un nouveau système européen de protection des droits de l'Homme?”, in *La Semaine Juridique*, 1998, I, pp. 9-26, esp at pp. 9-10.

See also T. Meron and J. S. Sloan “Democracy, Rule of Law and Admission to the Council of Europe” in vol. 26 *Israel Yearbook on Human Rights* (1996), pp. 137-157.

¹⁵ Such a decision requires unanimity of the votes cast and a majority of the representatives entitled to sit on the Committee (Article 20 of the Statute of the Council of Europe).

¹⁶ For a thorough study of conditions of membership see B. Haller “L'Assemblée parlementaire et les conditions d'adhésion au Conseil de l'Europe” in *Law in Greater Europe. Towards a Common Legal Area*. Studies in Honour of H. Klebes (B. Haller, H-C. Krüger and H. Petzold, editors, 2000), p. 27-79. See also Parliamentary Assembly doc. 1703 of 10 June 1994, Report on the enlargement of the Council of Europe (Rapporteur Mr Reddemann) and Conclusions of the Bureau of the Assembly, appended thereto and also published as “The Geographical Extension of the Council of Europe: Policy Options and Consequences”, in vol. 13 *Human Rights Law Journal (HRLJ)*, 1992, pp. 230-236 (see also vol. 14, *HRLJ*, 1993, p. 248).

Committee of Ministers to withdraw under Article 7. If a member State does not comply with this request, the Committee of Ministers may decide that the State concerned has ceased to be a member State of the Council of Europe. Such action was contemplated *vis-à-vis* the Greek colonels' regime back in 1969. However, this was short-circuited by the decision of the Greek authorities to withdraw from the Organisation, in December 1969, just before the decision to suspend Greek membership was to be taken ¹⁷.

Failure by a member to fulfil its financial obligation to the Council may also result in a decision by the Committee of Ministers, under Article 9 of the Statute, to suspend its rights of representation in the Committee and in the Parliamentary Assembly.

In short, the *possibility* or *threat* of suspension from the 'democratic club' is a weapon in the Organisation's armoury whose potential it is difficult to ignore.

Parliamentary Assembly

Article 23 (a) of the Statute provides, in particular, that the Parliamentary Assembly (referred to as "Consultative Assembly" in the Statute) shall discuss and make recommendations upon any matter referred to it by the Committee of Ministers with a request for its opinion.

It is important to note, in this connection, the key role played by the Parliamentary Assembly with the accession, principally, of countries from Central and Eastern Europe to the Organisation ¹⁸. Here, it should be recalled that although the power of decision to admit a State to the Council of Europe "which is deemed to be able and willing to fulfil the provisions of Article 3" (Article 4 of the Statute) lies with the Committee of Ministers, an opinion of the Parliamentary Assembly must first be sought and obtained (see Statutory Resolution(51)30). Under Statutory Resolution (51) 30, the Committee of Ministers also decides that, before inviting a member of the Council of Europe to withdraw in accordance with Article 8 of the Statute, it shall first consult the Parliamentary Assembly. Thus, whereas the decision to suspend a member State remains that of the Committee of Ministers, the fact that the Parliamentary Assembly must give its prior agreement to any accession or, where appropriate, to any suspension, provides the latter with substantial political weight.

¹⁷ See A. Drzemczewski *European Human Rights Convention in Domestic Law. A Comparative Study* (1983), at pp. 142-143 & references therein.

¹⁸ See B. Haller, *supra*, note 16 and references therein.

The Joint Committee of the Council, governed by Statutory Resolution (51) 30, allows for the co-ordination and discussion of questions common to the Committee of Ministers and the Parliamentary Assembly¹⁹. As of 1999 one Joint Committee meeting *per* year is now dedicated to monitoring of compliance with commitments, in addition to the recent institutionalisation of informal exchanges of views between the Chairman of the Committee of Ministers and the Bureau of the Assembly's Monitoring Committee.

In the particular context of the monitoring of obligations and commitments entered into by member States, the Parliamentary Assembly initially adopted a special procedure under Order No. 488 (1993), replaced by Order No. 508 (1995) which in turn has been superseded by Resolution 1115 (1997). These procedures are described in more detail in Part V.

The role of the Secretary General

Finally, a few words about the role of the Secretary General of the Organisation. Under Articles 10 and 37 (b) of the Statute, the Secretary General is responsible to the Committee of Ministers for the work of the Secretariat in serving the Committee and the Parliamentary Assembly. However, under present statutory provisions no mandate with respect to monitoring is conferred on the Secretary General. It follows that, for the Secretary General to have any independent role in the monitoring of obligations of members, this has to be explicitly attributed to him under a Convention or an Agreement or otherwise by resolution of the Committee of Ministers. Such a power was *expressly* provided for in paragraph 1 of the 1994 Committee of Ministers Declaration on Compliance with Commitments (see Part V below).

Also, in its Declaration on the Protection of Journalists in Situations of Conflict and Tension (3 May 1996), the Committee of Ministers "considers in this context that, in urgent cases, the Secretary General could take speedily all appropriate action on receipt of reports on infringements of rights and freedoms of journalists in member States in situations of conflict and tension and calls on the member States to co-operate with the Secretary General in this regard" (paragraph 7 of the Declaration). See also Recommendation No. R (96) 4 of the Committee of Ministers on the same subject, *passim*.

¹⁹ The complementary powers of the Parliamentary Assembly to discuss and make recommendations upon any matter within the aim and scope of the Council of Europe, as well as its relations with the Committee of Ministers, are governed by Articles 19, 22, 23, 24, 29 and 35 of the Statute of the Council of Europe.

Prevention of human rights violations by means of ‘reporting’ is recognised as a useful tool. In this context, specific mention needs to be made of the power of inquiry provided to the Secretary General under the ECHR. Article 52 (previously Article 57) of the European Convention on Human Rights provides the Secretary General with the possibility to request Contracting Parties to furnish an explanation of the manner in which their internal law ensures the effective implementation of the Convention’s provisions (discussed below, in Part IV) ²⁰.

III. Consolidation of the Organisation’s legal *acquis* ²¹

Conventions concluded within the Organisation

Under Article 15 of the Statute, the aims of the Council of Europe are furthered, in particular, by the conclusion of Conventions or Agreements (treaties) and by the adoption by Governments of common policies, a number of which provide for specific monitoring / compliance verification procedures.

The Statute of the Council of Europe contains no provision of a general nature conferring upon the Committee of Ministers or any other organ the task of monitoring the implementation of treaties elaborated within the Council of Europe. This is because treaties elaborated within the framework of the Council of Europe and listed in the European Treaty Series (ETS) are not strictly speaking acts of the Organisation as such ²². The adoption of the text of a Convention and its opening for signature give the treaty an independent life. Only those links with the Council of Europe which are explicitly foreseen by the treaty itself maintain it in the sphere of the Organisation.

²⁰ For a general survey of how violations of human rights can be *prevented* by the use of reporting procedures see V. Dimitrijevic “The monitoring of human rights and the prevention of human rights violations through reporting procedures” in *Monitoring Human Rights in Europe* (A. Bloed, M. Nowak and A. Rosas, eds., 1993), pp. 1-24.

²¹ See D. Simon & others “Rapport sur l’évaluation de l’acquis du Conseil de l’Europe comparé aux contraintes du droit de l’Union Européenne dans la perspective de l’adhésion d’un Etat membre à l’Union Européenne”, Council of Europe doc. Dir/Jur (97) 13, and *Law in Greater Europe*, *supra*, note 16, *passim*, esp. articles by G. de Vel and T. Market and W. Schwimmer. [This part of the paper is based on information contained in doc. Monitor/Inf. (2000)1].

²² The adoption of texts of Conventions requires a two-thirds majority within the Committee of Ministers, as set out in Article 20.d of the Statute: see, in this connection, Statutory Resolutions (51) 30 of 3 May 1951 and (93) 27, of 14 May 1993, adopted by the Committee of Ministers. But see, in this connection, ideas mooted by J. Malenovskiy in *Law in Greater Europe*, *supra*, note 16.

Instead, these matters are primarily governed by general principles of international law and/or by specific provisions contained in the treaties themselves. The vast majority of the 174 treaties elaborated to date within the Council of Europe contain no provision at all about monitoring. Hence, in the absence of particular provisions, parties are responsible *vis-à-vis* one another for the reciprocal implementation of treaty obligations. And difficulties between the parties, when they occur, are resolved without any intervention of the Council of Europe as such ²³.

Nonetheless, steering committees or other committees set up under Article 17 of the Statute are often entrusted with the task of examining the general operation of treaties falling within their competence, even in the absence of specific provisions to this effect in the treaties themselves. In this way, of legal / human rights standards are, in effect, verified by means of ‘preventive’ monitoring procedures within the daily – bread-and-butter – work of the Organisation’s various committees. In other words, through work which is carried out at the intergovernmental level.

Recommendations of the Committee of Ministers

Under Article 15 (b) of the Statute of the Council of Europe, the Committee of Ministers may request the Governments of member States to inform it on the action taken by States with regard to Recommendations and Resolutions addressed to them by the Committee of Ministers ²⁴.

This procedure provides for the possibility of subtle, behind-the-scenes, readjustment and improvement of legal standards in member States. Steering committees and *ad hoc* committees of experts are invited (not often enough, in my view) to select and examine Resolutions and Recommendations on matters falling within their jurisdiction. The way in which the said texts are adopted and implemented at the domestic level are then analysed and possible

²³ An excellent study of this subject is provided by J. Polakiewicz in *Treaty-making in the Council of Europe* (1999, Council of Europe Publishing), esp. chapters 1 to 3 and 8 (follow-up, monitoring and settlement of disputes).

