

## Information document on the Committee of Ministers' monitoring procedure (23 November 1998)

**Caption:** Drawn up in 1998 by the Monitoring Unit under the Secretary-General of the Council of Europe, this information document analyses the evolution of the Committee of Ministers' procedure for monitoring compliance with commitments entered into by its member States.

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## Compliance with commitments entered into by Member States: Development of the Committee of Ministers' monitoring procedure (23 November 1998)

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### I. Introduction

#### a. The Council of Europe

The Council of Europe, founded in 1949, is Europe's oldest intergovernmental and inter-parliamentary organisation. It comprises 40 member States, including 16 central and eastern European countries that have joined since the historic events of 1989-1990<sup>1</sup>.

The Council has a range of responsibilities. With the exception of defence matters, it is concerned with most issues of importance to European society: human rights, legal co-operation, local and regional authorities, social issues, health, education, the media, culture, sport, youth, the environment and so on.

Promoting and protecting human rights, pluralist democracy and the rule of law have always been at the heart of the Council of Europe's activities<sup>2</sup>. Since 1989, its responsibilities have included an additional element, as the Council of Europe has been given the task of helping the countries of central and eastern Europe to implement and consolidate their political, legal and constitutional reforms, in accordance with the aforementioned values.

Respect for common values is a fundamental requirement that the Organisation imposes on its member States (and which member States impose on each other). In fact, when joining the Council of Europe and participating in its activities, member States enter into a certain number of commitments.

#### b. The commitments entered into by member States

Three types of commitment may be identified<sup>4</sup>.

There are individualised commitments<sup>5</sup> entered into, with varying degrees of explicitness, during negotiations on countries' accession to the Council of Europe.

These commitments, which are often programmatic (for example, a commitment to sign and ratify within a specified time the European Convention on Human Rights, the Convention for the Prevention of Torture, the European Charter of Local Self-Government, etc.), have been incorporated in the opinions in which the Parliamentary Assembly has given its support for the admission of new members. By referring explicitly to

these opinions of the Parliamentary Assembly in its decisions to accept accession requests, the Committee of Ministers has given the new member States' individualised commitments a somewhat solemn and formal status<sup>6</sup>. Programmed commitments reflect the Council of Europe's flexible and constructive attitude towards applicant countries, some of which are not yet (totally) in compliance with (all) the Organisation's requirements<sup>7</sup>. The emphasis on countries' "willingness" to come into line with Council of Europe standards as rapidly as possible allows a certain flexibility regarding the issue of whether States can be "deemed to be able to fulfil the provisions of Article 3" of the Organisation's Statute<sup>8</sup>.

In addition, member States will normally, in the course of their participation in the Council of Europe's activities, accept a certain number of conventions: this is the very essence of intergovernmental co-operation within the Organisation<sup>9</sup>. Ratification of these international instruments entails a legal commitment as to complying with their basic provisions and participating in their supervisory machinery, where such exists.

Countries' accession to the Council of Europe necessarily implies becoming a party to the Organisation's Statute. The latter contains a certain number of principles which member States undertake to "accept", namely the principles of the rule of law and of the enjoyment by all persons within member States' jurisdiction of human rights and fundamental freedoms (Article 3 of the Statute)<sup>10</sup>. Moreover, contracting Parties to the Statute reaffirm in its preamble their attachment to "genuine democracy", which is itself based on the aforementioned values.

### **c. Monitoring compliance with commitments**

For many years there have existed, in the Council of Europe, judicial and non-judicial procedures for monitoring countries' compliance with commitments entered into.

The judicial procedure is the one established by the European Convention on Human Rights. It has just undergone major changes with the entry into force on 1 November 1998 of Protocol No 11 to the Convention and the introduction of a new permanent Court<sup>11</sup>. It has often been described as the most advanced procedure in the world for protecting human rights.

Some of the other Council of Europe conventions in the human rights field also contain provisions for monitoring their implementation by contracting Parties. In some cases - the European Social Charter, the European Convention for the Prevention of Torture and the Framework Convention for the Protection of National Minorities, for example - the procedures rely on independent experts. This implies that these procedures lie somewhere in between judicial procedures and the somewhat political intergovernmental ones.

Another form of monitoring compliance with commitments lies within the responsibility of the Council of Europe's steering committees, such as the Steering Committee for Human Rights, the European Committee on Legal Co-operation and so on. Their agendas include - either regularly or from time to time - reviews of the implementation of instruments that they have drawn up in the past. The instruments in question, both recommendations and conventions, are ones that have not been allocated any other supervisory machinery. This aspect of steering committees' work remained somewhat secondary and fairly invisible, since the meeting reports describing these monitoring activities are not public documents. Added to this, the members of steering committees are appointed by their governments<sup>12</sup> and might thus be deemed to be judges of and parties to the same proceedings. However, steering committees sometimes call in independent outside experts to examine systematically member States' application of certain instruments, for example in the form of comparative studies of various national practices; in this context, these documents are sometimes made public<sup>13</sup>.

This set of procedures has been supplemented in the last few years by monitoring procedures of a new sort, as will be explained below. These focus in particular on obligatory standards (principles) for member States and are Council of Europe activities in their own right, which involve its highest political bodies.

There were two reasons for these additional procedures. First, before agreeing to the accession of certain of

their neighbours, certain Council of Europe member States wanted to be sure that the new members would really comply with the commitments entered into at the moment of their accession, particularly when they concerned applicant countries' treatment of national minorities with links with existing member States. Secondly, doubts were expressed about the ability of certain applicant countries and new members to comply (fully) with commitments entered into at the time of their accession or thereafter. This did, and still does, raise questions about the Organisation's credibility<sup>15</sup>.

The Parliamentary Assembly was the first to question whether promises made were being kept. Its concern focused primarily on promises made to *itself*, that is the individualised commitments that applicant States had entered into to secure a positive Assembly opinion regarding their request for accession. The Parliamentary Assembly therefore established its own monitoring procedure in 1993<sup>16</sup>.

The Assembly's monitoring procedure has evolved considerably since its inception with the adoption of Order No 488 (1993) in June 1993. At the time, it was an additional task that was delegated to two Assembly committees, the Political Affairs Committee and the Committee on Legal Affairs and Human Rights, and was only concerned with the honouring of commitments by the new member States. In April 1995, Order No 508 made the monitoring procedure applicable to all member States. In January 1997, in its Resolution 1115, the Assembly decided to strengthen the monitoring system still further, in particular by setting up a special committee solely for that purpose<sup>17</sup>.

The monitoring procedure instituted by Resolution 1115 (1997) has been in operation since April 1997 and is concerned with the fulfilment of the obligations assumed by all the member States under the terms of the Council of Europe Statute, the European Convention on Human Rights and all other Council of Europe conventions to which they are parties, as well as the honouring of the commitments entered into by the authorities of member States upon their accession to the Council of Europe. Following a report of the Monitoring Committee, the Assembly may "penalise persistent failure to honour obligations and commitments accepted, and lack of co-operation in its monitoring process" by adopting a resolution or a recommendation, by refusing to ratify the credentials of a national parliamentary delegation or by the annulment of ratified credentials. "Should the member State continue not to respect its commitments, the Assembly may address a recommendation to the Committee of Ministers requesting it to take the appropriate action in accordance with Articles 8 and 9 of the Statute of the Council of Europe" (suspension or an invitation to withdraw from the Organisation)<sup>18</sup>. It is worth stressing that, as a matter of principle, the definitive versions of documents of the Monitoring Committee are made public, as are the debates of the full Assembly when the latter considers one of the Committee's reports<sup>19</sup>.

The Congress of Local and Regional Authorities of Europe (CLRAE) also has its political monitoring machinery, which is concerned with the functioning of local and regional democracy in the member States. The Congress was instituted by Statutory Resolution (94) 3 of 14 January 1994<sup>20</sup> and is composed of local and regional elected representatives from the Council of Europe's member States. Referring to a paragraph in the explanatory report to the European Charter of Local Self-Government, the Committee of Ministers instructed the Congress to establish a system for overseeing the application of the Convention that "would ensure adequate political control of compliance by the parties with the requirements of the Charter"<sup>21</sup>. The Congress has itself refined its monitoring procedures<sup>22</sup>. It undertakes a general review of the situation regarding local and regional democracy in several Council of Europe member States and publishes its conclusions<sup>23</sup>. The annual review also gives rise to recommendations to the Committee of Ministers in which the Congress may invite what is the executive body of central governments to take a certain number of steps to improve the functioning of local democracy in Europe.

Finally, there is the Committee of Ministers' monitoring procedure, the main subject of this document. This procedure is relatively recent - it started operating in 1996 - and it has adopted a significantly different approach to the other procedures -judicial or political - that it is intended to supplement.

