

*How to Maintain and Improve
Mutual Trust amongst EU Member States
in Police and Judicial Cooperation in Criminal Matters?*

**Lessons from the Functioning
of
Monitoring Mechanisms in the Council of Europe**

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§ 1 Introduction

§ 1.1 *A growing interest for monitoring*

“There is a gap between the rights proclaimed in international and regional human rights instruments and how these rights are respected in individual countries. In fact, all states encounter challenges in their work towards complete fulfilment of human rights. Scarce resources are often invoked as the main obstacle. Corruption, internal tensions, racism and intolerance are other obstacles to real progress. Serious violations of human rights also take place in countries that are considered stable and non-corrupt”.¹

With these words Mr Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, introduced his new *Recommendation on systematic work for implementing human rights at the national level*. The text was issued on 18 February 2009, on the occasion of the publication of the proceedings of an international conference on systematic work for human rights implementation.² Meanwhile the EU Fundamental Rights Agency published an up-dated overview of anti-Semitism in the European Union. The accompanying press release stressed one point in particular: “The 2009 report notes that a significant number of Member States do not maintain official or even unofficial data and statistics on anti-Semitic incidents”.³

These publications and initiatives – all from 2009 – reflect the growing interest for a more systematic approach to human rights implementation and monitoring at the national level. More and more countries develop strategies or action plans targeting specific problems, such as racism or trafficking in human beings. Several countries have adopted comprehensive action plans seeking to address the human rights situation in a coherent manner. National Human Rights Institutes are often instrumental in the development of a ‘human rights architecture’ that goes beyond the traditional reliance on the quality of legislation and the protection that courts can offer to the individual.

At the European level, effective monitoring is a ‘hot topic’ too. It is one thing to have a European Court of Human Rights that is empowered to receive individual complaints and to deliver binding judgments – but it is quite another thing to make sure that the structural problems underlying individuals complaints are addressed. Indeed, when the Council of Europe Member States met in May 2009 to celebrate the Organisation’s 60th birthday, they adopted a declaration which includes the following:

“We shall also step up our efforts to improve implementation of the [European] Convention

¹ T. Hammarberg, Commissioner for Human Rights, *Recommendation on systematic work for implementing human rights at the national level* (CommDH(2009)3) Strasbourg, 18 February 2009, p. 1. See www.commissioner.coe.int.

² The conference *Rights Work! – International Conference on Systematic Work for Human Rights Implementation* was organised by the Swedish Chairmanship of the Council of Europe’s Committee of Ministers in Stockholm on 6-7 November 2008.

³ EU Fundamental Rights Agency, *Anti-Semitism Summary Overview of the Situation in the European Union 2001-2008*, Vienna, 2 March 2009. See www.fra.europa.eu.

[on Human Rights] at national level, including through the full and complete execution of the judgments delivered by the Court”.⁴

In an effort to supplement these general statements with concrete action, the Parliamentary Assembly of the Council of Europe (PACE) has put the implementation of judgments of the European Court of Human Rights high on the agenda. Cypriot parliamentarian Mr Christos Pourgourides, who was appointed rapporteur on this subject, embarked on a series of visits to Member States that experience serious problems in this area. On 9 July 2009 he ended a two-day visit to Kyiv with a call for greater domestic parliamentary supervision to ensure that Ukraine implements judgments of the Court.⁵

All these activities may easily obscure the fact that the focus on implementation is fairly novel.⁶ At least four developments occurring the 1990s sparked off the current search for enhanced monitoring techniques:

- in the 1990s Council of Europe membership doubled as a result of the **accession of Central and Eastern European countries**. In the negotiations preparing the ground for accession, each candidate State was subjected to close scrutiny of its judicial and penal systems, the quality of its democratic institutions, the independence of its media and so on. Necessary changes were agreed upon on an individualised basis.⁷ After accession of these states, the need was felt to monitor the extent to which the new Member States actually complied with these obligations and commitments in the field of the Rule of Law and human rights. This led to the development of various procedures, involving both the Committee of Ministers and the Parliamentary Assembly.
- simultaneously the **number of complaints** lodged with the European Commission and Court of Human Rights started to grow dramatically. This necessitated not only a streamlining of the Strasbourg procedure, but also an analysis of the

⁴ Declaration adopted at the 119th Session of the Committee of Ministers (Madrid, 12 May 2009), § 3.

⁵ During the visit a Memorandum of Understanding was signed as regards regular parliamentary supervision of the Strasbourg Court’s judgments. See press release *Ukraine: PACE rapporteur calls for better implementation of judgments of the European Court of Human Rights* (9 July 2009, available at www.coe.int).

⁶ For an ‘early’ publication, see S.K. Martens, “Individual Complaints under Article 53 ECHR”, in R.A. Lawson & M. de Blois (eds.), *The Dynamics of the Protection of Human Rights in Europe - Essays in Honour of Professor Henry G. Schermers* vol. III (1994), pp. 253-292, with a reference to existing literature in footnote 6.

⁷ A similar phenomenon occurred a couple of years later in the context of the EU. The situation of human rights and the state of the rule of law in candidate countries were subjected to detailed monitoring. However, as a rule this comprehensive *ex ante* human rights monitoring of candidate countries was not matched by *ex post* control – the two notable exceptions being Romania and Bulgaria. Even in 2009 they are still subject to the ‘Cooperation and Verification Mechanism’, set up in the eve of EU accession. The two most recent reports were published on 22 July 2009 and provided for extension of the mechanism into 2010. In the case of Bulgaria the Commission made over 20 recommendations regarding organised crime, the fight against corruption and efficiency of the judiciary (see COM(2009)402). Romania was urged to carry out 16 tasks; see COM(2009)401. For an overview see http://ec.europa.eu/dgs/secretariat_general/cvm/index_en.htm

driving forces behind these complaints. As a result, the CoE Member States were called upon to implement Court judgments quickly, the Court started to experiment with pilot procedures, and the Committee of Ministers' capacity to monitor compliance with Court judgments (Article 46 ECHR) was expanded.

- just a few years earlier, in 1989, the **Committee for the Prevention of Torture (CPT)** had started to operate. It offered, as Antonio Cassese called it, a “New Approach to Human Rights”.⁸ The CPT would not deal with individual complaints but carry out on-site visits with a view to establishing an institutionalised dialogue with domestic authorities.
- the germs of the fourth factor can also be found in the early 1990s, even if it only came to flourish much later: the **Treaty of Maastricht**. ‘Maastricht’ supplemented the European Communities with a framework for co-operation in foreign policy and in ‘home and justice affairs’ as it was then dubbed. The primary focus on economic integration was widened and the ambition to offer European citizens an ‘Area of freedom, security and justice’ gained prominence. Such a development is contingent upon the existence of, and adherence to, shared values, since the quality of the judicial system of one Member State becomes co-dependant on 26 others. In other words: it requires mutual trust that all states comply with fundamental rights and the rule of law.⁹ This in turn presupposes that there are mechanisms in place that ensure that the mutual trust is, and remains, well-founded.

§ 1.2 *The special need for monitoring within the EU*

At this junction it is interesting to observe that the ‘underlying psychology’ of human rights protection within the EU differs from that within the Council of Europe. An element of reciprocity enters the scene: without adequate respect for human rights in all EU Member States, their common projects, including the Area of freedom, security and justice, are under threat. A similar idea was expressed by AG Maduro in 2007:

“[Articles 6 and 7 EU] give expression to the profound conviction that respect for fundamental rights is intrinsic in the EU legal order and that, without it, common action by and for the peoples of Europe would be unworthy and unfeasible. In that sense, the very existence of the European Union is predicated on respect for fundamental rights. Protection of the ‘common code’ of fundamental rights accordingly constitutes an existential requirement for the EU legal order. ... For instance, it would be difficult to envisage citizens of the Union exercising their rights of free movement in a Member State where there are systemic shortcomings in the protection of fundamental rights. Such systemic shortcomings would, in

⁸ A. Cassese, ‘A New Approach to Human Rights: The European Convention for the Prevention of Torture’, *The American Journal of International Law*, vol. 83 (1989), pp. 128-153.

⁹ Cf. R.A. Lawson, “The Contribution of the Agency to the Implementation in the EU of International and European Human Rights Instruments”, in Ph. Alston & O. de Schutter (eds.), *Monitoring Fundamental Rights in the European Union* (Hart 2005), pp. 229-251.

effect, amount to a violation of the rules on free movement”.¹⁰

Therefore the EU has a serious problem if, for instance, the European Court of Human Rights detects a structural problem affecting the administration of justice or the penal system of an EU Member State. This is not a theoretical concern: it happened this spring to Poland – twice *within two weeks*.¹¹

Such a structural problem cannot but negatively affect co-operation between EU Member States. One concrete example may illustrate this point. For many years the reception facilities for asylum seekers and irregular immigrants in Greece has been subject to strong criticism from various quarters.¹² But the consequences of this situation – which is obviously unacceptable in itself – are not confined to Greece alone: they ‘spill over’ to other EU Member States. After the European Court of Human Rights found, for its part, in the case of *S.D. v. Greece*,¹³ that the detention facilities in Greece were “degrading” and hence incompatible with Article 3 ECHR, the Court immediately received literally dozens of complaints *addressed against the Netherlands*. The applicants were third-country nationals who found themselves in the Netherlands after they had entered the EU via Greece. They were about to be sent back by Dutch authorities to Greece, pursuant to the so-called ‘Dublin II system’.¹⁴ Relying on *S.D.*, the applicants claimed that the Netherlands was under an obligation not expose them to a situation incompatible with Article 3 ECHR. More than 20 applicants requested the Court to

¹⁰ Opinion of AG Maduro in *Centro Europa 7* (Case C-380/05) of 12 September 2007.

¹¹ See ECtHR, 20 January 2009, *Slawomir Musial v. Poland* (Appl. No. 28300/06) (overcrowding and inadequate living conditions in detention facilities) and ECtHR, 3 February 2009, *Kauczor v. Poland* (Appl. No. 45219/06) (excessive length of pre-trial detention). The latter finding was confirmed in ECtHR, 19 May 2009, *Kulikowski v. Poland* (Appl. No. 18353/03), § 85: “...the present case is by no means an isolated example of the imposition of unjustifiably lengthy detention but a confirmation of a practice found to be contrary to the Convention (...). Consequently, the Court sees no reason to diverge from its findings made in the *Kauczor* case as to the existence of a structural problem and the need for the Polish State to adopt measures to remedy the situation”.

¹² See for instance the most recent CPT report on Greece (published 30 June 2009), § 53-54: “The CPT must reiterate that the conditions of detention of the vast majority of irregular migrants deprived of their liberty in Greece remain unacceptable. (...) The CPT recalls that its first visit to Greece took place in March 1993. To date, more than 15 years after that visit, the Committee finds itself in the regrettable position that it has to repeat many of its recommendations concerning the prevention of ill-treatment. For instance, the 1993 recommendations concerning forensic medical examinations in case of allegations of ill-treatment as well as those concerning the application of fundamental safeguards, such as in particular the right of access to a doctor and the right of access to a lawyer, remain as valid today as they were in 1993. Likewise, recommendations intended to fundamentally improve the conditions of detention for irregular migrants have been made in every report since 1997, but have been largely ignored by the Greek authorities. The CPT has gone to great lengths over the years to convince the Greek authorities to implement the Committee’s recommendations. The Committee has visited Greece eight times since 1993 and has also held high-level talks with the Greek authorities on two occasions, most recently in February 2007. Until now, to little avail”.

¹³ ECtHR, 11 June 2009, *S.D. v. Greece* (Appl. No. 53541/07).

¹⁴ Cf. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

indicate, by way of interim measures, that the Dutch authorities should not send them back to Greece. In the end a pragmatic solution was found – in that the Greek authorities assured the Court that all persons concerned would be treated in full compliance with the ECHR – but the episode shows how human rights problems in one EU Member State may have an immediate impact on the others.

§ 1.3 Research questions

The key question that we thus face is this. How to design a mechanism that will be best in securing compliance, by all EU Member States, with existing standards in the field of the rule of law and human rights? We will narrow our debate at this stage and concentrate on the specific context of police and judicial cooperation in criminal matters between EU Member States, even if it can be argued, as AG Maduro did, that the free movement of persons – and perhaps the entire internal market – would be at risk if systemic shortcomings were allowed to persist.

The purpose of the present study is to determine which lessons can be learned from the practice of the Council of Europe in the field of monitoring. What are strong points, what are weak points? Is there a relationship between the way in which monitoring is organised and the level of compliance? Are there any attempts to remedy perceived shortcomings?

There are three reasons to look at the Council of Europe in this connection. In the first place, the Council of Europe has developed extensive experience in the field of monitoring – not just in connection with the European Convention on Human Rights (ECHR), but also with many other instruments such as GRECO and the CPT. It would simply be a missed opportunity to re-invent the wheel, that is: not to take into account this experience when reflecting on the future architecture of monitoring in the context of the EU.

In the second place, the work of the Council of Europe is of direct relevance to the EU. The EU Member States are also members of the Council of Europe, and the close relationship between the two organisations was further entrenched with a Memorandum of Understanding signed in 2007:

“The Council of Europe and the European Union will develop their relationship in all areas of common interest, in particular the promotion and protection of pluralist democracy, the respect for human rights and fundamental freedoms, the rule of law, political and legal co-operation (...)

The Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe. (...)

The European Union regards the Council of Europe as the Europe-wide reference source for human rights. (...) The decisions and conclusions of its monitoring structures will be taken into account by the European Union institutions where relevant”¹⁵.

¹⁵ *Memorandum of Understanding between the Council of Europe and the European Union*, Strasbourg, 11 May 2007, §§ 9, 10, 17. Text available at: http://www.coe.int/t/der/docs/MoU_EN.pdf

This means that any relevant standards developed by the Council of Europe will have to be taken into account on a systematic basis by any monitoring mechanisms that the EU might wish to develop – even if the EU remains free to provide more extensive protection.¹⁶ Put differently, when developing mechanisms within the EU, one should not lose sight of the gradual emergence of a ‘European Area of Fundamental Rights’.¹⁷

The third reason why the work of the Council of Europe should be taken into account is that duplication will have to be avoided. There are legal arguments to support that view,¹⁸ but it is also useful to note that several observers witness a certain ‘monitoring fatigue’ amongst Member States. Is this the best time to develop yet more monitoring mechanisms? The Council of Europe has developed credible instruments, many of which have functioned well for decades. Their findings carry authority, both at the judicial and at the political level. Before launching any new initiatives in the context of the EU, one must therefore first ascertain the extent to which the Council of Europe may already provide for adequate monitoring mechanisms. Will there be any added value? Of course it is conceivable that the Union is in need of its own instruments – for instance because the dynamics of the internal market and the Area of Freedom, Security and Justice require more rigorous standards in the fight against corruption, or because the EU Member States can agree on more generous standards in the field of individual rights, or again because they want to create more daring mutual inspection mechanisms as ‘confidence building measures’. All this is conceivable, but one can only decide whether there is a need for new initiatives in the context of the EU, if one has taken stock of existing mechanisms established by the Council of Europe.

¹⁶ Memorandum of Understanding, § 19. See also Article 52 (3) of the EU Charter of Fundamental Rights (*OJ* 2000, C 364).

¹⁷ Cf. the Opinion of AG Maduro in *Elgafaji* (Case C-465/07) of 9 September 2008: “the protection of fundamental rights in the Community legal order exists alongside other European systems of protection of fundamental rights. These include both systems developed within the national legal systems and those stemming from the ECHR. Each of those protection mechanisms certainly pursues objectives which are specific to it and the mechanisms are certainly constructed from legal instruments particular to them, but sometimes they apply none the less to the same facts. In such a context, it is important, for each existing protection system, while maintaining its independence, to seek to understand how the other systems interpret and develop those same fundamental rights in order not only to minimise the risk of conflicts, but also to begin a process of informal construction of a European area of protection of fundamental rights. The European area thus created will, largely, be the product of the various individual contributions from the different protection systems existing at European level”.

