

ПРАВО МІЖНАРОДНИХ ОРГАНІЗАЦІЙ

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HONOURING THE COMMITMENTS BY MEMBER STATES OF THE COUNCIL OF EUROPE: MONITORING MECHANISM

Summary. The article is devoted to the monitoring mechanism in the Council of Europe. The author notes that, despite the fact that the term «monitoring» is not used in the Statute of the Council of Europe, it is widely used in the various official documents and the daily practice of the Organisation. The author made an attempt to classify the obligations of Member States and their respective monitoring mechanisms. Two basic types of Council of Europe monitoring depending on the subject have been highlighted. There are monitoring obligations which Member States take upon their accession to the Council of Europe and monitoring of treaty-based obligations. Special attention is paid to the monitoring of the European Court of Human Rights judgments and the post-monitoring dialogue.

Key words: Council of Europe, Member States, obligations, membership commitments, monitoring.

The Council of Europe (CE) is probably the only Eurocentric international organisation, the aims and objectives of which are to disseminate, and strength common European values and the achievements of European civilization. The Council of Europe, by its activity, embodies the ideas of humanism, equity and fairness. More than half a century of existing human rights system, established by the Council of Europe, is a phenomenon of European and international law.

The Council of Europe member states are responsible for ensuring proper compliance with their commitments. Such compliance has always been an important feature of the Organisation and has received additional impetus when the Heads of State and Government of the Member States of the Council of Europe gathered in Warsaw on 16-17 May 2005 for their Third Summit. In accordance with the provisions of the Warsaw Final Declaration, Heads of State and Government of the Member States of the Council of Europe reaffirmed: «...5. We are resolved to ensure full compliance with our membership commitments within the Council of Europe. Political dialogue between member states, which are committed to promoting democratic debate and the rule of law, evaluation, sharing of best practices, assistance and monitoring – for which we renew our firm support – will be fully used for that purpose. We shall work for the widest possible acceptance of Council of Europe's conventions, promoting their implementation with a view to strengthening common standards in the fields of human rights, democracy and the rule of law» [1].

The Member States commitments and obligations are the subject of monitoring of the Council of Europe. Obligations and commitments of the Council of Europe Member States may be divided into basic two groups:

- the obligations which the Member States take upon their accession to the Council of Europe. They include: statutory obligations of the Member States, the obligations to sign certain treaties of the Council of Europe, commitments to reform national legislation, administrative reforms, political commitments;
- the obligations that the Member States assume under the Council of Europe treaties to which they are Parties. These obligations are directly related to the subject matter of the treaty in question .

Accordingly, there are two basic types of monitoring foreseen by the Council of Europe depending on the subject:

- monitoring of obligations which Member States take upon their accession to the Council of Europe;
- monitoring of treaty-based obligations. There are two specific subtypes in this group: 1) the control mechanism of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) [2], and, correspondingly, the monitoring mechanism of the execution of the European Court of Human Rights' judgments by the States Parties to the Convention; 2) the control mechanism of the European Social Charter [3] establishes a Group of Experts, now called the European Committee of Social Rights, to monitor compliance. Article C in part IV of the European Social Charter (revised) [4] binds to the same supervision system as that of the European Social Charter. The system of collective complaints mechanism was established by the Additional Protocol to the European Social Charter providing for a system of collective complaints [5].

It should be noted that this type of monitoring may be country specific or thematic (democracy, human rights, rule of law, social dimension, education, culture, sports, etc.).

Also the monitoring of the Council of Europe may be classified:

- by form: legal and political;
- by the range of CE institutions involved in the monitoring process: monitoring of the Committee of Ministers of the Council of Europe, monitoring of the Parliamentary Assembly of the Council of Europe, monitoring of the Congress of Local and Regional Authorities and monitoring of other institutions which are created according to the partial agreements or Resolutions of the Committee of Ministers (such as the Council of Europe Commissioner for Human Rights, the European Commission against Racism and Intolerance (ECRI) and others).

Monitoring follows different forms and methodologies : these may include country-to-country visits, governments' own reports, collective complaints system, individual complaint system and the different types of reports emerging from expert fact-finding visits to member states, even surprise visits in emergency situations.

In contrast to the well-established procedures for monitoring the statutory obligations and obligations related to the execution of ECtHR judgments, the procedures and content of the treaty-based monitoring, although it is based on common principles, may be different.