²⁴ Recommendations apply to Governments of member States and are adopted by the Committee of Ministers by the unanimous vote of representatives casting a vote and, of a majority of the representatives entitled to sit on the Committee. For further information consult Council of Europe publication “Methods and Instruments of Co-operation in the Council of Europe”, 1975 and *The Committee of Ministers of the Council of Europe* (by G. de Vel, Council of Europe Press, 1995, pp. 37-38).

problems of implementation are discussed, where deemed appropriate. The Committee of Ministers is subsequently provided with information as to what follow-up action, if any, should be envisaged.

Work at the inter-governmental (committee) level

As explained above, according to Article 17 of the Statute of the Council of Europe, the Committee of Ministers may set up or authorise the setting up of advisory and technical committees for such specific purposes as it may deem desirable. These committees are often established in order to prepare draft conventions, draft recommendations and propose or implement other activities which are of direct relevance and contribute to furthering the aims of the Council of Europe. Normally it is for a “steering committee” to instruct and supervise appropriate committees of experts to which it delegates specific tasks. The terms of reference of a steering committee may be modified or cancelled at any time by the Committee of Ministers; these are usually of a generalised, political nature.

The committees of experts are, in turn, mostly composed of specialists in a certain field of the Council of Europe’s activity. Although the committee members of these subordinate committees are designated by the Governments of member States, they sit, in specific instances, on committees as individual experts of the Council of Europe and are not considered as representatives of their Governments. Hence, constructive, critical analysis of legal/human rights standards – analysed in a comparative context – often leads to a marked improvement of domestic standards.

An overview of monitoring procedures

In an overview such as this one, highlighting the Council of Europe monitoring procedures which contribute to the *prevention* of human rights violations and the consolidation of democratic stability in Europe, it is impossible to treat this subject in an exhaustive manner and refer to each and every procedure which may possibly be classified as ‘monitoring’²⁵. Work is presently being

²⁵ For further references, see Polakiewicz, *supra*, note 23, esp. *bibliography*, at pp. 191-193. Also consult Council of Europe *Intergovernmental Programme of Activities for 2000* and regular *Statutory Reports* submitted by the Secretary General to the Parliamentary Assembly, *passim*; see also Council of Europe Internet Site: www.coe.int

carried out by over twenty steering committees²⁶. An example may be provided for illustrative purposes: the European Committee on Legal Co-operation (CDCJ). As part of its permanent agenda the CDCJ considers the operation of Conventions, Agreements and Recommendations within its sphere of competence. A number of such instruments are selected for discussion at each of the meetings of the CDCJ, and members are asked to provide information on their application and interpretation to facilitate these discussions.

Also, a smaller number of treaties provide for a procedure or set up a machinery with a view to monitoring implementation of the treaty and/or fostering further co-operation between the parties: monitoring may be entrusted to existing bodies²⁷ and/or to newly created bodies. In the latter case, several treaties²⁸ set up “Standing Committees”, whose powers may vary, but usually comprise of general monitoring of treaty norms, proposing amendments/updates of treaties, making recommendations to Parties and using their best endeavours to settle differences between Parties, when need arises.

The reports of these monitoring bodies are usually forwarded to the Committee of Ministers for information, or are transmitted to the Committee of Ministers with specific proposals for action.

Some treaties provide for consultations between the Parties, to be convened at the request of a Party or by the Secretary General at regular intervals. The purpose of these consultations is, in all cases, to examine the application of the treaty, and, usually, to examine the advisability of revising the treaty or extending its provisions²⁹. Conciliation mechanisms are also sometimes foreseen, as are arbitration procedures in case of failure of the conciliation.

²⁶ See, in this context, Annual Intergovernmental Programmes of Activities, *passim*. For an overview, see Polakiewicz, *supra*, note 23.

As concerns working methods, consult Resolution (76) 3 of the Committee of Ministers “On Committee Structures, Terms of Reference and Working Methods”.

²⁷ For example, the European Convention on Social Security (ETS 78, 1972 and Protocol, ETS 154, 1994) and the (not yet in force Revised) European Code of Social Security (ETS 139, 1990) are reviewed by the CDCS; the European Cultural Convention (ETS 18, 1954) is reviewed by the CDCC (education and culture) and CDDS (sport).

²⁸ For example, the European Convention on the Legal Status of Migrant Workers (ETS 93, 1977) and the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (ETS 108, 1981). An outstanding case is the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment of Punishment (ETS 126, 1987), where the Committee which is set up is the very object of the Convention (see below for more details).

²⁹ Examples of such Conventions are: the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (ETS 105, 1980), the European Convention on Insider Trading (ETS 130, 1990 and Protocol, ETS 133, 1990), the European Convention on Certain International Aspects of Bankruptcy (ETS 136, 1990) and others.

Monitoring procedures: a couple of examples

The first example concerns the European Charter for Regional or Minority Languages. This text (ETS, 148, 1992) has been signed by 18 and ratified by 8 member States. It entered into force in 1998. The Charter establishes a system of monitoring, based on reports by a Committee of Experts. These reports may contain proposals for recommendations to be addressed to a State Party by the Committee of Ministers on the implementation of the Charter.

One outstanding feature of this monitoring system is that, besides the information provided by the Governments, any organisations or associations legally established within a State Party can draw the attention of the Committee of Experts to irregular situations concerning the Charter. After verification with the interested Party, the Committee may decide to reflect this information in the report. The publication of the report by the Committee is contingent on a decision to this effect by the Committee of Ministers.

Interestingly enough, both the Framework Convention for the Protection of National Minorities (described below) and the European Charter on Regional or Minority Languages form part of the legal standards upon which the work of the OSCE High Commissioner on National Minorities is often based.

The second legal instrument to which reference can here be made is the European Convention on Transfrontier Television, ratified by 21 member States and signed by 13³⁰. This Convention (ETS 132, 1989) applies Article 10 of the ECHR (freedom of expression and information) to the specific context of transfrontier television services. It guarantees freedom of reception and retransmission.

In case of an alleged violation of the Convention, States Parties try to find a solution themselves and, if they fail to do so, the matter is referred to a Standing Committee which serves as a forum for conciliation.

A Protocol to amend the Convention was adopted in 1998 (although it is not yet in force). It defines a number of new rules, in particular as regards the criteria for determining the Parties' jurisdiction *vis-à-vis* broadcasters, access by the public to events of major importance, advertising, sponsorship and tele-shopping, as well as the abuse of rights conferred by the Convention.

³⁰ For more information consult "Council of Europe Activities in the Media Field", doc. DH-MM(2000)1; the Media Division's Web Site www.humanrights.coe.int/media in which can be consulted the latest Intergovernmental Programme of Activities of the Council of Europe as well as Opinions and Recommendations of the Standing Committee on Transfrontier Television.

The above two examples (selected from a plethora of legal instruments negotiated under the auspices of the Organisation) provide good illustrations of how the Council of Europe carries out important but unspectacular (human rights) monitoring of a principally *preventive* nature. The fact that this work doesn't 'hit the headlines' of newspapers in no way diminishes its utility; the fact that the European Union is also strongly influenced by, and often elaborates its own standards on the basis of the Council of Europe norms – the so-called *acquis juridique* – tends to confirm this assertion.

IV. Core human rights monitoring procedures ³¹

The Commissioner for Human Rights

The post of Commissioner for Human Rights was created on 7 May 1999 by Committee of Ministers Resolution (99)50 ³². The resolution defines the Commissioner for Human Rights as “a non-judicial institution to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe” (Article 1). Elected by the Parliamentary Assembly from a list of candidates drawn up by the Committee of Ministers for a non-renewable six-year term of office, the Commissioner functions “independently and impartially” (Article 2; see also Article 6).

The Commissioner may be regarded as a dynamic link between the Council of Europe's two general statutory organs, the Committee of Ministers and the Parliamentary Assembly, and various institutions at national and international level.

³¹ See, *inter alia*, Council of Europe Internet Sites: www.coe.int; www.echr.coe.int; www.dhdir.coe.int; www.cpt.coe.int and www.ecri.coe.int. For a good, incisive overview, see P. Leuprecht “Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?”, in vol. 8 *Transnational Law and Contemporary Problems* (1998, B. H. Weston and S. Marks (eds.)), Journal of University of Iowa, College of Law, pp. 313-336.

³² Committee of Ministers Resolution (99) 50 on the Council of Europe Commissioner for Human Rights. Mr. Alvaro Gil-Robles took up office on 15 October 1999 and subsequently made a fact-finding visit to the Russian Federation, including the northern Caucasus. The Commissioner submitted a report to the Committee of Ministers (see the Ministers' Deputies decision of 15 December 1999, item 4.6, CM/Del/Dec (99) 692) and to the Parliamentary Assembly (see the Parliamentary Assembly Bureau's declaration of 13 December 1999 on the situation in Chechnya). For more details, consult J. Schokkenbroek's contribution in the proceedings of the Athens colloquy, May 1999, and J. Jaskiernia “Komisarz Praw Człowieka Rady Europy-nowa instytucja międzynarodowej ochrony praw” [“The Council of Europe Commissioner for Human Rights – a new international institution for the protection of rights”], in vol. LIV, *Panstwo i Prawo* (1999), pp. 3-17.