## II. The Committee of Ministers' monitoring procedure

### a. Basic texts

The need for political monitoring on the governmental side was expressed jointly for the first time in the "Vienna Declaration" of 9 October 1993<sup>24</sup>. The Heads of State and Government of the Council of Europe's member countries declared themselves "resolved to ensure full compliance with the commitments accepted by all member States within the Council of Europe".

A little over a year later, the Committee of Ministers clarified its intentions by stating that it would itself "consider the questions of implementation of commitments concerning the situation of democracy, human rights and the rule of law in any member State" (Declaration on compliance with commitments accepted by member states of the Council of Europe, adopted by the Committee of Ministers at its 95th session on 10 November 1994; hereafter referred to as the 1994 Declaration; full text in Appendix 1).

The preamble to the Declaration provides information on the legal basis of the commitments in question ("the commitments ... accepted by the member States under the Council's Statute, the European Convention on Human Rights and other legal instruments"), the legal grounds invoked by the Committee of Ministers for its new task ("the statutory responsibility incumbent upon itself for ensuring full respect of these commitments") and the envisaged method ("political follow-up, carried out constructively, on the basis of dialogue, co-operation and mutual assistance").

This is followed by five paragraphs which provide an initial outline of the procedure. The first paragraph sets out who is empowered to refer questions of implementation of commitments to the Committee of Ministers: member States, the Secretary General or the Parliamentary Assembly, on the basis of a recommendation.

There are two references to the sources of information that the Committee of Ministers would take account of: paragraph 1 states that the Committee would take account of "different sources such as the Parliamentary Assembly and the CSCE" (now the OSCE), while paragraph 2 adds "information deriving from contacts and co-operation with member States". Moreover, under paragraph 2 the Committee of Ministers grants the Secretary General a certain degree of discretion, since he is asked to forward (only) information "liable to call for the attention of the Committee of Ministers".

Paragraph 3 reiterates the planned method: "the Committee of Ministers will consider in a constructive manner matters brought to its attention, encouraging member States, through dialogue and co-operation, to take all appropriate steps to conform with the principles of the Statute in the cases under discussion."

Paragraph 4 of the Declaration deals with the situation where, in the light of the examination discussed in the previous paragraph, the Committee of Ministers considers that "specific action" is required. There are a number of options in such cases, since the Committee of Ministers can "request the Secretary General to make contacts, collect information or furnish advice", "issue [itself] an opinion or recommendation", "forward a communication to the Parliamentary Assembly" or "take any other decision within its statutory powers".

Finally, paragraph 5 introduces a dynamic element to the process just launched by stating that "the Committee of Ministers will continue to seek greater efficacy in its procedures with a view to ensuring compliance with commitments, in the framework of a constructive dialogue".

Six months later, the Ministers' Deputies, referring specifically to the aforementioned paragraph 5, adopted the "Procedure for implementing the Declaration of 10 November 1994" (20 April 1995, hereafter: 1995 Procedure)<sup>25</sup>. This Procedure, aspects of which have subsequently been altered<sup>26</sup>, is as follows:

Two procedures can be distinguished: one based on the Secretary General's factual overviews carried out every two years (paragraph 3, 1995 Procedure) and one that may be initiated by any Delegation or the Secretary General at least one month before any of the "at least three meetings of the Ministers' Deputies at A level" which, in accordance with paragraph 2, shall be devoted each year to the issue of compliance with commitments.

As noted below, only the first of these two procedures, the one based on overviews, has so far been applied, but much more frequently than envisaged in 1995. As to the possibility of including an item on the agendas of several successive monitoring meetings, in order to "continue the discussion on the situation in a member State", if the need is voiced during deliberations, it has in fact become the rule. However, this is related not to the situation in a member State, as provided for in paragraph 4, but to the fact that monitoring has become a continuous rather than an occasional activity (see "Results" below).

The second procedure, which has not so far been used, is dealt with in paragraphs 5 and 6. This *ad hoc* procedure will be considered in the section entitled "Future Prospects".

With respect to both procedures, the first paragraph of the 1995 Procedure repeats certain principles that were already laid down in the 1994 Declaration, and adds others. The reiterated principles are that all member States will be subject to the Committee of Ministers' monitoring procedure ("non-discrimination"), that the Committee of Ministers' procedure will not compete with other "existing procedures arising from statutory or conventional control mechanisms", and the principle that monitoring takes the form of "co-operation" (rather than confrontation and the levelling of accusations). This final point is the inspiration for paragraph 7 which, referring to Article 21 of the Council of Europe's Statute, states that "discussions should be confidential and held in private". The reason given for not publicising the discussions is the Committee of Ministers' desire to "encourage a constructive dialogue with the member States concerned". However, "the presence of senior officials from the capitals should be encouraged".

Paragraphs 8 and 10 of the 1995 Procedure deal with possible follow-up to the conclusions of the Committee of Ministers' monitoring meetings. Under paragraph 8, "if needed, appropriate assistance may be provided to the member States concerned" (and their "progress may be reviewed at subsequent meetings"), while paragraph 10 authorises the Committee of Ministers to decide on "specific action" in accordance with paragraph 4 of the 1994 Declaration, when a situation has not changed sufficiently rapidly in the desired direction.

To facilitate exchanges of information with the Parliamentary Assembly, the 1995 Procedure authorises the Committee of Ministers to invite the Assembly's Clerk "to be present to provide information on any discussions in Assembly bodies on the States concerned". As indicated below, the Committee of Ministers has abandoned this one-way approach to the flow of information on compliance with commitments between itself and the Parliamentary Assembly.

## **b. Terminology used: monitoring, (factual) overviews, areas of concern**

Earlier in this paper, it was possible to avoid discussing the terms "commitments" and "obligations". However, at this stage it is necessary to provide certain explanations concerning the very specific terms used in the context of the Committee of Ministers' monitoring procedure and the work of the Monitoring Unit, considered in the next section.

First it should be noted that, despite its current prominence, the term "control" is not used. The Committee of Ministers does not use this term to describe its own activities, confining it to the work of the "conventional control bodies" (1994 Declaration, preamble), or to (other) "existing procedures arising from statutory or control mechanisms" (1995 Procedure, paragraph 1). However, the 1994 Declaration explains that it is precisely because of its "statutory responsibility" that the Committee of Ministers must ensure full respect for commitments. One might therefore wonder if the Committee of Ministers' monitoring machinery does not form part of the "statutory control mechanisms".<sup>27</sup>

The Committee of Ministers' reluctance to use the term "control" is accounted for by the way it has decided to ensure compliance with commitments. The notion of control, or supervision, places an emphasis on criticism and passing judgment and the term is associated with inspections. As already noted, the Committee of Ministers has not opted for this type of procedure, but rather for that of "political follow-up, carried out constructively, on the basis of dialogue, co-operation and mutual assistance"<sup>28</sup>. It would therefore be



inappropriate to speak of control, less because of the outcome sought than of the means chosen.

In French, the relative merits of the terms *suivi* and *monitoring* can be discussed. In fact, the latter word, which normally does not exist in French language, is being used by the Committee of Ministers, in quotation marks. In the English language, the problem does not arise<sup>29</sup>.

The notion of "overview", or "factual overview", is related to one of the Committee of Ministers' two monitoring methods, that based on thematic reports which, in a non-discriminatory fashion, provide a general picture of the situation in all the member States with regard to a specific theme. The two terms are used, apparently indiscriminately, in paragraph 3 of the 1995 Procedure. They refer to the documents presented by the Secretary General (and prepared by his Monitoring Unit), which set out in a factual and neutral fashion "information from member States and all [other] relevant information". The terminological situation was clarified in April 1996, when the Ministers' Deputies became aware of the difficulties faced by the Monitoring Unit in taking on, without clear instructions, the dual task of presenting the relevant facts in a neutral fashion without expressing any opinions<sup>30</sup>, while at the same time drawing the Committee of Ministers' attention to possible failures by member States to fulfil their obligations. They then agreed that henceforth the documents produced by the Monitoring Unit would only constitute the first part of a larger document, the second part of which would comprise *factual* descriptions presented by the governments themselves. As a result, the word "factual" was no longer added to the word "overview" after April 1996.

The "themes" covered by the overviews must be distinguished from what the Committee of Ministers terms "areas of concern"<sup>31</sup>. The themes are subjects on which the Committee of Ministers has decided to focus its monitoring. Choosing one or other theme does not in itself signify that the Committee of Ministers considers the whole issue to be an area of concern. Indeed, numerous considerations affect the choice of themes, including the importance that is attached to particular subject from the Council of Europe's or one's own countries' standpoint, the Parliamentary Assembly's attitude, current political considerations, the Council of Europe's internal considerations and so on. The "areas of concern" relate to serious anomalies highlighted by the Committee of Ministers' procedure. Only the Committee of Ministers (or the Ministers' Deputies) can designate an anomaly as an "area of concern", after discussion of the information presented to it. The Secretary General and his Monitoring Unit only draw the Committee of Ministers' attention to facts that might be considered "areas of concern".

