

CORVINUS UNIVERSITY BUDAPEST

# POWER REALISM VERSUS NORMATIVE INSTITUTIONALISM IN THE COUNCIL OF EUROPE

The responses of the Organisation to the political and legal challenges to effective  
multilateralism

DOCTORAL DISSERTATION

Supervisor: Dr. Erzsébet Kardosné Kaponyi dr. habil PhD

Professor emerita

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Budapest, 2022

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Corvinus University of Budapest  
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## Abbreviations

<b>CDADI</b>	Steering Committee on Anti-Discrimination, Diversity, Inclusion of the Committee of Ministers
<b>CEE</b>	Central Eastern Europe
<b>CM</b>	Committee of Ministers of the Council of Europe
<b>CMDH</b>	Committee of Ministers Human Rights Meeting ( <b>C</b> omité des <b>M</b> inistres <b>D</b> roits de l' <b>h</b> omme)
<b>CoE</b>	Council of Europe
<b>CSCE</b>	Conference for Security and Co-operation in Europe
<b>EC</b>	European Commission
<b>ECHR</b>	European Convention on Human Rights
<b>ECRML</b>	European Charter for Regional or Minority Languages
<b>ECtHR</b>	European Court of Human Rights
<b>EP</b>	European Parliament
<b>EU</b>	European Union
<b>EXEC</b>	Department for the Execution of Judgements of the European Court of Human Rights
<b>FCNM</b>	Framework Convention for the Protection of National Minorities
<b>GR-EXT</b>	Rapporteur Group for External Relations of the Committee of Ministers, Council of Europe
<b>GR-PBA</b>	Rapporteur Group on Programme, Budget and Administration of the Committee of Ministers, Council of Europe
<b>NATO</b>	Northern Atlantic Treaty Organisation
<b>OSCE</b>	Organization for Security and Co-operation in Europe
<b>PACE</b>	Parliamentary Assembly of the Council of Europe
<b>PKK</b>	Kurdistan's Workers Party, Turkey
<b>UN</b>	United Nations
<b>WWII</b>	World War

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including my late father and late grandmother,  
to my very supportive mother,  
my patient husband and  
my fantastic children*

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## **Chapter 1: INTRODUCTION**

### **1. 1. Relevance of the topic**

The context of the current research is the crisis of the multilateral framework, since scepticism of effective multilateralism has been growing in recent years. Scholars of international relations depict the crisis of international organisations as a result of the growing number of geopolitical conflicts, but challenging the primacy of supranational authorities or the Brexit can also be the symptoms of this development. Petra Roter, former chair of the Advisory Committee of the Framework Convention for the protection of National Minorities in the Eleventh activity report refers to the worrying trend of bilateralisation, indirectly stating that this process could negatively affect the functioning of the human rights regime in general (Eleventh activity report, 2018, p. 14). Mette Eilstrup-Sangiovanni, actually examined the reasons leading the termination of international organisations in her study in 2018 (Eilstrup-Sangiovanni, 2018)

The role and future of multilateralism itself deserve a separate analysis, and the wide range of literature shows that this question is at the heart of scholars' interests (Lavelle, 2020; Hosli et al 2021). The Covid-19 pandemic also redirected attention to the question of effective multilateralism, but after the outbreak of the war in Ukraine on 24 February 2022, it is undeniably relevant to assess the current format of multilateralism. The structure of the thesis was determined in 2020, long before the war between the Russian Federation and Ukraine. However, this war in a neighbouring state has had a major impact on this research. It is impossible to ignore the most serious conflict in Europe since the end of the Second World War when presenting the political case study or analysing the mechanisms of the Council of Europe on how to motivate member states to comply with their international obligations. The exclusion of the Russian Federation from the Council of Europe is also an unprecedented political decision, the assessment of which will form an integral part of this research.

Accordingly, the present thesis focuses on the particular situation of the Council of Europe, and intends first to present the enlargement dilemma of the organisation in the mid-nineties: namely whether to invite the Eastern European countries to join before they were in compliance with the main standards or to delay their accession until their legal and institutional structures were closer to European standards. The decision on the early invitation determined the path of the organisation in subsequent decades, and besides institutional renewal, it led to a series of political and legal challenges. This dissertation aims to present one political and one legal case

study to illustrate the financial crisis of the main bodies of the Council of Europe, by showing statistical data to support the arguments. Therefore, both qualitative and quantitative analysis are conducted to seek an answer to the question, how the organisation can solve the challenges resulting from the reappearance of power realism in an intergovernmental organisation with the protection of human rights as a core mission. How, in other words, to solve its own Copenhagen dilemma.<sup>1</sup> As an overview, the dissertation also presents the latest development, the establishment of a new “rule of law” complementary procedure (see in detail in Chapter on Definitions of key concepts), as a possible solution to the institutional challenges.

A broad range of literature is available on the terminology of international, intergovernmental and supranational organisations, distinguishing the key factors of the different formats. The Council of Europe is a classical intergovernmental organisation (Lindseth, P- L., 2014) similarly to other regional or global cooperation formats.

It can be regarded as a thematic institution taking into account the fundamental human rights standards, legally binding convention system and serious supervision structure developed since its foundation. As a result, the Council of Europe became a unique multilateral organisation of its kind, and can be seen as the continent's leading human rights organisation. It is often confused with the European Council, an institution of the European Union which plans Union policy. In light of the recent institutional and financial crisis of the Council of Europe - caused by amongst other factors, a concrete, classical geopolitical challenge – the annexation of Crimea by the Russian Federation – it appears justified to examine the factors leading to the situation which nearly paralyzed the organisation. The Council of Europe has learnt its lessons and sought effective guarantees to prevent similar circumstances in the future.

The Council of Europe celebrated its 70<sup>th</sup> anniversary in 2019. With seven decades of experience in protecting human rights, guaranteeing the rule of law and democratic principles, this organisation undoubtedly contributed to developing the normative basis for the single European legal area. Through its close cooperation with other international organisations, by inspiring and mutually strengthening each other's activities, the Council of Europe became an active part of the European human rights construction. In some fields, its role and mission go beyond the standard-setting activities of the United Nations or the European Union. The legally binding conventions in the protection of national minorities and their supervisory mechanisms elaborated in the mid-1990s can be considered unique. However, sceptical voices could say that

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<sup>1</sup> The phenomenon of not respecting the commitments undertaken before accession. A term used in the European Union (EU), referring to the “Copenhagen criteria, which applicant countries to EU have to meet for becoming member”, Glossary of Statistical Terms (see in detail under the chapter Definitions of Key Concepts).

any legislation is only as good as its enforcement (Kardos, G. 2017. p. 40)<sup>2</sup>. The policy of the Council of Europe focused on dialogue, cooperation, follow-up activities and assistance. The organisation sought to evade sanctions or confrontations, and, in fact, it did not really make use of any kind of efficient restrictive measures. After the historical enlargement and institutional reform of the 1990s, the Council of Europe now faces another type of challenge. Soft power human rights instruments, and “normative institutionalism” versus classical, “power realism”<sup>3</sup> demands new approaches and methods. No one can predict how the newly established complementary procedure will succeed in achieving what its committed supporters hoped for regarding the enforcement of norms and standards. Bearing in mind that the real goal is not to punish the member states but to motivate them with strengthened tools, whenever the Committee of Ministers decides to apply the exclusion option, meaning the cessation of CoE membership in practice, the mechanism must be considered to have failed. Recent developments, specifically the approach and policy of the Council of Europe when it responded to the Russian aggression in Ukraine starting on 24 February 2022 with the expulsion of the Russian Federation, cannot be considered as the test of the complementary procedure, since the new mechanism has not been activated at all to tackle this serious violation.

In light of the preliminary findings, the Council of Europe apparently has a double history. During the first period, lasting from its foundation until the Eastern enlargement, the organisation focused on developing the institutional and legal framework of liberal democracies according to the rules of intergovernmentalism. After the door was opened to Eastern European states with entirely different historical, political and social backgrounds, the Council of Europe irrevocably turned a “new page”.<sup>4</sup>

The way I intend to conduct the research is largely based on my personal experiences in 1999 and between 2011 and 2016 in the Council of Europe. In 1999, I served as a contact diplomat in the Permanent Representation of Hungary to the Council of Europe, responsible for the organisation of Hungary’s chairing of the Committee of Ministers, including the 104<sup>th</sup> session of the Ministers for Foreign Affairs held in Budapest. A decade later I served again in Strasbourg, as deputy to the Permanent Representative of Hungary to the Council of Europe,

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<sup>2</sup> Professor Gábor Kardos, Hungarian member of the Committee of Experts to the European Charter of Regional or Minority Languages. Kardos, G. 2017. Mérés a Nyelvi Charta, Kisebbségi Szemle 2. évf. 3.sz. (2017) p. 40.

<sup>3</sup> Expressions in quotation marks borrowed from Professor Ferenc Gazdag, unpublished reviser opinion to the Author’s identically titled article.

<sup>4</sup> Opinion of Professor Ferenc Gazdag, unpublished reviser opinion to the Author’s identically titled article.

and in this capacity I actively participated in the work of four rapporteur groups<sup>5</sup> preparing the decision-making process of the Committee of Ministers and in the session of the Human Rights (DH) meetings of the Ministers' Deputies responsible for the supervision of the execution of the Strasbourg Court's judgements, as well as the regular, weekly sessions of the meetings of the Ministers' Deputies (Committee of Ministers, the executive body of the Council of Europe). Besides, I regularly participated as an observer in the plenary sessions and the committee meetings of the Parliamentary Assembly. As to the activity of the Parliamentary Assembly, I also followed its work in recent years, between 2016 and 2020. In addition, in my capacity as chief of the ministerial commissioner's cabinet for developing the neighbourhood policy of Hungary in the Ministry of Foreign Affairs and Trade, I have recently been appointed as government expert to the Steering Committee on Anti-Discrimination, Diversity and Inclusion (CDADI). The CDADI advises the Committee of Ministers on questions such as preventing and combating hate speech, safeguarding the rights of persons belonging to national minorities and promoting intercultural integration. The CDADI is tasked specifically with developing a new and comprehensive legal instrument on combating hate speech, carrying out a study on the active political participation of national minority youth and developing a multi-level policy framework for intercultural integration.<sup>6</sup> Since 1 January 2022 I have been the observer delegated by Hungary to the Governing Board of the Observatory on History Teaching in Europe, the new partial agreement of the Council of Europe.<sup>7</sup> Thanks to these opportunities, I have gained a deeper and more direct insight to the work of the mechanisms and institutions of the Council of Europe; consequently, I have already formed some preliminary assessments. With the help of the thorough analysis of the case studies and the comprehensive scrutiny of the new complementary procedure, I intend to justify my hypotheses.

Although more and more papers, articles, and studies have dealt with the challenges of multilateralism in the recent years, the number of analyses dedicated specially to the political challenges of the Council of Europe have remained relatively low. Therefore, this research could on the one hand contribute to the general literature focusing on the future role of

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<sup>5</sup> Rapporteur group on human rights - GR-H, on legal co-operation – GR-J, on social and health questions – GR-SOC, on education, culture, sport, youth and environment – GR-C.

<sup>6</sup> Terms of reference of the CDADI as a part of the Programme and Budget 2020-2021, adopted by the Committee of Ministers at their 1361st meeting on 19-21 November 2019. CM(2019)131-addfinal.

<sup>7</sup> Enlarged Partial Agreement on the Observatory on History Teaching in Europe with the aim to promote practices encouraging history teaching and learning in order to strengthen and promote the values of the Council of Europe. Resolution CM/Res(2020)34 establishing the Enlarged Partial Agreement on the Observatory on History Teaching in Europe.

multilateral organisations, and on the other hand, the conclusions of the research intends to assist the actions of the diplomacy in multilateral frameworks; contribute to fine-tuning the general perception of manoeuvring room in multilateral diplomacy Based on the findings concerning the efficiency, capacity and real role of multilateral organisations, decision makers and government officials aim to redefine their approach towards the role and the opportunities of classical diplomatic activity.

In addition, the adoption of the complementary procedure<sup>8</sup> in the Council of Europe is a brand-new element, and I have the opportunity to be the first to analyse it in a wider context, and to deliver not only an account of what is happening inside the Council of Europe but also of the political background and its pitfalls. However, the case studies of the thesis show that member states in the Council of Europe are far from equal, and enforcement opportunities differ substantially in the case of Russia and Turkey<sup>9</sup> compared to the medium sized and politically less influential member states. The conclusions of the thesis highlight what kind of actions are forward looking, useful and appropriate as regards the enforcement of national interest in the international arena for those countries, whose futures depend on the interests of great powers.

## **1. 2. Structure of the analysis**

The main objective of the thesis is to assess the responses and mechanisms of the Council of Europe to the political and legal challenges effective multilateralism faces in our days.

Since the core mission of the organisation is the protection of human rights, democracy and rule of law, standard setting, monitoring and implementation in those fields, the general perception is that the Council of Europe is a human rights organisation<sup>10</sup>. My goal is to follow a different approach towards the Council of Europe with the aim of highlighting the political aspects of its activity and to summarize all possible consequences having an impact on the functioning of the organisation. Although I intend to present specific judgments of the European

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<sup>8</sup> The joint reaction procedure, as a new mechanism, complement the tools of the Statute of the Council of Europe when a state violates its obligations and does not respect fundamental principles and values (see in detail under the chapter Definitions of Key Concepts).

<sup>9</sup> Accusation of double standards by Turkey, whose representative made a statement attached to the minutes of the 1236th meeting, 22-24 September 2015 underlining that “Turning the DH meetings into a State bashing, shaming and blaming exercise creates the risk of alienating States and causing artificial blocks among States. This is not a battlefield between good and evil, but a platform to address best practices and practices with room to improve. Excluding States and pushing them out of the system would completely be against the main objectives of the Council... It is interesting that among 11 States with cases under enhanced supervision, we discuss cases in respect of only three States.” Records Addendum to CM/Del/Dec(2015)1236.

<sup>10</sup> <https://www.coe.int/en/web/about-us/values>

Court of Human Rights, I will strictly focus on the description of the political context and the political challenges of the supervision of judgments. My objective is to consistently avoid any kind of legal analysis or legal interpretation of the Court's case law.

In Chapter I the thesis will first introduce the wider multilateral framework. After describing the methodological and research design, presenting the theoretical framework and the definitions of the key concepts, the present chapter provides a brief foundation of the issue by giving a general overview of the multilateral framework and the place of the Council of Europe in the system. A short outlook for the cooperation with other international organisations is also relevant to understanding the importance of the Council of Europe in the multilateral space.

In Chapter II the Eastern enlargement is examined with both the pre-enlargement considerations and the dilemma of the continued enlargement as well as the consequences of the early invitation. This Chapter is highly relevant for the initial hypothesis, which is that the Eastern enlargement with the accession of the Russian Federation as a great power largely contributed to the political and legal challenges of the Council of Europe.

Chapter III is for the presentation of the political and legal context, where the problems related to the European Court of Human Rights are described with special attention to the interstate cases reflecting geopolitical conflicts, as well as the most significant structural problems of individual cases. Both the political and legal case studies selected are appropriate to test the relevance of the core theories in international relations, and are good examples to generalize the conclusions to other multilateral organisations. Besides, the legal case raises the issue of the enforcement capability of the Council of Europe. The fact that the only formal sanction, the so-called "infringement procedure", the referral of the question to the Court to make a decision on non-implementation,<sup>11</sup> has been launched only once against Azerbaijan in 2017 December for the first in the history of the Council of Europe (CMDH Interim Resolution CM/ResDH(2017)429, 2017)<sup>12</sup> also provides an excellent demonstration for the analysis of the driving forces in the organisation.

Chapter IV introduces the term of "Copenhagen dilemma" used in the context of the European Union, referring to the problem of when a member state seems not to comply with the mandatory conditions set before its accession. The notion became widespread in the political

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<sup>11</sup> Article 46, indent 4 of the ECHR stating that "If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may [...] refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1."

<sup>12</sup> CMDH Interim Resolution CM/ResDH(2017)429, Execution of the judgment of the European Court of Human Rights, Ilgar Mammadov against Azerbaijan, 5 December 2017.

discourse of the European Union and adequately describes the situation evolved by 2017 in the Council of Europe. As the latter one was an active part in the Euro-Atlantic integration process, considered as an ante-room of the European Union for many of its member states, it seems justified to borrow the expression describing so perfectly the syndrome which gradually appeared in the Council of Europe and nearly led indirectly to a large financial deficit, the planned reduction of CoE staff by ca. 10% and the to the inoperability of the organisation by 2019. This Chapter seeks to examine the different responses, the strengthening of the supervisory system, adoption of the joint reaction procedure, and the other possible tools for sanction, by which the Council of Europe intends to respond to the problem of non-implementation. This Chapter also aims to examine the exclusion of the Russian Federation and its consequences in the medium and long term.

Finally, Chapter V will assess the relationship between power realism and normative institutionalism, based on interviews prepared with high-ranking diplomats of the member states, officials of the Council of Europe, and with members of the Parliamentary Assembly of the Council of Europe. It shall also answer the first research question of the thesis: “Could the recent political and legal challenges to effective multilateralism endanger the functioning of the Council of Europe in the long run?” The analysis of the political and legal context with the opinion and experience of the politicians, diplomats and high-level officials will probably also provide an answer to the second research question: “Could normative institutionalism prevail over the great powers’ geopolitical interests, and if so, to what extent?” The personal semi-structured interviews prepared with the high-ranking officials serve as the focus of the research. I summarize and analyse their experiences and opinion to justify the hypothesis and to find a response to the research questions.

In Chapter VI the findings will be linked to the relevant international relations theories and general conclusions, including the interpretation of the wider context, the validity and reliability achieved, the evaluation of the contribution and implications of the research, as well as an evaluation of the limitations of the research. An outlook will be devoted to the future of the newly established complementary procedure. The concluding section will give an evaluation of the efficiency of the procedure, whether it can be effective to sanction a less influential geopolitical but non-compliant player (see the explanation of this term in the chapter Definitions of Key Concepts).

### **1. 3. Methodology and research design**

As the objective of the thesis is to analyse the Council of Europe through concrete examples and assess the extent to which assertive national politics could affect the functioning of the institutional framework at international level, combined research methods will be applied. I rely largely on participant observation gathered during my own field work, but the presentation of a political and a legal case study will also help the examination, as well as semi-structured personal interviews with high-ranking officials of the Council of Europe statutory bodies, the Committee of Ministers and the Parliamentary Assembly, staff members of the European Court of Human Rights, diplomats and politicians, and members of the Parliamentary Assembly.

The semi-structured interviews included predefined questions chiefly concerned with the following: the preliminaries to the 2019 financial crisis; the impact and future treatment of global political and legal challenges; tools and means available to tackle the Copenhagen dilemma, and the role of the current monitoring mechanism as a form of screening; the possibilities and real opportunity to further strengthen the supervisory scheme; the role of the Parliamentary Assembly in detecting the dominance of political interests in the functioning of the organisation; and the future relationship between bilateralism and multilateralism. The specific interview questions are presented in Chapter V of the thesis, along with the answers given by interviewees (some of whom wish to remain anonymous), and the analysis of the issues that were raised.

The aim of the thesis is also to gain some insight into the possible reasons for the increasing influence of national government policy and to examine how the arguments of the classical theories function. The thesis will also focus on the question of whether the institutional crisis in the Council of Europe can be considered as its own Copenhagen dilemma. Both the European Union and the Council of Europe face the same problem of not having any instrument that could efficiently deal with violations of non-compliant member states, but to what extent is the "complementary procedure" an instrument to deal with the kind of continuous infractions seen in a number of Eastern and Southern countries? Is it a mechanism that can force member states to fully respect all norms and standards by enabling their possible exclusion or it is created for the sanctioning of unusual and large-scale violations such as the annexation of the territory of one member state by another of its members?

As to the complementary procedure, the objective of the research will be to analyse the political context. What happened and why? Which countries were instrumental in breaking the deadlock and made serious efforts to invite the Russian Federation back to the Parliamentary Assembly?



Why did this happen after five years? Why did the Council of Europe give in while the EU extended its sanctions against Russia at the same time? What role did money play? Did the Council of Europe simply give in to blackmail? Why did the Russians accept the deal to come back?

The questions formulated above will help to analyse the political-geopolitical context of the institutional crisis of the Council of Europe, and I hope that they will lead to answers of two main research questions highlighted in the previous point (1. 2) above.

It should also be noted that the selection of the research topic – the analysis of the impact of political developments in the Council of Europe – was made because the issue is only slightly and superficially examined in the scientific literature, and its comprehensive analysis is completely lacking. Research has focused instead on the standard-setting activity of the Council of Europe, and has examined the rich case law of the European Court of Human Rights; however, a broad overview of the effect of geopolitical conflicts on the normative activity and enforcement capability of the Organisation has not yet been written. This is also the reason why the focus of the research is limited to an examination of the Council of Europe in the context of the future of effective multilateralism.

From a methodological point of view, the main subjects of the thesis are the rapid eastern enlargement, the emergence of political and legal challenges as a consequence of the increasing role of national policy and the appearance of a similar phenomenon as the Copenhagen dilemma in the European Union. As to conceptualisation, Kaplan's three classes<sup>13</sup> will be applied to identify and make observable the main proposition. One direct observable to measure the rapid eastern enlargement is the chronological table with clear date of accession. The open-door policy dilemma can be observed through indirect signs, and by the declassified documents of the Council of Europe from 1994. The increasing impact of national politics is more difficult to measure, and is rather a construct observed on the ground during meetings. However, the adopted documents could help to transform them to indirect observables. Political challenges can be identified in the relevant documents, while legal challenges are measurable in the statistics of the European Court of Human Rights. The Copenhagen dilemma is an absolute construct, and the goal of this thesis is to prove its existence through direct and indirect observables.

During the process of operationalisation, the indicators to measure the main propositions and its identified parts or elements are independent, dependent variables and extraneous (statistical

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<sup>13</sup> Kaplan, A. (1964). *The Conduct of Inquiry*. San Francisco, CA: Chandler.

data of the European Court of Human Rights, official-primary documents adopted by the different institutions of the Council of Europe, personal experience and assessment of the developments in the Organisation based on more than five year of field work).

As the research field belongs to social science, the research philosophy<sup>14</sup> which best reflects the objectives of the thesis is interpretivism. The goal is to focus on humans (at least human controlled political developments), to study and interpret meanings with the aim of creating new, richer understandings and interpretations of a particular political context. Taking into account the fieldwork already conducted and the preliminary assessments, which are followed by literature review, the method is inductive. Small, in-depths investigations will be used with the aim of finally conducting a qualitative analysis of the results. From the assumptions underlying the philosophies, epistemology and axiology are the best suited to meet the objectives of the research. Epistemology is about the communication of acceptable, valid legitimate knowledge, while axiology refers to the values and ethics within the research process, so both assumptions can be applied.

The research context is also double. On the one hand, the thesis could be useful in the context of the Council of Europe, by providing a careful screening of the new mechanism, the success of which in achieving the enforcement of norms and standards cannot be predicted now. On the other hand, the context is my home country, Hungary, where decision makers and government officials might consider their approach towards the role and opportunities of diplomatic activity in multilateral organisations based on the conclusions and findings of the thesis.

### *1.3.1. Selection of cases studies, data collection and analysis method*

The reason behind the selection of the case studies was to present those events which have raised serious identification question in recent years as regards the credibility, operation and functionality of the Council of Europe. Presentation of the specific legal case study will be preceded by a general description of the supervision system highlighting those core elements that one way or another have an impact on the efficient implementation of the judgments. Special attention will be dedicated to the inter-state cases and the questions they have raised relating to the successful execution of judgements.

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<sup>14</sup> Sutton, A. 2016. *Systematic approaches to a successful literature review*. Los Angeles, CA: Sage Publications.

The timeframe of the research is the period between 1990 and 2020, but new developments that decisively influence the possible outcome of the research will be incorporated to the thesis. Both primary and secondary sources are examined by using Council of Europe conventions, resolutions, recommendations, decisions, reports, and press releases adopted and published by the bodies and institutions of the Organisation. Besides, the database to the case law of the European Court of Human Rights (HUDOC) Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note, the European Commission of Human Rights (decisions and reports) and the Committee of Ministers (resolutions) will be applied. As secondary sources, the relevant Council of Europe publications, handbooks, annual reports on the execution of the judgments of the European Court of Human Rights, general statistics and the analysis of statistics, and facts and figures published by states will be examined. Beyond the database of the Council of Europe, my own experiments and observations will be applied in the thesis after justifying and eliminating the possible biases and errors.

To realize the above aims, content analysis of the documents, and revoking a part of international and Hungarian scientific literature on the Council of Europe (Berger 1999; Schmahl and Breuer 2017; Vayssière 2022, Benoît-Rohmer and Klebes 2005; Busygina and Kahn 2020; Entin and Entina 2019; Greer et al 2018) on the raised issues will be an effective tool.

### *1.3.2. Feasibility, Limitations and Research Ethics*

Thanks to the direct access to all databases and adopted documents of the Council of Europe, the research plan is feasible. The timeframe of the research is relatively long, but will focus on strategical questions, which are indispensable for drawing valid conclusions, to find the most appropriate answers possible to the research questions and to allow me to conduct deeper analysis of the available data. The fieldwork allowed me to gain direct insight into the work of special committees and bodies of the Council of Europe. This precious field experience and the former informal consultations with officials of the Council of Europe and members of the diplomatic corps contribute to elaborating well-founded, though still personal opinions about the impact of new challenges on the operation of the organisation.

As regards the possible limitations of the research, the participants' observation and engagement, as well as ethical issues explained below, could have an impact on the results.

With regard to my own assessments, subjectivity cannot be absolutely excluded. The officials of the Council of Europe, as paid employees of the organisation, will obviously have rather positive assessments of the future role of the Council of Europe's institutions, and will relativize the risks of the events and activities examined in the case studies. Having the vital interest to keep the visibility and functionality of the Council of Europe as long as possible, their opinion could be partly biased. However, more objective views from former Hungarian ambassadors can be expected in this respect. However, as one of them still works as a government official in the Ministry of Foreign Affairs and Trade, opinions about Russian behaviour will obviously be cautious.

The third element to consider as an ethical question is that the author currently also works in the Ministry of Foreign Affairs and Trade, and has aspirations of continued diplomatic service either to the Council of Europe or to other foreign missions of Hungary. This is the reason why any possible assessment on the current diplomatic activity of Hungary will be avoided, and the thesis focuses on non-European Union member states of the Council of Europe.

#### **1. 4. Definition of key concepts**

This section provides guidance for the most relevant concepts used in the thesis and the research to help advance the understanding of the issues, as well as to explain in what sense these concepts are presented in the dissertation.

**Central Eastern Europe:** Following Géza Herczeg's definition of this historical region, this dissertation groups Poland, Hungary, the Czech Republic, and Slovakia – namely the Visegrad Four – under the heading of Central Eastern Europe, but Slovenia, Croatia and Romania could also be considered part of the region (Herczeg 1998 n. p).

**Complementary procedure:** A new mechanism initiated by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe to complement the organisation's Statute. The new procedure aimed to have the possibility to sanction the serious violation of the Statute and the fundamental norms and standards of the organisation. It was adopted by the Committee of Ministers on 5 February 2020. The decision states that “the Deputies, recalling the decisions on ‘Ensuring respect for rights and obligations, principles, standards and values’ adopted at the 129<sup>th</sup> Session of the Committee of Ministers (Helsinki, 17 May 2019), agreed on a

complementary procedure for the application of Article 8 of the Statute of the Council of Europe, as a consequence of a serious violation by a member State of fundamental principles and values of the Organisation under Article 3 of the Statute, as it appears in document CM/Del/Dec(2020)1366/1.7-app.” (CM decision on complementary procedure 2020)

**Copenhagen dilemma:** This term appeared in the context of the European Union to describe the phenomenon of non-compliance with the so-called Copenhagen criteria, the fundamental conditions for accession developed and adopted by the EU member states for the EU candidate countries. As the Glossary of the Statistical Terms of the European Central Bank Annual Report states, the “Copenhagen criteria refers to the overall criteria which applicant countries (to the European Union) have to meet as a prerequisite for becoming members of the European Union were defined in general terms by the Copenhagen European Council in June 1993,” The Copenhagen criteria include the stability of institutions guaranteeing democracy, the rule of law, human rights, and the respect for and protection of minorities; the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces with the EU; the ability to take on the obligations of membership, including adherence to the aims of political unification as well as Economic and Monetary Union (EMU).” (Glossary 2013)

**Effective multilateralism:** Today, the terms efficiency and multilateralism are often used together; scholars aim to assess how multilateral frameworks are capable of implementing their objectives. As to the notion of multilateralism, scholars argue that it “is an institutional form which coordinates relations among three or more states based on ‘generalized’ principles of conduct – that is, principles which specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence.” (Ruggie 1992 cited in Alexandroff 2020, p. 3). Some others add “that multilateralism is a process that is more inclusive than unilateralism or bilateralism” (Cohen 2018, cited in Kwakwa 2019 p. 339). The term is used in the sense of the capability of multilateral organisations to stick to their norms and rules and their ability to enforce the compliance with the legal framework set out in international legal instruments such as conventions and protocols. As Kwakwa also highlights, the “efforts at multilateralism could be harder to achieve results, given that achieving consensus among 193 countries would be more challenging than doing so among a smaller number of countries. It would also stand to reason

that regional or plurilateral arrangements are less reflective of multilateralism than are multilateral arrangements. But of course, multilateralism should not only be viewed against a yardstick of numbers, but also in terms of legitimacy, effectiveness and impact of activities and outputs.” (Kwakwa 2019 p. 339).

**Enhanced or standard supervision:** Following the provisions of the European Convention of Human Rights, the Committee of Ministers has the power and competence to supervise the execution of the judgements of the Court. According to the procedure and working method of the Committee of Ministers, a twin-track supervision system has been applied since 2010. “(a) enhanced procedure for judgments requiring urgent individual measures; pilot judgments; judgments disclosing major structural and/or complex problems as identified by the Court and/or the CM; and inter-State cases; and (b) standard procedure for all other cases.” (CM GR-H, 2016 p. 2). The Annual report of the Committee of Ministers also highlights that “The standard procedure relies on the fundamental principle that it is for respondent States to ensure the effective execution of the Court’s judgments and decisions. Thus, in the context of this procedure, the Committee of Ministers limits its intervention to ensuring that adequate action plans/reports have been presented and verifies the adequacy of the measures announced and/or taken at the appropriate time.” (CM Annual report, 2021, p. 90).

**Exclusion option:** this is the possibility enshrined in the Statute of the Council of Europe to expel the member state who seriously violate the fundamental principles, rights, and values of the Organisation. “Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.” (Statute of the Council of Europe, 1949, Article 8).

**Great powers:** John Mearsheimer defines great powers as those that “have sufficient military assets to put up a serious fight in an all-out conventional war against the most powerful state in the world.” (Mearsheimer, 2001 p. 5). According to Böhler “A great power is a sovereign state that is recognized as having the ability and expertise to exert its influence on a global scale” (Böhler 2017 n.p.) Neumann argues that “Great powers characteristically possess military and economic strength, as well as diplomatic and soft power influence, which may cause middle or small powers to consider the great powers' opinions before taking actions of

their own. International relations theorists have posited that great power status can be characterized into power capabilities, spatial aspects, and status dimensions” Neumann 2018 pp. 128-151).

**Infringement proceeding:** the term is commonly used by the non-governmental organisations in the context of the implementation of the judgements of the European Court of Human Rights. In case a member state does not respect Article 4, paragraph 1 of the ECHR, the Committee of Ministers, which is responsible for the supervision of the execution of the judgements has the right to decide that the case be referred to the Court to decide whether the state has implemented the Court’s ruling or not. This is Article 46, p. 4 of the European Convention of Human Rights (ECHR), which reads as follows: “If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.” (ECHR 1950, Article 46. p. 4).

**Leading case:** this term used in the case law of the European Court of Human Rights and means a “case which has been identified as revealing new structural and/or systemic problems, either by the Court directly in its judgment, or by the Committee of Ministers during its supervision of execution. Such a case requires the adoption of new general measures to prevent similar violations in the future.” (CM Annual report, 2021, p. 89)

**Legal challenge:** this notion describes the phenomenon whereby a member states has failed to implement their legal obligations deriving from legally binding international conventions or treaties. The main legal challenge which the present thesis focuses on is the non-implementation of the judgements of the European Court of Human Rights. However, article 46, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005) clearly states that “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.” (ECHR 1950)

**Multilateral organisation:** as one of the multilateral organisations, the Council of Europe is the focus of the present thesis, and the general overview of the multilateral framework forms an explanatory part of the dissertation, it is important to clarify the notion. As Harrygan states,

“multilateral organizations are formed by three or more nations to work on issues that are relevant to each of them. They ensure participation by all in the management of world affairs while ensuring the legitimacy of any relief efforts being implemented [...] Multilateral organizations can fund their projects by receiving funding from multiple governments.” (Harrygan 2017 n.p.) The Council of Europe was founded on 5 May 1949 in London to uphold the principle of political liberty and the rule of law, as the basis of all genuine democracy as well as the human rights and fundamental freedoms (Statute of the Council of Europe 1949, Preamble and Article 1.b).

**Non-compliant member state/player:** this term is connected to the disregard of the obligations undertaken by accession, and the ignorance or at least the non-implementation of the contractual liability of the state party to the conventions, protocols, charters it subsequently joined. Non-compliance not only refers to the infringement proceeding and Article 46, paragraph 4 of the ECHR, but also implies a larger-scale negligent attitude towards the implementation of soft law instruments and political obligations. The thesis uses non-compliant member state in the sense of disregarding political and legal obligations.

**Normative institutionalism:** the term used in this thesis is only partly linked to the theory of new institutionalism to describe the behaviour of individuals as one strongly shaped by the norms of institutions (March-Olsen 1984). Although some scholars “have categorized this approach as ‘normative’ institutionalism (Lowndes 1996, 2002; Peters 1999; Thoenig 2003), the term is used in the thesis as a process, or rather aspiration of the intergovernmental institutions to play a standard-setting function for their member states. In this sense these organisations aim to develop supervisory mechanisms to monitor the compliance of the members with the normative system, the norms, and standards of the organisation.

**Pilot judgement:** this is a procedure elaborated by the European Court of Human Rights. It was “developed as a technique of identifying the structural problems underlying repetitive cases against many countries and imposing an obligation on States to address those problems” (ECtHR Factsheet, 2021). As the annual report of the Committee of Ministers highlights, “[i]n a pilot judgment, the Court [...] provide guidance as to the remedial measures which the respondent State should take. In contrast to a judgment with mere indications of relevance for the execution under Article 46, the operative provisions of a pilot judgment can fix a deadline



for the adoption of the remedial measures needed and indicate specific measures to be taken (frequently the setting up of effective domestic remedies). Under the principle of subsidiarity, the respondent State remains free to determine the appropriate means and measures to put an end to the violation found and prevent similar violations.” (CM Annual report, 2021, p. 89)

The ECtHR Factsheet also adds that the main innovative element of the pilot procedure is “the possibility of adjourning, or ‘freezing’ related cases for a period on the condition that the Government act promptly to adopt the national measures required to satisfy the judgment. The Court can, however, resume examining adjourned cases whenever the interests of justice so require” (ECtHR Factsheet, 2021).

**Political challenge:** this term is used in the thesis as a symptom resulting from the impact, the reappearance of geopolitics provoked when great powers follow their own interest instead of respecting the international obligations undertaken upon accession to the Council of Europe.

**Power realism:** this term is linked to the classical theory of realism in international relations, which sees power and security as a primary concern for states (Donnelly 2008 p. 1). It is used in the sense of power politics, which is central to realist thinking. Realists remind us that “the national interest [is] defined in terms of power” (Morgenthau 1954, 5, 10) or “no ethical standards are applicable to relations between states” (Carr 1946, 153) and that “universal moral principles cannot be applied to the actions of states” (Morgenthau 1954, 9). Current developments in the international scene, and specifically the Russian aggression against Ukraine, cannot but convince us that power realism or power politics is still a determining factor of international relations. The notion combines power and realism, the latter defined in Encyclopaedia Britannica as a set of related theories of international relations that emphasizes the role of the state, national interest, and power in world politics. The term is used in the sense that great powers pursue their own geopolitical and national interests, are ready to use military force to achieve their goals, and their international obligations do not hinder them in doing so.

**Repetitive case:** As the Glossary of the Annual report of the Committee of Ministers defines it, this term refers to a “case relating to a structural and/or general problem already raised before the Committee in the context of one or several leading cases; repetitive cases are usually grouped together with the leading case” (CM Annual report, 2021, p. 89).

## 1. 5. Theoretical framework

Literature shows that scholars of the Cold War period searched for answers to the dynamism of international relations. New theories were elaborated from political realism through neorealism, from institutionalism to intergovernmentalism<sup>15</sup>. For the scope of the present thesis, in order to give an adequate answer to the research questions, neorealism and normative institutionalism serve as the most suitable theoretical frameworks for the research. Extensive studies are available on the standard-setting activity and on policy issues of the Council of Europe (e.g. Świerczyński 2022; Erdos 2022; Soyaltin-Colella 2021), which focus on the legal framework, inter alia, of digitalisation, data protection or social rights, or analyse the case-law of the European Court of Human Rights in different aspects. Therefore, the approach of the present thesis could be unique in the sense that the goal is to focus on political aspects in the activity of this human rights organisation. The theories below provide a feasible interpretative framework for understanding great power behaviour, and for assessing the possible consequences which impact on the functioning of the Organisation. Given that the examination of a political case study is also in the focus of the thesis, this research seeks to analyse possible links with the international relations theories below.

### *1.5. 1. Neorealism (structural realism) in international political theory*

The main feature of the international order after the World War II was the appearance of international organisations that introduced new questions into the field of international relations, namely the issue of integration, multilateralism, national competence or supranationalism. New theories have been developed to describe the new phenomenon of European integration, to understand and possibly to tackle the challenges of formal international cooperation.

However, all theories of international relations have their own roots, which diversify the theoretical background and traditions. “Michael Doyle, in his attempt to synthesize the intellectual history of international relations, finds four distinct traditions within realism: Thucydides’ complex realism, Machiavelli’s fundamentalist realism, Hobbes’ structural realism and Rousseau’s constitutional realism. Doyle further argues that later development of

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<sup>15</sup>See the wide range of literature indicated in the Bibliography attached to the present thesis

realism was divided into these four different traditions of political thought” (Doyle is cited by Feng and Ruizhuang, 2006).

When Hans Morgenthau published *Politics Among Nations: The Struggle for Power and Peace* in 1948, and introduced the concept of political realism, presenting a realist view of power politics (Morgenthau 1978), the world has just entered into the period of the Cold War. The strengthening of the communist parties and their transfer of power demonstrated the lasting Soviet influence over the eastern part of Europe. Apparently the concept of political realism was the guiding principle of the foreign policy of the United States in the Cold War period. The concept of classical realism was born as a response to the idealist approach in international relations which predominated after the First World War, adherents of which believed that an international law system supported by international organisations could solve inter-state problems. The fact that international cooperation was not able to prevent World War Two provoked a strong realist reaction (Korab-Karpowicz 2018. p. 15). Classical realism originally explained the machinations of international politics based on human nature, among the famous six principles of political realism (Cristol 2009, p. 238-244).

Just as realism was an answer to the idealist approach of the interwar period, so neorealism developed as a reaction to the new ideas which challenged classical realism.

As Korab-Karpowicz underlined, in the first two decades of the Cold War a large number of scientists from different fields attempted to replace classical realism with scientific concepts and reasoning, which provoked a counterattack by Morgenthau and scholars associated with him. Therefore, two main trends appeared in the discipline of international relations, “[...] traditional or non-positivist and scientific or positivist (neo-positivist) ... The traditionalists raise normative questions and engage with history, philosophy and law. The scientists or positivists stress a descriptive and explanatory form of inquiry, rather than a normative one [...] The realist assumption was that the state is the key actor in international politics, and that relations among states are the core of actual international relations.” (Korab-Karpowicz 2018. p. 24-25).

To respond to these new approaches, Kenneth N. Waltz reformulated the realism of international relations and outlined first *neorealism or structural realism* in his book *Theory of International Politics*. (Waltz 1979). He argues in his theory that states in the international system are like firms in a domestic economy, and share the same fundamental interest: to survive.

As Korab-Karpowicz summarises, according to Waltz, “the uniform behavior of states over centuries can be explained by the constraints on their behavior that are imposed by the structure of the international system. A system’s structure is defined first by the principle by which it is organized, then by the differentiation of its units, and finally by the distribution of capabilities (power) across units. Anarchy, or the absence of central authority, is for Waltz the ordering principle of the international system. The units of the international system are states. Since all states want to survive, and anarchy presupposes a self-help system in which each state has to take care of itself, there is no division of labor or functional differentiation among them.” (Korab-Karpowicz, 2018. p. 26)

Jepson summarizes in her article the strengths of the structural approach by pointing out that “the lack of ‘world government’ means that states continue to act in ways which preserve their own interests as this is the only way to ensure their preservation.” (Jepson 2012. p. 2.) She refers to Alex Bellamy, who summed up the “overwhelming features” of current affairs, highlighting that “the display of the overwhelming might by the world’s most powerful state, the persistence of the use of violence for political ends... and the seeming inability of internationally agreed norms and rules to constrain the world’s most powerful actors” (Bellamy, 2005, p. 1). According to Jepson, “although limitations exist, the structural approach still has much explanatory power concerning the prominence of the state within interactions at the global level and also regarding the continued abuse and manipulation of international institutions, including international law. The fact that these institutions play such a large role in the conduct of international relations means that structural realism is a useful tool in analysing at least one important aspect of current affairs and thus must not be disregarded completely. Although some would argue that the institutionalisation of international law nullifies Waltz’s claim to anarchy, this is not the case. The most powerful nations continue to ‘bend’ and ‘break’ the rules of international law in order to secure their own national interests” (Jepson refers to Waltz, 2000, p. 23).

The actions and behaviour of the Russian Federation perfectly demonstrate the relevance of the structural realist approach. The Russian Federation occupied and annexed the Crimea in 2014, the Parliamentary Assembly of the Council of Europe reacted to this violation of the territorial integrity of Ukraine by suspending some rights of the Russian parliamentary delegation in the Parliamentary Assembly. The situation escalated and lead to the suspension of the financial contribution of the Russian Federation to the annual budget of the Council of Europe. As a solution to the institutional and financial crisis of the Council of Europe, the rules of the

Parliamentary Assembly were finally modified in order to let the Russians return despite the fact that the Russian Federation had not implemented any of the requirements set out in the resolutions of the Parliamentary Assembly adopted earlier as a condition of the restoration of relations, e.g. a reversal of the illegal annexation of Crimea (PACE Resolution 2034 (2015)). As a further consequence of the crisis, the intergovernmental decision-making body of the Council of Europe, the Committee of Ministers, initiated a reform of the Statute with a view to ensuring the possible final exclusion of a member state not in compliance with the basic principles of the Council of Europe. The ultimate aim of this reform was to send a clear message that violation of norms and standards, and continuous, serious disrespect for the principles of the organisation, would no longer be tolerated. In my view, this case study absolutely underpins Waltz's opinion that the most powerful nations keep changing the rules of international institutions in line with their own interest, and therefore structural realism is one of the theories that clarifies the relationship between great powers and international intergovernmental organisations, and provides explanations for the dynamism of multilateral cooperation.

#### *1.5.2. Offensive and Defensive Realism*

Since the major split of neorealism from traditional realism in the seventies, further variants have proliferated. "The field of international relations now has at least two variants of structural realism, probably three kinds of offensive realism, and several types of defensive realism, in addition to neoclassical, contingent, specific and general realism (Snyder, 2002. p. 149-150). One of the most prominent variants of structural or neorealism has been developed by John Mearsheimer, who explains and argues for his theory of offensive realism in his book *The Tragedy of Great Power Politics*, published in 2001. His theory is grounded in five assumptions: the great powers are the main actors in world politics and the international system is anarchical, all states possess some offensive military capability, states can never be certain of the intentions of other states, states have survival as their primary goal, and states are rational actors, capable of coming up with sound strategies that maximize their prospects for survival (Mearsheimer, 2001. pp. 30-31). Although initially developed from similar propositions to those of defensive neorealism, Mearsheimer's offensive neorealism advances profoundly different predictions regarding great power behaviour in international politics (Taliaferro, 2001. p. 134).

He summed up this view as follows: "great powers recognize that the best way to ensure their security is to achieve hegemony now, thus eliminating any possibility of a challenge by another great power. Only a misguided state would pass up an opportunity to be the hegemon in the system because it thought it already had sufficient power to survive" (Mearsheimer, 2001. p 35).

He explains and argues for his theory of "offensive realism" in numerous articles, and readily acknowledges the inherent pessimism of offensive realism and its predictions. This pessimistic view of how the world works can be derived from the five assumptions of realism, which he outlined in his article *The False Promise of International Institutions*, published in 1994 (Mearsheimer, p. 10). At the same time, he admits that "none of these assumptions alone mandates that states will behave competitively. In fact, the fundamental assumption dealing with motives says that states merely aim to survive, which is a defensive goal. When taken together, however, these five assumptions can create incentives to think and sometimes to behave aggressively." (Mearsheimer, 1994-1995, p. 10-11).

His statements about the role of international organisations were widely criticised, so he defended his views in *A Realist Reply* in 1995. He repeated that the main question raised in *False Promise* was highly relevant in international relations literature: "can international institutions prevent war by changing state behavior? Specifically, can institutions push states away from war by getting them to eschew balance-of-power logic, and to refrain from calculating each important move according to how it affects their relative power position? Realists answer no. They believe that institutions cannot get states to stop behaving as short-term power maximizers. For realists, institutions reflect state calculations of self-interest based primarily on concerns about relative power; as a result, institutional outcomes invariably reflect the balance of power." (Mearsheimer 1995, p. 82).

It is interesting to note that some scholars are sceptical about whether the offensive branch of realism can be linked to the realist traditions in some respect. Liu Feng and Zhang Ruizhuang in their article on the Typologies of Realism argue that "prudent power and enlightened interest are the basic values of political realists." They remind readers that "Morgenthau saw prudence as the supreme virtue of politics and thought that if states want to advance and protect their own interests, they must respect the interests of other states." (Morgenthau Cited in Feng and Ruizhuang. 2006). Feng and Ruizhuang also draw attention to Waltz's remark that power is merely a means that can be employed, and that sensible politicians pursue a moderate amount of power. (Waltz cited in Feng and Ruizhuang 2006). Feng and Ruizhuang state that "The

history of international relations offers many examples of states that pursued the expansion of power to the extremes, and in doing so, sowed the seeds for their own destruction. If it is conceded that the international structure is a restriction on the behaviour of states, then states cannot seek to expand power without limit. At a minimum, their motivations and behaviour, intentions and outcomes cannot be divorced from one another. Offensive realists such as Mearsheimer who see states as seeking absolute power to great extremes, although they show the pessimism and drama of power politics, do not fall within realism's fundamental tradition of prudence and enlightenment." (Feng and Ruizhuang, 2006. p. 129.)

As presented above in detail, defensive realism derives from the main tenets of neorealism, developed by Kenneth N. Waltz, who represents at the same time defensive neorealism inside structural realism. He argues that states are not in reality aggressive, and that "the first concern of states is not to maximize power but to maintain their position in the system" (Waltz 1979, p. 126). This is the main point of difference with regard to offensive realism, which argues that anarchy encourages states to increase state power vigorously, as described thoroughly in the previous chapter.

As Jeffrey Taliaferro summarizes, defensive realists think that the "international system provides incentives for expansion only under certain conditions. Under anarchy, many of the means a state uses to increase its security decrease the security of other states. This security dilemma causes states to worry about one another's future intentions and relative power. Pairs of states may pursue purely security-seeking strategies, but inadvertently generate spirals of mutual hostility or conflict. States often, although not always, pursue expansionist policies because their leaders mistakenly believe that aggression is the only way to make their states secure. Defensive realism predicts greater variation in internationally driven expansion, and suggests that states ought to generally pursue moderate strategies as the best route to security. Under most circumstances, the stronger states in the international system should pursue military, diplomatic, and foreign economic policies that communicate restraint." (Taliaferro, 2001, p. 129).

Waltz's theory is built on the principle of balance of power, defensive neorealists declare that "In international politics, overwhelming power repels and leads other states to balance against it" (Waltz, 1991. p. 669.) Jack Snyder directly asserts that international anarchy does not tolerate aggression, and "it does not reward it". (Snyder, 1991. p. 11).