Monitoring of the Council of Europe depending on its subject, is probably the most meaningful as it includes all forms and methods of monitoring mechanism. Further research will focus on the specifics of the Council of Europe monitoring procedures depending on its subject.

Monitoring of obligations which Member States take upon their accession to the Council of Europe.

Despite the fact that the term «monitoring» is not used in the Statute of the Council of Europe [6], it is widely used in various official documents and the daily practice of the Organisation. For example, the annual progress reports of PACE are dedicated to the progress of the Assembly's monitoring procedure [7]. The absence of any mention of the Council of Europe monitoring system in the Statute of the Council of Europe can be easily explained. This system was established much later than the Organisation has been created. In 1959 the European Court of Human Rights begun its work as a Convention's supervisory machinery. But its jurisdiction only became binding for all Member States in 1998. As was noted by the Head of the Secretariat of the PACE's Committee on Legal Affairs and Human Rights, Mr. Drzemczewski (in his study «The Prevention Of Human Rights Violations: Monitoring Mechanisms Of The Council Of Europe»): «... signature of the ECHR upon accession and its prompt ratification thereafter (including declarations pursuant to Articles 25 and 46, ECHR, ie., acceptance in full of the individual and inter-State complaints system before the Strasbourg Commission and Court, pending entry into force of Protocol No. 11 on 1st November 1998) was an essential undertaking which all new Member States had to make when joining the Organisation» [8].

In 1993, the Assembly was the first statutory body, which established a mechanism for monitoring compliance with the obligations and commitments taken upon their accession to the Council of Europe by the new Member States.

Stressing the importance of these obligations, the Committee of Ministers decided in 1994 to establish its own monitoring mechanism. Also in 1994 the monitoring mechanism by the Congress of Local and Regional Authorities based on the Statutory Resolution was established. The organisational and legal mechanism of the Council of Europe continued its development and improvement, and, subsequently, in 1999 another specialized body – the Council of Europe Commissioner for Human Rights was created.

Role of the Parliamentary Assembly. Resolution 993 (1993), adopted by the Assembly on 3 February 1993 (25th Sitting), in its Para 6 stresses: «The Assembly considers that it should not only examine the situation in states having applied for membership, but that it has a duty regularly to monitor the human rights and democratic and cultural development situation in all member states as well as in states whose legislative assemblies hold special guest status» [9]. Also, in its Order No. 485 (1993), the Assembly instructed its Committee on Legal Affairs and Human Rights «to report to it when problems arise on the situation of human rights in member States, including their compliance with judgments by the European Court of Human Rights» [10].

On 29 June 1993, the Parliamentary Assembly noted in its Order No. 488 that «Recent Assembly opinions on applications for membership of the Council of Europe refer to specific commitments entered into by the authorities of the candidate states on issues related to the basic principles of the Organisation» and instructed its Political Affairs Committee and Committee on Legal Affairs and Human Rights «to monitor closely the honouring of commitments entered into by the authorities of new member States and to report to the Bureau at regular six-monthly intervals until all undertakings have been honoured» [11].

In Resolution 1031 (1994) the Assembly observed «that all member states of the Council of Europe are required to respect their obligations under the Statute, the European Convention on Human Rights and all other conventions to which they are parties. In addition to these obligations, the authorities of certain states which have become members since the adoption in May 1989 of Resolution 917 (1989) on a special guest status with the Parliamentary Assembly freely entered into specific commitments on issues related to the basic principles of the Council of Europe during the examination of their request for membership by the Assembly. The main commitments concerned are explicitly referred to in the relevant opinions adopted by the Assembly» [12].

The Assembly has since then extended and strengthened its monitoring procedure. In April 1995, by Order No. 508 (1995)¹ on the honouring of obligations and commitments by member States of the Council of Europe, the Assembly instructed its Committee on Legal Affairs and Human Rights (for report) and its Political Affairs Committee (for opinion) to continue monitoring closely the honouring of obligations and commitments in all member States concerned, and to report directly to the Assembly.

The above-described procedure under Order No. 508 (1995) has been replaced as of 25 April 1997 by a new monitoring mechanism which is to be

implemented by the Assembly Committee on the honouring of obligations and commitments by member States of the Council of Europe (Monitoring Committee), especially set up on the occasion. This procedure was instituted by Resolution 1115 (1997) [13], adopted by the Assembly on 29th January 1997 and was modified by Resolutions 1431 (2005), 1515 (2006), 1698 (2009), 1710 (2010) and 1936 (2013).

