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THE COUNCIL OF EUROPE'S MONITORING MECHANISMS AND THEIR RELATION TO EASTERN EUROPEAN MEMBER STATES' NONCOMPLIANCE

Vessela V. Stoyanova*

I. INTRODUCTION

We shall never build a better Europe if we cannot dream of a better Europe.¹

Vaclav Havel, President of the Czech Republic

Following the collapse of communism in Eastern Europe, the Council of Europe ("Council of Europe" or "Council")² opened its doors to most of the countries situated in Eastern Europe. While these states have been quite eager to obtain membership and thus join the ranks of their Western European counterparts, they have experienced substantial problems meeting the obligations that membership in the Council entails.³ Although much has been said about the bearing of internal conditions specific to each individual state on whether that state fulfills its commitments,⁴ little attention has been devoted to the practices of the Council of Europe itself and the aggravating effect some of these practices have

* Editor-in-Chief, Santa Clara Law Review, Volume 45; J.D. Candidate, Santa Clara University School of Law; B.A. International Relations, Stanford University.

1. Vaclav Havel, Address to the Council of Europe in Strasbourg, France (May 10, 1990), transcript available at http://old.hrad.cz/president/Havel/speeches/1990/1005_uk.html (last visited Apr. 16, 2005).

2. See *infra* Part II.A; see generally A. H. ROBERTSON, THE COUNCIL OF EUROPE: ITS STRUCTURE, FUNCTIONS AND ACHIEVEMENTS (2nd ed. 1961) (providing a detailed overview of the Council of Europe).

3. See *infra* Part II.B.1, II.C.

4. See *infra* Part II.C.

on the Eastern European countries' violation of their membership obligations.

This comment concedes that a myriad of factors exist that contribute to a state's noncompliance and a large portion of those factors originate within the violating state itself. Instead, this comment focuses on identifying factors not originating within the violating state that play a role in the problem of noncompliance and then proposes ways to address their negative impact.

Part II of this comment provides a brief introduction to how the Council of Europe operates.⁵ It commences with an overview of the Council's workings,⁶ followed by a closer examination of the organization's monitoring mechanisms.⁷ The latter examination includes a glimpse at what gives rise to the need to monitor the Eastern European states,⁸ a description of the legal and political monitoring and the respective organs that conduct it, and the several different kinds of monitoring that states undergo.⁹ Part II also presents the example of one Eastern European country as an illustration of the problem of noncompliance with the Council's rules.¹⁰

Part III of this comment identifies why an examination of the Council's monitoring mechanisms needs to be made because of Eastern European states' noncompliance with the Council's norms.¹¹ Part IV explores the idea that the structure and practices of the Council of Europe are partially responsible for the observed phenomenon of noncompliance by examining in turn the implications of the lack of true participation by the Eastern European countries in the making of Council rules,¹² and the mixed messages the Council of Europe sends to the Eastern European states by virtue of the duplication of its procedures¹³ and the application of double standards.¹⁴ Finally, Part V outlines some steps the Council may consider undertaking to address the problem of noncom-

5. *See infra* Part II.A.

6. *See infra* Part II.A.

7. *See infra* Part II.B.

8. *See infra* Part II.B.1-2.

9. *See infra* Part II.B.2.

10. *See infra* Part II.C.

11. *See infra* Part III.

12. *See infra* Part IV.A.

13. *See infra* Part IV.B.1.

14. *See infra* Part IV.B.2.

pliance.¹⁵

II. BACKGROUND

In the course of the last few decades, it has become fashionable to speak about Europe as a unified entity on its way to a structural unit resembling the United States.¹⁶ The vision of a unified Europe, however, is anything but new, although it has enjoyed new prominence in the wake of World War II.¹⁷ History abounds with past examples of failed attempts to give flesh to this vision. From the Roman Empire epoch, Napoleon's reign, and most recently with Hitler's aspirations for dominion over the continent, there are numerous examples attesting to the power of the captivating, though highly elusive, notion of "One Europe."¹⁸

In response to the devastation brought about by World War II, the vision of a unified Europe was resurrected with a new meaning.¹⁹ This time, it was cast in the light of cooperation and interdependency aimed at preventing future conflicts.²⁰ The notion that interdependency was the key to lasting peace was a recurrent theme in the creation of the Council of Europe, the European Coal and Steel Community, the European Economic Community, and the European Union.²¹ The "United States of Europe," as Winston Churchill

15. See *infra* Part V.

16. See, e.g., JERZY JASKIERNIA, *THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE*, 17-18 (Information Office of the Council of Europe, Warsaw trans., 2003). One of the concepts considered at the time for organizing post-World War II European order was as a "federation modelled [sic] on the United States which would require relinquishing some of the state sovereignty of its member states in favour of the federation." *Id.* at 23.

17. See, e.g., Peter Leuprecht, *Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 313, 313-14 (1998).

18. See *Evropeiskata ideya ot Cezar do Hitler [The European Idea from Caesar to Hitler]*, BANKER (Bulgaria), Jan. 17, 2004, at 19 (translated by author) (on file with author). The article also quotes French writer Victor Hugo, chairman of the Congress of Friends of Peace in Paris, in 1849 addressing an appeal to create the United States of Europe: "[t]he day will come when you, France, you, Russia, you, Italy, you, Germany, all of you, European nations, without losing your glorious individualities, will unite yourselves into something much greater." *Id.*; see also JASKIERNIA, *supra* note 16, at 17.

19. See Leuprecht, *supra* note 17, at 313-14.

20. See *id.* See generally PAUL B. STEPHAN ET AL., *THE LAW AND ECONOMICS OF THE EUROPEAN UNION* 1-14 (LexisNexis 2003).

21. See Interview with L.J. Sharpe, Fellow Emeritus in Politics, Nuffield College, University of Oxford, in Oxford, England (Nov. 2000) (on file with au-

called it shortly after the war,²² suddenly appeared to be a highly tangible concept.²³

A. *The Council of Europe at a Glance*

Founded in 1949, the Council of Europe was the first European organization established after World War II.²⁴ Today, this intergovernmental organization is comprised of forty-six countries, including twenty-one from Central and Eastern Europe that have acceded following the collapse of the Iron Curtain.²⁵ The Council of Europe's activities are shaped by the commitment to the "three pillars," or the fundamental values on which the organization rests: pluralistic democracy, respect for human rights, and the rule of law.²⁶ Its goals include standardizing member countries' legal practices and promoting "awareness of a European identity based

thor).

22. Winston Churchill, Address in Zurich, Switzerland (Sept. 19, 1946), at http://www.coe.int/T/E/Com/About_Coe/DiscoursChurchill.asp (last visited Apr. 16, 2005). See also JASKIERNIA, *supra* note 16, at 18 ("Our steadfast purpose has to be the building and strengthening of the United Nations Organization. As part of this world-wide structure and under its auspices we have to recreate the European family—it could be the United States of Europe—and the first practical step will be the Council of Europe." (quoting Winston Churchill)). Churchill's address sought the reconciliation of former enemies such as France and Germany through establishment of common European structures. See Churchill, *supra*; see also JASKIERNIA, *supra* note 16, at 22 (quoting Winston Churchill, Opening Address to the European Congress in The Hague, the Netherlands on May 8-10, 1948, laying out the concept of a Council of Europe and reiterating the notion of a united Europe).

23. See Leuprecht, *supra* note 17, at 313-14.

24. *Id.* at 313.

25. See Council of Europe, *The Council of Europe's Member States*, at http://www.coe.int/T/e/com/about_coe/member_states/default.asp (last modified Oct. 2004). Five other states (the Holy See (commonly known as Vatican City), the United States, Canada, Japan, and Mexico) have observer status in the Council of Europe. See COUNCIL OF EUR., *THE COUNCIL OF EUROPE: 800 MILLION EUROPEANS 7* (Council of Eur. Pub. Relations Div. ed., 2001). Observer status may be granted to any state wishing to cooperate with the Council of Europe and to observe the principles comprising the three pillars of the organization, namely pluralistic democracy, respect for human rights, and the rule of law. These states may send observers to the organization and its committees, but may generally not be represented on the Committee of Ministers or the Parliamentary Assembly. See COMMITTEE OF MINISTERS Res. 93 (26) (1993), at <https://wcd.coe.int/ViewDoc.jsp?id=619879&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679> (last visited Apr. 20, 2005).

26. THE COUNCIL OF EUROPE, *supra* note 25, at 7.

on shared values and cutting across different cultures.”²⁷

In carrying out these objectives, the Council’s initiatives include the conclusion of conventions and agreements²⁸ aimed at bringing national legal practices in conformity with one another and with the principles²⁹ espoused by the Council.³⁰ These multilateral agreements are legal instruments that are binding on the states that ratify them and thus carry the force of law.³¹ They are not statutory acts of the Council, which is not explicitly entrusted with monitoring their implementation; rather, it is the expression of the will of those states that sign and ratify them that gives these instruments legal significance—they attain a life of their own.³² Among the most well-known achievements of the Council are the passage of conventions on a wide variety of issues, including human rights,³³ rights of imprisoned persons,³⁴ rights of na-

27. Council of Europe, *About the Council of Europe*, at http://www.coe.int/T/E/Com/About_COE/ (last modified Jan. 2005).