[https://en.wikipedia.org/wiki/Defensive\\_realism](https://en.wikipedia.org/wiki/Defensive_realism) - cite note-10 Christopher Layne also uses this theory to illustrate the implications of unipolarity in his article, *The Unipolar Illusion: Why New Great Powers Will Rise*. He reminds readers that states balance against hegemons, even those such as the United States which seek to maintain their pre-eminence by employing strategies based more on benevolence than coercion. This also explains the fragility of the unipolar system, as unbalanced power creates an environment conducive to the emergence of new great powers (Layne, 1993. p. 7).

In the meantime, Taliaferro brings an additional perspective to explain the behaviour of states. He argues that “defensive realism proceeds from four auxiliary assumptions that specify how structural variables translate into international outcomes and states' foreign policies. First, the security dilemma is an intractable feature of anarchy. Second, structural modifiers-such as the offense-defense balance, geographic proximity, and access to raw materials-influence the severity of the security dilemma between particular states. Third, material power drives states' foreign policies through the medium of leaders' calculations and perceptions. Finally, domestic politics can limit the efficiency of a state's response to the external environment” (Taliaferro 2001. p. 131).

When seeking the answers to the research questions through the assumptions of defensive realism, I shall attempt to focus on the interpretation of defensive realism towards the role of international organisations. However, no differences seem to exist between the offensive and defensive branches of realism in this respect. Therefore, the answer will be then even more simple to the research questions in light of the security related power maximising behaviour of states: to what extent could recent political and legal challenges endanger the functioning of the Council of Europe in the long run, or could the new complementary joint procedure remedy the situation and ensure the functioning of the Council of Europe according to its Statute?

### *1. 5. 3. Institutionalism in international political theory*

Internationalism and institutionalism developed in the liberal school of international relations theory and became “the dominant challenge to realist analysis of world affairs by the second half of the of the 20th century”. (Dunne, 2005. p. 185). Institutionalism emerged in the 1970s and provoked deep debates about the “validity of liberal institutionalism as a real alternative to realism. Liberal institutionalism explains international relations through global governance and international organisations”. (Devitt, 2011, p. 1) This theory emphasizes the role that common goals play in the international system and the ability of international organisations to get states



to cooperate. “Institutionalists share many of Realism’s assumptions about the international system— that it is anarchic, that States are self-interested, rational actors seeking to survive while increasing their material conditions, and that uncertainty pervades relations between countries. However, institutionalism relies on microeconomic theory and game theory to reach a radically different conclusion—that co-operation between nations is possible.” (Slaughter, 2011. p. 2).

Robert O. Keohane was a leading scholar who underlined the use of international institutions by states to further their interests through cooperation.<sup>16</sup> He admits in his work that stability and world political economy depend on the presence of a hegemonic state, such role Britain played in the second half of the nineteenth century or the United States after World War II (Keohane, 1984. p. 31). These dominant states, Keohane argues, were able to promote international relations by developing effective international arrangements in several areas, but this hegemony is not necessary to maintain a cooperative relationship after the decline of the dominant state. According to Keohane, cooperation does not imply harmony but calls for mutual policy adjustment by states involved in the interactions (Finlayson 1987, pp. 408-409). Keohane claims that governments will often favour the creation of regimes because they judge that such arrangements will promote the long-term interests of their states. Regimes are valued because they “facilitate negotiations leading to mutually beneficial agreements among governments”. International regimes, by specifying international standards of conduct, reduce “transaction costs” and provide useful rules that help guide state behaviour. Therefore, the decline of a hegemon need not precipitate the dissolution of international regimes whose establishment was heavily influenced by such a dominant state. Precisely because regimes are valuable and governments are reluctant to abandon existing international arrangements, post-hegemonic co-operation is possible (Finlayson 1987 p. 409 refers to Keohane 1984 p. 107).

By creating rules and providing benefits of cooperation, institutions collect information about state behaviour and often make judgments about compliance or non-compliance with particular rules. Institutions can thus strengthen the utility of a good reputation to countries, while reciprocity also play an important role in bolstering international legal obligations (Slaughter, 2011. p. 3.).

An important thesis of institutionalism comes from Hedley Bull, who elaborated the concept of “international society”. He argued that international society is formed when “a group of states,

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<sup>16</sup> After Encyclopaedia Britannica, <https://www.britannica.com/biography/Robert-O-Keohane>

conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.” (Bull 1977. p. 13). Bull also argues in his work above that “by focusing on International organisations such as the United Nations, the European Union and the World Bank, for greater emphasis on soft power and cooperation through” (Dewitt 2011 p. 2.) “the forms and procedures of international law, the machinery of diplomacy and general international organization.” As Rebecca Devitt summarizes, “within a liberal institutionalist model states seek to maximize absolute gains through cooperation, states are therefore less concerned about the advantages achieved by other states in cooperative arrangements. The greatest obstacle to cooperation in world affairs is non-compliance or cheating by states.” (Devitt 2011, p. 2)

The complex interdependence is also appeared as one of the most important pillars of institutionalism. The notion was firstly argued by Robert Keohane and Joseph Nye in the 1970’s when they introduced the four main characteristics of institutionalism as differentiated from realism: multiple channels which allow for interaction among actors from different countries; multiple channels which increase the cooperation between actors and non-state actors; attention shared equally between high and low politics; reduction of military force as a means to create peace. (Keohane and Nye, cited by Dewitt, 2011, p. 1.)

Another significant part of institutionalism is the concept of multilateralism and global governance. According to Graham Allison, the challenges of the current world such as terrorism, drug trafficking and pandemics are evidence that states can no longer react unilaterally to these threats, and global collaboration is needed. (Allison, G, ‘The Impact of Globalization on National and International Security’2000, p. 84). “The development of the European Union is another example of how states have formed a successful regional community” (Dewitt 2011) with the aim of dealing with policy issues together. Structuring incentives, redistributing power and influencing the cultural context reduce the transaction costs of coordination. (Caporaso and Jupille, 1999, p. 430).

As Devitt points out, institutionalism also focuses on non-governmental ties, and institutionalist scholars “have acknowledged the influence non-state actors in world affairs such as transnational organizations and non-governmental organizations play, but they have failed to recognize the role that global political advocacy networks have had in international relations.” (Devitt 2011, p. 3).

Last but not least, it is worth briefly defining the main actors of the institutionalism. It was William Richard Scott, an American sociologist and representative of the institutionalist theory and organisation science, who formulated a definition of institutions: “institutions comprise regulative, normative, and cultural-cognitive elements, that together with associated activities and resources provide stability and meaning to social life.” (Scott 2013, p. 56.) The regulative pillar, meaning the rule-setting, monitoring and sanctioning activities “involve the capacity to establish rules, inspect others’ conformity to them, and, as necessary, manipulate sanctions – rewards or punishments – in an attempt to influence future behaviour”. (Scott 2013, p. 59). As to the normative pillar, “Emphasis is placed here on normative rules that introduce a prescriptive, evaluative, and obligatory dimension into social life. Normative systems include both norms and values. Values are conceptions of the preferred or the desirable together with the construction of standards, to which existing structures or behaviours can be compared and assessed. Norms specify how things should be done; they define legitimate means to pursue valued ends. Normative systems define goals and objectives...but also designate appropriate ways to pursue them.” (Scott 2013, p. 64). The third pillar of the institutions is the cultural-cognitive one. “The affective dimension of this pillar is expressed in feelings from the positive affect of certitude and confidence on the one hand versus the negative feelings of confusion and disorientation on the other [...] A cultural-cognitive conception of institutions stresses the central role played by the socially mediated construction of a common framework of meanings.” (Scott 2013, p. 70).

Following the developing structure of the international organisations after the World War II, the *raison d’être* of the new theory of international relations cannot be contested. Institutionalism seems highly relevant when analysing the dynamism of a particular international organisation, and the complex nature of states’ behaviour in the Council of Europe. Experiences gained in the human rights format of the Committee of Ministers responsible for the supervision of the judgements of the European Court of Human Rights, however, shade to some extent the main tenets of the theory with regard to the great powers. On the other hand, the basic assumptions can also give explanation to the crisis management deal agreed between the Russian Federation and the Parliamentary Assembly of the Council of Europe.

Indeed, what could be the most relevant when seeking arguments for my hypothesis, namely that the Eastern enlargement with the accession of the Russian Federation as a great power

largely contributed to the political and legal challenges of the Council of Europe, is found in the assumptions of the historical institutionalism in path dependence.

Eric Voeten referred to the historical institutionalist scholars when he said that they have emphasized four ways in which institutional development tends to be path dependent. “First, institutions may lock in balances of power, thus giving those with privileged positions an extended stake in protecting their positions. For example, the French are unlikely to give up their seat on the UNSC<sup>17</sup>, which makes it less likely that states can arrive at institutional designs that could be more effective at solving security problems. The other three mechanisms are related: positive feedback effects, increasing returns, and self-reinforcing qualities. Actors external to an institution may start readjusting their activities and expectations on the basis of existing institutional designs, making once feasible alternative designs less attractive. The consequence is that institutional design reflects a historical process that does not necessarily produce the best response to the functional problem the institution is supposed to solve.” (Voeten, E. 2019, p. 155). Bearing in mind the latest reform developments in the Council of Europe, the latter consequence is especially applicable when evaluating the situation preceding the elaboration and adoption of the complementary joint procedure of the Council of Europe. However, the basic tenets of institutionalism could provide a valid answer to all research questions, and it will be more than enlightening to assess the responses that different theories of international relations could bring to the conclusions of the present research.

Bearing in mind that the Council of Europe, as an international intergovernmental organisation, is at the heart of the present thesis, it is difficult to pass by the assumptions of this theory and completely ignore them in the case of this organisation. The main decision-making body, the Committee of Ministers with the permanent representatives of the member states’ foreign ministers, functions according to intergovernmental principles. Furthermore, this institution is responsible for the supervision of the Strasbourg Court’s legally binding judgments, though in practice it leaves little space for legal arguments when monitoring implementation in interstate cases. Taking into account that interstate applications are lodged with the court mainly following a military intervention or other type of armed conflict, sometimes the government representatives’ national instructions, which are based on bilateral political grounds, are hardly compatible with the legal arguments. The case of Cyprus versus Turkey (ECtHR case of Cyprus vs Turkey, 2001) is an outstanding example of the “efficiency” of supervision if we take into

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<sup>17</sup> United Nations Security Council

consideration that the European Court of Human Rights delivered its judgement in 2001 and yet several open chapters still remain, the closure of which seems to be very unrealistic in the near future.

However, the legal case study of the present research will have the focus on another element that questions the relevance of the institutionalist position, and strengthens the neorealist approach. In the case of *Catan and Others versus the Russian Federation*, the respondent state formally did not challenge the supranational competence of the European Court of Human Rights but the case raises the question of extraterritoriality, which to some extent points beyond the challenge of non-execution of the European Court of Human Rights, and helps understanding the relation between power politics and normativism. It seems that geopolitically motivated acts not only challenge international law, but assists the standard-setting process in its adjustment to new realities. Taking into consideration the main assumptions of institutionalism, as well as my empirical observations and experience, this theory seems to be fully sufficient to help finding answers for the research questions of the thesis and to understand the international context in which the Council of Europe functions.

#### *1.5.4. Criticism of neorealist theories and institutionalism*

Like other theories, neorealist approaches have been met with severe criticism from all sides. Thus, defensive realism was heavily criticised by both offensive realists and other scholars. As Peter Toft underlined, the weak point in the arguments of the defensive realism is that it is unable to theorise and make assumptions about the policies of specific states as offensive neorealism can (Toft, P. 2005. p 403.). Taliaferro summarized his views about the future of the approach by saying: “defensive realists note that states will sometimes engage in security-driven expansion, but that over the long run, self-aggrandizement will prove self-defeating.” (Taliaferro 2001. p. 160).

“Critics of structural realism argue that the involvement of states in international institutions disproves the theory as it fails to recognise the positive relationships that can be created between states” (Jepson, 2012. p. 2) but Jepson refers to the continued existence and extension of the North Atlantic Treaty Alliance beyond its original purpose to highlight how international institutions have become “subordinate to national purposes” (Jepson, 2012. p. 2). Jepson concludes that “whilst structural realism is useful in analysing states’ behaviour towards certain institutions, it is not always as well equipped to explain other major events. National interest is

becoming increasingly complex and states are being forced to take a variety of factors into account when deciding upon the appropriate course of action. Until there is an effective means of authority above the state level, states will continue to act in a self-interested manner thus structural realism remains a valuable approach. However, it cannot be used on its own or as a sole determinant of state behaviour” (Jepson, 2012. p. 4.)

Though there has been a great deal of criticism directed at structural realism, this theory tests the behaviour of states at a supranational level. While the present research through political and legal case studies has a focus on this relationship between the great powers and the normative rules of international organisations, I am further convinced that neorealism is a suitable means of explaining the series of events that happened in the Council of Europe between 2014 and 2019.

However, Jonathan Kirshner in his article on the tragedy of offensive realism, sharply criticised Mearsheimer predictions, especially on China: “The trajectory of state choices — especially of great powers, which have room for maneuver — is uncertain, and contingent. This is true in general, and this is true for contemporary China [...] The first lesson the student of international politics must learn and never forget,’ Morgenthau lectured, ‘is that the complexities of international affairs make simple solutions and trustworthy prophecies impossible.” (Kirshner, 2010. pp. 69-70).

Kirschner also asks what the alternatives for the US are with regard to the rise of China. Whether China will be a responsible great power or will seek only regional hegemony, US foreign policy is only one aspect defining the possibilities. According to Kirschner the offensive realist approach, designed to make sure that China does not become a peer is only “an attempt to reshape the world as one would like to see it, rather than respecting the realities of power. It is also, from the perspective of the self-interest of the US, almost certainly a self-fulfilling, and self-defeating prophecy. If it turns out (as is likely) that the US simply does not have the capability to inhibit China’s rise, certainly the prophecy of a powerful and hostile China will be realized by the attempt. If by chance it is ‘successful,’ the effort by the US to slow China’s rise would backfire, for three reasons: it would be very costly, it would seriously harm America’s international political position, and it would make China much more dangerous.” (Kirshner 2010. p. 70)

However, broad criticism of Mearsheimer's theory of offensive realism could be interpreted from a different angle. History students quickly learn that a critical approach towards different historical sources is indispensable for obtaining the most objective and most credible view of the period examined.

When writing about a renowned political scientist, Robert D. Kaplan emphasised that "in a country that has always been hostile to what realism signifies", Mearsheimer wears his "realist" label as a badge of honour. He cites later Ashley J. Tellis, Mearsheimer's former student and a senior fellow at the Carnegie Endowment for International Peace, who said that "realism is alien to the American tradition. It is consciously amoral, focused as it is on interests rather than on values in a debased world. But realism never dies, because it accurately reflects how states actually behave, behind the façade of their values-based rhetoric." (Kaplan, 2012. no p. number)

According to some scholars Mearsheimer's views are controversial on China, but even critics recognise that "*The Tragedy of Great Power Politics* published just before 9/11<sup>18</sup>, intimates the need for America to avoid strategic distractions and concentrate on confronting China. A decade later, with the growth of China's military might vastly more apparent than it was in 2001, and following the debacles of the Iraq and Afghanistan wars, its clairvoyance is breathtaking." (Kaplan, R. D. 2012). Moreover, the "Columbia University professor Richard K. Betts called *Tragedy* one of the three great works of the post-Cold War era, along with Francis Fukuyama's *The End of History and the Last Man* (1992) and Huntington's *The Clash of Civilizations and the Remaking of World Order* (1996). Betts also suggested", and "once China's power is full grown," Mearsheimer's book may pull ahead of the other two in terms of influence, Kaplan wrote in his article Why John J. Mearsheimer Is Right (About Some Things).

Essentially, the theory of offensive realism will be important to the present research in terms of its approach towards the power of organisations. Mearsheimer disagrees with the critical theorists on the importance of international organisations, and maintains that they have very little influence on the world. While reading Mearsheimer's opinion in *False Promise*, one could think that he considers critical theorists as very naïve, idealist and utopian thinkers. As he put it, "Institutions are at the core of critical theory, as its central aim is to alter the constitutive and regulative norms of the international system so that states stop thinking and acting according to realism. Specifically, critical theorists hope to create 'pluralistic security communities,' where states behave according to the same norms or institutions that underpin collective security.

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<sup>18</sup> Coordinated terrorist attacks against the United States on 11 September 2001.

States would renounce the use of military force, and there would instead be ‘a generally shared expectation of peaceful change.’ Furthermore, states would ‘identify positively with one another so that the security of each is perceived as the responsibility of all.’ States would not think in terms of self-help or self-interest, but would instead define their interests in terms of the international community. In this new world, ‘national interests are international interests.” (Mearsheimer, 1994-1995, p. 38-39).

Though it has been fiercely attacked from various angles, I still believe that the neorealist approach and its main tenets are relevant for finding an appropriate answer to all the research questions of the present thesis, but it is particularly relevant in the case of the second research question, namely, could normative institutionalism prevail over the great powers’ geopolitical interests, and if so, to what extent?

Institutionalism is not a homogeneous theory either, several variants have been developed since its first appearance, from the normative approach with strong emphasis on the norms of the institutions, the rationale choice institutionalism arguing the behaviour is the powerful incentive, functionalists seek equilibrium among the different rationales behind states’ actions. Historical institutionalist considers the earlier actions of any policy or governments as a point of departure, empirical institutionalists see the structure of government as the key factor, discursive institutionalists think that internal discourses define the organisations. Societal institutionalism put a great emphasis on the relations between state and society, international institutionalism has a focus on structure in “explaining behaviour of states and individuals” and informal institutionalism spotlights on non-formal institutions, which have a major influence on policy and governing process” (Peters, 2019, p. 23-26). Among these variants we can already find the critical approach of the normative institutionalism, as the assumptions of the rationale choice is in strong contrast with the approach of normativism (Peters, 2019, p. 24).

Other scholars argue that behaviorist political scientist heavily criticized the institutionalist approach, since „Historically, institutionalism was developed within the rational choice paradigm [but] This dependence on rational choice is not necessary. Strictly speaking, all that is required for institutional analysis is *some* consistent behavioral model; it does not have to be based on rational choice. That said, the dependence of the behavioral model is irreducible. All implications including the normative properties of policy-making institutions *jointly* depend on a model of institutions *plus* the behavioral model. If the behavioral model is invalidated, the normative implications derived from institutional analysis no longer hold” (Diermeier, 2015, p.



21). Diermeier points out that this criticism was especially applied in the electoral field, as he recalled „These issues become particularly virulent when we consider the impact of electoral politics on policy choice, either directly through policy referenda or the selection, replacement, and retention of public officials; or indirectly via the influence of public opinion on the positioning and behavior of elected officials, for example, incentives to pander to the electorate [...]” (Diermeier, 2015, p. 21). According to his conclusions the „growing empirical evidence” challenged the validity of institutionalism but recent works prove that institutionalist approach can be valid in many policy areas. As he draws the attention „there is a sizable gap between the behavioral models and the ability to assess specific policy domains, for example, public finance. But the initial results are encouraging; they point to the general insight that good governance rests far more in institutional characteristics [...]” (Diermeier, 2015, p. 26).

The relevance of the governance issue is also highlighted by other scholars, too, Fioretos recalled that „The international system in the early twenty-first century is characterized by a governance paradox. While organizations governing international affairs have never been so plentiful and as well endowed with resources and mandates, there has also been no point in history in which the same organizations have been as heavily criticized for not living up to expectations. This paradox can be understood in terms of the emergence and persistence of various governance gaps. [...] there are long-term discrepancies between what an organization is supposed to deliver and what it actually achieves [...]” (Fioretos, 2011, p. 386). As to the solution of this challenge „Rational choice institutionalist accounts suggest that states will expand the number and mandates of international organizations in order to resolve the larger number of coordination problems that emerge with greater levels of international interdependence. As the number of unfulfilled tasks increases (as gaps grow), states are expected to construct more institutions or grant more resources to existing ones [so] a close relationship [is] between the number of international organizations (or their resources) and the nature of governance gaps: as the former increases, the latter is expected to decline [...] as greater numbers of international rules and norms serve to socialize governments [...]” (Fioretos, 2011, p. 387).

Fioretos admits that „modern international system is far from rationally designed, and its normative cohesion is not as widespread or deep as some accounts suggest” (Fioretos, 2011, p. 390). He also refers to the phenomenon of the institutional layering, which means that “Rather than meeting the challenges of growing international interdependence by more fully transferring political authorities traditionally vested in the national level to a small number of international organizations, states [...] have dealt with new problems by creating new

subsidiary organizations within existing arrangements and by adding new institutional forms with limited authority alongside these existing arrangements. [...] With layering, radical change in major institutions ... gets more difficult over time and shifts in the international balance of power may do little to alter the basic architecture of international governance” (Fioretos 2011, p. 389-390).

Institutionalist approaches are apparently evolving in light of the new challenges, new variants are developed to adjust the assumptions to the realities, so this theory of the international relations is indispensable to draw relevant conclusions in respect of the Council of Europe. Although the institutionalism is complex in itself and the views above seem to strengthen the conviction that state actors have still a major role in international relations, in my view the classical paradigmatic confrontation between neorealism and institutionalism will definitely help to respond the research questions and also assist the researches in underpinning the initial hypothesis.

## **6. Foundation of the issue: General overview of the multilateral framework and the place of the Council of Europe in the system**

This chapter aims to give a general overview of the multilateral context, and seeks to present the first examples of intergovernmental structure. However, it does not attempt to describe the mechanisms and functioning of each organisation in detail. This chapter limits itself to describing the international environment, the reasons and background leading to the establishment of the new organisations, and desires to depict the main objectives and principles through which these new structures carry out their missions and performs the tasks assigned to them in their statutes.

The reasoning behind the selection of the organisations to be presented was their relations with the Council of Europe. With the exception of NATO, all other international organisations established long-term and fruitful cooperation with the Council of Europe, where they complement each other's activities mainly in human-rights related fields.

As far as NATO is concerned, being a political-military alliance committed to guaranteeing the freedom and security of its members through political and military means, it is ostensibly not connected to the Council of Europe in any field. However, contemporary challenges have required adaptation from all intergovernmental structures, meaning that new and overlapping activity fields have appeared on the agenda of both organisations. As NATO deals with gender

issues, cyber defence, and trafficking in human beings, and is committed to ensuring democratic values, so the Council of Europe carries out programs related to counterterrorism, while sensitive political crises such as relations between Russia or Ukraine are also high on its agenda.

Though the first international organisation was established in the early 1800s<sup>19</sup> and the Vienna Congress of 1814-1815 can be regarded as the first example for international cooperation since “the Congress System was deliberate conflict management and was the first genuine attempt to create an international order based upon consensus rather than conflict”<sup>20</sup>, real multilateralism is rather the brand of the 20th century.<sup>21</sup>

The new approach in international relations represented and required by the United States at the Paris Peace Conference in 1919 wished to break with European traditions of foreign policy which sought to ensure the balance of power. The United States was in a position to announce that the new world order should be built on the principle of national self-determination, on treaty-based open and transparent cooperation instead of confidential diplomatic agreements, and security ensured by the concept of collective defence instead of military coalitions. The American negotiators were convinced that the Great War was the consequence of defective European foreign policy practices, and not the result of the unresolved geopolitical conflicts (Kissinger, 1996, p. 11). This mind-set led to the first attempts of international agreements based on the principles of democracy and international law, such as the League of Nations or the General Treaty for Renunciation of war as an instrument of national policy, commonly known as the Kellog-Briand Pact<sup>22</sup>, signed in 1928 in Paris.

#### *1. 6. 1. United Nations, NATO, OSCE, European Union*

##### *United Nations*

The war and the desire of peace are probably as old as the humanity itself. Initiatives for the establishment of an international framework to guarantee peace and stability were not a recent concept after the World War II. The precedents of this effort date back to the end of the First

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<sup>19</sup>The Central Commission for the Navigation of the Rhine (CCNR) was founded in 1815. European Yearbook, volume XLII (1994) p. CCRI **Hiba! A hiperhivatkozás érvénytelen.**

<sup>20</sup>Jarrett, M. 2013. The Congress of Vienna and Its Legacy: War and Great power Diplomacy after Napoleon. pp. 353, xiv, 187.

<sup>21</sup> Author's opinion.

<sup>22</sup>League of Nations Treaty Series. Publication of Treaties and International Engagements registered with the Secretariat of the League of Nations, vol. 94. p. 59. **Hiba! A hiperhivatkozás érvénytelen.**

World War, and indeed the first attempts to establish an international organisation to prevent future wars were drafted on the eve of the First World War (Cline, C. A. 1963. pp. 15-17). History has given us ample evidence from the 20th century alone that pacifist movements and proposals to conclude pacts or alliances are clear examples of approaching armed conflict.<sup>23</sup> Just two mention a few, two years after the conclusion of the Treaty of Non-Aggression between Germany and the Union of Soviet Socialist Republics (Ronen, 2011, p. 19) in 1939, Germany launched a massive attack on the Soviet Union (Roberts, 2006). In 1941, four months after Hungary and Yugoslavia signed the treaty of “Eternal Friendship” , Hungary joined Germany in invading Yugoslavia.<sup>24</sup> The concept of setting up a global framework to solve international disputes by peaceful means was popular before, during and after the World War I. Following these initial proposals, the League of Nations was finally created on 25 January 1919 (Northedge, 1986). Officially the Treaty of Versailles contained a provision regarding the creation of the League (Magliveras, 1999 p. 8). Part One of the Treaty of Versailles emphasizes that “The High Contracting Parties, In order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another, Agree to this Covenant of the League of Nations.” (Treaty of Versailles, 1919)

However, the concept of the collective security<sup>25</sup> did not function in practice, as shown by the Abyssinia Crisis or the Winter War between the Soviet Union and Finland. These conflicts revealed the weak points of the League. (Northedge 1986, pp 253-254.) The Allied powers therefore agreed at the Tehran Conference in 1943 to replace the League with a new institution (Northedge 1986, pp. 278-280). As the Introductory Note of the Charter of the United Nations, the founding treaty of the United Nations says, the treaty was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. The Statute of the International Court of Justice is an integral part of the Charter.” (UN Charter, Article 7).

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<sup>23</sup> Opinion of the author

<sup>24</sup> <https://www.britannica.com/place/Hungary/War-and-renewed-defeat#ref411364>, accessed: 9 February 2021.

<sup>25</sup> Library of Congress. Legislative Reference Service. (1944). Events leading up to World War II: Chronological history of certain major international events leading up to and during World War II with the ostensible reasons advanced for their occurrence, 1931-1944. Washington: U. S. Govt. print. off. p. 97.

The Preamble and its 19 chapters lay down the objectives, the purposes and principles as well as the structure of the new international organisation. Accordingly, the Statute clearly assumes that the purposes of the United Nations are “to maintain international peace and security, [...] to take effective collective measures for the prevention and removal of threats to the peace, [...] To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace [...]” (UN Charter, Article 1, pp. 1-2). Furthermore, the Charter also underlines that the United Nations seeks to resolve “international problems of economic, social, cultural or humanitarian character” and promotes the “respect for human rights and for fundamental freedoms for all without distinction [...]” (UN Charter, Article 1 p. 3). Chapter VI of the United Nations also stipulates that member states follow the principle of peaceful settlement of debates and empowers the Security Council to take appropriate actions in case of threats to the peace. Chapter VII with its articles 39-45 of the Charter lays down the possible measures to be taken from making recommendations to using force through urgent military measures. However, Article 51 of Chapter VII also enables the member states to exercise their right of “individual or collective self-defence if an armed attack occurs until the UN Security Council has taken measures necessary to maintain international peace and security.”

The power and authority of the Security Council, especially the potential of the permanent members<sup>26</sup> and their veto right, clearly reflects the balance of power established after the WWII. This balance has been questioned on many occasions since 1945 as a result of global geopolitical rearrangements, especially after the collapse of the Soviet Union and the end of the Cold War. Thus, reform of the Security Council is high on the agenda and deserves separate analysis.

Nonetheless, the United Nations with its 193 member states has a unique international character, and is committed to taking action on several challenges humanity faces.<sup>27</sup> The adoption of the Universal Declaration of Human Rights by the General Assembly on 10 December 1948 represented a new milestone in the protection of human rights. The

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<sup>26</sup>The United States of America, The United Kingdom, France, People's Republic of China and the Russian Federation

<sup>27</sup> Overview, Welcome to the United Nations, <https://www.un.org/en/sections/about-un/overview/index.html>, accessed: 10 February 2021.

document can be regarded “as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected”<sup>28</sup>

### *North Atlantic Treaty Organization*

The Second World War had just ended but, sharp ideological contrasts among the victorious powers were already emerging. The European continent was divided, and the new enemy was not defeated Germany but the new superpower, the Soviet Union (Trachtenberg, M. 1998). The lesson learned from the war was the need for cooperation at the intergovernmental, international and even supranational level, both to prevent similar tragedies in the future and to answer calls for protection against the Soviet Union. However, the Dunkirk Treaty,<sup>29</sup> concluded between France and the United Kingdom in 1947, or the Brussels Treaty<sup>30</sup> between Belgium, Luxemburg, the Netherlands, France and the United Kingdom in 1948, were officially announced as alliances against a possible German attack.<sup>31</sup> Publicly available documents show that “British military authorities pointed out in 1944 that Russia would be the problem after the war, that it was important, however, not to antagonize that country by giving the appearance of building up the Western European block against her” (Baylis 1982 pp. 236-247 cited by Trachtenberg, 1998). The British assessed the German problem from a different angle by that time, they considered that “Germany needed to be built up and brought into a west European federation” (Zeeman, B. 1986).

The initiatives above clearly showed the need to establish an intergovernmental military alliance, which differs from coalitions: “An alliance as an explicit agreement among states in the realm of national security in which the partners promise mutual assistance in the form of a substantial contribution of resources in the case of a certain contingency the arising of which is uncertain.” (Bergsman, 2001, p. 29.)

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<sup>28</sup> [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf), accessed: 10 February 2021.

<sup>29</sup> Treaty of Alliance and Mutual Assistance between the United Kingdom and France (Dunkirk, 4 March 1947), Treaty Series. Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations. 1947. New York: United Nations. "United Kingdom of Great Britain and Northern Ireland and France. Treaty of Alliance and Mutual Assistance. Signed at Dunkirk, on 4 March 1947", p. 189-194, [https://www.cvce.eu/content/publication/1997/10/13/1fb9f4b5-64e2-4337-bc78-db7e1978de09/publishable\\_en.pdf](https://www.cvce.eu/content/publication/1997/10/13/1fb9f4b5-64e2-4337-bc78-db7e1978de09/publishable_en.pdf)

<sup>30</sup> The Brussels Pact established the Western Union in 1955.

<sup>31</sup> Trachtenberg, M. (1998). Appendix Two (Chapter Three, Note 74). The German Threat as a Pretext for Defense against Russia, <http://www.sscnet.ucla.edu/polisci/faculty/trachtenberg/appendices/appendixII.html>

Paradoxically, the establishment of a military alliance runs totally counter to what the United States represented in the foreign policy at the end of the Great War, when it rejected the old-fashioned European diplomatic traditions to ensure the balance of power. The US-led new military alliance was just the realisation of the classical balance of power strategy, the implementation of the principle of power-counterpower against the Soviet Union. (Fischer F 1996 p. 243). When the Attlee<sup>32</sup> government informed the US administration that they are no longer able to provide for the defence of Greece and Turkey, the United States was forced to undertake the containment of the Soviet Union's communist influence. As Joseph M. Jones notes, if the United States were to take steps to strengthen the countries under the threat of Soviet aggression and communist subjugation, it would indeed be protecting its own security and freedom itself. (Jones 1947 cited by Kissinger 1996 p. 437). This recognition led to the official announcement of the Truman Doctrine, the foundation of American foreign policy (McCullough, 1992. pp. 547-549).

Although the Charter of the United Nations also enabled the organisation to take urgent military measures by deploying Members' national air-force contingents (Article 45, Chapter VII), the demand for collective defence with mutual assistance in response to an attack by any external party was increasing as a result of growing Soviet influence on the continent. The Czech coup d'état, which led to Czechoslovakia joining the communist camp, shook the allies [...]" (Soutou, 2018 pp. 95-100) and led to the launch of the European Recovery Program, commonly referred to as the Marshall Plan, to improve European prosperity and prevent the spread of communism (Office of the Historian).<sup>33</sup>

The other event which inspired immediate action was the Berlin Blockade. On the basis of misleading report from the Soviet intelligence service, "Stalin concluded that the pressure on Berlin would force the Western powers to abandon the creation of a separate Germany, detach the German people from Western governments unable to protect them and enable the Soviet Union to negotiate from a position of strength. If the Western Allies refused to bow to the pressure, then the Soviets would force them out of Berlin and make the city the part of the Eastern zone." (Miller, 1998 p. 14).

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<sup>32</sup> Clement Richard Attlee Prime Minister of the United Kingdom from 1945 to 1951, Labour party, Whiting, R.C. "Attlee, Clement Richard, first Earl Attlee (1883-1967)" Oxford Dictionary of National Biography, 2004.

<sup>33</sup> <https://history.state.gov/milestones/1945-1952/marshall-plan>

So the Soviet Union “imposed the Berlin Blockade from 24 June 1948 to 12 May 1949, cutting off all land and river transit between West Berlin and West Germany. The Western Allies responded with a massive airlift to come to West Berlin’s aid. One of the first major international crises of the Cold War period, the Berlin Blockade exposed the deep ideological differences separating East and West. (NATO declassified document)<sup>34</sup>. The Berlin Blockade acted as a catalyst for concluding the North Atlantic Treaty, which established the North Atlantic Treaty Organisation.

The North Atlantic Treaty was signed in Washington on 4 April 1949 by twelve states: Belgium, Canada, Denmark, France, Iceland, Italy, Luxemburg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States. The Treaty enshrines that the “Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments. They are determined to safeguard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law. They seek to promote stability and well-being in the North Atlantic area. They are resolved to unite their efforts for collective defense and for the preservation of peace and security.” (NATO Treaty 1949, Article 1). Article 3 stipulates that “the Parties [...] by means continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack” in compliance with Article 51 of the Charter of the United Nations. Articles 5 to the Treaty requires member states to provide assistance to the other or others attacked, since “an armed attack against one or more of them in Europe or North America shall be considered an attack against them all” (NATO Treaty, 1949, Article 5).

#### *Organization for Security and Co-operation in Europe (OSCE)*

The dynamism of power politics is always cyclical. Historians argue that the first period of the Cold War ended with the Cuban Missile Crisis, the point at which the Cold War came closest to escalating into a full-scale nuclear war.<sup>35</sup> Lessons drawn by the superpowers resulted in the signing of the Nuclear Test-Ban Treaty, formally the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water, treaty signed in Moscow on 5 August,

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<sup>34</sup> [https://www.nato.int/cps/en/natohq/declassified\\_136188.htm?selectedLocale=en](https://www.nato.int/cps/en/natohq/declassified_136188.htm?selectedLocale=en), accessed: 12 February 2021.

<sup>35</sup> Scott, L-Hughes, R-G. 2015. The Cuban Missile Crisis: A Critical Reappraisal. Taylor&Francis. p. 17. ISBN 9781317555414. Archived from the original on July 29, 2016.



1963, by the United States, the Soviet Union, and the United Kingdom, which banned all tests of nuclear weapons except those conducted underground.<sup>36</sup>

However, other developments with global implications influenced the system of international relations in the 1960s. First, as a result of the termination of Western European colonial control, the decolonisation process largely decentralised and fragmented the world. Competition between the two superpowers increased in the countries of the third world, but at the same time a new trend also appeared, the shared interest of the US and the Soviet Union (USSR)<sup>37</sup> in keeping regional conflicts under control (Fischer 1996, p. 233). Second, relations between the USSR and China slowly changed. Differences at the level of party politics influenced inter-state relations at first, but after China conducted its first nuclear weapon test in 1964, it joined the ‘nuclear club’ of nations, changing the nature of the relationship between Moscow and Beijing. The increasing number of border incidents and the growing challenge from China forced the Soviet Union, nestled as it was between West and East, to reconsider its relations with the US and the NATO. (Fischer 1996, pp. 240-241). With this in mind, the Soviet Union proposed a European Security Conference, which resulted in the Bucharest Declaration.<sup>38</sup> The Declaration “proposes the simultaneous dissolution of the two military blocs, the recognition of the existence of two German States, the development of agreements on disarmament in Germany and in Europe, and the convening of a general European conference with a view to discussing the problems of ensuring security in Europe and of establishing general European cooperation.” (Declaration, Political Consultative Committee 1966).

On the other side it had become clear by 1969 that the US could not win the Vietnam War, even in a military sense. In parallel, the newly elected chancellor in the Federal Republic of Germany, Willy Brandt, launched *Ostpolitik* with a view to improving relations with Eastern Europe. (Fischer, p. 259). *Ostpolitik*, as a policy of confidence-building between East and West, resulted in the modern interpretation and practice of peaceful change or change through rapprochement by linking the abandonment of territorial revisionism and the policy of a dynamic status quo.

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<sup>36</sup> Limited Test Ban Treaty. US Department of State. Accessed: 14 February 2021. <https://2009-2017.state.gov/t/isn/4797.htm>

<sup>37</sup> Union of Soviet Socialist Republics (USSR), was a federal socialist state.

<sup>38</sup> Declaration of the Political Consultative Committee of the Warsaw Pact on the strengthening of peace and security in Europe (Bucharest, 5 July 1966), [https://www.cvce.eu/en/obj/declaration\\_of\\_the\\_political\\_consultative\\_committee\\_of\\_the\\_warsaw\\_pact\\_on\\_the\\_strengthening\\_of\\_peace\\_and\\_security\\_in\\_europe\\_bucharest\\_5\\_july\\_1966-en-c48a3aab-0873-43f1-a928-981e23063f23.html](https://www.cvce.eu/en/obj/declaration_of_the_political_consultative_committee_of_the_warsaw_pact_on_the_strengthening_of_peace_and_security_in_europe_bucharest_5_july_1966-en-c48a3aab-0873-43f1-a928-981e23063f23.html).

This approach was able to find a compromise between the Soviet aims of legitimization and the German objective of changing the status quo. (Kiss J. L.1997).

The circumstances established a favourable climate for these objectives. “Taking advantage of detente (a global decrease in international tension), President Nixon visited Moscow in 1972 to discuss a possible conference and weapon reduction talks. As a result of the ongoing war in Vietnam, arms control remained the most important item on the US agenda. As for the USSR, discussions on the reduction of nuclear stockpiles were part of a strategy to denuclearise Europe in order to take advantage of its superiority in conventional weapons. Meanwhile, conditions were also favourable for resolving the status of Germany: the German Democratic Republic and the Federal Republic of Germany were invited to take up United Nations membership in 1973, and the following year, Washington recognised the East German state.”<sup>39</sup>

In this positive political context, the Conference on Security and Co-operation in Europe (commonly known as CSCE) was organised in three phases. The first was opened in Helsinki on 3 July 1973, at the level of foreign ministers, then continued in Geneva from 18 September 1973 to 21 July 1975 at an operational level (Vilen, 2015, pp. 603-621). The conference was concluded at the Helsinki Summit on 1 August 1975, by the Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and Yugoslavia.<sup>40</sup>

As to the concrete outcome, the Final Act enshrined the principles guiding the relations between participating states, such as respect for sovereignty and territorial integrity, refraining from the use of force, the inviolability of frontiers, peaceful settlement of disputes, non-intervention in internal affairs, respect for human rights and fundamental freedoms, equal rights and self-determination of peoples, co-operation among states, and the fulfilment in good faith of obligations under international law. The Helsinki Final Act also stipulated forms of co-

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<sup>39</sup> The Organization for Security and Co-operation in Europe (OSCE), Briefing, European Parliamentary Research Service, 2018. p. 2.  
[https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/628219/EPRS\\_BRI\(2018\)628219\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/628219/EPRS_BRI(2018)628219_EN.pdf)

<sup>40</sup> <https://www.osce.org/files/f/documents/5/c/39501.pdf>

operation in the field of economics, science and technology, and of the environment as well as questions relating to security and co-operation in the Mediterranean.

It is also important to note that the Helsinki Final Act under the chapter on Co-operation and Exchanges in the Field of Culture refers to national minorities or regional cultures. It underlines that “The participating States, recognizing the contribution that national minorities or regional cultures can make to co-operation among them in various fields of culture, intend, when such minorities or cultures exist within their territory, to facilitate this contribution, taking into account the legitimate interests of their members.” (Helsinki Final Act p. 51)

Although the fundamental principles of the protection of human rights had already been laid down in the documents of the United Nations and the Council of Europe, this is the first and explicit reference to the national minorities. The Universal Declaration of Human Rights, adopted by the UN in 1949, focuses on human rights in general, while Article 27 of the International Covenant on Civil and Political Rights<sup>41</sup> which was adopted in 1966 but entered into force only in 1976, enshrined the rights of ethnic, religious or linguistic minorities. It states that “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” In addition, the Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe in 1950 also emphasises the general nature of human protection. As such, the Conference on Security and Co-operation in Europe, by mentioning national minorities, anticipates to a certain extent the standard-setting of purely human rights organisations, such as the Council of Europe. Although the Helsinki Final Act cannot be considered in any case as legally binding instrument, it later serves as a basis for establishing international legal norms.

However, the importance of the Conference on Security and Co-operation in Europe was more political and geopolitical, “it transformed the zero-sum game of the Cold War into a positive-sum game between European states, becoming a forum for discussion between the two superpowers and European countries. However, the main achievement of the Helsinki process

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<sup>41</sup> Adopted in 1966 but entered into force only in 1976.  
<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

that formed the CSCE was that it brought all the participating countries to the negotiating table” (Briefing, European Parliamentary Research Service, 2018).

### *From the European Communities to the European Union*

As in previous chapters, this section aims rather to depict the political climate during the period when European integration was launched, and does not seek to provide a chronological and descriptive presentation of the Union’s architecture. The different phases of European integration are well documented the literature on the subject is extensive. This chapter intends to highlight the characteristics that differentiate the European Union from the Council of Europe with a view to placing the latter within the multilateral framework.

The first concepts and ideas which sought to unify Europe on an ideological or common-values basis date back to the end of the late Middle Ages. Without aiming to give an exhaustive list, Henry IV, king of France<sup>42</sup> who dreamed of a Confederation of Christian Europe. Other examples include Charles-Irénée Castel de Saint-Pierre and his work on “Europe, a Plan for Peace”<sup>43</sup>, who inspired Immanuel Kant’s Philosophical Essay on Perpetual Peace<sup>44</sup>, or Victor Hugo who envisaged the European cooperation in his work *The Rhine*, which envisaged the Franco-German partnership as a pillar of peace in Europe<sup>45</sup> and “exposed his vision of the seminal idea of the United States of Europe”.<sup>46</sup> Ortega y Gasset wrote about the “great unifying enterprise”<sup>47</sup>, and Richard von Coudenhove-Kalergi and Archduke Otto von Hapsburg founded the Pan-European Union in 1922. (Gazdag 1995. p. 104). Foreign minister of France, Aristide Briand formulated an original proposal for a new economic union of Europe, which entailed the economic collaboration of the great industrial areas of Europe and the provision of political security to Eastern Europe against Soviet threats.<sup>48</sup>

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<sup>42</sup>According to the Memoirs of Maximilien de Béthune, Duke de Sully (1559–1641) In Von Kulesa R-Seth, C: *L’idée de l’Europe: au Siècle des Lumières*, 2017. <https://www.jstor.org/stable/j.ctt1sq5vcp>

<sup>43</sup>Projet pour rendre la paix perpétuelle en Europe (1713) <https://gallica.bnf.fr/ark:/12148/bpt6k105087z>

<sup>44</sup>Essai philosophique sur la paix perpétuelle (1796), Paris, Fischbacher, 1880 <https://www.gutenberg.org/files/50922/50922-h/50922-h.htm#tnote> In Von Kulesa R-Seth, C. 2017.

<sup>45</sup>« Le Rhin » Le couple franco-allemand comme pilier de la paix en Europe 1884. <https://gallica.bnf.fr/ark:/12148/bpt6k37469b>, Von Kulesa R-Seth, C. 2017.

<sup>46</sup>As chair of the Paris Peace Congress, on 21 August 1849 In Metzidakis, A. 1994-1995. Victor Hugo and the Idea of the United States of Europe *Vol. 23, No. 1/2 (Fall-Winter)*, p. 72., University of Nebraska Press, <https://www.jstor.org/stable/23537320?seq=1>

<sup>47</sup>The Revolt of the Masses 1932. W.W. Norton&Company. <https://ia800204.us.archive.org/32/items/TheRevoltOfTheMassesJoseOrtegaYGasset/Philosophy%20-%20The%20Revolt%20of%20the%20Masses%20-%20Ortega%20y%20Gasset%20Jose.pdf>

<sup>48</sup>Memorandum sur l’Organisation d’un régime d’Union Fédérale Européenne 1929. <https://dl.wdl.org/11583/service/11583.pdf>

Many proposals were drawn up in the 1930s, too, such as the German-Austrian Customs Union (Orde 1980 pp. 34-59), the Beneš proposal to arrange the situation of Central Europe (Kerner 1921, pp. 27-43), or the plan by André Tardieu, French prime minister, which was the most important scheme for regional integration in the Danube basin in the interwar years (Bariéty 1997 p. 1-14 cited by Gazdag, 1995, p. 104).

All the concepts above were derived from the historical loss of control and influence of the European continent. As European nations entered into the critical phase of nation-building, their politicians were unable to think in other than national terms. France could not move from the principle of French hegemony laid down in the Treaty of Versailles, which Germany was not willing to accept. Great Britain was involved in handling its colonies and limited itself to maintaining the traditional balance of power. The real winners of the WWII were the United States and the Soviet Union, and decisions on Europe were taken without Europe. (Gazdag, F. 1995, p. 105)

“After 1945, the pre-war political landscape was transformed in most European countries [...] The concept of European unity, considered by many as a bulwark against the return of nationalism, was generally viewed sympathetically. Western Europe was also aware that the United States and the USSR were extending their influence at the expense of the old continent and hoped to reclaim its place on the international stage by uniting the peoples of Europe.” (Deschamps, 2016).

Plans for the future of Europe differed, however, and the concept of European integration was not, in practice, met with much enthusiasm from the Great Powers in the first years following the end of World War II. Nevertheless, Churchill strongly advocated for a unified Europe, and in his speech at the Zurich University in 1946 he urged the establishment of a United States of Europe. He underlined that “The structure of the United States of Europe, if well and truly built, will be such as to make the material strength of a single state less important. Small nations will count as much as large ones and gain their honour by their contribution to the common cause. ... But I must give you a warning. Time may be short. At present there is a breathing-space. The cannons have ceased firing. The fighting has stopped; but the dangers have not stopped. If we are to form the United States of Europe, or whatever name it may take, we must begin now [...] Our constant aim must be to build and fortify the strength of the United Nations Organization. Under and within that world concept we must re-create the European Family in

a regional structure called, it may be, the United States of Europe. And the first practical step would be to form a Council of Europe. If at first all the States of Europe are not willing or able to join the Union, we must nevertheless proceed to assemble and combine those who will and those who can.”<sup>49</sup>

Compared to Churchill’s unionist approach, the federal position expanded on the continent. The latter preferred to follow the full integration process with a constitution, while the unionist hoped for a consultative body (Dinan, 2005. p. 14-15)

The attitude of the United States and the western powers towards European integration on the basis of the reconciliation between France and Germany only changed after the division of Europe in 1947. The role of Western Europe in the American containment policy significantly increased, and Western Europe recognised its opportunities and limitations. The foundation of the Council of Europe was the result of the changing approach towards the integration and the prevalence of those who supported only loose, intergovernmental cooperation without giving up too much sovereignty, thus this format did not provide a solution to the German question, or how to control it in an institutional framework (Gazdag, 1995. p.106-110.)