Role of the Committee of Ministers. In 1994 The Committee of Ministers decided to establish its own monitoring system. In its «Declaration on compliance with commitments accepted by member states of the Council of Europe» [14], adopted on 10 November 1994, the Committee of Ministers agreed that member states, the Secretary General or the Parliamentary Assembly could refer to it matters regarding «questions of implementation of commitments concerning the situation of democracy, human rights and the rule of law in any member state» (Para 1). This procedure can be used to enable the Committee of Ministers to examine issues of potential concern in one, several or all member states.

There are two important forms of monitoring by the Committee of Ministers based on the 1994 Declaration: a thematic monitoring and a country specific procedure (for Moldova, Georgia, Ukraine and the Russian Federation). In addition, the Committee of Ministers has set up a post-accession monitoring mechanism for the member states which last joined the Organisation (for Armenia, Azerbaijan, Bosnia and Herzegovina, Serbia, Montenegro). Finally, the Committee of Ministers also requested a number of intergovernmental committees to conduct monitoring procedures («Examples of such committees include the CDDH (human rights), CDPC (Criminal law and Prison Rules), CDCJ (Data protection, family law, refugees etc...), CODEXTER (Terrorism), CDEG (Equality between women and men), CDLR (Local and Regional Democracy) etc.» [15]).

Not all Council of Europe bodies which carry out monitoring at the present stage, monitor the statutory obligations of the Member States. In this case, it is important to distinguish between the statutory obligations of the Member States and obligations/commitments which the Member States undertake upon their accession to the Council of Europe. The content and the scope of these obligations certainly are different. The range of bodies and institutions involved in monitoring the procedure applicable to honouring these commitments and obligations are different too.

The amount of obligations which the Member States undertakes to abide by before the Council of Europe is much broader than the scope of statutory obligations.

Statutory obligations make up the substance of the Member States' obligations, which they have undertaken pursuant to sources of the Council of Europe law which have a «statutory nature». There are some more recognized statutory sources than the Statute of the Council of Europe: General Agreement on Privileges and Immunities of the Council of Europe and its Protocols, Statutory resolutions of the Committee of Ministers of the Council of Europe, the Convention

for the Protection of Human Rights and Fundamental Freedoms and its Protocols and final declarations of summits. This group of sources may also be called the «constitutional» [16] sources of the Council of Europe Law.

The principal role of any monitoring body is to ensure that Member States are complying in both law and practice with the Organisation's standards and their obligations. But non-compliance is not always deliberate or politically motivated, and many monitoring bodies have the capacity to offer advice, assistance and guidelines on policy making that will help Member States which have genuine difficulties in meeting their obligations.

The Parliamentary Assembly may use sanctions in cases of persistent failure to honour accepted obligations and commitments, and/or lack of co-operation in its monitoring process, by adopting a resolution and/or a recommendation or by the non-ratification of the credentials of a national parliamentary delegation at the beginning of its next ordinary session, or by the annulment of ratified credentials in the course of the same ordinary session in accordance with Rule 8 «Challenge of still unratified credentials on substantive grounds» of its Rules of Procedure [17]. 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 [18].

Thus the sanctions, in a first phase, may take the form of non-ratification of credentials of a national delegation to the Assembly. In a second phase, if serious violations persist, the state in question may eventually be suspended from the Council of Europe by the decision of the Committee of Ministers.

Treaty-based monitoring. Only 28 of 214 treaties elaborated in the Council of Europe provide directly for the setting-up of an independent mechanism to monitor their application. Thus not all the Council of Europe treaties provide for their own monitoring mechanism.

There are two main treaty-based monitoring mechanisms.

1) A specifically created expert body (committee of experts) may be provided in the text of the treaty. The power of the permanent committees, which can vary, usually consist of a general monitoring of treaty rules, the proposed amendment / update treaties, making recommendations to the Parties. The reports of these monitoring bodies, as a rule, have to be sent to the Committee of Ministers for information or with specific proposals for action.

The functions of these committees are typical, but among treaty monitoring mechanisms of the Council of Europe, there are two, mentioned above, exceptional mechanisms. These are: 1. Judicial body as a control mechanism to the Convention for the Protection of Human Rights and Fundamental Freedoms, and 2. The system of collective complaints under the European Social Charter (revised).