¹⁸ Memorandum of Understanding, § 12: “The co-operation will take due account of the comparative advantages, the respective competences and expertise of the Council of Europe and the European Union – avoiding duplication and fostering synergy –, search for added value and make better use of existing resources”.

§ 1.4 *Some initial reflections*

Given that there is a need to enhance the monitoring of domestic Rule of Law/human rights performance within the EU, notably in the area of police and judicial co-operation, a number of challenging questions could be raised. Which substantive and procedural factors impede full compliance¹⁹ with international standards? What is the impact of the way in which international supervision is organised? Which monitoring mechanisms are effective, and what makes them effective? How to improve the follow-up by Member States? These questions are highly relevant but at the same time, it is submitted, very difficult to answer.

There is no shortage in Europe of monitoring mechanisms and, as stated above, there is growing awareness of the need to secure implementation of fundamental rights at the national level. For the Council of Europe this has been its core-business for sixty years; for the EU it is vital to ensure that Member States subscribe to the rule of law and secure human rights to all. Still violations continue to occur. And still we know very little *why* this is so. Which factors impede full realisation of human rights? Is it scarce resources, corruption, internal tensions, or racism and intolerance, as Mr Hammarberg suggested?²⁰ Is the national legislator unfamiliar with the Strasbourg case-law, are victims unaware of their rights? Is it a problem of access to justice? Or is it a matter of competing interests, which national judges happen to weigh differently than their international colleagues? Are moral issues involved, and do the core values of one society differ from that of others?

Thus there are questions concerning the causes; and likewise there are questions concerning the remedies. It has been suggested that one supervisory mechanism may be more influential than the other.²¹ But we do not know *why* this is so. It is because of the composition of the supervisory bodies? Is it because of the scope of their powers? Is a preventive approach more effective than a reactive one? Does it depend on the subject-matter whether one mechanism is more appropriate, hence more successful, than the other? Are unanimous judgments taken more seriously than majority decisions? How meaningful are follow-up mechanisms, reporting procedures, on-site visits, or training programmes?

There is not one single answer to these questions. Literature is scarce and often

¹⁹ For the purpose of the present research project, the notion of ‘*compliance*’ refers to whether Member States comply with the legal standard which is set, whether the standard is defined in an international treaty, in secondary legislation, or in other, soft-law instruments; generally compliance will require both ‘*formal*’ and ‘*practical*’ implementation. In this connection ‘*formal*’ implementation refers to the adoption of legal or regulatory instruments that adapt the regulatory framework to the requirements set by international standards (for example, copying an EC directive in domestic law). On the other hand, ‘*practical*’ implementation refers to the effective enforcement of existing legislation, in order to ensure that it influences behaviour of the persons regulated.

²⁰ See footnote 1 *supra*.

²¹ In an interview a former judge in the European Court of Human Rights noted that the regime in a high-security institution did not change despite continued pressure by the CPT; it was only after the Court had found a violation of Article 3 ECHR that the regime was softened. See R.A. Lawson, “Terugblik op Straatsburg – Interview met W. Thomassen”, in *55 jaar EVRM* (2006), p. 20.

anecdotal.²² Conversely academic writing tends to remain fairly general when it comes to the methodology of measuring human rights.²³ In 2007 the Council of Europe itself published an interesting overview of the impact of its human rights mechanisms – but it is limited to “selected examples”, and the document “does not claim to be exhaustive”.²⁴ Indeed, it would be physically impossible to analyse for each of the institutions (and, in the case of the European Court of Human Rights: for each of its judgments!) what their actual impact is in each of the 47 CoE Member States and which factors were influential in that respect. In addition experience tells us that different countries respond very differently to monitoring activities.²⁵

In addition one has to be careful when it comes to causality. If, in the wake of the *Salduz* judgment, the Dutch rules concerning access to a defence lawyer during police detention are amended, is this *because of* the *Salduz* judgment, is this because the CPT had repeatedly called for immediate access to a defence lawyer during police detention, is this because the Commissioner for Human Rights during his visit in September 2008 had urged the Dutch authorities to grant immediate access to a defence lawyer during police detention – or is this because the existing practice was under review anyway?²⁶ Interestingly the Council of Europe’s ‘impact study’ claims that the regime in a Dutch high-security institution changed as a result of pressure by the CPT, whereas a former judge of the European Court of Human Rights suggested that the CPT was unable to bring about a change and that the situation only improved after the Court had found a violation of Article 3 ECHR.²⁷

²² See for instance I.M. Abels, “*Brogan*-wetgeving: herziening van de regeling van de inverzekeringstelling in het Wetboek van Strafvordering”, in *Ars Aequi* vol. 44 (1995), pp. 37-43. This article describes how *one* particular ECtHR judgment (in a case involving the UK) led to changes in the domestic legislation in *one* Contracting Party. I am not aware of any comparative overview of the implementation of the *Brogan* judgment in *all* Contracting Parties – let alone that there are such comparative overviews involving more (or even all) judgments.

²³ On this issue T. Landman & E. Carvalho, *Measuring Human Rights* to be published in 2009 by Routledge-Cavendish.

²⁴ Council of Europe, DG of Human Rights, *Practical impact of the CoE human rights mechanisms in improving respect for human rights in member states* (Strasbourg, April 2007), p. 5.

²⁵ Note, for instance, the outright refusal by Russia to implement the *Ilascu* judgment (ECtHR (GC), 8 July 2004, *Ilascu a.o. v. Moldova and Russia* (Appl. 48787/99)) by putting an end to the arbitrary detention of the applicants still imprisoned and to secure their immediate release. The Committee of Ministers repeatedly criticized Russia in public (see for instance Interim Resolution CM/ResDH (2007)106), but to no avail.

²⁶ See ECtHR, 27 November 2008, *Salduz v. Turkey* (Appl. No. 36391/02); CPT, *Report to the authorities of the Kingdom of the Netherlands on the visits carried out to the Kingdom in Europe, Aruba, and the Netherlands Antilles by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in June 2007* (doc. CPT/Inf (2008) 2), § 22 (with references to earlier reports); *Report by the Commissioner for Human Rights, Thomas Hammarberg, on his visit to the Netherlands on 21-25 September 2008* (doc. CommDH(2009)02), § 24. On the discussion in the Netherlands see the memorandum submitted to Parliament by the Minister of Justice on 15 April 2009, No. 5595481/09, and the judgment of the Supreme Court of 30 June 2009, LJN BH3079 (to be found at www.rechtspraak.nl).

²⁷ See Council of Europe, *Practical impact*, *supra* note 24, p. 18, and compare to the statements of Judge Thomassen referred to in note 21 above.

§ 1.5 Approach – identifying factors relevant to good Rule of Law review mechanisms

The conclusion of the above is that one should be modest when making statements about the effectiveness of international supervisory bodies. The present study will therefore try to avoid such statements. No attempt will be made to measure the capacity of monitoring bodies to bring about changes in the Member States and increase the degree of compliance with their international obligations. Instead, this study will describe a number of Council of Europe monitoring mechanisms, analyse their structure and compare their working methods.

Of course, this exercise is carried out with a view to drawing lessons for effective monitoring in the context of the EU. Thus, whilst refraining from firm statements about effectiveness as such, an attempt will be made to identify factors that appear to be relevant for the impact of the various monitoring bodies. For instance, common sense suggests, and insiders confirm, that a shortage of funding may create an obstacle to effective monitoring: the capacity to collect data may be impaired, the number of on-site visits may be limited, translations may be slow, and so on. To give another example: if a committee is unable to check the quality of data provided by national correspondents, it is arguably less effective in that respect than a committee that can also use data from various independent sources.

So – we will look at the various monitoring mechanisms. Who are they, what kind of information do they collect and how do they process it? In answering these questions, an attempt will be made to show how the mechanisms operate in practice. It was thought that it would be more useful to sketch the political and institutional context in which they work than to confine the discussion to a dry procedural overview. Thus, a series of face-to-face interviews with ‘insiders’ working in Strasbourg was held in order to identify strong points and weak points as they are perceived in actual practice. I spoke to nine officials as well as two diplomats based in Strasbourg.

For a study like this one needs a starting point. Where should one look when describing a monitoring body? Common sense dictates – and a recent research paper tends to confirm²⁸ – that a number of factors are likely to have an impact on the work of monitoring bodies, and may affect their effectiveness in a positive or negative way:

- mandate
(is the mandate framed in rigid or loose terms? is the monitoring body’s agenda pre-determined or is it free to respond to sudden developments? does it focus on ‘problematic’ countries or does it cover all countries concerned?)
- membership
(who is involved in monitoring: independent experts and/or government representatives? How are they elected?)
- quality of information
(does the monitoring body have up-to-date information at its disposal? does it have any mechanisms to ensure that the information is reliable? does it have the power to

²⁸ J. Jansen, *Practices of the procedures of the Council of Europe Monitoring mechanisms* (Strasbourg/Groningen), 21 May 2009. The project was supervised by Mr Gerard de Boer, Permanent Representation of the Netherlands in Strasbourg.

- carry out on-site visits?)
- standards and further standard-setting
(are the standards uniform or do they allow for country-specific flexibility?; how detailed are they? is there scope for further development of standards?)
- review process
(how transparent is the process? how long does a cycle take?)
- outcome
(are there any public findings? if so, are they translated and easily accessible in the countries concerned? in the case of non-compliance, can sanctions be imposed or is assistance provided? is there any further follow-up? does the monitoring body attempt to get public or political support for its findings and recommendations?)

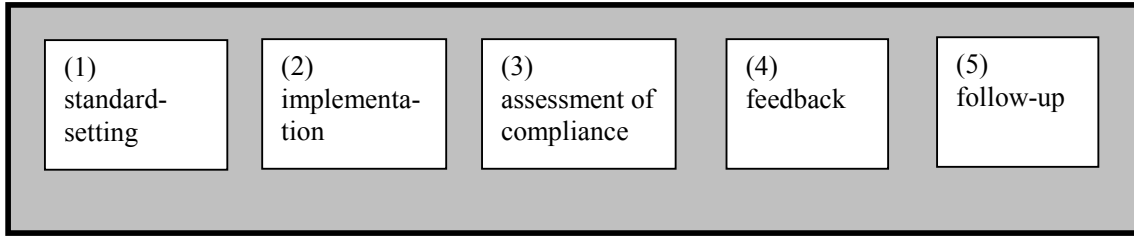
With these elements in mind, a number of institutions and bodies established within the Council of Europe were reviewed. It was decided to focus on:

- the Parliamentary Assembly (PACE);
- the Commissioner for Human Rights (CHR);
- the European Court of Human Rights (ECtHR);
- the Committee for the Prevention of Torture (CPT);
- the Group of States against Corruption (GRECO); and
- the European Commission for the Efficiency of Justice (CEPEJ).

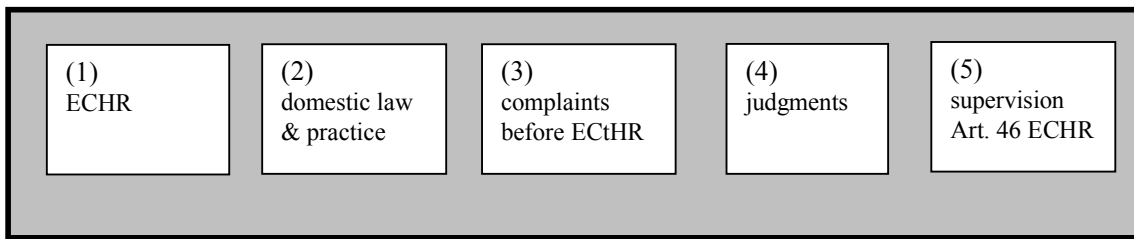
Given the limited scope of the study, and taking into account the overall focus on police and justice matters, no attention will be paid to the European Social Charter, various mechanisms to protect minority rights and the bodies set up to fight racism (ECRI) and trafficking in human beings (GRETA). The latter body is certainly relevant from the perspective of police and judicial co-operation, but it was only established in December 2008 and it started its operations in 2009.²⁹

The research is also refined in another way. There is little point in describing the relevant standards contained, for instance, in the European Convention on Human Rights (ECHR), or to explain the procedures before the European Court of Human Rights. This information is already widely available. What matters for present purposes is the stage in which a country is found in default. It has failed, for whatever reason, to implement its international obligations; its failure has been detected; and feedback has been given (for instance in the form of a judgment, in the case of the Strasbourg Court, or in the form of recommendations, in the case of the CPT). What happens then? Which mechanisms have been developed in this last stage? In a schematic way:

²⁹ For more information on GRETA, see http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Monitoring/GRETA_en.asp.



If we translate this general scheme to the best-known example, the ECHR, the following picture emerges:



The primary focus of our research, then, is on stage (5). In the context of the European Convention, this means the procedure developed by the Committee of Ministers, in accordance with Article 46 (2) ECHR, to supervise the execution of judgments delivered by the European Court of Human Rights. At the same time, it would be artificial to focus exclusively on the last phase and to ignore preceding stages completely. It may well be that the quality of stages (3) and (4) – for instance the availability of accurate information and the degree of precision with which feedback is given – has an impact on the quality of stage (5). Conversely, stage (5) may lead to further standard-setting, for instance through the gradual development of guidelines or soft-law standards.

§ 2 Monitoring in the Council of Europe

§ 2.1 Preliminary remarks

This is not the place to introduce the Council of Europe in any great detail. Suffice it to make three introductory remarks.

In the first place it seems useful to recall that the Heads of State and Government of the Member States, at their Third Summit (Warsaw, May 2005) identified the preservation and promotion of human rights, democracy and the rule of law as the core objective of the organisation.³⁰ Traditionally, the Council of Europe relies heavily on the adoption of binding and non-binding legal instruments such as conventions and recommendations. Texts are adopted by the Committee of Ministers, in which all 47 Member States are represented. To date, well over 200 treaties have been adopted and opened for signature. Some of them, such as the ECHR and the Convention for the Prevention of Torture, have been ratified by all Member States; others remained less popular. Recommendations are adopted by consensus and derive their authority from that fact. In addition they may acquire legal significance in practice: the European Court of Human Rights may take them into account when applying the ECHR, and in recent cases the Court went as far as to effectively oblige States to implement them.³¹

Secondly, and on a very different note, the difficult financial situation of the Council of Europe should be mentioned. Having been subjected to a regime of ‘zero real growth’ for a number of consecutive years, the Organisation’s annual budget is now approximately 205 million euros (which equals the amount that the EU spends in less than a day). The Member States, which provide for the funding, include five ‘*grand payeurs*’ – France, Germany, Italy, Russia and the UK – who each pay 11.9188% or 24 million euros. The Netherlands pays 3.68% of the regular budget. In the past few years the budget of the European Court of Human Rights and its Registry has grown considerably, at the expense of other bodies and activities.

Attempts to increase the overall budget have been blocked by a group of Member States that wants to force the Organisation to concentrate on its core activities (human rights, rule of law, democracy) and to spend its budget in a more efficient way. Be that as it may, the current situation clearly cannot but have a negative impact on the monitoring activities of the Council of Europe.

In the third place several observers noted a certain ‘monitoring fatigue’ amongst Member States. Especially for smaller Member States the various reporting procedures are sometimes quite demanding and, without calling into question their willingness to co-

³⁰ See Warsaw Declaration, § 1, and recently confirmed at the 119th Session of the Committee of Ministers (Madrid, 12 May 2009). For an interesting attempt to define the concept of the rule of law, and to draw up a typology of activities relevant to the rule of law, see *The Council of Europe and the Rule of Law – An Overview* (doc. CM(2008)170 of 21 November 2008). All texts available at www.coe.int.