The new initiative to establish an organisation to regulate industrial production under a centralised authority was proposed by the French foreign minister, Robert Schuman, in 1950.<sup>50</sup> The Treaty of Paris establishing the European Coal and Steel Community (ECSC) was signed on 18 April 1951 by Belgium, Germany, France, Italy, Luxembourg and the Netherlands. The objective of the ECSC was to organise the free movement of coal and steel, and to free up access to sources of production. An important feature was the setting up of a common High Authority to supervise the market, monitor compliance with competition rules, and ensure price transparency.<sup>51</sup>

“That Treaty [...] integrated the economic sectors of the coal and steel industry. Based on the same principles [...] the Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (EAEC or Euratom) were

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<sup>49</sup> „Speech of Sir Winston Churchill”. PACE website. Zürich, Switzerland: Parliamentary Assembly of the Council of Europe, 19 September 1946. [https://archive.vn/20130218054245/http://assembly.coe.int/Main.asp?link=/AboutUs/zurich\\_e.htm](https://archive.vn/20130218054245/http://assembly.coe.int/Main.asp?link=/AboutUs/zurich_e.htm)

<sup>50</sup> “EUROPA – The Schuman Declaration – 9 May 1950. [https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration\\_en](https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en)

<sup>51</sup> Traité instituant la Communauté Européenne du Charbon et de l'Acier, <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11951K/TXT&from=EN>

signed in Rome on 25 March 1957. As an organisation designed for the common management of the entire economy of the member states, the EEC soon emerged as the most important Community. It became the main tool for — indirectly — achieving political unification [...] The European Communities were the first organisations based on supranational integration.”<sup>52</sup>

Schuman believed that supranationalism was the only framework in which nation states could work together to achieve their common interests, but he was also convinced that the European Community should be built on national foundations, respecting cultural diversity. (Briefing. European Union History Series)<sup>53</sup> “The European Community must create the conditions for mutual understanding, while respecting the particularities of each” (Clement and Husson, 2006. pp. 151-152).

Though the institutions of the Communities were later merged, unification only took place at an operational level. The first step in institutionalizing international cooperation was the adoption of the European Single Act in 1987, which consolidated the constituent treaties of the Communities in a single Act and established European political cooperation (EPC) combining the method of supranational integration in the case of the Community policies and the method of intergovernmental cooperation with the EPC. The Treaty of the European Union, which entered into force on 1 November 1993, included two intergovernmental pillars with the Community component within the same institutional framework. The common foreign and security policy (CFSP) replaced the European political cooperation and the policy of cooperation in the fields of justice and home affairs (JHA). (Briefing. European Union History Series p.3.)

### *Council of Europe*

As the previous chapter pointed out, the Council of Europe, established in 1949 in London, constituted the first element of the European construction as envisioned by the “Founding Fathers” after World War II. Prime Minister of the United Kingdom Winston Churchill, Chancellor and Minister for Foreign Affairs of the Federal Republic of Germany Konrad

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<sup>52</sup> The European Communities. CVCE. European Navigator. Raquel Valls. p.2. [https://www.cvce.eu/obj/the\\_european\\_communities-en-3940ef1d-7c10-4d0f-97fc-0cf1e86a32d4.html](https://www.cvce.eu/obj/the_european_communities-en-3940ef1d-7c10-4d0f-97fc-0cf1e86a32d4.html)

<sup>53</sup> Briefing. European Union History Series, Robert Schuman p.8. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637930/EPRS\\_BRI\(2019\)637930\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637930/EPRS_BRI(2019)637930_EN.pdf)



Adenauer, Minister for Foreign Affairs of the French Republic Robert Schuman, Minister and Foreign Minister of Belgium Paul Henri Spaak Prime, Prime Minister of the Republic of Italy Alcide de Gasperi, and Secretary of State for Foreign Affairs of the United Kingdom Ernest Bevin<sup>54</sup> were “Convinced that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation” (Preamble of Statute of the Council of Europe, 1949), its primary goal was to achieve a greater unity between its members, to safeguard and realise the ideals and principles of common heritage and to facilitate economic and social progress. Any European state may become a member of the Council of Europe as far as it accepts the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms (Statute of the Council of Europe (Preamble of the CoE Statute, 1949)

By the 1990s, gradually deepening European integration (Barth & Bijsmans 2018) provoked reflection and discussion in the Council of Europe and encouraged the Organisation to redefine its major role compared to the European Economic Community.<sup>55</sup> Although the EEC transformed into the European Union after the Maastricht Treaty (Official Journal of the European Union, 1992, Treaty on European Union), it is not completely comparable with the Council of Europe as an intergovernmental organisation (Hlavac 2010). The competencies of the two European institutions needed clarification (Joris & Vandenberghe 2008) during the increased cooperation (Official Journal of the European Communities, 1987) and the institutionalized quadripartite meetings (Declaration on the future role of the Council of Europe in European construction, 1989). The quadripartite meetings were instituted by the Political Declaration of the Committee of Ministers on the role of the Council of Europe in European construction, adopted and signed at the 84th Session of the Committee of Ministers, 5 May 1989, on the occasion of the 40th anniversary of the Organisation. Paragraph 8 of the Declaration says that quadripartite meetings are held between the Chair of the Committee of Ministers and the Secretary General of the Council of Europe and the President of the Council of the European Communities and the President of the Commission of the European Communities.

Nevertheless, the relationship of the two European organisations deserves separate analysis, as this is beyond the scope of the present thesis.

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<sup>54</sup> See the website of the Council of Europe <https://www.coe.int/en/web/about-us/founding-fathers>

<sup>55</sup> Author's personal opinion



The current form of institutions in the Council of Europe had not yet been formulated on the eve of the democratic transition of Central Eastern Europe. The historical moment to unify the European states and to extend the democratic principles of the common heritage to the whole European continent arrived after the fall of the Berlin wall and the collapse of the Soviet Union. Both the Committee of Ministers and the Parliamentary Assembly agreed that the Council of Europe is a “suitable framework for initiating Central and East European countries into full participation in the construction of Europe” and “could usefully contribute to the political, legal, social and cultural dimensions of Europe” (PACE Recommendation 1124 (1990)). The new mission needed new means and structures, along with advanced mechanisms developed during the 1990s, which today form the image of the Council of Europe.<sup>56</sup>

The idea to establish a pan-European organisation to ensure the place of Europe between the emerging superpowers, the United States of America and the Soviet Union, appeared during the period following the First World War. However, competition among nation states for the leading role, mainly between the great powers of the 19<sup>th</sup> century, prevented the unification of the continent at that time. The tragic experiences and painful lessons of World War II made the European nations, particularly Great Britain and France, realise that the only chance to regain their lost political influence was to follow the federalist approach. (Gazdag, – Kovács 1999, pp. 31-48). Following numerous debates on principles and practices, the cooperation model finally achieved in the Council of Europe is a kind of transition compared to other European and transatlantic integration structures (Mezei 1999 in Gazdag and Kovács 1999 pp. 49-51). The founders of the organisation considered the Council of Europe as a representative of a Europe-building process, and they conceived of the structure as going beyond the simple framework of intergovernmental cooperation; rather it was intended to create a community of values by establishing the Council of Europe in the European order after World War II. (Mezei 1999 in Gazdag and Kovács 1999 pp. 49-51).

Following this objective and mandate, the Council of Europe systematically elaborated a normative regulation scheme with fundamental human rights treaties. The chapter below aims to give a general overview on the norm setting activity of the organisation preceding the Eastern European democratic changes.

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<sup>56</sup> This reflects the Author’s personal opinion.

### *1. 6.2. Cooperation of the Council of Europe with other multilateral organisations*

After examining the most relevant international organisations for geographical Europe, it appears that the circumstances of their foundation as well as their overlapping principles and purposes signposted the way for their cooperation. The need for united action was particularly important for the Council of Europe, as its main profile, the protection of human rights and democratic values, is of a general nature. Given that in the case of intergovernmental cooperation, where government interests are at times so divergent, the defence of universal values seem to be the highest common denominator. The Council of Europe could not compete with the United Nations in its globality, or with the European Union in its supranational character. Its comparison with NATO is the most difficult, but the complexity of new and modern challenges provided at least the theoretical basis of interaction between the political-military alliance and the human right organisation. Most overlaps can be found in the third-dimension activity of the OSCE, but the EU also relies to a large extent on the experience and expertise of the Council of Europe. The closest and most intensive cooperation is therefore established with these organisations. Though the supranational and intergovernmental dimension is comparable, they are not the same at least from the perspective of enforcement, as regards the volume of cooperation between the EU and the CoE, this partnership is decisive in respect of the democracy-building capacity of the Council of Europe. The joint programmes promoting respect for human rights and the rule of law, and to address education, youth issues, and social affairs “represent the largest source of funding sustaining Council of Europe technical assistance and co-operation projects in support of democratic stability (EU-CoE Joint Programmes .”<sup>57</sup>

#### *Cooperation with the United Nations*

The relations of the Council of Europe with the United Nations dates back to 1951 and are based on “the Agreement between the Secretariat General of the Council of Europe and the Secretariat of the United Nations and the Arrangements on Cooperation and Liaison between the Secretariats of the Council of Europe and the United Nations (Exchange of letters of 19

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<sup>57</sup> Joint Programmes between the Council of Europe and The European Union, <https://www.coe.int/en/web/der/european-union>

November 1971).”<sup>58</sup> The United Nations is a major partner for the Council of Europe, and their mutual interest in co-operation is reflected in regular contacts, consultations and dialogue. “The relations between both organisations are focused on, but not limited to human rights in a broad sense. Emphasis is given to co-operation with the Human Rights Council, in particular in the framework of the Universal Periodic Review (UPR) to which the Council of Europe contributes actively as regards the human rights situation in its member states” (DER/Inf (2019) 2 p. 2). The Council of Europe Offices in Geneva and Vienna, acting as permanent delegations to the UN Offices in both cities since 2010 and 2011, strongly contributed to the enhancement of relations with the UN, as well as to the increased visibility of the Council of Europe amongst UN member states. Since 2000 (every second year since 2004), the General Assembly of the United Nations, within its debate on co-operation with regional and other organisations, adopts a Resolution on co-operation between the United Nations and the Council of Europe. (DER/Inf (2019) 2 p. 1).

### *Cooperation with the OSCE*

The relationship between the Council of Europe and the OSCE is based on the common values of democracy, human rights and the rule of law, and the organisations' commitment to mutual reinforcement of action, taking into consideration the difference in membership and working methods, as its laid down in the Common Catalogue of Co-operation Modalities<sup>59</sup>.

The similarities in the mandate of the institutions of the Council of Europe and ODIHR<sup>60</sup> “tasked with assisting OSCE participating States to ensure full respect for human rights and fundamental freedoms; to abide by the rule of law; to promote principles of democracy; to build, strengthen and protect democratic institutions; and to promote tolerance throughout their societies” is obvious. Therefore, the identification of different competence is challenging even at expert level, and has contributed to certain tensions between the two organisations in the past. (Taubner, Z-József, J. in in Gazdag, F – Kovács P. 1999)<sup>61</sup>

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<sup>58</sup> Co-operation between the United Nations and the Council of Europe, Directorate of External Relations, DER/Inf (2019) 2, p. 1. <https://rm.coe.int/cooperation-between-the-united-nations-and-the-council-of-europe/1680947118>

<sup>59</sup> Signed by the two Secretaries General in Vienna on 12 April 2000, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680599d8d>

<sup>60</sup> Office for Democratic Institutions and Human Rights of the OSCE

<sup>61</sup> Taubner, Z-József, J: Az Európa Tanács a Nemzetközi Szervezetek együttműködésében, In Gazdag, F – Kovács P. 1999 Az Európa Tanács 1949-1999, SVKI p.112.

This was probably the reason why the detailed Common Catalogue of Co-operation Modalities rigorously regulates the framework for consultations, high-level "2+2" Meetings, parliamentary or joint meetings, ad-hoc contacts and enlarged consultations, such as high-level "Tripartite" meetings with the involvement of the UN. Through its field office network, the Council of Europe maintains close contacts with OSCE missions but modalities for the thematic co-operation in the field of democracy, human rights and rule of law, minorities, Roma and Sinti, media, economic and environmental activities, especially election monitoring, are also enshrined. (Common Catalogue, 2000). A decade later relations were reviewed and the Council of Europe decided on enhanced dialogue between the institutions, on strengthening the involvement of member and participating states in the co-operation, on taking into account the respective priorities of the two organisations and their complementarity, and an early planning process in order to avoid duplications and strengthen synergies (GR-EXT(2012)11-rev)<sup>62</sup>.

The Vienna Office in charge of liaison with the OSCE and other international organisations also acts as Permanent Delegation of the Council of Europe to the United Nations Office in Vienna. The office “regularly arranges for and provides Council of Europe contribution to the Universal Periodic Review and actively participates in the sessions of the Human Rights Council. It develops and promotes further relations with the United Nations Office (UNOG), the Office of High Commissioner for Human Rights (OHCHR), the High Commissioner for Refugees (UNHCR), as well as other relevant international organisations and institutions in Geneva”.<sup>63</sup>

### *Cooperation with the NATO*

There is no institutionalized or regular dialogue between these two organisations although sensitive political issues dominate the agenda of both institutions. The closest point of their interaction is that the NATO-Ukraine Commission referred to one of the most prestigious advisory institutions of the Council of Europe, the Venice Commission, when justifying Ukraine’s efforts to take forward reforms aimed at implementing Ukraine’s Euro-Atlantic aspirations through Ukraine’s Annual National Programme, in line with decisions of the 2008 NATO Summit in Bucharest. At the meeting of the North Atlantic Council with Georgia and

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<sup>62</sup> Relations between the Council of Europe and with the OSCE, The way forward, Rapporteur Group on External Relations, GR-EXT(2012)11-rev, 25 October 2012

<sup>63</sup> Council of Europe Liaison offices, <https://www.coe.int/en/web/der/liaison-offices>

Ukraine at the Brussels Summit in 2018, the Allies “urged Ukraine to fully implement the recommendations and conclusions of the Opinion of the Venice Commission .... and looked forward to further progress in Ukraine’s efforts to overcome significant remaining challenges and ensure the full implementation and sustainability of ambitious but necessary reforms.”<sup>64</sup> The published press release underlined that “the success of Ukraine’s reforms, including combating corruption and promoting an inclusive electoral process, based on democratic values, respect for human rights, minorities and the rule of law, will be crucial in laying the groundwork for a prosperous and peaceful Ukraine firmly anchored among European democracies.” The democratisation process of Ukraine is also monitored by the different mechanisms of the Council of Europe, but there is no information about formal cooperation between the CoE and NATO in this respect.

### *Cooperation with the European Union*

The relations between “the Council of Europe and the European Union have a long tradition based on the shared values. They benefit from the other’s respective strengths and comparative advantages, competences and expertise, and seek to avoid unnecessary duplication. The European Union is the Council of Europe’s most important institutional partner at both political, technical and financial levels. Co-operation embraces all sectors of the Council of Europe and a wide spectrum of activities.” (Directorate of External Relations of the Council of Europe)<sup>65</sup>

As pointed out in the previous chapter, regular dialogue between the organisations was institutionalized in the format of the quadripartite meetings, established by the Political Declaration of the Committee of Ministers on the role of the Council of Europe in European construction in 1989. The current form of cooperation is regulated by the Memorandum of Understanding between the Council of Europe and the European Union signed in 2007.<sup>66</sup>

The purposes and principles of their cooperation, as laid down in the Memorandum, is to develop relations in all areas of common interest, in particular the protection and promotion of pluralistic democracy, the respect for human rights and fundamental freedoms, the rule of law,

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<sup>64</sup> Chairman’s statement on NATO-Ukraine following the meeting of the North Atlantic Council with Georgia and Ukraine at the Brussels Summit, Press Release (2018) 098

Issued on 12 Jul. 2018, [https://www.nato.int/cps/en/natohq/official\\_texts\\_156623.htm](https://www.nato.int/cps/en/natohq/official_texts_156623.htm)

<sup>65</sup> Directorate of External Relations of the Council of Europe, <https://www.coe.int/en/web/der/european-union>

<sup>66</sup> The Memorandum was signed by the both the Chairman of the Committee of Ministers and the Secretary General on behalf of the Council of Europe on 11 May 2007 and by both the President of the Council of the European Union and the European Commission on behalf of the European Union on 23 May 2007 in Strasbourg.

political and legal cooperation, social cohesion and cultural interchange. In order to achieve this close cooperation, they follow the guidelines adopted by the Third Summit in Warsaw, which called for the building of a Europe without dividing lines. The Heads of State and Government of the member states of the Council of Europe, meeting in Warsaw on 16 and 17 May 2005, outlined a declaration and an action plan laying down the principal tasks of the Council of Europe for the future. The Action Plan enshrined the promotion of common fundamental values such as human rights, rule of law and democracy; the strengthening of the security of European citizens; building a more humane and inclusive Europe; and fostering co-operation with other international and European organisations and institutions.<sup>67</sup> Jean-Claude Juncker, Prime minister of Luxemburg at the time, underlined in his speech at the Warsaw Summit that there was no room for rivalry between the Council of Europe and the European Union on essential matters, the two organisations complement and respect each other's prerogatives and domains of excellence, and he expressed the wish to adopt a memorandum regulating cooperation between the two organisations.<sup>68</sup> Nevertheless the Declaration adopted at the Warsaw Summit entrusted Jean-Claude Juncker, to prepare, in his personal capacity, a report on the relationship between the Council of Europe and the European Union, on the basis of the decisions taken at the Summit and taking into account the importance of the human dimension of European construction".<sup>69</sup> (The Human Rights Architecture of Europe, 2007. p. 10). However, the Warsaw Summit was the first to bring together all the countries of Europe (with the exception of Belarus). Europe was finally reunited under one roof, sharing common values and objectives. This is why political leaders spoke of a "Summit of European Unity".<sup>70</sup>

The Memorandum of Understanding therefore set out shared priorities and focal areas for co-operation, such as human rights and fundamental freedoms, the rule of law, legal co-operation and addressing new challenges, democracy and good governance, democratic stability,

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<sup>67</sup> Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005) Action Plan, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016804e422a](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804e422a)

<sup>68</sup> Quand il s'agit de l'essentiel, les rivalités entre le Conseil de l'Europe et l'Union européenne n'ont pas lieu d'être. La sauvegarde des droits de l'Homme, l'action culturelle ainsi que son action normative font du Conseil de l'Europe une organisation dont l'Union européenne serait dans l'impossibilité de prendre le relais. Il est donc de notre devoir d'œuvrer ensemble pour plus de cohésion et d'unité en Europe dans le cadre d'un partenariat entre nos deux organisations. Pour que ce partenariat puisse s'épanouir, il revient aux uns de respecter les prérogatives et domaines d'excellence des autres....Des modèles de coopération enrichissants pour les deux côtés existent et fonctionnent dans la pratique....J'appelle donc de mes vœux l'adoption d'un mémorandum ambitieux sur le développement des relations entre l'Union européenne et le Conseil de l'Europe sur la base des lignes directrices déjà élaborées.

<sup>69</sup> Warsaw Declaration - Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005), [https://www.coe.int/t/dcr/summit/20050516\\_speech\\_juncker\\_fr.asp](https://www.coe.int/t/dcr/summit/20050516_speech_juncker_fr.asp)

<sup>70</sup> Summit website, [https://www.coe.int/t/dcr/summit/why\\_en.asp](https://www.coe.int/t/dcr/summit/why_en.asp)

intercultural dialogue and cultural diversity, education, youth and promotion of human contacts, and social cohesion. “The mutual representation, the Liaison Office of the Council of Europe to the European Union in Brussels and the Delegation of the European Union to the Council of Europe in Strasbourg also ensure the best possible coordination of the cooperation between the two organisations” (Directorate of External Relations of the Council of Europe).

On the other hand, the fact that the Council of Europe is increasingly becoming the small sister of the European Union in the years that has passed, inevitably constitutes a burden on relations between the two organisations. The Parliamentary Assembly pointed out in its resolution, adopted in 2015, that since the signature of the memorandum of understanding in 2007 and the entry into force of the Lisbon Treaty in 2009, co-operation has become more structured, strategic and political. At the same time, the European Union has increased its role in the traditional areas of Council of Europe activity, such as justice, freedom, security and the rule of law. The Assembly notes that the European Union has regularly requested input from the Council of Europe, notably in the context of the European Union Enlargement and Neighbourhood policies, and an increasing number of European Union documents refer explicitly to the standards and instruments of the Council of Europe. Therefore, the Assembly “warns against the setting up of parallel mechanisms which could lead to double standards, ‘forum shopping’ and the lowering of Council of Europe standards.” (PACE Resolution 2029 (2015)).

This attitude was clearly detected during the expert consultations over the possible programs of the second Hungarian Chairmanship of the Committee of Ministers scheduled for the second half of 2021. Originally the Hungarian Chairmanship intended to examine the role and responsibility of the Council of Europe in initiating legal regulation of the European Union based on the Council of Europe standards in the field of minority protection. After some rounds of consultation, the Hungarian partners recognised that the Council of Europe would prefer not to transfer another field of its competence to the European Union. Their interest is to retain as many fields as possible in this global competition among the international organisations. The Council jealously guards those fields the European Union has left it, and the focus is not on the elaboration of the most efficient regulation possible at a European level to finally and effectively tackle the situation of national minorities. These are not the principles at stake, but

instead the rather prosaic interests or disinterests of two international organisations aiming to preserve their relevance at all costs.<sup>71</sup>

However, the relation between the Council of Europe and the European Union remain special. The last decade of the 20th century, the historical period of democratic transition of Central Eastern Europe provided a unique chance to the Council of Europe to redefine its position in the competition of the international organisations. The European Union established by the Maastricht Treaty in 1993 and the institutionalizing CSCE<sup>72</sup> reshaped as OSCE in 1995 after the summit of heads of state and government in Budapest, has sought to emphasize its own relevance and aspired to a leading role in promoting democratic norms and standards.

Contrary to the EU, whose profile was first to promote the economic and financial cooperation and the OSCE, which could be regarded, first and foremost as a security-oriented intergovernmental organization, the Council of Europe remained committed to further developing the human rights and rule of law standards, maintaining its human rights institution character.<sup>73</sup> In the 1990s the role of these values become much more significant since the European integration process needed solid democratic and human rights architecture, a stable system of rule of law as well.<sup>74</sup>

The Council of Europe was stepping up to the challenge, granted the full membership to Eastern European States by fulfilling some fundamental conditions such as the abolition of the death penalty, ratification of the European Convention on Human Rights in order that the new democracies could benefit from the high level human rights standards. The Council of Europe thus assumed the role in preparing the new democracies for the EU accession. At the same time, the Organisation intensified the standard-setting activity and developed the monitoring capacity to provide assistance and expertise to the new democracies.<sup>75</sup> Given the fact that the EU frequently refers to the norms and standards of the Council of Europe, especially the opinions of the Venice Commission is often cited, the goal of the Council of Europe to be more visible in the international scene appear to have been reached.

One can also conclude that the political and social developments of the region contributed to the reform of the Organisation. However, the interests of Central Eastern Europe and the Council of Europe met in the revitalization of standard-setting and supervising activity, since

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<sup>71</sup> Author's impression based on the personal participation in these consultations.

<sup>72</sup> Conference on Security and Co-operation in Europe

<sup>73</sup> Author's opinion

<sup>74</sup> Outcome Document of the World Summit, 2005, Preamble and in Article 2 of the Treaty on European Union

<sup>75</sup> Rule of law checklist recently adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)



the assistance and expertise of the Council of Europe helped the new democracies in achieving their Euro Atlantic integration ambitions.<sup>76</sup> Petra Roter, former president of the Advisory Committee of the Framework Convention for the Protection of National Minorities<sup>77</sup> also argue in the same vein : “At the time, CoE membership represented more than just symbolic value for several states, namely those that wished to join the EU. Their entry into the CoE, subject to their meeting certain criteria as set by PACE, was broadly seen as a waiting room for their membership in the EU. (Roter, P. 2017. p. 42).

Special relationship between the two Organisations is further deepening, however their negotiating power and bargaining positions are highly different to the detriment of the Council of Europe. The fact that the European Union finance several CoE activities in the framework of common and specifically targeted programmes show the weight and influence of the EU in the everyday function of the Council. The joint programmes are theoretically co-financed by the two organisations but in practice the EU provides 80-95% of the funding needs of specific projects which make the Council of Europe more and more to the role of subcontractor of the European Union (CoE Programme and Budget 2022-2025, 2021 p. 201). As an illustration, the total budget of the Council of Europe for 2022 is 477 million euros, and the proportion of the funds coming from the European Union for the ongoing joint programmes is 195 million, which represents the 40% of the total budget of the Council.<sup>78</sup> The exclusion of the Russian Federation has also created major financial challenges for the Council of Europe, which would in all probability lead to the strengthened dependence of the Council from the European Union, in case that the missing financial sources will be partly provided by the Union. Obviously this increasing influence will have serious impact on the already unequal relations between the organisations and on the activity of the Council as “who pays the piper, calls the tune”. Another element which could shed light on their liaison is the long negotiation process on the accession of the European Union to the European Convention of Human Rights. The Lisbon Treaty<sup>79</sup> in 2009 created the legal obligation, Protocol 14 to the ECHR created the possibility that the European Union accede to the human rights convention of the Council of Europe. Negotiation rounds on the modalities of the EU accession started in 2012 and were concluded in agreement but “On 18 December 2014, the Court of Justice of the European Union delivered its Opinion 2/13, concluding that the agreement on the accession of the European Union to the European

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<sup>76</sup> This reflects the author’s opinion

<sup>77</sup> Hereinafter referred to as Framework Convention or FCNM

<sup>78</sup> Council of Europe’s budget (CoE Website)

<sup>79</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community 2007/C 306/01, Official Journal of the European Union, 17 December 2007.

Convention on Human Rights is not compatible with Article 6(2) of the Treaty on European Union or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on Human Rights.”<sup>80</sup> The accession issue apparently became the question of pre-eminence between the EU Court and the European Court of Human Rights of the Council of Europe. Although the negotiations re-started in 2020<sup>81</sup>, sceptical voices are strong enough and the stage of the negotiations infers an uncertain outcome, which perfectly reflects the EU position regarding the special relationship and the role patterns between the EU and the Council of Europe.

## **Chapter 2: THE HISTORIC ENLARGEMENT<sup>82</sup>**

In order to offer an adequate answer to the initial hypothesis of the research, it is necessary to present the Eastern enlargement including the accession of the Russian Federation to the Council of Europe. As it is described in the subsequent chapters it was far from being obvious for all leading officials of the Organisation that such a large-scale increase in the membership will be beneficial for achieving the mission of the Council of Europe. The debates over the continued enlargement perfectly reflect the dilemma, what will be the medium-term or long-term consequences of the decision to advance the membership for such a global actor, as the Russian Federation, which blatantly violated the fundamental values enshrined in the Statute of the Council of Europe already at the moment of its accession. Russia submitted its membership application in 1992 and following the decision of the Committee of Ministers in June 1992, the cooperation with a view to enabling the accession started (CM Resolution (92)27), the Parliamentary Assembly developed a long list as a precondition of the full membership (PACE Opinion 193, 1996). In effect the first war and military interventions in Chechnya were still ongoing when Russia joined the Organisation on 8 February 1996 (CM Resolution (96)2).

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<sup>80</sup> EU accession to the ECHR, Negotiation process, CoE website

<sup>81</sup> CM decision on the continuation of the ad hoc terms of reference for the CDDH to finalise the legal instruments setting out the modalities of accession of the European Union to the European Convention on Human Rights (CM/Del/Dec(2020)1364/4.3), 15 January 2020.

<sup>82</sup> Some parts of chapters 3.1, 3.2., 4.1., 4.2., 5.1, 5.2. are published in the Author’s identical titled article (2020. pp. 453-471) In Szerényi, Zs-Kaponyi, E-Benczes, I 2020. Contemporary Global Challenges in Geopolitics, Security Policy and World Economy.

## **2. 1. Pre-enlargement period**

This chapter aims to give an overview on the milestone events and documents leading to the Eastern Enlargement, and seeks to provide an exhaustive, possibly chronological analysis of the tendency during pre-enlargement period. It is a basic principle that both statutory organs of the Council of Europe<sup>83</sup>, the Committee of Ministers<sup>84</sup> and the Parliamentary Assembly<sup>85</sup> in general, closely follow the trends and events of the surrounding world for a timely and comprehensive response to all kind of challenges. In the Europe of the 1980s, fundamental changes were in the air, but the organisation had had a particular focus on East-West relations since the beginning of the 1970s. It followed with a special interest the multilateral exploratory talks to prepare the Conference on Security and Cooperation in Europe. In its recommendation the Parliamentary Assembly expressed its hope to establish an “increased cultural cooperation, involving the free movement of people, ideas and information between East and West” and an “increased cooperation among European States by establishing a framework for freer economic, industrial and scientific exchanges, and for joint projects in the power, transport and environmental fields” as early as 1973 (PACE Recommendation 692 (1973)). In this recommendation, PACE also recommend that the Committee of Ministers “reassess their policy towards Eastern Europe in the light of the Conference on Security and Cooperation in Europe to which the Council of Europe should make a contribution, and discuss the possibility of establishing cooperation with East European States in certain Council of Europe activities, such as conventions and technical intergovernmental work.” Parallel to this, PACE instructed its own committee on European Non-Member Countries to study developments in the relations between member states and European Non-member States and the prospects for improve cooperation. (PACE Order 332 (1973) on East-West relations in Europe).

The approach of the organisation towards the European non-members countries was later determined by the implementation process of the Helsinki Final Act. The Conference on Security and Co-operation in Europe, which opened at Helsinki on 3 July 1973 and continued at Geneva from 18 September 1973 to 21 July 1975, was concluded at Helsinki on 1 August 1975. <sup>86</sup> The Helsinki Final Act, signed on 1 August 1975, setting on the one hand the guiding

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<sup>83</sup> Hereinafter referred to as CoE

<sup>84</sup> Hereinafter referred to as CM

<sup>85</sup> Hereinafter referred to as PACE

<sup>86</sup> Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and Yugoslavia

principles of relations between Participating States and enshrining the provisions for co-operation in the field of economics, science, technology, environment, as well as in humanitarian and other fields. (Conference on security and co-operation in Europe Final Act, Helsinki 1975). As a follow-up to the Conference, the Participating States “declared furthermore their resolve to continue the multilateral process initiated by the Conference... on the deepening of their mutual relations, the improvement of security and the development of co-operation in Europe, and the development of the process of détente in the future;” (Helsinki Final Act, Follow-up to the Conference p. 2). In the first half of the 1980s the Council of Europe sought to intensify relations with the Eastern European countries in the field of commercial, economic, scientific and industrial cooperation, as the relevant resolutions demonstrate (PACE Resolution 778 (1982), PACE Resolution 827 (1984), PACE Resolution 867 (1986)). Furthermore, PACE called upon governments and parliaments of member states to intensify European co-operation particularly in the educational, cultural, economic, environmental, legal and scientific fields. (PACE Resolution 826 (1984)). However, the Council of Europe also began to pay increasing attention to the Eastern European countries, starting in 1985. In January 1985, the Committee of Ministers dedicated a special session to relations with Eastern part of Europe (Gazdag, Kovács 1999. p. 15). This special meeting of the Ministers for Foreign Affairs was held on the invitation of Hans-Dietrich Genscher, Minister for Foreign Affairs of the Federal Republic of Germany, Chairman of the Committee of Ministers at that time. Given the fact that the special meeting was of an informal character, in order to allow a “true and spontaneous dialogue”, the Ministers’ Deputies agreed before that no official record nor final communiqué would be issued. (Conclusions of the 379th meeting of the Ministers’ Deputies, 25 January 1985, CM/Del/Concl(85)379). Another field of possible cooperation between East-West was identified in strengthening cultural identity. Before the adoption of the Resolution on European cultural identity<sup>87</sup> by the Committee of Ministers in 1985, the states’ representatives underlined during the preparatory debates that “The East-West dialogue should not be reduced to questions of security and arms reduction and, as consequence of such a concept, to the dialogue between the two superpowers only. Europe should take part in the dialogue in fields where it could contribute in a particularly meaningful way. The Resolution on European cultural identity therefore had a twofold political aim: it was a signal of the Council of Europe member states to Eastern European countries to expand cultural co-operation, and it underlined for themselves the role member states wanted to play in this field”. (Conclusions of the 380th and

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<sup>87</sup> Resolution (85) 6 on European cultural identity adopted by the Committee of Ministers on 25 April 1985.

381st meeting of the Ministers' Deputies, CM/Del/Concl (85) 380 and 381, p. 42). In order to focus on the long-term future of European co-operation, a Commission of Eminent European Personalities chaired by Emilio Colombo was set up in 1984 (PACE Recommendation 994 (1984) on Future of European co-operation (General Policy of the Council of Europe). The eight-member Colombo Commission gathered former ministers and a former president of the European Parliament from Christian Democrats, Socialists and Conservatives. The task of the commission, under the chairmanship of the former Foreign Minister of Italy Emilio Colombo, was to present long-term proposals related to the broader perspective of Europe encompassing more than the Western European democracies. Their primary task should, however, be to strengthen the unity of the pluralistic democracies of Europe and to counter tendencies away from such unity. The Colombo Commission communicated its final report to both organs of the Council of Europe in June 1986 and dealt, among other things, with possibilities of European co-operation across the frontiers between the different economic and political systems. Following this final report, PACE called for establishment of permanent contacts with Eastern European countries at parliamentary level to strengthen the cooperation in certain fields such as culture, the environment and trans-frontier cooperation. PACE Recommendation 866 (1986) supported the recommendations of the Colombo Commission to inform the non-member European states about the Council of Europe's readiness for dialogue and cooperation not only in the sphere of culture, but also in other fields within its competence. The recommendation also urged "that the Secretary General of the Council of Europe be instructed to approach the governments of these states with a view to determining the fields in which co-operation might be envisaged and working out the practical arrangements."

The Council of Europe was accepted as an interlocutor by all participants in the CSCE process in 1987, so an Assembly delegation visited Romania in April and the Secretary General paid an official visit to Hungary in June. (PACE Resolution 886 (1987) on Conference on Security and Co-operation in Europe). PACE also decided to intensify contacts at parliamentary level with the Eastern European countries. As a result of the détente between East and West, dialogue was boosted, and the number of official visit increased in 1988. Talks between the enlarged Bureau and delegations from the Supreme Soviet were held in Strasbourg in April and from the Romanian Grand National Assembly in June. Gyula Horn, the Secretary of State for Foreign Affairs of Hungary, paid an official visit to Strasbourg in May, the President of the Assembly visited Yugoslavia with an Assembly delegation in April, and went to Warsaw in November at the invitation of the Speaker of the Sejm (Parliament) after an official visit to that country by

the Secretary General last March. (PACE Resolution 909 (1988) on East-West relations (General policy of the Council of Europe).

The year of 1988 represents a kind of prelude to the later enlargement of the Council of Europe, too. After ten years of pause, a new European state applied for membership. San Marino became the 22nd member state of the organisation in November, and a couple of months later, as a real symbol of the easing climate between East and West, Finland, as the 23<sup>rd</sup> member state, acceded to the Council of Europe in May 1989.

By this time, both organs of the Council of Europe had sought to identify the role of the Council of Europe in the European construction. PACE “stressed the irreplaceable political role of the Council of Europe as co-ordinator of all European parliamentary democracies and as a framework for real political dialogue between these democracies with the aim of preserving their internal cohesion and harmonising their positions on major international questions.” (PACE Recommendation 1103 (1989) on the Future role of the Council of Europe in the process of European construction) PACE also underlined in this recommendation “the extent to which this stronghold of democracy and human rights is indispensable for European co-operation as a whole and particularly for the policies of integration pursued in the framework of the European Community”.

In its Declaration commemorating the 40<sup>th</sup> anniversary of the organisation, the ministers for foreign affairs of the member states welcomed the reform process in some countries of Eastern Europe and possible future co-operation to establish genuine democracies throughout Europe (CM Declaration, 84th Session). The Declaration underlined that “co-operation with these East European countries should lead to the promotion of human rights, the rapprochement of individuals and groups across frontiers and the finding of solutions to the challenges of society today, thus contributing to awareness of Europe's cultural identity and of the heritage Europeans share in the values of democracy and freedom. In this respect we are ready to engage in an open and practical dialogue with European non-member countries on the respect and the implementation at national and international level of the principles of human rights and pluralist democracy enshrined in the Council of Europe's Statute, the European Convention on Human Rights and the European Social Charter.”

In order to simplify the accession of the Central and Eastern European countries, the Parliamentary Assembly decided to “grant special guest status for national legislative assemblies of European non-member countries which have shown their interest and which apply and implement the Helsinki Final Act and the instruments adopted at the CSCE conferences...” (PACE Resolution 917 (1989)). At the beginning of 1990 the Parliamentary

Assembly was already prepared to receive accession requests from Central and Eastern Europe. It defined as fundamental criteria for accession the importance of full implementation of commitments agreed in the CSCE framework (PACE Recommendation 1119 (1990)). In this recommendation PACE also called upon the Committee of Ministers to ensure that its high-level meeting “prove its determination to build on the Council of Europe's forty years of experience, which qualify it uniquely to provide a structure for bringing together, on the basis of shared values, all the states of Europe, thereby contributing to the practical realisation of such visions as the ‘common European home’ already expressed two decades ago in the Parliamentary Assembly...”. The special ministerial meeting of the Committee of Ministers “agreed that the Council of Europe should play a truly useful role in meeting real needs, be they for example, the transition to and the consolidation of pluralist democracy, the defence of human rights and the establishment of the rule of law.” (Minutes of the special ministerial meeting of the Committee of Ministers held in Lisbon on 23 and 24 March 1990). As regards admission to membership of the Council of Europe, the ministers firmly underlined that “all the statutory requirements must be met, without lowering in any way our standards.” The Committee of Ministers and the Assembly agreed that the Council of Europe is a “suitable framework for initiating Central and East European countries into full participation in the construction of Europe” and “could usefully contribute to the political, legal, social and cultural dimensions of Europe” and highlighted the protection of minorities through an urgent appeal to all parties concerned to refrain from violence and seek peaceful solutions to ethnic problems (PACE Recommendation 1124 (1990)).

To conclude the pre-enlargement period, which is chronologically defined by this thesis as starting from 1973, with the opening of the multilateral talks of the Conference on Security and Cooperation in Europe, until the accession of the first Eastern European country in 1990, it may be considered that the increasing interest of the Council of Europe was due to the world political situation between the two superpowers, while the generally easing climate definitely influenced the possible engagement of the organisation. The intention that the Council of Europe should take the lead in shaping the transforming Europe was slowly developed and was definitely affected by the increasing and concurring involvement of the CSCE.

## **2.2. Dilemma of continued enlargement**

The continued openness towards Eastern European countries and coordinated efforts to identify the possible fields of cooperation, such as common European cultural heritage, led to the

membership of Hungary and Poland in the European Cultural Convention in 1989. Later on, Hungary, as first country from the Eastern European club, joined the organisation on 6 November 1990.

However much it was expected that these fundamental changes would happen sooner or later, the year of 1991 became remarkable from a geographical and geopolitical point of view. As Walter Schwimmer, secretary general of the Council of Europe between 1999-2004 remembered “The differences are instantly apparent if one compares the map of Europe on 1 January 1991 and 31 December of the same year. In those 12 months, the accounts left open by the First and Second World War were finally closed off, and the order shaped by the Versailles Treaty of 1919, the German-Soviet Pact of 1939 and the Yalta Arrangements of 1945 lost its *raison d’être*. Two multi-ethnic, pluri-national federations – one covering 40% of Euro-Asian continent and one-sixth of the world’s land mass, and often described as the last colonial empire, the other an increasingly shaky jigsaw in the most volatile part of Europe – were simply swept off the map.” (Schwimmer, 2004. p. 129.)

In the course of the first three years of European democratic transition, nine countries from the former Soviet area officially acceded to the Council of Europe: Hungary, Poland, Bulgaria, Estonia, Lithuania, Slovenia, the Czech Republic, Slovakia, and Romania. (CoE Website, 46 member states). This relatively rapid transformation generated an institutional adaptation to the challenges of the new mission. The mechanisms and structures characterized the face and image of the CoE in the last three decades, so institutional development deserves to be given a separate analysis, and the thesis shall present them in another chapter.

The heads of states and governments of the member states of the Council of Europe met for the first time in the organisation's history in Vienna, on 9 October 1993. Although they emphasised that “the Council of Europe is the pre-eminent European political institution capable of welcoming, on an equal footing and in permanent structures, the democracies of Europe freed from communist oppression” and “For that reason the accession of those countries to the Council of Europe is a central factor in the process of European construction based on our Organisation's values” the invitation to the Council of Europe was not an unconditional offer. The first Summit, in the Vienna Declaration set the clear criteria of accession. The fundamental requirements were to sign and ratify the Convention for the Protection of Human Rights and Fundamental Freedoms, including the abolition of the death penalty. The Council of Europe made abolition of the death penalty a precondition for accession. No executions have been carried out in any of the organisation's 47 member states since 1997. In compliance with the



institutions and legal system with the basic principle of the Council of Europe, free and fair election on universal suffrage, freedom of expression, and respect for national minorities are also mandatory. (Vienna Declaration and Action Plan 1993). The heads of state and governments also underlined in Vienna their “will to promote the integration of new member states and to undertake the necessary reforms of the organisation, taking account of the proposals of the Parliamentary Assembly and of the concerns of local and regional authorities, which are essential to the democratic expression of peoples.” The political leadership of the CoE member states confirmed “the policy of openness and co-operation vis-a-vis all the countries of Central and Eastern Europe that opt for democracy. The programmes set up by the Council of Europe to assist the democratic transition should be developed and constantly adapted to the needs of our new partners.” (Vienna Declaration and Action Plan 1993).

By the First Summit of Heads of States and Governments in Vienna, the number of members had increased from 23 to 32. As Walter Schwimmer recalls “At a safe distance from the slaughter in Bosnia, the Council was heading a historic spring – one that would see its membership rise, in the space, of a few weeks, from 26 to 31... Thus, on the eve of its first Summit, the ‘one Europe’ embodied in the Council was not simply growing faster than ever before, but was also preparing- while insisting more than ever on the statutory values which gave its identity – to change character: originally a ‘club’ for accredited democracies, it gradually evolved into a ‘college’ for ‘students’ of democracy, both advanced and beginners.” (Schwimmer, 2004, p. 133.)

Reading the memoirs above, it is not surprising that despite the official commitment of the organisation to Eastern enlargement, some voices questioned the necessity and meaningfulness of the rapid enlargement process. Those who raised concerns were convinced that overly hasty progress would lead to the weakening of values and principles, and that the Council of Europe would be sold out. (Gazdag, Kovács 1999). This question became an issue in the election process of the new secretary general in 1994. The government of France submitted the candidature of Catherine Lalumière, the secretary general in office in November 1993, in the hope of her re-election for a second term (CM(93)195, Confidential<sup>88</sup>). At the same time the government of Sweden submitted the candidature of Daniel Tarschys for the post in December 1993 (CM(93)222, Confidential). The office of Secretary General Lalumière prepared a

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<sup>88</sup>The Committee of Ministers Resolution Res(2001)6 on access to Council of Europe documents recalls the rules governing access to its documents (except those relating to “human rights” and “monitoring” meetings) since 1 January 2001, namely: in documents classified “restricted” are declassified a year after being issued, ii. documents classified “confidential” are declassified ten years after being issued;

discussion paper for the 94<sup>th</sup> Session of Ministers for Foreign Affairs to generate a common reflection on the development of the organisation and on the implications of continued enlargement, particularly the Russian Federation's accession (CoE Discussion paper 1994). The paper highlighted that the Council of Europe was beginning to be seen as the European institution most capable of responding to the demand from the emerging democracies in Central and Eastern Europe. However, through the enlargement process its role and forms of actions also evolved significantly. The reflection paper also pointed out that the new role of the organisation is "highly influenced by the renewed outbreak of armed conflicts on our continent...as well as the emergence of new challenges (migration, rise of intolerance, social exclusion etc.) and welfare state crisis". The secretary general concluded that the Europe of the Council of Europe is less homogeneous and more unstable, compared to the period before 1989. Secretary General Lalumière was deeply concerned about the prospects of future enlargement, especially the admission of the Russian Federation, and she questioned the political and institutional impact of future Russian membership on the activity of the organisation. She warned that "in the short term this radical pursuit of an open-door-policy will... entail increasing heterogenisation within the organisation. It may be accompanied by risks in the form of a lessening of member states' common resolve and a weakening of the organisation. By virtue of its size, diversity and great-power status, Russia also raises special problems of integration." (Discussion paper p. 6). The secretary general in office predicted that "the accession of such countries as Russia and Ukraine is liable to cause an immediate increase in the number of applications lodged under the European Convention on Human Rights." (Discussion paper p. 10).

On the contrary, the Swedish candidate for the post of secretary general was deeply convinced that the Council of Europe could effectively promote the democratisation process by formulating serious conditions for newcomers. The values and principles of the Council of Europe were never dealt with so intensively and thoroughly as during the enlargement. This process gave new impetus to the honouring of obligations and commitments by member states in both organs of the Council of Europe. The enlargement helped the organisation to identify new activity fields, and the compilation and entry into force of the two legally binding instruments in national minority protection<sup>89</sup> can be considered as a major step forward to regulate a very sensitive area. The efforts by the Council of Europe aiming to promote the

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<sup>89</sup> The Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages

development of democracy and rule of law mechanisms in Central and Eastern Europe also contributed to the pre-accession strategy of the European Union. (Tarschys, Gazdag, Kovács 1999, p. 21-22.)

The enlargement process of the Council of Europe was affected by the fact that Daniel Tarschys was elected as Secretary General in April 1994. During his mandate between 1994-1999, Andorra (1994), Latvia, Albania, Moldova, Ukraine, North Macedonia (1995) the Russian Federation, Croatia (1996) and Georgia (1999) were granted full membership (CoE Website)

Year of accession	No.	Acceding state
1990	24	Hungary
1991	25	Poland
1992	26	Bulgaria
1993	27	Estonia
	28	Lithuania
	29	Slovenia
	30	Czech Republic
	31	Slovakia
	32	Romania
1994	33	Andorra
1995	34	Latvia
	35	Albania
	36	Moldova
	37	Ukraine
	38	North Macedonia
1996	39	Russia
	40	Croatia
1999	41	Georgia
2001	42	Armenia
	43	Azerbaijan
2002	44	Bosnia and Herzegovina
2003	45	Serbia

2004	46	Monaco
2007	47	Montenegro

Table 1: Chart of Eastern enlargement by the author

Source: CoE website, 47 member states

<https://www.coe.int/en/web/portal/47-members-states>)

However, when the 94th session of the ministers of foreign affairs was held in May 1994, the Council of Europe faced only the challenge of a new wave of enlargement. They adopted a final communiqué reflecting the decisions of the Vienna Declaration and Action Plan approved some months before at the First Summit of the Heads of State and Government of the member states of the Council of Europe on 9 October 1993.

As to the issue of enlargement, the discussion paper of the outgoing secretary general served as the basis for further negotiations. Nine countries presented their applications for membership at that time.<sup>90</sup> As far as the Russian Federation was concerned, the ministers agreed on the importance that the presence in the Council of Europe of a democratic Russia, firmly anchored in Europe, alongside its European neighbours, would have for the stability of the continent. The foreign ministers decided to closely follow developments, and instructed the Committee of Ministers to present a detailed report on the political and institutional prospects of the Council of Europe in light of the impact of the enlargement and the increasing involvement of the organisation in establishing a more secure Europe. (Final communiqué of the 94th Session, 1994).

With regards to the concrete results and decisions of the Vienna Declaration, the Final communiqué noted the progress and called for further immediate actions in those fields where the concepts of the Summit had not yet been fulfilled. In fact, the Vienna Declaration not only established the criteria for accession, as pointed out earlier, but also decided on those measures, which were indispensable in preparing the organisation for the possible future challenges and benefits of enlargement. Among others, in the Action Plan of the Vienna Declaration the heads of state and government “resolved to establish, as an integral part of the Convention, a single European Court of Human Rights to supersede the present controlling bodies” and “mandate the Committee of Ministers of the Council of Europe to finalise a draft protocol amending the

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<sup>90</sup> Albania, Andorra, Belarus, Croatia, "The Former Yugoslav Republic of Macedonia", Latvia, Moldova, Russia, Ukraine

European Convention for the Protection of Human Rights and Fundamental Freedoms, on which substantial progress has been made, with a view to adopting a text and opening it for signature at its ministerial meeting in May 1994”.

Besides recognising the lessons of the bloodiest armed conflict on the territory of the European continent since the end of World War II, the resurgence of aggressive nationalism in Yugoslavia, European leaders agreed that the rights of national minorities must be ensured in order to guarantee peace and stability in Europe. Therefore, they decided “to instruct the Committee of Ministers [...] to draw up confidence-building measures aimed at increasing tolerance and understanding among peoples [...] to draft with minimum delay a framework convention specifying the principles which contracting States commit themselves to respect, in order to assure the protection of national minorities. This instrument would also be open for signature by non-member States” as well as “to begin work on drafting a protocol complementing the European Convention on Human Rights in the cultural field by provisions guaranteeing individual rights, in particular for persons belonging to national minorities.” (Vienna Declaration and Action Plan).