The Commissioner therefore acts principally as a *preventive* mechanism in the human rights field, without prejudice to the range of other supervisory machinery in existence at the Council of Europe. The Commissioner does not, however, possess the mandate to take up individual complaints (Article 1, paragraph 2).

The Commissioner has several types of function, including the promotion of human rights and the provision of advice and assistance to member States when he identifies “possible shortcomings in the law and practice of member States”. The Commissioner promotes “the effective implementation of [human rights] standards by member States and assists them, with their agreement, in their efforts to remedy such shortcomings” (Article 3e). The Commissioner also acts as a watchdog: “whenever the Commissioner deems it appropriate” he may alert the organs of the Council of Europe through reports, opinions and recommendations.

European Convention on Human Rights

By virtue of Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 5, 1950)³³ States Parties undertake to secure for everyone within their jurisdiction the rights and freedoms defined by the Convention. By ratifying the Convention and its protocols, States Parties accept the double commitment resulting from Article 1 – to ensure that their domestic law and practice is compatible with the Convention and to remedy any violation of the rights and freedoms protected by the Convention.

Any State Party may refer to the European Court of Human Rights an alleged breach of the provisions of the Convention and its protocols by another State. This procedure is rarely used. To date, there have been 20 such inter-State applications³⁴. Also individuals may bring applications under Article 34 of

³³ The following account of the system is based on the Convention as amended by Protocol No. 11 (ETS 155, 1994) on 1st November 1998. For a commentary on Protocol No. 11 see vol. 15 *HRLJ* (1994), pp. 81-115 esp. at pp. 82-83 (also in vol. 6 *RUDH* (1994), pp. 81-155 at pp. 82-83) and my studies “A major overhaul of the European Human Rights Convention control mechanism: Protocol No. 11” in vol. VI (1995), Book 2, *Collected Courses of the Academy of European Law* (Florence, 1997), pp. 121-244; “Le Protocole n° 11 à la Convention européenne des Droits de l’Homme: aperçu du processus de négociation” in vol. 69/70 *Boletim de Documentação e Direito Comparado* (1997), pp. 375-445 and “The ECHR: Protocol No. 11. Entry into force and first year of application” in vol. 79/80, *Boletim de Documentação e Direito Comparado* (1999), pp. 220-267.

³⁴ Two applications by Greece v. United Kingdom; Austria v. Italy; four applications by Denmark, Norway, Netherlands and Sweden v. Greece (and one joint application by Denmark, Norway and

the Convention to the (new) Court. In this case, the State undertakes “not to hinder in any way the effective exercise” of the right to individual petition³⁵.

The procedure before the Court develops in two stages: one on admissibility and one on the merits. The judgments are final and binding. The Committee of Ministers supervises that the necessary measures are taken to prevent new violations and to remedy fully the situation of the applicants.

This monitoring system is considered to be the most successful international human rights control mechanism in existence. It would be difficult to deny that the existence of the ECHR and case-law elaborated thereunder has not had a profound effect in preventing many human rights violations³⁶. The system of control of the Convention allows for remedying individual situations and has undoubtedly brought about substantial improvements of the respect for human rights in member States by the adoption of measures of general nature (Article 46), often with repercussions far beyond the case (and State) in question. Nevertheless, the present system has certain shortcomings: it is ill-equipped to deal with serious and/or systematic violations of human rights. Here, the system’s capacity to deal with major violations depends very much on the initiative of the Committee of Ministers and (the possibility of) joint action of all the constituent parts of the Council of Europe³⁷.

Under Article 52 (formerly Article 57) of the Convention, the Secretary General has the right to request from any State Party an explanation of the manner in which its internal law ensures the effective implementation of the provisions of the Convention and its protocols. The States Parties are under an obligation to furnish the requested explanations. In such instances, the Secretary General acts on his own responsibility and discretion, in the exercise of the powers conferred to him by the Convention independently from any other powers

Sweden against Greece; three applications by Cyprus v. Turkey; two applications by Ireland v. United Kingdom; five applications by Denmark, France, Norway, Netherlands and Sweden v. Turkey and one application by Denmark v. Turkey.

³⁵ For a recent set of statistics see, for example, vol. 20 *HRLJ* (1999) at p. 114.

³⁶ For up-to-date information consult the Court’s Web Site (www.echr.coe.int) and D. Gomien’s *Short Guide to the ECHR* (2nd ed., 1999) *passim* (in which a list of the most important/recent commentaries on the ECHR is provided). See also *Law and Practice of the ECHR and the European Social Charter*, by D. Gomien and L. Zwaak (Council of Europe Publishing, 1996). Many important Recommendations of the Committee of Ministers to Governments of member States and other instruments in the human rights field are not expressly referred to in the present paper. Reference to these may be found in *Collection of Recommendations, Resolutions and Declarations of the Committee of Ministers concerning Human Rights 1988-1995* (Strasbourg, 1996), which complements an earlier volume covering the period 1949-1987.

³⁷ See, in this connection ‘*general observations*’ made in Part I and, in particular, references in footnote 2, *supra*.

which he may have by virtue of the Statute of the Council of Europe; these powers under Article 52 of the Convention are not subject to any outside control or instructions.

To date, the Secretary General has used this prerogative six times ³⁸, requesting every time – except in the most recent 1999 request – from all States Parties information on their legislation concerning certain provisions of the Convention. In two instances, the Secretary General undertook comparative studies of the explanations provided by the Governments with a view to exploring the conclusions although up till now, no follow-up has been given to these studies.

In December 1999, the present Secretary General, Mr W. Schwimmer, used this prerogative under Article 52 for the first time with regard to one member State only, namely the Russian Federation, concerning the situation in Chechnya. Upon receipt of the Russian Federation's reply, he made a supplementary request for information. Subsequent to yet another exchange of letters, the Secretary General indicated that the replies received “cannot be considered as satisfactory ‘explanations’ for the purpose of Article 52 of the Convention”. He therefore transmitted a report containing the said correspondence to the Committee of Ministers and the Parliamentary Assembly “for any action they might consider appropriate in the circumstances”, adding that he had “requested a team of recognised experts in international human rights law to analyse in greater depth [the said exchange of correspondence] in the light of the obligations incumbent on a High Contracting Party which is the recipient of a request under Article 52 of the Convention” ³⁹.

As concerns the ECHR, two subjects merit particular attention, namely the subtle change in the nature of a rising number of cases which the Strasbourg Court must now be prepared to deal with and that of the substantial enlargement of the European Human Rights Convention's geographical parameters.

³⁸ In 1964, 1970, 1975, 1983, 1988 and, on 13th December 1999, for the sixth time in respect of the Russian Federation. See also footnote 20, *supra*.

A first-rate analysis of Article 52 [formerly Article 57] of the ECHR can be found in P. Mahoney's “Does Article 57 of the ECHR serve any useful purpose?” in *Protecting Human Rights: the European Dimension*. Studies in honour of G. J. Wiarda (F. Matcher & H. Petzold, editors, 1988), pp. 373-393 (a shorter, French-language, version of which can be found in *La Convention européenne des Droits de l'Homme*. Commentaire article par article (L.-E. Pettiti, E. Decaux & P.-H. Imbert, editors, 1995/1999, at pp. 881-891).

³⁹ Citation taken from page 5 of document “Request for explanations concerning the manner in which the Convention is implemented in Chechnya and the risks of violation which may result therefrom. Report by the Secretary General on the use of his powers under Article 52 of the ECHR in respect of the Russian Federation”, SG/Inf (2000)21 of 10th May 2000. (See also Addendum to this document).

There is a marked tendency – over the last few years – for primary facts to be disputed, especially where serious human rights violations are alleged, as illustrated by the number of applications brought against Turkey⁴⁰. This will require the new Court to undertake difficult and expensive fact-finding missions. It is likely that this type of issue may well arise in a number of new States Parties to the Convention. The extent to which this more ‘active’ role of the Court will help prevent (potential) human rights violations is difficult to determine at present.

The substantial geographical enlargement of the Council of Europe, tied principally to the upheavals in Central and Eastern Europe that commenced in 1989, is the other subject which merits separate analysis, especially in the context of enormous efforts undertaken in order to ensure the conformity of States’ law and practice with the Convention’s requirements. As already explained, admission to the Organisation presupposes a commitment, on behalf of candidate States, to join the Convention system and for them to make appropriate adjustments beforehand. Numerous ‘compatibility exercises’ have been and continue to be organised in order to bring domestic law and practice into harmony with the Court’s standards. However, standards in a number of new States Parties to the Convention are below those established by the Convention control organs⁴¹. Thus States “willing and able” (Article 4 of the Organisation’s Statute of 1949) to guarantee rule of law, pluralistic democracy and respect of human rights, and which have made specific undertakings to remedy shortcomings in their constitutional, political and legal orders as part of the membership package need additional assistance beyond the framework of the ECHR control mechanisms. It is in such instances that *political* monitoring mechanisms can come into play.

⁴⁰ Noted by N. Bratza & M. O’Boyle in “The Legacy of the Commission to the New Court under Protocol No. 11” in *The Birth of European Human Rights Law*. Studies in honour of C. A. Norgaard (1998, M. de Salvia & M. E. Villiger, editors), pp. 377-393. See also A. Drzemczewski “Fact-finding as part of effective implementation; the Strasbourg experience” to be published in *Enforcing International Human Rights Law: the Treaty System in the 21st Century* (2000, editor A. Bayefsky).