### **c. Secretariat: the Secretary General's Monitoring Unit**

The Committee of Ministers' monitoring procedure entrusts the Organisation's Secretary General with several tasks. He can refer an issue relating to compliance with commitments to the Committee of Ministers (paragraph 1 of the 1994 Declaration) or be requested "to make contacts, collect information or furnish advice" (paragraph 4) and, in preparation for the Committee of Ministers' examination of issues, he will forward to the Committee "information ... liable to call for [its] attention" (paragraph 2). To help the Secretary General carry out these tasks, a new Secretariat entity - the Monitoring Unit - was established in August 1996. It currently comprises three permanent officials, two administrators and their assistant. From time to time, the Unit employs temporary staff or consultants.

Together with the Research and Planning Unit and Protocol, the Secretary General's Monitoring Unit is one of three Secretariat units directly attached to the Secretary General and the Deputy Secretary General in the organisation chart<sup>32</sup>. It is not therefore integrated into an operational directorate, such as Political Affairs, Human Rights or Legal Affairs. This distinctive feature is explained by the need for the Monitoring Unit, in accordance with specific tasks assigned to it, to liaise with different directorates, depending on the theme it has been instructed to work on<sup>33</sup>.

Since only the Committee of Ministers itself can undertake monitoring, the Monitoring Unit is required to confine its activities to collecting the information necessary for the Committee of Ministers' work and to present this information in a neutral fashion, in particular in the form of the aforementioned overviews. Its role in drawing the Committee of Ministers' attention to possible failures by member States to fulfil their obligations (areas of concern) has now been substituted by the need for it to provide "comments" (see

below).

#### **d. Procedure(s) and working methods**

In the light of the potential offered by the 1994 Declaration, it is appropriate to speak of the Committee of Ministers' monitoring procedures in the plural. For the time being, however, the Committee has only implemented one of the envisaged procedures. The discussion that follows concerns only the Procedure used so far<sup>34</sup>. The section on "Future Prospects" will then offer a few reflections on the other procedures that could also be used in accordance with the 1994 Declaration and the 1995 Procedure.

The monitoring procedure has evolved since the first "factual overview" in March 1996, which represented the first application of the 1995 Procedure.

The notion of two-year cycles was rapidly abandoned in favour of a more flexible approach, since it soon became clear that monitoring was a continuous exercise which must not be broken up artificially. The system of cycles was abandoned, not as a result of a formal decision but because the Committee of Ministers continued to include themes already dealt with on the agenda of monitoring meetings even after the first two years had elapsed, for purposes of updating and of "monitoring the monitoring", that is, considering how situations that had already been discussed had developed.

In April 1998<sup>35</sup>, the Ministers' Deputies decided that each of the (at least) three annual meetings which they would devote exclusively to monitoring in conformity with the 1995 Procedure, would last two days. It was also decided to change the method of drafting the presentation of the situation in each country: for the next overview, the national authorities would describe the situation and the Monitoring Unit would be responsible for adding "comments"<sup>36</sup>. Hitherto, the reverse procedure had applied<sup>37</sup>.

The monitoring procedure now operates as follows (see also the outline in Appendix 4).

Once the theme for consideration has been specified by the Committee of Ministers, an "outline of basic issues" is agreed upon. A four-stage procedure, divided into two phases, is then set in motion. The first phase is called the preparatory phase and the second the operational one.

The preparatory phase (overview and debate)

The first stage of the preparatory phase follows a timetable laid down in advance by the Committee of Ministers. It consists of the preparation, by the Secretary General's Monitoring Unit, of a country-by-country overview, based on national contributions (of between 5 and 10 pages in length), in accordance with the aforementioned "outline of basic issues". The national contributions are supplemented by short comments prepared by the Secretariat, in which it identifies issues that might justify further consideration. When preparing these comments, the Monitoring Unit relies on information supplied by the member States and any relevant information it has been able to obtain.

The provisional text containing the national information and the Secretary General's Monitoring Unit's comments is submitted to the member States. Governments only receive the sections relating to their country. Bilateral contacts are made between the delegations of member States and the Secretary General's Monitoring Unit. The relevant authorities in each member State can propose corrections and updates before a specific deadline.

The final overview prepared by the Secretary General's Monitoring Unit, containing national contributions and the short comments made by the General Secretariat via the Monitoring Unit, is released as a confidential document.

The circulation of the overview is followed by a second stage, which is the Committee of Ministers' debate on compliance with commitments entered into by member States. At least three meetings of Ministers'



Deputies each year must be devoted to monitoring, each currently lasting two days.

The preparatory phase comes to a close after these discussions. The Chairperson of the Ministers' Deputies then has the opportunity to present his or her summing-up, which can cover the discussions and the documents upon which discussions have been based.

The operational phase (conclusions and operational follow-up)

The first stage of the operational phase consists of the adoption of "conclusions" by the Ministers' Deputies (usually taking the form of "decisions").

After the Committee of Ministers' conclusions comes the final stage in the procedure, the "operational follow-up". This can take several forms, such as adjustments to the intergovernmental work programme, changes to the cooperation programmes associated with the "activities for the development and consolidation of democratic stability" or "specific action", as referred to in paragraph 4 of the 1994 Declaration (see "Basic texts" and "Future prospects").

The Parliamentary Assembly is informed of decisions concerning the operational follow-up<sup>38</sup>.

### **III. Documents on substance produced by the Secretary General's Monitoring Unit**

#### **a. The first ("factual") overview**

Even before the establishment of the Secretary General's Monitoring Unit in August 1996, and in accordance with the Committee of Ministers' wishes, the Secretary General presented his first "factual overview" in March 1996. The document was entitled "Compliance with member States' commitments: Commencement of procedure for monitoring by the Committee of Ministers". The report was prepared within a very short period of time (from January to the beginning of March 1996) by an official attached to the Secretary General's Private Office for that specific purpose.

The first factual overview was in fact a sort of trial run, whose main purpose was to test the methods envisaged. In a hundred or so pages, it offered a succinct and general statement on the situation in each member country (listed in English alphabetical order) under four broad headings: respect for human rights and the rule of law, the prevention of degrading treatment, freedom of the media and compliance with other commitments. During the year, five addenda, totalling about 250 pages, with comments, reactions and new information from member States, were added to this document.

#### **b. Subsequent "overviews"**

The Secretary General's Monitoring Unit became operational in August 1996; a third staff member was attached to it as of February 1997. To-date, the Committee of Ministers has asked the Unit for overviews on six themes: freedom of expression and information, the functioning and protection of democratic institutions, the functioning of the judicial system, local democracy, the death penalty and police and security forces.

Freedom of expression and information

The overview on this theme was presented to the Committee of Ministers in September 1996. The 137 page document (English version) started with an introduction which briefly presented the case-law of the Strasbourg institutions with regard to Article 10 of the European Convention on Human Rights and an outline of the way incitement to racial, national and religious hatred (hate speech) and its dissemination in the media were dealt with. This was followed by country-by-country descriptions of the situation in all the member States. There were also three appendices: two presenting the table of signatures to and ratifications

of the European Convention on Human Rights and the European Convention on Transfrontier Television, while the third contained Recommendation No R (81) 19 of the Committee of Ministers to the member States on access to information held by public authorities. Approximately 90 pages of comments and clarifications were subsequently added from several member States.

The subject was discussed by the Committee of Ministers between October and December 1996. In spring 1997, the Committee instructed the Secretary General's Monitoring Unit to produce proposals for the organisation of seminars on "freedom of expression and restrictions included in penal codes and other legal texts", a sub-theme of the general report on freedom of expression which the report had picked out as being of particular importance. The Committee of Ministers approved the Secretariat proposal in May 1997.

The seminars were held in Budapest in September 1997 and in Strasbourg in October 1998. They brought together policy-makers, lawyers, media professionals and representatives of organisations with responsibilities in this area, under the guidance of a team of four independent experts<sup>39</sup>. In November 1997, following the seminars, the team of experts submitted an interim report to the Secretary General which was in turn transmitted to the Committee of Ministers. This interim report listed the problems observed in certain member States and made proposals for further action. After the report had been presented to the Committee of Ministers a final report of about twenty pages was drafted in December 1997. It took account of the comments made by several member States and reproduced those that had been submitted in writing (more than 60 pages).