The background and the circumstances of the drafting process in relation to the national minorities will be presented in the following chapter. Related to the reform of the European Convention on Human Rights control mechanism, much progress was made after the Summit, since Protocol No. 11 to the European Convention on Human Rights was opened for signature before the 94th session of the foreign ministers. This new protocol merged the European Commission of Human Rights and the European Court of Human Rights, running in parallel and with a temporary character, rationalised the machinery for enforcement of rights and liberties guaranteed by the Convention and stipulated that all alleged violations of the rights of persons were to be referred directly to the new permanent Court. (Explanatory report to Protocol No. 11). Though the ministers expressed their strong wish that the Protocol should enter into force as soon as possible, following the necessary five ratifications by the Parties to the European Convention of Human Rights, Protocol No. 11 only entered into force four years later, in 1998.

Still, the Council of Europe had to be prepared not only in substantial matters for the enlargement but in procedural aspects. At their 95th session in November 1994 the foreign ministers adopted the report on the effects of the enlargement. The document focused on

political aspects and the principal institutional implications of further enlargement. As to the political nature, the foreign ministers emphasised that this enlargement would “enable the Council of Europe to achieve its true pan-European dimension [...] the Council of Europe will be put into a position to contribute efficiently to the democratic security and the stability of the continent, whilst providing to all European countries a frame within which they can come closer together and forge an ever-greater unity among themselves through co-operation and political dialogue.” (Report on the enlargement, 1994, p. 2).

As far as the institutional, procedural implications are concerned, substantial consultations preceded the adoption of the documents. Ad hoc working groups were set up to calculate the scales of member states’ contributions, administrative matters or the intergovernmental programme of activities. As a result of the negotiations, the decision based on the report explicitly stipulated the principle of equality between member states irrespective of geographical area, size of population, and political, economic or other influence. The document refers to the issue of the membership and powers of the Bureau of Ministers’ Deputies<sup>91</sup>, the official languages and additional working languages as well as the voting rules, by defining the question regarding the majorities required for decisions of the Committee of Ministers. Another essential element was the decision on the application of Article 9 of the Statute for cases in which a member state, apart from exceptional circumstances having prevented it from fulfilling its obligation, defaults on its financial obligations for two years. (Report on the enlargement, 1994, p. 3-8). Article 9 empowers the Committee of Ministers to “suspend the right of representation on the Committee and on the Consultative Assembly of a member which has failed to fulfil its financial obligation during such period as the obligation remains unfulfilled” (Statute of the Council of Europe).

Against these preparations or due to the necessary consultations and preliminary institutional changes, Secretary general Daniel Tarschys was determined to open the door for Russia. His conviction that it is “better to include than exclude” might come from his political experiences, as he spent several terms as the member of the Swedish delegation to the Parliamentary Assembly. He authored as rapporteur the recommendation of the Assembly on the crisis in the Soviet Union, in 1991: “The Assembly expresses its concern about the threats to European and global security that might result from insufficient democratic, political control over the nuclear arsenal of the Soviet armed forces, and demands that the power of decision on nuclear arsenals

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<sup>91</sup> Commonly known as Committee of Ministers

remain with the central government.” (PACE Recommendation 1161, p. 6). The Assembly was also concerned about the “proliferation of ethnic and other tensions in the area, so it was convinced that Western support is required, especially in the form of technical and humanitarian assistance, and by the removal of obstacles and encouragement of trade. It emphasises the need for stabilisation measures necessary to expand the opportunities for domestic and foreign investments in the East European economies.” (PACE Recommendation 1161, p. 7-9). According to Daniel Tarschys, in order to ensure the stability of the region, it was urgently necessary to “increase substantially the resources of the organisation in order to make available to the central and republican authorities of the Soviet Union all constitutional, legal and other assistance for the consolidation of democracy as may be requested.” (PACE Recommendation 1161, p. 11).

Therefore, he intentionally and strongly advocated for Russian membership in the Council of Europe, in order to have some control over developments. If we consider the enlargement from an institutional point of view, from the angle of the Council of Europe, the wish to set clear and severe criteria for accession was absolutely legitimate. On the other hand, if we assess the geopolitical importance of the Eastern enlargement, the unique and historical chance to unite Europe or rather to create a wider, political Europe sharing the same democratic values, there was no other path to follow. Enlargement was necessary, even at the price of facing possible new challenges in political, legal and financial terms some years later.

Daniel Tarschys was the first secretary general in the history of the Council of Europe to address the North Atlantic Council of NATO in July 1996. In his intervention, Tarschys presented his credo about the eastern enlargement of the Council of Europe. He argued that the Council of Europe has increased its contribution to democratic security in Europe through the intensive enlargement process. The Council, he claimed, had lent its full support to the international efforts to implement the Dayton agreements, to strengthen European security by civilian means, through democracy building measures to promote the core principles of the Council in the newly joined states. He noted that “the recent member states have varied backgrounds: some lived under dictatorship for more than 40 years, others for over 70 years; some had previously experienced democracy, while others never had; and some had never existed before as an independent state. This is also why accession to the Council of Europe is often an arduous process which can go on for more than four years, with each single application judged on its

own merits. Moreover, accession is accompanied by strict commitments undertaken by the new member states, in agreement with the Parliamentary Assembly, to continue their reforms.”

He therefore had a different opinion about the necessity of enlargement, and disagreed with those who regarded the enlargement process as a triumph of politics over principles. As he argued “it should rather be seen as the politics of principles: the conviction that Europe can only be built on the solid foundations of shared values and that joint efforts are needed to strengthen these foundations, for nowhere are they rock solid. This is true both in Central and Eastern Europe, where the economic vicissitudes of the transition and stark new inequalities pose constant threats to the great achievements that have already been made in building free and democratic societies, and in Western Europe, where new tensions and social cleavages tend to erode civic confidence in established political institutions and procedures.” He concluded his statement by highlighting that “The new European security architecture should not create new dividing lines in Europe. Security on this continent is a matter for European institutions whose membership may or may not overlap, but whose goals are interdependent. In this respect, the Council of Europe's efforts are complementary to those of NATO, including its work through the NACC and the Partnership for Peace. (Tarschys 1997, pp. 4-9).

### **1. 3. Consequences of an "early" invitation**

The open-door policy of the Council of Europe had had a serious impact on the activity and role of the organisation, improving its visibility in the competitive cooperation between international organisations. The new structure and mechanism, and institutional reform, definitely helped the Council of Europe to redefine its mission, but it also faced different political and legal challenges nearly a decade later. The internal and inter-state conflicts of the new members determined the political agenda after a while, to which the human rights organisation endeavoured to develop legal and human rights answers. The Council of Europe progressively developed, improved and strengthened the supervision process to help the member states to comply with the norms and standards of the organisation, and to uphold the highest democratic and human rights standards. Both statutory organs and the convention or not convention-based mechanisms established their own monitoring procedure. However, the legal implications were much more tangible and became highly visible over time. One of the most recognised achievements of the Council of Europe membership is the right of individual



application enshrined in Article 34 of the European Convention of Human Rights<sup>92</sup> to the European Court of Human Rights. Each member state must ratify the European Convention of Human Rights and Fundamental Freedoms when joining the organisation, and the Court rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. The opening up to Eastern Europe enlarged this right to 800 million people throughout the Council of Europe area and this resulted in an immense growth in the workload of the Court. By the end of 2010 the Strasbourg Court was faced with 139,630 pending applications for judgement before a judicial format (in Annual Report, ECtHR 2010).

For the reasons and developments presented in the introductory part of this thesis, the heads of state and government decided at the summits in Vienna and Strasbourg, in 1993 and 1997 respectively, to establish a number of new institutions (e.g. European Commission against Racism and Intolerance/ECRI, Commissioner for Human Rights, Venice Commission) with the aim of assisting the Eastern European countries to bring their democratic and political architecture into line with the European norms and standards. Accordingly, the membership of the Council of Europe became a first step for the EU aspirant countries in the integration process.<sup>93</sup>

### *2.3. 1. From the institutional renewal to the political and legal challenges of the organisation*

This section aims at providing a brief analysis of the developments leading to the establishment of the new institutions, seeks to give a concise overview of the new mechanisms and new standard-setting, which helped mainly the countries of Central Eastern Europe to build their democratic structure, to bring closer their national legislation with the European standards, which helped, as described more in detail in Chapter II, the EU accession process.

The present chapter attempts to highlight that the most relevant and influential human rights and rule of law instruments of the Council of Europe were established during the political transition of Central Eastern Europe, in whole or in part as an answer to the new challenges. The introduction of these structures and new legal instruments also help to answer the first

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<sup>92</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Rome, European Treaty Series (ETS) No. 5.

<sup>93</sup> Hungary became the 24<sup>th</sup> member state of the Council of Europe on 6 November 1990 and the first from the Eastern European region before Poland (1991), Bulgaria (1992), Estonia, Lithuania, Slovenia, Czech Republic, Slovakia, Romania (1993), Latvia, Ukraine, Albania, “The former Yugoslav Republic of Macedonia” (1995), Croatia, The Russian Federation (1996), Bosnia and Herzegovia (2002), Serbia (2003), Montenegro (2007).

research question, whether the political and legal challenges could endanger the functioning of the Council of Europe in long-run. The reputation and added value of the new mechanisms, even if their efficiency is still far from the initial expectations provides a kind of comparative advantage for the Council of Europe, particularly in the field of national minority protection, as the only legally binding instruments, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages (see them in detail at the end of this Chapter) were elaborated here. Besides, the presentation of the PACE monitoring mechanism and the efforts to strengthen the procedure by providing institutional background becomes important to understand the context of the responses of the Council of Europe to the political and legal challenges to be assessed in Chapter IV.

### *European Court of Human Rights*

Although the European Court of Human Rights was established in 1959 by Article 19 (2) of the ECHR,<sup>94</sup> the full-time and permanent court has been in operation only since 1998, as from the entry into force of Protocol No. 11 to European Convention of Human Rights. The Convention rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. The judgments are binding on the countries concerned and have led governments to alter their legislation and administrative practice in a wide range of areas. The Court's case law makes the Convention a powerful living instrument for meeting new challenges and consolidating the rule of law and democracy in Europe. The Court monitors respect for the human rights of 800 million Europeans in the 47 Council of Europe member states that have ratified the Convention (The Court in Brief, CoE Website).

Under the provision of Article 46 of the ECHR, the Committee of Ministers supervises the execution of the judgements of the Court. According to the decision of the Committee of Ministers on 30 March 2016, on the “supervision of the execution of judgments of the European Court of Human Rights: procedure and working methods for the Committee of Ministers’ Human Rights meetings”<sup>95</sup>, the (Human Rights) meeting of the Committee of Ministers is held on a quarterly basis to overview the state of play of execution. “The Department for the Execution of Judgments of the European Court of Human Rights advises and assists the

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<sup>94</sup> [https://www.echr.coe.int/Documents/Collection\\_Convention\\_1950\\_ENG.pdf](https://www.echr.coe.int/Documents/Collection_Convention_1950_ENG.pdf)

The Consultative Assembly of the Council of Europe elected the first members of the Court in January 1959 and the Court hold its first session in February 1959.

<sup>95</sup> GR-H(2016)2-final, 30 March 2016

Committee of Ministers in its function of supervision of the implementation of the Court's judgments. It also provides support to the member states to achieve full, effective and prompt execution of judgments.” (Department for the Execution of judgements of the European Court of Human Rights, CoE<sup>96</sup>).

As highlighted above, the responsibility for the supervision process is held by the Committee of Ministers, made up of the representatives of the governments of the 47 member states. Cases remain under supervision until the required general or individual measures have been taken, and the process is then closed by a final resolution.

Once judgments and decisions by the Court become final, states indicate to the Committee of Ministers the measures envisaged to remedy violation in an “action plan”. After introducing the measures, the “action report” is submitted by the contracting party. In the course of the supervision process, applicants, NGOs and national institutions for the promotion and protection of Human Rights can submit communications, in writing.

“The supervision of the adoption and implementation of action plans has followed a new twin-track procedure since January 2011. Most cases follow the standard procedure. An enhanced procedure is used for cases requiring urgent individual measures or revealing important structural problems (in particular pilot-judgments) and for inter-state cases.” (EXEC The supervision process, CoE)

Although the judgments have a binding force, the special human rights format of the Committee of Ministers has no real means to impose sanctions if the member state fails to implement the judgement. The last resort is the so-called “infringement procedure”<sup>97</sup> when the Committee, in application of Article 46 (4) of the ECHR, formally asks the Court to decide whether the member state in question has failed to fulfil its obligation to abide by the court's judgment in a given case. <sup>98</sup>

As described in the previous chapter, the rationale behind the elaboration of a new protocol to the Convention and to initiate reform of the system was largely politically motivated. The

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<sup>96</sup> The Department commonly known as EXEC

<sup>97</sup> First in the history of the Council of Europe it has been launched against Azerbaijan in 2017 December

<sup>98</sup> The supervision process, <https://www.coe.int/en/web/execution/the-supervision-process>

drastic and rapid increase in the number of new members provided legitimate reasons for preparing the Court and its controlling mechanism for the possibility of an increased workload.

Protocol No. 11. drafted following the instruction of the Vienna Summit, not only merged the Commission and the Court, establishing a single Court replacing the two supervisory organs, but reformed the competence of the Committee of Ministers in some respects. Before the entry into force of the new Protocol, the Committee of Ministers, as part of the tripartite system, had the right to decide in cases which were not referred to the Court.

After the entry into force of the new Protocol, the Committee of Ministers retained its competence under former Article 54 to supervise the implementation of the judgment. However, its competence under the former Article 32 of the Convention, to give a final binding decision in some cases, was abolished. According to the new provisions the jurisdiction of the Court was extended to all matters concerning the interpretation and application of the Convention, including inter-State cases as well as individual applications. In addition, the Court was empowered to give, as is the current practice, advisory opinions when so requested by the Committee of Ministers. Besides the establishment of the new, permanent Court, one of the most important changes was that individuals could apply to it directly (Explanatory report 1994. p. 7)

On the whole, Protocol No. 11. contributed to enhancing the effectiveness of the system, notably by improving the accessibility and visibility of the Court and by simplifying the procedure in order to cope with the influx of applications generated by the constant increase in the number of states (Explanatory report 2004. p. 1).

#### *European Commission against Racism and Intolerance (ECRI)*

The European Commission against Racism and Intolerance (ECRI) is a human rights monitoring body dedicated to the fight against racism, discrimination on grounds of “race”, ethnic/national origin, colour, citizenship, religion, or language (racial discrimination), xenophobia, antisemitism, and intolerance (ECRI’s Mandate). ECRI was set up following the decision of the first Summit of Heads of State and Government of the Council of Europe in 1993 (Vienna Declaration and Action Plan, CoE Summit, Vienna, 1993). The idea to convene

the Head of States and Governments of the Council of Europe was not only based on the wish that there is a unique chance to unite the European continent on commonly shared norms and principles after the fall of the Berlin Wall. The outbreak of the armed conflict in Yugoslavia, then the escalation of violation and especially the war in Bosnia served as a deterrent example at a global level. These events led European leaders to understand that the “resurgence of aggressive nationalism” with all its disastrous implications to national minority communities, “the perpetuation of spheres of influence, intolerance or totalitarian ideologies” (Vienna Declaration and Action Plan, 1993) threatened not only the peaceful European construction but could also have political and geopolitical effects on other regions. This recognition was translated into concrete actions at the standard-setting level of the Council of Europe when the political leaders of the CoE Member states decided to establish a committee of governmental experts with a mandate to supervise legislation, policies, and other measures to combat racism, xenophobia, antisemitism, and intolerance in the member states. The Action Plan of the Vienna Declaration empowered the new entity to formulate general policy recommendations, to study international legal instruments applicable related to reinforcement. (Vienna Declaration and Action Plan, 1993). After identifying the guidelines, the modalities of the new mechanism were formulated by the Committee of Ministers.

The Declaration and Action Plan adopted on 11 October 1997 in Strasbourg by the second Summit of Heads of State and Government of the member states of the Council of Europe decided to intensify the activities of the European Commission against racism and intolerance (Strasbourg Declaration and Action Plan, 1997). Following the relevant proposals of the Parliamentary Assembly as a reaction to the “threat posed to democracy by extremist parties and movements in Europe” (PACE Recommendation 1438 (2000)) the ECRI statute was adopted by the Committee of Ministers of the Council of Europe on 13 June 2002.

ECRI’s statutory activities cover country-monitoring, work on general themes and relations with civil society. ECRI issues General Policy Recommendations (GPRs) addressed to the governments of all member states. These recommendations provide guidelines which policymakers are invited to use when drawing up national strategies and policies (ECRI Standards).

In the framework of its country monitoring work, ECRI examines the situation concerning manifestations of racism and intolerance in each of the Council of Europe member states on an

equal footing and takes place in five-year cycles, covering nine to ten countries per year. ECRI's sixth monitoring cycle has begun in 2019 (ECRI Country Monitoring).

### *Commissioner for Human Rights*

The far-reaching changes and new challenges to European societies, as well as the significant enlargement of the organisation, led to the Second Summit of the Heads of States and Governments of the Council of Europe in 1997 (Final Declaration, Second Summit). At the Second Summit an Action Plan to strengthen democratic stability was outlined, which identified the areas of democracy and human rights, social cohesion, security of citizens as well as democratic values and cultural diversity, where there was a scope for immediate advances and practical measures (Action Plan 1997). The establishment of the Office of the Commissioner for Human Rights<sup>99</sup> was one of the proposals in the field of democracy and human rights to promote respect towards human rights in the member states. The Action Plan instructed the Committee of Ministers to study the possibilities for creating the office. This process led to the establishment of the institution in 1999 by a Resolution of the Committee of Ministers.<sup>100</sup> The 104th Session of the Ministers for Foreign Affairs was also an opportunity to celebrate the 50th anniversary of the Council of Europe. The foreign ministers reaffirmed their “determination fully to use the potential of the Council of Europe, as the pre-eminent political institution capable of bringing together, on an equal footing and in permanent structures, all the countries of Greater Europe....and reaffirmed the primacy of the human person in our policies” including the promotion of “these rights, and those protected by other basic Council of Europe instruments, in particular through the action of the Council of Europe Commissioner for Human Rights [...]” (Budapest Declaration 1999).

According to its Mandate, the Commissioner for Human Rights is an independent and impartial non-judicial institution to promote awareness of and respect for human rights in member states of the Council of Europe. The Commissioner shall be elected by the Parliamentary Assembly for a non-renewable term of office of six years.

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<sup>99</sup>Dunja Mijatović was elected Commissioner for Human Rights on 25 January 2018 by the Parliamentary Assembly and took up her position on 1 April 2018. She is the fourth Commissioner, succeeding Nils Muižnieks (2012-2018), Thomas Hammarberg (2006-2012) and Alvaro Gil-Robles (1999-2006).

<sup>100</sup> CM Resolution (99) 50 on the Council of Europe Commissioner for Human Rights adopted by the Committee of Ministers on 7 May 1999 at its 104<sup>th</sup> Session, Budapest, during the first Hungarian Chairmanship of the Committee of Ministers

The Commissioner has authority in – among others – the following fields: to promote education in and awareness of human rights, provide advice and information on the protection of human rights and prevention of human rights violations, facilitate the activities of national ombudsmen or similar institutions in the field of human rights, identify possible shortcomings in the law and practice of member states concerning the compliance with human rights, to ensure the effective implementation of these standards by member states and to assist them, and to address any report concerning a specific matter. (CM Resolution (99) 50).

The Commissioner's work focuses on reform measures to achieve tangible improvements in human rights promotion and protection. The office is a non-judicial institution, and therefore the Commissioner cannot act upon individual complaints, but draws conclusions and takes wider initiatives based on reliable information regarding human rights violations suffered by individuals (The Mandate, 1999).

*European Commission for Democracy through Law (commonly known as the Venice Commission)*

This new institution characterizes the greatest contribution of the organisation to the democratic transition process of newcomers in the nineties. Its reputation extends beyond the borders of the organisation, and has become the main reference on the European continent. The European Union gained special status in the Venice Commission, and cites the opinion of the Commission in numerous cases. “There is probably also an influence on decisions of the European Union, particularly since in a number of instances the European Commission has taken the initiative to win over the VC for its activities” (Hoffmann-Riem<sup>101</sup>, 2014 p. 584).

Following the idea of Mr La Pergola<sup>102</sup>, the concrete proposal to establish the Commission was made by the Minister of Foreign Affairs of Italy, who invited his counterparts<sup>103</sup> to “a Conference for the Constitution of the Commission for Democracy through Law, which was held in his hometown, Venice on 31 March-1 April 1989. In the light of the pressing need to assist Central and Eastern European countries in adopting new democratic constitution after the

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<sup>101</sup> Wolfgang Hoffmann-Riem is a German legal scholar, a former judge of the Federal Constitutional Court of Germany and former representative of Germany in the Venice Commission.

<sup>102</sup> Antonio Mario La Pergola, Italian jurist, Advocate General, later Minister for coordinating Community policy (1987-1989) and judge of the European Court of Justice of the European Union in Luxembourg (1994-2006).

<sup>103</sup> Final Declaration of the Conference “Democracy through Law” (Venice, 31 March 1989 – 1 April 1989)

fall of the Berlin wall, the Committee of Ministers agreed to the creation of such a Commission in the form of a partial agreement at a further Conference in Venice on 19-20 January 1990.” (Schnutz Dürr, 2010).

Although the activity of the Venice Commission has since proven to be a success story, initially not all member states were ready join such an initiative. Some feared that the Commission would become a tool for the proliferation of specialized constitutional courts opposed to Supreme Courts exercising constitutional review (Schnutz Dürr, 2010).

In 2010 Schnutz Dürr also highlighted that “the cooperation in the field of constitutional law was however by no means obvious within the framework of an intergovernmental organization such as the Council of Europe. Constitutional law is necessarily close to issues touching upon state sovereignty as it also deals with sensitive questions like the distribution of competencies between the executive and legislative branches of power.”

The circumstances above explained that the Commission was established in the format of a partial agreement and only 18 member states<sup>104</sup> out of 23 joined the initiative in 1990 (CM Resolution (90) 6).

The European Commission for Democracy through Law, better known as the Venice Commission, named after its seat in Venice, is the Council of Europe's consultative body on constitutional matters (CM Resolution (90) 6 on a Partial Agreement establishing the European Commission for Democracy through Law)<sup>105</sup>. The role of the Venice Commission is to co-operate with member states and non-member states of the Council of Europe, in particular those of Central and Eastern Europe<sup>106</sup> on the constitutional, legislative and administrative principles and technique for the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law (Statute of the Venice Commission, 1990).

The Statute appended to CM Resolution (90) 6 also lays down that the Commission’s specific field of action shall be the guarantees offered by law in the service of democracy. It also shall

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<sup>104</sup> The representatives in the Committee are ministers from Austria, Belgium, Cyprus, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Malta, Norway, Portugal, San Marino, Spain, Sweden, Switzerland and Turkey.

<sup>105</sup> The Statute of the European Commission for Democracy through Law is appended to the Resolution adopted by the Committee of Ministers on 10 May 1990 at its 86th Session

<sup>106</sup>At the adoption of the Statue there were no member states in the Council of Europe form Central Eastern Europe.



assist member states to understand their legal culture and to examine the problems raised by the working of democratic institutions and their reinforcement and development.

The Annual report of activities in 2019 generally states that Commission's prime function is to provide constitutional assistance to States. "This assistance comes in the form of opinions, prepared by the Commission at the request of States and of organs of the Council of Europe, more specifically the Parliamentary Assembly, the Committee of Ministers, the Congress of Local and Regional Authorities and the Secretary General, as well as of other international organisations or bodies which participate in its activities." The Annual report 2019 also stresses that even if the Commission's opinions are not legally binding, they are generally reflected in the law of the countries to which they pertain, thanks to the Commission's reputation of independence and objectivity. Furthermore, even after an opinion has been adopted, the Commission remains at the disposal of the state concerned, and often continues to provide its assistance until the constitution or law in question has been adopted.

In 2002, once all Council of Europe member states had joined, the Commission became an enlarged agreement, opening its doors to non-European states, which could then become full members. In 2019, it had 62 full members and 13 other entities formally associated with its work (Annual report of activities 2019).

### *National minority protection in the Council of Europe*

The situation of national minorities was, from the outset, though with variable intensity, one of the foremost priorities of the Council of Europe. As the predecessor of the Parliamentary Assembly, the Consultative Assembly recommended as early as 1949 that the Committee of Ministers should draft a Convention providing a collective guarantee to ensure that all persons residing within their territories should enjoy the effective rights and fundamental freedoms referred to in the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations (PACE Recommendation 38 (1949)). As a result, the Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome in 1950, but this instrument was only the first step "for the collective enforcement of certain of the rights stated in the Universal Declaration", stated by the Preamble of the ECHR.<sup>107</sup>

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<sup>107</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 005, Rome, 04/11/1950

The Parliamentary Assembly, in its Recommendation 234 (1960) recommends that Committee of Ministers draft a Second Protocol to the Convention of Human Rights to protect certain civil and political rights not covered by the original Convention or the First Protocol. PACE Recommendation No. 234 also recommends appending to the draft protocol an article stating that “All persons are equal before the law. No one shall be subjected by the State to any discrimination based on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, belonging to a national minority, property, birth, or other status.” Following the proposals of the Recommendation above, PACE recalled in its Recommendation 285 (1961) on the rights of national minorities that Article 14 of ECHR already provided certain protection against discrimination for national minorities, but “it is desirable that the collective interests of national minorities should be satisfied to the extent compatible with safeguarding the essential interests of the States [...]”. Thus, the Parliamentary Assembly recommends that the following wording should be included in the Second Protocol of the ECHR:

“Persons belonging to a national minority shall not be denied the right, in community with the other members of their group, and as far as compatible with public order, to enjoy their own culture, to use their own language, to establish their own schools and receive teaching in the language of their choice or to profess and practise their own religion” (PACE Recommendation 285, 1961).

But the developments in the Belgian linguistics cases concerning language used in education and the judgement of the European Court of Human Rights<sup>108</sup> negatively affected the drafting process and the relevant committee of experts concluded in 1973 that “from a legal point of view, there was no special need to make the rights of minorities the subject of a further protocol to the ECHR” (Explanatory Report to the Framework Convention 1995).

Besides, similar initiatives focused on the possibilities of positive protection for minority languages and the communities using them. The Consultative Assembly in 1957 and the Parliamentary Assembly in 1961<sup>109</sup> “called for a protection measure to supplement the European Convention to be devised to safeguard the rights of minorities to enjoy their own

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<sup>108</sup>Case ““relating to certain aspects of the laws on the use of languages in education in Belgium” v Belgium, European Court of Human Rights. Judgment of 27 July 1968, Series A No. 6 cited in the Explanatory report to the Framework Convention

<sup>109</sup>Resolution 136 (1957), Recommendation 285 (1961)

culture, to use their own language [...]” (Explanatory report to the European Charter for Regional or Minority Languages 1992). Then “the Parliamentary Assembly adopted Recommendation 928 (1981) on the educational and cultural problems of minority languages and dialects in Europe, and in the same year the European Parliament passed a resolution on the same questions. Both documents concluded that it was necessary to draw up a charter of regional or minority languages and cultures” (Explanatory report 1992).

### *Framework Convention for the Protection of National Minorities*

Democratic transition in Central Eastern Europe definitely brought a political boost to revising the legal and political measures of national minority protection in the Council of Europe. Political conflicts and wars since the end of the Cold War have directed the attention of intergovernmental organisations to the situation of national minorities and showed that it was time to tackle ethnically, culturally, and linguistically diverse societies.

The preparatory work began in the Committee of Ministers in 1992, and after the examination of various proposals and texts<sup>110</sup> the Heads of State and Government of the Council of Europe’s member states decided at the First Summit in 1993 to draft a framework convention for the protection of national minorities<sup>111</sup> and to begin work on drafting a protocol complementing the European Convention on Human Rights in the cultural field by provisions guaranteeing individual rights, in particular for persons belonging to national minorities<sup>112</sup>. (Appendix II on National Minorities to Vienna Declaration, 1993). The decision based on the conviction of the political leaders that that the protection of national minorities is an essential element of stability and democratic security on the European continent (Vienna Declaration, 1993).

According to its Summary, the Framework Convention for the Protection of National Minorities, which entered into force in 1998, is the first legally binding multilateral instrument concerned with the protection of national minorities in general. Its aim is to protect the existence of national minorities within the respective territories of the Parties. The Convention seeks to

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<sup>110</sup> Proposal for a European Convention for the Protection of Minorities by the Venice Commission, 1991, draft protocol to the European Convention on Human Rights, guaranteeing the protection of ethnic groups, submitted to the Committee of Ministers by the Austrian delegation, PACE Recommendation 1201 on an Additional protocol on the rights of minorities to the European Convention on Human Rights

<sup>111</sup> Framework Convention for the Protection of National Minorities ETS 157, Strasbourg, 01/02/1995

<sup>112</sup> European Charter for Regional or Minority Languages ETS 148, Strasbourg, 05/11/1992

promote the full and effective equality of national minorities by creating appropriate conditions enabling them to preserve and develop their culture and to retain their identity.

“The Convention sets out principles relating to persons belonging to national minorities in the sphere of public life, such as freedom of peaceful assembly, freedom of association, freedom of expression, freedom of thought, conscience and religion, and access to the media, as well as in the sphere of freedoms relating to language, education, transfrontier co-operation, etc.” (Summary to the Framework Convention)

### *European Charter for Regional or Minority Languages<sup>113</sup>*

The European Charter for Regional or Minority Languages, which entered into force in 1998, likewise “aims to protect and promote the historical regional or minority languages of Europe. It was adopted to maintain and to develop the Europe's cultural traditions and heritage on the one hand and to respect an inalienable and commonly recognised right to use a regional or minority language in private and public life, on the other.” (Summary to the European Charter for Regional or Minority Languages)

Enforcement of both the Framework Convention and the European Charter is under the control of their respective boards of experts (Advisory Committee for the Framework Convention and Committee of Experts for the Charter), which periodically examine reports presented by the Parties, conduct field visits, and consult the relevant stakeholders and representatives of national minority communities. At the end of the periodic monitoring cycles, the Committee of Ministers adopts a resolution with specific recommendations to the national authorities.<sup>114</sup>

### *The role of the Parliamentary Assembly in monitoring the states' obligations*

The Parliamentary Assembly (PACE) is the deliberative organ of the Council of Europe. (Statute of the Council of Europe). It also elaborated its own monitoring structure to supervise the situation and to help states to honour their obligations. If a state persistently fails to do so,

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<sup>113</sup> Hereinafter referred to as Language Charter

<sup>114</sup> Personal experience of the Author in the relevant rapporteur groups of the Committee of Ministers between 2011-2016.

the Assembly may refuse to ratify, or may withdraw the credentials of the national delegation of the parliament of that state (Rules of Procedure of the Assembly). As a last resort, it may recommend that the country's membership of the organisation be suspended (Brochure on the Parliamentary Assembly). The Assembly's monitoring procedure helps member states to comply with the norms and standards of the organisation, to uphold the highest democratic and human rights standards.

The monitoring mechanism of the Parliamentary Assembly is, not surprisingly, also an achievement of the organisation, elaborated following the experiences of the democratic transition in Central Eastern Europe. (The monitoring procedure of the Parliamentary Assembly)

The open-door policy of the Council of Europe after 1990, and the conviction that “membership will have positive impact on the transition process (an approach sometimes referred to as “therapeutic accession”), meant that from 1994 onwards the Parliamentary Assembly and Committee of Ministers phased in two procedures for monitoring how far member states respected the commitments they had made.” (50 years and 104 sessions for building a greater Europe without dividing lines). The document published on the 50th anniversary also pointed out that both the public and country-by-country approach-based monitoring of the Parliamentary Assembly and the confidential, theme-based monitoring mechanism of the Committee of Ministers were intended to ensure that all member states, through a process of critical and constructive dialogue, attain a high level of democracy and respect for human rights. In 1993, the Parliamentary Assembly instructed its respective committees “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”. (Order No. 488 (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”. (PACE Order No. 488). The monitoring procedure was gradually extended and strengthened in the Assembly, but the opening of the monitoring procedure for new member states required a reasoned written request addressed to the Bureau until 1997.

The Assembly decided to establish a Permanent Committee (PACE Resolution 1115 (1997) to monitor the obligations and commitments made by the member states at their accession in 1997, after granting full membership to Russia in 1996. Since the setting up of the Committee, the

monitoring procedure has gone into operation automatically in respect of the states acceding after 1997. (The monitoring procedure of the Parliamentary Assembly)

According to current practice, the procedure functions in four different forms:

The full monitoring procedure involves regular visits by a pair of rapporteurs, who conduct an ongoing dialogue with authorities, and occasional plenary debates to ensure that a state's progress and problems are honestly assessed.<sup>115</sup>

States that have made progress may pass on to the post-monitoring dialogue, which is a less intensive procedure involving a limited number of remaining issues.<sup>116</sup> During the periodic reviews, the committee is obliged to prepare regular periodic reviews on all Council of Europe member states that are not under a full monitoring procedure or engaged in a post monitoring dialogue. The order and frequency of these reports is decided upon by the committee in accordance with its internal working methods based on substantive grounds, with the objective of producing over time, periodic review reports on all member states.<sup>117</sup> Finally, the committee can prepare specific report on the functioning of democratic institutions in any member state when particular developments warrant. (Monitoring Committee: Work overview, 2020).

### **Chapter 3: POLITICAL AND LEGAL CONTEXT OF THE CHALLENGES TO EFFECTIVE MULTILATERALISM**

When seeking the roots of the political and legal challenges which the Council of Europe faces, there is one field where this connection with enlargement is more than obvious. As to the workload of the Court, the impact of increasing the number of members states on the crisis the Court faced in the first decades of the 21st century is clear. The problem was also predicted: Secretary General Catherine Lalumière warned the Committee of Ministers in 1994 that the accession of Russia and Ukraine would cause an immediate increase in the workload of the Court. On the one hand it is due to the population of the Council of Europe area, which increased to 800 million people having the individual right to apply directly to the Court. On the other hand, in the new member states where democratic traditions and rule of law were not consolidated enough, not to speak of the serious human rights consequences of armed conflicts,

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<sup>115</sup> This currently applies to eleven States (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Republic of Moldova, Poland, Russian Federation, Serbia, Turkey, and Ukraine) – status as of 14/10/2020

<sup>116</sup> Currently applies to three States (Bulgaria, Montenegro, and North Macedonia)

<sup>117</sup> The Committee is preparing periodic review reports on three states (Hungary, Malta, and Romania).

these circumstances created a risk of violations to the provisions of the ECHR which was several times larger.

As to legal challenges, this research focuses on the Court. In my view, the increased workload was only one aspect of the complexity of problems the European Court of Human Rights (ECtHR) had to face. Another aspect is the increase in the number of the inter-state applications as significant indicator of the geopolitical reality in the region of the Council of Europe. This number is also self-explanatory. While twelve inter-state applications were lodged with the Court during the four decades between 1956 and 1997, sixteen inter-state applications have been submitted in the last fourteen years (Inter-state applications, ECtHR, 2021. p. 2-3). Ten out of sixteen were submitted against the Russian Federation, which is an important factor in the research seeking to answer the question of the extent to which normative institutionalism can prevail over geopolitical interest.

However, increased workload and frequent inter-state applications are still not the only problem in the legal field. The reform process of the Court to reduce the workload by introducing new administrative rules has been completed, therefore it could be treated even if the procedure has taken years. In the case of inter-state applications, the fact that the implementation takes decades in some cases, already show the reluctance of the states to the regime. The case of Cyprus-Turkey is a telling example. The Court delivered the judgement in 2001, and the case concerns 14 violations in relation to the situation in the northern part of Cyprus since the military intervention by Turkey in July and August 1974 (Case description, HUDOC Database)<sup>118</sup>. The supervision of the ruling is still ongoing in the Human Rights meetings of the Committee of Ministers, as three open chapters are continuously in the agenda.

In my view the most significant challenge that can affect the convention system is when a state party questions the supremacy of the European Court of Human Rights. The legal case study aims to present the first case where the respondent state officially initiated a legal procedure at its own Constitutional Court to resolve whether is possible to enforce the judgement of the Court on the basis the prevalence of its constitution over other laws, including the rulings of the international Court of Human Rights.

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<sup>118</sup> [https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22: \[%22004-37128%22\]}](https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22: [%22004-37128%22]})

Above all, before giving a detailed analysis in respect of the two selected examples, the political and legal cases, I intend to briefly describe both the political and legal context, leading to the landmark cases, which finally launched the defensive mechanism of the Council of Europe.

### **3.1. Reappearance of classical geopolitics, political climate around great powers Russia and Turkey in the Council of Europe**

Without a doubt, the accession of the Russian Federation had a decisive influence on the functioning of the Council of Europe, a fact that was clear from the outset. Russia was not simply a state from the former Soviet Bloc, it was the heir to one of the superpowers of the Cold War, preserving if not an imperial then at least a great-power attitude. This raises the question of the extent to which a great power is willing to accept being only one among equals. The Vienna Summit set forth in the Vienna Declaration in 1993 that the Council of Europe treats newcomers on an equal footing, though the Russian Federation was regarded as major contributor to the budget. In general, the calculation of the scales of member states' contributions relies on population and GDP data. (Report of the Ministers' Deputies on enlargement, 1994. p. 3.) According to the method of calculations, Russia was a member of the great contributors' club, along with France, Germany, Italy, Turkey and the United Kingdom. These are the member states which are entitled to 18 representatives and 18 substitute members in the Parliamentary Assembly (Statute, Article 26). On the other hand, another club was emerging among the new members, which have been the subject of serious monitoring, and had to accept certain norms and standards which were apparently not compulsory for the old member states. As Petra Roter, former President of the Advisory Committee of the Framework Convention for the Protection of National Minorities concluded in her article "this process was very asymmetric with 'newcomers' being expected to adjust to established (Western) constitutive liberal norms and practices. This international socialization made rational state actions dependent on value-based norms on legitimate statehood and appropriate behaviour, whereby the process was always defined by cost-benefit analysis of such expected state conformity" (Schimmelfennig cited in Roter 2017 p. 33). Roter continues by stating, following her interview with S. Schennach, a member of PACE, Socialist Group, an MP from Austria,<sup>119</sup> that the "process of evaluating would-be member states, or member states in the post-accession

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<sup>119</sup> Strasbourg, 29 January 2016.



monitoring process in the CoE, was typically not extended to ‘older’ members although they sometimes clearly did not accept the norms the newcomers were expected to meet.” Roter refers to the conditions of EU membership in a different article, with minority protection being a typical example, as national minority rights are one of the criteria for EU and CoE membership (Roter 2014. p 1). Then she recalls, however, that “both organizations have ‘old’ members like France that do not recognize the concept of minority, or Greece, that does not recognize the concept of national minority – indeed, neither of them is a state party to the CoE Framework Convention for the Protection of National Minorities, which newcomers had to ratify if they wanted to join the CoE as member states” (Roter 2017. p. 34). This approach strengthened the feeling and opinion of the new members that the Council of Europe applies double standards, “with the newcomers being under the impression that they were accepting stricter conditions (substantive norms) in return for the ‘membership carrot.’ This asymmetry paved the way for perceptions of (political) inequality of member states in organizations functioning according to the fundamental principle of international law – i.e., the principle of sovereign equality of states. This de facto unequal treatment of some issues in some member states appears to be particularly problematic for big(ger) states or great powers, including Russia, even if great power status might largely be based on self-perception or on a perception that is not necessarily broadly shared among the membership of an organization.” (Roter 2017. p. 34-35.)

When seeking arguments for why the Council of Europe was convinced that Russia should join the club before complying fully with the conditions set forth, the conviction of Secretary General Daniel Tarschys – “Better include than exclude” – comes to the fore. If we accept that global security reasons prevail over the human rights and rule-of-law related accession criteria in a human-rights focused international organisation, the argument might be valid. Though it is more than cynical that alongside the request for membership to a leading human rights organisation, Russian troops had just intervened in Chechnya and massacred, detained or tortured several hundred civilians (Human Rights Watch, 1996), violating the most fundamental accession criteria before even starting the accession process. The response of the Council of Europe was to suspend the examination procedure, only to reopen it several months later.

Although the German rapporteur of the Parliamentary Assembly formulated in his report on Russia’s application for membership that “One of the principal problems in the Russian Federation seems to be the application of the rule of law. The eminent lawyers, in their conclusions, stated that ‘so far the rule of law is not established in the Russian Federation’ ... There are several reasons for this, ranging from missing legal codification and relatively poorly

developed legislation over structures and mentalities inherited from the Soviet past to simple non-appliance of newly adopted rules and regulations.” (Doc. 7463, PACE Opinion).

As the rapporteur described in the same opinion, the “mentality towards the law has not yet changed. In Soviet times, laws could be completely disregarded – party politics and ‘telephone justice’ reigned supreme. While it cannot be said that laws are ignored as a matter of course in present times, they are disregarded if a ‘better’ solution to a particular problem seems to present itself. This assertion is valid for every echelon of the Russian state administration, from the President of the Federation [...] down to local officials [...] In addition, there seems to be a new tendency even in the higher echelons of the Russian bureaucracy to diminish or deny human rights violations committed during the Soviet period.” (Doc. 7463, PACE Opinion). However, political interest overrode the institutional and normative aspects and Russia joined the Council of Europe as the 39th member state on 28 February 1996.<sup>120</sup>

Bearing in mind the circumstances around its accession and Russia’s behaviour later in the different structures of the Council of Europe, the question arises as to what the real interest of the Russian Federation could have been in becoming a member of the organisation. The normative answer that the Council of Europe could help in democratic modernisation is only one possibility, through its expert bodies at the Council could indeed have helped bring the legal and institutional structures into line with European standards. One might have the impression that membership gave Russia the opportunity to keep an eye on what was going on in the organisation, and it played the game in accordance with its own rules, following its great power interests.

Some scholars (Busygina and Kahn 2020) came to the same conclusion after analysing academic literature and taking into account some theoretical considerations. They argue that “[a]uthoritarian leaders may have various incentives to join a ‘political’ IO [note: international organisation] using the membership to their advantage for strengthening their own power and prospects for their survival. These considerations may therefore mitigate the risks inherent in relinquishing some aspects of state sovereignty.” (Busygina and Kahn 2020 p. 66). They refer to von Stein (2013) and recall that membership in international organisations “that extend far-reaching human rights to citizens will be particularly useful to leaders needing to assert or re-establish their legitimacy. Second, [...] membership often involves dissemination of

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<sup>120</sup> <https://www.coe.int/en/web/portal/russian-federation>

information. Authoritarian leaders can manipulate the information disseminated by [international organisations] and in this regard they may benefit even more from [...] membership than their democratic counterparts (Lee 2017 cited in Busygina and Kahn 2020 p. 66). 2). Besides, “the government is put under international surveillance, but the leaders can actually use this as a shield to cover their power-consolidating behaviour” (Lee 2017 cited on Busygina and Kahn p. 66). They add in the end a fourth incentive, “whether the leadership of such a state really intends to abide by its treaty obligations or simply free ride, if possible, until non-compliance is recognized by its fellow (international organisation) members as a state policy rather than as mere under-performance for economic, personnel, or other reasons.” (Busygina and Kahn 2020, p. 66)

After having a closer look at the history of the first decade of the Russian Federation, the internal developments, and the presidential elections in 1996, where Boris Yeltsin was re-elected (Depoy 1996), it seems that the considerations presented above are justified, and that one of the reasons the Russian president pursued membership was to demonstrate international legitimacy by accession to the organisation. “The [Council of Europe], therefore, is part of Moscow's search for recognition and international respectability, which began in the Yeltsin era” (Massias 2007 p. 13). However, neither the Council of Europe nor the Russian Federation was prepared for Russian membership, and the PACE report of the Political Affairs Committee was clear in this respect. “Russia does not yet meet all Council of Europe standards [...] But integration is better than isolation; co-operation is better than confrontation” (PACE Doc. 7443 cited in Busygina and Kahn 2020, p. 68). Besides the immature democratic structure and the Chechen War there was another alarming element for experts at the Parliamentary Assembly of the Council of Europe. The Commonwealth of Independent States was established in 1992 and the European Convention of the Commonwealth of Independent States was promulgated in 1995 and ratified by the Russian Federation the same year (Drzemczewski 1996 p. 157). The functioning of the overlapping structure with the European Court of Human Rights was not clear, and the answer they were given by Russia was not reassuring. The legal experts of the Council of Europe “were told that an individual complaint should at first be submitted to the new system and only thereafter, if necessary, to the institution(s) in Strasbourg” (Bernhardt 1994 cited in Busygina and Kahn 2020 p. 68). As described in the previous chapter, the question of Russian accession divided the political leadership of the Council of Europe, with some strongly advocating it for political and security reasons, including Daniel Tarschys, the secretary general of the Council at the time of accession, while opponents saw Russian membership as overly hasty. As Deputy Secretary General Peter Leuprecht put it, “One

underlying motive certainly was to help President Yeltsin in his then forthcoming presidential election; and he did, of course, not fail to celebrate Russia's admission to the Council as a major success of his policies. The Russian leadership itself gave to understand that Russian accession would occur 'now or never,' a move of blackmail or poker that ultimately produced the desired effect." (Leuprecht 1998, 330). In the end, Russia became a full member of the Council of Europe on 8 February 1996 and Leuprecht "resigned his position in opposition to the decisions to admit Russia and Croatia" (Busygina and Kahn 2020 p. 68). As Kautzanis also pointed out, "despite various conditions being placed on membership, the only condition that ultimately matters are whether a sufficient number of existing members deem the candidate worthy of accession." (Kautzanis et al, 2016, p. 401). It seems that in the case of Russia only political decisions can be taken. Both the accession and the exclusion of the country were decided on the basis of political considerations.

With regard to the ambiguous cooperation between Russia and the Council of Europe, its "participation à la carte" (Roter 2017. p.1.), and its territorial conflict in the neighbourhood seem to be clear indications of a realist geopolitical game, whose obvious consequence was the annexation of Crimea. In my view the occupation and annexation were a clear message to Ukraine, which had just turned its back on Russia and reoriented itself towards the European Union by signing the Association Agreement against the will of the Russian Federation. (Ukraine and the EU).

Russian foreign policy was pragmatic and coherent throughout. However, the Council of Europe had unrealistic expectations regarding the importance and beneficial consequences of membership on Russia's attitude towards international institutional cooperation.

As Mr Zoltán Taubner, former Head of the CoE Liaison Office in Brussels, former director for external relations and current secretary to the Committee of Ministers emphasised during an interview:

*"After the exclusion of the Russian Federation a survey has been made about the number of the projects implemented in the Russian Federation and the financial resources allocated for these programs. The result was staggering even for the CoE staff when the survey showed that the total cost of Russia related projects was roughly 2 million euro compared to the approximately 30-million-euro annual contribution paid by the Russian Federation to the CoE budget. So, the real impact of the CoE membership on Russia was astonishingly low. It is not because the CoE did not intend to invest into*

*these projects, but the Russian Federation did not request, or did not allow deeper and more intensive involvement from the Council of Europe.” (Zoltán Taubner, 2022)*

As to the other powerful and influential actor in the Council of Europe, Turkey has a long history of cooperation with the Council of Europe. It is not a founding member but joined the Council of Europe at the very beginning, as early as 1950<sup>121</sup>. Despite the fact the Turkey was not a new member state in the nineties, the gradually deepening and institutionalised monitoring mechanism, as it was presented in Chapter 2.3.1, describing among others the role of the Parliamentary Assembly in monitoring states’ obligations, was progressively extended to supervise Turkey’s obligations. However, such a decision on the Parliamentary Assembly to monitor the functioning of democratic institutions and the situation of human rights in Turkey was not unprecedented. As the PACE report on Turkey's military intervention in northern Iraq and on Turkey's respect for commitments concerning constitutional and legislative reforms highlighted, the Parliamentary Assembly expressed serious concerns “about human rights violations in Turkey – notably in the south-east of the country, following armed conflict between central government forces, the PKK and Kurdish nationalists” (PACE Report 7290, 1995). The PACE recommendation also stated that Turkey had violated its obligations under the Statute through military intervention in a foreign state, and called on it to “withdraw its forces from northern Iraq and seek a peaceful solution to the Kurdish problem”, as well as urging it to bring its Constitution and legislation in line with the principles and standards of the Council of Europe, and recommended that the suspension of Turkey's rights of representation should be considered unless the Committee of Ministers could report substantial progress (PACE recommendation 1266, 1995). Following this recommendation, the Committee of Ministers opened a dialogue with the Turkish government, to obtain answers to the issues raised by the Parliamentary Assembly, but did not suspend Turkey’s rights (CM Interim reply to Recommendation 1266, 1995). After the establishment of the permanent monitoring committee (PACE Resolution 1115 (1997) in 1997, this process continued until 2004 when the monitoring procedure was officially closed with regard to Turkey, though it was emphasised that the Parliamentary Assembly should follow developments in the country within the framework of so-called post-monitoring dialogue (PACE Resolution 1380, 2004). In the first decade of the new century several political developments had an impact on the Turkish

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<sup>121</sup> Council of Europe website. Turkey//46 States one Europe. <https://www.coe.int/en/web/portal/turkey>

attitude in the Council of Europe. The closure of the monitoring procedure was an important gesture from the CoE side, but the decision of the European Union at the Copenhagen Summit in 2002 to postpone consideration of Turkey's EU application and, at the same time, the decision regarding the widest enlargement of the Union in 2004, including the accession of divided Cyprus, was a very disappointing and discouraging political development for Turkey. As the PACE monitoring rapporteurs noted in their report, they "were struck by the extent to which the Copenhagen summit decision was perceived by both the authorities and civil society as an injustice. Several of those they met spoke of their discouragement and argued that whatever Turkey did to promote democracy and human rights she was always asked for more, without ever finally receiving a mark of approval" (PACE Doc. 10111 2004). The Turkish counterparts also recalled "that Turkey had been an associate member since 1963, that its first accession application went back to 1987, that the customs union was established in January 1996 and that its candidature had been officially accepted in Helsinki in 1999. Fears were also expressed that with 25 member states in 2004 it would be even harder for the Union to reach a decision in its favour." (PACE Doc. 10111 2004).