⁴¹ See footnotes 2, 9 & 13, *supra* (together with, *inter alia*, reports undertaken in the context of accession procedures, conveniently listed in vol. 20 *HRLJ* (1999) at pp. 112-113). As P. Mahoney, the Court’s Deputy Registrar, has rightly pointed out “While it may be possible at the intergovernmental and parliamentary level of the Council of Europe to make concessions to new members on the grounds that they are in a process of transition and on the road to full democracy, it is of vital importance, for the continuing integrity of the Convention system, that the Convention institutions avoid a concessionary approach when applying the principle of universality to cases before them”. This citation is taken from an article Mahoney wrote on the subject of free speech in *EHLR* (1997), pp. 364-379 at page 371, footnote 19.

Another ‘complication’ – as concerns member States from the ex-Soviet Union – has been the adoption of the Commonwealth of Independent States (CIS) Convention on Human Rights in Minsk in 1995 ⁴².

European Social Charter

The European Social Charter (ETS 35, 1961) complements the European Convention of Human Rights in the field of economic and social human rights. It provides a systematic control of the totality of the undertakings accepted by States Parties, at regular intervals (from two to four years depending on the provision). ‘Compatibility exercises’, as concerns conformity with the Charter’s provisions, are carried out *before* the deposit of instruments of ratification.

State Parties undertake to send to the Secretary General, at regular intervals, a report on the application of the provisions of the Charter which they have accepted.

The control procedure itself is implemented in two stages. The European Committee of Social Rights, composed of nine experts elected by the Committee of Ministers and assisted by an International Labour Organisation observer, examines the reports submitted by the Contracting Parties and gives a legal assessment of compliance with the accepted provisions.

A follow-up to this evaluation – based on social, economic and other policy considerations – is then carried out within the Governmental Committee of the Social Charter, in collaboration with social partners. The Governmental Committee indicates ‘situations’ which should, in its view, be the subject of individual recommendations to Contracting Parties. The Committee of Ministers then adopts a Resolution covering the entire supervision cycle, containing individual recommendations to the Contracting Parties concerned and the time limits within which the procedure should be accomplished.

Twenty-four member States are Contracting Parties to the European Social Charter and five to the Revised Social Charter (ETS 163, 1996). A total of 37 member States have signed or ratified these instruments. The number of ratifications are expected to continue to increase significantly in 2000. The provisions of the Charter do not have to be accepted all at once, subject however

⁴² English-language text available in vol. 17. *HRLJ* (1996), pp. 159-164. For analyses of the legal implications for States intending to ratify the ECHR and the CIS Convention on Human Rights, see A. A. Cançado Trindade & J. A. Frowein in vol. 17 *HRLJ* (1996), pp. 164-180 & 181-184 respectively. See also Venice Commission “opinion” in vol. 10 *RUDH* (1998), pp. 469-474. The subject of overlapping human rights guarantees is discussed in *The Monitoring System of Human Rights Treaty Obligations* (E. Klein, editor, 1998), esp. at pp. 147-194.

to the acceptance of a majority of the provisions of the “hard core” and a minimum total of 10 Articles (16 under the Revised Charter), which allows States to extend their acceptance within a certain time-span in accordance with the development of their social and economic situation.

Article 22 of the Charter specifies that the Committee of Ministers can ask States Parties to produce reports on those provisions which they have *not* yet accepted. This procedure permits a periodical recapitulation of the situation in law and in practice as regards non accepted provisions as well as the promotion of their acceptance.

This control procedure was modified in 1991 (ETS 142) and has already been partially implemented following a decision by the Committee of Ministers in December 1991, asking the supervisory bodies to apply it before its entry into force, in so far as the text of the Charter allows. This procedure has now been consolidated in the Revised Social Charter.

The Additional Protocol to the European Social Charter, providing for a system of collective complaints (ETS 158, 1995) came into force on 1 July 1998. So far, the procedure has been accepted by nine States Parties to the Charter or the Revised Charter. Its purpose is to permit collective complaints alleging violations of the Charter to be dealt with as a complement to the current procedure for examining Government reports.

Collective complaints can be submitted by the following: European organisations of employers and trade unions which participate in the work of the Governmental Committee, other international non-governmental organisations with consultative status with the Council of Europe and appearing on a special list drawn up for this purpose by the Governmental Committee, as well as national organisations of employers and trade unions from the Contracting Party concerned. In addition, each State may, in a declaration to the Secretary General, authorise national non-governmental organisations to lodge complaints against it.

Collective complaints are first examined by the European Committee of Social Rights which assesses their admissibility according to certain criteria listed in the Protocol. Following this and after having collected information from the initiator of the complaint, from the State concerned, from the other Contracting Parties to the Charter and from the social partners, the Committee draws up a report to the Committee of Ministers containing its opinion on whether or not the State in question has ensured the satisfactory application of the Charter.

The first collective complaint was submitted in October 1998. The procedure was closed by the adoption of the Committee of Ministers of a

Resolution in December 1999. The European Committee of Social Rights is currently examining several other complaints.

European Convention for the Prevention of Torture ⁴³

By ratifying the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS 126, 1987 and Protocols, ETS 151 and 152, 1993), the States Parties accept to permit visits by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), established by the Convention, to all places within their jurisdiction where persons are deprived of their liberty by a public authority. In fact, the establishment of the Committee with its strong monitoring powers is the very subject of the Convention.

The prerogatives of the CPT include, under Article 8, paragraph 2 (c), of the Convention, the right to interview in private and without restriction persons deprived of their liberty. The Committee has the mission to examine the treatment of persons deprived of their liberty (in prisons, police stations, military barracks, mental hospitals, etc.) with a view to making recommendations, where necessary, to protect such persons from ill-treatment.

The protective mechanism is of a non-judiciary character and rests on two pillars: co-operation between the Committee and the States Parties and confidentiality. The Committee submits to the Committee of Ministers, under Article 12 of the Convention, a yearly general report on its activities.

The CPT is entitled, after each visit, to establish a confidential report which contains its recommendations. By transmitting it to the Party concerned, the Committee initiates a dialogue and co-operation with that State Party, which may decide to take measures to meet the recommendations of the Committee.

According to Article 11, paragraph 2, of the Convention each State Party may decide to lift the confidentiality of the relevant report of the Committee. To date the vast majority of States have made use of this provision, which of course is an important development that permits the informed public to evaluate work accomplished and progress achieved.

Under Article 10, paragraph 2, of the Convention, when a State Party fails to cooperate or refuses to improve the situation in the light of the recommendations of the Committee, the latter may decide by a two-thirds majority of its members and after the Party concerned has had the opportunity to present

⁴³ For a more thorough study consult R. Morgan & D. Evans (eds) *Protecting Prisoners. The Standards of the European Committee for the Prevention of Torture in Context* (1999).

its views, to make a public declaration on the subject. This is clearly an exceptional procedure which, to date, has been adopted twice by the CPT⁴⁴.

By the end of 1999, ten years since the CPT began its activities, the Committee had undertaken a total of 96 visits, namely 67 visits of a periodic nature and 29 *ad hoc* visits⁴⁵.

European Commission against Racism and Intolerance

By signing the Vienna Declaration on 9 October 1993 (referred to above), the member States undertook to combat as energetically as possible racism, xenophobia, antisemitism and intolerance.

A new mechanism (the European Commission against Racism and Intolerance: ECRI) was established in order to review member States' legislation, policies and other measures to combat racism and intolerance and to propose further action at local, national and European level.

The ECRI monitors the situation as regards racism and intolerance in the member States through a "country-by-country approach". This approach involves an in-depth study of the situation in each of the member countries as a prelude to drawing up specific proposals. These are designed to help Governments by suggesting arrangements which may help to solve current problems or to remedy shortcomings observed in their countries.

ECRI's analyses are communicated in the form of draft texts to national liaison officers based in the countries concerned and are the subject of a confidential dialogue with these officers. This process is intended to allow the national authorities to provide ECRI with their observations concerning its analysis of the country in question. After this confidential dialogue, ECRI adopts its final reports and transmits them to the Governments of the member States in question through the Committee of Ministers. The reports are made public two months after their transmission to the Governments in question unless the latter are expressly against making these texts public.

Having completed the first round of its reports in 1998, ECRI is now in the second stage in its country-by-country work. This combines the follow-up (monitoring) of proposals made in the first reports of ECRI, together with a more in-depth analysis of particular issues in each country.

⁴⁴ Public declarations concerning Turkey of 15 December 1992 and 6 December 1996.

⁴⁵ See Annual Reports of the CPT; the 9th Annual Report was published in August 1999, doc. CPT/Inf (99)12. The Convention has been ratified by 40 of the 41 member States i.e., all except Georgia. See also CPT Internet Site, www.cpt.coe.int

The second stage takes place over a four-years period and covers all member States of the Council of Europe, with the aim of producing a minimum of some ten individual country-by-country reports annually. In order to obtain as detailed and clear a picture as possible of the situation as regards racism and intolerance in each country, contact visits are organised for the relevant ECRI rapporteurs before they prepare their reports on each country ⁴⁶.

Framework Convention for the Protection of National Minorities ⁴⁷

This Convention (ETS, 157, 1995), entered into force, after twelve ratifications, on 1 February 1998. As of 1 February 1999, it had been signed by 37 States, of which 24 had also ratified it.