The conclusions and follow-up action were agreed upon by the Ministers' Deputies in December 1997. As part of the operational follow-up, it was decided to transmit the proceedings of the two seminars as well as the final report of the team of independent experts to the Steering Committee on the Mass Media (CDMM) and the Steering Committee for Human Rights (CDDH) so that the topics raised in these documents could be taken into account in these two steering committees' intergovernmental activities. The Ministers' Deputies also asked the Secretary General to make proposals to one of the Ministers' Deputies' rapporteur groups<sup>40</sup>, so that the co-operation and assistance programmes could be revised to take the results fully into account.

Functioning and protection of democratic institutions, including issues relating to political parties and free elections

The overview by the Secretary General's Monitoring Unit was presented to the Committee of Ministers in February 1997. The report comprised two main parts. The first contained general observations of a political, legal and methodological nature to provide a framework for the rest of the document. The second part contained a country-by-country overview. The information on each country was subdivided in the same fashion. First came the "basic principles", which set out, where necessary, the main features of how the state in question was organised. This was followed by four sub-themes: "free elections", "party system", "the functioning of Parliament" and "protection of democratic institutions". Two or three sub-headings - always the same for each country - were covered under each of the four sub-themes. Several tables were attached to the document, which represented more than 160 pages in its English version.

There are two addenda with the comments of member States, one presented at the same time as the interim version in December 1996 and the other accompanied the final version of the overview issued in February 1997.

An update of this overview was produced in December 1997. The aim was to supplement the February 1997 report with additional information on important events that had occurred in 1997 concerning the functioning of democratic institutions in the member States, to which were attached a few further comments submitted by certain members.

The second phase of the monitoring procedure, the discussions in the Committee of Ministers, took place in March, April and October 1998. The theme will again be on the Committee of Ministers' agenda at its next monitoring meeting in March 1999.

## Functioning of the judicial system

The overview of the Secretary General's Monitoring Unit was presented to the Committee of Ministers in February 1998. The document as a whole was composed of three distinct parts. The first, fifteen pages in length, set out the framework within which the document was presented, with reference made to applicable Council of Europe standards as well as the case-law of the ECHR Strasbourg control organs, where pertinent.

The second part, of more than 170 pages in length, was the country-by-country overview, which highlighted situations likely to constitute areas of concern. Four basic issues were analysed: "access to justice", "judicial independence and impartiality", "effectiveness of judicial remedies" and "the role and status of public prosecutors", as well as, in addition, a number of sub-themes therein. As with all the overviews prepared by the Secretary General's Monitoring Unit, the overview took account of the comments and updates submitted by member States in response to the interim versions, where provided.

The third part, the Addendum, was an extremely voluminous compilation (more than 400 pages) of descriptions of the functioning of judicial systems, as presented by the national authorities. (This information is considered as an integral part of overviews since a decision was taken to this effect in April 1996).

The debate on the functioning of member States' judicial systems ended in April 1998. It led to a summary of the debates which the German Chairman of the Committee of Ministers drew up on his own initiative in June 1998 and in which, on a theme-by-theme basis, he referred to the main problems observed in one or other country. In response to the Chairman's summing-up, the Ministers' Deputies instructed the Secretariat to prepare specific suggestions as concerns "the readjustment of both the intergovernmental programme of activities and assistance programmes". In a decision taken in September 1998, the Committee of Ministers adopted a certain number of proposed measures<sup>41</sup>.

## Local democracy

The Secretary General's Monitoring Unit produced the overview in June 1998. In many respects it is untypical of the Unit's reports since, after explaining in some twenty pages the concept of local democracy, as it emerges from Council of Europe instruments<sup>42</sup>, for the first time the Monitoring Unit did not use its own research as a basis for a presentation of national situations. In 165 pages (English version), it confined itself to summarizing and highlighting the main contents of all the relevant documents produced by, in particular, the CLRAE, the Parliamentary Assembly and the CDLR. The reason for this was its wish to avoid duplicating the work of the CLRAE, which has been examining member States' compliance with their commitments in detail since the establishment of the Congress in 1994, and whose annual sessions produce recommendations which draw attention to situations where there is a failure to comply with the principles of local self-government. As a result, the Monitoring Units overview inevitably appears to some extent as a monitoring of the monitoring done by the CLRAE, the Parliamentary Assembly and the CDLR. (Information provided by member States is contained in a 415-pages Addendum).

At its meeting in October 1998, the Committee of Ministers discussed the situation concerning local and regional democracy in the member States. The Chairman of the Committee of Ministers presented a summing-up of these discussions to his colleagues. The Deputies must now adopt their conclusions on the situation.

## Death penalty and police and security forces

The Deputies also decided at their October 1998 meeting that the two new subjects they would consider in

1999 (as well as those already covered but still on their agenda) would be the death penalty and police and security forces. It asked the Monitoring Unit to produce an "outline of basic issues" for each theme and to propose a timetable. These proposals, drawn up in conjunction with the Directorates of Human Rights, Legal Affairs and Political Affairs, will shortly be considered by the Committee of Ministers.

#### IV. Results and future prospects

##### a. Results

Because of the confidentiality which surrounds this activity, it is difficult to make a public presentation of the results of the Committee of Ministers' monitoring activity since it was launched in 1996.

The first outcome of the monitoring activity is quite simply that the Deputies *are informed*. In the areas so far covered, they are aware of situations which comparative analysis has revealed to be potential "areas of concern".

The intergovernmental programme of activities (Vote II of the Organisation's budget) and the activities for the development and consolidation of democratic stability (Vote IX) of the Council of Europe for 1999 will take account of the Committee of Ministers' monitoring process. Admittedly, the "visibility" of this outcome is significantly diminished by the fact that an outside observer cannot be aware of the "cahier des charges" which explains the new programmes.

It is also possible to detect a significant change in the way the Committee of Ministers now reacts to Parliamentary Assembly and CLRAE recommendations concerning member States' compliance with commitments. The Committee responds much more rapidly than in the past, it avoids resorting to interim replies and the replies have become more detailed and specific.

In certain cases the national authorities have changed situations that have been the subject of the Committee of Ministers' monitoring. Such cases could be taken as the most important evidence of the impact of the Committee of Ministers' monitoring, since this is precisely the outcome that is sought. Admittedly, it is difficult to establish a causal relationship between the monitoring activity and changes observed<sup>43</sup>. Nevertheless, it is reasonable to assume that the political follow-up procedure has at least contributed to a certain number of changes identifiable in member States.

There is thus both an individual and a collective recognition that certain situations are not compatible with commitments entered into and that these situations must be changed. This process of recognition is facilitated by the fact that the discussions take place *in camera* and that an atmosphere of understanding and co-operation allows Representatives of member States to become aware of other member States' opinions on certain aspects of their national situation. They also discover that other member States have had to face similar problems. Exchange of experience can therefore take place to identify ways of dealing with the situation. This, above all, is the justification for the notion of discrete political monitoring within the Committee of Ministers.

##### b. Future prospects

Despite the advantages that have just been outlined, the highly discrete nature of the Committee of Ministers' monitoring procedure is often seen as a weakness<sup>44</sup>. At a meeting of the Joint Committee (made up of representatives of the Committee of Ministers and the Parliamentary Assembly, see notes 38 and 49) in January 1998, some members of the Parliamentary Assembly expressed reservations about the Committee's statutory right to undertake an activity without informing the Parliamentary Assembly of the content. In particular, they wondered whether it would be possible for the Committee of Ministers to hold information on serious neglects of commitments by member States without informing the Parliamentary Assembly<sup>45</sup>.

The Committee of Ministers has replied to these criticisms<sup>46</sup> by agreeing to inform the Parliamentary

Assembly "of any follow-up action decided upon" and by establishing formal and informal dialogue with it<sup>48</sup>. It has also changed the classification of documents relating to the monitoring procedure from "secret"<sup>49</sup> to "confidential"<sup>50</sup>.

However, the Committee of Ministers might be willing to accept still greater transparency in its procedure. The Committee of Wise Persons<sup>51</sup> has devoted a section of its final report to the Committee of Ministers to the issue of "complementarity and transparency of procedures". The Wise Persons made a concrete proposal: "Implementation of monitoring through "diplomatic" persuasion and through the publication of monitoring reports as required by various conventions should be carried out fully and consistently. Reports drawn up within the framework of monitoring procedures, including monitoring reports on various conventions (e.g. the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the Framework Convention for the Protection of National Minorities) should, whenever possible, be made public, taking into account the delicate political nature of such information. In specific cases, time limits should be fixed within which recommendations made in the report should be implemented, failing which the report about the country will be published."<sup>52</sup>. In any case, one of the three "main recommendations" relating to monitoring compliance with commitments is that "reports drawn up within the framework of monitoring procedures should be made public wherever possible"<sup>53</sup>.