³¹ See e.g. ECtHR, 20 May 2008, *Gülmez v. Turkey* (Appl. No. 16330/02), § 63: “... the respondent state should bring its legislation in line with the principles set out in Articles 57 § 2 (b) and 59 (c) of the European Prison Rules”.

operate in good faith, they simply reach the limits of their capacity. A distinct – and even more worrying – development is that some Member States have become less co-operative. Recently the findings of monitoring bodies such as ECRI have been challenged head-on by the countries concerned in the Committee of Ministers – something that was ‘not done’ only a couple of years ago. Malta has been mentioned in this connection as a country that fiercely criticised both the accuracy of an ECRI report and the validity of ECRI’s recommendations.³² This made it easier for other countries, such as Russia, to distance themselves as well. If this trend continues, that does not augur well for new monitoring mechanisms in the EU.

§ 2.2 *The Parliamentary Assembly*³³

2.2.1 *Description of monitoring activities*

The Parliamentary Assembly of the Council of Europe (PACE) meets four times a year for a week-long plenary session in Strasbourg. The 318 representatives and 318 substitutes are appointed by national parliaments from among their members. Each country, depending on its population, has between two and eighteen representatives, who provide a balanced reflection of the political forces represented in the national parliament.

(a) *The Monitoring Committee*

The work of PACE is prepared in committees, which also meet between the plenary sessions. For present purposes the *Committee on Honouring of Obligations and Commitments by Member States* – or Monitoring Committee, as it is often referred to – is of special interest. Pursuant to Resolution 1115 (1997), this committee is responsible for seeking to ensure:

- (i) the fulfilment 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 conventions concluded within the Organisation to which they are parties;
- (ii) the honouring of the commitments entered into by the authorities of member states on their accession to the Council of Europe.

³² ECRI’s *Third report on Malta* (29 April 2008) contains, as is common practice, the reaction of the respondent Government in an appendix. It starts as follows: “ECRI’s third report shows disregard of Malta’s vital national interests and disrespect towards its democratic institutions, including parliament, the judiciary and the free press. The report falls short of accepted standards of impartiality” (p. 38). See ECRI’s database on www.coe.int. The same criticism seems to have been voiced in the Committee of Ministers. ECRI’s *Annual report on 2008* completely ignored the clash with Malta.

³³ The documents mentioned in this section can be found on PACE’s website: assembly.coe.int. For an extensive overview see: Council of Europe, *The Parliamentary Assembly – Practice and Procedure* (Strasbourg, CoE Publishing, tenth ed., 2008).

It is worth recalling that the current procedure was preceded by a mechanism, adopted in 1993, which was meant to focus exclusively on *new* CoE Member States.³⁴ Under that mechanism the Political Affairs Committee and the Committee on Legal Affairs and Human Rights were instructed “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”.

The introduction of the new monitoring mechanism was clearly inspired by the rapid expansion of the Council of Europe, which had grown from 23 to 40 Member States in less than seven years. There was a widespread concern that not all new Member States were in full compliance with the obligations they had undertaken upon joining the organisation.

Interestingly the work of PACE prompted the Committee of Ministers to establish, in 1994, its own monitoring procedure.³⁵ No information about this procedure was made public, however, and very little can be said about its effectiveness.³⁶ It would seem that the procedure is no longer applied, even though it was never formally abolished. One observer noted that this mechanism simply fell in disuse after Mr Peter Leuprecht, then Deputy Secretary-General of the Council of Europe, left the organisation. It was felt that “one needs a strong personality” to give clout to the exercise and to act as a counterweight to the members of the Committee of Ministers – that is, diplomats who are not necessarily interested in in-depth monitoring of their domestic situation. The same lesson was drawn from *ad hoc* missions, such as a series of visits to Azerbaijan to address the situation of political prisoners. It seems fair to say that the success of that mission was largely dependent on the determination of individual experts.³⁷

Back to the monitoring instrument developed by PACE in the early 1990s. Gradually, the procedure was expanded so as to include *all* CoE Member States.³⁸

³⁴ See Order 488 (1993), adopted 29 June 1993. The instrument was commonly known as the ‘Halonen Order’, after the current Finnish President who at the time played an important role in pushing this initiative. See also J. Kleijssen, “De Parlementaire Vergadering van de Raad van Europa: Politiek toezicht op de naleving van algemene en specifieke verplichtingen van de lidstaten – een overzicht”, in *NJCM-Bulletin* 1997, pp. 653-660.

³⁵ See 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.

³⁶ The same conclusion is reached in P. van Dijk a.o., *Theory and Practice of the European Convention on Human Rights* (4th ed., 2006), pp. 318-321.

³⁷ In 2001, the Secretary General of the Council of Europe, with the approval of the Committee of Ministers, instructed a group of independent experts to carry out an investigation concerning the political prisoners in Armenia and Azerbaijan. The experts were Professor Stefan Trechsel of Zurich University, former President of the European Commission of Human Rights, Professor Evert Alkema of Leiden University, former member of the European Commission of Human Rights, and Mr Alexander Arabadjiev, former Judge at the Constitutional Court of Bulgaria and former member of the European Commission of Human Rights. See PACE Resolution 1272 (2002).

³⁸ In Resolution 1031 (1994) PACE observed “observed “that *all* member states of the Council of Europe are required to respect their obligations under the Statute, the European Convention on Human Rights and all other conventions to which they are parties. In addition to these obligations, the

Monitoring relates to compliance with *general obligations* (that is, obligations flowing from CoE membership *per se* and from treaties ratified) as well as with *specific obligations* (that is, obligations undertaken when a country joined the CoE).

In accordance with a practice which by now is well-established, two PACE members will be appointed as co-rapporteurs for a specific country. When appointing co-rapporteurs the Monitoring Committee will seek to ensure a political and geographical balance. They will visit the country, where they will typically meet with the government, parliamentarians, NGOs and representatives of organisations such as UNHCR. The co-rapporteurs will draft a preliminary report and present it to the domestic authorities for comments. During this initial stage the documents remain confidential, although it is increasingly the case that reports are made public very quickly.³⁹ After the governments' comments had been received, the matter is discussed – first in the Monitoring Committee, and then in the plenary Assembly. The latter debates on monitoring are held in public and will result in the adoption of a resolution, which are usually fairly detailed.⁴⁰

In terms of sanctions, the relevant instruments stipulate that PACE could sanction persistent failure to honour commitments, and lack of co-operation in its monitoring process, by the non-ratification of the credentials of a national parliamentary delegation. Should the country continue not to respect its commitments, the Assembly may address a recommendation to the Committee of Ministers requesting it to take the appropriate action provided for in Article 8 of the Statute of the Council of Europe. In actual practice, the right of vote of the Russian delegation to PACE was suspended from April 2000 to January 2001 over the situation in Chechnya.⁴¹ It does not appear that suspension was ever seriously considered by the Committee of Ministers. Of course all actors are very well aware of that reality.

The first countries to be subjected to the entire procedure, in 1997, were Albania, Estonia and Romania. At the moment eleven States are on the Monitoring Committee's work programme: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Moldova, Monaco, Montenegro, Russia, Serbia and Ukraine.⁴² Up to now, 47 country reports have been discussed in the plenary meetings of PACE. In addition, a "post-monitoring dialogue" was developed: when closing a monitoring procedure, the Parlia-

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" (emphasis added). This was consolidated by Order 508 (1995), adopted 26 April 1995: "The Assembly therefore instructs 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*" (emphasis added).

³⁹ For instance a report of a fact-finding mission to Tblisi, Georgia, that took place 24-27 March, was made public on 28 April 2009 and placed on the internet two days later (see doc. AS/Mon(2009) 16 rev).

⁴⁰ For a recent example see Recommendation 1661 (2009), *Honouring of obligations and commitments by Serbia*, adopted 28 April 2009.

⁴¹ See e.g. Resolution 1444 (2000) on the conflict in Chechnya, adopted 27 January 2000.

⁴² See information document AS/Mon/Inf(2008)01rev2 of 25 September 2008.

mentary Assembly may at the same time decide to pursue the dialogue with the national authorities on certain issues mentioned in Resolutions adopted, allowing itself the choice of re-opening a procedure if further clarification or enhanced co-operation would seem desirable. Currently three countries are engaged in a post-monitoring dialogue: Bulgaria, Turkey and “the former Yugoslav Republic of Macedonia”.

(b) Other PACE activities

It should be added that the monitoring procedure described so far is not the only way in which PACE is instrumental in securing compliance with CoE standards. The work of PACE member Mr Dick Marty on ‘rendition flights’ and secret detention sites used for anti-terrorist purposes, illustrates that PACE can monitor specific issues in a very visible way.⁴³

PACE has also been active, since the mid 1990s, in attempts to enhance the execution by Member States of judgments of the European Court of Human Rights. For many years Dutch parliamentarian Mr Eric Jurgens acted as rapporteur on this issue; he was succeeded in 2006 by Cypriot PACE member Mr Pourgourides whose work was mentioned in the introduction of this study. The Committee on Legal Affairs and Human Rights has so far submitted six reports: one general report and five specific ones on the implementation of decisions of the Court, including two reports on Turkey.

An interesting initiative was taken in 2006, when the President of PACE wrote a letter to the Speakers of all national parliaments, asking in what way their parliaments contributed to the execution of Court judgments. The idea behind this is that national parliaments can play an important role in the implementation of judgments of the European Court of Human Rights, and that PACE can be instrumental in bringing about an exchange of best practices. It would seem, however, that the response to this initiative was fairly limited. The lukewarm response of most parliaments seems to match a less than enthusiastic attitude by the Committee of Ministers. As we will see later on, Article 46 (2) ECHR explicitly charges the Committee of Ministers with the supervision of the execution of judgments, and some observers believe that this intergovernmental body (or a part of its members) is not particularly eager to see interference by parliamentarians in this domain.

Nevertheless the Committee decided to continue with this theme and authorised its rapporteur in early 2009 to carry out fact-finding visits to Bulgaria, Greece, Italy, Moldova, Romania, Russia, Turkey and Ukraine.

A last initiative that deserves attention is the annual debate on “The State of Human Rights in Europe”.⁴⁴ This is an attempt to integrate the work of various monitoring mechanism into an overall assessment of the human rights situation in the CoE Member States. The emphasis is on the countries under monitoring and on

⁴³ See e.g. the report *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states* (Doc. 10957 of 12 June 2006) by Mr Dick Marty, Committee on Legal Affairs and Human Rights.

⁴⁴ See most recently Resolution 1676 (2009), *The state of human rights in Europe and the progress of the Assembly’s monitoring procedure* (adopted 24 June 2009).

countries involved in a post-monitoring dialogue. However, wishing to include also the other CoE Member States, PACE has developed a cycle of periodic reports on the approximately one third of the remaining states.⁴⁵ The periodic reports are based on the country-by-country assessments made by the Commissioner for Human Rights and other Council of Europe monitoring mechanisms or institutions.

Meanwhile it should not be forgotten that the PACE members have a double mandate: they are also parliamentarians at home. As a result they have limited time available and, being elected politicians, they may have a certain preference for projects that enhance their visibility in the short term. It is therefore crucial that their activities are adequately supported by Council of Europe staff. The size of the staff is extremely limited. The Committee on Legal Affairs and Human Rights, for instance, has a Secretary who is assisted by less than a handful; a significant part of the work has to be done by interns.

2.2.2 Lessons learned

Some characteristics of PACE's monitoring procedure stand out. It is *flexible*, both in terms of organisation (co-rapporteurs may decide on very short notice to visit 'their country'), themes addressed and the variety of sources used. The introduction of a 'post-monitoring dialogue' is another example of the flexible nature of the procedure. It may also be said that the procedure is fairly *transparent*: documents are available on internet; the discussions, at least in the plenary meetings, are public. The fact that the monitoring procedure will be extended until PACE is satisfied with the outcome, guarantees *continuity*: periodic visits will continue, and the co-rapporteurs will refer back to previous observations in order to see what progress has been made in the meantime. The procedure might also be said to be *universal* in that it may extend to all Member States. In this connection it is interesting to recall that the initial format, in which the procedure was restricted to new Member States, was quickly abandoned. Apparently it is politically difficult to single out specific countries for a prolonged period of time. Nevertheless, the monitoring procedure and post-monitoring dialogue are in practice only applied to some countries.

Another, fairly obvious, characteristic of PACE's monitoring procedure is that it is *political*. Although PACE is supported by a secretariat which is usually responsible for drafting the texts under the direction of the rapporteurs, it is in the end of the day a matter of parliamentary debate. Needless to say that no binding judgments are adopted, but, more importantly, the very choice to start (or end) the monitoring procedure is a political issue. States will have an obvious interest in avoiding the procedure, and often parliamentarians vote accordingly. This also applies to the contents of the resolution and to possible measures against Member States. When, in the aftermath of the Russian-Georgian war in the summer of 2008, it was decided not to reject the credentials of the Russian delegation, the Georgian parliamentarians voted against. Individual parliamentarians may also have their own agenda. It is said that a rapporteur

⁴⁵ In 2009 this concerned Andorra, Austria, Belgium, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France and Germany.

delayed publication of a critical country report with a couple of weeks, because he was a candidate for an important position within the Council of Europe and he did not want to lose the votes of the parliamentarians of that particular country.

It is not so easy to make any firm statements about the actual impact of PACE's monitoring work. It may be an indication that in a number of cases PACE itself was satisfied with the outcome of either the monitoring procedure or the post-monitoring dialogue; it was then decided to discontinue the procedure.⁴⁶ Former PACE President René van der Linden, a strong believer in "parliamentary diplomacy", claims that the Parliamentary Assembly does have leverage, even in very large Member States such as Russia.⁴⁷

§ 2.3 *The Commissioner for Human Rights (CHR)*⁴⁸

2.3.1 *Description of monitoring activities*

(a) Background, staff, and budget

The Commissioner for Human Rights is an independent non-judicial institution within the Council of Europe. His mandate is to promote education in, awareness of and respect for human rights in the CoE member states.

The office of the Commissioner is relatively young: it was established only in 1999.⁴⁹ The CHR is elected for a non-renewable term of office of six years. As we have seen in the introduction, the current Commissioner is Mr Thomas Hammarberg (Sweden), who assumed office in 2006. He and his predecessor, Mr Alvaro Gil Robles, have managed to put their office in the spotlights: they feature prominently on the CoE's website and they manage to raise publicity when visiting Member States. At its most recent meeting in Madrid, the Committee of Ministers confirmed its political support for the Commissioner.⁵⁰

⁴⁶ PACE closed in 1997 the monitoring procedure as regards the Czech Republic and Lithuania. It also decided in 1999 to close the monitoring procedure on Slovakia. In January 2000, the monitoring procedure ended as regards Bulgaria. In April 2000, the Assembly closed the monitoring procedure as regards "the Former Yugoslav Republic of Macedonia", and in September 2000, it ended the procedure on Croatia. In January 2001, the Assembly closed the monitoring procedure as regards Latvia. Lastly, in June 2004, the Assembly closed the monitoring procedure as regards Turkey. Between 2001 and 2005 the Committee recommended to conclude the post-monitoring dialogue with Estonia, Lithuania, Romania, Croatia, the Czech Republic, Slovakia and Latvia.

⁴⁷ See my interview with Mr Van der Linden "Het is cruciaal dat we Rusland erbij houden", in *NJCM-Bulletin* 2007, pp. 967-971.

⁴⁸ The documents mentioned in this section – including the Annual Activity Report 2008, doc. CommDH(2009)12 – can be found on the Commissioner's website: www.coe.int/t/commissioner/.

⁴⁹ See Resolution (99) 50 on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999.