But Turkey also had a special record before the European Court of Human Rights (ECtHR). Until the establishment of the permanent Court on 1 November 1998 (Protocol 11 to the ECHR, 1994, paragraph 3)<sup>122</sup> the number of cases did not justify reporting on an annual basis on the activity of the Court. The first summary was published in September 1998, presenting the activity of the Court between 1958 and 1998. As an illustration of the dramatic increase in applications lodged with the Court, during the forty years the ECtHR more than one thousand cases were referred to the Court (Survey, ECtHR 1988, p 4). It is worth noting that it was not Turkey which dominated the list of cases at that time: at least ten times more cases were referred to the Court concerning Italy. The first annual report was published in 2001, which already contained concrete numbers for the preceding three years. According to these statistics, 135 judgements were delivered in 1999, 447 in 2000 and 725 in 2001. This year Turkey ranks second after Italy, with 171 cases out of 725 delivered regarding Turkey. To be fair, however, there is no data indicated in respect of the Russian Federation for the period between 1999-2001 (Annual report, 2001, p. 79).

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<sup>122</sup> Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) made provision for the new permanent Court.

Among the most noteworthy cases, the interstate case lodged by Cyprus in 1994 against Turkey should specifically be mentioned. To have a full picture, it should be also noted that Cyprus lodged four interstate cases against Turkey following the Turkish invasion in Northern Cyprus in 1974. The best-known interstate case is the last one, Cyprus vs Turkey IV, lodged in 1994, regarding which the Court delivered its judgement in 2001. The supervision of the implementation has regularly been on the agenda of the specialized human rights forum of the Committee of Ministers for more than 20 years. In connection to this case, the Grand Chamber of the Court delivered another judgement in 2014 on the just satisfaction issue and the Court stated that Turkey was to pay Cyprus 30,000,000 euros (EUR) in respect of the non-pecuniary damage suffered by the relatives of the missing persons, and EUR 60,000,000 in respect of the non-pecuniary damage suffered by the enclaved Greek-Cypriot residents of the Karpas peninsula (Turkey, Country profile 2022 p. 2). Besides the interstate case, the average number of applications lodged against Turkey was approximately 3000 per year between 2002 and 2004, thus being in the top three member states in respect of which the most cases were allocated to a decision body of the Court (Annual report ECtHR 2004, p. 119). But these numbers have dramatically increased during the subsequent years, and concerning Turkey alone, 15 206 cases were pending before a judicial formation at the end of 2010 (Annual Report ECtHR, 2010 p. 146).

Regarding relations between Turkey and the Council of Europe, 2016 could be seen as a turning point. The year before, Turkey had informed the Secretary General that it intended to become a major contributor to the ordinary budget of the Council of Europe from the next biennial financial cycle, 2016-2017 (GR-PBA (2015)9). As a result of this decision, its contribution rate increased from 4.5% to 10.7%, to a total of more than 25 million euros per year.<sup>123</sup> But in July 2016 a coup d'état was attempted against governments institutions and President Recep Tayyip Erdogan (Kinney 2016 pp. 1-3), in response to which Turkey decided “to impose a three-month state of emergency, in response to the failed military coup, [which] may involve measures that derogate from the European Convention on Human Rights” (Statement by CoE SG, 2016). Both high-level dialogue and expert level consultations intensified between Turkey and the organisation, as some concerns were raised that the responses of the Turkish government to the failed coup d'état might not follow the norms of the Council of Europe or the ECHR. At the extraordinary meeting of the Committee of Ministers held with the participation of the Turkish

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<sup>123</sup> In 2021, the major contributors to the Council of Europe were France, Italy, Germany, The Russian Federation, Turkey, and the United Kingdom, and together these countries paid more than 60 % of the total ordinary budget of the Council of Europe (GR-PBA (2015)9 rev, p. 4).

foreign minister on 6-7 September 2016, “The Chair and the Secretary General reiterated the importance of ensuring respect for the rule of law and human rights in the aftermath of the attempted coup. Secretary General Jagland reviewed several questions which the legal measures taken under the decree-laws enacted following the proclamation of the state of emergency raise from the point of view of their compatibility with the ECHR.” (Chair’s Summing-up, 2016) As the Chair of the Committee of Ministers, Marija Kaljurand, the foreign minister of Estonia, concluded the debate by recalling that several representatives of the Committee of Ministers “referred to the importance of taking proportionate measures, respecting the right to a fair trial, including the presumption of innocence. The need for a transparent judicial process was also underlined, as was the importance of ensuring respect for freedom of expression and information and freedom of the media” (Conclusions of the Chair, 2016). Despite the fact that the Turkish foreign minister, Mevlüt Çavuşoğlu, had excellent personal contact with the leadership of the Council of Europe<sup>124</sup> and assured his counterparts that Turkey respected its obligations in the Council of Europe, the measures adopted by the Turkish government as a response to the failed coup d’état, such as the prospect of reintroducing the death penalty, raised serious concern, and the Parliamentary Assembly began to closely follow the post-coup developments within the framework of post-monitoring dialogue (PACE report, Explanatory memorandum 2017, p. 10). As the report highlighted, “the post-coup developments, including the implementation of the state of emergency, have had large-scale, disproportionate and long-lasting effects on the protection of fundamental freedoms, the functioning of democratic institutions, and on all sections of society” (PACE Report 14282, 2017, p. 31). The document added that “the disproportionate measures taken (150 000 civil servants, military officers, judges, teachers, and academics dismissed, 100 000 individuals prosecuted and 40 000 of them detained), the prevailing legal uncertainty despite recent steps taken by the authorities, and the consequences of the emergency decree laws on individuals and their families, has created a climate of suspicion and fear which is detrimental to social cohesion and stability.” PACE Report 14282, 2017, p. 31). The Monitoring Committee “also expressed its dismay over the renewed discussions about the reintroduction of the death penalty in Turkey, which, it stressed, is incompatible with membership of the Council of Europe” (PACE report, Explanatory memorandum 2017, p. 10). The Assembly report recommended strengthening the monitoring of Turkey, which the Turkish authorities considered as a reopening of the PACE monitoring with respect to the country. As the Chair of the Turkish delegation underlined in his dissenting

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<sup>124</sup> He was an active member of the Parliamentary Assembly between 2003 and 2014, served as the President of the PACE between 2010-2012 (Mandate, Çavuşoğlu)



opinion attached to the PACE report, “Deciding to reopen the monitoring procedure in respect of Turkey will be an unjust, unfair, and extremely prejudiced action which is in stark contradiction with the values of the Council of Europe. This report may result in an adverse effect on the relationship between Turkey and the Council of Europe and will not only significantly decrease the credibility of PACE in the eyes of Turkish public but also clearly constitute a discriminatory approach towards Turkey.” (PACE Report 14282, Dissenting opinion, 2017, p. 33). Within this political climate, the straw that broke the camel’s back was the decision of the Parliamentary Assembly concerning the fifth Václav Havel Human Rights Prize. It was awarded to Murat Arslan, a Turkish supporter of the independence of the judiciary, former rapporteur of the Turkish Constitutional Court and president of the already dissolved Association for the Union of Judges and Prosecutors, who had been in detention since 2016 (PACE Report, 2017 Ordinary session). According to the statement of the Turkish government, PACE was supporting terrorism through its decision to award the Human Rights Prize to a FETO terrorist<sup>125</sup>, as the official communication emphasised “It is wrong and unacceptable to award the Václav Havel Human Rights Prize to a person who is a member of FETO terrorist organization, the perpetrator of the coup attempt of July 15. Making such a mistake under the roof of an organization that is the defender of the principles of democracy, human rights, and the rule of law, has seriously damaged the credibility of the Parliamentary Assembly of the Council of Europe (PACE).” (Press Release, Turkey MFA, 2017). Turkey has not been idle in responding to this step: it withdrew as one of the six major contributors to the ordinary budget of the Council of Europe (Daily news, 2017). Since this incident, new developments have occurred and led to the second infringement proceeding (see in Chapter of key definitions) in the history of the Council of Europe. After the rapid political decision on expelling the Russian Federation on 16 March 2022, we are witnessing a growing dispute, but is it unclear whether this will result in the cessation of membership for Turkey (Demir 2021).

### **3. 2. The Court-related problems**

As stated above, the Eastern Enlargement had a direct influence on the increase in workload. “Whereas the Commission and Court had given a total of 38 389 decisions and judgments in

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<sup>125</sup> According to the Turkish governmental communication the Fetullah Terrorist Organization (FETO) is the group behind the failed 2016 coup attempt in Turkey.

the forty-four years up to 1998 (the year in which Protocol No. 11 took effect), the single Court has given 61 633 in five years ... Indeed, since 1990, there has been a considerable and continuous rise in the number of individual applications as a result, amongst other things, of the enlargement of the Council of Europe. Thus, the number of applications increased from 5 279 in 1990 to 10 335 in 1994 (+96%), 18 164 in 1998 (+76%) and 34 546 in 2002 (+90%). Whilst streamlining measures taken by the Court enabled no less than 1 500 applications to be disposed of per month in 2003, this remains far below the nearly 2 300 applications allocated to a decision body every month.” (Explanatory report, 2004. p. 1-2).

However, this boost was not only a consequence of the new members. The possibility to apply directly to the Court and active citizenship also contributed to the immense rise in the number of applications. This implied the need for a permanent reform of the mechanism after the entry into force of Protocol No.11, since after several years it had become clear that the even new, reformed system could not cope with the new situation. As the Explanatory report to Protocol No. 14 to the ECHR, amending the control system of the Convention also admits: “This increase is due not only to the accession of new States Parties [...] and to the rapidity of the enlargement process, but also to a general increase in the number of applications brought against states which were party to the Convention in 1993. In 2004, the Convention system was open to no fewer than 800 million people. As a result of the massive influx of individual applications, the effectiveness of the system, and thus the credibility and authority of the Court, were seriously endangered.” (Explanatory report, 2004. p. 2.)

It was clear that the Court had become a victim of its own success. The greater awareness of the Convention, and the entry into force of additional protocols, all contributed to the pessimistic forecast about the further increase of the caseload. This trend promoted the elaboration of a new protocol with a view to amending the control mechanism. As the explanatory notes summarised, “the prospect of a continuing increase in the workload of the Court and the Committee of Ministers (supervising execution of judgments) in the next few years is such that a set of concrete and coherent measures – including reform of the control system itself – was considered necessary to preserve the system in the future.” (Explanatory report, 2004. p. 2). The dilemma was to reform the system on the one hand but preserve the main achievements on the other, but this made possible only administrative adjustments of the mechanism, as the Explanatory report also highlighted: “At the same time – and this was one of the major challenges in preparing the present protocol – it was vital that reform should in no way affect what are rightly considered the principal and unique features of the Convention

system. These are the judicial character of European supervision, and the principle that any person claiming to be the victim of a breach of the rights and freedoms protected by the Convention may refer the matter to the Court (right of individual application).” (Explanatory report, 2004. p.3).

The new protocol made significant changes in the system. It introduced a new admissibility criterion, to limit the number of incoming applications, as well as amending the treatment of repetitive or clearly inadmissible cases, for a more satisfactory operation of the European Court of Human Rights. Besides, Protocol No. 14 empowered the Committee of Ministers to bring proceedings before the Court when a state refused to comply with a judgment. The Committee of Ministers also had a new power to ask the Court for an interpretation of a judgment. This reform was needed to assist the Committee of Ministers in supervising the execution of judgments and particularly in determining what measures may be necessary to comply with a judgment. Among other alterations, this Protocol included changing the judges' term of office to a single, nine-year term, and a provision allowing the accession by the European Union to the Convention (Summary to Protocol No. 14).

Regarding the substantial elements, the new protocol contained, Article 19 stipulated that it would enter into force when all Parties to the ECHR joined the protocol. This process ultimately lasted six years, as the Russian Federation was not willing to join for years. By 2006, all other Council of Europe member states had ratified the protocol so that the vital reform could start. This momentum probably began to stall when it became clear that there was no consensus over the need for reform, or the preservation of efficiency and credibility in the Court and its control system. Considering the Russian positions expressed later during committee meetings, there were likely two elements which the Russians contested: The possibility of referring proceedings to the Court by a two-thirds majority decision of the Committee of Ministers and the clause on the possible accession of the European Union to the ECHR. The blocking of the Russian Federation aggravated the situation of the Court, so the Committee of Ministers decided to conclude Protocol No. 14bis, which allowed them to introduce the most urgent procedural elements of the reform pending the entry into force of Protocol No. 14. As its explanatory reports depicts the situation, “The urgent need to adjust the control mechanism of the 1950 European Convention on Human Rights (hereinafter referred to as ‘the Convention’) was cited as a principal reason for the adoption of Protocol No. 14 to the Convention in 2004. The continuing non-entry into force of Protocol No. 14, however, has made the situation faced by the European Court of Human Rights (hereinafter ‘the Court’) deteriorated yet further in the

face of an ever-accelerating influx of new applications and a constantly growing backlog of cases. This unsustainable situation represents a grave threat to the effectiveness of the Court as the centrepiece of the European human rights protection system. (Explanatory report, 2009. p. 1.) This Protocol ceased to be in force as from 1 June 2010, when Protocol No. 14 finally entered into force.

In 2010, the issue of Court reform was an absolute priority of the organisation. The rotating chairs of the Committee of Ministers were committed to promoting the process. Between 2010 and 2018 five high-level conferences were organised under the aegis of the presidencies of the Committee of Ministers: The Interlaken Conference in 2010 (Swiss Chairmanship), the Izmir Conference in 2011 (Turkey), the Brighton Conference in 2012 (the United Kingdom), the Brussels Conference in 2015 (Belgium) and the Copenhagen Conference in 2018 (Denmark).<sup>126</sup> All addressed the most urgent aspects of the efficiency of the Convention system, including among other factors, the shared responsibility between the different actors (mainly the Court in respect of the European supervision and the state parties as regards effective national implementation), the political commitment of the state parties to recognising and accepting the key legal obligation of the execution of the judgements as set out in the ECHR itself, and the selection and election of judges of the ECtHR (Copenhagen Declaration 2018, pp 1-7). As the History of the ECHR's Reforms, published by the Court, outlined, because of this process two additional protocols were adopted in 2013, as part of further reforms. Protocol No. 15. "Inserted a reference to the principle of subsidiarity and the doctrine of the margin of appreciation into the Convention's preamble; it also reduces from 6 to 4 months the time within which an application must be lodged with the Court after a final national decision. Protocol No. 16, allows the highest domestic courts and tribunals to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto." (History of the ECHR's Reforms)

With regard to the substance of Protocol No. 15, its entry into force also depended on the consent of all parties to the ECHR, as was the case with Protocol No. 14. As a result, it did not enter into force for a long time, and nearly the same scenario was repeated with the only difference that it was now Italy which did not ratify the Protocol for years, preventing its entry into force. Since the Russian Federation joined Protocol No. 14 on the very first day of the

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<sup>126</sup> Reform of the Court, website of the European Court of Human Rights

Interlaken Conference, there was a hope that the Italian Chairmanship of the Committee of Ministers, starting in November in 2021, would bring some promising results in this regard.

The breakthrough was achieved in this sense earlier, during the German Presidency of the Committee of Ministers, when Italy finally ratified Protocol No. 15 on 21 April 2021, thus contributing to the entry into force of the Protocol on 1 August 2021, during the second Hungarian Presidency of the Committee of Ministers (Chart of signature and ratification of Treaty 2013).

Considering that the conditions were much less onerous in the case of Protocol No. 16, ratification by just 10 member states was sufficient, and it entered into force in 2018.

Thanks to serious efforts, continued commitment from all stakeholders and the long reform process, the backlog of the Court was significantly decreased from 139,560 pending applications in 2010 (Annual report, 2010, p. 147) to 70,150 pending cases in 2021 (Annual report, 2021, p. 180). The ranking of member states changed only marginally between 2010 and 2021. Applications lodged against the Russian Federation (24, 25%), Turkey (21, 7%), Ukraine (16%), Romania (8%) and Italy (5%) still accounted for the highest proportion, amounting in total to approximately 75% of pending cases before the Court (Annual report 2021, p. 182).

According to the assessment of the president of the Court, the Interlaken reform process came to an end in 2021, and following the latest conference held on the future of the convention system in Copenhagen in 2018, we are witnessing a paradigm shift in the approach of the Court (Annual report 2021, p. 7). As an important procedural innovation, “the Court has recently introduced a more targeted and more effective case-processing strategy, consisting of identifying potentially well-founded ‘impact’ cases which address key issues of relevance for the State concerned or for the Convention system generally and which warrant speedier processing.” (Annual report 2021, p. 175). The main goal of this new method is “to process and adjudicate priority cases [...] and newly categorised ‘impact’ cases [...] even more expeditiously, [with the view of increasing] standardisation and streamlining of the processing of non-impact category [...] cases [and measuring] the Court’s success not only numerically – the number of inadmissible cases processed in a given period – but by reference to its adjudication of cases which address core legal issues of relevance for the State concerned or for the Convention system in general.” (Annual report 2021, p. 175).

The annual summaries, reports and statistics unsurprisingly aim to draw attention to successes, although they also describe the shortcomings and difficulties, despite the fact that the only goal

is to highlight the time-proven relevance of the European Court of Human Rights. Therefore, neither deadlock in the negotiations between the Strasbourg and Luxembourg Courts of the Council of Europe and the European Union about the future possible accession of the European Union to the European Convention of Human Rights (ECHR), nor the very alarming phenomenon of official declarations by member states on the supremacy of their constitutions over the ECHR, are indicated and analysed as a new threat to the future of the Convention system. However, the legal challenge that affects the functioning of the Council of Europe and its more precious and recognised “jewel” in the long run is precisely the appearance of this denial of the legal primacy of the international courts. Compared to the simple non-implementation of the legally binding judgements of the Court, this goes beyond the lack of political will on the part of member states. In my view this is the sign of the *raison d'être* and legal foundation of the international courts and international organisations being called into question.

Nevertheless, international scholars regard the decision of the Russian Constitutional Court as the result of a long and controversial relations between the Russian Federation and the European Court of Human Rights, in which the verdict is not simple (Mälksoo 2016, 2018, Kleimenov 2016, Pomeranz no date, Pustorino 2016). The fact that the Russian Constitutional Court officially declared its supremacy over the Strasbourg Court in decision N 7-ΦΚ3, Federal Constitutional Law on the Introduction of Amendments to the Federal Constitutional Law ‘On the Constitutional Court of the Russian Federation’, approved by the State Duma on 4 December 2015 and by the Federation Council on 9 December 2015, and in force since 14 December 2015 (cited in Mälksoo 2016 p. 377) was already the consequence of the more and more complex cooperation, which ultimately became a kind of philosophical debate about human rights between the Western European and Russian conservative schools. As Mälksoo explained “there is an accelerating ontological and epistemological debate about the philosophical foundations of (European) human rights law. These Russian conservative lawyers and theologians have persistently challenged liberal orthodoxies and prevailing dogmas regarding European human rights law and its making [...so] there is significant inter-European debate on the nature and direction of human rights; something that did not exist so visibly in the 1990s” (Mälksoo 2018, pp. 3-4).

But the Russian Federation was not the only member state in 2021 to formally criticize certain judgments of the European Court of Human Rights. Following the Court’s ruling in case *Xero Flor w Polsce sp. z o.o. v. Poland* delivered on 7 May 2021, the Court’s unanimously verdict

was that the right to a fair trial had been violated, and it was “furthermore adjudged that the actions of the authorities in appointing one of the judges who had been on the bench in the applicant company’s case and the ignoring of the Constitutional Court’s judgments in that connection had meant that the panel that had tried the case had not been a ‘tribunal established by law’” (Press Release, ECtHR, 2021, p. 1). In its response, the Constitutional Court of Poland ruled that some parts of the European Conventions of Human Rights were incompatible with the Constitution of Poland. The deputy justice minister of Poland remarked on the decision as follows: “The Constitutional Court throws away the ECHR judgement violating our system,” (Euractive, 25 November 2021). The Secretary General of the Council of Europe warned that “[t]oday’s judgment from the Polish Constitutional Tribunal is unprecedented and raises serious concerns. We will carefully assess the judgment’s reasoning and its effects.” (Newsroom, SG, 2021).

As a conclusion it can be said that the problems that occurred in relation to the Court went beyond issues of an administrative nature, and the legal challenges not only comprise the simple non-execution of judgements. Although political statements were not rare in regard to certain rulings of the Court, as reluctance to implement them was always observed in complex, structural cases, but the decisions of the national constitutional courts questioning the supremacy of the European Court of Human Rights are a real threat to the system. In the subsequent chapter of the legal case study, this issue will be further assessed, since these legal acts could have a long-term and very harmful impact on the future of the Convention system, and thus on the principal and most important pillar of the Council of Europe.

### *3.2.1. Interstate cases reflecting geopolitical conflicts*

Although the international order was codified in the statutes and charters of the newly established international organisations after the end of the World War II, which sought to maintain international peace and security, to develop friendly relations among nations (Charter of the United Nations), or were “convinced that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation” (Statute of the Council of Europe) they could not prevent armed conflicts on the European continent, which were not necessarily connected to the Cold War. These conflicts had deeper historical roots dating back many centuries in most cases, and unsurprisingly, man were linked to ethnic tensions and to the issue of self-determination of peoples.

Europe appears to be peaceful, at least in its Western part. Conflicts broke out in the East, as we have seen in the war in Eastern Ukraine or the annexation of Crimea most recently. But let us not forget the armed conflicts of the 1990s in Yugoslavia, in Transdniestria or in Nagorno-Karabakh between Armenia and Azerbaijan, which was renewed as recently as in 2020. It is also worth mentioning the conflict in Abkhazia and South Ossetia in 2008. The latter has been called the first war of the 21st century in Europe, “which has seen Russia acting in line with the European realpolitik models of the 19th and early 20th centuries” (Emerson, M. 2008. p. 1.)

But did Western Europe remain calm and peaceful after the Second World War? Did great power behaviour appear only in the case of the Russian Federation, with no other member states of the Council of Europe acting in a similar manner between 1945 and 1990, until the organisation opened its door to the East?

It is very interesting to closely study the statistics of the European Court of Human Rights related to inter-state applications<sup>127</sup>. Until 1997, twelve inter-states applications were lodged with the Court by old members of the Council against another old member. The term “old” is used here in the sense of obtaining a membership before 1990, when the eastern enlargement officially started.

Without aiming to list all applications, it is not difficult to discover the relation between the date of application and a well-known political-military conflict of the region. Two applications were lodged with the Court by Greece against the United Kingdom in 1956 and 1957, when Cyprus was still under British control (Rosenbaum, N. 1970. p. 623). The Case of Austria versus Italy reflects the South-Tyrol conflict, with its violent incidents and explosions, over the question of autonomous status. Two applications were lodged by Denmark, Norway, Sweden and the Netherlands against Greece, first in 1967-1968, and then again in 1970, when a far-right military junta ruled Greece (Ganser, D. 2005 pp. 220-223). Ireland submitted two complaints against the United Kingdom in 1971 and 1972, when the bloody civil strife between Protestant unionist and Catholic nationalists was at its peak. (McGlinchey, M. 2019. pp. 161-162.). Four applications were submitted by Cyprus against Turkey between 1974 and 1994 as a consequence of the Turkish military invasion in Cyprus in 1974, which led to Turkey’s occupation of the northern part of the island, and declaration of independence by the Turkish Republic of Northern Cyprus in 1983. Though the state was not internationally recognised, and the United Nations Security Council called for its withdrawal in its Resolution 541, adopted on

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<sup>127</sup> [https://www.echr.coe.int/Documents/InterState\\_applications\\_ENG.pdf](https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf)



18 November 1983, the division of the island has endured. Furthermore, on 22 July 2010, the International Court of Justice of United Nations delivered its opinion on the legality of Kosovo<sup>128</sup>, which had likewise declared its independence in 2008, and argued that there was no violation of UN Resolution 1244 in that case, and “international law contains no prohibition on declarations of independence: therefore, the declaration on independence on 17 February 2008 did not violate general international law”. The decision of the International Court of Justice is encouraging for Turkish Cypriots but very worrying for Cyprus and Greece.

Taking into account the examples above, it seems easy and straightforward to conclude that the political and legal challenges to the Council of Europe are only connected with the quick and relatively smooth accession of states from the former communist bloc, as we witness several new geopolitical conflicts breaking out in the former Soviet dominated area. When examining the crisis of Western Europe more closely, however, we can see that some of those conflicts have still not been resolved, or that several decades of negotiations lie behind such agreements as have been reached, and deals might prove fragile if circumstances change.

What is the difference between the conflicts in the West and the East? Are the “old” states of Western Europe, having well-founded, tried, and tested democratic structures, mature enough to settle their disagreements in a peaceable manner? Will the new or half democracies learn too, hopefully in the medium term, to peacefully arrange their conflicts? The answer is probably the difference between the state and nation building process and the fact that while these developments have already taken place in the West, in the East they started after the collapse of the Soviet Union, mainly in new states which obtained their independence only in the 20th century, or because of the resurrected imperial outlook of the Russian Federation. The new states, in the absence of any tradition and experience of statehood, require the same historical opportunity to build their own nation-state, ignoring the possible multi-ethnic character of the society in most cases. When speaking about the autonomous regions as good- and forward-looking models to settle interethnic tensions, the Autonomous *Territorial* Unit of *Gagauzia* in Moldova is often referred to as the best example of Eastern Europe, to prove that such a model is not possible only in highly developed Western states. On the one hand, the fact that this territory, with three official languages, inhabited by Orthodox, Turkish-speaking Gagauz people can exist on the eastern edge of Europe is promising, but on the other, it is not widely

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<sup>128</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403

communicated that Turkey exerted a decisive influence on the establishment of the autonomous unit in 1994.

As to the principles and theories underpinning the practice, besides the term nation-building, Armin von Bogdandy, Stefan Häußler, Felix Hanschmann and Raphael Utz refer also to the notion of nation failure, which according to them explained the collapse of Yugoslavia and the war in Bosnia-Herzegovina. “Nation failure thus describes a process in which the requirements of normal politics, the social substratum essential for the acceptance of majority and redistribution decisions, disappear. Nation failure is an aggravated form of state failure particularly relevant to multi-community states. The individual communities may define themselves by shared religion, class, language, or ethnicity, different to that of the other communities. Along these characteristics irreconcilable dissensions can emerge that make it unlikely if not impossible that government decisions will be adhered to.” (Bogdandy et al 2005. p. 585).

Constitutional nation-building is a different process, and it is more typical, in my view, in those parts of Europe where constitutional traditions are more solid. Constitutional nation-building focus rather on “enshrining the political values of a political community in a constitutional document that ought to become the focus of nation-building initiatives.” Bogdandy quotes Fukuyama and Habermas who claiming that “the constitution itself can become the focal object of collective loyalties [...] so that other, traditional elements of identity become largely irrelevant [therefore] is unlikely to be successful. In consequence, it is suggested to conceive the constitutional nation-building as follows: by incorporating into the constitutional text some of the traditional elements of collective identity (such as institutions or symbols), constitutional nation-building can filter, formalize, and direct the nation-building process towards democracy and the rule of law. Constitutional nation-building, thus, should make use of the legitimizing power of nationalism rather than attempting to replace it.” (Bogdandy et al 2005 p. 597).

## *2. 2. 2. Individual cases – selected presentation of the most significant structural problems*

This chapter seeks to give a brief overview of the cases which have had most impact in terms of non-execution. The selection is based on subjective criteria, and on the experience of the author, regarding the type of cases (beyond the interstate cases), about which articles of the ECHR appeared most frequently on the agenda of the CMDH meetings between 2011 and 2016

and after. This brief review will also consider the complex cases, which – in the view of international lawyers – represented a major challenge for the member states in terms of execution. Particular attention will be dedicated to the cases in which the first infringement proceedings were launched, although the circumstances of the non-execution of these two cases will be assessed more in detail in a separate chapter later, when evaluating the legal tools available in the Council of Europe to improve the willingness of the rulings’ implementation. Therefore, this overview serves only as an illustration, and as a such, the subchapter does not seek to provide a comprehensive and exhaustive presentation of all the structural problems, the only goal is to bring us closer to an understanding of what aspects hindered non-implementation. Were there always and only political considerations behind the position of the governments when they were reluctant to comply with their unconditional obligations arising from the Convention?

In accordance with the provisions of the European Convention on Human Rights, “The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution” (ECHR, 1950, Article 46 p. 2). The Committee of Ministers has issued an overview of the major developments on annual basis for 15 years, together with supporting statistics, presentation, inter alia, of the nature of leading and repetitive cases or of the main themes under enhanced supervision.

The pilot judgements procedure (see the definition under the relevant chapter) also reflects the emblematic and structural cases since 2004, when the first pilot judgement was delivered by Grand Chamber of the Court on 22 June 2004, in case of *Broniowski v. Poland* about properties situated beyond the Bug River (Press Release, ECtHR, 2004, p. 1), which concerned some 80,000 people (ECtHR Factsheet, 2021).

#### *Right to free elections – (Article 3 of Protocol No. 1)*

The question of prisoners’ voting rights appeared with regard to several member states and caused serious resistance in many of them. This group of cases demonstrated that not only the new members which joined the Council of Europe in the process of eastward enlargement, or Turkey, whose record was always impressive before the Strasbourg Court, but even Western democracies seem to be reluctant to comply with the judgement of the European Court of Human Rights when they disagree with the ruling. The first judgement of the Grand Chamber of the Court was delivered in 2005 in the case of *Hirst v. the United Kingdom*, “in which the

Court had found a violation of Article 3 of Protocol No. 1 on account of the automatic and indiscriminate restriction on Mr Hirst’s right to vote due to his status as a convicted prisoner.” (ECtHR Factsheet, UK, 2022, p. 14). Effective remedy and new legislation, which could lift the blanket ban on voting in national and European elections for convicted prisoners in detention in the United Kingdom has not been put in place for years. So, in 2010 the Strasbourg Court “applied its ‘pilot judgment’ procedure and gave the UK Government six months from the date the decision becomes final to amend its legislation and remove the blanket ban” in the case *Greens and MT v United Kingdom* (Hosking, 2010). The decision of the Court provoked long and emotional internal debates in the UK. “David Davis, MP, a former shadow Home Secretary—and not a member of the government—immediately called for Parliament to challenge Hirst. He sponsored a private [...] Parliamentary debate in February 2011 [and while acknowledging the international obligations under the ECHR, expressed the] opinion that legislative decisions of this nature should be a matter for democratically elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand” (Bates 2014, p. 513). Prime Minister David Cameron also admitted in his speech on the European Court of Human Rights that the focus would be on the reform of the Court during the British Chairmanship of the Committee of Ministers, between November 2011 and May 2012. As he explained, “at times it has felt to us in national governments that the ‘margin of appreciation’ – which allows for different interpretations of the Convention – has shrunk ... and that not enough account is being taken of democratic decisions by national parliaments. Let us be frank about the fall-out from this issue. As the margin of appreciation has shrunk, so controversy has grown” (Cameron speech, 2012). The British Chairmanship scrupulously implemented its objectives. In the framework of its Chairmanship program, during long and tireless drafting consultations with the UK Ambassador in the Chair<sup>129</sup>, a Declaration was prepared and adopted in the High-Level Conference, in Brighton on 19 and 20 April 2012. The so-called Brighton Declaration put a great emphasis on two important aspects, the principle of subsidiarity and the large margin of appreciation for national authorities, both elements which were widely cited by the UK representatives in the debates on the execution of the emblematic Court’s judgements against the United Kingdom on the issue of prisoners’ voting rights.<sup>130</sup> The Declaration not only referred to the two principles, but instructed the Committee of Ministers to amend the European Convention on Human Rights by drafting an additional protocol. As the Declaration says, the Conference “concludes that, for reasons of transparency and accessibility,

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<sup>129</sup> Based on the author’s personal experience as the Hungarian representative in the drafting consultations.

<sup>130</sup> Personal experience as the representative of Hungary at the CMDH meetings between 2011 and 2016.

a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case law should be included in the Preamble to the Convention and invites the Committee of Ministers to adopt the necessary amending instrument by the end of 2013..." (Brighton Declaration 2012, Section B point 12.b). As a result of this call, the drafting of the new protocol started, and the instrument was adopted by the Committee of Ministers in June 2013. Its Article 1 says "At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'" (Article 1, Protocol No. 15, 2013). Although Protocol No. 15 entered into force only in 2021, with the cooperation of the UK authorities the supervision of the issues finally came to an end and even though the possible internal debates had not yet been closed. "On 6 December 2018, the Committee of Ministers of the Council of Europe closed the supervision of the prisoners' voting rights cases against the United Kingdom (UK) and adopted final resolution CM/ResDH(2018)467. Thirteen years after *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41 (*Hirst*) was made final, the protracted prisoner voting stalemate is over" (Adams 2019). Some voice scepticism regarding the claim that the question has been resolved. As Elisabeth Adams concluded, "at the European level, the robustness of the Committee of Ministers can be doubted. It is unlikely that the issue of prisoners' voting rights in the UK is closed. The door to future litigation remains open" (Adams 2019).

However, before closing the issue with respect to the United Kingdom, on the other side of the European continent the question was raised in 2013 in the case of *Anchugov and Gladkov* versus the Russian Federation, when the Court decided in the same vein as in cases of *Hirst* or *Greens and MT*. But the response of the Russian authorities was quicker and more determined than that of their UK counterparts: As Russian scholars in public international law have pointed out, the case of *Anchugov and Gladkov* was a very good pretext for Russian legislators to resolve the question of implementing other unpleasant judgements of the Strasbourg Court. "On 14 July 2015, the Russian Constitutional Court issued a decision, in which it refused to declare unconstitutional the 1998 Russian Federal law on Russia's ratification of the ECHR and its Protocols, as it had been invited to do so by 93 deputies. The MPs had made clear that their plea on the lack of constitutionality was motivated by the allocation of an unprecedented sum

of €1.9 billion to the shareholders of Yukos [...]”<sup>131</sup> (Chaeva 2016, p. 2). But the Constitutional Court took this decision as a compromise, since in the same decision “the Constitutional Court pointed out that the judgements of international bodies, among which the ECtHR, must be complied with in conformity with the principle of constitutional supremacy. Notably, the Constitutional Court made a direct reference to the ECtHR judgement in *Anchugov and Gladkov* as being clearly inconsistent with the Russian Constitution. As the guardian of constitutional supremacy, the Russian Court ‘authorised’ the legislator to create a legal mechanism which allows it to rule on the ‘constitutionality’ of any judgement of the ECtHR and declare ‘impossible to implement’ those judgements which it holds inconsistent with the Russian Constitution.” (Chaeva 2016 p. 2). Other scholars argue that the decision of the Russian Constitutional Court on announcing the supremacy of the Russian Constitution does not harm the relations between Russia and the European Court of Human Rights. They recall that “the opinions of judges of the Constitutional Court are diametrically opposed: from a suggestion that the Convention should have greater importance than the Constitution, to the doubting of the correctness of the Constitutional Court even having the right to hear this case. The presence of such dissenting opinions once again underlines the nature of the compromise solution, which does not imply any subordination of the Constitutional Court to the European Court, nor ignore the legal position of the ECtHR, and is aimed at the development of dialogue between the two high courts.” (Kleimenov 2016, p. 38-39). In any event, opinions on the real aim of the Constitutional Court were diverse among scholars who have deeper knowledge of Russian constitutional traditions. They claim that “the Russian Constitutional Court’s judgment adds a new worrying element to the debate about using the Constitution as a brake to comply with international law because what is lacking [...] is any effort to strike a balance between national and international values and principles.” (Pustorino 2016, p. 17). As they see the options regarding how the decision of the Russian Constitution Court could be regarded, they argue that “Certainly one could consider the Russian Constitutional Court’s judgment as an example of an ‘abuse’ of the resort to constitutional law. Some ‘uncharitable’ minds could even see the 2016 judgment as ‘testing the water’ while the Russian Constitutional Court gears up for much more important decisions in relation to landmark judgments of the ECtHR (and other international courts) already adopted against Russia.” (Pustorino 2016, p. 17).

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<sup>131</sup> The case concerned the tax and enforcement proceedings brought against the Russian oil company, OAO Neftyanaya Kompaniya Yukos, (Yukos), resulting in its liquidation, final judgement of the Court on 15 December 2014.

*Article 18 cases concerning abusive limitations of rights and freedoms – Imprisonment of human rights defenders*

The cases presented here are closely related to the worrying trend of non-execution of the legally binding judgements of the Court. The annual report of the Committee of Ministers on the supervision of the execution has used the Article 18 related reference only for two years. The reasoning behind the application of this new term is that “Article 18 ECHR allows the Court to establish that Member States have limited non-absolute Convention rights for illegitimate reasons, usually reasons of State and the suppression of dissent. Like Article 14 ECHR, Article 18 is a non-autonomous provision, and must be invoked together with another Convention right.” (Heri, 2017). The purpose of this article, as the scholars argue “to safeguard against undemocratic tendencies that, while posing as legitimate rights restrictions, in fact abuse, undermine and erode human rights and the principles of democracy.” (Keller-Heri 2016 p.3).

Ilgar Mammadov versus Azerbaijan falls under this label and its importance is not only explained by its being the first infringement proceeding ever in the Council of Europe. The issue of political prisoners in Azerbaijan directly provoked a serious credibility crisis in the Parliamentary Assembly in 2017, when the corruption scandal exploded (BBC News, 2017). The main facts in the case of Ilgar Mammadov v. Azerbaijan were that “following protests in 2013 and his publication of a number of critical blog posts, Mr Mammadov was convicted of the crime of mass disorder and sentenced to seven years’ imprisonment.” (Heri, 2017) Before his final sentence he lodged an application with Court concerning his arrest and pre-trial detention, “arguing that his detention and the charges against him were unlawful under the Convention. While his case was still pending in Strasbourg, in March 2014 the Azerbaijani authorities concluded domestic judicial proceedings and sentenced him to seven years of imprisonment. The Strasbourg judgment on the lawfulness of his pre-trial detention arrived two months later, finding that there was no reasonable suspicion to detain him under Article 5(1) c of the Convention and that his detention pursued the political purpose of silencing and/or punishing him for having criticised the government.” (Başak 2019). To facilitate understanding, the determination of the Committee of Ministers urged the Azeri authorities from the very first moment to release Mammadov from detention. The open letter of a human rights think-tank, the European Stability Initiative, provides some explanation. The letter was addressed to 125 members of the CoE Parliamentary Assembly, who rejected a resolution authored by a German socialist rapporteur on the follow-up to the issue of political prisoners in Azerbaijan by 125 to

79 votes in early 2013<sup>132</sup> (ESI Open letter 2014). The letter accuses these PACE members of assisting the Azeri authorities to prosecute human rights defenders in Azerbaijan, and of indirectly contributing to the arrest of Ilgar Mammadov among many others. As the letter says “Not all votes in PACE have immediate consequences. This one did. It even led to the arrest of the very people the Council of Europe had relied on and worked with in Azerbaijan [...] Ilgar Mammadov, an opposition party leader and director of the Council of Europe’s Political Studies Programme in Baku; [...] Anar Mammadli, [...] who had advised the PACE rapporteur on political prisoners. They both put their faith in the Council of Europe. They were both arrested in 2013 [...] We hope that you realise by now that your vote in January 2013 was a mistake.” (ESI Open letter 2014 p. 2). The pressure coming from the human rights organisations undoubtedly contributed to the special attention on this issue. The supervision of the case of Mammadov became a permanent item on the agenda of CMDH meetings, then it was added to the agenda of the CM meetings held on weekly basis. However, the Azeri authorities did not comply with the systematic and urgent call of the relevant CoE. It is difficult to disregard the timing of applying the “nuclear weapon” (Başak 2019) of the Committee of Ministers. Immediately after the corruption scandal regarding the PACE members erupted in May 2017, just as the investigations had started regarding the involvement of some PACE members in political lobbying for Azerbaijan and in accepting Azeri payment (BBC News, 2017), the Committee of Ministers decided to launch the infringement proceedings, for the first time in the history of the Council of Europe.

Another emblematic case illustrating the relevance of Article 18 is the case Osman Kavala versus Turkey. The Court delivered its judgement in 2019 and “Mr Kavala, a businessman who has been involved in setting up numerous nongovernmental organisations (“NGOs”) and civil-society movements which are active in promoting and protecting human rights, argued that his arrest and placement in pre-trial detention had been unjustified.” (ECtHR Factsheet, Turkey 2022). The annual report summarized the major steps taken regarding supervision and recalls that “in the last examination of the case, the Committee adopted an interim resolution<sup>133</sup>, and considered that, by failing to ensure the applicant’s immediate release, Turkey is refusing to abide by the final judgment of the Court in the present case. As a result, the Committee served formal notice on Turkey of its intention, at its meeting on 2 February 2022, to initiate the

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<sup>132</sup> Result of the Vote on PACE Resolution on political prisoners in Azerbaijan: <http://assembly.coe.int/nw/xml/Votes/DB-VotesResults-EN.asp?VoteID=34435&DocID=14409&MemberID=>

<sup>133</sup> Interim Resolution CM/ResDH (2022)21 Execution of the judgment of the European Court of Human Rights Kavala against Turkey



procedure under Article 46, paragraph 4, of the Convention.” (CM Annual report 2021 p. 17). The Kavala case seems to have become a certain “tensile test” for the Turkish attitude of non-compliance with international commitments. The case is of symbolic importance for the European Union as well. The EU spokesperson for foreign affairs and security policy also expressed the Union’s concerns, saying “it is regrettable that the Turkish authorities have refused to execute the respective ECHR’s ruling. Such an attitude sets a worrying precedent and further increases the EU’s concerns regarding Turkish judiciary’s adherence to international and European standards” (Mudge, DW, 2022). Extremist political discourses went further. Three months after the interim resolution adopted by the Committee of Ministers, a motion for resolution was submitted by some members of Identity and Democracy, a right-wing group of the European Parliament expressing its concerns regarding “the systematic imprisonment of human rights defenders, journalists, lawyers, academics, and many other voices opposing the Erdogan regime, and [...calling] on the Council of Europe to follow through with the infringement proceedings against Turkey; [it called] on the Commission and Council to terminate all funding to Turkey in terms of the pre-accession process (IPA III), [...and furthermore insisted] that all accession negotiations with Turkey are immediately and irrevocably terminated, considering that for geographic, cultural and historical reasons Turkey could never be part of the EU” (EP Motion 2022)

*Prohibition of discrimination (Article 14) and Right to free elections (Article 3 of Protocol No. 1)*

*Sejdic-Finci v. Bosnia-Herzegovina*

Another example of the non-implementation of certain norms of the Council of Europe, and of a serious structural problem, is Bosnia-Herzegovina. The symptom is the ruling of the Strasbourg Court in the case of Sejdic-Finci group versus Bosnia-Herzegovina. The case directs attention to citizens’ ineligibility to stand for elections to the Presidency and the House of Representatives due to their non-affiliation (whether because of their situation or of their choice) with one of the constituent peoples (Country Factsheet)<sup>134</sup>. The Court delivered its judgment in 2009 but there has been no progress in implementation so far, despite the repeated calls the CMDH has issued. At its last session, the CMDH reiterated its positions by deploring “that the political leaders of Bosnia and Herzegovina, eleven years after the Court’s final

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<sup>134</sup> Country Factsheet, Bosnia and Herzegovina, Department for the Execution of Judgements of the ECtHR

judgment in *Sejdić and Finci*, have failed to reach a consensus on the content of the constitutional and legislative amendments to execute this group of judgments, that elections continue to be held under discriminatory conditions and that the European Court continues to deliver judgments finding similar violations” (CM/Del/Dec(2021)1398/H46-4). In the case of Bosnia and Herzegovina, it is likely not the lack of political will that hinders the implementation of the Court’s ruling, since this expectation became the part of the key priorities formulated by the European Commission as a prerequisite for the opening accession negotiations (Commission Opinion on Bosnia and Herzegovina, 2019. p. 15.)<sup>135</sup>. According to some alarming news, the political entity developed artificially by external powers in Dayton in 1995 failed to function in the country, and this inoperability is manifesting in the non-compliance with the norms and standards of the Council of Europe. However, this is not the only problem for this country which consists of three ethnically different parts. There are fears that the ethnic tensions swept under the carpet in 1995 by international actors could break out again if the international community ceases to maintain its support and assistance. However, external observers are highly sceptical that Bosnian Serbs’ ambition to secede from Bosnia and Herzegovina could be successful. They argue that Serbia will not ruin its EU accession prospects and once again become an international pariah by supporting this endeavour (Ker-Lindsay, 2016. p. 48).<sup>136</sup>

The Bosnian case, however, serves as another example of the reappearance of geopolitical and ethnic interests, and its solution is far beyond the competences of the Council of Europe. Nevertheless, institutional scholars could be right to some extent in saying that international regimes provide useful rules and are valuable if we regard the role of the European Union in this case. Namely, the prospect of EU membership may prevent Serbia from supporting the secession of the Bosnian Serbs and the break-up of Bosnia and Herzegovina. The possibility of non-recognition of the new state by the international community is another aspect that Bosnian Serb political leaders should consider.

In view of the above, one can conclude that evaluation of the Court’s caselaw brings us closer to an understanding of the very complex political and geopolitical reality of the member states, and of the interrelation between the political and legal context. This chapter aimed to provide a survey of those cases where the implementation at national level was seriously questioned and

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<sup>135</sup> “Ensure equality and non-discrimination of citizens, notably by addressing the *Sejdić-Finci* ECtHR case law”

<sup>136</sup> On the other hand, newspaper articles continue to report on secession ambitions of the Bosnian Serb Leader and the dysfunctionality of the Bosnian State. See Daniel Kovacevic: Dodik Unveils Fresh Threat of Bosnian Serb Secession, 13 February 2020 or Srećko Latal: Bosnia in 2021. The Year Dayton Gets Rewritten? 8 January 2021.

led to drastical steps either from the member state by initiating the amendment of the ECHR or by officially contesting the supremacy of the Strasbourg Court or from the side of Committee of Ministers by applying the last resort to sanction non-execution. The Bosnian case has even more far-reaching lessons, as the judgement pointed out the dysfunction of the state, the legal solution to which is at present difficult to perceive.

The full picture implies the findings of the latest annual report of the Committee of Ministers, which identified cases in relation to the functioning of the judiciary as one of the major challenges. However, the report positively noted “that despite the complexity and challenges these cases raise, in a number of them positive developments have been recorded and welcomed by the Committee in 2021.” (CM Annual report 2022, p. 19).