Another issue concerning the dissemination of monitoring documents arises with relation to the work of the Organisation for Security and Co-operation in Europe (OSCE) and the European Union. Particularly with regard to its "human dimension" activities, the former is concerned to ensure respect for certain principles already covered in Council of Europe instruments and on which the Committee of Ministers monitoring focuses<sup>54</sup>. Equally, the European Union has incorporated most of the Council of Europe's key values relating to human rights, the rule of law and democratic functioning in the political criteria for accession agreed in Copenhagen in June 1993<sup>55</sup>. It is in the interests of both the governments and the international organisations concerned to avoid duplication or conflict with the Council of Europe. From this standpoint, the official use<sup>56</sup> of the Committee of Ministers' monitoring documents - or at least the conclusions - would appear logical<sup>57</sup>.

Consideration should also be given to how the United Nations could benefit from the Council of Europe's experience in the monitoring of political and legal standards, as suggested by the Parliamentary Assembly<sup>58</sup>.

Turning to the system of thematic reports (overviews), there is a need to give more detailed consideration to topics already considered. The monitoring of a subject as broad and important as, for example, the functioning of member States' judicial systems has highlighted a significant number of areas where problems remain or, sometimes, have emerged. Further discussion might be appropriate on possible and planned solutions. Moreover, there is a certain number of topics still to be covered. It might also be necessary to update existing reports, or even to monitor the follow-up, that is, to determine whether the measures decided on as a result of a previous monitoring exercise have been put into effect. If one decides to do that, then the modalities of such an exercise will have to be defined.

As well as continuing with and possibly improving the current procedure based on thematic reports, the Committee of Ministers' has two further significant monitoring procedures at its disposal: firstly, there are the "specific actions" referred to in paragraphs 4 of the 1994 Declaration and 10 of the 1995 Procedure, and secondly there are the *ad hoc* procedures provided for in paragraphs 1 of the Declaration and 5 and 6 of the 1995 Procedure. These two sorts of procedures would supplement the existing thematic reports system.

"Specific action" is seen as a particular form of "operational follow-up" in the current procedure. According to the 1994 Declaration, the Committee of Ministers may decide on "specific action" in "cases requiring [such action]" (paragraph 4). Beforehand, "the Committee of Ministers will consider in a constructive manner 'matters brought to its attention, encouraging member States, through dialogue and co-operation, to take all appropriate steps to conform with the principles of the Statute" (paragraph 3). These would therefore be measures to be taken when normal operational follow-up is not giving satisfactory results. This interpretation is confirmed by paragraph 10 of the 1995 Procedure which states that a decision on specific action may be taken "after a question has been on the agenda for a reasonable number of meetings".



Paragraph 4 of the Procedure stipulates that matters will be placed on the agenda of the next meeting "if, during the deliberations, a need to continue the discussion on the situation in a member State is voiced". "Specific action" can concern a single State; thus, a non-discriminatory, thematic procedure covering all the member States could very well result in "specific action" directed at just one or several States<sup>59</sup>.

The second important step is the commencement of *ad hoc* proceedings. For the time being, it is the Ministers' Deputies who initiate procedures by deciding collectively on a theme on which monitoring is then undertaken with respect to all the member States. This practice is not provided for in the 1994 Declaration, paragraph 1 of which uses the singular: "questions of implementation of commitments ... in any member State". It is true that the current practice of choosing a theme jointly could correspond to the wording in paragraph 1: "the Committee of Ministers will consider the questions [...] which will be referred to it [...] by member States". However, paragraph 1, second indent, also provides for the *Secretary General* to refer questions of implementation of commitments to the Committee of Ministers. Paragraphs 5 and 6 of the 1995 Procedure offer further clarification on this issue by stating that "any Delegation or the Secretary General may ask to put the situation in any member State on the agenda of that meeting, on the basis of its own concerns or with reference to a discussion in the Parliamentary Assembly"; "The request should be accompanied by specific questions, to enable the Delegations concerned to obtain relevant information."

In their final report, the Wise Persons allocate a key role to the Council of Europe's Secretary General for the "strengthening of monitoring", which they strongly support: "The Secretary General should also have more responsibilities in the field of monitoring. In particular, he/she should be responsible for proposing to the Committee of Ministers concrete measures in the context of co-operation programmes, stemming from the conclusions of the monitoring."<sup>60</sup> They add: "The Secretary General should be given the possibility to commission reports from outside public figures with recognised authority, or to appoint special thematic "rapporteurs" to look into particular areas of concern, in consultation and agreement with the Committee of Ministers [and] to carry out joint missions (with the Chairperson of the Committee of Ministers) in the member States concerned"<sup>61</sup>.

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At all events, it seems likely that "seek[ing] greater efficacy in its procedures with a view to ensuring compliance with commitments", as stated in paragraph 5 of the 1994 Declaration, will continue to be a major concern for the Committee of Ministers. For, as the Committee of Wise Persons notes in its report, "the implementation of the "Declaration on compliance with commitments by member States" [...] should be strengthened"<sup>62</sup>.

## Appendix I: Basic texts

### COMMITTEE OF MINISTERS

#### **Declaration on compliance with commitments accepted by member States of the Council of Europe** (Adopted by the Committee of Ministers on 10 November 1994 at its 95th Session)

The Committee of Ministers,

Bearing in mind:

- the vocation of the Council of Europe to promote the reinforcement of democratic security in Europe, as stressed by the Vienna Summit (October 1993), where heads of state and government also resolved to ensure full compliance with the commitments accepted by all member states within the Council of Europe;
- the commitments to democracy, human rights and the rule of law accepted by the member states under the Council's Statute, the European Convention on Human Rights and other legal instruments;
- the importance of the strict compliance with these commitments by every member State;



- the statutory responsibility incumbent upon itself for ensuring full respect of these commitments in all member states, without prejudice to other existing procedures, including the activities of the Parliamentary Assembly and conventional control bodies;
- the need to facilitate the fulfilment of these commitments, through political follow-up, carried out constructively, on the basis of dialogue, co-operation and mutual assistance,

Decides as follows:

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

- by member states,
- by the Secretary General, or
- on the basis of a recommendation from the Parliamentary Assembly.

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

2. The Secretary General will forward to the Committee of Ministers to this end information deriving from contacts and co-operation with member states that are liable to call for the attention of the Committee of Ministers.

3. The Committee of Ministers will consider in a constructive manner matters brought to its attention, encouraging member states, through dialogue and co-operation, to take all appropriate steps to conform with the principles of the Statute in the cases under discussion.

4. The Committee of Ministers, in cases requiring specific action, may decide to:

- request the Secretary General to make contacts, collect information or furnish advice;
- issue an opinion or recommendation;
- forward a communication to the Parliamentary Assembly;
- take any other decision within its statutory powers.

5. The Committee of Ministers will continue to seek greater efficacy in its procedures with a view to ensuring compliance with commitments, in the framework of a constructive dialogue.

#### COMMITTEE OF MINISTERS

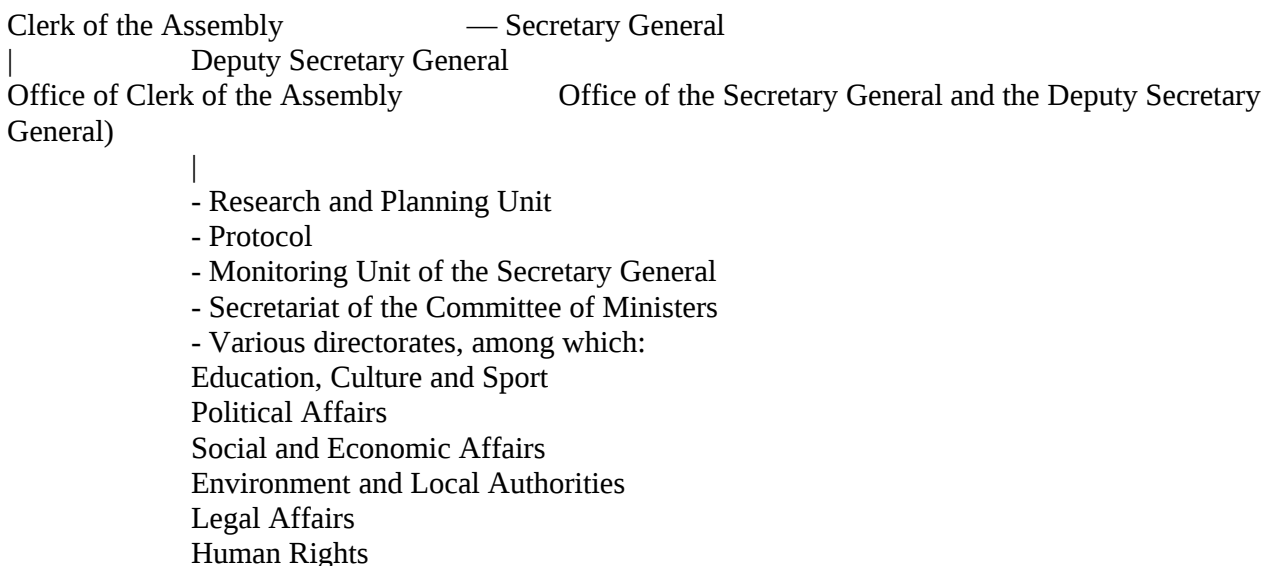
#### **Procedure for implementing the declaration of 10 November 1994 on compliance with commitments accepted by member States of the Council of Europe**