⁵⁰ See the 119th Session of the Committee of Ministers (Madrid, 12 May 2009), at www.coe.int, § 4: "The Council of Europe's Commissioner for Human Rights carries out his mandate in an outstanding way through action in the field and sustained dialogue with member states. The Commissioner's

The Commissioner is supported by a relatively small office of 13 ‘advisors’, as well as support staff dealing with financial and administrative matters and the website. In recruiting his staff, the Commissioner took care to attract individuals who had working experience in the other CoE monitoring mechanisms; currently the office is said to contain a fine mix of specialists. In 2008 the budget (of some € 2 million) represented about 1% of the total ordinary budget of the Council of Europe. This was supplemented by a total amount of € 855 054 in voluntary contributions.⁵¹

In practice the Commissioner’s office is often enlarged through secondments of national civil servants. The advantage is obvious in that the capacity increases and that it may be easier to liaise with national administrations. A potential danger is, however, that Member States may try to exert influence, through ‘their’ staff, on the Commissioner’s work. Quite apart from whether this risk materialises, the institution’s perceived independence may be affected. Some observers argue therefore that secondments are better to be avoided at all – not just in the case of the CHR, but in general. In order to avoid any appearance of risks, the new Director of the CHR Office has decided that a secondment is only possible if several candidates have responded to a specific job profile (for instance experience in the area of media freedom) and a selection on the basis of interviews has been made.

(b) Working method: visits

Apart from a number of other activities (such as the promotion of national human rights bodies and the publication of a regular electronic newsletter), the Commissioner is probably best-known for his country visits. So far a distinction has been made between *contact visits*, which aim at strengthening the relationships with the authorities and looking into one or several specific issues, and *assessment visits*, the purpose of which is to give a comprehensive review of the effectiveness of human rights protection in a given country. Each assessment visit is completed by the publication of a report containing conclusions and recommendations. These reports tend to be quite elaborate; the report on the Commissioner’s visit to the Netherlands comprises of 58 pages and 37 recommendations, addressing diverse topics such as the treatment of asylum seekers, the age of criminal responsibility and the need to remove the exemptions for associations based on religion or belief from equal treatment legislation.⁵² According to his own website:

The Commissioner seeks to engage in permanent dialogue with Council of Europe member states and conducts official country missions for a comprehensive evaluation of the human rights situation. The missions typically include meetings with the highest representatives of government, parliament, the judiciary, as well as leading members of human rights protection

activity has become fundamental, including in times of crisis. We shall continue to lend him our active support, as well as to the Council of Europe independent monitoring mechanisms”.

⁵¹ These voluntary contributions came from Finland, Germany, Greece, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, the Netherlands, Slovak Republic, Spain and the United Kingdom.

⁵² See *Report by the Commissioner for Human Rights, Thomas Hammarberg, on his visit to the Netherlands on 21-25 September 2008* (doc. CommDH(2009)02), Strasbourg, 11 March 2009.

institutions and the civil society. The Commissioner's reports contain both an analysis of human rights practices and detailed recommendations about possible ways of improvement. The reports are presented to the Council of Europe's Committee of Ministers and the Parliamentary Assembly. Subsequently they are published and widely circulated in the policy-making and NGO community as well as the media.

A few years after the official visit to a country, the Commissioner or his Office carries out a follow-up visit to assess the progress made in implementing the recommendations. The Commissioner subsequently issues a follow-up report, which is also widely publicised.⁵³

Thus in the year 2008, the Commissioner paid assessment visits to San Marino, FYRO Macedonia, Montenegro, The Netherlands, Serbia, Monaco and Belgium. As a result the full cycle of – very time-consuming – assessment visits was completed: all 47 Member States have now been visited for the purpose of a comprehensive human rights appraisal. Still in 2008, contact visits were carried out to Bulgaria, the Slovak Republic, the Russian Federation, Poland, Denmark, Romania and Cyprus. At the same time, a new approach was developed, with more focused visits with the aim of defining key problems and issuing more precise recommendations. This approach included special visits to France, the United Kingdom, Italy, Cyprus and Greece.

Meanwhile a number of thematic priorities were identified: discrimination on grounds of handicap and sexual orientation, the human rights of migrants, the position of Roma and Sinti, and the protection of human rights in the fight against terrorism. These thematic priorities are given particular consideration during country missions. Another priority area is co-operation with 'National Human Rights Structures', i.e. Ombudsman Offices and National Human Rights Institutions.

The Commissioner is to a very large extent free to determine his own agenda, which means that he can respond to political developments rapidly. After the war between Georgia and Russia, he offered his good offices to both sides and went to the region in August, September and November 2008 and once again in February 2009. Unlike other international actors he was received by both sides to the conflict and to secure the release and exchange of hostages. To mention another example: the Commissioner visited Italy in January 2009, as a follow-up to an earlier visit in June 2008. In the course of this visit the CHR addressed a number of human rights issues including action against discrimination, protection of Roma and Sinti and migration.⁵⁴

2.3.2 Lessons learned

The work of the Commissioner shares a number of characteristics with PACE's monitoring procedure. First and foremost it is *flexible*, both in terms of organisation (he may decide on very short notice to visit specific countries), themes addressed and the variety of sources used. His country reports and other documents are *public*; indeed the Commissioner is very active in seeking publicity for his activities. The intention to

⁵³ See http://www.coe.int/t/commissioner/Activities/mandate_en.asp

⁵⁴ See *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Italy on 13-15 January 2009* (doc. CommDH(2009)16), Strasbourg, 16 April 2009.

engage in an on-going dialogue with governments may guarantee *continuity*, although it is too early to tell if it will be feasible to continue to visit all 47 States on a systematic basis.

Contrary to the work of PACE, the activities are meant to cover (and in practice so far have covered) all Member States. Another difference with PACE's monitoring procedure is that the work of the Commissioner is arguably less politicised – that is: there are no public debates and votes on the contents of his findings, or about the choice of countries to be visited. As a result, the threshold to deploy activities vis-à-vis a particular country is much lower. This is also due to the gradual introduction of new monitoring techniques, such as the short 'single-issue visits'.

A challenge is surely posed by the size of the budget and the staff. Admittedly the Office was able to grow in recent years – which in itself is exceptional in the context of the Council of Europe – and there seem to be long-term plans to expand the staff to 18 or even 30 advisors. But for the time being it is an open question if the Commissioner will be able to live up to his ambitions: to engage in a continuous dialogue with all Member States, to explore very diverse themes, to react rapidly to developments which may affect human rights in Member States, and so on. At a very practical level the duration of country visits tends to be so short, that a meaningful exchange of ideas and information will sometimes be difficult to realise.

It also seems implausible that the Commissioner and his Office will have the capacity to collect and verify all relevant information. Inevitably, then, the Commissioner will be largely dependent on country information provided by others. These may be other monitoring bodies within the Council of Europe, and NGOs. Both categories of suppliers may actually be quite pleased to have the Commissioner carry their message, especially if they themselves face constraints in searching for publicity. The Commissioner for his part seems to be happy with the role of messenger as well – the report of his visit to Belgium, for instance, included references to the findings of no less than 13 supervisory bodies (excluding NGOs and domestic bodies): CEPEJ, the UN Committee against Torture, the CPT, the European Court of Human Rights, the UN High Commissioner for Refugees, the European Parliament, ECRI, the UN Committee on the Elimination of Discrimination against Women, the European Commission for Democracy through Law ("Venice Commission"), PACE, the Congress of Local and Regional Authorities, the UN Committee on the Rights of the Child, and the UN Human Rights Committee.⁵⁵ The idea behind this must be synergy – it is hoped that the Commissioner will be able to generate additional pressure to have the recommendations of other supervisors accepted.

⁵⁵ See *Report by the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, following his visit to Belgium on 15-19 December 2008* (doc. CommDH(2009)14), Strasbourg, 17 June 2009.

§ 2.4 *The European Court of Human Rights*⁵⁶

2.4.1 *Description of monitoring activities*

(a) *The Court*

It would be superfluous to introduce the European Convention on Human Rights or the European Court of Human Rights in any detail. It is common ground that the Court is unique. In terms of numbers, no other international tribunal deals with so many cases. In terms of substance, no other supervisory body has been able to reach such a level of sophistication in shaping and refining human rights and rule of law standards. In terms of significance, the Court's judgments have an impact matched by no other human rights body – not only on the parties whose disputes are settled in final and binding rulings, but also on the community of 47 Contracting Parties who change their domestic law and practice in a continuous process of adaptation to the Convention.

It is also common ground that (a) the Court consists of 47 full-time judges who meet high standards of expertise and independence, and who, having been nominated by their respective governments, are elected for a 6 year term by the Parliamentary Assembly; (b) the Registry comprises over 230 lawyers and a extensive supporting staff; (c) the Court is free, in reviewing applications, to take into account materials from various sources⁵⁷ and developments that have occurred after the impugned national decisions were taken⁵⁸; (d) being a judicial organ, the Court is essentially passive: it will respond to applications lodged, but it will not investigate situations of its own motion; (e) the Court's judgments are binding; and (f) judgments may include separate opinions. There is an increasing willingness of the Court to take into account other human rights treaties when interpreting the ECHR – even treaties which the respondent State in a particular case has not ratified.⁵⁹

Increasingly the Court pays express attention to structural problems underlying the individual case at hand, and it no longer shies away from giving rather specific instructions to the respondent States. The *Broniowski* case is a well-known example. The case concerned a very large group of Polish citizens who had once possessed land and property in territories that Poland had lost to the Soviet Union after World War II. Since 1946, Polish law had entitled these former owners to compensation – but the State Treasury had been unable to meet all compensation claims. The Court found a violation of Article 1 of Protocol No. 1 and noted that the failure to pay compensation originated in a systemic problem. In view of the magnitude of the problem, the Court issued a so-called 'pilot judgment'. In this judgment, the first of its kind, the Court

⁵⁶ Most information and documents mentioned in this section can be found on the Court's website: www.echr.coe.int.

⁵⁷ See e.g. ECtHR (GC), 28 February 2008, *Saadi v. Italy* (Appl. No. 37201/06), §§ 128-131.

⁵⁸ *Ibidem*, § 132, see also ECtHR (GC), 23 June 2008, *Maslov v. Austria* (Appl. No. 1638/03), § 93.

⁵⁹ See esp. ECtHR (GC), 12 November 2008, *Demir & Baykara v. Turkey* (Appl. No. 34503/97), §§ 65-86.

endeavoured to give guidelines for a general settlement.⁶⁰

A more recent example involves the failure to enforce the judgments of domestic courts in Russia. In *Burdov (No. 2)* the Court, in the operative part of the judgment:

6. *Holds* that the respondent State must set up (...) an effective domestic remedy or combination of such remedies which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgments in line with the Convention principles as established in the Court's case-law;

7. *Holds* that the respondent State must grant such redress, within one year from the date on which the judgment becomes final, to all victims of non-payment or unreasonably delayed payment by State authorities of a judgment debt in their favour who lodged their applications with the Court before the delivery of the present judgment and whose applications were communicated to the Government (...);

8. *Holds* that pending the adoption of the above measures, the Court will adjourn, for one year from the date on which the judgment becomes final, the proceedings in all cases concerning solely the non-enforcement and/or delayed enforcement of domestic judgments ordering monetary payments by the State authorities (...).⁶¹

Judgments like these may put additional pressure on States to implement previous Court rulings and thus to comply with international obligations freely entered into.

This is not to say that there are no weak points or threats. The European Convention is by no means an exhaustive human rights catalogue. There are various dimensions of the rule of law (such as the fight against corruption within the judiciary) which do not translate well in individual complaints: applicants may find it difficult to substantiate their allegations to the extent that the Court's standards of proof are met.⁶² Also the Court's fact-find capacity is very limited, it has difficulties in addressing systemic problems and large-scale human rights violations. Victims may feel frustrated when they discover the Court's limited powers to address the consequences of violations. The Court *cannot* re-open proceedings at national level, strike down laws which are found to be incompatible with the Convention, or grant a resident permit. Pursuant to Article 41 of the ECHR, the Court may (or may not) find one or more violations of the Convention, and, if a violation is found, award 'just satisfaction' to the victim.

(b) *The Court's workload*

As is well-known, the Court is seriously overburdened. As a result, it takes years before cases, even urgent ones, are dealt with. As of 1 July 2009, the Court has roughly 108,000 applications pending before one of its judicial formations: Committee,

⁶⁰ ECtHR, 22 June 2004, *Broniowski v. Poland* (Appl. 31443/96). For the aftermath see the decision of 28 September 2005, striking out the *Broniowski* case, and also ECtHR, 4 December 2007, *Wolkenberg v. Poland* (Appl. 50003/99).

⁶¹ ECtHR, 15 January 2009, *Burdov v. Russia (No. 2)* (Appl. 33509/04).

⁶² See e.g. ECtHR, 3 July 2007, *Flux v. Moldova (No. 2)* (Appl. No. 31001/03), with a partly dissenting opinion of Judge Bonello.

Chamber, or Grand Chamber.⁶³ Of these cases, 55% emanates from Russia (27.0%), Turkey (10.6%), Romania (8.8%) and Ukraine (8.6%). There are a further 22,000 applications at the pre-judicial stage. A relatively high percentage of them will never require a judicial decision and be destroyed administratively because the applicants do not follow up their initial communication. But they still lay a considerable claim on the Registry's capacity.

The 108,000 applications that are awaiting a judicial decision, vary widely in terms of complexity and importance. About two-thirds will be disposed of summarily by a Committee of three. As regards the potentially well-founded cases, there are approximately 39,600 currently pending before Chambers. About half of these are so-called repetitive cases, i.e. cases deriving from the same structural cause in a given country.⁶⁴ If the responsible authorities are slow in remedying the situation, similar complaints continue to be brought before the Court. These complaints do not require any sophisticated treatment, all legal issues having been resolved in previous case-law. But they nevertheless claim part of the Court's capacity, even if it is merely operating much like a claims commission: admissibility, facts and compensation have to be assessed in each individual case.

There remain a further 20,000 or so cases raising substantial and/or novel Convention issues. These cases in a way justify the very existence of the Court; by deciding these cases the Court can really have an impact on the operation of national legal systems and the daily lives of citizens. The Court's inability to deal speedily with these cases, is really the most serious problem facing the Convention system. But even in this category there are relatively few leading cases – 0.47% in 2007, to be precise.⁶⁵ In other words: the Court's capacity is to a large extent absorbed by cases that (a) do not relate to human rights violations or (b) are not of great significance. As a result the real victims suffer, since they have to wait for years before the Court can deal with their case.

Of course there are attempts to cope with the case-load. Protocol 14 is meant to further streamline the procedure before the Court, but it will only enter into force after all 47 States have ratified it; so far Russia has failed to do so. An interim solution was found through the adoption of Protocol 14*bis* in May 2009: the Court's procedure will be simplified in cases involving the countries that become party to it.⁶⁶ This is not the

⁶³ The figures mentioned here can be found on the Court's website, www.echr.coe.int.

⁶⁴ Notorious examples are length of proceedings and non-execution of final judicial decisions (see e.g. ECtHR, 7 May 2002, *Burdov v. Russia* (Appl. 59498/00)).

⁶⁵ In 2007, the Court delivered 136 'level 1' rulings (109 judgments, 27 admissibility decisions), i.e., rulings which in the eyes of the Court itself 'make a significant contribution to the development, clarification or modification of its case-law, either generally or in relation to a particular State'. In the same period, the Court delivered 28,792 judgments and decisions. In other words: 0.47 per cent of all cases fell in category 1 (and this percentage would drop to 0.32 if the calculation were to take into account the 13,417 files that were disposed of administratively in 2007). Perhaps this limited percentage is in itself not unacceptable, but the Court's overload leads to serious delays. Of the 10 'level 1' judgments issued in November 2007, two concerned applications brought in 2000, one in 2001 and two in 2003.

⁶⁶ Official named *Protocol No. 14bis to the Convention for the Protection of Human Rights and*

place, however, to discuss this issue in great detail.

(c) *The Committee of Ministers (CM) – general*

The Committee of Ministers (CM) is the main policy-making body of the Council of Europe. Officially it is made up of the Ministers of Foreign Affairs of each Member State, but they meet only once or twice per year. In daily practice the CM is composed of diplomatic representatives, usually with the rank of ambassador, permanently based in Strasbourg. The Committee of Ministers approves the CoE budget and programme of activities, and it is competent to adopt conventions and recommendations addressed to Member States.