28. For purposes of this comment, “treaty,” “convention,” and “agreement” will be used interchangeably. For an explanation of the subtle difference between the latter two terms as used in the context of the Council of Europe, see Council of Europe, *About Conventions and Agreements*, at <http://conventions.coe.int/general/v3IntroConvENG.asp> (last visited Apr. 16, 2005) (suggesting that conventions and agreements have in essence the same legal effect, and the only difference is the form in which a state may express its wish to be bound by one or the other).

29. See *infra* note 45 and accompanying text.

30. See THE COUNCIL OF EUROPE, *supra* note 25, at 41.

31. *Id.* See also COUNCIL OF EUR., *Monitoring of Compliance With Commitments Entered Into by Council of Europe Member States: An Overview, CE/OSCE(97)2*, in *METHODOLOGY FOR IMPLEMENTING MECHANISMS FOR MONITORING COMMITMENTS BY MEMBER STATES OF THE COUNCIL OF EUROPE AND THE OSCE* 9, 19 (1997) (“[T]hese [conventions] are governed by general principles of international law and/or by specific provisions contained in the treaties themselves.”).

32. COUNCIL OF EUR., *Monitoring of Compliance With Commitments Entered Into by Council of Europe Member States: An Overview, CE/OSCE(97)2*, in *METHODOLOGY FOR IMPLEMENTING MECHANISMS FOR MONITORING COMMITMENTS BY MEMBER STATES OF THE COUNCIL OF EUROPE AND THE OSCE* 9, 19 (1997). In the absence of specific provisions outlining monitoring of compliance, “parties are responsible vis-à-vis one another for the reciprocal implementation of treaty obligations.” *Id.*

33. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5 (entered into force Sept. 3, 1953) [hereinafter ECHR]; Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Apr. 4, 1997, Europ. T.S. No. 164.

34. See European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, Europ. T.S. No. 126.

tional minorities,³⁵ lawful collection and use of personal data,³⁶ environmental protection,³⁷ and social and economic rights,³⁸ to name a few.

The conventions are supplemented by numerous resolutions and recommendations addressed to the member states, which serve as "guidelines for national legislation or administrative practice" targeted at solving specific problems.³⁹ Unlike the conventions, these resolutions and recommendations are not legally binding and do not carry the force of law under general principles of international law.⁴⁰ However, the Council itself monitors compliance with them and may use its internal mechanisms to ensure the states' compliance with the resolutions and recommendations.⁴¹

Membership in the Council of Europe entails numerous obligations. These obligations are grounded in the Statute of the Council of Europe,⁴² the European Convention on Human Rights,⁴³ other conventions to which the states are parties,⁴⁴ and in a series of "principles, rules, standards and values" that have been elaborated on over the past fifty-plus years within the Council of Europe with respect to the three fundamental pillars.⁴⁵ Member states undertake the obligation

35. *See* Framework Convention for the Protection of National Minorities, Feb. 1, 1995, Europ. T.S. No. 157.

36. *See* Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Jan. 28, 1981, Europ. T.S. No. 108.

37. *See, e.g.*, Convention on the Protection of Environment Through Criminal Law, Nov. 4, 1998, Europ. T.S. No. 172.

38. *See* European Social Charter, Oct. 18, 1961, Europ. T.S. No. 35.

39. *See* THE COUNCIL OF EUROPE, *supra* note 25, at 41.

40. *See* COUNCIL OF EUR., *Council of Europe Monitoring Mechanisms: General Introduction, CE/OSCE(97)4*, in *METHODOLOGY FOR IMPLEMENTING MECHANISMS FOR MONITORING COMMITMENTS BY MEMBER STATES OF THE COUNCIL OF EUROPE AND THE OSCE* 51, 52 (1997).

41. Possible sanctions for violating states include suspension of their membership and even expulsion from the Council. *See* Statute of the Council of Europe, May 5, 1949, Europ. T.S. No. 1, ch. II, art. 8.

42. *See id.*

43. ECHR, *supra* note 33.

44. There are 198 international treaties sponsored by the Council of Europe. *See* Council of Europe at <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG> (last visited Apr. 16, 2005).

45. COUNCIL OF EUR., *Monitoring of Compliance With Commitments Entered Into by Council of Europe Member States: An Overview, CE/OSCE(97)2*, in *METHODOLOGY FOR IMPLEMENTING MECHANISMS FOR MONITORING COMMITMENTS BY MEMBER STATES OF THE COUNCIL OF EUROPE AND THE OSCE* 9, 11(1997). The pillars are "democratic pluralism, human rights and the rule of

not only to formally accede to the Council's conventions through signature and ratification, but to in fact bring their legal systems in line with the set of standards promulgated in those conventions, resolutions, and other instruments.⁴⁶

The Council of Europe must be distinguished from the European Union ("EU"), which currently has twenty-five members⁴⁷ and is scheduled to undergo further enlargement in 2007.⁴⁸ No country has ever joined the EU without first obtaining membership in the Council of Europe.⁴⁹ In that sense, the Council of Europe has occasionally been referred to as the "antechamber" leading to EU membership.⁵⁰ Membership in the EU includes numerous advantages that are particularly enticing to Eastern European states, including economic growth, political stability, and increased security.⁵¹

law." *Id.*

46. *See id.*

47. The most recent entrants in the EU are the ten countries that acceded to the organization on May 1, 2004: Cyprus, Czech Republic, Slovenia, Poland, Hungary, Slovakia, Lithuania, Latvia, Estonia, and Malta. European Union, *The Member States*, at <http://www.eurunion.org/states/home.htm> (last visited May 15, 2005).

48. Two additional countries, Bulgaria and Romania, have completed their entry negotiations and are scheduled to accede to the organization in 2007. European Union, *Enlargement*, at <http://www.eurunion.org/legislat/agd2000/agd2000.htm>. In addition, Turkey and Croatia have commenced the negotiation process. European Union, *The Member States*, at <http://www.eurunion.org/states/home.htm> (last visited May 15, 2005).

49. THE COUNCIL OF EUROPE, *supra* note 25, at 7. For a list of the current twenty-five members of the European Union, see http://europa.eu.int/comm/enlargement/index_en.html (last visited Aug. 13 2005).

50. Interview with Marin Raykov, Ambassador of the Republic of Bulgaria to France, in Paris, France (Jan. 6, 2004) (on file with author). *See also* PETER M. R. STIRK, *A HISTORY OF EUROPEAN INTEGRATION SINCE 1914* at 260-61 (1996). For the Eastern European states in the post-Cold War environment, "entry into the Council of Europe . . . proved comparatively easy." *Id.* at 245. Since human rights play a seminal role in the Council's activities, the organization was in position to act as a "gatekeeper" for integration with the West. Admission to the Council of Europe in turn was contingent on successful demonstration of the applicants' "democratic credentials." *Id.* at 260.

51. *See, e.g., Europe's Magnetic Attraction: A Survey of European Enlargement*, THE ECONOMIST, May 19, 2001, at 8. For a discussion of some of the benefits and challenges of the process of European integration, see generally QUO VADIS EUROPE? (Horst Siebert ed., Tubingen, Germany: Institut fur Weltwirtschaft an der Universitat Kiel, 1997).

B. The Monitoring Mechanisms of the Council of Europe

1. The Need for Monitoring

Following the collapse of the Iron Curtain and of the communist empire in Eastern Europe, the Council underwent a “spectacular enlargement,”⁵² doubling its membership from twenty-three states in 1989 to forty-six as of this writing.⁵³ The fragility of the continent’s post-communist democracies has necessitated that the Council act as a “political anchor and human rights watchdog” for these countries.⁵⁴ As a result, many of the organization’s mechanisms are aimed at assisting the former Soviet Bloc states in “carrying out and consolidating political, legal and constitutional reform in parallel with economic reform.”⁵⁵ As it became apparent that it would take a “considerable while” before these countries meet the requirements for membership, a compromise was reached to allow the Council to admit them yet maintain its credibility as a champion of human rights and political freedoms.⁵⁶ This would be accomplished by extending a “credit of confidence” whereby upon accession to the Council, candidate states formally commit to adopt legislation and ratify Council-sponsored instruments, and by, simultaneously, initiating a monitoring procedure to ensure that these commitments are implemented into the states’ legal systems and are observed.⁵⁷ The Council has established various mechanisms, whose goal is to monitor whether member states, and particularly the more recently acceded countries of Eastern Europe, meet the

52. Leuprecht, *supra* note 17, at 326.

53. Council of Europe, *supra* note 27.

54. *Id.*

55. *Id.* As one progress report prepared by the Council’s institutions states, Full compliance with the principles, standards, conventions and commitments accepted by some of the states being monitored appears to be a difficult goal to achieve in practice. It requires major reforms in the states concerned: revision of the Constitution, new legislation, government, administrative and judicial reforms, changes of habits and mentalities, etc. In any event, it cannot be achieved without the assistance and expertise, particularly in legal matters, of the Council of Europe.