In accordance with Articles 24-26 of the Framework Convention and the Committee of Ministers' Resolution (97) 10, the monitoring of the implementation of the Framework Convention is to be carried out by the Committee of Ministers, assisted by an Advisory Committee of independent experts. The Parties are required to submit a report containing full information on legislative and other measures taken to give effect to the principles of the Framework Convention, within one year of the entry into force. Further reports must be made on a periodical basis (every five years) and whenever the Committee of Ministers so requests. These reports are made public upon their receipt by the Council of Europe.

State reports are first examined by the Advisory Committee, which is composed of 18 ordinary members appointed by the Committee of Ministers. The Advisory Committee – which commenced its work in June 1998 – prepares an opinion on the measures taken by each reporting State. In order to do so, it may request additional information from a State Party, take into account – and solicit, if need be – information from other sources (including individuals, NGOs, etc.) and, in certain instances, hold meetings with government representatives and other interested parties.

Having received the opinion of the Advisory Committee, the Committee of Ministers must adopt conclusions and, where appropriate, recommendations

⁴⁶ For more information, consult Annual Report on ECRI's activities, 1999 and the ECRI Web Site: www.ecri.coe.int

⁴⁷ This overview must be read in conjunction with R. Hofmann's contribution, to be published in the proceedings of the Athens colloquy, May 1999, in which he lays emphasis on the preventive mandate of the control system created by the Framework Convention. See also his article "Minority Rights: Individual or Group Rights? A Comparative View on European Legal Systems" in vol. 40, *German Yearbook of International Law*, 1997 (1998), pp. 356-382.

in respect of the State Party concerned. The conclusions and recommendations of the Committee of Ministers will be made public upon their adoption, including – as a rule – the opinion of the Advisory Committee. The Advisory Committee may be asked by the Committee of Ministers to help monitor follow-up action taken to the latter’s conclusions and recommendations.

Twenty-three reports from States Parties were due on 1 February 1999 (one year after the entry into force). In 2000, the Advisory Committee should receive four additional State reports and one in 2001.

V. Necessity to safeguard standards after the historic changes of 1989

As is already clear from the above, the Organisation’s functions have evolved substantially: its role is no longer limited to the preservation of relatively sophisticated human rights standards and the maintenance of pluralistic democracy, a role which it assumed until the mid-1980’s. With the substantial geographical enlargement of the Council of Europe, subsequent to the upheavals in Central and Eastern Europe that commenced in 1989, long-standing member States (together with their new partners) have given the Organisation a new task, namely that of “democracy-building” principally (but not exclusively) aimed at former communist countries. States “willing and able” (Article 4 of the Organisation’s Statute of 1949) to abide by Council of Europe standards have – rightly or wrongly – been let into the fold on the understanding that they remedy shortcomings in their constitutional, political and legal orders as part of the membership package. This concessionary approach was deemed to constitute “a sound legal and political basis [upon which could be conducted] meaningful admission procedures ... which enabled the organs of the Council of Europe to maintain the credibility of the Organisation without imposing obligations on the new members, which would have made membership impossible for a long time to come”⁴⁸.

Here, reference can again be made to the undertakings by Heads of States and Government at the Vienna (1993) and Strasbourg (1997) Summits. The Vienna summit conference, solemnly reaffirmed that “... accession [to the Organisation] presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy,

⁴⁸ *Per* H. Winkler “Democracy and Human Rights in Europe: A Survey of the Admission Practice of the Council of Europe” in vol. 47, *Austrian Journal of Public International Law* (1995), pp. 147-172 at p.155.

the rule of law and respect for human rights”, with the Second Summit stressing member States’ attachment to the fundamental principles of the Organisation – pluralist democracy, respect for human rights, the rule of law – and their commitment to comply fully with the requirements – and responsibilities – arising from membership.

In their 1997 “Action Plan to strengthen democratic stability in member States” Heads of State and Government specified:

“3. *Compliance with member States’ commitments:* the Heads of State and Government resolve to ensure that the commitments accepted by the member States are effectively honoured, on the basis of a confidential, constructive, non-discriminatory dialogue carried on within the Committee of Ministers and taking into account the monitoring procedures of the Parliamentary Assembly; they reiterate their determination to work together to solve the problems faced by member States and consider that this monitoring process must be supported, where necessary, by practical assistance from the Council of Europe.”

It may be recalled that political monitoring (to consolidate democracy and to prevent human rights violations in the future) commences at the very outset, in other words, when accession to membership of the Council of Europe is contemplated. The procedure formally starts when the Committee of Ministers expresses its intention to invite a State to become a member. The Committee is obliged to seek an opinion of the Parliamentary Assembly before issuing such an invitation (Resolution (51) 30A). The Assembly expresses its views on the candidate State’s ability and willingness to comply with Articles 3 and 4 of the Statute, after having thoroughly analysed the State’s legal and human rights standards. This procedure often takes several years. Although this opinion is not legally binding on the Committee of Ministers, in practice the latter takes account of it; the Assembly’s opinion is referred to in the Committee of Ministers Resolution inviting the candidate State to become a member.

When examining the application for membership, the Assembly (first through its committees and subsequently in plenary) assesses whether the applicant is a European State, whether it is willing and able to comply with the provisions of Article 3 of the Statute, whether it is prepared to sign and ratify the ECHR and, when appropriate, its additional protocols, within a reasonable time, and whether it can be considered to be a “genuine” democracy. In addition, the Assembly may also take into account whether the candidate State is ready to subscribe to certain Council of Europe legal instruments and

to respect the rights of minorities. These specific commitments are freely entered into by the authorities of applicant States upon their accession to the Council of Europe and often involve difficult, long and drawn-out negotiations⁴⁹.

*Commitments of a political nature tied to statutory obligations:
Parliamentary Assembly*

Once States become members of the Organisation, they can be (and often are) “monitored” by the Assembly. These procedures have evolved substantially over the last few years.

In its Order No. 488 (1993), the Parliamentary Assembly instructed its Political Affairs Committee and the Committee on Legal Affairs and Human Rights “to monitor closely the honouring of commitments entered into by the authorities of new member States and to report to the Bureau at regular six-monthly intervals until all undertakings have been honoured”. Also, in its Order No. 485 (1993), the Assembly instructed its Committee on Legal Affairs and Human Rights “to report to it when problems arise on the situation of human rights in member States, including their compliance with judgments by the European Court of Human Rights”.

In Resolution 1031 (1994) the Assembly observed “that all member States of the Council of Europe are required to respect their obligations under the Statute, the ECHR and all other Conventions to which they are Parties. In addition to these obligations, the authorities of certain States which have become members since the adoption in May 1989 of Resolution 917 (1989) on a special guest status with the Parliamentary Assembly freely entered into specific commitments on issues related to the basic principles of the Council of Europe during the examination of their request for membership by the Assembly. The main commitments concerned are explicitly referred to in the relevant opinions adopted by the Assembly.” In the same Resolution the Assembly considered that “persistent failure to honour commitments freely entered into will have consequences [...]. For this purpose, the Assembly could use the relevant provisions of the Council of Europe’s Statute and of its own Rules of Procedure”⁵⁰.

⁴⁹ See B. Haller, *supra* note 16 and references therein.

⁵⁰ For an analysis of this procedure consult H. Klebes & D. Chatzivassiliou, and C. Schneider, *supra*, note 13, *passim*.

See also, in this context, the critical comments of J. Malenovsky “Suivi des engagements des Etats membres du Conseil de l’Europe par son Assemblée parlementaire: une course difficile entre droit et politique”, in vol. XLIII, *Annuaire français de droit international* (1997), pp. 633-656.

Taking into account the Declaration on compliance with commitments accepted by member States of the Council of Europe, adopted by the Committee of Ministers on 10 November 1994 (described below ⁵¹), the Assembly has since then – on two occasions – extended and strengthened its own monitoring procedure. In April 1995, by Order No. 508 (1995) ⁵² on the honouring of obligations and commitments by member States of the Council of Europe, the Assembly instructed its Committee on Legal Affairs and Human Rights (for report) and its Political Affairs Committee (for opinion) to continue monitoring closely the honouring of obligations and commitments in *all* member States concerned. This Order also specified that these committees report directly to the Assembly; in other words, parliamentary debates on monitoring were to be held in *public*.

The above-described procedure under Order No. 508 (1995) was, in turn replaced – as of 25th April 1997 – by a new monitoring mechanism which is now being implemented by an Assembly committee on the honouring of obligations and commitments by [all] member States of the Council of Europe (the Monitoring Committee). This procedure was instituted by Resolution 1115 (1997), adopted by the Assembly on 29th January 1997.

The Monitoring Committee is responsible for verifying the fulfilment of obligations assumed by member States under the terms of the Organisation's Statute, the ECHR and all other Council of Europe Conventions, as well as the honouring of commitments entered into by the authorities of member States upon accession to the Council of Europe (see para's 5, 13 and 14 of the Resolution 1115 (1997)) ⁵³. Paragraph 12 of the Resolution stipulates that "The Assembly may sanction persistent failure to honour obligations and commitments accepted, and/or lack of co-operation in its monitoring process, by adopting a resolution and/or a recommendation or by the non-ratification of the credentials of a national parliamentary delegation at the beginning of its next ordinary

⁵¹ See also doc. Monitor/Inf (20009) 4 rev, available on the Council of Europe's Internet site: <http://www.coe.int/cm>

⁵² Text adopted by the Assembly on 26 April 1995 (12th Sitting). [This order superseded Order No. 488 (1993) and Resolution 1031 (1994)]. [Information concerning the Parliamentary Assembly's monitoring procedure was provided to the author by D. Chatzivassiliou]. Assembly debate on 26 April 1995 (12th Sitting) (see doc. 7277, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr. Columberg; doc. 7292, opinion of the Committee on Relations with European Non-Member Countries, rapporteur: Mr. Seitlinger; and doc. 7294, opinion of the Committee on Rules of Procedure, rapporteur: Lord Finsberg).