In addition the CM carries out a number of specific tasks. Mention has already been made, in § 2.2.1 above, of the monitoring procedure that was established in 1994. In this section we will focus on another task. Pursuant to Article 46 (2) of the ECHR, the Committee is responsible for supervising the execution of judgments. It will ensure in the first place that payment of any just satisfaction decided by the Court is made as ordered. Secondly, the Committee will see to it that individual measures are, where necessary, taken in order to ensure *restitutio in integrum* – *i.e.*, that the victim is put, as far as possible, in the same situation as he enjoyed prior to the violation of the Convention.⁶⁷ Thirdly, the CM will examine if general measures are, where necessary, adopted in order to avoid new similar violations of the Convention in the future.⁶⁸ Once the CM is satisfied that all necessary measures have been taken, it adopts a so-called ‘final resolution’.

Given the ever-increasing number of judgments it is hardly surprising that this supervisory function is becoming a heavy burden too. The CM devotes four special sessions per year on this issue. At one such meeting, in March 2008, the Committee examined draft final resolutions to close 121 cases in which the respondent states had complied with their obligations under the Convention. The Committee also started the supervision of the execution of 185 new judgments of the Court. It then supervised the payment by respondent states of just satisfaction awarded by the Court to applicants in 845 cases, the adoption of other individual measures granting redress to the applicants in 139 cases or groups of cases and/or the adoption of general measures aimed at preventing new similar violations in 178 cases or groups of cases.⁶⁹ The next meeting, of June 2008, featured a staggering total of 3,726 cases on the agenda. By the end of 2008, over 7,000 cases were pending with the Committee of Ministers. At the most recent meeting, from 2-5 June 2009, the CM started the supervision of the execution of

Fundamental Freedoms adopted in Strasbourg, on 27 May 2009. European Treaty Series No. 204. For full text see conventions.coe.int. At the time of writing (July 2009) six States had ratified it.

⁶⁷ These measures may consist, for instance, of re-opening of proceedings at national level, granting of a resident permit, striking-out of criminal records.

⁶⁸ *E.g.*, constitutional, legislative or regulatory amendments, a change in administrative practice or in case-law, publication and/or dissemination of the Court's judgment.

⁶⁹ More information can be found on the special CoE web site dedicated to the execution of judgments of the European Court of Human Rights. See http://www.coe.int/T/E/Human_Rights/execution/. In addition annual reports on this issue have been published in March 2008 and April 2009.

another 476 new judgments of the Court.

The CM is assisted by a special section of the CoE Secretariat, the *Department for the Execution of Judgments of the ECtHR*. There is an interesting dialectic between the ‘intergovernmental’ Committee of Ministers and the ‘international’ Department. When preparing the Human Rights Meetings, the Department will inquire with the respondent States whether all necessary execution measures have been taken. De Boer, a long-time participant in the CM Human Rights Meetings, observes that the Department is “very precise” in verifying if measures have actually been taken.⁷⁰ Sometimes there are discussions when States argue that the Department is going beyond the obligations that flow from a particular judgment.

In this connection De Boer also noted that the Member States tend to take a cautious attitude towards one another. In addition he observed that groups of countries, such as the Scandinavians, prepare the Human Rights Meetings with a view to arriving at common positions. He is under the impression that countries such as Turkey, Italy and Russia – who are markedly opposed to the possible introduction of new sanctions and share a common interest in this matter – harmonise their positions in advance.⁷¹

Lodeweges, who worked for this Department notes that, as a result of the large numbers, it has become impossible to discuss the execution of each individual case.⁷² Similar cases may be clustered and be discussed jointly. Since the documentation for the Human Rights Meetings is voluminous, it seems safe to assume that many delegations will not have studied all materials. As a result, the question whether a Court judgment has been properly executed or not becomes a debate – or a written exchange of views – between the Department and the representative of the State concerned; third States rarely intervene if they do not have a direct interest at stake.

It is commonly understood that the compliance rate is very high. Of the thousands of judgments delivered, there are only *two* known cases where the respondent State refused to execute a judgment: the *Loizidou* case (which established Turkish responsibility for violations in the northern part of Cyprus) and the *Ilascu* case (which established Russian responsibility for violations in a separatist region of Moldova).⁷³ In both cases the Committee of Ministers exercised considerable diplomatic pressure, and in the end, even in these two cases solutions were found.⁷⁴ Still, De Boer feels that the impact of these resolutions is usually rather limited – but the Committee has very few other means at its disposal to make its point and put some pressure on a country. The

⁷⁰ G. de Boer, ‘Hof en raad hebben elkaar nodig’, in *NJCM-Bulletin* 2006, pp. 77-82, at p. 81. Mr. De Boer is seconded by the Dutch Ministry of Justice to the Dutch Permanent Representation in Strasbourg.

⁷¹ *Ibidem*, p. 80.

⁷² A. Lodeweges, ‘Executie-impressies. Ontwikkelingen in de praktijk van de tenuitvoerlegging van Hof-uitspraken’, in *NJCM-Bulletin* 2008, pp. 949-953.

⁷³ ECtHR (GC), 28 July 1998, *Loizidou v. Turkey* (Art. 50) (Appl. 15318/89) and ECtHR (GC), 8 July 2004, *Ilascu a.o. v. Moldova and Russia* (Appl. 48787/99).

⁷⁴ In *Loizidou* the Turkish government agreed, in 2004, to pay the amounts awarded by the Court. In *Ilascu* the Russian Federation had been ordered by the Court to use its influence in order to secure the applicants’ release, but Moscow continued to argue that it did not have the influence ascribed to it. In the end the applicants were released by the ‘MRT’ authorities after they had served their ‘sentence’.

fact that Turkey was willing to compromise in the *Loizidou* case, De Boer suggests, may also have to do with Turkey's wish to improve the climate for accession talks with the EU.⁷⁵

Leaving these two exceptional cases aside, it must be acknowledged that States are sometimes slow, or even reluctant, to take the necessary general measures. Both slowness and reluctance may undermine the authority of the Court, and it is therefore important that the Committee may then exert pressure on the State concerned. The CM may do so behind the scenes, or publicly, through the adoption of 'interim resolution'. In March 2009, for instance, the CM adopted a new interim resolution concerning the excessive length of judicial proceedings in Italy. The Committee of Ministers noted that

notwithstanding the measures taken, the statistics for the years 2006-2007 still show an increase in the length of proceedings in particular before certain jurisdictions (justices of peace [*giudici di pace*] and courts of appeal), as well as a substantial backlog in the civil and criminal fields (approximately 5.5 million pending civil cases and 3.2 million pending criminal cases), and that therefore a permanent solution to the structural problem of length of proceedings must be found.⁷⁶

The Committee therefore called upon the Italian authorities to pursue actively their efforts to ensure the swift adoption of the measures already envisaged for civil and criminal proceedings and to adopt urgently *ad hoc* measures to reduce the civil, criminal and administrative backlog. It also strongly encouraged the authorities to consider amending Act No. 89/2001 (the so-called Pinto Law) with a view to setting up a funding system resolving the problems of delay in the payment of compensation awarded, to simplify the procedure, and to extend the scope of the remedy to include injunctions to expedite the proceedings put into question.

It is too early to analyse the effect of this particular Interim Resolution on Italy (leaving the question of causality aside), but the point is that the Committee of Ministers has had this very topic on its agenda since the 1980s. Apparently the Committee of Ministers has not been able to force Italy into compliance as far as the length of judicial proceedings is concerned.

(d) The Committee of Ministers (CM) – recent trends

In recent years the use of internet has been intensified. For instance, it is now possible for outside observers to check on a country-by-country basis the state of execution of so-called all leading cases and other cases raising specific execution issues. For each case a standard format is used, providing comprehensive information about individual and general measures taken, the assessment of the secretariat, as well as any decisions taken by the CM so far.⁷⁷

⁷⁵ G. de Boer, 'Hof en Raad hebben elkaar nodig', in *NJCM-Bulletin* 2006, at p. 79.

⁷⁶ Interim Resolution CM/ResDH(2009)42, adopted 19 March 2009.

⁷⁷ See <http://www.coe.int/t/e/human%5Frights/execution/03%5FCases/>.

But there is more to be reported. The CM is keenly aware of the urgent need to take concrete measures at the national level so as to address the root causes of the Court's case-load.⁷⁸ For one, more emphasis is being placed on co-operation. The *Second Annual Report* mentions that states are proposed, wherever needed, different forms of assistance in defining and/or implementing the necessary execution measures, notably taking into account interesting practices of other states:

“Whereas such activities were previously only undertaken on an infrequent ad hoc basis, such activities have now become a more regular feature of the supervision of execution. Activities may be limited to the respondent state but may also encompass groups of states with similar problems. The CM has allowed a special budget for this purpose starting in 2007, clearly signalling its increased importance: the 2007 expenses were just over 52 000 euros, the 2008 totalled almost 66 000. This increase is, of course, reflected in the number of activities, which also increased by over 20% from 2007 to 2008. The 2009 budget totals 90 000 euros. Activities include, in particular, high level discussions with competent authorities, expert opinions on legislation and training sessions either in the country concerned or in Strasbourg”.⁷⁹

In addition, a most important development is the new Human Rights Trust Fund set up in 2008. The mission of the Fund, *inter alia*, is to assist in ensuring full and timely execution of judgments of the ECtHR. The Fund, a Norwegian initiative, has approved its first projects. The Assembly of the Fund's Contributors has recently allocated almost € 785,000 to the financing of execution-related activities in certain key areas: the non-execution of domestic court judgments in six countries and the responses to violations of the ECHR by security forces in the Chechen Republic.⁸⁰ It is still too early to say anything about the results of this initiative. But in May 2009 the Netherlands announced that it would contribute € 250,000 to the Fund, and indicated that it intended to make similar donations in the years 2010-2012. Of course there may be various foreign policy considerations behind this gesture, but one would assume that the Dutch government is only prepared to make scarce resources available if it believes that the money will be well-spent.

2.4.2 Lessons learned

The European Court of Human Rights has all the advantages and disadvantages of a judicial body. It delivers binding judgments following a procedure characterised by equality of arms. In the 50 years of its existence the Court has acquired a unique status,

⁷⁸ For a description, see H.L. Janssen, ‘Protocol 14 bij het EVRM. Met maatregelen in Straatsburg zijn we er nog niet: de toekomst van het Hof ligt in de handen van de verdragspartijen bij het EVRM’, in T. Barkhuysen, M. Kuijter & R.A. Lawson (eds.), *55 jaar EVRM* (speciale aflevering *NJCM-Bulletin*), 2006, pp. 123-133.

⁷⁹ CoE Committee of Ministers, *Supervision of the execution of judgments of the ECtHR – 2nd Annual Report 2008* (Strasbourg, April 2009), p. 11.

⁸⁰ *Ibidem*, pp. 11-12.

and the authority of its findings is undisputed.⁸¹ In its judgments it seeks to set out the general principles applicable in the case at hand, thereby showing *why* a violation was found. This may guide the State in identifying shortcomings in its legal system. The ‘pilot judgments’ present a new step in this development.

On the other hand the Court is not a perfect mechanism to monitor compliance with the ECHR. For one, it will only review the situations that are presented to it in the form of applications. The right to individual petition may be an excellent way to detect problems, but it all depends on the ‘vigilant individual’ (to borrow a term from Community law) who must be willing and able to lodge complaints in Strasbourg. Thus it was only several years after the armed conflict in Chechnya broke out, that the Court dealt with its first Chechen case – before that, there were simply no applications. The Court’s case-load creates similar problems. In the case of *A. a.o. v. UK* (2009) the Court reviewed certain British anti-terrorism measures.⁸² Whereas the judgment is of great importance for the interpretation of the ECHR, it does not assess the current state of affairs in the UK – the anti-terrorism measures had been abolished in 2005.

The Committee of Ministers supervises the execution of Court judgments. Publicity for this activity is made through press releases, special websites and (since 2008) annual reports. To that extent the procedure may be regarded as transparent. Still it is difficult for the outsider to follow *what happens* when the execution of specific cases is discussed behind closed doors. Insiders report that political/diplomatic considerations do play a role. Objectivity is ensured, however, at least to a certain degree, through the involvement of an independent secretariat, i.e. the Department for the Execution of Judgments of the ECtHR.

Interestingly the CM and the Secretariat co-operate in monitoring experiments. Countries are increasingly encouraged to co-operate and to exchange experiences in solving similar problems. Funds are made available for countries that are willing to change but lack the capacity to do so.

⁸¹ Of course there are exceptions. See e.g. ECtHR, 27 March 2008, *Shtukaturov v. Russia* (Appl. No. 44009/05), § 38, in which the St Petersburg court explains why it will not give any follow-up to an interim measure indicated by the ECtHR (stipulating that the applicant should be allowed to have access to his lawyer): “The Russian Federation as a special subject of international relations enjoys immunity from foreign jurisdiction, it is not bound by coercive measures applied by foreign courts and cannot be subjected to such measures ... without its consent”.

⁸² ECtHR (GC), 19 February 2009, *A. a.o. v. UK* (Appl. No. 3455/05).

§ 2.5 *The Committee for the Prevention of Torture (CPT)*⁸³

2.5.1 *Description of monitoring activities*

(a) *Background*

The *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (for the sake of brevity referred to as CPT) is a non-judicial treaty body, composed of independent experts. It is based on the 1987 Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, that was concluded in the framework of the Council of Europe. All CoE Member States have ratified the Convention.

(b) *Working method: visits*

The starting point of the Convention is that all States parties are already bound by the ECHR and that they all accept the prohibition of torture and other forms of ill-treatment. That prohibition is supplemented by the Convention, which aims to strengthen domestic structures for the protection of individuals who, for whatever reason, are deprived of their liberty by State organs. Thus the CPT visits places of detention (prisons, police stations, psychiatric hospitals and so on); the purpose is to see how persons deprived of their liberty are treated and, if necessary, to recommend improvements to States. The CPT has unlimited access to places of detention and the right to move inside such places without restriction. It may interview persons deprived of their liberty in private and communicate freely with anyone who can provide information. It follows from the above that the CPT is not meant to identify and remedy individual cases of ill-treatment. The CPT is about prevention and systemic improvement; individual victims should turn to their domestic courts and, if necessary, the European Court of Human Rights.

CPT delegations visit all Contracting States periodically. In practice the CPT is able to carry out about ten regular visits per year, which means that it will visit a country every four to five years. Insiders feel that this frequency is sufficient; also because additional *ad hoc* visits may be organised whenever necessary. Thus, an *ad hoc* visit to Armenia in March 2008 was triggered by events which followed the presidential election held the previous month. On 1 March 2008, a police operation took place aimed at dispersing opposition rallies in Yerevan. The CPT subsequently received numerous reports according to which dozens of persons had been arrested in the course of and following that operation. It was alleged that law enforcement officials had frequently used

⁸³ Most information and documents mentioned in this section can be found on the CPT's website: www.cpt.coe.int. For more background see esp. the work of Bristol professors M. Evans & R. Morgan, such as *Preventing Torture* (Oxford 1998), *Protecting Prisoners* (Oxford 1999), *Combating Torture* (Council of Europe 2001). See also J. de Lange, *Detentie genormeerd – Een onderzoek naar de betekenis van het CPT voor de inrichting van vrijheidsbeneming in Nederland* (diss. Rotterdam, 2008).

excessive force at the time of apprehension, and concern was expressed about the fate of those taken into detention. The CPT decided that it should examine on the spot the situation of persons detained in connection with the post-election events and seek detailed information on the force used during the 1 March operation.⁸⁴ At first sight this comes close to offering individual protection, but the primary purpose of the CPT was to ensure that there were adequate mechanisms in place in Armenia to handle individual cases of ill-treatment.