*(Adopted by the Committee of Ministers on 20 April 1995 at the 535th meeting of the Ministers' Deputies)*

In the Declaration adopted on 10 November 1994 on compliance with commitments accepted by member States of the Council of Europe, the Committee of Ministers decided to seek greater efficacy in its procedures with a view to ensuring compliance with commitments, in the framework of a constructive dialogue. It has agreed on the following:

1. The dialogue will be based on the principles of non-discrimination and co-operation. It will not affect existing procedures arising from statutory or conventional control mechanisms.
2. At least three meetings of the Ministers' Deputies at A level, fixed in advance, shall be devoted every year to this question.
3. At the first meeting and subsequently every second year, unless otherwise decided, the Secretary General shall present a factual overview of the compliance with the commitments accepted by member States. The overview should be based on information from member States and all relevant information as set out in paragraph 1 of the Declaration.
4. If, during the deliberations, a need to continue the discussion on the situation in a member State is voiced, the matter will be put on the agenda of the next meeting, referred to in paragraph 2 above.
5. By request made a month before each of these meetings, any Delegation or the Secretary General may ask to put the situation in any member State on the agenda of that meeting, on the basis of its own concerns or with reference to a discussion in the Parliamentary Assembly.
6. The request should be accompanied by specific questions, to enable the Delegations concerned to obtain relevant information.
7. In accordance with Article 21 of the Statute, the discussions should be confidential and held in camera, to encourage a constructive dialogue with the member States concerned. The presence of senior officials from the capitals should be encouraged
8. Conclusions of the meeting may be followed up in accordance with paragraph 3 of the Declaration. If needed, appropriate assistance may be provided to the member States concerned. Progress may be reviewed at subsequent meetings.
9. The Clerk of the Parliamentary Assembly may be invited to be present to provide information on any discussions in Assembly bodies on the States concerned,
10. Nothing in the preceding paragraphs precludes the Ministers' Deputies from taking decisions in accordance with paragraph 4 of the Declaration of 10 November 1994, after a question has been on the agenda for a reasonable number of meetings.

**Appendix II: Simplified organisation chart of the Secretariat**



**Appendix III: Chronology**

1993 (10 September)

Declaration of the first Summit of Heads of State and Government in Vienna

1994 (10 November)

"Declaration on compliance with commitments accepted by member states of the Council of Europe" adopted by the Committee of Ministers

1995 (20 April)

"Procedure for implementing the Declaration of 10 November 1994 on compliance with commitments accepted by member states of the Council of Europe", adopted by the Committee of Ministers, at the 535th meeting of the Ministers' Deputies

1996 (January)

Commencement of activities of the Committee of Ministers' monitoring procedure

1996 (March)

Issue of first "factual overview" prepared by the Secretary General

1996 (August)

Establishment of the Secretary General's Monitoring Unit

1996 (September)

Issue of overview on the theme *Freedom of expression and information*

1997 (February)

Issue of overview on the theme *Functioning and protection of democratic institutions*

1997 (September-October)

Seminars in Budapest and Strasbourg on the theme *Freedom of expression and restrictions included in penal codes and other legal texts*

1997(10-11 October)

Second Summit of Heads of State and Government in Strasbourg: Plan of Action

1998 (February)

Issue of overview on the theme *Functioning of the judicial system*

1998 (April)

Decision to re-adjust and streamline the Committee of Ministers' monitoring procedure, taken by the Ministers' Deputies at their 630th meeting on 29-30 April 1998

1998 (June)

Issue of overview on the theme *Local democracy*

1998 (October)

Decision that the two next themes of the Committee of Ministers' monitoring will be "*Death penalty*" and "*Police and Security forces*" (644<sup>th</sup> meeting of the Ministers' Deputies)

**Appendix IV**

## Outline of the procedure presently used (situation as at November 1998)<sup>63</sup>

Identification of the themes under consideration  
(Committee of Ministers)

↓

### PREPARATORY PHASE

#### First stage: overview

(Secretary General's Monitoring Unit = SG/MU)

- Information (5 to 10 pages) supplied to the SG/MU by national authorities.
- "comments" by the Secretariat
- distribution of the provisional texts of the overview (= national contributions + comments) to the states in question
- written observations sent to the SG/MU by states
- circulation of the overview

#### Second stage: debate

(Committee of Ministers)

- debate at one or more sessions
- summing-up by the Chairman of the Ministers' Deputies (optional)

↓

### OPERATIONAL PHASE

#### Third stage: conclusions

(Committee of Ministers)

- *conclusions of the Committee of Ministers*

#### Fourth stage: follow-up

(Committee of Ministers)

- adjustments to intergovernmental work and/or
- review of the programme of "Activities for the Development and Consolidation of Democratic Stability (ADACS)", plus where appropriate,
- implementation of one or more provisions of paragraph 4 of the Declaration of 10 November 1994 \*

\* Paragraph 4 of the Declaration of 10 November 1994 states that:

The Committee of Ministers, in cases requiring specific action, may decide to:

- request the Secretary General to make contacts, collect information or furnish advice;
- issue an opinion or recommendation;
- forward a communication to the Parliamentary Assembly;
- take any other decision within its statutory powers."

See also paragraph 10 of the Procedure for Implementing the Declaration of 10 November 1994, adopted on 20 April 1995.

These provisions may be implemented at any time, independently of the procedure described.

The procedure laid down in paragraph 4 has not yet been used.

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Winkler H., « Democracy and Human Rights in Europe. A Survey of the Admission Practice of the Council of Europe » in *Austrian Journal of Public and International Law*, 1995, 47 (2-3), pp. 147-172.

<sup>1</sup> Belgium, Denmark, France, Ireland, Italy, Luxembourg, Norway, Netherlands, Sweden, United Kingdom (1949); Greece (1949); Iceland, Germany, Turkey (1950; former GDR October 1990); Austria (1956); Cyprus (1961); Switzerland (1963); Malta (1965); Portugal (1976); Spain (1977); Liechtenstein (1978); San Marino (1988); Finland (1989); Hungary (1990); Poland (1991); Bulgaria (1992); Estonia, Lithuania, Slovenia, Slovakia, Czech Republic, Romania (1993); Andorra (1994); Latvia, Albania, Moldova, "the Former Yugoslav Republic of Macedonia", Ukraine (1995); Russia and Croatia (1996).

<sup>2</sup> See Imbert P.-H., "L'action intergouvernementale du Conseil de l'Europe en matière de droits de l'homme: sauvegarde ou développement?", in *Protection of Human Rights: the European Dimension - Studies in honour of Gerard J. Wiarda*, C. Heymanns Verlag, Köln, 1988, p. 259.

<sup>3</sup> In certain texts, particularly those of the Parliamentary Assembly, a distinction is drawn between member States' "commitments" and "obligations". The Committee of Ministers does not make this distinction and uses the term "commitments entered into by member States".

<sup>4</sup> This is not the place for a discussion about the extent to which Committee of Ministers' recommendations to the governments of member States may contain commitments of member States. These recommendations are adopted by the Committee of Ministers by a unanimous vote of the representatives casting a vote and a majority of the representatives entitled to sit (regarding their authority, see De Vel G., *The Committee of Ministers of the Council of Europe*, Council of Europe Press, 1994, p. 37).

<sup>5</sup> It is probably preferable to talk about "individualised" commitments rather than "specific" commitments (the term most often used) since convention-based commitments can also be very specific (in the sense of precise). Here, we are focusing specifically on commitments negotiated individually with each applicant State for Council of Europe membership, in accordance with its situation. For an overview of the origins of these individualised commitments and the accession procedures before 1989/90 see Winkler H., "Democracy and Human Rights in Europe. A Survey of the Admission Practice of the Council of Europe" in *Austrian Journal of Public and International Law*, Vol 47 No. 2-3, 1995.