Progress Report of the Assembly’s Monitoring Procedure, EUR. PARL. DOC. (9198) (2001).

56. Jan Kleijssen, *The Monitoring Procedure of the Council of Europe’s Parliamentary Assembly*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS 623, 624 (Gudmundur Alfredsson et al. eds., 2001).

57. *Id.* at 624-25.

obligations that arise from membership in the organization.⁵⁸

2. *Monitoring Mechanisms*

a. *Legal Mechanisms for Monitoring*

The Council of Europe's legal mechanisms for monitoring stem from the multilateral international conventions and agreements entered into by the member states: of these, the most prominent instrument is the European Convention on Human Rights ["ECHR"], which establishes a system of judicial control.⁵⁹ Enforcement of the ECHR is conducted by the European Court of Human Rights on the basis of individuals' and states' claims for violations in individual cases.⁶⁰ The judicial decisions are binding on the member states.⁶¹ Ratification of the ECHR is a compulsory condition for membership in the Council of Europe, and as such is the most compelling framework for legal monitoring.⁶²

In addition to the ECHR, numerous conventions establish mechanisms for legal enforcement of some of the fundamental principles espoused by the Council.⁶³ Ratification of

58. "Monitoring" in the context of human rights violations has been defined as a:

[S]ustained (that is, repeated, at regular intervals), standardised (that is, systematic) effort to gather data from a variety of sources on a set 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

Andrew Drzemczewski, Head, Secretary General's Monitoring Unit, Council of Europe, International Colloquy, *The Prevention of Human Rights Violations, Monitoring Mechanisms of the Council of Europe*, Athens, Greece (May 24-25, 2004) (quoting A. P. SCHMID & A. J. JOGMAN, *Introduction, in MONITORING HUMAN RIGHTS VIOLATIONS 3* (A. P. Schmid & A. J. Jogman eds., 1992)).

59. COUNCIL OF EUR., *Council of Europe Monitoring Mechanisms: General Introduction, CE/OSCE(97)4*, in *METHODOLOGY FOR IMPLEMENTING MECHANISMS FOR MONITORING COMMITMENTS BY MEMBER STATES OF THE COUNCIL OF EUROPE AND THE OSCE 51, 52-53* (1997).

60. *See id.* at 53.

61. *Id.*

62. *Id.* "This scheme is compulsory because member States accept the political obligation to ratify the Convention and to submit to the Convention's control mechanism." *Id.*

63. These 195-plus instruments include the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, Europ. T.S. No. 126, the European Social Charter, Oct. 18, 1961, Europ. T.S. No. 35, the Framework Convention for the Protection of National

these treaties by the member states is optional; however, once ratified, they are implemented into the respective state's local body of law.⁶⁴

b. Political Mechanisms for Monitoring: An Overlap

The multifaceted monitoring conducted by the Council of Europe also includes political (i.e., lacking judicial oversight) mechanisms that fall under the aegis of two of the organization's three main bodies.⁶⁵ The Council of Europe's Statute⁶⁶ institutes the intergovernmental organization's two primary organs: the Committee of Ministers,⁶⁷ or the decision-making body, and the Parliamentary Assembly⁶⁸ ("Assembly"), or the deliberative body.⁶⁹ Under the Statute, ensuring the fulfillment of the parties' statutory obligations rests on both the Committee of Ministers and the Assembly.⁷⁰ In the event that a country seriously violates its obligations, the Statute gives the Committee of Ministers power to suspend or even termi-

Minorities, Feb. 1, 1995, Europ. T.S. No. 157, and thirteen penal law conventions. See *supra* note 45 and accompanying text for a discussion of fundamental principles.

64. See THE COUNCIL OF EUROPE, *supra* note 25, at 12.

65. See COUNCIL OF EUR., *Council of Europe Monitoring Mechanisms: General Introduction, CE/OSCE(97)4*, in METHODOLOGY FOR IMPLEMENTING MECHANISMS FOR MONITORING COMMITMENTS BY MEMBER STATES OF THE COUNCIL OF EUROPE AND THE OSCE 51, 53-55 (1997). This comment focuses on the monitoring conducted by the Committee of Ministers and the Parliamentary Assembly. In addition to that, the organization's third main organ, the Congress of Local and Regional Authorities of Europe, also conducts monitoring targeting the practice of local and regional autonomy in Europe. See *id.*

66. Statute of the Council of Europe, *supra* note 41.

67. THE COUNCIL OF EUROPE, *supra* note 25, at 8. The Committee of Ministers comprises the Foreign Affairs Ministers of all the member states. "In collaboration with the Parliamentary Assembly, it is the guardian of the Council's fundamental values, and monitors member states' compliance with their undertakings." *Id.* at 11.

68. *Id.* at 15. The Parliamentary Assembly is composed of 301 representatives (and the same number of substitutes) appointed by the forty-six member states' national parliaments. The composition reflects the political forces within the member states. *Id.*

69. Statute of the Council of Europe, *supra* note 41, at ch. III, art. 10.

70. See *id.* at ch. II, art. 3 ("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, and collaborate sincerely and effectively in the realisation of the aim of the Council. . . ."). See also *id.* at arts. 4, 5 (providing that one of the preconditions of membership in the international organization is the ability and willingness to fulfill the provisions of Article 3).

nate the concerned state's membership in the organization.⁷¹ The Committee of Ministers' power to administer such sanctions has been interpreted to also give rise to the power to monitor the obligations of the member states as they are derived from the Statute.⁷²

1. The Assembly's Monitoring Procedures

The Assembly's power to monitor is derived from the Committee of Ministers' statutory obligation to consult with the Assembly regarding decisions to grant, suspend, or terminate membership status.⁷³ The Assembly, in its turn, delegates this power to the committees comprised of its individual representatives.⁷⁴ Prior to 1997, there was no single committee entrusted exclusively with the duty of monitoring.⁷⁵ Instead, the Assembly's monitoring was administered by the committee within whose substantive area of expertise a particular type of activity fell.⁷⁶ For example, under this system, alleged human rights violations by a particular member state would be examined by the Legal Affairs and Human Rights

71. *See id.* at arts. 8, 9.

72. COUNCIL OF EUR., *Monitoring of Compliance with Commitments Entered into by Council of Europe Member States: An Overview, CE/OSCE(97)2*, in METHODOLOGY FOR IMPLEMENTING MECHANISMS FOR MONITORING COMMITMENTS BY MEMBER STATES OF THE COUNCIL OF EUROPE AND THE OSCE 9, 12 (1997).

73. *See* Statute of the Council of Europe, *supra* note 41, at ch. V, art. 23. *See also* COMM. OF MIN. STAT. RES. (51) 30 (providing for the opinion of the Assembly being sought and obtained with regard to such actions).

74. EUR. PARL. ASS., Res. No. 1202 (1999). Prior to 1997, these committees were: Political Affairs; Legal Affairs and Human Rights; Economic Affairs and Development; Social, Health and Family Affairs; Migration, Refugees and Population; Culture, Science and Education; Environment, Agriculture and Local and Regional Affairs; Equal Opportunities for Women and Men; Rules of Procedure and Immunities; and, Monitoring. *See* THE COUNCIL OF EUROPE, *supra* note 25, at 16.

75. *See* COUNCIL OF EUR., *Note Prepared by the Office of the Clerk of the Parliamentary Assembly of the Council of Europe on the Parliamentary Assembly's Mechanism for the Monitoring of Compliance With Obligations and Commitments*, in METHODOLOGY FOR IMPLEMENTING MECHANISMS FOR MONITORING COMMITMENTS BY MEMBER STATES OF THE COUNCIL OF EUROPE AND THE OSCE 91, 95 (1997).

76. *See* EUR. PARL. ASS. ORDER (488) (June 29, 1993) (instructing the Political Affairs Committee and the Committee on Legal Affairs and Human Rights to "monitor closely the honoring of commitments" of new member states). *See also* EUR. PARL. ASS. ORDER (508) (Apr. 26, 1995) (instituting in greater detail the monitoring scope and procedure).

Committee.⁷⁷

Both the increased scale and the long-term nature of monitoring in the wake of the post-communist states' accession necessitated the creation of a more established monitoring mechanism.⁷⁸ Thus, a permanent committee entrusted exclusively with the responsibility for conducting monitoring was created.⁷⁹ In April 1997, the Assembly established the Committee on the Honouring⁸⁰ of Obligations and Commitments by Member States of the Council of Europe, commonly referred to as the "Monitoring Committee" ("Committee").⁸¹ In Resolution 1115, the Assembly delegated to this Committee the duty of administering monitoring.⁸² The Committee's composition reflects a desire to achieve political and regional balance in the representation: the eighty-three members are nominated by the political groups of the Assembly, with geographical factors being taken into account.⁸³ Resolution 1115 also sets forth the conditions for initiation of a monitoring procedure on a member state.⁸⁴ Finally, it establishes the

77. See Interview with Maria Spassova, Member of Bulgarian Parliament and representative of Bulgaria at the Parliamentary Assembly of the Council of Europe, in Sofia, Bulgaria (Dec. 17, 2003) (transcript on file with author). Mrs. Spassova has been a member of the Council of Europe's Monitoring Committee from its inception in 1997, as well as a member of the Bulgarian Parliament's Foreign Policy Committee and Committee on European Integration.

78. Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), COUNCIL OF EUR., Doc. AS/Mon/Inf (2002)03.

79. *Id.*

80. The Council of Europe has adopted British English spelling. This comment preserves the original spelling of words when used in names of entities and in direct quotations as they appear in the Council's official documents. Therefore, where applicable, this comment uses British English spelling, and not American English spelling.

81. See EUR. PARL. ASS. RES. (1115) (Jan. 29, 1997).

82. Resolution 1115 promulgated the purpose of the Committee as responsible for verifying the fulfillment of the obligations assumed by the member states under the terms of the Council of Europe Statute, the European Convention on Human Rights and all other Council of Europe conventions to which they are parties, as well as the honouring of the commitments entered into by the authorities of member states upon their accession to the Council of Europe.

Id. Resolution 1115 initially established the Committee to consist of sixty-five members. *Id.* Subsequently, in 2005, the number of seats was increased to eighty-three. Progress of the Assembly's Monitoring Procedure, EUR. PARL. ASS. DOC. (10541) (2005).

83. *Id.*

84. See *id.* Resolution 1115 calls for two co-rapporteurs to be appointed for each state for which a monitoring procedure is initiated. The mechanism of se-

formal consequences of a state's persistent failure to honor the obligations and commitments its membership entails.⁸⁵ Naturally, there are also other, less tangible ramifications of such a failure, such as, for example, the stigma associated with a state's noncompliance.⁸⁶

There are numerous substantive areas covered under the monitoring procedure.⁸⁷ In the realm of pluralist democracy, the Committee monitors: separation of powers; elections;⁸⁸ political parties;⁸⁹ parliament;⁹⁰ special powers in emergency situations;⁹¹ and local and regional self-government.⁹² Similarly, in the areas of rule of law and human rights, monitoring is conducted on: the status of domestic law vis-à-vis international human rights treaties; effectiveness of constitutional and/or legal guarantees for human rights; judicial system;⁹³ police attitudes; prison conditions and administration; respect for private and family life;⁹⁴ property rights;⁹⁵ freedom of worship and conscience; freedom of expression, notably of the media; freedom of association; freedom of movement and assembly; equality between men and women; minorities;⁹⁶ policies to combat racism, anti-Semitism, and xenophobia.⁹⁷ Finally, the Committee monitors the settlement of internal and international disputes by peaceful means.⁹⁸

lection of these co-rapporteurs (one from each main party, various geographic regions represented) is aimed at ensuring political and regional balance. *Id.*

85. *See id.* The sanctions include non-ratification or annulment of credentials. *See also* Statute of the Council of Europe, *supra* note 41, at ch. II, arts. 8, 9 (providing for suspension or termination of membership).

86. *See* Interview with Maria Spassova, *supra* note 77.

87. *See* THE MONITORING PROCEDURE FOLLOWED BY THE PARLIAMENTARY ASSEMBLY app. 2 (1999).

88. *See id.* (including electoral law, access to media, assessment of whether free, general, secret and fair).

89. *See id.* (including status, conditions for setting up, fiscal rules, and party finances).

90. *See id.* (including pluralist composition, minority representation, control over the executive, immunities, rights and duties of the opposition).

91. *Id.* (referring to use and control).

92. *Id.*

93. THE MONITORING PROCEDURE FOLLOWED BY THE PARLIAMENTARY ASSEMBLY *supra* note 87 (including independence of the judiciary, access to justice, criminal justice, role and status of public prosecutors, status of attorneys).

94. *See id.* (emphasizing data protection).

95. *Id.* (including restitution and fair compensation).

96. *Id.* (including non-discrimination, citizenship legislation, status and education in minority languages).

97. *Id.*

98. *Id.*

2. The Committee of Ministers' Monitoring Procedures

The Committee of Ministers performs its own quasi-judicial monitoring activity, distinct from that of the Assembly's Monitoring Committee.⁹⁹ The Committee of Ministers' monitoring is referred to as "thematic monitoring."¹⁰⁰ It is conducted in ten areas, or "themes," namely: freedom of expression and information, functioning and protection of democratic institutions, functioning of the judicial system, local democracy, capital punishment, police and security forces, effectiveness of judicial remedies, non-discrimination, freedom of conscience and religion, and gender equality.¹⁰¹ The Committee of Ministers has justified this extensive proliferation of monitoring activity conducted by both organs as having been made imperative by the Council of Europe's enlargement and inclusion of the new Eastern European democracies.¹⁰²

3. Post-1990 Proliferation of Monitoring: Monitoring Procedures and Post-Monitoring Dialogues

Currently, the Committee monitors ten countries.¹⁰³ In addition, there are five countries¹⁰⁴ with which the Council of Europe is engaged in a so-called "post-monitoring dialogue"—a less stringent form of monitoring.¹⁰⁵ The philosophy behind

99. See discussion *supra* Part II.B.2.

100. COUNCIL OF EUR. MONITORING DEPARTMENT OF THE DIRECTORATE OF STRATEGIC PLANNING, *Compliance With Member States' Commitments: The Committee of Ministers' Monitoring Procedures*, Doc. Monitor/Inf (2003)4, (Sept. 29, 2003).

101. See *id.*

102. See *Reply From the Comm. of Ministers to Recommendation 1536*, Doc. 9312 (2002) (stating that "[a]long with the enlargement of the Organisation, there appeared to be an increased need for monitoring by both the Assembly and the Committee of Ministers").

103. As of April 18, 2005, these ten states are: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Moldova, Monaco, Russia, Serbia and Montenegro, and Ukraine. Progress of the Assembly's Monitoring Procedure, EUR. PARL. ASS. DOC. (10541) app. B (2005).

104. These five states are: Bulgaria, Latvia, Slovakia, Turkey, and the Former Yugoslav Republic of Macedonia. See *id.*

105. Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), COUNCIL OF EUR., Doc. AS/Mon/Inf (2002)03 (describing this post-monitoring mechanism as enabling the Committee to "maintain a constructive dialogue with the member states in respect of which the monitoring procedure has been concluded but

the post-monitoring mechanism is similar to that of the monitoring procedure in that it seeks to ensure the affected state's compliance.¹⁰⁶ It differs, however, in that it "no longer reflects a 'guardianship' role, but responds to a request for assistance."¹⁰⁷ Also, unlike the official monitoring procedure, which was promulgated through Resolution 1115 at the time of the Committee's inception, the procedure and methodology for conducting post-monitoring dialogue was not formally integrated into the Assembly Rules of Procedure until 2005.¹⁰⁸

There are numerous examples that illustrate the types of noncompliance with the Council's standards occurring in the fragile Eastern European democracies that have triggered the proliferation of monitoring procedures.¹⁰⁹ While the specifics of Eastern states' noncompliance are not the focus of this comment, it is useful to take one of these nations, Bulgaria, as a representative example to demonstrate the issues involved.¹¹⁰

C. An Example of One Eastern European State's Noncompliance: The Case of Bulgaria

Bulgaria, which acceded to the Council in 1992,¹¹¹ was

which, while on the right track, have not yet reached the stage where they fully honour all their obligations and commitments.")

106. Progress Report of the Assembly's Monitoring Procedure, EUR. PARL. ASS. DOC. (9651) (2003).

107. *Id.*

108. Progress Report of the Assembly's Monitoring Procedure, EUR. PARL. ASS. DOC. (10250) (2004); EUR. PARL. ASS. RES. (1431) (Mar. 18, 2005) (promulgating provisions for conducting post-monitoring dialogue). See also Initiation of a monitoring procedure and post-monitoring dialogue, EUR. PARL. ASS. DOC. (10475) (2005).

109. See *id.* See also Progress Report of the Assembly's Monitoring Procedure, EUR. PARL. ASS. DOC. (9198) (2001). See, e.g., the commitments referred to in EUR. PARL. ASS. RES. (1123) (Apr. 24, 1997) and EUR. PARL. ASS. RES. (1326) (Apr. 24, 1997) for Romania; EUR. PARL. ASS. RES. (1211) (Jan. 26, 2000) and EUR. PARL. ASS. RES. (1442) (Jan. 26, 2000) for Bulgaria; EUR. PARL. ASS. RES. (1196) (Sept. 21, 1999) and EUR. PARL. ASS. RES. (1419) (Sept. 21, 1999) for Slovakia; EUR. PARL. ASS. RES. (1185) (Apr. 29, 1999), EUR. PARL. ASS. RES. (1405) (Oct. 7, 1999), EUR. PARL. ASS. RES. (1223) (Sept. 26, 2000) and EUR. PARL. ASS. RES. (1973) (2000) for Croatia; EUR. PARL. ASS. RES. (1236) (Jan. 23, 2001) and EUR. PARL. ASS. RES. (1490) (Jan. 23, 2001) for Latvia; EUR. PARL. ASS. RES. (1338) (Sept. 22, 1997) for the Czech Republic; EUR. PARL. ASS. RES. (1213) (Apr. 5, 2000) and EUR. PARL. ASS. RES. (1453) (Apr. 25, 2000) for the Former Yugoslav Republic of Macedonia.