Another important aspect of the efficiency of the supervision by the Committee of Ministers we must be aware of is the fact that under the provision of Article 46 of the ECHR, the Committee of Ministers supervises the execution of the judgements of the Court. Bearing in mind that the Committee of Ministers is composed of the diplomats of the member states, the question arises, to what extent the supervision system is reliable. How can we expect member states to have equally neutral and legally based approach in a politically sensitive interstate case? How objective the Committee of Ministers could be in such a case? The issue has obviously been a concern for others as well and some scholars recalled that “the main criticism levelled against peer review in the human rights field is that peers either lack incentives or have the wrong incentives when it comes to reviewing others” (Çali and Koch 2014, p. 302.) They argued that „Monitoring the human rights of other states is not often a priority. Conversely, [...] States become interested in human rights in other states for reasons of self-interest. The problem of low political salience leads to inefficient monitoring. The problem of high political salience leads to power games and diplomatic bargaining. Both problems point to the same theoretical conclusion: collective ownership of human rights law implementation is hard to maintain. Peer review in the case of monitoring human rights commitments has profound structural deficiencies and is unreliable.” (Çali and Koch 2014, p. 302). Despite the general and sceptic attitude towards similar structure and after conducting an in-depth analysis of the system the scholars came to an interesting conclusion, which enriches the understanding of the relevance of power games and normative institutional framework. They found that „there is support amongst peers for building in institutional constraints to offset under-monitoring and bargaining [...] the Committee as a compliance monitoring system illustrates that, under the institutional constraints of double delegation of *interpretive and monitoring powers* to the Court and the

Secretariat, peer review in Europe offers a model to overcome the structural problem of unreliability” (Çali and Koch 2014, p. 324.)

### **3. 3. Case studies**

As both political and legal questions are in the focus of this thesis, the most outstanding examples have been selected. The reason behind the selection of the case studies was to present those events, which have raised serious identification question in the recent years as regards the credibility, operation, and functionality of the Council of Europe. According to the author's personal experience, the political case nearly paralyzed the Organization in financial terms, but as to the implementation debates of the legal case, the supremacy of the Court was questioned.

#### *3.3.1. Political case study – From partial suspension to exclusion: The Russian Case*

The Russian case has already made history in the Council of Europe, and provides lessons in many regards. The case study clearly illustrates the concurrence between the Committee of Ministers and the Parliamentary Assembly, the risk of escalation following politically motivated decisions, the prevalence of pragmatic aspects, credibility, and face-saving efforts, as well as the largely criticized compromise, which could have as many positive as negative messages for the different participants. But it is also highly relevant for the research questions, and perfectly reflects the dilemma of the organisation between power realism and the normative character of the Council of Europe.

The direct event generating the financial crisis of the Council of Europe was the reaction of the Parliamentary Assembly of the Council of Europe to the annexation of Crimea. The organisation always seeks to respond first to the most pressing political events, and the Assembly immediately reacted to the events by limiting the mandate of the Russian parliamentary delegation. In response to this decision, the Russian delegation left the parliamentary forum, and did not take part in the activity of the Parliamentary Assembly for five consecutive years. Furthermore, the Russian government decided not to implement its financial obligation towards the Council of Europe from 1 July 2017. The situation escalated, and the Assembly sought some solutions by which the Russians could return and the Assembly while saving face. The inoperability of the Council of Europe was at stake in June 2019. To

keep Russia in, the Parliamentary Assembly was ready to disregard its own criteria, formulated only a few years earlier.

The annexation of Crimea in 2014 is now an oft-cited antecedent, in light of the ongoing war between Ukraine and the Russian Federation. It may be recalled that troops were deployed by Russia to protect Russian speakers on the Crimean Peninsula on 1 March 2014, then the Crimean authorities declared their independence on 11 March 2014 (EP Resolution 2014). In the Autonomous Republic of Crimea and in Sevastopol, after the decision of the Crimea's Supreme Council, a referendum was held on joining the Russian Federation on 16 March 2014. The next day, 17 March 2014, the annexation of Crimea was successfully completed, and to this day the territory still de facto belongs to the Russian Federation. The international community firmly and immediately reacted to the violation of Ukraine's territorial integrity. By reason of the Russian veto, the UN Security Council could not condemn the act, only a resolution in the UN Assembly could be voted (UN General Assembly Resolution 11493, 2014). The EU Foreign Affairs Council convened an extraordinary session on 3 March, then an extraordinary meeting of EU head of states or governments took place, as a result of which the first sanctions were introduced by the EU ministers on 17 March (Foreign Affairs Council, 17 March 2014). The scope and term of further restrictive measures was continuously extended and enlarged. The EU Council renewed economic sanctions relating to the annexation of Crimea on 13 January 2022 (EU restrictive measures)<sup>137</sup>.

Following the request of the permanent representative of Ukraine, an extraordinary meeting of the Committee of Ministers was convened on 3 March 2014 to review the situation in Ukraine, but no decision was adopted. After the referendum held in Crimea, the Committee of Ministers, upon the request of Ukraine, invited the Advisory Committee of the Framework Convention on National Minorities to conduct a field visit with a view to monitoring the situation of national minorities in Ukraine as a matter of urgency. At the same time the Committee of Ministers also decided to request the opinion of the Venice Commission to assess the legality of the Crimean referendum (CM decision on the Situation in Ukraine, 2014). The Committee of Ministers finally condemned the referendum and considered the annexation as illegitimate (CM decision on the Situation in Ukraine, 2014) after the opinion adopted by the Venice Commission on 10-22 March 2014 (Venice Commission Opinion no. 762, 2014). Despite of this decision, any proposals to limit in any form the membership of the Russian Federation was not on the agenda. At the same time, an urgent debate on the recent developments in Ukraine and threats to the

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<sup>137</sup>Timeline – EU restrictive measure against Russia over Ukraine, European Council of the European Union

functioning of democratic institutions was held in the Parliamentary Assembly and a resolution was adopted, which considers the referendum as unconstitutional and condemns the aggression in line with the decision of the Committee of Ministers. Furthermore “Given the risk of destabilisation and the deterioration of the security regime of the whole region by further Russian military aggression against Ukraine, the Assembly recommends that the signatories of the Budapest Agreement<sup>138</sup>, as well as other relevant European States, explore the possibility for tangible security agreements to ensure Ukraine’s independence, sovereignty, and territorial integrity.” (PACE Resolution 1988 (2014)).

Besides, more than 70 PACE members tabled a motion for resolution to reconsider the ratified credentials of the Russian parliamentary delegation on substantive grounds (PACE Motion for Resolution, 2014). Following this initiative, PACE adopted a resolution (PACE Resolution 1990 (2014)) on restricting some rights of the Russian parliamentarians.<sup>139</sup> The Russia PACE delegation did not accept suspension and left the Parliamentary Assembly. In view of the continuous extension of the decision on the suspension of their rights, the Russian parliamentary delegation did not take part in the activity of the Assembly for the next five years. The Assembly also resolved on the criteria of restoring the rights of the Russian PACE members in its resolution on the still unratified credentials of the Russian delegation during the first part session in 2015 (PACE Resolution 2034 (2015)).<sup>140</sup> The Russian Federation not only ignored the criteria of the Assembly but announced on 30 June 2017 that they would not comply with the financial obligation to pay the part left to the annual budget (Batchelor 2017).

The Council of Europe, as an intergovernmental organisation, is financed by its member states. The Statute stipulates the obligation of the secretary general to

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<sup>138</sup> Memorandum on security assurances in connection with Ukraine’s accession to the Treaty on the Non-Proliferation of nuclear weapons. Budapest, 5 December 1994.

<sup>139</sup> The PACE resolves to suspend the following rights of the delegation of the Russian Federation until the end of the 2014 session: voting rights; right to be represented in the Bureau of the Assembly, the Presidential Committee, and the Standing Committee; right to participate in election observation missions. (PACE Resolution 1990 (2014) 15.1, 15.2, 15.3).

<sup>140</sup> The Assembly urged the Russian Federation among others “to reverse the illegal annexation of Crimea; to disband all paramilitary forces in the region, to take credible measures to end the influx of Russian ‘volunteers’ into the conflict in eastern Ukraine; and to prosecute to the full extent of Russian law, all Russian citizens who have participated as ‘volunteers’ in the armed conflict in eastern Ukraine; to withdraw all its troops, including covert forces, from Ukrainian territory; to release all hostages, prisoners of war and illegally held persons, bring the Federal Law on Defence of the Russian Federation into line with the opinion of the European Commission for Democracy through Law (Venice Commission) on this law.” (PACE Resolution 2034 (2015)).

inform all member states about the total amount of their financial contribution on an annual basis. (CoE Statute, 1949, Article 39).<sup>141</sup>

According to the financial regulation, the “financial year shall last one year extending from 1 January to 31 December of the same calendar year” (Financial regulation 2011, Article 3.1). The rules also provide that “Each member state shall pay at least one third of its obligatory contribution in the course of the first two months of the year [...] The balance of the contribution due shall be payable before the end of the period of six months referred to in Article 39 of the Statute” (Financial regulation 2011, Article 10. 1.,2). Those states, which have not paid the contribution in time, by the deadline set in the Regulation, are “required to pay simple monthly interest of 0.5% on amounts remaining unpaid on the first day of each of the following six months, and 1% on amounts remaining unpaid on the first day of each month thereafter”. (Financial regulation 2011, Article 10.4). The Russian Federation is one out of the six major contributors, and its annual financial obligation approaches 33 million euro. Statistics from 2016 show that 10. 06% of the total ordinary budget came from Russia.<sup>142</sup>

Therefore, the Russian decision not to pay approximately 22 million euro, the balance contribution due before the end of the financial year of 2017, not to mention the whole contribution due for 2018, together with the decision of Turkey to withdraw from the major contributor status (PACE Resolution 2208 (2018)) had a serious impact on the Council of Europe<sup>143</sup>

It is no coincidence that common reflection how to tackle the situation had already started by the end of 2017, including preparation for the Russian parliamentarians’ return to the Assembly.

Taking into account the diverse positions of member states about the return of the Russians to PACE, in light of pros and cons of political and financial arguments, the full participation of Russian delegates in the Parliamentary Assembly became more and more important, since the Assembly elects the leading officials of the Council of Europe, the secretary general, the deputy secretary general, the commissioner for human rights, as well as the judges of the European Court of

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<sup>141</sup> The Committee of Ministers decided in 2010 to introduce the biennial budget from 2012.

<sup>142</sup> In 2016-2017 The largest contributor is France 11, 54 %, followed by Germany 10, 97 %, Italy 10, 65%, Turkey 10, 29 %, the Russian Federation 10, 06 % and finally the United Kingdom 9, 86% (Draft Council of Europe Programme and Budget, 2015. p. 210).

<sup>143</sup> As a result of the emergency declared after the failed coup d’état in Turkey on 15 July 2016, several human rights violations were observed in the opinion of the Parliamentary Assembly, thus PACE decided to reopen the full monitoring procedure regarding Turkey. The pro-government representatives of Turkey considered this step as a discriminatory measure against Turkey, leading among other things to its withdrawal from major contributor status (Appendix - Dissenting opinion to PACE Report, 2017, p. 33.)

Human Rights (PACE Rules of Procedure 2022, X. p). As Russia argued in its statement in January 2019, thanks to the long absence of the Russian parliamentary delegation, more than half of the judges of the Strasbourg Court had been elected without Russian votes, raising serious legitimacy questions regarding the future judgements of the Court in respect of the Russian Federation. But the new commissioner for human rights was also elected without the Russian delegation.<sup>144</sup> Russia invoked the responsibility of PACE not to launch the necessary procedure to restore their rights and decided not to submit the credentials for examination in January 2019 (Statement of the State Duma, 2019). There was a time pressure in the sense of further automatic restrictive measures resulting from prolonged non-payment, as the Statute says that “The Committee of Ministers may suspend the right of representation on the Committee and on the Consultative Assembly of a member which has failed to fulfil its financial obligation during such period as the obligation remains unfulfilled.” (Statute, Article 9). What is more, the third session of the Parliamentary Assembly in June 2019 was also approaching, when the new secretary general had to be elected. In light of the Russian statement above, the organisation apparently did not wish to be blamed for a possible situation in which the legitimacy of the new secretary general would be questioned by one of the major contributors of the Council of Europe.

Therefore, PACE adopted a resolution in April 2019, which clearly stated that Council of Europe membership implies an obligation to participate in both statutory organs, the Committee of Ministers and the Parliamentary Assembly, and called on the Russian Federation, “to appoint a delegation to the Assembly and to resume obligatory payment of its contribution to the Organisation’s budget” (PACE Resolution 2277 (2019)). Based on the report on strengthening the decision-making process of the Parliamentary Assembly concerning credentials and voting, the decision was finally taken on the first of the June session in 2019. The resolution states that *“The members’ rights to vote, to speak and to be represented in the Assembly and its bodies shall not be suspended or withdrawn in the context of a challenge to or reconsideration of credentials.”* PACE Resolution 2287 (2019) 10. p). *This former automatism is now taken out of the rules of procedure, and provides that* “it is up to the Assembly, when deciding, by resolution, on a challenge to or reconsideration of credentials to determine which rights are affected.” (PACE Resolution 2287 (2019) 10. p). To receive the support of PACE members refusing the possible return of the Russian parliamentarians, the same document emphasises the obligation of the Parliamentary Assembly to introduce a joint procedure of reaction, by which

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<sup>144</sup> Commissioner for Human Rights Dunja Mijatovic was elected by the PACE in January 2018 for a term of six years.



the Committee of Ministers and the Parliamentary Assembly could jointly respond to the serious violations of CoE norms and values (PACE Resolution 2287 (2019) point 4. The credentials of the Russian PACE delegation were finally approved in a Resolution adopted by PACE on 26 June 2019, and the Russian parliamentarians participated both in the debate and in the parallel process of the election of the secretary general. However, the resolution called on Russia to fulfil all recommendations of the previous PACE decisions and to pay all fees due to the budget (PACE Resolution 2292 (2019)).

In light of the overheated debates in PACE, as well as the financial and electoral considerations above, one can conclude that the organisation had been obliged to take into account the political reality and budgetary implications, but after the return of the Russian PACE delegation, the credibility of the organisation was questioned by many individuals and human rights bodies, who thought that the decision was a huge mistake. According to some analysts, the unconditional return of the Russian delegation was clear proof that there was neither a common position, nor a common strategy in Europe against Russia. In view of these evaluations, the fact that a violation of rights was not sanctioned creates a precedent, and that is an extremely detrimental signal for the other member states: namely that a state can disregard its obligations if it pays its financial contribution to the budget. It was also seen as a message to the Eastern European countries that they could not count on their western European allies to help counter Russian security threats, and so they had better to look to the United States for security guarantees. Some experts added that Russian civil society also regarded the PACE decision as hypocritical, believing that it was Russian money which was important, and the communications stating that the Council of Europe was concerned about the human rights of Russian citizens and the Russian civil sphere was only a pretence.<sup>145</sup>

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<sup>145</sup> The Moscow Times (2019) Russia Returns to European Rights Body After 5-Year Suspension; Gigitashvili 2019. Russia's return to PACE. New Eastern Europe; Jozwiak 2019. Explainer: Will Russia Return to PACE Next Week? RadioFreeEurope, RadioLiberty. Mounier 2019. Russia's undiplomatic return to the Council of Europe, France24.

### *Russian aggression against Ukraine on 24 February 2022*

An awareness of the response of the Council of Europe to the annexation of Crimea, described in detail above, is necessary for a clear understanding of the CoE reaction to the war between Ukraine and the Russian Federation which began in February 2022. As the present thesis aims to assess the CoE responses to political challenges, the examination of the reasons behind the aggression in 2022 and its geopolitical context are beyond the scope of this analysis. The reaction of the Council of Europe becomes interesting in light of its previous response in the Crimea-related suspension issue of the PACE, since in comparison to the previous CoE sanctions, considered both then and now as very cautious and introduced only at PACE level, the reply of the Council of Europe to the Russian aggression in 2022 was strong and led by the Committee of Ministers.

The decision of the Council of Europe appeared quick and determined to outsider observers. Russia recognized the two breakaway regions in Eastern Ukraine, the “people’s republics” of Donetsk and Luhansk (Statement by the Council of Europe Secretary General), and approved the use of the armed forces abroad on 22 February (Statement of the Ministry of Foreign Affairs of Ukraine). On 24 February the Russian Federation attacked Ukraine from three directions. (Statement from Council of Europe Secretary General on the military attack), and on 25 February the Committee of Ministers suspended the right of representation of the Russian Federation both in the Committee of Ministers and the Parliamentary Assembly (CM decision on the Situation in Ukraine – Measures to be taken). PACE held an extraordinary session on possible sanctions and argued in favour of the termination of Russian membership in the Council of Europe (PACE Opinion 300, 2022). Parallel to this process, the Russian Federation officially informed the secretary general of its withdrawal from the Council of Europe and denounced the European Convention on Human Rights (CoE Newsroom). The Committee of Ministers decided on the exclusion of the Russian Federation the next day, on 16 March 2022 (CM Resolution CM/Res (2022)2). The President of the Court announced the decision at the plenary session on 22 March 2022, declaring that “The Russian Federation ceases to be a High Contracting Party to the Convention on 16 September 2022 [and] The Court remains competent to deal with applications directed against the Russian Federation in relation to acts or omissions capable of constituting a violation of the Convention if they occurred until 16 September 2022.” (ECtHR Resolution, 2022).

Consequently, one month after the beginning of the military attack against Ukraine, a cooperation of 26 years between the Russian Federation and the Council of Europe ended.

The organisation merely averted its gaze on other occasions when armed conflicts broke out in the CoE region, caring solely about humanitarian aspects, and neglecting other considerations. In fact, the CoE let the Russian Federation join the organisation in the middle of its first military intervention in Chechnya (PACE Report 7531. 1996)<sup>146</sup>. Turkey's attack on the independent and sovereign state of Cyprus was not sanctioned in 1974, and no restrictive measures were adopted during the war between Georgia and the Russian Federation in 2008, the events of which, according to foreign policy analysts, have macabre analogies with the war in Ukraine (Dodman 2022, Seskuria 2022, Toal 2022, Vartanyan 2022). In addition, the annexation of Crimea was essentially accepted after five years. In 2022, neither the human rights of Russian citizens, nor the possible budget deficit of the organisation were taken into consideration, and the Russian Federation was expelled from the Council of Europe. The sanction arsenal available in the Council of Europe has been fully applied against the Russian Federation: from suspension via withdrawal to exclusion, all means have been used. Only the joint reaction procedure developed purposely for similar cases during the financial crisis in 2019 (CM Decision on complementary procedure, 2020), to compensate the loss of face resulting from the decision to let the Russian parliamentarian return to the PACE, was not activated. According to internal sources<sup>147</sup>, representatives of Ukraine demanded a decision provoking immediate political impact, which is why consideration of the joint reaction procedure did not take place.

However, the process leading to the decision on the exclusion was prompt only from outside. On the very day of the military attack, Ukraine declared the severance of diplomatic relations with the Russian Federation (Statement by the Ministry of Foreign Affairs of Ukraine 24 February 2022). The Committee of Ministers convened an extraordinary meeting to evaluate the situation and to discuss options regarding its reaction. The decision it adopted “condemned in the strongest terms the armed attack on Ukraine by the Russian Federation [... and] the recognition by the Russian Federation of the Ukrainian oblasts of Donetsk and Luhansk as independent entities; reiterated their unwavering commitment to the independence, sovereignty

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<sup>146</sup> The Committee of Ministers invited the Russian Federation to join the Council of Europe at its meeting on 8 February 1966. CM Resolution (96)2.

<sup>147</sup> Interview with the Chairman of the Parliamentary Committee on Foreign Affairs of the Hungarian National Assembly, Head of the Hungarian PACE delegation, Mr. Zsolt Németh on 28 February 2022 in Budapest, see in detail in Chapter 5

and territorial integrity of Ukraine within its internationally recognised borders, decided to examine without delay, and in close co-ordination with the Parliamentary Assembly and the Secretary General, the measures to be taken in response to the serious violation by the Russian Federation” (CM decision on Ukraine, 24 February 2022). The information document circulated for the meeting already contained an overview of the possible means of sanctions, inter alia the regular review of the situation by the Committee of Ministers, formal CM monitoring, involvement of CoE monitoring bodies including the Commissioner for Human Rights, the activation of the complementary procedure and the different options in the framework of the Actions under the Statute (suspension, a CM request to the state to withdraw in accordance with Article 7 and the combination of suspension with a CM request to withdraw under Article 8 of the Statute (CM Indicative list). The background paper did not, however, detail the provision of Article 8, which adds to the options above that the CM has the right decide to terminate the membership with the indication of the concrete date: “If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine” (Statute, Article 8). Pursuant to debates in the extraordinary CM meeting and in the framework of the Joint Committee<sup>148</sup>, the CM decided to suspend the right of representation of the Russian Federation with immediate effect in both the Committee of Ministers and the Parliamentary Assembly (CM decision on the Situation in Ukraine – Measures to be taken).

So, dividing lines could be observed again behind the scenes, with intensive analysis of the usual arguments, the possible legal and financial implications of the Russian withdrawal, and consideration of the immediate sanctions introduced by the European Union. <sup>149</sup> Another aspect, which was certainly not negligible, was that the CoE had to respond to the criticism it received when Russian parliamentarians returned to the PACE in 2019. In other words, the organisation had to atone for the inevitable loss of face at that time to maintain its future credibility.

Taking into account the above, one can conclude that the Council of Europe would not have reacted to the war in Ukraine in such determined way without the previous five-year experience of wrangling in the PACE after the annexation of Crimea and the return of the Russian PACE delegation guided by financial considerations, and without the critiques frequently mentioned

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<sup>148</sup> Member states’ representatives from the Committee of Ministers and corresponding number of MPs from the Assembly in respect of each member state, PACE Website, Joint Committee

<sup>149</sup> Based on open but not published reports of the Permanent Mission of Hungary to the CoE

by the foreign policy analysts, namely that Europe had had no obvious response to the war between Georgia and Russia. The lack of a unified European approach encouraged Russia, and this leniency in 2008 indirectly led to the annexation of Crimea in 2014 (Euronews, 2018). At the same time, it should be also noted that the Council of Europe is an intergovernmental organisation, unlike the European Union, and the foreign policy considerations of member states towards Russia came to the forefront. The response of the Council of Europe to Russian aggression against Ukraine should be assessed in a pan-European policy context and could be considered as a manifestation of Euro-Atlantic foreign policy against the Russian Federation.<sup>150</sup>

### *Suspension, withdrawal, expulsion*

The Statute of the Council of Europe contains three options for the cessation of membership. Article 7 makes possible a voluntary withdrawal, with no immediate effect, but pending the date of the formal notice addressed to the Secretary General, the cessation takes effect at the end of the financial year or, if the notice was sent in the last three months of the year, it shall take effect at the end of the subsequent financial year. This period is of great importance relating to the duration of the financial obligation, as the member state in question should contribute to the budget and remain the state party to the Convention on Human Rights within the jurisdiction of the Strasbourg Court until withdrawal or cessation takes effect (Statute, 1949, Article 7). Article 8 of the Statute stipulates that the Committee of Ministers can suspend a member state which has seriously violated CoE values, namely Article 3 of the Statute, and may request its withdrawal. In case the member state does not comply with the withdrawal request, the CM “may decide that it has ceased to be a member of the Council” (Statute 1949, Article 8). This is a very significant distinction between withdrawal and cessation or expulsion: the date when one or the other takes effect. As indicated above, withdrawal has a longer transition period, unlike cessation, the date of which is determined by the CM. There has been no precedent for exclusion since the foundation of the Council of Europe, in the last 70 years. There is a historical precedent for withdrawal, in the case of Greece in 1969, when it decided to withdraw to prevent a decision on cessation (CM Resolution (69) 51).

Consequently, there was a need to terminate the membership of a member state which had already withdrawn for procedural reasons, in order that cessation of the membership should

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<sup>150</sup> Authors’ opinion

take place with immediate effect. This CoE reaction, in light of the PACE decision in 2019 and the intensive debates preceding that response, could be surprising, and can be regarded as a compensatory measure. Although Ukraine had demanded the launch of the procedure under Article 8 of the Statute since the first day of the military attack, and several member states which had previously had similar experience with Russia, or with serious fears of similar future security threats from Russia, were ready to support these Ukrainian efforts, while there were also cautious, pragmatic attempts to prevent hasty and premature decisions. Certainly, the credibility argument prevailed when finally deciding on exclusion, as the criticisms received over the PACE decision in 2019 were still too recent and intense – namely that the Council of Europe had bowed to Russian blackmail, and that the violation of CoE values and human rights were overshadowed by financial considerations. It is not premature to conclude that Russia would have not been necessarily expelled on 16 March 2022 without the developments in the Parliamentary Assembly after the annexation of Crimea. As many interlocutors during the interviews highlighted:<sup>151</sup>

*The decision of the PACE in 2014 to limit the rights of the Russian Parliamentary delegation as a response to the annexation of Crimea has not been consulted with the Committee of Ministers. The latter one blamed the PACE for taking imprudent decision, which escalated after by the counter reaction of the Russian parliamentarians. The main lesson was the need to coordinate the political actions and to communicate unified messages at the level of the whole organisation.*

In addition, the exclusion has numerous legal, financial, and institutional implications on the Council of Europe. As regards the financial impact, common reflection had already begun in March about how to temporally fill the gap caused by the lack of a Russian contribution. Even before the decision on expulsion, as a reaction to the initiative of the German Bundestag, the president of the Parliamentary Assembly issued a statement calling the national parliaments of the other 45 member states to contribute over their own financial obligation to avoid financial damage to the organisation, “to press for increased funding from their governments to cover for any possible loss of Russian contributions to the Organisation.” (PACE President calls, 2022).

In addition, a revision of the Programme and Budget adopted by the Committee of Ministers at the end of 2021 for the budget period of 2022-2025, containing the annual contribution rate of the member states and the planned professional activity of the Council of Europe at

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<sup>151</sup> Interviews with CoE high ranking officials, see in detail in Chapter 5

intergovernmental structure level, will probably also be needed, and could amend the already scheduled programs as well. The legal and institutional consequences are more obvious and concrete, so the Committee of Ministers took its decision in this respect on 23 March 2022. Accordingly, Russia ceased to be a party to the so-called ‘closed’ instruments, with the European Convention on Human Rights at first place, as only CoE members may become contracting parties to these conventions. Hereinafter Russia will remain a party to the CoE treaties open to the accession on non-member States of the Council, and in the case of conventions and protocols which Russia signed but did not ratify before it ceased to be a member, its signatures will be suspended. Regarding its participation in future activities and programs of the Council of Europe, the rule applied for non-members will be in force. Russia ceased to be a member in all partial and enlarged partial agreements<sup>152</sup>, which it was a party to before. As to the financial implications “The Russian Federation is bound to fulfil its full financial obligations arising out of its membership of the Council of Europe and of partial agreements, up to the date it ceased to be a member of the Organisation, including its contributions for 2022 determined on a *pro rata temporis* basis. It also remains liable for all arrears accrued at the date of termination of its membership. The Secretary General is invited to inform the Russian Federation of the amount of its financial contributions for 2022, including for convention mechanisms as appropriate.” (CM Resolution CM/Res(2022)3). Taking into account the above, Russia is obliged to pay one third of the total amount set as the 2022 annual contribution (34 353 428,33 million euros).

### *3.3.2. Legal case study – Non implementation of the Court's judgement*

As the analysis of the previous chapters has already shown, although the issue related to the functioning of the Court and implementation of its judgements seem to be a purely legal problem, the Court faced more serious challenges than a simple increase in workload. In the thesis, an insight into the complexity of the court’s case law with a description of the major structural problems has been already provided, while this chapter seeks to evaluate another type of judgement as a legal case study, which can be regarded as a transition between the interstate and the individual case requiring complex and deep internal reform, and represents a new aspect, the concept of extraterritoriality.

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<sup>152</sup> “Partial Agreements are not international treaties but merely a particular form of co-operation within the Organisation”. A Partial Agreement is “an activity of the Organisation as other programmes, except that it has its own budget and working methods which are determined solely by the members of the partial agreement” (CoE Website, About Partial agreements)

The case of *Catan and Others versus Moldova and the Russian Federation* seems interesting from the point of view that it relates to a frozen conflict, where one of the respondent states has no de facto control over the territory. But the other respondent state, the Russian Federation, does not recognize its responsibility, arguing that the Moldavian Republic of Transdniestria is a sovereign state, where Russian intervention would run counter to the provisions of international law. In any event, in light of the ongoing war in Ukraine, the argumentation above could be seen as more than cynical. However, regarding practical implementation, the international security context does not contribute to the solution, just as it does not help execution in many other cases where the judgement affects internationally contested, militarily occupied territories. In my view, this case perfectly illustrates the dilemma between geopolitics, political reality and an idealistic approach following the established framework of legal norms, which are binding equally, in principle at least, upon all members of the Council of Europe. Apparently, the Court's case law serves as a kind of mirror, in which the true face of the real power appears.

In *Catan and Others*<sup>153</sup> the European Court of Human Rights first determined the possible jurisdiction of the Republic of Moldova, and concluded that as in the case of *Ilaşcu and Others*<sup>154</sup>, this case also fell within the jurisdiction of Moldova. In its arguments, the Court concluded that “Although Moldova has no effective control over the acts of the ‘MRT’<sup>155</sup> in Transdniestria, the fact that the region is recognised under public international law as part of Moldova's territory gives rise to an obligation, under Article 1 of the Convention, to use all legal and diplomatic means available to it to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention to those living there (see *Ilaşcu*, cited above, § 333)” (Case *Catan and others* 2012 p. 40). In the end, the Court unanimously held that the applicants fell within the jurisdiction of both the Republic of Moldova and the Russian Federation (Case *Catan* 2012 p. 57). As scholars pointed out regarding the similarity between *Ilaşcu* and *Catan*, “In *Ilaşcu and Others v. The Republic of Moldova and Russia*, it was held that both States may be found to exercise jurisdiction over the MRT, the former on the basis of its sovereign title over the region – its jurisdiction being limited to certain positive obligations –, and the latter on the basis of its ‘effective authority or, at the very least [its] decisive influence’ over the MRT (§ 392).” (Hamid 2019). As to responsibility for the violations, the Court held “unanimously,

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<sup>153</sup> The case contains 28 applications in total (Case *Catan* 2012 p. 65, List of applicants)

<sup>154</sup> Case of *Ilaşcu and others v. Moldova and Russia*, Final judgement of the European Court of Human Rights, 8 July 2004.

<sup>155</sup> “Moldavian Republic of Transdniestria” (Case *Catan* 2012, p. 4)



that there has been no violation of Article 2 of Protocol No. 1 to the Convention in respect of the Republic of Moldova; [and held] by sixteen votes to one, that there has been a violation of Article 2 of Protocol No. 1 to the Convention in respect of the Russian Federation” (Case *Catan* 2012 p. 57).

The right violated relates to education, the concrete provision of which reads as follows: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” (Protocol to the ECHR, Article 2). Case *Catan* specifically concerns violations of the rights of children, parents and staff members of Latin-script schools located in the Transnistrian region of the Republic of Moldova during the years 2002-2004 (CM Notes, *Catan and others* 2022). The supervision of the case is regularly on the agenda of the CMDH meetings, despite the repeated communication of Russia, “in which they have underlined that the European Court’s attribution to Russia of responsibility for violations [...] on the territory of another State created serious problems of implementation. According to the authorities, they have applied significant efforts to find acceptable solutions to these problems, by [...] conferences to discuss issues related to the European Court’s case law on the extraterritorial responsibility of states. The authorities also expressed the view that a further detailed consideration by the Court of the current situation in the Transnistrian region was necessary to resolve the relevant problems...” (Communication, *Catan and Others* 2022, pp 3-4). Despite the different interpretation, dialogue remained open between the Committee of Ministers and Russia as to the supervision of this case, although “on 30 September 2021 the Russian authorities responded [to the letter of the Secretary general by] recalling the position of [the Russian] authorities that the Court’s application of the doctrine of ‘effective control’ in the *Catan* judgment, entailing the international responsibility of Russia for acts that were not committed or controlled by it, was legally flawed, and presupposed that in the execution of the relevant judgments, Russia must act on the territory of another sovereign State, which was contrary to the principles of international law.” (CM Notes *Catan and others* 2022).

The CMDH Committee examined the case the most recently at the 1428<sup>h</sup> meeting (8-10 March 2022). The Committee *inter alia* “strongly urged the Russian authorities to provide an action plan setting out concrete measures and to proceed without further delay with the payment of the just satisfaction awarded to the applicants by the Court, along with the interest accrued”

(CM Decision on Catan, 2022). The CMDH also “instructed the Secretariat to prepare an analysis of the measures required, in the light of the Court’s findings and the current factual conditions concerning the functioning of the Latin-script schools.” (CM Decision on Catan)

In view of the Russian attitude to the execution of certain other, complex cases, the openness of the Russian authorities is recognised and appreciated even if neither the payment of the just satisfaction nor practical, forward-looking proposals were elaborated from Russian side. Considering the decision of the Russian Constitutional Court, declaring the implementation of the case of prisoners’ voting rights impossible and announcing the formal supremacy of the Russian constitution vis-à-vis the European Convention of Human Rights, the willingness to cooperate was undeniably promising. At the same time, the question arises regarding the extent to which the shift of the Court’s concept and perception towards extraterritoriality served the interests of Russia. But this question remains rhetorical for the time being, since the Russian Federation was excluded from the Council of Europe on 16 March 2022, and the “The Russian Federation ceases to be a High Contracting Party to the Convention on 16 September 2022” (ECtHR Resolution 2022). According to the decision of the Plenary Court, the ECtHR “remains competent to deal with applications directed against the Russian Federation in relation to acts or omissions capable of constituting a violation of the Convention provided that they occurred until 16 September 2022 [and] The suspension of the examination of all applications against the Russian Federation pursuant to the decision of the President of the Court of 16 March 2022 is lifted with immediate effect” (ECtHR Resolution 2022). As regards the future supervision of the implementation of judgements, the CoE Execution department recently informed applicants and other interested parties that communications in cases concerning the Russian Federation, may continue to provide information to the Committee of Ministers on the progress of the execution of the judgments, including the payment of just satisfaction.<sup>156</sup> Albeit, the representatives of the respondent state do not take part in the meetings, and information from internal sources<sup>157</sup> confirmed that Russian authorities are not consulted in multistakeholder cases, which also affect them.

Yet, in relation to the Catan case, it is very interesting to examine the development of the Court’s case law as regards the concept of extraterritorial jurisdiction. According to the relevant summary of the Court, judgements in connection with the extraterritorial jurisdiction of the

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<sup>156</sup> News: Information on pending cases concerning the Russian Federation, Website of the Department of the Execution of the Judgements

<sup>157</sup> Interview with CoE high ranking official E, on 8 April 2022, Strasbourg, see in detail in Chapter 5

state parties to the ECHR date back to 1989, 30 judgements were delivered so far and the states' acts occurring within ECHR space are sorted into different groups: inter alia to military presence and political support; state security forces acting abroad; and military interventions not exercising or exercising effective control (ECtHR Factsheet, 2018). However, in the view of the relevant literature, the Court has not developed a consistent case law in this respect, though the increasing number of interstate applications require a clear vision in the not-too-distant future. As Demetriades notes, "The Court will have ample opportunity to reconsider its approach to extraterritoriality. In the coming years, the extraterritorial application of the ECHR will become increasingly important as cases regarding Turkey's military operations in Syria and Russia's support for separatist regimes in the Ukraine reach the ECtHR. Therefore, it is imperative that the Court develops a clear and coherent doctrine of extraterritoriality, which will enable it to fulfil its purpose as the gatekeeper of human rights in Europe" (Demetriades 2020, p. 194).

The current starting point is the ECHR statement that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." (ECHR, 1950, Article 1). But scholars argue that "The law regarding the extraterritorial application of the ECHR has become increasingly important as more State Parties to the Convention engage in cross-border activities. The Court has developed the law of extraterritoriality to ensure that States are held accountable for the commission of human rights violations, even if these occur outside their own territory. The aim was to avoid the creation of a regrettable vacuum in the system of human-rights protection" (Demetriades, 2020, p. 159). Academic debates about extraterritoriality have continued also in the last decade (Besson 2012; Demetriades, 2020; Mallory 2021), as many scholars state that the current practice of the Strasbourg Court is not only not well established but also confused and contradictory. Furthermore, they warn that "...we should read the jurisdiction threshold of applicability of human rights in line with the political and relational nature of human rights, [and] more specifically, to mean de facto legal and political authority. It amounts [...] to three elements: (i) effective, (ii) overall, and (iii) normative power and control." (Besson 2012, p. 884). Debates in the CoE on the convention system have always referred to the nature of the human rights conventions as a living instrument, arguing that legal instruments should be adjusted to a constantly changing world. One of the best examples of the change in interpretation is the Charter for Regional or Minority Languages, which was originally drafted as a cultural convention, but has now become one of the most frequently referenced human rights

instruments in the field of national minority rights.<sup>158</sup> As to the ECHR, with its 16 protocols it has undoubtedly been the most amended CoE convention ever since its adoption. In light of the growing geopolitical challenges, a reconsideration of the current practice seems inevitable. As Mallory claims, “the confusion, contradiction and criticism may finally be starting to eat away at the Court’s legitimacy and authority on the issue [...] there is the risk that the current cultural approach is causing real ‘damage to its credibility’ [...] Its credibility amongst states is threatened when the Court appears to introduce a new basis of extraterritorial jurisdiction [...] Its credibility amongst other interested parties (applicants, lawyers, observers, and NGOs) is threatened when its approach varies dramatically in different cases.” (Mallory 2021, pp, 47-48). The political reality and the clear intention of the Council of Europe officials to help the implementation of judgements in complex cases, the interpretation of which varies among the stakeholders, implies a necessity to reconsider the Court’s approach to extraterritoriality<sup>159</sup>. As scholars argue, “this reformulation must be conducted with a view to tailoring State obligations and responsibility according to each State’s ability to secure the Convention rights on the facts of each case. This tailoring of State responsibility will ensure that the Court’s judgment can realistically be executed” (Demetriades 2020, p. 193). As for feasibility, they add concrete propositions regarding which aspects should be taken into account when elaborating the new attitude. “First, it provides that jurisdiction is a creature of both law and fact. Hence, concurrent jurisdiction should be recognised when one State has the legal right to regulate the situation in question, whereas another State has the de facto ability to do so. This occurs when one State is acting extraterritorially. Secondly, the model suggests that the obligations of respondent States could be tailored by recognising that respondent States will often be subject to positive obligations when acting extraterritorially.” (Demetriades 2020, p. 193).

Apparently, the legal challenges relating to the European Court of Human Rights derive not only from non-execution. The adaptation capability of the human rights system is as important in the longer term as the preservation of its credibility. As Besson concludes, “Human rights duties are institutional and hence necessarily bounded and, when drawing those boundaries, one can never hope for one state’s institutions to respect the human rights of all. What the extraterritoriality of human rights debate shows, therefore, is that, in the human rights context just as in the democratic one, the territorial sovereign state’s model is in crisis. Migration on

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<sup>158</sup> Personal experiences from the CoE committee meetings (2011-2016)

<sup>159</sup> Enforcing Strasbourg Court’s judgments concerning the Transnistrian region of the Republic of Moldova, 19 February 2018, <https://www.coe.int/en/web/execution/-/enforcing-strasbourg-court-s-judgments-concerning-the-transnistrian-region-of-the-republic-of-moldova>

the inside and interventions on the outside make the territorial boundaries of the polity unsatisfactory from the perspective not only of democratic inclusion, but also now of human rights protection.” (Besson, 2012 p. 884).

To a certain extent, the presentation of the Catan case and the question of extraterritoriality point beyond the challenge of non-execution of the European Court of Human Rights, and contribute to examining the relation between geopolitics and normativism. It seems that power politics not only challenges international law, but assists the standard-setting process in its adjustment to new realities.

As a final remark to the examination of the non-execution issue in respect of the Russian Federation and the Catan case more specifically. The future modalities of the enforcement of the Russian cases raise serious questions. After its exclusion, the Russian Federation remains a contracting party to the ECHR until 16 September 2022, although individual applications can be lodged with the Court concerning those violations, which happened before this date. The examination of the Catan case is on the agenda of the next CMDH meeting in June 2022, formally with the participation of the government representative of Russia, though it is an open secret that Russian representatives will not take part in the session. The secretariat prepared an analysis about the state of play regarding execution, and identified several measures which have to be taken by the respondent states to end the violation. As they stress, “The Committee may [...] wish to reaffirm its grave concern over the respondent State’s continued failure to ensure the payment of the just satisfaction compounded by the absence of the information on the concrete measures to execute these judgments and reiterate with insistence its call on the authorities to rapidly proceed with the implementation of these obligations, as required by Article 46 § 1 of the Convention” (CM Notes 2022). The Russian Federation, as a member of the Council of Europe, bearing in mind its unconditional obligation to execute the Court’s judgement continuously, failed even to submit an action plan with the measures envisaged over nine years, and did not ensure just satisfaction<sup>160</sup> to the applicants. The question of how the CMDH intends to enforce the execution of Russian cases, including Catan and others, with a non-member, if Russia ignored its legal obligations even during its membership, is one for the future. High-ranking officials responsible for the execution of the Court’s judgements

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<sup>160</sup> ECHR defines just satisfaction as follows: “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party” (CoE Convention 1950, Article 41).

confirmed in personal interviews that within the organisation there are no ideas for how to proceed with the pending Russian cases without the cooperation of the Russian Federation.

#### **Chapter 4: COPENHAGEN DILEMMA IN THE COUNCIL OF EUROPE AND EFFORTS TO FIND A SOLUTION**

The previous chapters, the presentation of the historic enlargement to underline the initial hypothesis, and the assessment of the legal and political context, all sought to identify the main problem intergovernmental organisations face, namely the non-implementation of the obligations undertaken by the member states at their accession, or in the conventions and treaties they joined. The term "Copenhagen dilemma" is used in the context of the European Union, and refers to a problem first detected at the beginning of 2010s, when a member state appeared not to comply with mandatory conditions set before its accession. The expression was used by Viviane Reding, vice president of the European Commission, during a debate in the European Parliament on the political situation in Romania, on 12 September 2012, but she was pointing out a new and widespread phenomenon: "[...] we face a Copenhagen dilemma. We are very strict on the Copenhagen criteria, notably on the rule of law in the accession process of a new Member State but, once this Member State has joined the European Union, we appear not to have any instrument to see whether the rule of law and the independence of the judiciary still command respect." (Reding 2012). The notion became widespread in the political discourse of the European Union, was widely used in the academic literature (Bárd et al 2016, Toggenburg-Grimheden 2016, Schroeder 2016, Bárd-Carrera 2017, Salati 2019, Kochenov 2021), and adequately describes how the situation had evolved by 2017 in the Council of Europe. As the latter one was an active part in the Euro-Atlantic integration process, and considered an ante-room to the European Union for many of its member states, it seems justified to borrow an expression describing so perfectly the malaise. However, the situation in the two organisations is of course not identical. The Council of Europe developed a rigorous monitoring mechanism as one of the achievements of the eastern enlargement. Still, this detailed and theoretically well-functioning system has an Achilles heel: the organisation has no real means of sanctioning non-compliance. This would imply, in practical terms, that respect for human rights and rule of law principles on the ground depend upon the political will and interest in cooperation among state

parties.<sup>161</sup> Yet, the problem of states not respecting their commitments, defined in the EU as the Copenhagen dilemma, gradually appeared in the Council of Europe and indirectly contributed to the increasing inoperability of the Organisation by 2019.<sup>162</sup> But the situation was obviously more complex, as it was not explicitly general non-compliance which led to the financial crisis of the organisation. The fact that the Russian Federation deliberately failed to comply with its financial obligation as a response to the decision of the Parliamentary Assembly on the restriction of their rights in the CoE parliamentary forum following the annexation of Crimea, was a concrete step, regardless of the general atmosphere, and, in the run-up to this escalation, its gradual and continuous testing of the organization's patience with regard of sanctions, certainly had a huge impact on developments in PACE. In this concrete case, the Russian Federation actually ignored the conditions set by the Parliamentary Assembly as a precondition for restoring the full rights of the Russian Parliamentary delegation, so it can be seen as a form of non-compliance, but it was not directly linked to commitments undertaken at accession, if we do not take into account the general commitment to the norms and values of the Council of Europe, where the use of military force is not compatible with the Statute of the Council of Europe. Nor can blackmail be seen as corresponding with the rules of an international organisation. This political case study perfectly illustrated the situation in which the organisation was unable to enforce the implementation of commitments, since as an intergovernmental organisation financed by its member states, the Council of Europe is even more vulnerable and exposed to such unexpected developments. So the phenomenon identified as the Copenhagen dilemma in the European Union could be seen as a more serious and complex challenge in the Council of Europe. The accession criteria were not so determined in the latter case, as the Copenhagen European Council in June 1993 clearly defined criteria for countries aspiring to join the EU, while to join the Council of Europe, apart from some general requirements such as the abolition of the death penalty, accession to the European Convention on Human Rights, or acceptance of national-minority related conventions – after their elaboration had been defined, of course – the Parliamentary Assembly examined each accession request individually, and prepared its tailor-made opinion and recommendations regarding what criteria should be met for full membership. Consequently, beyond general commitments to

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<sup>161</sup> Author's personal opinion based on experience gained in the Rapporteur Group-Human Rights (GR-H), Rapporteur Group-Legal Cooperation (GR-J), in Human Rights (DH) meetings of the Ministers' Deputies in the Council of Europe between 2011-2016.

<sup>162</sup> See the political case study of the present thesis in Chapter III. 2.1.

respect the values and principles of the Council of Europe, each CoE member state is accountable for its own obligations.

Furthermore, membership was advanced in most of the cases as a kind of aspiration, hoping that the mechanisms and expertise of the Council of Europe could help the new member state to bring its state structure closer to the expectations of the organisation, and that with the help of ongoing programmes, projects, advice and support, the new member could fully comply with commitments in time. Few even considered the possibility that some members would question even unconditional, legally binding obligations. The CoE structure was built on sincerity and good faith, and this approach was also expected from member states. As the UN special rapporteur, Fernand de Varennes also pointed<sup>163</sup> to this problem as regards the efficiency of mechanisms on national minority protection, noting that international standard setting relied on trust, and that legislators trusted in the good will of states to fully comply with their obligations. Certainly, the prospect of future EU membership for a group of countries was also a powerful motivation, and still it is for those which are candidate countries.

On this basis, the Copenhagen dilemma could be identified in other international organisations which specify any criteria for membership. The reason why the adaptation of the Copenhagen dilemma could be valid and justified in the case of the Council of Europe is the unique acquis of legally binding standards the organisation elaborated during the last decade, unlike other intergovernmental regional organisations, where there is no similarly complex standard setting. Taking into consideration the fact that EU regulations are largely founded upon CoE norms, interpretation of non-compliance as a kind of Copenhagen dilemma in the Council of Europe seems reasonable.

The need to adjust the monitoring scheme remained cyclically on the agenda, not always as a general objective but in different policy sectors. However, the financial crisis in 2019 was a new point of departure, and efforts to strengthen the overall mechanism of accountability have been maintained and amplified with the aim of including a new element, functioning as a security guarantee into supervisory tools which do not have real sanctioning effect.

Therefore, the Council of Europe recognised the process and made several attempts to fine-tune the supervision procedure at different levels, to launch awareness-raising measures, and to

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<sup>163</sup> Intervention of the UN special rapporteur, Fernand de Varennes in the public hearing in the PACE Committee on Equality and Non-discrimination held in the Paris Office of the Council of Europe, on 4 December 2019, personal participation of the Author.



adequately define the obligations with a view to clarifying the criteria, increasing transparency. The Parliamentary Assembly decided to introduce “a periodic overview of groups of countries [...] to launch issue-based, cross-country monitoring in close co-operation with the relevant Assembly committees as a complementary measure to the country-by-country monitoring” (PACE Resolution 2018 (2014)). Secretary General Thorbjørn Jagland<sup>164</sup> was pragmatic and committed to regular and open dialogue with political leaders on sensitive issues. The Venice Commission elaborated the rule of law checklist to fulfil its main objective, to promote the rule of law and democracy (Resolution Res (2002) 3). The checklist intends “to provide a tool for assessing the Rule of Law in a given country from the viewpoint of its constitutional and legal structures, the legislation in force and the existing case-law. The checklist aims at enabling an objective, thorough, transparent and equal assessment.” (Venice Commission Rule of law checklist 2016).

The aim of the reform (see its evaluative presentation in detail in Chapter 4.2.) in the Framework Convention and the Language Charter was also to improve the efficiency, hypothetically, but first it is necessary to identify what efficiency means. If the objective was to speed up the procedure to ease administrative burdens, the new reform elements seem logical and reasonable. If the goal was to improve the efficiency of monitoring in the sense that the new system has more power to enforce the proper implementation of CoE standards, the result is doubtful. Scepticism is even growing as to whether the strong critiques delivered by some member states against the FCNM Advisory Committee have been taken into account. The ECMRL and FCNM reform package adopted in 2018 and 2019 is an excellent example to demonstrate the real interests behind any new procedural or substantive change. On the basis of normative expectations, the modifications should have served to strengthen the objective power of the relevant secretariat so as not to leave any further competence or right to the member state, whose interest are obviously different as regards effective monitoring. When examining the relation between power realism and normative standard setting, it is difficult to neglect the political interest, when the introduction of the new confidential dialogue is examined. The fact that the member state has the right to exercise a kind of censorship over the draft opinion of the impartial and independent experts of the Advisory Committee and the Committee of Experts is a worrying signal and proves that political considerations prevail over professional ones.