⁵³ Text adopted by the Assembly on 29 January 1997 (5th Sitting). This Resolution abrogated Order No. 508.

See also Parliamentary Assembly Resolution 1176 (1998) of 4th November 1998, on the terms of reference of Assembly committees.

session, or by the annulment of ratified credentials in the course of the same ordinary session in accordance with [the relevant rule of its] Rules of Procedure. Should the member State continue not to respect its commitments, the Assembly may address a recommendation to the Committee of Ministers requesting it to take the appropriate action in accordance with Articles 8 and 9 of the Statute of the Council of Europe”. In addition, the new Rules of Procedure of the Assembly, in force as of 24 January 2000, explicitly refer to the “persistent failure to honour obligations and commitments and [to the] lack of co-operation with the Assembly’s monitoring procedure” as “substantial grounds” for which the unratified credentials of a national delegation may be challenged (Rule 8.2). Moreover, as far as the procedure is concerned, a report of the Monitoring Committee is one of the two ways by which the unratified credentials may be challenged (Rule 8.1).

By virtue of Resolution 1115 (1997), the Monitoring Committee is required to report to the Assembly once a year on general developments in monitoring procedures and to submit to it at least once every two years a report on every country monitored. To date, three such Reports have been issued (doc. 8057 of 2nd April 1998, doc. 8359 of 19th March 1999 and doc. 8734 of 4th May 2000).

And what is the present situation concerning the Assembly’s monitoring procedure? In 1997, the Committee presented to the Assembly reports on the Czech Republic and on Lithuania (docs. 7898 & Addendum and 7896 respectively). These reports led to the adoption of Recommendations 1338 (1997) and 1339 (1997) whereby the Assembly closed the monitoring procedure for these States, although dialogue was pursued with the national authorities on certain issues. Annual reports on the progress of the Assembly’s monitoring procedure were presented in 1998 and 1999 (as indicated above), as well as the following country reports: information reports on Russia (doc. 8127), Bulgaria (doc. 8180), Turkey (doc. 8300) and Latvia (doc. 8426). In addition, a report on Slovakia (doc. 8496) led to the adoption, in September 1999, of Recommendation 1419 (1999) and of Resolution 1196 (1999), whereby the Assembly formally closed its monitoring procedure with respect to Slovakia, without prejudice to the maintenance of dialogue with the Slovak authorities on certain issues.

Two reports on Ukraine (docs. 8272 & 8424) which led to the adoption of Resolution 1179 (1999) and of Recommendation 1395 (1999), in January 1999, and of Resolution 1194 (1999) and of Recommendation 1416 (1999), in June 1999 and a report on Croatia (doc. 8353) which led to the adoption of Resolution 1185 (1999) and of Recommendation 1405 (1999), in April 1999, probably merit special mention. In both instances, substantial pressure was exerted on Ukraine

and Croatia to comply with commitments entered into. For example, in Resolution 1179 (1999) the Assembly “considers that the Ukrainian authorities, including the Verkhovna Rada, are responsible to a great extent for the failure to respect the commitments Ukraine entered into when becoming a member of the Council of Europe ...” (paragraph 14) and that “should substantial progress in honouring these commitments not be made [within a given time period], it shall: i) proceed to the annulment of the credentials of the Ukrainian parliamentary delegation ...; ii) recommend that the Committee of Ministers proceed to suspend Ukraine from its right of representation, in conformity with Article 8 of the Statute of the Council of Europe” (paragraph 15) . Similarly, in Recommendation 1405 (1999) the Assembly indicated that it “regrets that little progress had been made by Croatia in honouring commitments and obligations ...” (paragraph 1, viii)⁵⁴.

In January 2000, the Monitoring Committee presented the Assembly with a new report on Bulgaria (doc. 8616) which led to the adoption of Recommendation 1442 (2000) and of Resolution 1211 (2000) which closed the monitoring procedure (with, again, a proviso that dialogue be pursued with the Bulgarian authorities on certain issues).

Presently, nine States are on the Committee’s agenda, namely Albania, Croatia, Georgia, Latvia, Moldova, Russia, “the former Yugoslav Republic of Macedonia”, Turkey and Ukraine. Almost all of these States have in common a number of specific commitments, such as those relating to the judicial system (independence of the judiciary, role of public prosecutors, etc.), prison conditions, freedom of the media and minority rights.

Commitments of a political nature tied to statutory obligations: Committee of Ministers

In its “Declaration on compliance with commitments accepted by member States of the Council of Europe”, adopted by the Committee of Ministers on 10 November 1994, at its 95th Session, the Committee of Ministers decided that it

“1. ... will consider the questions of implementation of commitments concerning the situation of democracy, human rights and the rule of law in any member State which will be referred to it either:

- By member States,
- By the Secretary General, or
- On the basis of a recommendation from the Parliamentary Assembly.

⁵⁴ Full texts of most of the Assembly Recommendations and Resolutions referred to can be found in the *Official Gazette of the Council of Europe* and on the Assembly’s Internet site <http://www.stars.coe.int>

When considering such issues the Committee of Ministers will take account of all relevant information available from different sources such as the Parliamentary Assembly and the CSCE [now OSCE].”

Unlike the Parliamentary Assembly, which undertakes individual scrutiny of States, the principle methodology of the Committee of Ministers monitoring procedure is to examine all forty-one States through the perspective of a chosen “theme”⁵⁵. Also, unlike the Assembly’s procedure which is public, the Committee of Ministers procedure is *confidential*, based principally on persuasion, peer pressure and diplomatic negotiation.

The first stage of the Committee of Ministers’ procedure consists of the preparation of country-by-country “overviews”. At the core of the “overview” are contributions submitted by member States (“national contributions”) on the selected themes in line with an agreed framework of basic issues. These contributions are supplemented by short “*comments*” prepared by the Secretary General’s Monitoring Unit identifying facts which might need to be brought to the Committee of Ministers attention. The “national contributions” are made public, whereas the “*comments*” remain confidential.

The monitoring itself takes place in the strictest of secrecy. There are at least three such meetings per year, each of them scheduled for two days. The information contained in the “overview” is debated and a set of conclusions, in the form of “decisions” by the Committee of Ministers, is agreed upon. In this process the Committee of Ministers has the task of “encouraging member States, through dialogue and co-operation, to take all appropriate steps to conform with the principles of the Statute in the cases under discussion” (paragraph 2 of the 1994 Declaration). “Follow up” activities take a variety of forms including adjustments to intergovernmental work, review of co-operation programmes such as Activities for the Development and Consolidation of Democratic Stability (ADACS) and “specific action” as provided in paragraph 4

⁵⁵ An overview of “the state of play” concerning the six themes retained by the Committee of Ministers can be found in doc. Monitor/Inf (2000) 2, which can also be consulted on the Organisation’s Internet Site, <http://www.coe.int/cm>. The six themes that have been under consideration since the Committee of Ministers’ monitoring procedure began functioning in 1996 are ‘freedom of expression & information’ (see doc. Monitor/Inf (2000)2, Appendix I), ‘functioning & protection of democratic institutions’ (see doc. CM/Monitor(99)16 & four-part doc AS/MON/Inf(2000)01), ‘functioning of the judicial system’ (see doc. CM/Monitor (99)15 rev), ‘local democracy’ (see doc. Monitor/Inf (2000) 2, Appendix IV), ‘capital punishment’ (see doc. CM/Monitor (2000)3) and ‘police and security forces’(see doc. .CM/Monitor (99)11 and Addendum thereto). For a description of how this procedure has evolved see note 10, *supra*, and documents Monitor/Inf (98)2 & Monitor/Inf (2000)4 rev., which can also be consulted on the Organisation’s Internet site.

of the 1994 Declaration ⁵⁶. The approach is thus generally a constructive one, with the Committee of Ministers primarily giving effect to its monitoring through co-operation and assistance activities. And, although based on persuasion and ‘dialogue’, it does not rule out the possibility of a graduated form of “sanctions” (see paragraph 4 of the 1994 Declaration and Article 8 of the Organisation’s Statute).

Congress of Local and Regional Authorities in Europe

This overview of political monitoring procedures merits a few words about the Congress of Local and Regional Authorities in Europe (CLRAE). The CLRAE, which was established in 1994 by Statutory Resolution (94) 3 in 1994, subsequent to the Council of Europe’s first Summit of Heads of State and Government in Vienna in 1993. It constitutes, along with the Parliamentary Assembly, one of the Organisation’s principal consultative bodies.

The Congress, which is composed of locally and regionally elected representatives of member States of the Council of Europe and consists of two Chambers, the Chamber of Local Authorities and the Chamber of Regions, issues resolutions directed at all the municipalities and regions of Europe, as well as opinions and recommendations to the Parliamentary Assembly and the Committee of Ministers ⁵⁷.