110. A detailed examination of the situation of each Eastern European state would be too cumbersome for the purposes of this comment.

111. THE COUNCIL OF EUROPE, *supra* note 25, at 7.

monitored closely for its divergence from Council standards in a number of areas as identified below.¹¹² The Assembly initiated formal monitoring of Bulgaria's commitments in 1994.¹¹³ In assessing the extent of compliance of the country with its obligations, the Monitoring Committee's co-rapporteurs¹¹⁴ for Bulgaria in 1998 identified the following major areas of concern: (1) inadequacy of legislative and judicial reforms; (2) absence of legislation safeguarding the independence of the media from interference and censorship by the government; (3) police violence against members of religious communities; (4) problems with the independence of the judiciary in theory and in practice; (5) political purges; and (6) legislation related to election and appointment of local self-government.¹¹⁵ In 1999, monitoring of Bulgaria was conducted in the areas of: local and regional self-government, judicial system, police attitudes, prison conditions and administration, respect for private and family life, freedom of worship and conscience, freedom of expression, and minorities.¹¹⁶

By 2000, Bulgaria was deemed to have made sufficient progress to justify termination of the formal monitoring procedure. However, there still remained an array of issues that continued to present concern to the Council, namely: the training of judges, magistrates, police officers and prison staff; the fight against corruption; minority rights;¹¹⁷ and the

112. See Interview with Maria Spassova, *supra* note 77.

113. See EUR. PARL. ASS. ORDER (488) (June 29, 1993); EUR. PARL. ASS. ORDER (508) (Apr. 26, 1995). After the Assembly set up the Monitoring Committee in 1997, the latter took over all existing monitoring procedures. See discussion *supra* Part II.B.2.a.

114. An official monitoring procedure with respect to a given country entails the appointment of two members of the Monitoring Committee as co-rapporteurs in assessing that country's honoring its obligations. See EUR. PARL. ASS. RES. (1115) (Jan. 29, 1997).

115. See Progress Report of the Assembly's Monitoring Procedure, EUR. PARL. ASS. DOC. (8180) (1998).

116. See THE MONITORING PROCEDURE FOLLOWED BY THE PARLIAMENTARY ASSEMBLY, *supra* note 87.

117. See Interview with Maria Spassova, *supra* note 77 (referring to the not yet publicly released document entitled *Comments of the UdDF—DSB Parliamentary group on the Memorandum of the Chairman of the Monitoring Commission at the Parliamentary Assembly of the Council of Europe concerning the post-monitoring dialogue with Bulgaria*). Among the examples of minority rights violations are the placement of Roma children of mainstream mental ability in special schools for children with mental disabilities and two-track adoption systems. See *id.*

implementation of the European Social Charter¹¹⁸ and the European Charter of Local Self-Government¹¹⁹ into the local body of law.¹²⁰ While the monitoring procedure with respect to Bulgaria was officially closed, these remaining issues of concern led the Council to adopt a new practice: the so-called post-monitoring dialogue.¹²¹

The precedent for this practice was set in dealing with the case of Bulgaria, but it has subsequently been applied to five other states upon their release from official monitoring.¹²² In a sense, this mechanism acts as a probation period, where the country is subject to less stringent monitoring, but where a reopening of the official monitoring procedures could take place if a relapse in the offending behavior occurs.¹²³ A state that satisfactorily complies with the conditions identified by the Council in the post-monitoring dialogue is then released from this mechanism as well.¹²⁴

III. IDENTIFICATION OF THE LEGAL PROBLEM

Eastern European states often fall short of meeting the legal obligations they have undertaken as part of their acces-

118. European Social Charter, *supra* note 38. While the European Convention on Human Rights focuses on guaranteeing civil and political human rights, the European Social Charter guarantees social and economic human rights. http://www.coe.int/T/E/Human_Rights/Esc/1_General_Presentation (last visited May 15, 2005).

119. European Charter of Local Self-Government, Oct. 15, 1985, Europ. T.S. No. 122 (establishing principles of local self-government for the signatory nations).

120. See EUR. PARL. ASS. REC. (1442) (Jan. 26, 2000). In addition, a new item of concern sprang from the passage of a new Bulgarian law on religion, the so-called "Confessions Act 2002." The concerns stem from the statute's ambiguous drafting and the slightly preferential treatment it affords to the country's predominant religion, Eastern Orthodox Christianity. See EUR. PARL. ASS. RES. (1390) (Sept. 7, 2004).

121. Progress Report of the Assembly's Monitoring Procedure, EUR. PARL. ASS. DOC. (9651) (2003).

122. Interview with Maria Spassova, *supra* note 77.

123. See EUR. PARL. ASS. RES. (1211) (Jan. 26, 2000). The Assembly undertakes to

pursue its dialogue with the Bulgarian authorities on the issues referred to [earlier], or any other issues arising from the obligations of Bulgaria as a member state of the Council of Europe, with a view to reopening procedure in accordance with Resolution 1115 . . . if further clarification or enhanced co-operation should seem desirable. *Id.*

124. So far, Croatia has been the first country to be taken off the post-monitoring dialogue procedure. See Progress of the Assembly's Monitoring Procedure, EUR. PARL. ASS. DOC. (10541) app. B (2005).

sion to the Council of Europe.¹²⁵ Some of these countries have failed to sign and/or ratify various conventions facilitated by the Council.¹²⁶ Others have done so, but only in form, while in practice they have taken few steps towards implementing them into their domestic legal systems.¹²⁷ Such noncompliance impacts the functioning not only of the Council of Europe, but also of the European legal system to the extent that the latter is grounded in norms and instruments derived from the Council's legal and political framework.

It has been widely recognized that the newer member states of the Council of Europe have experienced substantial difficulties in complying with the guidelines and principles derived from their membership in the organization.¹²⁸ This phenomenon is partially attributable to a wide variety of internal issues specific to the individual countries involved, many of which are attributable to the myriad of challenges and obstacles that accompany the transitional period from communism to democracy. These often include the slow pace of the political, legislative, judicial, economic, and social reforms due to the ossified structures and attitudes inherited from the totalitarian era.¹²⁹

For example, matters of fundamental importance to the Council of Europe, such as the protection of human rights and the environment, in communist regimes were treated as "the least important items on the ruling elite's agenda."¹³⁰ The process of changing such attitudes can be difficult and time-consuming. Moreover, while these nations' Western European counterparts had many decades to develop and implement democratic norms and structures, Eastern European countries are expected to do so almost overnight following the

125. See discussion, *supra* Part II.B.2.b.3.

126. See Interview with Maria Spassova, *supra* note 77. For a complete listing, see the list of conventions sponsored by the Council of Europe at <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm> (last visited Apr. 6, 2005).

127. See Interview with Maria Spassova, *supra* note 77.

128. See Honouring of commitments entered into by new member states, EUR. PARL. ASS. DOC. (7037) (1994).

129. *Id.*

130. Interview with Luchezar Toshev, Member of Bulgarian Parliament, in Sofia, Bulgaria (Dec. 18, 2003) (on file with author). Mr. Toshev is also chairman of the Human Rights and Religion Committee and member of the Foreign Policy Committee of the Bulgarian Parliament, as well as representative of Bulgaria at the Parliamentary Assembly of the Council of Europe.

collapse of their communist dictatorship governments.¹³¹

While the aforementioned internal problems help explain the Eastern European states' noncompliance with the norms and regulations discussed, the focus of this analysis is not on them. Instead, this comment examines the inherent characteristics of the Council of Europe's monitoring process itself and advances the notion that they too play a role in the problem of noncompliance.

A combination of factors inherent in the Council of Europe's own procedures and mechanisms exerts an influence on the Eastern European members' difficulties with meeting their commitments and obligations. First, there was a lack of true participation by the Eastern European countries in the creation of the rules that they are obliged to follow: a problem that, unfortunately, cannot be remedied without turning back the clock on history. Second, the Council of Europe has been sending mixed messages to the Eastern European states through structural overlap in its procedures and application of double standards to Western as opposed to Eastern European member states. This latter set of factors, which are more amenable to changes, is where the focus of attention should be turned.