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<sup>164</sup> Former Norwegian Prime Minister and Foreign Minister Thorbjørn Jagland became Secretary General in 2009.. He was re-elected in June 2014 – the first Secretary General to win two terms. <https://70.coe.int/home/#160562>

Apart from the FCNM and ECMRL reforms, the results of which cannot be evaluated now, the other efforts to strengthen monitoring capacity have apparently failed to achieve satisfactory results, and the unconditional return of the Russian parliamentarians into the PACE in 2019 also showed the weaknesses of the overall supervisory function. Consequently, the ministers for foreign affairs instructed the ministers' deputies in Helsinki, at their 129<sup>th</sup> Session of the Committee of Ministers on 17 May 2019 “to develop – in co-operation with the Parliamentary Assembly – a clearly defined complementary procedure, which could be initiated by either the Parliamentary Assembly, the Committee of Ministers or the Secretary General, and in which all three of them would participate”. The ministers “agreed further that such a co-ordinated response [...] encouraging member States, through dialogue and co-operation, to take all appropriate measures to conform with the principles of the Statute, [...], and may ultimately lead to a decision to act under Articles 8 or 9 of the Statute, which lies with the Committee of Ministers (CM Decision of 129<sup>th</sup> Session). Article 7, 8 and 9 of the Statute cover the different forms of the cessation of the membership from the voluntarily withdrawal to the compliance with the request to withdraw until the concrete exclusion by the decision of the Committee of Ministers” (CoE Statute, Article 7-9).

#### **4.1. Sanctions for non-compliance?**

One of the major impacts of the financial crisis and the Covid pandemic on the Council of Europe has unarguably been the continuation of the reflection process, which aimed to have a general overview of the CoE monitoring mechanisms. The process started in 2021, right before the annual ministerial session, and the goal was apparently to take a decision with clear guidelines for the future regarding how to reform the supervisory system in general, and how to adapt this major achievement of the Council of Europe to a changing world and to the new priorities and expectations of the member states. After her election, the secretary general of the Council of Europe issued her strategic vision for the subsequent four years of the organisation based on the requests of the Committee of Ministers: “The Deputies invited the Secretary General, in consultation with member States, to carry out a wider review of the Organisation, including a pay review and impact assessment, with a view to improving the working methods, efficiency and effectiveness of the Organisation and to embed the outcome and recommendations of such a review into future budgets and the Organisation’s strategic framework, thereby ensuring it delivers even greater value for money by identifying concrete efficiency savings and through

organisational reform within prescribed timeframes” (CM Decision 2019)<sup>165</sup>. In her strategic framework the secretary general placed particular emphasis on strengthening synergy and cohesion among the different monitoring mechanisms, as a tool to help first to achieve in the longer term the goals of the Council of Europe. Secondly, support for the simplification of member states’ reporting obligation, in line with UN practice, also appears among the key deliverables of the secretary general. As she highlights, “Facilitating reporting obligations under monitoring mechanisms, particularly by aligning monitoring and reporting (similar to the UN practice of a single ‘core document’) for several monitoring mechanisms with targeted questionnaires between the monitoring cycles. Achievement of enhanced co-ordination (alignment of visits, joint visits etc.) at the level of the Organisation, as well as with respect to the monitoring activities of other international organisations” (CoE Strategic Framework 2020, p. 5-6). On the basis of the secretary general’s proposals, an ad hoc working group was set up in early 2021 with a view to examining the recommendations and preparing a report for adoption at the ministerial session in May 2021 (CM Decision 2021)<sup>166</sup>. In order to help the compilation of the report, background notes were prepared to overview the current situation of the monitoring mechanisms. The documents distinguished between monitoring at the level of the statutory bodies, the Committee of Ministers, and the Parliamentary Assembly (GT-MON Document 2021, pp. 2-4). In principle, the intergovernmental monitoring, convention-based and institutional mechanisms function at the level of the Committee of Ministers, constituting the thematic monitoring procedure, while the Parliamentary Assembly applies the country-based approach. However, following the Eastern enlargement in the 1990s, overlapping procedures were elaborated to address specific concerns in the case of a limited number of countries in the Committee of Ministers. In the 1990s the CM monitored only Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, Montenegro, the Republic of Moldova, the Russian Federation, Serbia and Ukraine. In the framework of thematic monitoring, which was developed later, between 1996 and 2007, specific areas were in the focus of CM supervision, such as “freedom of expression and information, equality between women and men, capital punishment” (GT-MON Document 2021, pp. 2). Beyond the statutory bodies, the Congress of Local and Regional Authorities and the Commissioner for Human Rights were also responsible for the monitoring function, but while the Commissioner’s activity cannot be seen as standard monitoring procedure, the “Congress is responsible for evaluating the application of the European Charter of Local Self-Government (ETS N°122) and its additional Protocol

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<sup>165</sup> CM/Del/Dec(2019)1361/11.1 – Part 1, point f.

<sup>166</sup> CM/Del/Dec(2021)1393/1.7

(ETS N° 207) in each member State, as well as for assessing compliance of local and regional elections with European electoral standards and good practices in the field” (GT-MON Document 2021, pp. 4). However, the current structure of the complex CoE monitoring system has some permanent features, such as cooperation with other international organisations, civil society involvement, rapid reaction capacity or the follow-up procedure (CM Document (2021) Overview).

The main convention-based or institutional monitoring bodies<sup>167</sup> of the Council of Europe have international reputation and many of them are involved in EU and UN monitoring mechanism, thus serious efforts are needed to improve synergies and avoid duplications between these structure at the international level. Still, supervision faces several challenges, as the summary identifies: “Monitoring is a complex exercise, which requires continued political and financial support to remain efficient. It also requires confidence, respect, consistency and non-politicisation. Monitoring mechanisms must also be able to evolve and adapt to new challenges [...] inconsistencies and duplication; periodic country-by-country evaluation cycles are [...] too long; [...] opinions and recommendations of monitoring bodies are ignored; monitoring bodies have [...] faced harsh criticism for [...] carrying out their mission.” (GT-MON Document 2021, pp. 4).

The ministerial session of May 2021, in Hamburg, reinforced readiness to further strengthen monitoring capacities with the coordination of the secretary general (CM Report 2021) and the last ministerial conference in Turin on 19-20 May 2022 also addressed this issue. While the evaluation of effective monitoring is handled by the Directorate of Internal Oversight, from the side of the secretary general there is a clear intention to somehow unify the results of the monitoring procedure and ensure an easy access to them. Consequently, the secretary general’s proposal was endorsed by the ministers of foreign affairs. The secretary general recommended the creation of “a monitoring portal on the Council of Europe website that functions as a ‘one-stop shop’ to facilitate access to information, activities and results of the monitoring processes of the Organisation and increase their visibility will further facilitate co-ordination and

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<sup>167</sup> European Committee for the Prevention of Torture (CPT), European Committee of Social Rights (ECSR), Advisory Committee on the Framework Convention for the Protection of National Minorities, Committee of Experts of the European Charter for Regional or Minority Languages, European Commission against Racism and Intolerance (ECRI), Group of Experts against Trafficking in Human Beings (GRETA), Group of States against Corruption (GRECO), Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL), Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Committee), and other monitoring mechanisms on anti-doping, safety and security at sports events and on the manipulation of sports competitions (GT-MON Document 2021, pp. 4-8).

coherence. The concrete details of this portal will be discussed with the chairs of the monitoring and advisory bodies and the relevant departments of the Secretariat in 2022 with a view to its implementation in 2023.” (SG Information Document 2022, p. 4).

Though procedural elements are continuously evolving, and the CoE political leadership is committed to improving transparency and efficiency, success largely depends on the political will of the member states, and the extent to which they are willing to cooperate with the different monitoring structures. CoE experts and high-level officials often referred to monitoring as assistance to the state under review, to help it develop its national structure and overcome shortcomings with a view to achieving the ultimate goal, well-functioning democratic institutions, and a rule-of-law system with general and non-discriminatory respect for human rights, in full compliance with CoE standards. In a word, they see monitoring as a procedure which serves the best interests of the member state. But what measures and tools are available to the CoE if the member state under review does not share this optimism and enthusiasm? As sanctioning power in the classical sense, the only detrimental effect could be some loss of reputation, which carries weight with countries aspiring to join the EU, but beyond these arguments there are no powerful legal or financial means to enforce the implementation of the obligations undertaken. As to the legally binding obligation to respect and execute the judgements of the European Court of Human Rights, the only possibility has been in force for just a few years. Although the monitoring function is one of the core duties of the Council of Europe, besides standard setting and cooperation, efficiency could only be improved by increasing the motivation of the member states or by introducing some restraining measures. The period of initial good will and good faith expired as early as the 1990s, when the rules were elaborated, but the regulations of the 1990s are no longer relevant, and the system has to be adapted to the new political circumstances if the CoE wants to remain competitive among international organisations, and in particular with the European Union.

#### **4.2. Systematic strengthening of the supervisory function**

The current self-reflexion process of the organisation, with a particular focus on the monitoring mechanisms, helps to justify the initial hypothesis of the present thesis: namely that the Eastern Enlargement and the accession of a great power like the Russian Federation largely contributed to the political and legal challenges of the Council of Europe. When looking at the background papers and charts prepared to help develop common thinking on the future of the supervisory function, one element is well-marked. As regards convention-based or institutional thematic

monitoring, all mechanisms already underwent some kind of reform from the mid-2010s, or else the adjustment process is still ongoing. Both the need to adapt and the timing of the reform marks the period when the political leadership realized the urgent need to fine-tune the structure developed in the 1990s to maintain the functioning capabilities and credibility of the monitoring system. This chapter devotes special attention to the reform of the Framework Convention and the Language Charter as the modalities of the new reporting scheme in these cases go beyond the pure technical and procedural nature and illustrates the new approach of the organisation towards the accountability of member states.

As a serious effort to reinforce monitoring in the field of national minority rights, the reform of the supervisory mechanisms of the Framework Convention and the Language Charter perfectly symbolises the internal endeavours of the Council of Europe.

The chapter identifying the general trends and emerging challenging threatening the effective protection of national minority rights appeared in the regular biannual reports of the Advisory Committee of the Framework Convention in the middle of the last decade.<sup>168</sup> It was not a coincidence that attention was directed to the alarming developments threatening national minority protection. The annexation of Crimea boosted certain processes in the Council of Europe, raising the issue of the efficiency of the existing monitoring mechanisms. In its ninth report, the Advisory Committee of the Framework Convention drew attention to the resolution<sup>169</sup> of the Committee of Ministers establishing the supervisory system of the Convention, which originally contained a provision allowing for ad hoc monitoring beyond the periodic report upon the instruction of the Committee of Ministers, but this article was not applied until 2014. Although other examples of armed conflicts have also been in the CoE area<sup>170</sup> earlier, the annexation of Crimea and the military incident widening a war in Eastern Ukraine represented an important turning point, and an international organisation ensuring human rights as a core mission had limited instruments to tackle the humanitarian and human rights aspects of such a challenge.

Upon the request of the Ukrainian authorities, the Committee of Ministers instructed the Advisory Committee to conduct a fact-finding visit on the Crimean Peninsula to oversee the enforcement of national minority rights in the occupied territory. A special report was compiled, but stated that the ad hoc mission had not taken place in the framework of the periodic country

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<sup>168</sup> FCNM Advisory Committee, Ninth activity report covering the period from 1 June 2012 to 31 May 2014.

<sup>169</sup> CM Resolution (97) 10, 1997.

<sup>170</sup> War between Georgia and the Russian Federation for the independence of Abkhazia and South Ossetia in 2008.

report, and recommendations were not elaborated or adopted by the Advisory Committee. It is also a fact that the address of the recommendations would also have been problematical, taking into account that it was not Ukraine which exercised de facto control over the territory, and the Russian intervention has not been recognized by any international organisations<sup>171</sup>, including the Council of Europe<sup>172</sup> to date. The resolution adopted by the Ukrainian Parliament on 21 May 2015 approved the derogation request from certain provisions of the UN International Covenant on Civil and Political Rights and the European Convention on Human Rights. The statement of Ukraine, forwarded to the CoE Secretary general and registered on 2 February 2017, passed on all responsibilities to the Russian Federation in respect of the occupied territory of Crimea and the Eastern Ukrainian territories as regards the enforcement of human rights and humanitarian law.<sup>173</sup>

The geopolitical challenges pointed to a growing tendency, namely to the weakening commitment of member states to multilateralism and to human rights standards. Petra Roter, the former chair<sup>174</sup> of the Advisory Committee, highlighted in the eleventh activity report<sup>175</sup> of the Committee that the real challenge is the lack of effective multilateralism. She also emphasised that the obstructions raised by geopolitical interests in the protection of national minority rights, and in the management of minority issues in bilateral relations, are extremely worrying. According to Roter, we are witnessing the reappearance of security concerns regarding national minorities parallel to ethnicity-based nation-state building. We seek to enforce the rights of national minorities in a political context where minorities should demonstrate their loyalty to the state, as exclusive nation-building policies divide societies.

The need to reform the monitoring mechanisms of the two national minority related conventions could be explained by other factors besides the geopolitical context, although the link between weakening multilateral commitment and the delayed country reports as a prerequisite for starting the periodic monitoring cycle is quite clear. The standard-setting activity of the Council

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<sup>171</sup> EC Press release of the Council of the European Union, 18 June 2020.

<sup>172</sup> PACE confirmed its position in its monitoring report adopted on 30 January 2020 in respect of the annexation of Crimea. The progress of the Assembly's monitoring procedure (January-December 2019), Resolution 2325, 2020.

<sup>173</sup> Declaration from the Permanent Representation of Ukraine, dated 31 January 2017, registered by the Secretariat General on 2 February 2017 - Or. Engl.

<sup>174</sup> The Slovenian professor held the position of chair in the Advisory Committee of the Framework Convention between 2016 and 2018.

<sup>175</sup> Eleventh activity report of the Framework Convention's Advisory Committee covering the period from 1 June 2016 to 31 May 2018.

of Europe in the field of national minority rights is widely recognised, though it is a serious challenge for the intergovernmental organisation to enforce these rights where there is no political will to implement them. The prolonged debates and over-politicisation of the resolutions and recommendations drafted on the basis of the expert reports, and the improper implementation of the supervision recommendations, have all contributed to the compelling need for reform to the mechanism.

### *Reform of the Language Charter's monitoring procedure*

The review of the monitoring system's efficiency started first in the case of the Language Charter in 2018, with a view to adjusting the monitoring cycle, and as a result of the reform the new system ensured the timely submission of the state reports, as well as the factuality and, after adoption, the timely publication of the evaluation reports of the Committee of Experts. The reform also aimed to help the gradual rotation of experts, as Article 17 of the Charter only enshrined a six year-mandate and the possibility of reflection, it did not limit the number of re-elections. However, the periodical renewal of membership of the Committee of Experts could contribute to the efficiency and to the openness to new aspects, and, last but not least, there was a need to harmonize the practice with the proceedings of other intergovernmental monitoring mechanisms of the Council of Europe, which make possible only one or a maximum two terms for the four- to six-year mandates.<sup>176</sup> As a result of consultations, the Committee of Ministers amended the rule of monitoring of the Language Charter by its decision adopted in November 2018, as from 1 July 2019. The major change among the modifications is to increase the reporting period of the state report from three to five years, with the introduction of a so-called mid-term review report, to "follow up on the evaluation report's recommendations for immediate action, only" (CM Document, GR-J, 2018, point 10.) In consequence of the reform the Committee of Experts can recommend to the Committee of Ministers for starting the new monitoring cycle even in the absence of the new periodical state report. As another novelty, the reform introduces the institution of the confidential dialogue between the secretariat and the state under monitoring, which allows a period of two months for the state under review to comment the evaluation report prepared on the application of the Charter in its respect and to send its observations. The possibility to send government comments to the expert report is not

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<sup>176</sup> CM document (GR-J) on Strengthening the monitoring mechanism of the European Charter for Regional or Minority Languages, GR-J(2018)8-rev2.25 September 2018.



a unique feature but in this case the reform makes possible for the government to send comment already to the draft evaluation report before its adoption, only to correct the factual mistakes, in principle. Though the decision on the reform of the Charter's monitoring is not clear at that part, points e and f of the resolution, referring to the drafting possibility of the evaluation report and the finalized expert report, support this conclusion. As a further element of the reform package, the resolution maximises the mandate of the experts to be elected to the Committee of Experts, highlighting that experts elected to this body after 1 July 2019 could be re-elected only once. Beyond the periodical reporting system, the reform strengthens the rapid response capacity of the Charter, to preserve the possibility of extraordinary evaluation and fact finding in justified cases. The institution of the ad hoc monitoring applied by other monitoring mechanisms also ensure the efficiency of the Charter, especially in those cases where unexpected, worrying legislative developments happen in one of the member states, which have negative impact on the enforcement of the linguistic rights of national minorities. Flexible and larger application of the rapid response mechanism complements the adopted reform measures thus contributing to a more efficient supervision and to the more effective enforcement of language rights. The resolution on the Charter's reform contains a detailed timetable for the transition period as regards the modalities and due dates of the states reports' submission under the monitoring cycles of the Framework Convention and the Language Charter.<sup>177</sup>

#### *Reform of the Framework Convention's monitoring procedure*

Following the adoption of the Language Charter's reform package, the synchronisation of the supervisory mechanisms of the two national minority related conventions was only a matter of time. Consultations on the efficiency of the monitoring under the Framework Convention started in May 2019. The aim of the reforms was, inter alia, to improve the toolkit of the Framework Convention, by which periodical monitoring could be launched in the absence of a state report. The introduction of the confidential dialogue also aimed to improve the accuracy of the expert opinions and to ensure their earliest possible publication. The reform also set itself the objective of decreasing the administrative period between the adoption of an expert report by the Advisory Committee and the inclusion of the draft resolution elaborated on the basis of the experts' opinion in the agenda of the respective rapporteur group, as well as the

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<sup>177</sup> Decision of the Committee of Ministers on 28 November 2018: "Strengthening the monitoring mechanism of the European Charter for Regional or Minority Languages", CM/Del/Dec(2018)1330/10.4e

reinforcement of the rapid reaction capacity, the system of election for the Advisory Committee, and the consolidation of all relevant texts relating to the monitoring of the Framework Convention into one single document.<sup>178</sup>

The major elements of the Language Charter's reform measures were reflected in the decision<sup>179</sup> of the Committee of Ministers, adopted on the strengthening the monitoring mechanism of the Framework Convention on 11 December 2019.

Accordingly, the same measures appear in this package, namely the possibility to launch the periodical cycle in the absence of a state report, the reinforcement of the rapid reaction capacity, including ad hoc, non-periodical visits. As to the confidential dialogue, the resolution on the new monitoring of the Framework Convention is more explicit here. Point 10 of the resolution clarifies that if the draft opinion compiled by the experts of the Advisory Committee has already been forwarded to the government of the state under review, then the opinion will be formally adopted with the remarks of the government. In this regard, it is difficult to disregard the government critiques the Advisory Committee received in recent years. Some government criticism referred only to inaccuracies in the evaluation report<sup>180</sup>, but the hardest critiques accused the expert body of exceeding its power, by copying findings of different shadow reports without minimally checking their content and by ignoring the government measures relating to the application of the Convention.<sup>181</sup> In the latter case, more than seven years have passed since the beginning of the last periodical cycle, namely the submission of the state report when the drafting of the resolution could finally be concluded. Taking into account that the reporting period of five years remained unchanged after the adoption of the reform, the reasoning behind the introduction of the new institution was obviously to help the drafting and adoption of the resolutions by a certain automatism, to avoid the possibility of contesting any element of the text. This measure could actually improve the monitoring cycle, but as for the real efficiency of the supervision procedure, only time will tell. The resolution on the reform entered into force as of 1 January 2020 in respect of the Framework Convention.

It should be borne in mind that only a little time has passed since the introduction of the new reform measures. In addition, a longer period for reporting was introduced in the case of the

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<sup>178</sup> Strengthening the monitoring mechanism of the Framework Convention for the Protection of National Minorities, May 2019, GR-H (2019)4-rev

<sup>179</sup> CM Decision on Strengthening the monitoring mechanism of the Framework for the Protection of National Minorities. CM/Res (2019)49, 11 December 2019.

<sup>180</sup> Comments of the Government of Norway on the Fourth Opinion of the Advisory Committee on the implementation of the Framework Convention for the Protection of National Minorities by Norway, 2017.

<sup>181</sup> Comments of the Government of Romania on the Fourth Opinion of the Advisory Committee on the implementation of the Framework Convention for the Protection of National Minorities by Romania 2018.

Language Charter, so it is premature to evaluate the efficiency of the new system. The rationale behind the reform was obviously to make the monitoring system smoother in procedural terms, which will fulfil the hopes placed in it, at least for administrative point of view, by regulating the monitoring cycle, facilitating the launch of the procedure, ensuring the timely publication of the reports, and making proceedings more transparent. The new system provides for a transition period of 12 months, and there is no information available for the time being as to whether the new scheme will be successful and the launch of the new cycle will not cause any further delay in the supervisory process. Dealing with the fact that the reform measures did not amend the drafting procedure of the resolutions of the Framework Convention or the Language Charter in the rapporteur groups will probably prove more of a challenge. Although the objective of the confidential dialogue is to provide the government under review with sufficient time before the formal adoption of the expert reports, to recommend factual corrections to the text, in order to improve their accuracy. This measure helps to avoid cases in which the state under review contest certain parts of the expert opinion. However, this new institution will still not prevent the politically motivated interventions in the rapporteur groups as regards the more sensitive bilateral relations. Besides the delayed submission of state reports, the monitoring procedures are often prolonged thanks to the politically heated debates in the rapporteur groups, which have been blocking progress for years. In these cases, the worrying trend towards the bilateralisation of the national minority issue cited by the former chair of the Advisory Committee, Petra Roter, is what leads to irreconcilable positions. However, it is a very important signal of how other stakeholders consider the reform of the monitoring system in the national minority field. As a member of the Moldavian PACE delegation highlighted during the plenary debate of a report on preserving national minorities in Europe, on 19 April 2021, “The Framework Convention for the Protection of National Minorities is an essential instrument that [...] contributes to the stability of countries [...but] the proper understanding and implementation of the standards also depend on adequate assessments by the Advisory Committee [...] It is particularly important to strengthen the accuracy of opinions through confidential dialogue, given the challenges and difficulties that countries face” (PACE Official report 2021 p. 45). The politician points out the most essential element of the reform measure by emphasizing that “We hope that this procedure will allow for the resolution of any divergent positions between the Advisory Committee and the country concerned, before the adoption of the final text of the opinion, leaving a smoother path for the adoption of the resolution” (PACE Official report 2021 p. 45). Politicians can usually afford to speak more openly than diplomats do, and this intervention clearly revealed the real intentions behind the introduction of the

confidential dialogue. It is not the situation of national minorities which is most important, or even efficient and substantial monitoring, but the smooth adoption of the previously censored, non-problematical, non-revolutionary document with recommendations that dutifully take into account the interests of the government. Thus, the confidential dialogue is a blatant example of serving political interests instead of focusing on international norms. But the closing thought from the same intervention leads us further and reminds us of the preventive efforts of the OSCE with regard to national minorities issues: “When discussing national minorities, we have to be very careful [...] one appreciates the role of the Venice Commission: following the logic of the Venice Commission, any request for additional guarantees for a specific minority group can set a precedent for other minority groups that can claim similar special treatment. The rights of national minorities have always been a sensitive issue and, if not dealt with diligently, can constitute a major challenge to the integrity of a country” (PACE Official report 2021 p. 45). The conclusions are probably very simple. The member states finance the Council of Europe, which act in accordance with expectations. Those who pay the most have enormous influence on the general agenda of the organisation, and the circle has been closed.

In any case, the current chair of the Advisory Committee, Marie B. Hagsgård<sup>182</sup> is confident about the success of the reform measures. In her twelfth report, published on 25 November 2020, she declares that the reform makes it possible for the Advisory Committee to react in a timely and proper way, and to strengthen the instruments available to overcome the difficulties national minorities face. According to her, these reform measures arrived just in time, as the unprecedented pandemic made minorities even more vulnerable.<sup>183</sup> Whatever the experiences of the reform will be, both intergovernmental and parliamentary monitoring build on the conviction that multilateral cooperation has no alternative and cannot be replaced in the longer term. In spite of the weakness of the monitoring and sanctioning capabilities, intergovernmental organisations are, in certain respects, unavoidable as we face more and more global, transnational challenges which only international cooperation can respond to. The pandemic further strengthened this conviction, and compelled international organisations to reflect more deeply.

#### *4.2.1. Responses to earlier armed conflicts*

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<sup>182</sup> Swedish expert of the Advisory Committee

<sup>183</sup> Twelfth activity report covering the period 1 June 2018 to 31 May 2020.

It is particularly instructive to examine the official reactions of the Council of Europe to armed conflicts in the CoE area. As indicated earlier, in Chapter 3.3.1, until this year, Greece was the only member state which had ever completely withdrawn from the organisation, on 12 December 1969 (CM Resolution (69) 51), following pressure from four other member states of the Council of Europe to prevent its exclusion. As background to that case, it is worth noting that Denmark, Norway, Sweden and the Netherlands jointly lodged an application (The Greek Case 1967) with the predecessor of the European Court of Human Rights, namely the European Commission of Human Rights<sup>184</sup> against Greece's membership, on 20 September 1967, for violations of the ECHR by Greece. In this case there was no external aggression, or an attack of another sovereign state, but an internal military coup,<sup>185</sup> as a result of which the human rights and fundamental freedoms were violated to a large extent in Greece. (Greek Case, 1967. pp. 159-161).<sup>186</sup> But the invasion of Northern Cyprus by Turkey was a direct response to the support of the Greek military junta for a military coup aiming at *enosis*, the union of Greece and Cyprus. As a response to these unionist efforts between Greece and Cyprus, Turkey invaded the northern part of the island to protect Turkish Cypriots in July 1974. (Morelli et al., 2011, p. 1). The Turkish army likewise regularly violated human rights, so Cyprus lodged its interstate application with the European Commission of Human Rights in 1994. The Commission, which has since become a permanent Court, delivered its judgement on 10 May 2001, condemning Turkey for violating several rights of the ECHR (Case of Cyprus v. Turkey 2001). However, the Council of Europe did not react to this aggression through sanctions, Turkey was not asked to withdraw (PACE Recommendation 736, Resolution 574), and no decision was adopted either on suspension or on immediate exclusion. On the basis of the CM debate assessing the developments on 21 August 1974, Turkey referred to the 1960 Treaty of Guarantee regarding the territorial integrity of Cyprus, and emphasised that the treaty was violated by Greece and not by Turkey.<sup>187</sup> (CM Document 1974), 234<sup>th</sup> meeting p. 45).

So the military occupation was sanctioned by the Council of Europe. While in the first case, the withdrawal of Greece was the result of an internal military coup, in the other case – the violation

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<sup>184</sup> Although the European Court of Human Rights (ECtHR) was established on the basis of Article 19 of the European Convention on Human Rights in 1959, the permanent Court started to operate in 1998 after the entry into force of the additional Protocol no. 11 to the ECHR.

<sup>185</sup> A wide-ranging academic literature is available on the causes of this military coup, see among others C. L. Sulzberger, *An Age of Mediocrity, Memoirs and Diaries, 1963-1972*, New York: Macmillan, 1973. p. 575.

<sup>186</sup> Greece was re-invited on 28 November 1974, following the decision of the CM in its 55<sup>th</sup> ministerial session (CM Resolution (74)34).

<sup>187</sup> Treaty of Guarantee (1960) No. 5475, signed at Nicosia on 16 August 1960 by the United Kingdom of Great Britain and Northern Ireland, Greece and Turkey and Cyprus to guarantee the territorial integrity of Cyprus.

of the territorial integrity of sovereign Cyprus – punitive measures were not applied against Turkey. For explanation, only the provisions of the Treaty of Guarantee can be quoted, in which Cyprus undertakes “to ensure the maintenance of its independence, territorial integrity and security [...] undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever” (Treaty of Guarantee 1960, Article 1). The Treaty further declares that “In the event of a breach of the provisions of the present Treaty [...] each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty” (Treaty of Guarantee 1960, Article 4).

Foreign experts regard the five-day war fought between Georgia on the one side and South Ossetia, Abkhazia and the Russian Federation on the other as the first European war of the 21<sup>st</sup> century. (Emerson 2008, p. 1.). Analysts also draw attention to the numerous analogies between the situations of Georgia and Ukraine. The Russian objection to Ukraine’s NATO membership is well-known, and likewise Russian foreign policy has continuously sought to prevent Georgia from entering the Euro Atlantic integration process (Kiss, Cs. 2022). The gradual Eastern enlargement of NATO, especially the accession of the Baltic States in 2004, strengthened Russia’s sense of being surrounded, and it did everything it could to impede the encroachment of NATO into post-Soviet area (Benes, K. 2018. 73. o). Membership promises made to Ukraine and Georgia at the Bucharest NATO Summit of the Heads of State and Government on 2 and 4 April 2008 (Bucharest Summit Declaration, 2008), even if it could have not been considered a concrete timetable because of the internal divisions of NATO member countries (Sztáray, P. 2008, p. 25. o.), obviously only added fuel to the fire. Although the war was ostensibly started by Georgia, based on the findings of the independent investigation committee of the European Union<sup>188</sup>, the so-called Tagliavini report,<sup>189</sup> Russian claims that the intervention was for peacekeeping purposes, were not accepted by the international community, including the Council of Europe (PACE Resolution 1633 (2008)), and Russian recognition of South Ossetia and Abkhazia was not followed by any other European states<sup>190</sup>. The European Union reiterated its call on the Russian Federation in 2018 to withdraw its decision related to the recognition of these territories (European Parliament Resolution 2018), but the Russian Federation pointed at Kosovo, which had unilaterally declared its independence on 17 February 2008, and was

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<sup>188</sup>Independent International Fact-Finding Mission on the Conflict in Georgia.

<sup>189</sup> The committee was named after its Head, the Swiss diplomat Heidi Tagliavini (Independent International Fact-Finding Mission, p. 12.)

<sup>190</sup> Countries that recognized South Ossetia’s and Abkhazia’s independence on 26 August 2008, TASS, Russian News Agency, 29 May 2018.

recognized immediately by the United States the day after (U.S. Department of State Archives 2001-2009). Furthermore, the International Court of Justice declared in its decision of 22 July 2010 that the declaration of independence did not violate international law (International Court of Justice, Advisory Opinion, 2010). The majority of the CoE member states also recognise Kosovo as an independent state (PACE Resolution 2094 (2016)).<sup>191</sup>

The responses of the Council of Europe to the war between Georgia and the Russian Federation are summarised in the report of the then CM Chairman. Although the invocation of Article 8 (suspension from the rights of representation or the request to withdraw) was considered, taking into account the fact that “open hostilities began with a large-scale Georgian military operation against Tskhinvali and the surrounding areas” on 7 August (Independent International Fact-Finding Mission 2009, pp. 238–289) and Russia argued that Georgian military actions amounted to “illegal use of force” triggering the right to self-defence under the UN Charter, the Swedish CM Chair called on both sides to respect their international obligations and proposed to assess the overall human rights situation in the war-affected areas, including South Ossetia and Abkhazia (Chairman’s summing-up, 2008).

The position of the Parliamentary Assembly was also limited to highlighting the responsibility of both sides for violations of international humanitarian law and the principle of the peaceful settlement of disputes, including Georgia’s use of military force against its own territory and Russia’s disproportionate counterattack. The relevant resolution therefore urges all parties of the conflict, inter alia, “to implement unconditionally all points of the European Union-brokered ceasefire agreement [...] co-operate fully in the establishment of an independent international investigation to look into the precise circumstances surrounding the outbreak of the war [...] investigate all allegations of human rights violations committed during the war and in its aftermath, and hold the perpetrators to account before the domestic courts” (PACE Resolution 1633, p. 3). The Assembly Resolution underlined that the “withdrawal of the Russian troops to positions *ex ante* the conflict is essential [and] withdrawal by Russia of the recognition of independence of South Ossetia and Abkhazia, would be minimum conditions for a meaningful dialogue.” (PACE Resolution 1633, p. 5).

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<sup>191</sup> 34 CoE member states out of 46 recognize the independence of Kosovo. Those CoE member states which do not recognize the unilateral declaration of independence of Kosovo are the following: Armenia, Azerbaijan, Bosnia-Herzegovina, Cyprus, Georgia, Greece, Moldova, Romania, Spain, Serbia, Slovakia, Ukraine.

Real sanctions were not applied in this case either. In the foreign policy experts' view, the absence of a strong message and punitive measures led to later events in Ukraine, as they highlight: "If Europe had acted firmly in the conflict between Georgia and Russia ten years ago, she would have prevented Moscow getting its hand on the Crimean Peninsula" (Mchedlishvili 2018).

### *Second Nagorno-Karabakh war*

The conflicts between Armenia and Azerbaijan led to armed confrontations on several occasions, for control over the region inhabited mainly by Armenians but belonging to Azerbaijan on the basis of international law, is permanent war zone in the CoE area. Most analysts say that this confrontation is a classic example of ethnic tension aggravated by the extremely hostile relations between Armenia and Turkey regarding the 1915 Armenian genocide (Ferguson 2006 p. 177), which projected for Azerbaijan because of the "two countries – one nation" principle built on close Turkish-Azeri cooperation. Peaceful co-existence between the two nations in such an ambience is absolutely utopistic." (Tölgyesi, B. 2021). The conflict first escalated into war between 1988-1994 (Gyene 2012) and it is important for elements that make it more than a simple local clash. Azerbaijan is backed by the NATO member Turkey for its cultural, religious and linguistic ties, while Armenia, a member of the Collective Security Treaty Organisation, is supported by the Russian Federation. International foreign policy analysts argue that the armed conflict known as the second Nagorno-Karabakh war began on 27 September 2020 with an Azeri offensive seeking to recapture the southern part of Nagorno-Karabakh (Kofman, 2020). Azerbaijan won the war, ended by a ceasefire agreement on 9 November 2020, and recaptured Susa, the so-called capital of Nagorno-Karabakh (Kramer, 2020). The international context of the war, according to experts, is that Turkey was challenging Russian dominance over the Caucasus. (Chausovsky 2020).

International reaction followed the usual practice. The UN Security Council (Gotev 2020), the European Union (EU Declaration 2020), and the co-chairs of the Minsk Group<sup>192</sup> called on the

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<sup>192</sup> The OSCE Ministerial Council decided in 1992 to establish a group helping to resolve the Nagorno-Karabakh conflict, its mandate was adopted during the Hungarian Chairmanship in 1995. The co-chairs of the Minsk Group are: France, the Russian Federation and the United States. (Third Meeting of the Council Summary of Conclusions Decision on Peaceful Settlement of Disputes, 1992, p. 8, Fifth Meeting of the Ministerial Council Chairman's Summary Decisions of the Budapest Ministerial Council Meeting 1995, p. 10.)



parties to cease the armed hostilities and urged a negotiated settlement in order to prevent a humanitarian crisis.

The Parliamentary Assembly of the Council of Europe held a debate on the humanitarian consequences of the Armenian-Azeri conflict on 27 September 2020, in which the representatives of the parties accused each other of escalating of the conflict. Allegations about the involvement of Turkey were rejected by members of the Turkish PACE delegation (PACE Official report of debates, 2021, pp. 16-58). Parliamentary representatives of Azerbaijan, referring to the territorial integrity of Azerbaijan as recognised by the UN Security Councils,<sup>193</sup> blamed Armenia for the violation, but they also criticized the international community for overlooking the occupation of Nagorno Karabakh, which belongs to Azerbaijan under international law, by Armenia over the last three decades (PACE Official report of debates, 2021a, p. 12.). Although international law is on the Azeri side, the population of the region was 80% Armenian at the time when Soviet Union was formed (Tölgyesi 2021), and its population declared by referendum its wish to join Armenia before the first Nagorno-Karabakh war (Waal 2013). In fact, Turkey invaded Northern Cyprus in 1974 under the same circumstances and for the same reasons, to protect the Turkish Cypriots, by unilaterally declaring the Turkish Republic of Northern Cyprus. The Council of Europe focused strictly on the humanitarian aspects in this case, too, and the Parliamentary Assembly elaborated requirements for both parties in a resolution adopted nearly a year after the six-week war. As the resolution underlines, the Assembly recalled that “both Azerbaijan and Armenia have binding obligations to repatriate prisoners of war and release civilian persons without delay after the cessation of active hostilities; [...under the Geneva Convention (III)], [...] exchange of prisoners, [...] to fully investigate the allegations and bring to justice anyone [...] when designing and implementing their respective policies in support of displaced persons, thereby ensuring that they comply with Council of Europe human rights and rule of law standards [...] Unlimited access to member States, including ‘grey zones’, by Council of Europe and United Nations human rights monitoring bodies” (PACE Resolution (2391) 2021). In addition, the Assembly condemned both member states for damage to cultural heritage, the worrying level of speech and hate crimes, and lastly PACE called on the parties to fully cooperate with the relevant mechanism of the Council of Europe to decrease the humanitarian consequences (PACE Resolution (2391) 2021).

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<sup>193</sup> The Security Council of the United Nations adopted four resolutions in 1993: UN Security Council Resolutions 822., 853., 874., 884.

Despite the principle of settling disputes by peaceful means in order to maintain international peace and security as enshrined in Article 1 of the UN Charter or the provisions of the CoE Statute highlighting that “peace based upon justice and international co-operation is vital for the preservation of human society and civilisation” (CoE Statute 1949, Preamble), and in spite of the commitments of the CoE member states towards the primacy of democracy, the rule of law and respect for human rights, it has not been possible to entirely eliminate armed conflicts between the states. Although the exclusion option was always in the Statute to apply as a final sanction, after the examination of the CoE responses to armed conflicts, it is clear that the organisation first and foremost endeavoured to maintain the platform character of the CoE and in most of the cases there was no political will from member states to introduce punitive measures. The absence of determined and painful sanctions could certainly encourage major member states to more and more freely disregard the values of the organisation and their obligations, since as foreign policy analysts have pointed out, the lack of concrete and decisive measures could lead to a certain kind of escalation in security and military terms, which raises the issue of responsibility from the organisation’s side. This can explain the reaction to the war between Ukraine and Russia: the decision on the immediate exclusion of the Russian Federation can be considered as a compensatory measure even if the recent overall military attack against Ukraine was in large part unprecedented, not localised, did not only target a specified region, and as the recent statement of the Advisory Committee of the Framework declared, used minority rights only as a pretext for invasion. The experts added that “The Advisory Committee is deeply concerned that the war has exacerbated in Ukraine the situation for interethnic relations, deepening the mistrust between persons identifying as ethnic Russians and the majority population. This will have an impact also on those persons who identify with other national minorities or as Ukrainian but use Russian as their main language of communication.” (FCNM/AC Statement 2022).

It is not the armed conflicts, but the earlier responses of the CoE to the armed conflicts, which proved the geopolitical considerations of the organisations in many cases, and the CoE reaction to the war between Ukraine and Russia seems intended to prove that norms and rules finally prevailed over political and geopolitical arguments. But precisely the inconsistency between previous positions and the current reaction is evidence that the CoE has again taken a political decision.

#### *4.2.2. Infringement proceedings*

As previous chapters showed, the Council of Europe, as an intergovernmental organisation, has no real means to enforce the obligations undertaken by its members in the conventions or other institutions. The only exception is the European Convention of Human Rights, on the basis of which the European Court of Human Rights delivers legally binding judgements, the execution of which is an unconditional legal obligation deriving from the Convention for the member states. The supervision of the execution is in the hands of the Committee of Ministers, the supreme, intergovernmental decision making body in its specialized format, the Committee of Ministers' Human Rights meeting (CMDH), and for this purposes a set of tools were systematically developed over many years. Some of these instruments already appear in the Convention, such as the inquiries of the Secretary general in Article 52, giving the secretary general the opportunity to ask for further information about the modalities of the implementation of the judgements. As the Convention specifies "On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention" (CoE Convention, Article 52). The modalities of the supervision procedure are set out in the rules and working methods specifying the classification of the cases, and depending on the complexity and relevance of the case it can be supervised under standard or enhanced procedure, a decision which also sends a signal to the member state about the seriousness of the monitoring. The rules are clear in this respect, the "enhanced procedure [was elaborated] for judgments requiring urgent individual measures; pilot judgments; judgments disclosing major structural and/or complex problems as identified by the Court and/or the CM; and inter-State cases;" (GR-H Rules, 2016, point II/8/a). Beyond the enhanced procedure or the secretary general's inquiry, the adoption of an interim resolution is also a message to the respondent state in the practice of the CMDH meetings that concerns were raised regarding the execution, and other, more efficient measures are expected from the national authorities. As the rules highlight, "In the course of its supervision of the execution of a judgment or of the terms of a friendly settlement, the Committee of Ministers may adopt interim resolutions, notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution." (GR-H Rules 2016, Rule 16). The role of civil organisations in the supervision is relevant, as they can forward their evaluations and recommendations to the CMDH prior to

the sessions, and they are very active in this sense. “The Committee of Ministers shall be entitled to consider any communication from non-governmental organisations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of judgments under Article 46, paragraph 2, of the Convention” (GR-H Rules 2016, Rule 9/2). Besides formal communications, they often organise briefings for the government representatives on selected cases, where they draw attention to the systematic failures and in the most complex or urgent cases the non-governmental organisations have on the CMDH to apply the most serious warning, the so-called infringement proceeding in those cases where no progress has been seen for years.<sup>194</sup>

Article 46, point 4 is an amendment introduced by Protocol 14 to the ECHR, adopted in 2004 but in force only since 2010, when the Russian Federation also ratified the Protocol, as a precondition of its entry into force. As usual, all additional protocols introducing relevant and substantial modifications to the ECHR needed the consent of all parties of the basic Convention. “This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 18.” (Protocol No. 14, Article 19).

Since the introduction of this new sanction measure, the non-governmental organisations keep calling on the CMDH to apply this tool, thus sending a clear message to all respondent states which for any reasons are not showing progress in respect of the implementation of the Court’s judgement. However, the CMDH has been quite careful about launching this proceeding, which would serve also as a precedent.

Both cases in which the first two infringement proceedings were launched have already been presented in Chapter 3.2.2. The cases, *Ilgar Mammadov versus Azerbaijan* and *Osman Kavala versus Turkey* fall under Article 18: cases concerning abusive limitations of rights and freedoms according to the classification of the Execution Department.

It would be a very optimistic evaluation to think that finally the critical voices reached the CMDH and in the absence of any progress the CMDH decided to apply the “nuclear weapon” (Başak 2019) against Azerbaijan. Nevertheless, there is a more pragmatic and realistic explanation, suggesting that the corruption scandal which erupted in PACE in May 2017 (BBC News 2017) had an enormous influence, one way or another, on the decision-making process

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<sup>194</sup> Personal experience of the Author as the Hungarian representative in CMDH between 2011-2016.

of the CMDH. Though it should be noted that cooperation between the two statutory bodies of the Council of Europe was not always smooth, the questions of competence, relevance, power over decisions, and visibility are equally important for both bodies, so a kind of competition was occasionally observed. The fact that the PACE sometimes adopts resolutions as a result of particular interests of certain political groups or national delegates, not entirely reflecting the political views not only the leadership of the Council of Europe but of the majority of the governments, had already caused sensitive moments for the organisation even before the PACE decision had to be explained and interpreted. As an outstanding example for this, the PACE resolution on children's right to physical integrity, adopted in 2013, caused a huge political storm, as PACE and the CoE was criticized of being anti-Semitic, and anti-religious, since as the resolution classifies, among others, the circumcision of young boys for religious reasons as a violation of the physical integrity of children (PACE Resolution 1552 (2013)). Following a huge outcry, the Ministry of Foreign Affairs of Israel denounced the resolution, and according to some voices the PACE decision was an attack on European Jews (Goldman 2013). However, the investigations against PACE members are another dimension, and the credibility crisis of one statutory body could cast a shadow over the whole organisation, so when the corruption affair was revealed against some politicians of the Parliamentary Assembly, the CMDH sent a strong signal to the Azeri authorities by drafting the formal notice on the infringement proceeding in its session of September 2017. The formal decision on launching the first infringement proceeding in the history of the Council of Europe in the case of Ilgar Mammadov versus Azerbaijan was taken on 7 December 2017 (CM Interim Resolution 2017). The infringement means in practice that the case will be referred to the Court to officially state the non-execution. The Convention reads as follows in this respect: "If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1." (CoE Convention, Article 46. 4). Following this request, the Court delivered its judgement on 29 May 2019 and formally confirmed that Azerbaijan had failed to comply with its obligation to execute the judgement (ECtHR Proceedings 2019). The fact that the Azeri authorities released Mammadov from the prison on 13 August 2018 shows the force and efficiency of the new sanction measure, and strengthens the hope that normative tools also have some kind of power if connected with persistent political pressure from the governments of the other member states.

The background of the case *Osman Kavala versus Turkey* was also presented in Chapter 3.2.2. It represents the same type of case under Article 18, concerning abusive limitations of rights and freedoms. “In justifying Kavala’s pre-trial detention [...] the Turkish magistrate court found that there existed concrete evidence indicating that he had led, organised and financially supported the Gezi Park events, an insurrection orchestrated with the involvement of terrorist organisations aimed at overthrowing the Government. As regards the charge concerning the 15 July attempted coup, the magistrate alleged that Kavala had been in contact with [...] one of the instigators of the attempted coup) [...]” (Turkut 2019). The judgement of the Court became final on 11 May 2020 and found that “the applicant’s arrest and pre-trial detention took place in the absence of evidence to support a reasonable suspicion he had committed an offence [...] and pursued an ulterior purpose, namely to silence him and dissuade other human rights defenders [...]” (CMDH Interim resolution 2021). On the basis of the Court’s decision “the respondent State is to take all necessary measures to put an end to the applicant’s detention and to secure his immediate release” (ECtHR Case Kavala 2020 p. 79). The CoE secretariat and government representatives paid particular attention to this case during the CMDH and the regular CM meetings, and in consequence they urged Turkey to take the appropriate steps in eight decisions and the interim resolution. In the absence of any concrete result, the CM considered “that by failing to ensure the applicant’s immediate release, Turkey is refusing to abide by the final judgment of the Court in the present case” (CMDH Interim resolution 2021). Therefore, the CM decided to launch the second infringement proceeding in case *Kavala v. Turkey* on 2 February 2022 (CM Interim resolution 2022). In order to appreciate the prospects of cooperation between Turkey and the Council of Europe in the Kavala case, it should be noted that Turkey contests the justification of the infringement proceeding. The Turkish authorities argue that they are “taking all necessary measures, including individual measures within the scope of its duties [...but] reiterate there is a different offense and different proceedings against the applicant and there is no judgment of the European Court regarding the applicant’s current detention” (CM Interim resolution 2022, Appendix). As regards the efficiency of the infringement proceeding against Turkey, it should be recalled that contrary to the reaction of the Azeri authorities who released Ilgar Mammadov from prison some months after the launch of the infringement proceeding, a Turkish court sentenced Osman Kavala to life in prison at the end of April 2022 (Poole 2022). As part of a concerted effort by the CoE, the rapporteurs of the PACE recently conducted a fact finding visit to Turkey as a part of the PACE monitoring of the obligations and commitments by Turkey with a view to consulting with the competent authorities on the possible solution in the Kavala case. PACE stands ready to cooperate and

assist the authorities in finding an appropriate answer. As the rapporteurs declared “We believe that resolving the Kavala case lies in the hands of the Turkish judicial system, which has the capacity to find a legal solution which complies with the Strasbourg ruling – in compliance with international law, and reached without political pressure or undue interference. We sincerely hope that higher courts will show a more diligent interpretation of the Strasbourg court judgement, and we stand ready to help achieve this, in any way we can” (PACE News 2022).