The Committee must notify the State concerned of its intention to pay a visit but does not have to specify when the actual visit will take place and which establishments will be visited. This keeps an element of surprise, which is considered necessary to get a reliable picture of the reality. In practice the CPT publishes, in November or December, a list of States which it intends to visit during the following year.

(c) Reporting

On the basis of the facts found during the visit, the CPT will formulate recommendations. These are included in a report which is adopted by the plenary Committee, and then presented to the State concerned. The report is confidential until publication is authorised by the respondent Government. Over the years it has become custom for the State parties to allow publication of the Committee's report together with their response. Several countries, including the Netherlands, tend to authorise publication of the CPT report even before their own response is available. A few countries, including Russia and Turkey, have been reluctant to allow publication of 'their' CPT report at all. But this is becoming more exceptional; by now all Turkish reports are in the public domain. So far, the CPT has made 270 visits (165 periodic visits and 105 *ad hoc* visits); 220 reports have been published. When assessing these statistics it should be kept in mind that the reports about the more recent visits are simply not adopted yet.

The adoption of the report is not seen as an end in itself: it is meant to be the starting point for an ongoing dialogue with the State concerned. It is a well-established practice for the CPT to refer back to previous findings when carrying out follow-up visits. For instance, the CPT carried out follow-up visits to "the former Yugoslav Republic of Macedonia" in October 2007 and June/July 2008, specifically aimed at examining the steps taken by the national authorities to implement recommendations made by the CPT after earlier visits. On this issue the CPT stated in its most recent General Report:

"As has been stressed before, a country's cooperation with the CPT cannot be described as effective in the absence of *action to improve the situation in the light of the Committee's recommendations*. Over the years, there has been no shortage of 'success stories'. However, it is also the case that the failure of States to implement recommendations repeatedly made by the CPT on certain issues remains a constant refrain of the Committee's reports. Few countries visited over the last twelve months have escaped this criticism".⁸⁵

⁸⁴ See 18th General Report on the CPT's activities (Strasbourg, 18 September 2008), § 5.

⁸⁵ See 18th General Report on the CPT's activities (Strasbourg, 18 September 2008), § 16.

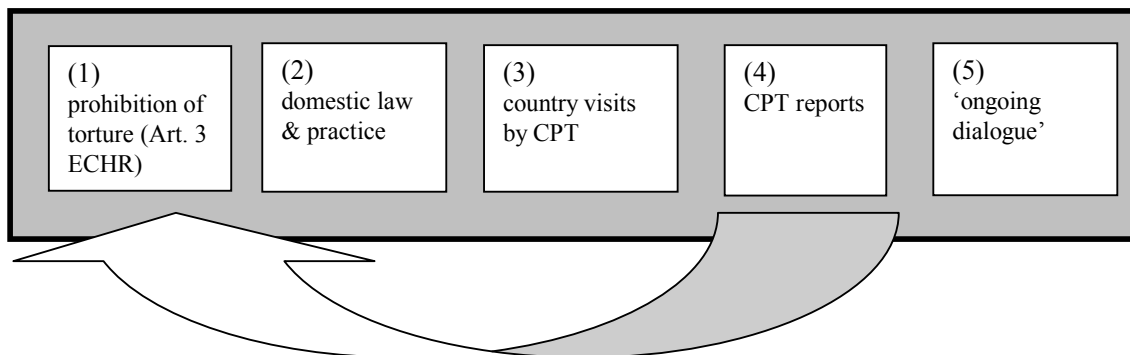
The CPT has two guiding principles: co-operation and confidentiality. Co-operation with the national authorities is at the heart of the Convention, since the aim is to protect persons deprived of their liberty rather than to condemn States for abuses. It is believed that co-operation is made easier by confidentiality. The idea is that States are more likely to share sensitive information and engage in frank discussions with the CPT if they know that information will not be passed on to others, unless they agree to it. The Committee therefore meets in camera and, as mentioned above, its reports are confidential until publication has been authorised. In this respect the CPT clearly differs from the other monitoring bodies discussed so far. Within the Council of Europe the CPT was always known for its ‘secretish’ attitude: it consistently refused to share information with other CoE bodies, including the Human Rights Court, even on an informal basis. It would appear that this is changing somewhat in recent times. The CPT will still not forward any confidential information, but it becomes more willing to share information that does necessarily qualify as confidential. Various factors may play a role: the Member States may have become used to the CPT and as a result less adamant on the issue of confidentiality; staff has moved from the Court’s Registry to the CPT’s secretariat and vice versa; and the Court’s new President, Mr Costa, has made an effort to intensify the contacts between the two bodies.

Having said that, confidentiality remains the rule. Nevertheless, if a country fails to co-operate or refuses to improve the situation in the light of the Committee’s recommendations, the CPT may decide to make a public statement. It has done so only in exceptional circumstances, involving Turkey and the Russian Federation.

In addition, the CPT draws up a general report on its activities every year, which is made public. Interestingly the CPT has developed a tradition to include in these general reports *standards* relating to the treatment of persons deprived of their liberty. Already in its Second General Report (covering 1991) the CPT paid attention to “some issues related to police custody of criminal suspects and imprisonment”. The Committee explained that it intended to give a clear advance indication to national authorities of its views regarding the manner in which persons deprived of their liberty ought to be treated and, more generally, to stimulate discussion on such matters. The “substantive” standards drawn up so far also deal with training of law enforcement personnel, health care services in prisons, foreign nationals detained under aliens legislation, involuntary placement in psychiatric establishments and juveniles and women deprived of their liberty. These standards have been published also in separate brochures.⁸⁶

This practice adds a new dimension to the scheme used in paragraph 1:

⁸⁶ See <http://www.cpt.coe.int/en/docsstandards.htm>.



A final observation concerns the lack of any systematic follow-up at the political level. Unlike the judgments of the European Court of Human Rights, the country reports of the CPT are not on the agenda of the Committee of Ministers. One might be inclined to see this as a weakness, especially in the case of countries who fail to improve the situation for a number of years.⁸⁷ Political pressure might back-up the work of the CPT. It would seem, however, that the CPT itself is not unhappy at all with the situation. If its reports became the subject of discussion in the CM, the reasoning goes, the CPT would be drawn into a political discussion. That might frustrate the co-operation with the States concerned.

(d) Membership, staff, and budget

The CPT members are elected for a four-year term by the Committee of Ministers and can be re-elected twice. One member is elected in respect of each Contracting State. The CPT has always been composed of a combination of lawyers, medical doctors and specialists in prison or police matters. In case of vacancies the CPT will informally advise the Committee of Ministers about its views concerning the ideal professional background of new members, so that a proper balance may be maintained. The CM may take this into account when electing new members. Currently candidates are not interviewed or tested in any way about their knowledge and language skills. Observers regret this and point to the contrast with the election procedure for the European Court of Human Rights: all candidates are interviewed by a delegation of the Parliamentary Assembly. There is also pressure to make the nomination process of candidates for the Court more transparent. In 2007 the Parliamentary Assembly itself called for an enhanced procedure of appointment of CPT members.⁸⁸

Visits are carried out by delegations, usually of two or more CPT members, accompanied by members of the Committee's Secretariat and, if necessary, by additional experts and interpreters. The member elected in respect of the country being

⁸⁷ See e.g. the CPT report on Greece, quoted in footnote 12 *supra*.

⁸⁸ See Resolution 1540 (2007), *Improving selection procedures for CPT members*, adopted 16 March 2007: "[t]he CPT's continued authority depends on the moral standing, professional qualifications and personal implication of all its members".

visited does not join the delegation.

The CPT is assisted by a Secretariat which is divided in three divisions. Leaving administrative staff aside, each division is composed of a head and three administrators, who usually have a background in law, but sometimes also other areas such as medicine. Each division is responsible for the activities vis-à-vis 16 countries, which means that every single official has to ‘cover’ four countries. The CPT is also confronted with budgetary constraints. The budget for 2009 enabled the Committee to develop a programme with 185 “visit days”.⁸⁹ The CPT itself believes that the ultimate goal is an annual programme of 200 visit days: this is the volume of visit days required to cope effectively with the workload generated by 47 Parties to the Convention.

A substantial part of the budget has to be spent on translation costs. In order to be able to monitor the situation in, for instance, Latvia, the CPT and its Secretariat must have access to new legislation and jurisprudence. This means that documents will have to be translated into one of the working languages.⁹⁰ Country visits also claim high interpretation costs, as CPT delegations tend to split up in order to be able to visit as many institutions as possible – but this implies that, ideally, each delegation member is accompanied by an interpreter. In practice, however, budgetary constraints entail that delegation members have to share an interpreter, which diminishes the efficiency of the visit.

2.5.2 *Lessons learned*

Over its years of activity in the field, the CPT has developed great expertise in the treatment of detainees. An interesting feature of its membership is that there has always been an attempt to arrive at ‘the right mix’ of lawyers, medical specialists and other experts. Attention for the selection process of new members is growing, though. The Committee makes use of very diverse sources, and never fails to contact civil society in the context of a country visit. Its unprecedented powers of access to places of detention enable it to achieve a very sophisticated level of fact-finding. The CPT’s findings are referred to by the European Court of Human Rights on a regular basis,⁹¹ and it seems fair to say that the CPT is highly regarded by the Member States – even if its recommendations are not always followed.⁹²

The annual working programmes pre-determine the CPT’s activities to a considerable extent, but this is compensated by the possibility to pay *ad hoc* visits if the circumstances so require. The frequency of on-site visits is relative low (once every 4-5 years), but this does not appear to be a problem for the purposes of the CPT.

⁸⁹ See 18th *General Report on the CPT’s activities* (Strasbourg, 18 September 2008), § 37.

⁹⁰ This is all the more true since not all nationalities are represented in the Secretariat. In this respect the CPT differs from the Court with its large Registry. The relevant committees of PACE each have a small Secretariat too, but, unlike the CPT, they do not seem to collect information from all Member States on a systematic and on-going basis.

⁹¹ See e.g. ECtHR, 6 March 2001, *Dougoz v. Greece* (Appl. No. 40907/98), §§ 40, 46; ECtHR (GC), 19 February 2009, *A. a.o. v. UK* (Appl. No. 3455/05), §§ 117, 132.

⁹² See the remarks in footnotes 20 and 25 *supra*.

The CPT has always emphasised the need for an on-going dialogue with domestic authorities. The visits are not seen as an end in itself, but as part of a long-term co-operation. No public information is available about the nature or outcome of this “on-going dialogue”, so it is difficult to say anything about its effectiveness. On the other hand, the extent to which the Committee’s previous recommendations have been implemented is always on the agenda of a CPT delegation. In this respect continuity is guaranteed.

Apart from the possibility to issue public statements – which is rarely used – the Committee does not have the power to impose sanctions. Rather, the CPT relies on close co-operation with national authorities. There is no institutionalised follow-up at the political level of the Committee of Ministers, but the CPT does not appear to regret that. In order to protect its relationship with national authorities, the CPT takes the rule of confidentiality very seriously. It will not share its information with any outsiders, nor with any other CoE bodies, unless it has been made public. Whether this secrecy adds to the Committee’s effectiveness is impossible to state for the outside observer.

§ 2.6 *The Group of States against Corruption (GRECO)*⁹³

2.6.1 *Description of monitoring activities*

(a) *Background, staff, and budget*

Organisations such as Transparency International have put the fight against corruption in the spotlights, but the issue already received attention in the Council of Europe in the early 1980’s, when the Committee of Ministers recommended to take measures against economic crime, including bribery.⁹⁴ Since then the Organisation has drafted a number of instruments (conventions, guiding principles and recommendations) dealing with matters such as the criminalisation of corruption in the public and private sectors, liability and compensation for damage caused by corruption, conduct of public officials and the financing of political parties.⁹⁵

The *Group of States against Corruption* (GRECO) was established in 1999 by the Council of Europe to monitor States’ compliance with the organisation’s anti-corruption standards. Currently, GRECO comprises 46 Member States (45 European States and the USA). Each Member State appoints up to two representatives – often senior officials from the Ministry of Justice – who participate in GRECO plenary

⁹³ Most information mentioned in this section can be found on, and § 2.6.1 is largely based on, GRECO’s website: <http://www.coe.int/t/dghl/monitoring/greco/>.

⁹⁴ See *Recommendation No. R (81) 12 on economic crime*, adopted 25 June 1981.

⁹⁵ See esp. *Criminal Law Convention on Corruption* (27 January 1999; ETS 173; entry into force 2002, by now 41 ratifications); *Civil Law Convention on Corruption* (4 November 1999, ETS 174; entry into force 2003, by now 33 ratifications); *Recommendation No. R (2000) 10 on Codes of Conduct for Public Officials*; *Recommendation (2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns*; and the *Additional Protocol to the Criminal Law Convention on Corruption* (15 May 2003; ETS 191; entry into force 2005, by now 24 ratifications).

meetings with a right to vote. At present Liechtenstein and Monaco are the only CoE Member States still not to have joined GRECO.

GRECO is assisted by a small secretariat, provided by the Secretary General of the Council of Europe. The Secretariat, which is headed by an Executive Secretary, consists of a deputy and five administrators, as well as support staff. The budget for 2009 is slightly more than € 2 million – actually an increase of 13% when compared to the previous year. That increase is rare in the context of the Council of Europe, and may be seen as an indication that GRECO is doing well.

(b) Working method: the evaluation process

GRECO intends to improve the capacity of its members to fight corruption through what is called “a dynamic process of mutual evaluation and peer pressure”. Thus, all Member States participate in, and submit themselves without restriction to, the mutual evaluation and compliance procedures. In this connection two types of procedure are distinguished:

- a “horizontal” *evaluation procedure* whereby all members are evaluated within an Evaluation Round, leading to recommendations for legislative, institutional and practical reforms;
- a *compliance procedure* designed to assess the measures taken by its members to implement the recommendations.

Each evaluation round covers specific themes. GRECO’s first evaluation round (2000–2002) dealt with the independence, specialisation and means of national bodies engaged in the prevention and fight against corruption. It also dealt with the extent and scope of immunities of public officials from arrest, prosecution, etc. The second evaluation round (2003–2006) focused on the identification, seizure and confiscation of corruption proceeds, the prevention and detection of corruption in public administration and the prevention of legal persons (corporations, etc) from being used as shields for corruption. The third evaluation round (launched in January 2007) addresses (a) the incriminations provided for in the Criminal Law Convention on Corruption and (b) the transparency of party funding.

The clear and rather narrow focus of each evaluation round seems to have advantages and disadvantages. On the one hand a thorough, in-depth analysis of national law and practice is made possible; recommendations can really be meaningful. On the other hand GRECO sometimes has to ignore obvious problems because they ‘belong’ to another evaluation round. GRECO’s ability to fulfil its mission would be enhanced if the evaluation procedure had more flexibility, but Member States might argue that this would lead to unequal treatment of States. The answer to that concern would be that the standards are the same for all States, but that, depending on differences between the States, different responses are called for.

Unlike PACE, the Commissioner for Human Rights and the CPT, GRECO does not have a specific instrument to respond to urgent situations: GRECO’s task is

primarily about structural changes in the area of policies, legislation, practices and so on. As a result the emphasis is on medium and long term strategies.

(c) The evaluation rounds in practice

The evaluation process starts with the establishment of a team of experts for the evaluation of a particular member. The experts (academics, practitioners, government officials and so on) are selected from lists submitted by each Member State. Although the experts are appointed by GRECO itself, it is the secretariat that tables a first proposal, taking into account the need to strike a geographical balance and to have a sound division of expertise; a team should not contain, for instance, two prosecutors. Experts will never be involved in the evaluation of their own country. For each evaluation round new lists of experts are compiled, taking into account the substantive expertise that is required for that particular round.