Thus this form of treaty-based monitoring may range from a judicial body, such as the European Court of Human Rights, to an independent group of experts, such as the European Committee of Social Rights, the European Commit-

tee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Group of Experts on Action against Trafficking in Human Beings (Greta), the Advisory Committee on the Framework Convention for the Protection of National Minorities, the Committee of Experts of the European Charter for Regional or Minority Languages.

Treaties can also be monitored by representatives of States Parties, such as for the European Convention on the Exercise of Children's Rights, or by steering committees of the Committee of Ministers.

2) State reports at regular intervals as specified in the treaty, as well as consultation of the Parties at their request or at the request of the Secretary General of the Council of Europe, which are also held on a regular basis. The purpose of these consultations is to examine the state of application of the treaty and to assess which provisions should be revised, if necessary.

It is important to distinguish the treaty-based monitoring mechanism and the resolution based monitoring mechanism. The Commissioner for Human Rights, the European Commission against Racism and Intolerance (ECRI), the Group of States against Corruption (GRECO) and the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) are bodies with a resolution based monitoring mandate.

Other bodies that do not have any monitoring mandate but rather advisory functions also play an important role by assisting states in complying with their obligations. These are the European Commission for Democracy through Law (Venice Commission), the European Commission for the Efficiency of Justice (CEPEJ), the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) [19].

Obviously, only a minority of Council of Europe treaties provides for their own monitoring mechanism. «Hence, in the absence of particular provisions, parties are responsible vis-à-vis one another for the reciprocal implementation of treaty obligations. And difficulties between the parties, when they occur, are resolved without any intervention» [20].

Monitoring of execution of the European Court of Human Rights judgments. The European Court of Human Rights is a unique mechanism designed to control fulfillment of the commitments of the State Parties according to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Execution of Court's judgments is governed by Article 46 of the Convention on Human Rights [21]. The Committee of Ministers of the Council of Europe monitors the execution of judgments.

Due to the growing stream of complaints to the ECtHR, the amount of unfulfilled judgments by the State Parties proportionally increases. The whole system is «bursting at the seams». It's not because the mechanism is not perfect, not effective or idea did not justify itself. But because of a too long and complicated «feedback» of State Parties to the judgments resulting from objective and subjective circumstances.

In addition to providing fair compensation awarded by the Court in accordance with Article 41 of the Convention, the Committee of Ministers supervises the adoption of:

- individual measures in order to eliminate as far as possible, all remaining effects of violations (by, for example, calling for the destruction of information collected in violation of the right to privacy, or the cancelling of a deportation order issued despite evidence of a risk of torture or other forms of ill-treatment);

- general measures to prevent new violations similar to one or more of the Court's findings (by, for example, calling for changes in legislation or other regulations, judicial or law enforcement). Of particular importance is the establishment, as appropriate, of effective domestic remedies.

Sometimes, the Court provides guidance on the adoption of appropriate measures of individual or general nature in its judgments. However, in most cases, the measures necessary to execute the judgments are defined in the as part of the dialogue between the respondent State and the Committee of Ministers.

The judgments which are declaratory in nature provide direction in discussing implementation requirements even if they do not specify exactly what needs to be done. In *Assanidze v Georgia* (2004), which concerned the arbitrary detention of the applicant, the Court clarified how the direction it provides for implementation should be read and how the domestic authorities have to find the best ways to prevent future violations.

«...As regards the measures which the Georgian State must take subject to supervision by the Committee of Ministers, in order to put an end to the violation that has been found, the Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1)» (para202) [22].

Exceptions are the pilot judgments, in which the Court identifies a «systemic or a structural» problem that affects a large number of similar applications. In pilot judgments, unlike in declaratory or specific guidance-providing judgments, the Court sets out a framework of general measures in the final part of the judgment. These measures provide specific instructions and time limits for their fulfillment. The Court waits for the State's response to the pilot judgment before it deals with other cases of a similar kind. There were 29 pilot judgments, delivered by the Court, as of November 12, 2012 [23].

Exercising supervision, the Committee of Ministers may adopt interim resolutions and other forms to assess the progress achieved and, if necessary, direct the appropriate recommendations to the authorities. The Committee concludes the consideration of each case by adopting a Final resolution. Since 2007, the

Committee shall draw up an annual report on its activities under Article 46 of the Convention.