The Congress carries out numerous (preventive) monitoring functions. An example of the CLRAE’s monitoring functions is its Resolution 31 (1996) on guiding principles for the action of the Congress when preparing reports on local and regional democracy in member States and applicant States. Paragraph 11 of this Resolution specifies that “[Congress] [a]sks the Bureau to ensure that over a reasonable period of time all member States be the subject

⁵⁶ Paragraph 4 reads:

- “4. The Committee of Ministers, in cases requiring specific action, may decide to:
- Request the Secretary General to make contacts, collect information or furnish advice;
 - Issue an opinion or recommendation;
 - Forward a communication to the Parliamentary Assembly;
 - Take any other decision within its statutory powers”.

This procedure was resorted to for the first time in January 2000 with regard to the theme “democratic institutions”: see Council of Europe, doc. CM/Monitor (2000)2, also issued as AP/MON/Inf.(2000)01.

⁵⁷ For further details concerning the competence and functioning of the CLRAE, consult Statutory Resolution (94) 3 relating to the setting-up of the Congress of Local and Regional Authorities in Europe (adopted by the Committee of Ministers on 14 January 1994 at the 506th meeting of the Ministers’ Deputies).

of a detailed report on local and regional democracy, even where no express request is made by a Party recognised in point 8 above”⁵⁸.

In addition, the CLRAE carries out political control of commitments entered into by States upon ratification of the European Charter of Local Self-Government (ETS 122, 1985). This is done in two ways; by means of *ex officio* monitoring (article-by-article of the Charter and, if appropriate, country by country) and monitoring upon request (following requests received by local authorities or their associations).

VI. An interim assessment

Rather than provide a summary of what has been discussed above, this “interim assessment” will limit itself only to two observations of a general nature, one concerning the notion of “monitoring” generally and the other a critical overview of practice and perspectives for the future.

“Monitoring” undertaken by the Council of Europe

The word “monitoring” is not defined, either in the Organisation’s Statute of 1949 or in any of the principal legal instruments which have set up so-called “monitoring procedures”. So what does this word actually mean? The Shorter Oxford English Dictionary defines a “monitor” as “[o]ne who (or that which) admonishes another as to his conduct”, with the term’s historical origins probably being traceable to the monitory lizard found in Africa, Asia and Australia, known for its faculty of warning persons of the approach of any venomous animal by, for example, hissing or whistling when in the vicinity of crocodiles. Another, much less flattering, but journalistically amusing, definition was provided by Miles Kingsley in *The Independent* (London) newspaper, on 17th February 1998: “*Monitor*: A verb meaning, To ignore, to do nothing about, to treat with apathy, as in ‘We are monitoring the situation on a 24-hour basis’.”

⁵⁸ Point 8 of the Resolution refers to a number of ‘parties’, including the Committee of Ministers, the Parliamentary Assembly and the Working Party responsible for monitoring the implementation of the European Charter of Local Self-Government.

“Local democracy” was the fourth theme considered by the Committee of Ministers in its own confidential monitoring procedure. A stock-taking of progress achieved (on the basis of decisions taken on this subject back in October 1998) is to be undertaken in 2001: see Appendix IV of doc. Monitor/Inf (2000) 2, *supra* note 55.

A more serious attempt at defining “monitoring” – in the context of potential human rights violations – is the following: “Monitoring ... means ... a sustained (that is, repeated, at regular intervals), standardised (that is, systematic) effort to gather data from a variety of sources on a set of occurrences involving human rights violations and/or warning indicators pointing to the probable occurrence of such violations in many cases and places (countries and territories) ... The monitoring should in the end result in a capacity to make policy recommendations on the basis of accurate early warning enabling prevention or at least mitigation of the predicted outcome by some kind of humanitarian intervention”⁵⁹. This may be an appropriate working definition for NGOs, but it doesn’t fit in neatly into Council of Europe context, in that the latter probably encompasses two distinct forms of “monitoring”. I will try to explain what I mean.

Express reference to Council of Europe “monitoring” procedures can be found in the recent Report of the Committee of Wise Persons transmitted to the Committee of Ministers in November 1998. Under the sub-title *Monitoring the compliance of member states with their commitments*, the Wise Persons wrote:

“In addition to the “monitoring” par excellence undertaken in the proceedings before the European Court of Human Rights, an important task of the Council of Europe is to ensure that every member respects the values and the important system of norms and standards developed by the Organisation over the years and embodied in some 170 conventions and a great number of recommendations. This requires both efficient and effective mechanisms of monitoring and control, and the reinforcement of the programmes of co-operation and technical assistance.” (paragraph. 69)⁶⁰.

In other words, a distinction is made between, on the one hand, “monitoring” carried out by the European Court of Human Rights (and other independent bodies, such as the CPT and the newly appointed Human Rights Commissioner?) and, on the other hand, “monitoring” carried out by political bodies, such as the

⁵⁹ Per A. P. Schmid & A. J. Jongman “Introduction” in *Monitoring Human Rights Violations* (A. P. Schmid and A. J. Jongman, editors, 1992) at p. 3.

⁶⁰ *Building Greater Europe without dividing lines. Report of the Committee of Wise Persons to the Committee of Ministers* (under the Chairmanship of Mário Soares), November 1998 (also available on the Council of Europe’s Internet Site: www.coe.int/cm/indexes/rep.0.htm), doc. CM(98)178 of 20.10.98.

Committee of Ministers and the Parliamentary Assembly. The latter's "monitoring" must be understood within the context of "compliance with commitments", "[political?] obligations entered into" and "undertakings". Somewhere in between are "legal obligations" entered into which must, presumably, stand up to scrutiny before the political monitoring bodies, in situations where no independent supervisory/verification procedure exists.

When trying to understand "monitoring" carried out by the Committee of Ministers – especially as concerns the *prevention* of human rights violations – two, if not more, procedures must be distinguished. The first relates to the Committee of Ministers quasi-judicial functions under the ECHR, namely "monitoring" carried out within the context of Article 46, paragraph 2, of the ECHR⁶¹. One could also argue that other 'core' human rights mechanisms should likewise be classified under this rubric. The second type of "monitoring", exemplified by the 1994 Declaration on Compliance with Commitments, provides for the subtle use of two inter-related and yet distinct procedures. It provides not only a forum in which States may be 'persuaded' to take corrective measures on the basis of behind-the-scenes political peer pressure and diplomatic negotiation, but it also provides a legal basis upon which there now exists a permanent inter-governmental procedure (after the Parliamentary procedure set up the year before) for monitoring of member States' "commitments" that is linked directly to adjustments in the Organisation's intergovernmental co-operation, ADACS and assistance activities.

As concerns the Parliamentary Assembly:

- "i) The purpose of monitoring is to help ensure that all countries build upon, and stay within, a common legal and political framework of the rule of law, of parliamentary democracy, and human rights protection according to the standards of the Council of Europe;
- ii) The opening of a monitoring procedure – in respect either of a limited number or wide range of issues – has, as such, no implications for the status of any country as a member of the Council of Europe;

⁶¹ See P.-H. Imbert "L'exécution des arrêts de la Cour européenne des droits de l'homme et des décisions du Comité des Ministres" in *Le nouveau système de protection prévu par la CEDH à la lumière du Protocole n° 11* (seminar organised by the Italian Court of Cassation, Rome, 4th June 1999) and other academic studies referred to in note 36 *supra*.

- iii) Monitoring is the expression of the Assembly's political will to ensure that:
- No unnecessary strains are placed on the European Court of Human Rights;
 - Commitments entered into upon accession to the Council of Europe are met;
 - The principles of pluralistic democracy are respected;
 - A crisis of state authority does not put basic human rights at risk”⁶².

The way in which this monitoring mechanism helps *prevent* or solves potentially difficult human rights problems is self evident. The Assembly monitoring proceedings are by and large publicly conducted, country-specific and based on visits by two co-rapporteurs of different political conviction. The procedure is based on close co-operation with national parliamentary delegations, as well as confidential discussions with States' national authorities (including the opposition and other interested parties). Reports issued often identify shortcomings, establish priorities and include proposals to redirect Council of Europe co-operation and assistance programmes, when need for this arises. The Monitoring Committee holds its meetings *in camera*, whereas debate on the final version of a Report is always held in public during Assembly plenary meetings⁶³.

If any conclusion can be made on the subject of “monitoring” in the context of the present paper, it is this: “Monitoring is an indispensable element in any human rights strategy. Systematic, reliable, and focused information is the starting point for a clear understanding of the nature, extent, and location of the problems which exist and for the identification of possible solutions. It is also a necessary element in any strategy to garner the support of civil society and the community at large for measures to promote and protect the human rights of vulnerable groups”⁶⁴. This ties in neatly with what an old Chinese proverb says: the whole

⁶² Parliamentary Assembly document. Quotation taken from D. Huber's book, *supra*, note 4, at page 171. See also the 1997-1998 [First Activity] Progress Report of the Assembly's Monitoring Committee: “Monitoring is understood as a process of seeking solutions to specific problems rather than a process of confrontation” (doc. 8057 of 2nd April 1998), at p. 9.

⁶³ Those who harbour doubts as to the utility of such procedures would do well to consult R. Bindig & T. Kleinsorge “Monitoring the compliance of member States with obligations and commitments: The case of Estonia” in *Law in Greater Europe*, *supra*, note 16, pp. 102-130.

⁶⁴ *Per* P. Alston and J. H. H. Weiler. Introductory remarks in *The EU and Human Rights* (ed. P. Alston, 1999), at p. 55. In this introductory chapter of the book the authors go on to suggest

year's harvest depends on the spring time when the seeds are sown. Simply put, *prevention* is better than cure.