The analysis of the situation in each country starts with written replies to a questionnaire. The secretariat may seek additional information where necessary. Then an on-site visit takes place. The purpose is on the one hand to meet with public officials, politicians, journalists, the chamber of commerce, representatives of civil society and so on. On the other hand the on-site visit allows for a better assessment of the situation ‘on the ground’. There may for instance be a gap in the law, and the written replies to the questionnaire may have been ambiguous as to how this gap is dealt with in practice. It may then be very useful to ask judges and prosecutors how they see the situation. The visits typically last one week, which is said to be enough given the narrow focus of the evaluation.

Following the on-site visit, the secretariat and the experts draft a report which is communicated to the country under scrutiny for comments. There may be a ‘pre-meeting’ to clarify certain issues and open questions. On this occasion the wording of draft recommendations may also be discussed, but this is not the primary objective of the meeting.

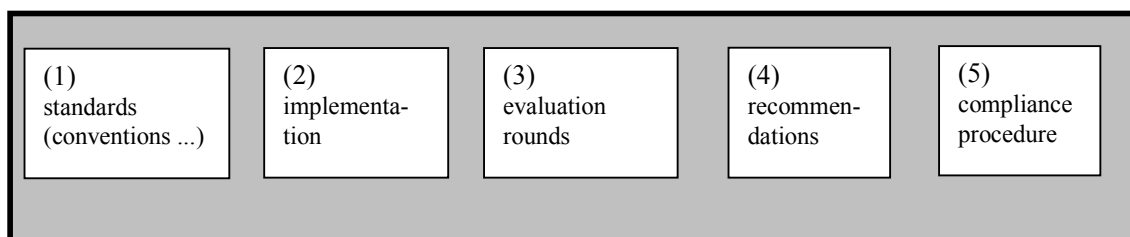
Finally the draft report is submitted to GRECO for examination and adoption. The discussions in GRECO are said to be very lively and – unlike what we were told about the situation in the Committee of Ministers⁹⁶ – other countries may be actively involved. The explanation would be that these countries themselves haven been subjected to scrutiny and may have received recommendations which they found hard to accept; so in turn they want to make sure that the same strict standards are applied to other States as well. This ‘peer driven’ insistence on coherence seems to add greatly to GRECO’s effectiveness. The difference with the ECHR and the attitude of the Committee of Ministers might be explained by the existence of clear legal standards relating to a small and well-defined area and by the fact that GRECO members know in advance that *all* States have to go through the same test sooner or later.

The conclusions of evaluation reports may state that legislation and practice comply – or do not comply – with the provisions under scrutiny. The conclusions may

⁹⁶ See § 2.4.1 (c), footnotes 69-71 and accompanying text, *supra*.

lead to recommendations which require action within 18 months. In the past, GRECO also used to formulate observations which members were supposed to take into account but were not formally required to report on in the subsequent compliance procedure.

One of the strengths of GRECO's monitoring procedure is that it does not stop here. The implementation of recommendations is examined in the *compliance procedure*. The Member State under scrutiny must show, 18 months after the adoption of the evaluation report, whether it has implemented a recommendation. If not all recommendations have been complied with, GRECO will re-examine outstanding recommendations within another 18 months. Depending on the progress made, GRECO may decide whether to terminate the compliance procedure in respect of a particular member. Put schematically:



In 2008, GRECO carried out 12 on-site visits, adopted 12 evaluation reports and over 20 compliance reports. An interesting dilemma occurred when GRECO was asked to provide support to members: how to reconcile its role as a monitoring body with providing formal advice/assistance on how to implement the recommendations that resulted from its own monitoring? In the end it was decided that guidance could be provided, but that GRECO would remain free in its assessment of the situation.⁹⁷ The situation illustrates that one cannot always make a sharp distinction between 'monitoring' and 'assistance' – or that it may be artificial or even counter-productive to do so. Yet, within the structure of the Council of Europe these two activities are allocated to separate directorates.

On a final note it is interesting to observe that there is also, to some extent, a GRECO 'jurisprudence' on most topics that have come under evaluation so far. Thus, standards have emerged concerning issues such as determining how far a prosecutor should be (in)dependent, at what stage do immunities become an obstacle to prosecuting corruption offences and who may legitimately enjoy immunities apart from MPs/government members/the national ombudsman, how much should be expected in terms of guidance on the detection of corruption-related money laundering by private sector entities, how independent should a party financing control body be, etcetera. The development of these 'GRECO standards' is explained by the fact that the standards contained in the basic instruments, especially the resolution and the recommendations, are sometimes drafted in very broad terms and need some kind of 'interpretation'. Observers maintain that GRECO has established some important milestones and progressive practice over the years, often after very intense discussions. At the same time

⁹⁷ See *Ninth General Activity Report of GRECO (2008)* (Strasbourg, Feb. 2009), p. 10.

these standards are not easily perceptible due to the technicality of certain aspects.

2.6.2 *Lessons learned*

The example of GRECO provides us with a number of interesting innovations: (a) the combination of *evaluation procedures* leading to recommendations and a *compliance procedure* to ensure that recommendations are implemented; (b) the involvement of independent experts (who “cannot be missed”, one observer emphasised) and government representatives during distinct phases of the process; and (c) rather active peer pressure which is driven by the fact that exactly the same test is applied to all countries consecutively. The latter element leads to a desire amongst the Member States for coherence and increases the credibility of recommendations.

It might be suggested to increase the flexibility of the evaluation procedure. The effectiveness of the monitoring would undoubtedly be enhanced if the mandate were less rigid. It remains to be seen, however, if all Member States would support such a change.

Again it is difficult to make firm statements about the actual impact of GRECO. There are success stories, such as Georgia, which was severely criticised in the first evaluation round but showed a lot of progress in the second round. A causal link with the work of GRECO is not always easy to establish, even if changes in the domestic law often answer very directly to recommendations made by GRECO. The question then arises whether such changes are *attributable* to GRECO only. It often happens that a variety of anti-corruption pressure groups (including NGOs, media and academics) refer to GRECO findings and recommendations for improvements. In doing so they amplify the activities of GRECO. Apparently these actors regard GRECO as a credible institution with convincing reports and recommendations.

§ 2.7 *The European Commission for the Efficiency of Justice (CEPEJ)*⁹⁸

2.7.1 *Description of monitoring activities*

(a) *Background, staff, and budget*

The *European Commission for the Efficiency of Justice (CEPEJ)* was established in 2002.⁹⁹ It is based not on a convention, such as the ECHR or the CPT, but on a resolution. The Committee of Ministers took as a starting point that “the rule of law on which European democracies rest cannot be ensured without fair, efficient and accessible judicial systems”. The idea behind CEPEJ was to improve inter-state co-operation in this area a very practical way: to compare judicial systems, to exchange experiences, and to define concrete means to improve the functioning of the judicial

⁹⁸ Most information mentioned in this section can be found on, and § 2.7.1 is largely based on, CEPEJ’s website: <http://www.coe.int/t/dghl/cooperation/cepej/>.

⁹⁹ See *Resolution (2002) 12 establishing the European Commission for the efficiency of justice (CEPEJ)*, adopted 18 September 2002.

systems in Europe. The scope extends beyond ‘mere’ efficiency in a narrow sense: it includes the quality and the effectiveness of justice. According to the Statute of CEPEJ, these tasks shall be fulfilled by, among others,

“(a) identifying and developing indicators, collecting and analysing quantitative and qualitative figures, and defining measures and means of evaluation, and (b) drawing up reports, statistics, best practice surveys, guidelines, action plans, opinions and general comments”.

The CEPEJ is composed of experts from all the 47 Member States of the Council of Europe; most are magistrates or senior officials from the Ministry of Justice. The CEPEJ is assisted by – another – small secretariat consisting of seven members (including documentation and assistance). Apart from staff costs, its modest budget allows for little more than a few expert meetings per year.

(b) Working method: data collection

In practical terms, the CEPEJ has undertaken a regular process for evaluating judicial systems of the participating states. Its Working Group on the evaluation of judicial systems (CEPEJ-GT-EVAL) is in charge of the management of this process. The collection of data – and thus the development of common statistical criteria – have been central concerns. After a pilot evaluation of judicial systems (2002-2004) two regular evaluation cycles (2004-2006 and 2006-2008) followed. CEPEJ will send a questionnaire to each Member State and receive written answers by national correspondents. These correspondents tend to be officials of the Ministry of Justice or of the council of the judiciary.

Unlike CPT and GRECO there are no on-site visits; there are no expert teams that will examine a country any closer; nor is there a possibility to consult other national sources to verify the data supplied by national correspondents. This makes that CEPEJ is heavily dependent on the quality of their work. In this system of self-reporting the correspondents are fully responsible for the quality and reliability of the data that they supply. If a state fails to provide data at all, the CEPEJ does not have any sanctions at its disposal.¹⁰⁰

The national evaluations feed into comprehensive reports which are made available on the CEPEJ website.¹⁰¹ These reports contain a wealth of information about the functioning of the judiciary in Europe. The website also contains the contributions of the national correspondents. Although the national replies vary in their degree of detail, they often contain additional explanations. They are therefore potentially a useful complement to the overall report.

¹⁰⁰ According to the 2008 report, “Albania has provided very few answers to the questionnaire” whereas Liechtenstein and San Marino were not able at all to provide data for this report (see pp. 10-11).

¹⁰¹ See *European Commission for the Efficiency of Justice (CEPEJ) - European judicial systems - Edition 2008 (2006 data): Efficiency and quality of justice*. This 334-page report was adopted by the CEPEJ during its 11th plenary meeting (2–3 July 2008) and published on 8 October 2008.

So CEPEJ is essentially about data collection. National reports are not discussed in a monitoring body (as in GRECO); there are no findings about compliance with pre-existing standards or recommendations (as in CPT). Conversely, Member States do not give systematic feedback on their own activities in response to the findings of CEPEJ. In France, for instance, the comparative data compiled by CEPEJ have been used in discussions to increase the budget of the judiciary, and in the Netherlands a professional journal devoted a special issue to the work of CEPEJ¹⁰² – but these are in a way incidents that happen to occur and there is no institutionalised way to report back on these developments to CEPEJ.

Perhaps more than any of the other monitoring bodies described so far, the CEPEJ has experienced that “the comparison of quantitative figures from different countries set against the varied geographical, economic and legal situations is a delicate job”.¹⁰³ The quality of the figures will necessarily depend very much on the definitions used by the national correspondents – seemingly straightforward questions, such as the budget allocated to the courts, may be interpreted in many different ways –, the system of registration in the countries, the national figures available and the way the figures have been processed and analysed. It seems unavoidable that variations occur when national respondents interpret the questions for their country and try to match the questions to the information available to them. Against that background, the CEPEJ has engaged in a continuous process of developing and fine-tuning the questionnaires and the guidelines that accompany them.

(c) Other activities

Meanwhile, the CEPEJ has set up a number of working groups, dealing for instance with mediation and the execution of court decisions in civil, commercial and administrative matters at national level. The *Working Group on quality of justice (CEPEJ-GT-QUAL)* is instructed to develop means to analyse and evaluate the quality of the work done inside the courts. The Working group will therefore collect information on evaluation systems existing in the member states, and improve tools, indicators and means for measuring the quality of judicial work. In doing so, the Working Group will have to respect the principle of independence of judges.

Along similar lines a *Centre for judicial time management (SATURN Centre - Study and Analysis of judicial Time Use Research Network)* was established in 2007.¹⁰⁴ The Centre is instructed to collect information necessary for the knowledge of judicial timeframes in the member States. The purpose is to enable member states to implement policies aiming to prevent violations of the right for a fair trial within a reasonable time protected by Article 6 ECHR. Again an important task is to define and improve measuring systems and common indicators on judicial timeframes in all member states and to develop appropriate modalities and tools for collecting

¹⁰² “Het Nederlandse rechtsbestel in Europees perspectief”, special issue of *Justitiële verkenningen*, vol. 35/4 (2009), with summaries in English. Available in full text via www.wodc.nl.

¹⁰³ See the 2008 report, p. 12.

¹⁰⁴ See http://www.coe.int/t/dghl/cooperation/cepej/Delais/default_en.asp.

information through statistical analysis.

2.7.2 *Lessons learned*

All in all a mixed impression of CEPEJ remains. On the one hand CEPEJ is in the process of accumulating an impressive body of data on the organisation and administration of Justice in Europe. But on the other hand, from an institutional point of view, there are a number of weaknesses when CEPEJ is compared to other monitoring bodies – indeed one could even ask if CEPEJ can be seen as a ‘monitoring body’ in the first place, or rather as a forum for co-operation. But leaving semantics aside, it is clear that the work of CEPEJ is entirely dependent on self-reporting by national correspondents; there are no instruments to verify the data supplied by them; and there is little organised feedback about the findings between the CEPEJ and the Member States.

§ 3 Some concluding observations

§ 3.1 *Summary of main findings*

What lessons can be learned from the above? Apart from some recurring themes (such as a serious shortage of funding) we have seen considerable differences between the various monitoring bodies set up by the Council of Europe. Some differences have a historical background, others have been inserted on purpose, taking into account the subject-matter of the monitoring exercise. But one thing is clear: there is no single blueprint. Perhaps the most useful way to structure our findings a little bit is to get back to the factors that were suggested in § 1.5.

- ***Mandate***

It is important to point out at the outset that both the European Court of Human Rights and the CPT are treaty bodies. They have an unequivocal legal basis for their activities, in the form of binding conventions providing for a clear mandate. The standards that they supervise, are *legally binding* standards. The latter is also true for GRECO¹⁰⁵ and the Commissioner for Human Rights (CHR), even if they were ‘only’ established in resolutions of the Committee of Ministers.

Since compliance with these standards is a legal obligation, and not just a desirable policy, the process of monitoring is in essence a legal matter as well. It is not subject to prioritisation or *quid pro quo*. It may be helpful to their impact if the legal work is amplified at one stage in the political arena (notably the Committee of Ministers (CM) or the Parliamentary Assembly (PACE)), but this should not dilute the outcome of the legal assessments made.

Whereas PACE and the CHR are by all means free to respond to sudden developments, GRECO’s agenda is pre-determined by the well-defined cycles that it has to go through. Some argue that GRECO’s rigid agenda entails diminished effectiveness, but at the same time the narrow focus allows for detailed and in-depth investigations. CPT is a bit in-between: it has annual working programmes but it remains possible to organise *ad hoc* missions.

As to the geographical scope of monitoring, there is a constant tension between the principle of equality (which means that *all* countries should be covered) and the desire to focus on ‘problematic’ countries. The CPT, GRECO and the CHR address all countries, but they have devised various ways to pay extra attention to those countries that are found to be in default of their obligations. It is interesting to observe that PACE started its monitoring activities with an exclusive focus on the new CoE Member States, then expanded so as to include *all* Member States, and then developed specific instruments for ‘problematic’ countries.

¹⁰⁵ Strictly speaking one should distinguish between the three treaties dealing with corruption and the political instruments (one resolution and two recommendations). The latter derive their binding effect in practice from the fact that they too are subjected to GRECO’s monitoring.

- ***Membership***

Independent experts are essential, according to virtually all observers. They bring (or are supposed to bring) expertise, impartiality and credibility. The ECtHR and CPT are composed of, and GRECO relies to a large extent on, independent experts, who derive their authority from their own qualifications and from the fact that they were nominated by their own countries and elected by PACE or the Committee of Ministers. Several observers argue that the personality of the experts is of crucial importance: they may make or break any monitoring body. An extreme example of the ‘human factor’ is how the monitoring procedure of the Committee of Ministers simply fell in disuse after the Deputy Secretary-General of the Council of Europe left the organisation. At a different level the same phenomenon occurs at the secretariats of the monitoring bodies: often they operate in the shadow, but they can be extremely influential in supporting, and steering, their ‘bosses’.¹⁰⁶ In this connection it was also noted that the secondment of national civil servants in secretariats may have advantages and disadvantages; it seems advisable to have careful and transparent selection procedures.