IV. ANALYSIS

A. Lack of Meaningful Participation by Eastern European States in the Establishment of the Council of Europe's Principles and Norms

Ancient Roman wisdom says that a law which is not observed is a bad law.¹³² It is also a widely accepted truth that coming to respect, embrace, and abide by what one perceives as the imposition of a foreign will can be quite challenging.¹³³ In order to comply with a system of rules, one has to participate in its creation, or at least have a true, meaningful oppor-

131. Per the author's personal experience and observations as a native of one such Eastern European country, Bulgaria.

132. *Id.*; see also MARGUERITE YOURCENAR, MEMOIRS OF HADRIAN 115-16 (Farrar, Straus & Company 1951) (1954) ("If too severe, [laws] are broken, and with good reason. If too complicated, human ingenuity finds means to slip easily between the meshes of this trailing but fragile net Any law too often subject to infraction is bad").

133. See Interview with Marin Raykov, *supra* note 50.

tunity to do so.¹³⁴ Else, the rule feels like a virus, which the entity's immune system is innately programmed to fight against.¹³⁵ This applies with equal force to both a sovereign nation and a human being.

The Eastern European states, which did not participate in the drafting and creation of the Council of Europe's rules, feel that the latter are imposed on them. The vast majority of the principles and norms on which the Council of Europe's treaties rest were synthesized during the course of the Cold War, when only the states of Western Europe were members of the Council.¹³⁶ Therefore, only those states had the opportunity to constructively participate in the creation of the principles and norms. The Eastern European countries, by contrast, were not handed the finished product until decades later, following the collapse of the Iron Curtain.¹³⁷ Treaties and conventions were presented to them on a "take-it-or-leave-it" basis.¹³⁸ It is only natural that they would be inclined to reject that which has been imposed on them.

Critics of this argument have pointed out that since membership in the Council of Europe is voluntary, it is up to each state to decide whether it wishes to accede to the organization and become a party to the set of treaties and conven-

134. *See id.*

[T]he future of democracy in Europe lies less in fortifying and perpetuating existing formal institutions and informal practices than in adapting them to a changing context.

Like the Queen of Hearts in the famous novel "Alice in Wonderland", democracy needs to run faster than the world around it in order to remain in place. By keeping the spirit of democracy alive, we create the fundamental conditions for peace, stability and prosperity for 800 million Europeans.

Deputy Secretary General Maud De Boer-Buquicchio, Speech at the Conference on "The Future of Democracy in Europe," in Barcelona, Spain (Nov. 17, 2004), *available*

http://www.coe.int/t/e/integrated_projects/democracy/02_Activities/16_Final_conference/Deputy%20Secretary%20General.asp (last visited May 15, 2005). at

135. *See id.*

136. *See* Leuprecht, *supra* note 17, at 326. He suggests that the Council is increasingly assuming the pan-European dimension that was originally intended for it, but for forty years prevented by Europe's post-World War II ideological division; it now has the chance to promote its basic values and principles in the "other Europe" which, until recently, had been deprived of their enjoyment.

137. *See id.*

138. Interview with Luchezar Toshev, *supra* note 131.

tions sponsored by it.¹³⁹ This manner of analyzing the situation, however, is an oversimplified one because membership in the Council of Europe has been largely perceived as a requisite passage on the way to entering the European Union.¹⁴⁰ It is virtually unthinkable for a country to turn down the opportunity to become a member of the Council. Doing so would have substantially negative ramifications, including ostracism by the community of remaining European states, and, more importantly, cutting off of economic and infrastructural aid—a highly valued commodity for Eastern European states that have found themselves engulfed in the turbulent waters of post-communism.¹⁴¹ For that reason, those countries' governments "have no choice but to bow [their] heads and sign everything [they] are handed, no questions asked."¹⁴²

This absence of bargaining power leads the Eastern European states into signing the European conventions, eager to find approval in the face of their more prominent Western counterparts, resulting in the building of a "façade or Potemkin village of democracy" rather than a "genuinely democratic regime and society."¹⁴³ At the same time, however, although they were quick to commit themselves and seemingly embrace the rules promulgated by the West, the Eastern countries nevertheless fail to deliver on their promises: in that sense, they are untruthful in their declamations to the West.¹⁴⁴

The frequent turnover of governments in formerly communist states and the lack of continuity in the platforms of succeeding administrations also play a role.¹⁴⁵ There is the real concern that commitments undertaken by one political party in power at a given moment may be retracted as soon as

139. See Interview with Caroline Ravaud, Head of the Secretariat in the Committee on the Honouring of the Obligations and Commitments by Member States. Council of Europe, in Paris, France (Jan. 5, 2004) (on file with author).

140. See *supra* Part II.A. See also Leuprecht, *supra* note 17, at 332 (Membership in the Council is regarded as a "key that opens other doors, particularly those of the European Union.")

141. Per author's personal experience and observations as a native of Bulgaria.

142. See Interview with Maria Spassova, *supra* note 77.

143. Leuprecht, *supra* note 17, at 332.

144. See *id.* (suggesting that "some of the leaders of the countries involved do not appear really willing to push through the necessary reforms and to honor their commitments").

145. See Interview with Maria Spassova, *supra* note 77.

another party seizes power.¹⁴⁶ A future administration can therefore easily adopt a contrary position. This gives rise to a monumental double betrayal: on the one hand, the Eastern government has misrepresented its intentions to its Western partners in Strasbourg¹⁴⁷ and Brussels,¹⁴⁸ and there is no real, firm commitment to the norms that are seemingly adopted;¹⁴⁹ on the other hand, the populace itself is being betrayed by its elected representatives.¹⁵⁰

The necessity for a more meaningful representation of the Eastern European states is also supported by the Assembly's finding that the Monitoring Committee, while based on nominations by political groups and thus reflecting a political balance, comes short of representing a regional balance.¹⁵¹ The Assembly has recommended that this principle be taken into account to assure a more fair representation, in particular of the states under scrutiny.¹⁵²

Another negative ramification of the nonparticipation of Eastern countries in the creation of the rules is that they perceive the monitoring mechanism as a punitive procedure because the states being monitored do not fully understand the reasons that stand behind it.¹⁵³ They have not participated in the making of the rules and therefore do not comprehend the objectives.¹⁵⁴ The lack of a defined purpose results in a vacuum being created, and there is a real danger that the internal balance of the system will be undermined.¹⁵⁵

146. *See id.*

147. Location of the Council of Europe's headquarters.

148. Location of the European Union's headquarters.

149. *See* Leuprecht, *supra* note 17, at 331-32. *See also* Interview with Marin Raykov, *supra* note 50; Interview with Caroline Ravaud, *supra* note 140.

150. Interview with Marin Raykov, *supra* note 50.

151. *See* EUR. PARL. ASS. RES. (1260) (Sept. 26, 2001).

152. *Id.*

153. *See* Interview with Marin Raykov, *supra* note 50.

154. *Id.*

155. *Id.* For a discussion of the similar challenges aspiring EU members face in distinguishing between "national interest" and a "pan-European interest," see also Krassimir Nikolov, *Meeting Integration Challenges "Im Krebsgang": From Implementing EU Policies Towards Making Them*, at http://www.becca.org/start_en.php?id=en_Policy_Making (last visited Apr. 30, 2005).

If a state's motivation for joining the EU is based on the perception that such membership presents a confrontation between national and non-national interests, it is in essence

coming into the club in order to protect what is "ours", to say "no" to anyone that wants to deprive us from what is "ours", and, if possible, to

The equilibrium among the nations is crucial, and its disruption would lead to “disintegration of the system.”¹⁵⁶ The latter may happen when the members do not see their functions and duties as having equal weight.¹⁵⁷ France and Germany, for example, being among the more powerful states in the continent, frequently dictate the outcome of various situations that arise.¹⁵⁸ This situation is representative of a “poly-structural system where only a few of the [states] dictate the rules,”¹⁵⁹ and therefore the result is a “Europe based on their norms and criteria.”¹⁶⁰ This leads to a double standard. Moreover, rules that are neither constructed nor enforced with everyone’s participation are naturally perceived as punishment by the more disadvantaged parties.

The Assembly has expressed the opinion that, if its new members are expected to embrace European democratic standards, they must be better acquainted with the existence and nature of these standards.¹⁶¹ The organization’s statement that “[o]nly better informed citizens could be genuine participants in the democratic debate,”¹⁶² however, appears somewhat hypocritical. Critics have pointed out that this type of statement is a disguise for the Western countries’ holding their value systems out as supreme.¹⁶³ As a result, Eastern

take a bigger slice of what is someone else’s. If we apply such logic, little time will pass before we become isolated inside the club, and all ambitions to participate in joint policy making together with the other partners will prove a mirage If we ask ourselves the question “What do we want to GET from the EU?”, we shall achieve little. We should rather have clarity over “what we want to DO together in the EU?”.

Id.