Practice and perspectives for the future

The Council of Europe is presently living a difficult period of its history, having been asked to contribute to “democratic stability” in Europe, without the economic or military clout that other organisations in the region possess⁶⁵. As was recently observed in *The Economist*, on 27th November 1999: “To be fair to the Council [of Europe], it works hard to help its new members to understand their responsibilities. Many of its efforts go ‘hardly noticed by the majority of the European public’, laments Mr Schwimmer [the Organisation’s Secretary General]. Every month it runs roughly 100 workshops, conferences and study visits across Central and Eastern Europe on topics such as press freedom, education and legal reform, as part of its permanent programme for the ‘development and consolidation of democratic stability’.” It possesses a number of highly sophisticated human rights mechanisms, whose standards must be maintained, independently of the fact that the process of transition to full democracy in certain new member States may necessitate concessions. Thus, the Organisation must absorb, into these human rights mechanisms, new member States, whose “[l]egal standards ... often fall far below those required by the [European Human Rights] Convention control organs”⁶⁶.

The present situation is compounded by the fact that within the capitals of the 41 member States of this Organisation – encompassing inter-governmental, parliamentary and (quasi-) judicial mechanisms – it is sometimes difficult to

that there is a “principal need [...] to produce an annual survey of human rights within the EU which would be factual, objective, and designed to facilitate informed policy-making”, adding that such monitoring would be distinct from policy-making, policy implementation and enforcement.

⁶⁵ See, e.g., *The Challenges of a Greater Europe. The Council of Europe and democratic stability* (1996), *passim* and D. Huber’s book, *A Decade which made History. The Council of Europe 1989 – 1999* (1999).

⁶⁶ Citation taken from H. Suchocka’s General Report from the proceedings of a European regional colloquy held at the Council of Europe in Strasbourg on 2-4 September 1998: *In our hands. The effectiveness of human rights protection 50 years after the Universal Declaration* (1998), pp. 161-178 at p. 176. The proceedings were also published in French. Mrs H. Suchocka is Poland’s Minister of Justice.

In her General Report Suchocka quotes Professor Sudre’s finding (see footnote 9 *supra*) in which Sudre states that “... il est clair que nombre de nouveaux Etats membres sont incapables de respecter l’engagement fondamental inscrit dans l’article 3 du Statut du Conseil. L’abaissement des standards du Conseil de l’Europe est manifeste et la ratification de la Convention EDH par les nouveaux Etats semble relever de l’alibi ...” (at p. 175).

identify the existence of a clearly defined role for the Council of Europe within the new so-called *European architecture*. How should the Council of Europe's work be assessed and compared with that of other institutions with a substantially overlapping membership, be it the European Union or the OSCE. The fact that the Council of Europe's work encompasses a plethora of diverse and yet often very important activities might explain, in part, why – comparatively speaking – rather limited resources are put at the disposal of the Organisation.

It is obviously inappropriate for a staff member of the Council of Europe directly involved in a confidential “monitoring procedure” to attempt a stock-taking of the Organisation's achievements or to comment on political decisions taken by member States. That being said, it is probably instructive to reflect upon what two former senior officials of the Organisation have written on these and related subjects. In his paper “Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?”, published in 1998, Peter Leuprecht has written that “intellectual honesty requires acknowledging that some of the countries admitted in recent years [into the Council of Europe] clearly did not comply with the statutory requirements at the time of accession”, adding that “it is at the pre-accession stage that the Council of Europe's representatives have the most leverage and can press for the reforms needed to bring the applicant country into line with the Council's standards”⁶⁷. The views of the Parliamentary Assembly's former Clerk, Heinrich Klebes, are also worth citing in this respect: “Avec le slogan ‘intégration, pas exclusion’, les conditions d'admission au Conseil de l'Europe ont *de facto* changé. L'élargissement vers l'Est – trop rapide mais politiquement inévitable – a modifié le caractère de l'Organisation. De ‘club des démocraties’, elle s'est développée en ‘école de démocratie’”⁶⁸.

⁶⁷ See *supra* note 9 at page 328. He has written that it “is indisputable that the Council of Europe has lowered its standards for admission in recent years”, citing specifically Romania's accession in 1993, that of the Russian Federation in 1996 and Croatia in 1996 (see pp. 329-332), adding that “serious monitoring is essential if the basic values and standards of the Council of Europe are not to be further diluted” (at p. 333). Professor Leuprecht is presently Dean of McGill Law School, in Canada, having held, *inter alia*, the functions of, respectively, Director of Human Rights and Deputy Secretary General for a number of years within the Council of Europe.

⁶⁸ H. Klebes “Le Conseil de l'Europe survivra-t-il à son élargissement?” in *Le Droit des Organisations Internationales. Recueil d'études à la mémoire de Jacques Schwob* (eds. J.-F. Flauss & P. Wachsmann, 1997), pp. 175-202 at p. 200. He then goes on to explain “Notons en passant que l'influence de l'Union Européenne, un bloc de 15 Etats parmi les [41] Etats membres du Conseil de l'Europe, n'a pas non plus été négligeable. Ainsi, à plusieurs reprises, le Conseil de l'Union a pris position en faveur de l'entrée de la Russie au Conseil de l'Europe – sans faire état du fait que pour la Russie, comme pour d'autres candidats, il n'y a pas de perspectives d'adhésion à l'Union Européenne dans un avenir prévisible: il s'agissait d'ancrer la Russie dans une organisation européenne

Whether or not one shares the views expressed by Leuprecht or Klebes, one thing is certain:

“[For the Council of Europe] it is no longer simply a question of enabling member States to remain democratic, but rather of assisting several of them to become democratic. Monitoring activities, more necessary than ever, should be accompanied by support and back-up activities. There should be as much – if not more – emphasis on prevention and education as on condemnation. Even more than the law and institutions, society as a whole requires action and help in changing mentalities”⁶⁹.

A postscript

As the moral guardian of human rights standards in Europe, those who work in the Organisation (whether within its Secretariat, in one of its statutory bodies or within one of its core human right monitoring institutions) could do no better than reflect upon what Pastor Martin Niemöller has said:

*First they came for the Jews
and I did not speak out –
because I was not a Jew.*

... En ce sens, le Conseil de l'Europe est un moyen et non une fin, et les observateurs critiques se demandent dans quelle mesure les gouvernements, guidés par des considérations politiques 'supérieures' se souciaient de la sauvegarde du Conseil de l'Europe en tant que communauté de valeurs”.

See also, in a similar vein, *The Economist* of 5th December 1998, A Survey of Human Rights Law, esp at pp. 7-8: “It remains to be seen whether the European Convention system can help Eastern Europe establish as firm a rule of law and respect for human rights as in Western Europe. It will be a stern test ... For those [such as Poland, the Czech Republic and Hungary], the prospect of joining the EU before too long is an added, crucial, incentive. But it is difficult to imagine the Strasbourg court exercising much influence on the chaos in Russia in the near future. (...) There are severe limits to what any international human-rights regime – monitoring, self-reporting on compliance with treaties, or judicial – can achieve on its own ... A government determined to crush opposition is unlikely to heed panels of experts, monitors or distant judges”.

⁶⁹ Per P.-H. Imbert “Towards a European system of Human Rights protection”, English translation (in doc. AS/Jur/DH (1998) I of the Assembly’s Committee on Legal Affairs & Human Rights) of Imbert’s article “Pour un système européen de protection des droits de l’homme” in *Mélanges en hommage à L. E. Pettiti* (G. Flécheau, editor, 1998), pp. 449-464.

*Then they came for the communists
and I did not speak out –
because I was not a communist.*

*Then they came for the trade-unionists
and I did not speak out –
because I was not a trade-unionist.*

*Then they came for me –
and there was no-one left to speak out for me ⁷⁰.*

⁷⁰ Quotation taken from *The Human Rights Handbook. A Practical Guide to Monitoring Human Rights* (K. English & A. Stapleton, 1995), at p. 14.

The Human Rights Council is already the subject of major public interest and controversy. The Council has been criticized for having dropped some of the protection strategies of the former commission and this book aims to present a balanced view of the council, outlining its current role, acknowledging where it has made positive contributions, highlighting the deficiencies, and identifying options for improving the body's future work. And how does it address the quest for justice in the face of gross violations of human rights? What does it see as the place of human rights in conflict prevention, peacemaking and peacekeeping? And how does it address the quest for justice in the face of gross violations of human rights? 46 The Council of Europe Commissioner for Human Rights Thomas Hammarberg and John Dalhuisen. 515. 47 The Monitoring Procedure of the Council of Europe's Parliamentary Assembly Jan Kleijssen. 523. 48 The Pilot Judgment Procedure of the European Court of Human Rights David Thór Björgvinsson. 529. 49 Monitoring against discrimination and Xenophobia The European Commission against Racism and Intolerance ECRI Lauri Hannikainen. 541. The Organization for Cooperation and Security in Europe. 547. 50 Monitoring the Human dimension of the OSCE Arie Bloed. 549. The Human Rights Chamber and Its Contribution to the Establishment of Rule of Law in Postwar Bosnia and Herzegovina Ekkehard Strauss. 687. The Future. In the Council of Europe, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the European Committee of Social Rights have specific mandates to monitor implementation of the treaties that address these specific issues- torture and degrading treatment and economic and social rights. The European Union allows individuals and groups to submit communications to the European Commission and the European Parliament about specific incidents of human rights violations and non-compliance with European Union Law. The European Court of Human Rights, which can redress violations of individual human rights, is currently backlogged, and the process can be very slow and time-consuming.