All this is not to suggest that politicians (as in PACE) or government representatives have no useful role to play. The procedure of GRECO, which involves both experts and representatives, seems to combine the best of both worlds. The experts provide the factual analysis and propose recommendations; the government representatives discuss and decide, thereby securing political support for the final outcome. But experiences differ: it seems that the dynamics in GRECO is very different from that in the Committee of Ministers when supervising the execution of Court judgments. The narrow scope of GRECO’s work and the more or less technical nature of the issues at stake may explain why the active involvement of government representatives appears to be so constructive.

- ***Quality of input***

When it comes to the quality of the information on which to base its work, CEPEJ faces two problems. On the one hand the comparability of data is problematic, because different countries have different definitions and methodologies. This is a problem that may be solved over time, when common understandings emerge. On the other hand, a clear weakness of CEPEJ is its dependence on self-reporting by national correspondents. There are no means to verify the information. On-site visits – which play a key role for CPT, CHR and GRECO – do not occur in the framework of CEPEJ. The Commissioner faces another problem: for capacity reasons he depends to a large extent on country information from other CoE bodies.

¹⁰⁶ In a similar vein, albeit in a somewhat different context, see the conclusion of the Commission’s *Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of Fundamental Rights* (COM(2009) 205 final, at p. 9): “perhaps the most important element which needs to be worked upon is the human element. The fundamental rights reflex has to be promoted in the services of the Commission where proposals and initiatives are created and a ‘fundamental rights culture’ fostered from the earliest stages of the conception of a Commission proposal”.

- **Review process**

Again there are huge differences between the monitoring bodies when it comes to the processing of information. The CPT collects its own information, discusses the situation internally and presents the country concerned with a report once it is adopted. What follows is a ‘dialogue’ with the national authorities on how to implement these recommendations, and there will be follow-up visits, but there is no institutionalised follow-up phase in, say, the Committee of Ministers. The CPT itself does not appear too eager to have such a follow-up, as it fears to be drawn into a political discussion where conclusions tend to be watered down.

The procedure before European Court of Human Rights has similarities: following an application there will be an adversarial procedure where both parties can advance their views of the case; then there are internal deliberations and a decision or judgment is adopted. The main difference with the CPT is that the execution of the judgments is supervised by the Committee of Ministers. There are no indications that *because* of this follow-up, the Court is drawn into politics. Even if States tend not to interfere too much in the execution of cases that involve other countries, it still seems safe to say that the Committee of Ministers – supported by the Secretariat – gives a useful back-up to the Court. It puts pressure on the respondent State to take both specific and general measures.

A subtle innovation was developed by PACE: a “post-monitoring dialogue”. When closing a monitoring procedure, the Parliamentary Assembly may at the same time decide to pursue the dialogue with the national authorities on certain issues mentioned in Resolutions adopted, allowing itself the choice of re-opening a procedure if further clarification or enhanced co-operation would seem desirable. A similar approach has been institutionalised in GRECO. After an overall evaluation round, which leads to the adoption of country-specific recommendations, GRECO will initiate the so-called *compliance procedure*. The Member State under scrutiny must show that they have complied with the recommendations within 18 months after their adoption .

A last issue to be addressed is *continuity*. To what extent do monitoring bodies ensure the issues that they have raised previously, do not simply disappear from the agenda? The CPT will always refer back to previous observations in order to see what progress has been made in the meantime, and so most rapporteurs for PACE. The European Court of Human Rights, on the other hand, simply responds to the complaints that are submitted to it, and it is only gradually seeking ways to see to it that the respondent State has addressed the problems that were identified in previous judgments. The prevailing view has always been that supervision of execution falls essentially outside the Court's jurisdiction, being entrusted to a political body, the Committee of Ministers.¹⁰⁷

¹⁰⁷ On this issue, see most recently ECtHR, 30 June 2009, *VgT v. Switzerland* (Appl. No. 32772/02).

- ***Standard-setting through monitoring***

Both the European Court of Human Rights and the CPT refine their standards continuously through their work. The Court delivers leading cases which clarify the meaning of the rights and freedoms contained in the Convention; the CPT gradually develops its own standards and publishes these, not in country reports but in its annual reports. A similar development takes place with GRECO, although it is perhaps less visible due to the technical nature of some of its standards. Also there is less scope to develop jurisprudence in so far as GRECO bases its activities on conventions which are more specific and elaborate than, say, the ECHR or the prohibition of torture. There is more need for standard-setting in areas where GRECO works on the basis of more loosely drafted recommendations. CEPEJ, for its part, may be able to identify trends and best practice, which in the future could lead to the development of European standards.

No clear picture emerges when it comes to the uniformity of standards. Uniform standards are legitimate but may not fit the situation of individual States; country specific evaluations which do not follow a commonly agreed framework may make more sense to the country concerned but may at the same time be seen as discriminatory. GRECO is clearly on the ‘uniform’ side of the scales (for the time being its Member States guard against deviations); the Commissioner’s country reports and PACE’s various monitoring activities are much more tailor-made.

- ***Outcome***

Publicity, which paves the way for the mobilization of shame, may be of key importance. Again, there are differences. CPT reports are only made public after the respondent State has authorised publication. There is some pressure to do so, however, since publication has become the standard and silence the exception. The rulings of the Court are by definition public, and so are the findings of the Commissioner. It would seem that the latter is the most active in seeking publicity. The discussions in PACE and the resolutions adopted are public as well.

It is striking to observe that whereas the monitoring bodies will no doubt have up-to-date information at their disposal, few of them actually give their views of ‘real time developments’. If a human rights violation occurs, it will typically take five to six years – after exhaustion of domestic remedies! – before the European Court of Human Rights rules on the case. The CPT for its part visits countries in principle only once every four years; its reports usually become public between one and two years after the visit took place. One cannot, therefore, base an opinion on the current state of affairs in, say, Polish prisons by consulting CPT reports alone.¹⁰⁸ This is not to say, of course, that the CPT is ignorant of domestic developments taking place in between visits; on the contrary, its staff is well-informed and collects information on an on-going basis. But the point is that the

¹⁰⁸ The most recent CPT report on Poland that is available dates from March 2006, and relates to a visit that took place in October 2004 – five years before the present study was conducted. The CPT’s next visit to Poland is scheduled for 2009.

CPT does not provide policy-makers – or NGOs, or the general public – with its analysis of events occurring here and now: the establishment of a new high-security institution, a situation of serious overcrowding in alien detention centres after a sudden influx of irregular immigrants, and so on. If its views are not heard, or only several years later, common sense suggests that the domestic impact of the CPT must be lower. Admittedly the CPT states that it engages, after publication of its report, in an on-going dialogue with the domestic authorities. But to the outside world this remains invisible and one cannot say anything about the effectiveness (or indeed the agenda) of this dialogue behind the scenes. One thing is sure: the element of publicity, and therefore an opportunity to mobilize of shame, is absent.

The preceding passage referred to the CPT, but same goes for the other monitoring bodies. CEPEJ published a highly detailed report in October 2008 – but the data related to 2006. GRECO may have up-to-date information, but only on very specific issues and only in connection with countries whose turn it is to be subjected to an evaluation round.

Another observation, which follows from what precedes, is that – despite (or maybe because of) the multitude of monitoring bodies – there is no overall picture of the human rights situation in a specific State. In recent times the Parliamentary Assembly has tried to fill that gap by organising debates on “The State of Human Rights in Europe”. But this essentially boils down to a country-by-country enumeration of the findings of separate monitoring bodies, which is still a far cry from an overall and integrated analysis.

This general problem of lagging behind is compensated to some extent by the power to indicate interim measures (ECtHR) or carry out *ad hoc* visits (CPT, Commissioner and PACE).

- ***Follow-up – on sticks and carrots***

The emphasis in this study has been on monitoring – not on assistance. One could argue that the two are separate issues, and indeed the organizational chart of the Council of Europe shows that ‘monitoring’ and ‘co-operation’ have been allocated to different directorates. Yet this distinction cannot always be maintained. Monitoring bodies, such as GRECO, are asked – just because of their expertise – to assist countries in reviewing domestic law and practice. Likewise it could be argued that countries may be more keen to discuss their problems, if they know that they will be helped solving them, rather than just criticized. Seen in this perspective, the establishment of the Human Rights Trust Fund in 2008 is an important step. The mission of the Fund, *inter alia*, is to assist in ensuring full and timely execution of judgments of the ECtHR. It is too early to tell whether the Fund is really a success, but common sense dictates that ‘monitoring’ and ‘assistance’ should not be separated; a marriage may well bear fruit.

And what about sanctions? First of all it should be recalled that the purpose of monitoring is not to punish States, but to get countries to the point that they make their legal systems compatible with the legal obligations that they freely entered into, and that they ensure that their citizens enjoy their rights effectively.

Having said that, the ‘nuclear option’ – suspension of membership or even expulsion from the Council of Europe – is so radical, that it is hardly a realistic option. PACE may decide not to accept the credentials of a parliamentary delegation, but that weapon cannot be used too often either. Harvey argues that the Council of Europe mechanisms “come out very favourably” when compared to the EU (where *ex ante* control of candidate countries human rights records is comprehensive but *ex post* control is considerably restricted in scope). At the same time he is fairly critical in his assessment. The lack of meaningful sanctions plays an important part in his analysis:

There is nothing wrong with *ex post* conditionality *per se*. If it builds in some flexibility to the admissions process and if accepting partial progress is an incentive to further progress then it is desirable policy. But there is a point where *ex post* conditionality becomes an oxymoron. The question turns upon whether post-accession instruments for ensuring compliance are sufficiently strong to compensate for having given away the carrot of membership.¹⁰⁹

§ 3.2 *The EU: the way ahead*

What lessons can we draw from the experience of the Council of Europe, if we wish to identify factors that should be taken into account when reflecting on rule of law monitoring in the EU?

The first remark must be that the Council of Europe is more than just an interesting ‘monitoring laboratory’ for the EU. It has developed credible instruments, many of which have functioned well for decades, despite limited funding. The Memorandum of Understanding of 2007 between the two organisations confirms the need to avoid duplication and to make better use of existing resources.

This means that a clear and convincing case must be brought if the introduction of a new monitoring mechanism in the context of the EU is contemplated. Of course one may readily agree (as was argued in § 1.2) that there is a special need for mutual trust, and thus for monitoring, in the EU. But that leaves the question unanswered *where* this monitoring should take place: should there be a new structure in the EU, can we rely on existing structures in the Council of Europe, or should we invest in the Council of Europe in order to improve its mechanisms?

It is submitted that one should only resort to new initiatives in the context of the EU, if it is clear that the existing CoE mechanisms cannot do the job *and* cannot be improved so as to do the job. This may be the case. After all it is conceivable that the functioning of the Union requires compliance with more rigorous standards than could be agreed upon in the context of the larger, less-integrated Council of Europe. It is equally possible that the EU Member States are prepared to create more daring monitoring mechanisms as ‘confidence building measures’ than the 47 CoE Member States are willing to accept.

¹⁰⁹ See P. Harvey, *The Future of the European Court of Human Rights* (PhD thesis EUI, Florence, defended 12 April 2007; as yet unpublished), p. 76.

But whatever argument is made, the point is that one needs to show the added value of a new EU monitoring mechanism. Indeed, this is all the more imperative given the ‘monitoring fatigue’ that was described in § 2.1: some Member States have serious difficulties in meeting all the existing reporting requirements and others are simply becoming less co-operative. They need to be convinced. The core of the argument must be that better monitoring is possible – and that it is in their own interest.

If we assume that in the short term the debate in the EU will focus not so much on the introduction of higher standards, but rather on more effective ways to monitor compliance with existing ones, then the following considerations become relevant.

- In terms of *mandate* it is crucial to avoid an agenda that is too rigid. This takes two dimensions.
 - First, if it is to be of any relevance for policy makers, it is essential that a monitoring body is in a position to ***respond to developments as they take place***. Especially in the field of police and judicial cooperation in criminal matters one must be able to address current developments. This was illustrated by the wave of Dutch asylum cases immediately after the *S.D. v Greece* judgment (see § 1.2). In this connection it is also revealing that the Parliamentary Assembly has found ways to organise its agenda in a very flexible way: politicians realise how important it is to respond immediately to important developments. As the example of the Commissioner for Human Rights shows, it is useful to have a pre-determined annual working programme, *provided* that there is sufficient flexibility to organise ad hoc missions whenever necessary. The CPT may carry out ad hoc visits too, but its voice will be heard only rarely in the public debate, since the CPT reports appear with large intervals and after considerable delays only. Such a situation is likely to diminish the usefulness of reports as policy input.
 - Secondly, the example of GRECO shows that one also needs flexibility in another way. Although a narrow ***focus*** has the advantage that it allows for a thorough, in-depth analysis, GRECO sometimes has to ignore obvious problems because they ‘belong’ to another evaluation round. Observers argue that GRECO’s ability to fulfil its mission would be enhanced if the evaluation procedure had more flexibility. The argument of some Member States that this would lead to unequal treatment of States, could be countered with the observation that the standards remain the same for all States, but that, depending on differences between the States, different responses are called for.
- When it comes to ***membership***, there is widespread agreement within the Council of Europe that independent experts cannot be missed. They bring expertise, impartiality and credibility. The European Court of Human Rights and the CPT are composed of independent experts; the Commissioner for Human Rights is independent; GRECO relies on independent experts to carry out evaluations. They are indispensable. Ideally they derive their authority from their own qualifications

and from the way in which they were elected.

On the other hand, there are sound arguments to involve government representatives too: they can secure political support for the final outcome and may also introduce a kind of peer pressure that independent experts cannot create. The procedure of GRECO, which involves both experts (legal assessment) and representatives (formulation of policy recommendations), seems to offer an attractive combination. But much depends on the subject-matter: if the monitoring concerns specific and unequivocal legal standards which do not leave much room for discussion, then the added value of government representatives in the decision-making process becomes less clear.

Be that as it may, the crucial importance of the ‘human factor’ should be underlined. ‘Strong personalities’ may make all the difference (see also § 2.2.1).

- Another crucial factor is the *quality of input* available to the monitoring body. The monitoring body should have up-to-date information at its disposal and – unlike CEPEJ – a possibility to verify the reliability of data with independent sources. The possibility to carry out on-site visits is also important, both to get a feeling for the situation on the ground but also to liaise with national actors.

It goes without saying that any EU monitoring body should take into account (and indeed base itself) all relevant *materials from the Council of Europe*. Given that there is a risk that parallel monitoring structures arrive at different results (and that States may be tempted to search for, and maximise, differences), care must be taken to avoid confusion and conflict.

A somewhat related issue is that of *continuity*: once a monitoring body has picked up an issue, it should not let the State concerned ‘get off the hook’ before the issue is settled. One should ensure that States actually ‘absorb’ the outcome of monitoring exercises. CPT and PACE delegations always refer back to previous findings in order to find out what the authorities have done in response to them. GRECO has developed an innovative separate ‘compliance procedure’ to this end which is worth studying.

- *Further standard-setting* should be allowed as part of the monitoring process. This is especially the case if the subject-matter has been regulated in loosely drafted texts that require further interpretation.
- *Publicity* is another element that should be taken into account. Confidential mechanisms may of course be useful and indeed effective, but they lack the possibility of the mobilization of shame. Various commentators from within the Council of Europe argue that in the end this is an indispensable element for any monitoring body. For that reason the Commissioner for Human Rights is very active in seeking publicity. Likewise the Parliamentary Assembly seeks to reach the general public, for instance by organising debates on “The State of Human Rights in Europe”.

- On a final note, although a lot of attention tends to go to the question of *sanctions* in the case of non-compliance, it is perhaps more important to look at possibilities for *assistance*. Arguably countries are more keen to discuss their problems, if they know that they will be helped solving them, rather than just criticized. The establishment of the Human Rights Trust Fund in 2008, and the substantial support announced by the Dutch government, shows that this approach is gaining weight.