<sup>6</sup> This is not the place to enter into the discussion on the character - legal and/or political - of these commitments. On this issue, see Klebes H., "L'élargissement du Conseil de l'Europe vers l'est: réalisation du rêve des pères fondateurs?", report presented at the colloquy "Le Conseil de l'Europe acteur de la recomposition du territoire européen", Faculté de droit et Espace Europe, Groupe de recherche sur le Conseil de l'Europe, Grenoble, 14 May 1996, Cahiers de l'Espace européen n° 10, May 1997, pp. 16-17; Schneider C., "Le contrôle des engagements du Conseil de l'Europe revisité par l'Histoire", *ibidem*, pp. 134-135 and Winkler H., *op.cit.*

<sup>7</sup> "The procedure followed makes it possible to admit to the Council of Europe a country which, although fulfilling in broad terms the general requirements of the Council of Europe [...], in one or more specific areas still has to adopt legislation and which still must bring its administrative and judicial practice into line with accepted standards. [...] I believe it is the correct way of proceeding, provided the political will exists to insist on full and timely compliance with the engagements entered into through appropriate monitoring mechanisms" (Winkler, *op. cit.*, p. 166).

<sup>8</sup> The conditions of accession to the Council of Europe are laid down in Article 4 of the Statute: "Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers. Any State so invited shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute." (For the content of Article 3 see footnote 10). For more information on the accession procedure see Winkler H. *op. cit.* and Klebes H., Chatzivassiliou D., "Problèmes d'ordre constitutionnel dans le processus d'adhésion d'Etats de l'Europe centrale et orientale au Conseil de l'Europe" in *Revue universelle des droits de l'homme (RUDH)*, 1996, 6, pp.

<sup>9</sup> According to Article 15 of the Statute, the Council of Europe achieves its objectives through the conclusion of conventions or agreements and the adoption by governments of common policies.

<sup>10</sup> Article 3: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I." Such a general obligation is not to be found in any other founding treaty of an international organisation (Imbert, *op. cit.*, p. 259).

Article 1: "The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress."

<sup>11</sup> For concise information on the new system see *Human Rights Law Journal*, vol. 15, Editions N.P. Engel, 1994, pp. 81-115; See also Vol. VI (1995), Book 2, *Collected Courses of the Academy of European Law* (Florence, 1997), pp. 121-244.

<sup>12</sup> Participants in steering committees are appointed by the governments of the member States, preferably from among national



officials of the highest possible rank (Resolution (76) 3 of the Committee of Ministers on committee structures, terms of reference and working methods, paragraph II.4.A).

<sup>13</sup> The Group of Specialists on conscientious objection to military service (DH-S-CO), under the auspices of the Steering Committee for Human Rights (CDDH), has been instructed to "consider ways and means of helping member States effectively implement, in their domestic legislation and practice, the principles and rules set forth in Committee of Ministers Recommendation No. R (87) 8 regarding conscientious objection to compulsory military service. For this purpose, the DH-S-CO will commission an independent consultant to draft an in-depth comparative study of the legal measures deployed in member States as regards conscientious objection to military service [...]", and "will prepare a short publication designed to make national authorities, the bodies concerned and the general public aware of the different questions raised [...]" (terms of reference of the DH-DEV-S-CO adopted by the Committee of Ministers in December 1997). For its part, the European Committee on Legal Co-operation (CDCJ), having recognised that in the past doubt had been cast on the effectiveness of its examinations of the application of international instruments for which it is responsible, has recently adopted a new procedure for these examinations. It has expressed the opinion that henceforth one of its most important tasks is to ensure that conventions, agreements and recommendations for which it is responsible are properly applied.

<sup>14</sup> See, for example, Winkler, *op. cit.* and Sudre F., "La Communauté européenne et les droits fondamentaux après le Traité d'Amsterdam: Vers un nouveau système européen de protection des droits de l'homme?" in *La Semaine juridique*, n° 1-2, 7 January 1998, pp 9-10. See also the General Report presented by Mrs Suchocka, the Polish Minister of Justice, to the colloquy "In our Hands: Human Rights Protection 50 Years after the Universal Declaration" (European regional colloquy organised by the Council of Europe as a contribution to the commemoration of 50th anniversary of the Universal Declaration of Human Rights and the 1998 review of the implementation of the Vienna Declaration and Programme of Action, Strasbourg, 2-4 September 1998), document 50DUDH(98)10, p. 17.

<sup>15</sup> See, *inter alia*, the addresses of Mr Tiit Vähi, Prime Minister of Estonia, to the Parliamentary Assembly on 27 January 1997 (document AS(1997)CR1 prov, p. 12) and of Mrs Tarja Halonen, the Finnish Ministry of Foreign Affairs and then Chair of the Committee of Ministers, to the Parliamentary Assembly on 28 January 1997 (document AS(1997)CR3 prov), and Winkler, *op. cit.*, pp. 169 and 171.

<sup>16</sup> H Klebes states that "the Assembly has always felt that it had a particular responsibility to observe developments in member countries and to pinpoint disturbances of the democratic order and violations of the rights and freedoms guaranteed by the European Convention on Human Rights" and he gives a number of examples to illustrate how the Assembly has reacted to situations that it considered abnormal ("Human Rights and Parliamentary Democracy in the Parliamentary Assembly", in *Protection of Human Rights: the European Dimension. Studies in honour of Gerard J. Wiarda*, C. Heymanns Verlag, Köln, 1988, pp. 312-314). See also HRLJ, vol. 14, 1993, p. 248.

<sup>17</sup> The Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (hereafter called the Monitoring Committee) was set up on 25 April 1997. It comprises 65 members appointed by the political groups - and not by national delegations as is the case with the other Assembly committees. There are no substitutes. The chairs of the Political Affairs Committee and the Committee on Legal Affairs and Human Rights are *ex officio* members.

<sup>18</sup> For more detailed information on progress in the Parliamentary Assembly's monitoring procedure and the lessons to be drawn from its first year of application, see the first report of the Monitoring Committee: Parliamentary Assembly, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), "Progress of the Assembly's monitoring procedures (April 1997 - April 1998)", Rapporteur: Mr Guido de Marco, Doc. 8057, 2 April 1998.

<sup>19</sup> On the other hand, the Monitoring Committee's documents remain, in principle, confidential, until the authorities of the country concerned have submitted their comments. Similarly, the Committee generally sits in closed session.

<sup>20</sup> Before the adoption of this resolution, CLRAE signified Standing Conference of Local and Regional Authorities of Europe.

<sup>21</sup> Explanatory report, European Charter of Local Self-Government, Treaties and Reports, Part B, General Comments, Council of Europe, 1986; see also Resolution 233 (1992)

<sup>22</sup> See Resolutions 31 (1996), 34 (1996) and 71 (1998), as well as Recommendation 20 (1996).

<sup>23</sup> At the same time, the Steering Committee on Local and Regional Authorities (CDLR), a body concerned with intergovernmental co-operation, also has responsibilities for monitoring the application of the European Charter of Local Self-Government. It organises, among others, exchanges of views and information, undertakes studies in specific areas and describes the experiences of member States in its reports. On the basis of its analysis of these experiences it proposes guidelines and the adoption of concrete measures to encourage the effective application of the subsidiarity principle.

<sup>24</sup> This first meeting of Heads of State and Government of the Council of Europe's member States was convened for the Vienna Summit several years after the fall of the Berlin Wall, which had turned the political scene in Europe and the world on its head. Eight countries of central and eastern Europe - Hungary, Poland, Bulgaria, Estonia, Lithuania, Slovenia, the Czech Republic and Slovakia - had already joined the Council of Europe and a ninth, Romania, acceded during the Summit.

<sup>25</sup> "Procedure for implementing the Declaration of 10 November 1994 on compliance with commitments accepted by member States of the Council of Europe", adopted by the Committee of Ministers on 20 April 1995, at the 535th meeting of the Ministers' Deputies. See Appendix I for full text.

<sup>26</sup> For the changes, see **II.d**: "Procedure(s) and working methods".

<sup>27</sup> In the communication of 28 May 1997 in response to Recommendation 1280 (1995) of the Parliamentary Assembly, the Committee of Ministers noted that "the Assembly has requested the Committee of Ministers ... to improve ways of monitoring" the application of conventions. The French version used the term *contrôle*, which in other contexts is translated as "control". See item XIII of document Monitor/Inf(97) 2 rev.

<sup>28</sup> 1994 Declaration, preamble.

<sup>29</sup> For additional comments concerning the use of these terms, see French-language version of the present document.

<sup>30</sup> Relevant opinions expressed by Council of Europe or other bodies may constitute "facts" for the purposes of monitoring.

<sup>31</sup> Over a certain period, some terminological confusion arose from the fact the Committee of Ministers also used the term "area of concern" with regard to themes it was considering.

<sup>32</sup> See the simplified organisation chart in Appendix II.

<sup>33</sup> Technically, the tasks are entrusted by the Committee of Ministers to the Secretary General and not directly to the Monitoring Unit.