156. Interview with Marin Raykov, *supra* note 50.

157. *Id.*

158. Per the author’s personal observations as a European native.

159. Interview with Marin Raykov, *supra* note 50.

160. Interview with Maria Spassova, *supra* note 77.

161. See EUR. PARL. ASS. REC. (1536) (Sept. 26, 2001).

162. *Id.*

163. See Interview with Maria Spassova, *supra* note 77.

“I shall accept you as an equal, but only if you are actually identical to me.” This is racism. In order to create one Europe, it has to be based on an exchange of values, and there can be no such exchange where one side dictates the rules. Saying “forget your values, from today on only ours are valid” is a *de facto* occupation In a sense, all are made to bow before the gods, but only some are invited inside the shrine This has another problematic ramification: because the “second-class” worshippers come to this shrine not as equals, they have a strong motivation to vandalize it. They do not contribute anything; they take bar-

countries do not fully embrace these values, but merely appear to strive to uphold them, in order to glean economic and other benefits.¹⁶⁴ This is directly linked to the problem of non-compliance with the norms.¹⁶⁵

In addition to its chilling effect on compliance, the non-participation of Eastern states in the creation of the norms contains an additional peril: the absence of responsibility by the Council of Europe in the event the behavior that has been encouraged in a particular Eastern European state actually leads to unforeseen adverse consequences.¹⁶⁶ The monitoring criteria, having been elaborated without the participation of the Eastern members, carry the potential of inadequacy for addressing situations based on circumstances very different from those found in the West.¹⁶⁷ The question Eastern states would logically find themselves asking is: who will assume the responsibility if things take the wrong turn?¹⁶⁸ When an authority bids a state to act in a certain way, it must bear the responsibility for the ramifications: "When the foundations of a law are laid, the material basis for its application is created, which implies that someone must take responsibility for the consequences of its implementation."¹⁶⁹ In light of their unique historical and political contexts, Eastern states need more assistance in the implementation of the laws and assurance that there will be a safety net in case their progress takes an unexpected turn for the worse.

B. The Mixed Messages the Council of Europe Sends to Eastern Countries through Duplication of its Monitoring Procedures and Use of Double Standards

The monitoring mechanisms themselves may also lead to noncompliance.¹⁷⁰ The Assembly considers the reports arising from its monitoring procedure "an invaluable source of refer-

barically. When the principle of distribution is unfair, then all try to grab as much as they can. In these circumstances, the equilibrium is lost.

Id.

164. See Leuprecht, *supra* note 17, at 332.

165. See Interview with Marin Raykov, *supra* note 50.

166. See *id.*

167. See *id.*

168. See *id.*

169. See *id.*

170. See *supra* Part II.B.

ence for the European Union in dealing with the EU membership applications of the countries concerned.”¹⁷¹ However, the Assembly simultaneously has conceded the need for reexamination of the Council of Europe’s purpose by stating, “certain principles laid down in Resolution 1115 (1997)¹⁷² . . . need at present to be restated.”¹⁷³

1. *Duplication of Monitoring Mechanisms*

One part of the problem with monitoring may be traced to overlap in the functions of the Committee of Ministers and the Assembly.¹⁷⁴ The Assembly has admitted that, in its view, monitoring procedures “have expanded rapidly” within the Council of Europe’s framework, which poses a “threat to the visibility, and thus the effectiveness of the work of the Assembly in the field of monitoring.”¹⁷⁵ At issue is the conflict between, on the one hand, the *ad hoc* monitoring of democratic developments in certain countries, as administered by the Committee of Ministers, and, on the other hand, the Assembly’s monitoring procedure as administered by its Monitoring Committee.¹⁷⁶

The Monitoring Committee, in its progress reports to the Assembly, has repeatedly cautioned about the inherent risks of the simultaneous operation of the two mechanisms.¹⁷⁷ In its 2001 report, the Committee denounced the duplication of the two mechanisms, which creates a risk of diverging assessments of whether states have honored their obligations.¹⁷⁸ The overlap also poses the risk of creating confusion among the monitored states as to what criteria they must comply with.¹⁷⁹ In a progress report to the Assembly in 2003, the Monitoring Committee reiterated its warning that the existence of duplicate or competing monitoring procedures carries

171. EUR. PARL. ASS. RES. (1260) (Sept. 26, 2001).

172. EUR. PARL. ASS. RES. (1115) (Jan. 29, 1997) (concerning the establishment of the Monitoring Committee).

173. EUR. PARL. ASS. RES. (1260) (Sept. 26, 2001).

174. *See supra* Part II.B.

175. EUR. PARL. ASS. RES. (1260) (Sept. 26, 2001).

176. *Id.*

177. *See* Progress Report of the Assembly’s Monitoring Procedure, EUR. PARL. ASS. DOC. (9198) (2001); Progress Report of the Assembly’s Monitoring Procedure, EUR. PARL. ASS. DOC. (9651) (2003).

178. Progress Report of the Assembly’s Monitoring Procedure, EUR. PARL. ASS. DOC. (9198) (2001).

179. *Id.*

the risk of confusion and serves neither the credibility nor the visibility of the organization.¹⁸⁰

While the Assembly has unambiguously endorsed these conclusions of its Monitoring Committee,¹⁸¹ the Committee of Ministers' response has been less clear. The latter has attempted to justify the monitoring it conducts with the argument that the Council of Europe's enlargement has resulted in an "increased need for monitoring" by both organs of the organization.¹⁸² This response of the Committee of Ministers has been perceived by Assembly representatives as evasive and "skirting the issue."¹⁸³

Not only has the Monitoring Committee admitted to the problem presented by this duplication, but, in fact, government officials from the Eastern European countries directly affected by the mechanism have noted the confusion to which this procedure subjects them.¹⁸⁴ One member of the Bulgarian Parliament, who is also a Bulgarian delegate on the Council of Europe's Monitoring Committee, has, by virtue of this unique position, witnessed the problem from both sides:

As a nation under monitoring, Bulgaria has received mixed signals from the Council with regard to the exact criteria it is expected to follow. When rapporteurs come from the Monitoring Committee, they make a number of observations as to what our alleged violations are. Then, when the Committee of Ministers sends an *ad hoc* delegation as part of its thematic monitoring activities, they would have a whole set of different criticisms. It confuses the Bulgarian policymakers tremendously.¹⁸⁵

The representative also noted the difficulties the situation presents to the monitors as well:

When [the Monitoring Committee]'s rapporteurs prepare one set of observations on the state of violations in, say, Armenia, and then [the Committee of Ministers' observ-

180. Progress Report of the Assembly's Monitoring Procedure, EUR. PARL. ASS. DOC. (9651) (2003).

181. See EUR. PARL. ASS. RES. (1260) (Sept. 26, 2001), followed subsequently by EUR. PARL. ASS. REC. 1536 (Sept. 26, 2001).

182. See *Reply From the Comm. of Ministers to Recommendation 1536*, Doc. 9312 (2002)

183. Interview with Maria Spassova, *supra* note 77.

184. See *id.* (stating that many Eastern European delegates who represent their nations at the Assembly have frequently expressed concern about the structural overlap).

185. *Id.*

ers] return with a different account of the situation, there is ambiguity as to whether Armenia in fact is complying with its obligations or not.¹⁸⁶

The structural overlap in the monitoring mechanism serves neither those who perform the monitoring nor those being monitored.¹⁸⁷

Another type of duplicate monitoring mechanisms resulting in confusion occurs in the context of post-monitoring. The case of Latvia is illustrative. Latvia was undergoing post-monitoring dialogue with the Council, when in 2002 the Monitoring Committee, upon members' motion, suddenly faced the question of possibly reopening the official monitoring procedure on that country.¹⁸⁸ A lengthy discussion ensued within the Assembly (between the Monitoring Committee and the Bureau), finally resulting in a 2004 decision not to reopen the official monitoring procedure.¹⁸⁹ This example of the Monitoring Committee's examination of the request to reopen a monitoring procedure while post-monitoring dialogue was in progress resembles "a real dialogue of the deaf" between the Assembly's organs, threatening "lasting damage to the exercise of post-monitoring procedure."¹⁹⁰

2. *The Application of Double Standards*

Another piece of the Council's mixed message to the countries of Eastern Europe lies in the application of double standards in its treatment of its older, more prominent Western members, in comparison to that of its newer ones from the East. "The fact that an Eastern country witnesses its supposedly equal peers from the West being held to a different, somewhat laxer, standard of compliance does not serve to promote its own compliance."¹⁹¹

The double standard treatment is apparent in how a procedure is initiated or reinstated.¹⁹² The progress reports of the Monitoring Committee repeatedly point to the problem of

186. *Id.*

187. *See id.*

188. Progress Report of the Assembly's Monitoring Procedure, EUR. PARL. ASS. DOC. (10250) (2004).

189. *Id.*

190. *Id.*

191. Interview with Maria Spassova, *supra* note 77.

192. *See* Progress Report of the Assembly's Monitoring Procedure, EUR. PARL. ASS. DOC. (9651) (2003).

the vagueness of the criteria based on which it is determined whether to initiate or reinstate a monitoring procedure.¹⁹³ In response, the Assembly has authorized the Committee to define these criteria more clearly.¹⁹⁴ The absence of such clearly defined criteria results in no assurances against the application of double standards, where violations by older and more prominent members are overlooked, while those committed by newer members are taken into account.¹⁹⁵

The problem of this mixed message is so acute that even Western states' representatives at the Council have been forced to admit it. According to an Assembly delegate from the United Kingdom,¹⁹⁶ the constitutional controversy surrounding Liechtenstein is an example of this threat.¹⁹⁷

Upon being alerted to the development in Liechtenstein,¹⁹⁸ the Monitoring Committee recommended to the Assembly that a monitoring procedure be initiated.¹⁹⁹ However, the Assembly ultimately rejected the proposal to open such a monitoring procedure on one of its older members, namely Liechtenstein, possibly with the consideration that the monitoring is intended to apply only to new democracies.²⁰⁰ This appeared to be an unconvincing argument, for if the purpose of the monitoring procedure is to ensure that member states honor their commitments to the organization, then which party is in violation is irrelevant.²⁰¹

193. See, e.g., *id.*

194. See EUR. PARL. ASS. ORDER (585) (2003).

195. Interview with Maria Spassova, *supra* note 77.

196. Interview with Lord Kilclooney, Representative of the United Kingdom at the Parliamentary Assembly of the Council of Europe, in Paris, France (Jan. 9, 2004) (on file with author).