Post-monitoring dialogue. As emphasized in the information document «The monitoring procedure of the Parliamentary Assembly» of the Committee on the Honoring of Obligations and Commitments by Member States of the Council of Europe: «Since 1997, when closing a monitoring procedure, the Parliamentary Assembly has decided at the same time 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. The Assembly thus instructed its Monitoring Committee to carry out a post-monitoring dialogue with all States concerned. Normally, the post-monitoring dialogue commences one year after the closing of monitoring procedureUntil 2009, the Chairperson or a Vice-Chairperson of the Committee was asked to undertake the post-monitoring dialogue. Since 2010, following the same criteria as for the appointment of monitoring co-rapporteurs, the Committee nominates only one rapporteur for each country subject to post-monitoring dialogue. The Committee should present a report on each country under post-monitoring dialogue at least once every three years» [24].

As Mr. Gross stressed in his Report on the Initiation of a monitoring procedure and post-monitoring dialogue: «The post-monitoring dialogue is not a part of the monitoring procedure regulated by Resolution 1115 (1997) but a distinct process carried out by the Monitoring Committee on behalf of the Assembly The dialogue between the Monitoring Committee and the authorities of a given country is an exchange of information on further substantial progress made by that country in the efforts to implement the recommendations which the Assembly made when concluding the monitoring procedure. Its modalities were fixed in document AS/Bur (2000) 18 of which the Assembly took note on 3 April 2000. The Monitoring Committee finalized the details of the post-monitoring dialogue on 19 December 2000... . The committee also approved a code of conduct for co-rapporteurs on the honouring of obligations and commitments of member States» [25].

As of October 1, 2013, there are ten countries under specific monitoring (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, the Republic of Moldova, Montenegro, the Russian Federation, Serbia and Ukraine), and four countries engaged in a post-monitoring dialogue (Bulgaria, Monaco, «the former Yugoslav Republic of Macedonia» and Turkey) [26] in their efforts to fully comply with the obligations and commitments they entered into upon accession to the Council of Europe.

For more than 60 years, the Council of Europe has evolved from a «club of democracies» to a «school of democracy» [27]. The opportunity to join the Council of Europe «in advance» has not allowed to complete the monitoring process in relation to the obligations of many Member States. The so-called «new democratic» states have been hostages to this situation for many years.

While the work carried out by the Council of Europe in the sphere of monitoring membership commitments is already considerable, due attention should be accorded to new initiatives. In this sense, the proposal of the Secretary General of the Council of Europe to launch a process of reflection on the monitoring procedures in the intergovernmental sector of the Organisation, aimed at strengthening and improving co-operation between the different monitoring mechanisms, deserves full support.

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Анцупова Т. А. Виконання почесних забор'язань державами-членами ради європи: механізм контролю

Аннотация. Стаття посвящена аналізу механізму моніторингу в Союзі Європи. Автор отмечает, что, несмотря на то, что термин «мониторинг» не используется в Уставе Совета Европы, он широко используется в официальных документах и повседневной

практике Организации. Автор сделал попытку классифицировать обязательства государств-членов и соответствующие механизмы их контроля. Были выделены два основных типа мониторинга Совета Европы в зависимости от его предмета. Это мониторинг обязательств, взятых государствами-членами при вступлении в Совет Европы и мониторинг договорных обязательств. Особое внимание уделяется мониторингу решений Европейского суда по правам человека и постмониторинговому диалогу.

Ключевые слова: Совет Европы, государства-члены, обязательства, членство, мониторинг.

Анцупова Т. А. Исполнение почетных обязательств государствами-членами совета европы: механизм контроля

Анотація. Стаття присвячена аналізу механізму моніторингу в Раді Європи. Автор зазначає, що, незважаючи на те, що термін «моніторинг» не використовується в Статуті Ради Європи, він широко використовується в офіційних документах і повсякденній практиці Організації. Автор зробила спробу класифікувати зобов'язання держав-членів і відповідні механізми їх контролю. Були виділені два основних типи моніторингу Ради Європи в залежності від його предмета. Це моніторинг зобов'язань, взятих державами-членами при вступі до Ради Європи та моніторинг договірних зобов'язань. Особливу увагу приділяється моніторингу рішень Європейського суду з прав людини і постмоніторинговому діалогу.

Ключові слова: Рада Європи, держави-члени, зобов'язання, членство, моніторинг.