<sup>34</sup> This description is based largely on the document Monitor/Inf (98) 1 which was published to present the *current* Committee of Ministers' monitoring procedure, whereas this information document is broader in scope.

<sup>35</sup> Decision to re-adjust and streamline the Committee of Ministers' monitoring procedure, taken by the Ministers' Deputies at their 630th meeting on 29-30 April 1998. This decision adjusts the "Procedure for implementing the Declaration of 10 November 1994 on compliance with commitments accepted by member States of the Council of Europe" (adopted by the Committee of Ministers on 20 April 1995, at the 535th meeting of the Ministers' Deputies), which had been amplified by the procedure agreed upon at the Deputies' 591st meeting in April 1997. Additional information is to be found in Monitor/Inf (97) 2 rev. and CM Misc (97) 15 rev.

<sup>36</sup> Other changes were introduced (and confirmed) concerning working procedures and, in particular, the preparation of overviews. Whereas the Secretary General's Monitoring Unit had, in December 1996, sent the draft reports on the situation in all the countries to all the member States for comment, it was subsequently instructed to send each country only the draft of the section which concerned it, and not the entire document.

<sup>37</sup> See the above explanations concerning the terms "overview" and "factual overview".

<sup>38</sup> The annual consultation in the Joint Committee (see Statutory Resolution (51) 30, adopted by the Committee of Ministers on 3 May 1951), is supplemented by informal contacts between the Chairperson of the Committee of Ministers and the Parliamentary Assembly's Monitoring Committee. This involves exchanges of information which respect each side's constraints of confidentiality and take account of the essentially different, but complementary, character of the two monitoring procedures.

<sup>39</sup> For more information on these seminars see document Monitor/Inf (97) 3 and Addendum.

<sup>40</sup> Enlarged Rapporteur Group on relations with the countries of central and eastern Europe (GREL), now renamed the Rapporteur Group for Democratic Stability (GR-EDS).

<sup>41</sup> CM/Del/Dec (98) 639, item 2.3 (on Internet: [www.coe.fr/cm](http://www.coe.fr/cm)).

<sup>42</sup> The concept of local democracy goes beyond that of local self-government. Whereas local self-government concerns local and regional authorities' relations with central government and relations between local and regional authorities (including their transfrontier co-operation), local democracy also includes the aspect of relations between local and regional authorities and their citizens.

<sup>43</sup> Though there has been one case where a government has referred explicitly to the monitoring of the Committee of Ministers when announcing important legal changes.

<sup>44</sup> Petranov B., "Council of Europe Launches Confidential Monitoring Procedure" in *Interights Bulletin*, 1996, Vol. 10, No. 2, p. 85

<sup>45</sup> See also *Methodology for implementing mechanisms for monitoring commitments by member states of the Council of Europe and the OSCE*, Compendium of documents for the joint meeting of the Council of Europe and the Organisation for Security and Co-operation in Europe, Strasbourg (10 March 1997), Council of Europe Publishing, 1997, p. 88.

<sup>46</sup> In its Recommendation 1366 (1998), adopted on 21/4/98, the Parliamentary Assembly recommended that the Committee of Ministers: "i. adopt ministerial replies to Assembly recommendations on monitoring as a matter of priority; ii. reconsider its decision on the absolute secrecy of its monitoring documents; iii. make information available to the Monitoring Committee's rapporteurs; iv. regularly include monitoring on the agenda of the Joint Committee" (see also paragraphs 31 to 34 and 36 to 37 of the aforementioned report of Mr de Marco, Chair of the Assembly's Monitoring Committee, and paragraph 6 of Resolution 1155 (1998) of the Assembly, also adopted on 21/4/98. In its reply to the recommendation, the Committee of Ministers made the points referred to below, while stressing that "it has been giving and will continue to give priority to adopting replies to recommendations on monitoring" (CM Del/Dec (98) 639 item 2.6).

<sup>47</sup> CM Del/Dec (98) 630 item 2.1

<sup>48</sup> "Annual consultation in the Joint Committee will be supplemented by informal contacts between the Chairman-in-Office and the Assembly's Monitoring Committee [...] exchange of information on a confidential basis is envisaged, with due regard being taken of the essentially different but complementary nature of the two monitoring procedures" (CM Del/Dec (98) 630 item 2.1).

<sup>49</sup> Neither the 1994 Declaration nor the 1995 Procedure made any reference to the classification of Committee of Ministers' monitoring documents as "secret" (but see paragraph 7 of the latter). With respect to the (factual) overviews, such decision was taken during the Committee of Ministers' discussions in December 1995. In April 1996, the Deputies extended the secret classification to the comments that the delegations might wish to offer on the Secretary General's overview of their country: "all comments received will be issued in an addendum also classified secret which will then, together with the Secretary General's overview, form, on an equal footing, a basis for the future discussions" (Procedure and timetable for implementing decisions of the Committee of Ministers, agreed by the Ministers' Deputies on 3 April 1996 at their 562nd meeting (Chairman's summing-up), CM/Inf(96)7, paragraph 1).

<sup>50</sup> See Del/Dec (98) 621 item 2.4 (February 1998). This decision concerns the overviews prepared by the Monitoring Unit and the information, observations and comments of member States' governments relating to the overviews. It was later decided (April 1998, CM/Del/Dec (98) 630 item 3) to give this declassification retroactive effect. However, in view of the fact that, in the absence of a Committee of Ministers' decision to the contrary, documents classified as "confidential" fall into the public domain after one year, the Ministers' Deputies also agreed to extend the embargo on such declassified monitoring documents by a year. None of the former "secret" documents are therefore yet available to the public.

<sup>51</sup> At the Council of Europe 2nd Summit (10 and 11 October 1997) the Heads of State and Government instructed "the Committee of Ministers to carry out the structural reforms needed to adapt the Organisation to its new tasks and its enlarged membership and to improve its decision-making process". The Committee of Ministers accordingly decided to set up a so-called "Committee of Wise Persons" made up of ten European figures, five of whom were independent and the other five selected *ex officio*.

<sup>52</sup> Committee of Wise Persons, Final Report to the Committee of Ministers, document CM(98)178 of 20/10/98, paragraph 71 (<http://www.coe.fr>).

<sup>53</sup> *Ibidem*, p. 9

<sup>54</sup> See Parliamentary Assembly Recommendation 1381 (1998) on "General policy: Council of Europe and OSCE" (adopted on 22

September 1998), particularly paragraph 8.

<sup>55</sup> Point III of the Conclusions of the European Council in Copenhagen (21-22 June 1993) sets out the political criteria for the accession of countries of central and eastern Europe to the European Union. It has frequently been pointed out by the European Union that the standards in these fields are very much those of the Council of Europe (see for example the introductory report to and the preamble and part V of the conclusions of the Noordwijk conference organised by the Netherlands Presidency of the European Union in close collaboration with the Council of Europe in June 1997 on the theme "the rule of law"). As regards the monitoring of the application of these standards, the most recent "regular reports" of the Commission on the progress of applicant States towards accession stipulates explicitly that the Commission uses "evaluations from international organisations (particularly the Council of Europe)". See <http://europa.eu.int/comm/dg1a/enlarge>.

<sup>56</sup> It may well be that these documents are already currently being used *unofficially*, via the Ministries of Foreign Affairs of the Council of Europe's member States, which are required, as member States of the European Union, to decide on the entry of new States to the Union. These ministries receive the monitoring documents from their Permanent Representatives at the Council of Europe.

<sup>57</sup> Such a request was presented in Brussels on 6 March 1998 at a meeting between the "Troika" of the K4 Committee and a Council of Europe delegation (CM/Inf (98) 15, pp. 5 and 6). See also the press release published following the 12th Council of Europe/European Union quadripartite meeting on 7 October 1998, particularly paragraph 2. In its final report, the Committee of Wise Persons said that "the possibilities for co-operation with the European Union and the OSCE in the field of monitoring should be explored" (*op. cit.*, paragraph 70).

<sup>58</sup> In its Recommendation 1367 (1998), adopted on 22/4/98, the Assembly "recalls that the Council of Europe has a unique mechanism for establishing political and legal standards and has developed a monitoring system which also contributes to conflict prevention. The United Nations should benefit from this experience" (paragraph 12, see also paragraphs 13 and 15 i and vi).

<sup>59</sup> See in this context the comments of the Deputy Secretary General in *op. cit.*, note 45, p. 88.

<sup>60</sup> *Op. cit.*, paragraph 58

<sup>61</sup> *Ibidem*, paragraph 75.

<sup>62</sup> See the report of the Committee of Wise Persons for their concrete proposals: *op. cit.*

<sup>63</sup> This Outline is taken from document Monitor/Inf(98)l.