197. *Id.* Liechtenstein, which is among the older members of the Council, having acceded to the organization in 1978, has been undergoing a revision of its constitutional structure, which in essence would change the country from a constitutional monarchy to a near-absolute monarchy by granting a vast increase in the power of the Prince. Such a system is in contradiction with the fundamental principles on which the Council rests. *Id.*

198. In May 2002, the Monitoring Committee received two memoranda from citizens of Liechtenstein concerning the current revision of their country's Constitution. See Progress Report of the Assembly's Monitoring Procedure, EUR. PARL. ASS. DOC. (9651) (2003); Progress of the Assembly's Monitoring Procedure, EUR. PARL. ASS. DOC. (10250) (2004).

199. Progress of the Assembly's Monitoring Procedure, EUR. PARL. ASS. DOC. (10250) (2004).

200. See *id.*

201. See *id.* During a 2004 Assembly discussion on the constitutional crisis in Ukraine, several speakers warned against the Council introducing a "two-

While the position of the Council may easily be explained by the organization's desire to remain on favorable terms with its older, wealthier members,²⁰² who also make larger monetary contributions²⁰³ to maintaining the organization's large apparatus,²⁰⁴ the Eastern countries may be justified in accusing the Council of hypocrisy.²⁰⁵ This, in turn, has a chilling effect on the Eastern European countries' incentive to comply with their commitments because they did not participate in the making of norms and these norms are being applied with unequal force among the different states.

Another example of the Council of Europe turning a blind eye to noncompliance by Western states while closely scrutinizing Eastern states' performance is that of the Framework Convention for the Protection of National Minorities.²⁰⁶ France, one of the prominent Western European members of the Council, has not yet signed this landmark treaty.²⁰⁷ It is all the more pertinent that France is among the Western states with one of the largest presences of national minorities in the population.²⁰⁸ By contrast, all of the Eastern European member states of the Council have signed and/or ratified the Convention.²⁰⁹ Many of these states have been the subject of

tier, two-speed system" resulting in the organization being "discredited" if it failed to adopt the same criteria for Liechtenstein as for the new democracies. The Council "would only maintain its credibility if it showed itself capable of defending universal principles." *Id.*

202. Mainly the nations of Western Europe.

203. A member state's population and wealth are used as some of the main factors determinative of that state's monetary contribution to the Council. *See* THE COUNCIL OF EUROPE, *supra* note 25, at 9. Therefore, Western states, who are substantially higher gross domestic product ratios than their Eastern counterparts, contribute a larger share of the Council's support.

204. The Council of Europe's secretariat currently employs more than 1800 persons. The organization had a budget of 186,012,700 euros in 2005. *See* Council of Europe at http://www.coe.int/T/E/Com/about_coe/ (last visited May 1, 2005).

205. *See* Interview with Maria Spassova, *supra* note 77..

206. Framework Convention for the Protection of National Minorities, *supra* note 35.

207. *See* EUR. PARL. ASS. REC. (1492) (2000); <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm> (last visited Aug. 13, 2005).

208. *See, e.g.*, EUR. PARL. ASS. REC. (1492) (2000); Johannes Willms, France Unveiled: Making Muslims Into Citizens, *at* <http://www.opendemocracy.net/xml/xhtml/articles/1753.html> (Feb. 26, 2004) ("the Muslim minority in France [is] the highest in the European Union at 3.26 million (5.5% of the population of mainland France)").

209. *See* Council of Europe *at*

repeated inquiries into the status of the national minorities inhabiting their territories.²¹⁰ This kind of duality of standards has a very demoralizing impact on the Eastern states' respect for the integrity of the Council's institution.²¹¹

V. PROPOSAL

The path to remedying the problem of the Eastern European member states' noncompliance with the Council of Europe's agreements lies in the intergovernmental organization's reexamination of its own mechanisms and structures. If the Council of Europe wishes to witness improvement in compliance on the part of its Eastern members, it should not be content with merely pointing fingers at the violators. Instead, it must address the shortcomings noted above²¹² after a careful examination of its own structures, as well as of the principles on which its treaties and conventions rest.

While the nonparticipation by the Eastern states in the synthesis of norms and principles on which the Council's rules and conventions are based²¹³ cannot be undone without turning the clock back on history, the focus should instead be on addressing the more concrete set of problems.²¹⁴ The Council must end the practice of sending mixed messages to its Eastern members, including the employment of confusing and overlapping monitoring mechanisms and double standards in relation to different groups of nations.

With the proliferation of monitoring procedures of both legal and political nature, it is essential that visibility and clarity are maintained. The Council must adopt clear rules governing the conduct of the various types of monitoring. It must seek to terminate the duplication of its political monitoring procedures, as those are performed under the separate auspices of its two organs, the Committee of Ministers and the Assembly. The two bodies should immediately enter into a constructive dialogue that would help clarify each other's

<http://conventions.coe.int/Treaty/EN/cadreprincipal.htm> (last visited May 1, 2005).

210. See, e.g., *supra* Part II.B (discussing the post-monitoring dialogue of the Council of Europe with Bulgaria on the subject of the national minorities' situation).

211. See Interview with Maria Spassova, *supra* note 77.

212. See *supra* Part IV.

213. See discussion *supra* Part IV.A.

214. See discussion *supra* Part IV.B.

purposes and procedures and ensure that no overlap occurs.

To address the ambiguity surrounding the post-monitoring procedure, the Council should amend its Rules of Procedure to add provisions detailing the precise manner of conducting the post-monitoring dialogue. For example, it should outline the precise procedural steps to be undertaken by the Monitoring Committee in the event of a request to reopen the monitoring procedure on a country involved in post-monitoring dialogue.

To eliminate the use of dual standards with respect to newer and older members, the Council should adopt resolutions authorizing the Monitoring Committee to initiate monitoring procedures in response to noncompliance or violation of commitments not only by its more recently acceded members of the East, but also by its more prominent Western members. For example, monitoring procedures should be opened for Luxembourg and France for their noncompliance with the Council's principles.²¹⁵ This would serve to send a clear message to the Eastern states that they are not treated differently, which in turn would have a positive effect on their efforts to comply with the Council's guidelines.

VI. CONCLUSION

In seeking to remedy the problem of Eastern European states' noncompliance with the international treaties and conventions promulgated by the Council of Europe, we should not end the inquiry by placing only the violating states themselves under the magnifying glass. A meaningful and comprehensive analysis of the problem entails examining the very structure of the monitoring administered by the Council of Europe and the normative basis on which it rests.

In addition to a myriad of internal factors that may be linked to a state's noncompliance, it is difficult for an Eastern European country to observe legal norms in situations where it was granted little or no opportunity to participate in their creation, and the mechanisms implemented for their enforcement create confusion through overlap and application of double standards. It is only by means of a careful examination and a thoughtfully planned revision²¹⁶ of the Council of

215. *See supra* Part IV.

216. *See supra* Part V.

Europe's mechanisms and practices that the problem of the Eastern nations' noncompliance may be partially addressed. That is one of the very first, most crucial steps that must be taken if the vision of "One Europe"²¹⁷ is ever to materialize into something more than an elusive mirage.

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Postscript: Since acceptance of this comment for publication, the Council of Europe has acknowledged some of the problems associated with the current procedures, including the confusion created by parallel monitoring mechanisms and the different treatment afforded to long-term member states.²¹⁸ However, it remains to be seen what measures will be undertaken in attempt to address these concerns in the future.

217. See *supra* note 18. See also *Joint Meeting Between the Parliamentary Assembly of the Council of Europe and the European Parliament*, EUR. PARL. ASS., 25th Sess. 4 (Sept. 25, 2003) (discussing the topic of the challenges and rewards to be faced on the path to building One Europe).

218. See *Progress of the Assembly's Monitoring Procedure*, EUR. PARL. ASS. DOC. (10541) (2005)