#### **4. 3. Adoption of a new complementary joint mechanism**

Just as the possibility of launching an infringement procedure was incorporated into the ECHR as early as 2004, as a result of the recognition of the continuous non-execution of certain judgements, the non-participation of the Russian delegation in PACE, with its lessons and consequences, was seen in the Council of Europe as a serious, urgent imperative to develop a new instrument which could prevent similar difficulties in the future. One major lesson for PACE was to recognise the need for dialogue and cooperation between the CM and PACE to strengthen their power and competence, while it was also urgent to produce a concrete mechanism to reassure those delegations who strongly opposed to the return of the Russians into PACE. The common thinking began in PACE in 2019, as the report on the role and mission of the Assembly dealt with substantial questions relating to the activities of the PACE, such as its character as a pan-European platform, its role as political engine of the Council of Europe, the identity of PACE, and the challenges it faces (PACE Report 2019). According to the rapporteur, this report was already a follow-up to an earlier resolution calling for a Council of Europe summit to reaffirm European unity and to defend and promote democratic security in Europe. The last point stated that “the Assembly resolves to continue its own reflection on its identity, role and mission as a statutory organ of the Council of Europe and a pan-European forum for interparliamentary dialogue which aims at having an impact in all Council of Europe member States. This reflection would also enable the Assembly to provide its own vision of the future of the Organisation” (PACE Resolution 2019 p. 3). The need for joint action from the CM and PACE as regards the harmonisation of the statutory organs’ rules to prevent a similar situation in which a member state is represented in only one of the organs appeared in the PACE documents in 2017, and as the Assembly resolved, it is to “initiate a procedure aimed at harmonising, jointly with the Committee of Ministers, the rules governing participation and

representation of member States in both statutory organs, while fully respecting the autonomy of these bodies. This coherence should strengthen the sense of belonging to a community and of the obligations incumbent upon every member State.” (PACE Resolution 2019 p. 3). This was the basis of the gradual amendment of the procedural rules of the PACE, which finally allowed to invite Russians back in the middle of the calendar year. However, the concrete idea of setting up something common, to strengthen the capability of joint actions, emerged during an informal meeting of the Presidential Committee of the PACE and the Bureau of the Committee of Ministers on 28 February 2019, and the joint discussion paper circulated to the informal meeting of the ministers’ deputies contained very specific proposals as regards the future mechanism (CM Joint Discussion Paper 2019). The Finnish presidency of the Committee of Ministers paid particular attention to the issue, and parallel to the intensive consultations in the CM the other statutory organ, PACE was also closely following the progress of the new proposal. The relevant PACE resolution is also very specific and detailed regarding the proposal. As the resolution declares, the Assembly “proposes to put into place [...] a joint response procedure which could be triggered by either the Parliamentary Assembly, the Committee of Ministers or the Secretary General and in which all three of them would participate” (PACE Resolution 2019 p. 4). Already at this stage, the mechanism with all its modalities was well described and elaborated, and the resolution emphasises that the joint procedure could lead to the application of the relevant provisions of the CoE Statute relation, and to exclusion from the organisation. As the resolution highlights, this new mechanism “would ensure enhanced legitimacy, credibility, impact, relevance and synergy of the measures to be taken, both regarding the member State concerned and within the Organisation, without prejudice to each organ’s existing separate powers and responsibilities; political action could also be combined, where appropriate, with technical support to the State concerned” (PACE Resolution 2019 p. 4).

At the 129th Session of the Committee of Ministers the Ministers for Foreign officially “instructed its Deputies to develop – in co-operation with the Parliamentary Assembly – a clearly defined complementary procedure, which could be initiated by either the Parliamentary Assembly, the Committee of Ministers or the Secretary General, and in which all three of them would participate” (CM Decision 2019, Shared responsibility). Following the decision of the Helsinki Session (17 May 2019), intensive consultations started to elaborate the framework and content, and the responsibility and competence of the three main actors, namely the Committee of Ministers, the Parliamentary Assembly and the Secretary General. During the French



presidency of the Committee of Ministers, from May to November 2019, efforts were concentrated on finalising and adopting the new mechanism within a reasonable timeframe. The Joint Committee held several meetings to clarify the details of competence issues of the two organs related to the modalities of the new procedure. The Joint Committee is composed of representatives of the Committee of Ministers and representatives of the Parliamentary Assembly. The secretary general of the Council of Europe is entitled to attend the meetings of the Joint Committee in an advisory capacity. The functions of the Joint Committee are to examine the problems which are common to the Committee of Ministers and the Parliamentary Assembly.<sup>195</sup>

Besides the Joint Committee, a specific report was under preparation itemizing the role of the PACE relating to the new procedure (PACE Report 2020). While the document presents the different phases of the new procedure, the rapporteur deems it important to declare some basic principles regarding the application of the joint reaction mechanism. He emphasises that “this procedure, of an exceptional nature, is complementary to existing rules and regulations, building upon the 1994 Declaration on compliance with commitments accepted by member States of the Council of Europe, and its implementation will not require any changes to the Statute. It will not affect existing procedures arising from statutory or conventional control mechanisms, neither will it affect the existing Assembly’s monitoring procedure; [...and] the procedure will address only the most serious violations of fundamental principles and values enshrined in the Statute of the Council of Europe” (PACE Report 2020, p. 8). The rapporteur also highlights in the explanatory part of the report four important elements as the main features of the mechanism. The new procedure will be “credible: it must be a useful tool, that can be implemented in practice, [...] predictable: the various steps of the procedure need to be sufficiently predictable and clear to allow the Committee of Ministers, the Parliamentary Assembly and the Secretary General to follow concrete and well-defined steps” (PACE Report 2020 p. 8). Since the objective of the new mechanism is not to punish the state under review but to provide a platform for dialogue, the report also adds to the main characteristics the followings. It should be, as the report highlights “reactive: the procedure needs to provide enough time for dialogue with the member State concerned on all necessary issues [...] and to avoid inconclusive or indeterminate discussions; reversible: it will be important to develop a well-defined exit-strategy, that also foresees how the procedure can be terminated at each step

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<sup>195</sup> PACE Website, Joint Committee, <https://assembly.coe.int/nw/Page-EN.asp?LID=JointCommittee>

of the procedure, if the member State concerned takes appropriate steps to rectify the situation” (PACE Report 2020 p. 9).

As a result of this co-operation, frank debates, and informal consultations in the Committee of Ministers, the latter adopted the decision on the complementary procedure for the application of Article 8 of the Statute of the Council of Europe, as a consequence of a serious violation by a member State of fundamental principles and values of the Organisation under Article 3 of the Statute (CM Decision 2019), on 5 February 2020. In the appendix to this decision, the Committee of Ministers defines the basic principles and practical modalities of the new mechanism. They highlight that “The primary aim is to bring a member State, through constructive dialogue and co-operation, to comply with the obligations and principles of the Organisation, hence as far as possible to avoid imposing sanctions.<sup>196</sup> It will not affect existing procedures and mandates arising from statutory or conventional control mechanisms.” The appendix contains clear provisions for the steps, the initiators, the indicative timeframe, the road map and its implementation, as well as for the possible decision, including the voting rules on the suspension of a member state’s rights. Although the possibility of suspending or excluding a member state not in compliance with the basic principles of the Council of Europe was always incorporated in the Statute, the recent decision is a clear message that violation of the norms and standards, or continuous, serious disrespect for the principles of the organisation shall no longer be tolerated. However, it is important to note that the procedure is reversible, “should the member state remedy the situation and bring it into compliance with the Statute the decision can be revoked. Otherwise, “in case of exclusion, the State concerned will have to reapply for membership” (CM/Del/Dec(2020)1366/1.7).

Though the joint complementary procedure has not been applied yet, its objective is, by drawing the lessons from the ordeal with the Russian parliamentary delegation between 2014–2019 in PACE, to establish the opportunity to unify the capacity and competence of the CM and PACE, to ensure a concerted and therefore strengthened response to serious violations in the future. After the accusations from the CM that the PACE decision against the Russian parliamentary delegation was premature and hasty, the joint complementary procedure unifies the power of the two statutory bodies and the secretary general, and provides greater legitimacy and credibility for the joint actions. In this sense, “joint” means the common action of the CM and PACE, “complementarity” means that its competence goes beyond the current sanction tools

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<sup>196</sup> Adopted by the Committee of Ministers on 10 November 1994 at its 95th Session) - Decl(10/11/94)

of PACE, including its monitoring mechanisms. As the CM is competent to take a decision on exclusion or a withdrawal request, so PACE is entitled to provide an opinion for the CM decision, and the joint action implies the competences and powers of both statutory organs. The existence of this new procedure is already an achievement, in spite of the fact that it has not yet been applied, and according to its supporters it will be an appropriate mechanism to prevent both political and legal challenges in the future. Though the supervision of the execution of the Court's judgement is in the hand of the CM, and the infringement proceeding is one – indeed currently an ultimate – element to sanction non-execution, the complementary joint procedure could be applicable as a general framework, which strengthens the message sent by the infringement proceedings.

However, this innovative procedure, which was intended to be powerful and far-reaching, was, after lengthy discussions, not tested in respect of Russia after its aggression against Ukraine on 24 February 2022. The extraordinary meeting of the Committee of Ministers was convened on the same day as the commencement of Russian aggression, and the Secretariat presented the indicative list of tools available for the Committee of Ministers to respond to this military aggression. According to a graduated approach, the list referred to five possibilities from the regular CM review of the situation via the complementary joint procedure to the different actions under Article 7 and 8 of the Statute, which actually meant the request for withdrawal or exclusion.<sup>197</sup> This was a historic moment to check the new complementary joint procedure, but its guarantee element, the cautious and graduated approach, was disadvantageous in this case when a strong and immediate political message was needed from the organisation. By comparison, the infringement proceeding to sanction non-execution existed only on paper during the long period between 2004 and 2010. After the entry into force of Protocol No. 14 to the ECHR, further years passed until the first infringement proceeding was launched in 2017. According to the initiators and supporters of the new mechanism, the pure existence in theory could serve its objective to deter the member states from seriously violating the norms and values of the organisation. As the Russian Federation was expelled from the Council of Europe, all eyes are on Turkey now, the approach of the Turkish authorities to Kavala case will certainly have an influence on the future application of the complementary joint procedure.

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<sup>197</sup> On the basis of unpublished MFAT report of the meeting

## **Chapter 5: THE EVALUATIONS OF THE PACE MEMBERS, CoE OFFICIALS AND DIPLOMATS**

### **5.1. Effectiveness of the Council of Europe in terms of its responses to political and legal challenges**

This chapter focuses on the practical realization of policies related to power realism and to normative standard-setting in international organisations in general, and in the Council of Europe in particular. This part of the thesis is based on the interviews prepared with high-ranking officials of different nationalities in the Committee of Ministers and the Parliamentary Assembly, members of the Parliamentary Assembly, officials of the Hungarian administration and foreign service with long experience in the Council of Europe, former ambassadors, permanent representatives of Hungary to the Council of Europe and the Hungarian government agent before the European Court of Human Rights, all of whom have specific knowledge of both kinds of challenges. The main issue addressed in this chapter, and in the thesis in general, is the effectiveness of international organisations in their efforts to respond to political and legal challenges, with particular attention on the Council of Europe, through the different areas presented below. In order to have a clear picture and evaluate the effectiveness of multilateral organizations, various issues should be dealt with and focused on through the sub-questions related to the main topic of the effectiveness of international organisations. This objective was realized through the implementation of semi structured interviews with high-ranking officials with a competence and mandate closely connected to the effectiveness of multilateral institutions, which are crucial in terms of assessing practical effectiveness. As the sources are very limited, there is no academic literature analysing one of the greatest crises the organisation has experienced, triggered by the 2014 annexation of Crimea by the Russian Federation. Only the resolutions and decisions adopted by the Committee of Ministers and Parliamentary Assembly are available, so these interviews with competent officials are of the utmost importance.

The majority of interlocutors participate or used to participate in one of the structures of the Council of Europe for many years, and therefore have deep insight and understanding of the daily operation of the organisation; they are well aware of processes and developments, and have first-hand experience of emerging issues linked to multilateral cooperation in general. Their views and assessments of the developments of the organisation from the Eastern Enlargement to the recent institutional and financial crisis of the Council of Europe, as well as

their vision of the future of multilateralism, help us to understand the different processes and mechanisms, and to obtain an overview of their effectiveness. During the research, officials of the Council of Europe and of the Hungarian foreign service were contacted in the framework of personal interviews. Interview questions were prepared beforehand, but depending on the context and institutional memory of some interlocutors, as well as their specific commitment and positions, other issues were raised as well. The interviewees had the opportunity to skip certain topics they had no relevant information on or did not wish to comment on for various reasons, and at the same time they also had the opportunity to raise other issues not strictly linked to the questions, which could assist in the better understanding of certain matters. The above-described, semi-structured interviews, along with the available primary sources, secondary documents, and own field experiences, as well as academic literature, served as suitable methods for the examination of the research topic.

The list of interviewees covers different nationalities within the Council of Europe, some working in the structure of the Committee of Ministers and the Parliamentary Assembly, and others politicians in the Parliamentary Assembly and high ranking diplomats of the Hungarian foreign service. The intention was to keep a certain balance between the Hungarian and foreign nationals. Ultimately, eight interviews were conducted with Hungarian nationals and ten with other nationals of the 46 member states of the Council of Europe, either in physical format in Budapest, Strasbourg (at the headquarters of the Council of Europe), Rome (on the margins of a Council of Europe expert meeting organised by the Italian Presidency of the Committee of Ministers) or Paris (where one of the interviewees is currently posted), or in online format for logistical and timing reasons.

It should be noted once again that some of the interviewees did not wish to have either their names or positions revealed, as through the latter they could have easily been identified. In order to respect their wishes, apart from the Hungarian participants, nationality is not indicated either.

**In the interviews, the issues examined were classified in the following categories:**

1. *Preliminaries to the 2019 financial crisis* (The Council of Europe was close to being financially inoperable in 2019. According to your assessment, what could be considered as a major cause of this crisis?);

2. *The impact and future treatment of global political and legal challenges* (How do you evaluate the impact of global political and legal challenges, e.g. non-implementation of the ECtHR judgements, to effective multilateralism, can they endanger the functioning of the Council of Europe in the long run? Do you believe that geopolitical challenges can be tackled by normative tools? If so, in what way?)

3. *Tools and means available to tackle the Copenhagen dilemma, screening of the current monitoring mechanism* (If we consider the Copenhagen dilemma as a phenomenon of not respecting commitments undertaken before accession, what is your opinion regarding the possibilities of Council of Europe compared to the tools and means available in the European Union? Are you aware of any information about the background, preliminary discussions, proponents and opponents, financial implications or possible alternative options of the complementary procedure adopted by the Committee of Ministers on 5 February 2020, which could lead to the exclusion of a Member State?)

4. *Possibilities and real chance of further strengthening the supervisory scheme* (In your opinion, will the newly adopted complementary procedure be capable of remedying the situation of possible non-compliance and ensuring the functioning of the Council of Europe according to its Statute?)

5. *Role of the Parliamentary Assembly to detect the dominance of political interests in the functioning of the Organisation* (How do you assess the strengthening of decision-making process by PACE concerning credentials and voting, empowering itself by way of derogation from its own Rules of Procedure in order to make the unconditional return of the Russian parliamentarians possible? Were you aware of any alternative scenarios to the continued participation of the Russian delegation in PACE in 2019? In your view, what could be the reason why some CoE State parties, also members of the EU, opted for a lenient course in the CoE towards Russian participation in PACE while the EU took a different course at the same time?)

6. *Future relation between bilateralism and multilateralism* (How do you assess the role of bilateral relations in the framework of multilateral organisations? According to your assessment, could the concern that bilateralism in some fields prevails over the multilateral international cooperation be justified?)

The opinion and experiences of the interlocutors will be presented and evaluated, classified into the six above-mentioned categories. The interviewees gave us sometimes similar and univocal opinions about the issues examined, allowing us to draw clear conclusions concerning the above-mentioned problems. This is also the reason why the topics are thematically presented.

Furthermore, not all participants' opinions are specified one by one in connection with all issues: similar views will be presented selectively, highlighting those answers where additional elements enriched the context or the position and therefore the opinion of the interviewee deserves particular attention. Of course, opinions differing considerably from those of the majority of the interlocutors will also be highlighted.

## **5. 2. Preliminaries of the 2019 financial crisis**

Before the current geopolitical crisis in the Council of Europe, the financial difficulties which emerged in 2017, and the increasingly critical situation by mid-2019, were decisive issues affecting the organisation in several aspects, and it was important to evaluate the financial considerations of decision making in the organisation to understand what reasons could influence major decisions of long term effect. We can draw general lessons regarding the response of the Council of Europe to the financial crisis, and observe that it unquestionably had an impact on the recent and final decision of the organisation about the exclusion of the Russian Federation. Most partners actually highlighted the same element, Russian non-payment, as the main cause leading to this very problematic period between 2017 and 2019, but the interpretation of its impact was already diverse. The higher the position the interviewee held in the organisation, the less importance he/she attached to these events. The sincerest opinions came from the expert level, and the views of staff enriched to a great extent the context and the seriousness of the series of events. As regards the first three interview questions, the correlation between the emerging challenges and the Eastern Enlargement were also raised by some partners.

Most high-ranking officials pointed out that the financial crisis was a deep one, but that the CoE has finally overcome these challenges. The director of the Private Office admitted that the organisation has certain financial limitations but emphasised that he dislikes linking this difficulty in any sense to the Eastern Enlargement (Miroslav Papa, 2021).

The spokesperson for the Council of Europe drew attention to the fact that, in his view, the CoE was not inoperable in 2019, although the organisation was facing a major financial crisis because the Russian Federation stopped paying as a response to the decision of PACE, but the Council of Europe was nevertheless able to operate, and all monitoring mechanisms functioned. At the intergovernmental level, the CM did not sanction Russia, but the fact that Russia failed to comply with the financial situation took the whole organisation hostage. The direct cause

was the Russian behaviour of not respecting human rights, and its aggression, but subsequently the financial issue also emerged. Finally, the CM and PACE elaborated the new procedure in tandem, the Russian delegation returned to PACE and paid its contribution, it seemed that this step – taking Russia back – could solve the problems. Heiko Maas, the German minister, also declared at that time that it was better to have dialogue with Russia, and that one of the main roles of the CoE is precisely to have a platform for dialogue. Russia resumed paying the ordinary contribution, but the interest, amounting to some EUR 8 million, was never paid. Russian argued that they should not have to pay for a period during which they were unjustly restricted in voting rights by PACE. The spokesperson quoted Russian position: *“We pay again because we are again in the organisation as a whole”* (Daniel Hölting, 2022).

According to another high-ranking official, the cause of the financial crisis was that a member state failed to pay, which meant 11–12 % shortage every year for a certain time. For 2019 the debt became so big that the CoE could not continue, so the issue was that either this member state had to be convinced to pay or else the organisation would have to cut back on its activity. The contribution was finally paid, but not the accumulated interest (High-ranking CoE official A). This opinion was confirmed by the head of the Hungarian PACE delegation, stating that the major cause of the crisis was Russian aggression against Crimea and the Donbas regions. (Zsolt Németh, 2022)

However, the director for human rights added another element to the general thinking:

*“The Russian non-payment of course had an impact on the financial crisis but we already had similar problems because Turkey withdrew its major contributor status as the PACE awarded the human rights prize a Turkish opposition figure, so they decided to downgrade their financial contribution. So this is not necessarily limited to only Eastern countries and to Russia, which caused problems to the CoE but Turkey or Western Europe, where either among public authorities or among political forces more widely they say that the country should not remain the party of ECHR because there are non-elected judges in the European Court of Human Rights in Strasbourg, what the United Kingdom say and the decision of the Court addressed to democratically elected parliaments, but there are similar voices in France or in Switzerland. So theoretically it can happen that a Western country downgrades its financial contribution saying that the CoE does not meet its expectations”* (Christophe Poirel, 2021).



The secretary general of PACE warned that it is a fact that the Russian Federation did not pay its annual contribution to the budget for the reason that they did not participate in the work of PACE. She highlighted that this is not the question of opinion, this is a fact. However, it is important to note as she added that the crisis started in 2017 and stopped in 2019, when the CoE floated the idea of a complementary joint procedure that would be applied in case of grave violations against member states. As she remembered:

*“In June 2019 there was a vote changing our rules and providing something what I still believe is correct even if I was not a Secretary general then and I was not responsible for that report by the Rules Committee, which came to the conclusion that the Assembly cannot deprive members of their right to vote because this is a right linked to the capacity of national parliamentarians, this is linked to the elections by its citizens. Therefore, the sanction of the Assembly it had used to deprive members of the Russian delegation from their right to vote is no longer applicable and the idea was if a state violates gravely its obligations and commitments it is not sufficient to deprive them of their right to vote in the Assembly, they need to get out of the Organisation as a whole. As the current President says the CoE is not a cafeteria, you choose whether you go or not go. If you are a member you are obliged to be in the Parliamentary Assembly, you are obliged to be in the Committee of Ministers and you are obliged to pay. From that moment on the one hand it could not be a unilaterally sanction in the Assembly but on the other hand there could be a sanction coming jointly by the two statutory bodies, PACE, CM and the Secretary general, leading to the exclusion of the member state. After the adoption of these reports the credentials of the Russian delegation was ratified and they paid the contribution but they did not pay the interest, so there is still a debt of interests” (Despina Chatzivassiliou-Tsovilis, 2022).*

According to a former Hungarian ambassador to the CoE, the main reason for this financial crisis was that the CoE had forgot its core mission, and had not behaved according to its mandate, namely to assist member states to gradually comply with their commitments and not to blame and shame certain countries. As he stressed, the results cannot be achieved by other means except dialogue, and it is no coincidence that there are no serious, definitive sanctions in the system. Even the execution of the judgements is supervised by the Committee of Ministers, so the objective is to issue a kind of democracy certificate of good conduct for countries. The ultimate goal is to help member states in their efforts to harmonise their democratic institutions with European norms by means of constructive dialogue, assistance,

advice, and cooperative projects. If such decisions are taken for tactical reasons, or for short-sighted political considerations of political groups, the main objective of the CoE cannot be achieved, as the country is no longer there at the table. It is no coincidence that the intergovernmental forum, the CM, did not urge sanctions against Russia at that time, it was the decision of PACE, which became a kind of self-propelled vehicle in this sense, and apparently PACE itself admitted that the decision of 2014 was not sufficiently planned in advance. But the working logic of PACE is always to focus on political interests, and the question for the moderate forces is how to pull infringing parties back towards a common-sense position, and to show them the red lines of the organisation. Exclusion is counterproductive, and the only result of stigmatization is that Russia will withdraw from all these structures (Ferenc Robák, 2022).

Others see a direct link between the financial crisis and Eastern Enlargement. According to the secretary to the Committee of Ministers there is an obvious link between the Eastern Enlargement and the political legal challenges since the 2019 financial crisis caused by Russia. This tension between the level of standards and efforts to form a unified Europe sometimes burn up in the Council of Europe. As to relations between Russia and the CoE, the big question was to what extent European affiliation mattered to Russia, and how far CoE member states can go as a compromise regarding CoE standards (Zoltán Taubner, 2021). The Secretary to the CM added:

*“At the beginning of the 1990s when I was the Hungarian member of the CDDH, I regularly came to Strasbourg and I formed very good relation with the then Deputy Secretary General, Peter Leuprecht, who actually resigned from his post because he did not agree with the so large extent Eastern enlargement. He said that the CoE should not go beyond the countries of the Visegrad Four otherwise it will cause huge decline in the normative system”* (Zoltán Taubner, 2021).

The secretary of the Committee of Ministers believes that Eastern Enlargement of the CoE was a kind of illusion for those countries who will never belong to Europe. The enlargement of the EU passed this point in some respects with the Visegrad Four countries, while in other respects the frontier lies where the EU enlargement process stands now. The fundamental dilemma of the CoE since the 1990s has been the expanding geographical extent of the organisation, while standards remain constant. The larger territory the CoE covers, the more difficult it is to maintain norms. Before 1990, the CoE functioned as the third pillar of the European Economic Area, the predecessor of the European Union. It was a kind of elite club of European standards.

The CoE could present European level standards. The CoE can produce European norms in the present day too, but not across all of its territory, and the EU continuously exceeds normative levels in the CoE. The EU has gradually extended its activities into the traditional domain of the CoE – human rights and legal cooperation – so the question raised in thematic terms is what role the CoE can keep. The Eastern Enlargement solved this dilemma in the sense that the scope of activities was restricted but the territorial extent became larger (Zoltán Taubner, 2021). He added that at the first Summit in Vienna, the decision was taken that the CoE would be the organisation which implies the whole European continent. Then, somehow the high level of standards was allowed to decline, since it was obvious that the common denominator of two old members was higher than between an old and a new member (Zoltán Taubner, 2021).

The Director of Human Rights also thinks that to a certain extent there is an interrelation between the Eastern Enlargement and the political and legal challenges of the CoE, in the sense that until the fall of Berlin Wall, the Western European countries had the same understanding of CoE standards and values. They had the same economic situation, and there were no major disagreement at that time about the role of the CoE. Then, after the Eastern Enlargement, new countries joined with different histories and the heritage of the communist period in their legalisation, in their institutions, and in the cultural and political matters among certain groups of society. Furthermore, in economic terms, the cohesion which existed until 1990 between the old and new member states was no longer there. For this reason, at least at the beginning there was a big appetite among Eastern European countries to adapt European values to overcoming the past. At that time, between 1989–1995/96, there was political willingness among Eastern European countries to comply with CoE norms. Problems started when Russia joined, and they had to undertake a number of commitments, more than the other newcomers. It is said that Russia was in a weak position at the beginning of the 1990s, and had no choice at the time, but that after a couple of years Russia sought to reconsider these, and the monitoring methods. That was the first major challenge. Then a new political elite came to power in certain Central European countries with different views about democracy and dissenting opinions, claiming that Western democracies imposed their norms which did not correspond to their country's traditions, so the West imported their rules and values which were not acceptable to them. Other countries, particularly in the Caucasus, were dominated by post-Soviet leaders, opposition was very weak or there was no dialogue with it, and there was strong resistance from ruling parties seeking to use the tool of democratic elections to solidify their power, so all these elements, together with Central Europe's feelings that Western values were being imposed on them,

Russia with its great power self-image and the feeling she was mistreated, and the Eastern European countries with the least developed political culture, the strong influence of post-Soviet leaders leading to arrest of political opposition leaders, and falsified elections, all painted a diverse and challenging picture. But now one of the countries with which the CoE has a major problem is Turkey, which was a founding member and joined the CoE at the very beginning, thus becoming a member before the Eastern Enlargement. Nowadays there are problems in respect of human rights in Western democracies as well, including the treatment of migrants and LGBTI issues, but in many other respect the picture is broader (Christophe Poirel, 2021).

On the other hand, the Head of the Private Office categorically rejected the argument that there is any correlation between the difficulties in the enforcement of CoE norms and the accession of the so-called new members. He suggests that one should cease thinking in terms of old and new members, even in the European Union, which has a different geometry. In his view, such a division does not exist in the Council of Europe, and he finds this classification very artificial. In addition, he said he had not encountered such views (Miroslav Papa, 2021).

Another former Hungarian ambassador also considered the financial crisis in a wider and more complex context, definitely linking the events in 2019 with the Eastern Enlargement 20 years earlier. She believes that the major cause of the financial crisis was that countries at very different levels of democratic maturity gathered in the Council of Europe very early – indeed too early. They were very diverse in many aspects, including sociocultural and socio-philosophical circumstances, or as regards social organisation or the individual ability of the population in the framework of an intergovernmental organisation carrying out a human rights standard-setting activities, which was rather forced and artificial, as we see today (Judit József, 2022).

As regards a positive outcome of the crisis, the Director of the Private Office recalls that issuing the strategic framework was absolutely the result of this financial crisis, as it was necessary to think ahead regarding what to do if the budget proved insufficient to finance all current activities, making it necessary for the CoE to somehow prioritize issues with a possibly limited budget (Miroslav Papa, 2021).

A former Hungarian PACE member, the rapporteur of the report on the situation of national minorities, also believes that the crisis was caused by the Russian suspension from PACE and Russian non-payment, but as he stressed, the CoE was accused by the Russians of having taken a firm stand for one party – Ukraine – without having seriously monitored the situation of

national minorities. According to the Russian narrative, the organisation should have done more to urge respect for CoE standards in this field. In the view of Ferenc Kalmár, a former PACE member, the CoE should provide a certain platform for dialogue, but it is not within the competence of the CoE to play the role of arbitrator and take a position on one side. The shortcomings in terms of national minority rights in Ukraine contributed to the escalation of the situation, but the CoE has punished only one of the two parties (Ferenc Kalmár, 2022).

In the view of a high-ranking Hungarian official, the financial crises have deeper roots, dating back to 11 September 2001. Since then the human rights, rule-of-law pillar clashed with political orientations which gradually changed over the last decade or 15 years. The classical political ideologies connected to political groups within PACE (liberals, social democrats, people's party) shifted, the rule-of-law criteria became overly politicized, political aspects or criteria appeared on the scene and, parallel to this, as a kind of collateral impact, financial problems also emerged. The latter retracted the scope of action of the CoE, meaning the issues the organisation could and intend to finance. He admitted that there are many worrying trends in Turkey and Azerbaijan, but that the problem had come to a head in the Russian case, so the preliminaries of the financial crisis are very complex (High-ranking Hungarian official).

As one of the high-ranking officials reported, regarding the impact of the crisis at staff level:

*“We had the impression that the leadership of the Council of Europe and the Secretary General in office at that time did not take seriously the Russian announcement of non-payment. The Secretary General always declared with optimism in his official statements, saying that Russia will finally fulfil his payment obligation. Either the Secretary General was too naive or he had some information on the basis of which he could be such confident, it seemed to us that they do not have any emergency scenario. Whatever was in the background, the message to the staff was wrong. The biggest part of the budget relates to the human resources at the whole level of the organisation. That is why it was very worrying, because if there are projects financed by the budget, the projects can be suspended but in case the budget covers the staff costs, the contracts are endangered. Of course the Turkish withdrawal from the major contributor status could have an effect on the financial crisis but in my view the Russian non-payment was absolutely enough to let-down the organisation in financial terms” (High-ranking official E, 2022).*

The CoE official also added to the above evaluation that apparently the different organs of the CoE do not meet, and it is very unpleasant to hear from one of the CoE bodies that the decision of the other was not legally justified: “*We do not have the impression that the CoE is able to speak with one voice*” (High-ranking official E, 2022).

Besides the general opinion that Russian non-payment was the main cause of the crisis, there were some interlocutors who recalled another element: They argued that it was not only the Russian non-payment which led to the financial crisis, but also the Turkish decision to withdraw from major contributor status. The reasoning behind the decision of Turkey was the reopening of the formal monitoring procedure against the country in PACE as a consequence of the series of internal measures following the coup d’état, while Turkey was also very dissatisfied with the message sent by PACE when it awarded the Vaclav Havel Prize to a Turkish human-rights activist in 2017 (High-ranking CoE official D).

The opinion from the PACE side reveals the practical considerations of the crisis. As a member of the Serbian PACE delegation remembered:

*“It is obvious that the financial crisis was caused by the Russian non-payment, but the full picture also implies that fact that ordinary PACE members are not really aware of the functioning of the whole system at the level of the organisation, or at the level of PACE either. Only those parliamentarians had a deeper insight or understanding of the system who were more active as rapporteurs or as members of the Bureau. When the financial restrictions reached PACE and they were confronted with the problem that fewer fact-finding visits will be financed, they finally understood what is at stake. Of course, the Covid pandemic to some extent bridged the gap, because online solutions replaced fact-finding meetings for a while, and it was feasible. However, it is obvious that the interlocutors are not so open and sincere during an online consultation than during a personal meeting. So the payment issue dominated the agenda, and after a while there were ideas about how to compensate the missing parts of the budget, e.g. through voluntary contribution, but it became clear very fast that the solution would be to invite the Russian delegation back” (Elvira Kovács, 2022).*

The Hungarian government agent confirmed the general assessment about the background of the crisis on the basis of his experiences at expert level. The financial crisis dominated the agenda of expert groups and everyday discussion, and all partners referred to the Russian non-

payment and the difficulties it caused in staff matters, and through this it has an impact indirectly on the efficiency of the Court, too. (Zoltán Tallódi, 2022)

### **5. 3. The impact and future treatment of global political and legal challenges**

As some of the interviews were registered before the Russian exclusion, this option was only a theoretical one at that time, and the views were more nuanced. As the secretary to the CM believed the CoE was established to tackle such challenges, until the organisation is capable to settle these issues inside the CoE framework, these challenges will not endanger the CoE. On the contrary, they could strengthen the organisation and prove its necessity. The problem is if a member leaves the organisation, which could endanger the existing framework. Since the *raison d'être* of the CoE is now its geographical extent. If Russia leaves, it would seriously affect this *raison d'être*, though there are still large non-EU countries among the members. He added that the logic of social evolution is that we move from small entities to bigger formations, from the family, clans, tribes, city states, states, and now we have reached a stage of evolution when national sovereignty is questioned because there are more and more transnational challenges, e.g. the environment, to which no answer can be given at a merely national level. The subjects of multilateralism can change, and not only states, but also bigger actors can be players (Zoltán Taubner, 2021).

A Hungarian PACE member warned of the potential serious, long term consequence of the recent crisis some days before the final exclusion of the Russian Federation. He said that the non-respect of CoE norms and non-execution of the Court's judgement, mainly by the Russian Federation and Turkey, is worrying, especially the recent Russian declarations after their suspension that it could easily reintroduce the death penalty if they are no longer the party to the ECHR (Zsolt Németh, 2022).

As a general lesson, the director of the Private Office noted that great powers certainly have more influence on the functioning of the CoE, but the mandate of the organisation focusing on standard setting and monitoring gives another, more objective focus to the activity of the organisation where there is no such emphasis between the status of different members. It has greater importance in other, more global formats, e.g. in the United Nations, than here in the CoE, although the major contributor or 'grand payeur' status obviously give them an opportunity to have more impact on the activity of the CoE. However, this is not a unique

phenomenon on the CoE, and is valid also for other international organisations (Miroslav Papa, 2021).

Officials with a sufficiently long institutional memory drew attention to the permanent existence of geopolitics in the Council of Europe. As the official recalled, in order to illustrate the extent to which geopolitics are important in the CoE, it is worth examining when the observer status in the Committee of Ministers becomes interesting to non-member countries. The United States started to show an interest in the Council of Europe when the question of Russian membership in the CoE had been settled. In addition, international organisations have served as a kind of toolkit for major players, and they took from the box the structure they needed for particular issues. So the United States became an observer in the CM two months earlier,<sup>198</sup> and Canada became an observer two month later<sup>199</sup> than the Russian Federation joined the Council of Europe, on 8 February 1996 (High-level CoE official D).

Many of the interviewees share the view that political and legal challenges can absolutely endanger the current functional format of an intergovernmental organisation in the future, and not because of the non-execution approach of Russia or Turkey, but with regard to the position of the United Kingdom as regards the implementation of certain judgements of the Court. The United Kingdom ultimately left the EU because of its supranationalist character in certain fields. She does not claim that the EU will not function, but the issue of national sovereignty emerged in international organisations, and could jeopardise the functioning of the CoE in its current form in the long run. If those countries do not consider themselves bound by the Court's judgements, then the legitimacy of the Court will be called into question. What is more, it is enough if only some countries follow this approach, as they could be easily followed by others contesting those judgements which are delicate for them. The supranational character of the European Court of Human rights works only when all member states are willing to accept its judgements, even if it sometimes harms their interests. The working principle of international organisation contrasts with the rule of national sovereignty, which is on the rise in some countries (Judit József, 2022). Political and geopolitical challenges are always linked to great powers, in classical, traditional terms, which have a clear definition in the academic literature. For this reason, it seemed a very new approach in this context to consider the EU as a great power. In the view of the Secretary of the Committee of Ministers, the great powers which have

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<sup>198</sup> CM Resolution (95) 37 on Observer status for the United States of America with the Council of Europe, 7 December 1995

<sup>199</sup> CM Resolution (96) 9 on Observer status for Canada with the Council of Europe, 3 April 1996.



an influence on the standard-setting of the CoE are the European Union on the one hand and the Russian Federation on the other, since there is no separate French, German or Italian policy on certain issues, but one European approach, to which Turkey often joins, except on certain ideological question, of course (Zoltán Taubner, 2021). Interlocutors admitted that the problem of legal challenges is very complex. They highlighted that the annual reports of the Court provide a problem-focused analysis, and do not follow a country-based approach. There are cases where the shortcomings appear to be a legal problem, but it is clear that these difficulties arise from the political setting, becoming a very complex political-legal issue, and in these cases the roots of non-execution are deeper (Miroslav Papa, 2021). Beyond official communications, there are some pessimistic views of how the political and legal challenges will affect the organisation:

*“Of course the discussions on the prospects of the CoE dominate our everyday life, especially after the exclusion of the Russian Federation. The discriminatory way the Organisation intends to treat the officials with Russian nationality, distinguishing those who were forward-thinking and wisely obtained double nationality in time (beyond Russian they have French or Swiss nationality, for example) is worrying and not credible in the Council of Europe proclaiming herself as a leading human rights Organisation, which combats all forms of discrimination. Some colleagues predict already now that the Council of Europe has 20 years from now before closing down once and for all”* (High-ranking CoE official E, 2022).

As a staff member emphasised regarding the impact of political and legal challenges: “It would be very difficult to say that these challenges do not endanger the functioning of the Council of Europe in the long run. The problem is that the success of the organisation does not depend on the organisation itself, but on the willingness and cooperation of the member states to what extent they are ready to participate in this multilateral framework. We could adopt numerous amendments to any legal instrument with the view to increasing the efficiency but at the end of the day it is the member state who decides to take part in the game. There are some cynical voices or defeatist attitudes at staff level saying ‘20 years more and we close the shop’, because international organisations have some expiration date. This is a very dangerous approach for the Pygmalion effect, the self-fulfilling prophecy as well. We miss the real discussion on real reforms, not only on procedural modifications. As to the Court, it should be known what is the direction, what is the future of the right of individual application, to avoid being a kind of ‘petty claims court’ dealing only with repetitive claims for money. Would it be worth dealing with

only interstate cases or with structural conflict? But where is the forum for such discussions? The procedural amendments will not solve the problem of how the CoE standards will be implemented at a national level” (High-ranking CoE official E, 2022).

As the official added, on the other hand, this standard-setting has an important role in preventing further challenges. We know that all legislation is worth as much as it is enforceable but no one questions the importance of criminal justice either. Of course, crimes are still committed, but we cannot underestimate the possible dissuasive and deterrent impact of these penalties. Without legislation and norms, and this is valid also in the field of international law, we might face even more challenges. However, for its efficiency as a compliance mechanism, the enforcement capacity is indispensable, as without this structure the law is not more than religion, in which one can believe, but with which one has no incentive to comply. As to enforcement, the other problem is that countries regard the judgements of the Court as ‘personal’ attacks, and not as a joint exercise in creating common values by which other states will also abide. So the organisation reacts to this state attitude by shrinking back to avoid ‘hurting’ any member state. This approach will not be rewarding in the long run, because it cannot retreat enough to not hurt anyone, since the organisation will lose its credibility, and in the case of the Court, Luxemburg will take over the jurisdiction of fundamental rights. We already face an unpleasant situation, in that the case law related to fundamental rights of the Luxemburg Court sets higher standards than the European Court of Human Rights (High-ranking CoE official E, 2022).

In order to complete the picture, some interlocutors recall that apart from the United Kingdom and France, other permanent members of the UN Security Council are not bound by international tribunals. The USA is not party to any, not – to an even greater extent – is China, but Russia as a great power accepts the jurisdiction of the ECtHR here, and is not the worst as regards implementation: others also have problems when it comes to the execution of judgements (Miroslav Papa, 2021).

The spokesperson sees political legal challenges as being connected to the future of multilateralism. This has many consequences, but the problem of non-implementation of the key judgements is a reputational risk for the CoE. The Court is the jewel in the crown, the roof of the organisation, so the non-execution of the Court’s judgements was heavily mediatized, and thus became a reputational issue for the CoE and for multilateralism. In the informed public

and in diplomacy, the key cases which were not implemented (Kavala, Demirtaş<sup>200</sup>, Yukos<sup>201</sup>) are better known than the hundreds or thousands of other judgments which are executed. So the spokesperson undertook the initiative to create a website to show how the implementation of judgements has changed the lives of thousands of people. It is called the impact of the convention, where examples can be found county by country, showing how the judgements, when they have been implemented, have made a difference either in legislation, changes to the constitution, and have quite often had impact internationally on how equal pay, discrimination issues and the acceptance of homosexuals in the armed forces have been resolved. This is very important in showing why the CoE, standards, the Court and its implementation are so important. Political and legal challenges have an impact on effective multilateralism, because if we cannot demonstrate that in key cases the countries do what they should do, the CoE, and multilateralism in general, suffer a loss of reputation. As to the danger on the functioning of the CoE in the long run, it is a question because the two countries which are responsible for bringing the most cases to the Court are Russia and Turkey. Russia is now out, but Turkey is quite dedicated to the CoE. However, in the Kavala case the CM launched the infringement procedure by referring the case back to the Court, and if Court declares it to be a case of non-execution, Hölting believes that Turkey will comply with the judgement, though not immediately, and certainly not the day after. If we look very carefully at Erdogan's comments, he did not say Turkey would never implement the judgement, or was not bound by the Court. Rather he said that Turkey was not bound by the CM, the member states and their decisions, so he spoke more generally (Daniel Hölting, 2022).

According to the spokesperson, the CoE is not endangered in the long run, but non-implementation is a reputational problem, and can call the organisation, like others, into question, but apart from Russia he does not know of any country which in the long run has consistently refused to implement a judgement. He referred, by way of example, to a special case to illustrate how the issue of non-execution could be solved, when there is a political will to do so:

*“In the United Kingdom, we have this case with prisoners’ voting for nearly ten years. On a summer afternoon, when nobody is looking, nobody noticed it, suddenly some ministerial guidance was adopted, parliament was not even involved, despite the fact that Cameron said that it made him sick to give prisoners the vote despite the fact that*

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<sup>200</sup> ECtHR Case of Selahattin Demirtaş v. Turkey (No. 2), 22 December 2022

<sup>201</sup> Case of OAO Neftyanaya Kompanya Yukos v. Russia

*every time the UK said we can't have the Court deciding over our Parliament, there is no majority in Parliament to give prisoners the vote, the solution was found by ministerial guidance outside the parliament. The solution was accepted by the Court and the issue was closed. This was politically monumental; prisoners' votes were even worse than the extradition of terrorists. So I don't think in the long run it is dangerous, on the contrary, if we can succeed in showing how judgments do actually change and if governments take notice of that then I think there will be an increase in reputation"* (Daniel Hölting, 2022).

As a response to legal challenges, the CoE introduced a new method nearly a decade ago, but it was not applied for long time. As the spokesperson recalled, the infringement in the Mammadov case was a precursor or a precedent case, a symbolic decision for large states like Turkey or Russia. In CoE communication, Article 46.4 is also called an infringement procedure. The spokesperson believes that the CoE needs to recommit to the conventions in order to address challenges, yet for many reasons, commitment to the CoE convention and other treaties has declined. One treaty which is most important in this context is the Istanbul Convention. It was ready for signature during the Turkish chairmanship in 2011, and Turkey was the promoter and first country to ratify the Convention, while now it is also the first and most prominent country to denounce it, under the same president and the same foreign minister. This, then, is what we can say about the recommitment to human rights: Same regime, same government, same text – nothing has changed. But what has changed is that other things have become more important, political issues now seen as superseding commitment to this Convention. This is very strange, in that the member state whose trophy it was, was also the first to exit the Convention. And other countries who signed it now likewise distance themselves. To the question of whether more tools or recommitment is more important, the spokesperson highlighted that in the CoE's view no more tools are necessarily needed, though of course there are new challenges, such as artificial intelligence or online hate speech, for which new tools may be needed. But in many areas, it is recommitment which is necessary. That brings us back to question of where we stand with multilateralism in general. (Daniel Hölting, 2022)

There was a general agreement about the importance and long-term consequences of political and legal challenges. As officials emphasised, the global political challenges and major developments have always an impact on international organisations. For example, the impact in the CoE following the recent developments is cataclysmic – it was the first time that the CM ever expelled a member state. Human rights protection, what is at the core of the CoE's activity,

is linked to political challenges existing at the national level and it is impossible to avoid side-effects when it comes to transnational organisations: whenever there are huge political developments or upheavals at a national or regional level, nobody really knows how it is going to end or develop. As for the non-implementation of judgements, the recent Russian invasion shows that it will have a very negative, adverse effect on the execution of judgements. Russia is allowed to participate in the CMDH meeting, but they rule out their participation in the execution process, although they are bound by judgements delivered until September 2022 and also by the future judgments of the Court in all cases which were lodged with the Court before 16 September 2022. So the question now is whether Russia will implement these judgements, as well as older, pending ones. This proves that political developments have an impact on the CoE, including the Court, which considered the crowning jewel, we used to say, and we hope we can still say it is now and will be in the future. Another example of this is so-called frozen conflicts, and there is a specific reference to them in the latest annual report. There are three important interstate cases: Cyprus v. Turkey and Georgia v. Russia I and II. All three reflect geopolitical conflicts of the past, and ten more interstate cases are pending before the Court. These are extremely complex and highly politicized, conflict related cases, and generate an enormous amount of work both for us and for the CM. And if we take into account the very limited resources at present, the system cannot survive if we are further flooded with more interstate application from conflict-afflicted regions. We do not have the capacity to deal with the cases. So these examples show that each political development has its direct impact on the ECHR system as a whole. (High-ranking CoE official B)

The political will of member states was also a general element that many interlocutors mentioned as the main condition of effectiveness. As they pointed out, the precondition of effective multilateralism is the willingness of member states to participate. It is the question of the member state's willingness to contribute to the system and to abide by the rules. On the one hand, it is absolutely true that global political challenges have an impact on the effectiveness of the system: some of the cases which cause the biggest problems regarding the execution of the effectiveness of the system are the interstate cases, and I would add that all other cases related to conflicts between member states, because it is not only interstate cases which concern such conflicts, but also other cases which are indirectly related to this conflict, as in the Transnistria case. Other cases also reflect conflict between Cyprus and Turkey, like Xenides-Arestis and all other cases falling onto this category of state-conflict related cases, related to territories where the effective jurisdiction is held by another state to which the territory belongs.

The other global political conflicts, in war zones such as Iraq and Afghanistan, are conflicts as well, and raise the question of the responsibility of member states for acts committed by their troops outside the territory of the Council of Europe. These cases do not necessarily present challenges to the effectiveness of the system so long as the member states are willing to execute the judgements. Although it is true that these are tricky, sensitive and complicated cases, not only regarding execution, but for the Court as well. It takes a longer time to decide, and they often end up before the Grand Chamber and pose a big challenge for the Convention regarding how to resolve such a legal question. As for legal challenges, not only is non-implementation a risk, but so is the case law of the constitutional courts, which calls into question the obligations deriving from the Strasbourg Court's judgements. These are certainly challenges for the system, new and recent developments like this, while Russian and Polish approaches, for example the Polish Supreme Court calling into question the extent to which Polish authorities are bound by the Convention as allegedly the Court overstepped its competencies according to those Courts. Then, in the Baka case, a recurring argument comes up in the action plan that certain measure do not fit into the Hungarian system, and that goes in the same direction. Normally one would say as a lawyer that you have to adapt to the system, if you are bound by the convention and you want to abide by the obligations, but the argument does not fit into the system, and reviews a certain approach towards effective multilateralism, to the system of the conventions. In the Baka case one measure is requested by the CM, it is a mechanism, a remedy that was put in place for the President of the Supreme Court (Curia) to be able to challenge a possible impeachment procedure before Parliament. At the moment this procedure is taking place before Parliament only and there is no independent judicial institution which could control or review such a decision by the Parliament. This is what the case law of the Court requires and what the CM requested, but in this respect the official Hungarian position is that such a remedy does not fit into the constitutional system of Hungary. It also belongs to the picture of course: it is less extreme than the positions of Russian or Polish Supreme Courts, but it is going in the same direction. As long as the states are willing to keep the system working also in those cases where solutions can be found, it is important. Cyprus v. Turkey has been pending for ages, but it is progressing, and there are slow steps forward, for instance concerning the payment of just satisfaction (High-ranking CoE official C).

However, the interlocutors also reported on some promising impacts, as they highlighted the outcome of the first infringement in case Mammadov v. Azerbaijan there was some positive outcome. Both the Kavala and Mammadov cases relate to the arbitrary use of power, Article

18. The Sejdic-Finci v Bosnia case also reflects the regional upheaval, which has very adverse effects on implementation. This is a very special case, because Bosnia-Herzegovina is a very special country. Very complex, because in some views Bosnia is not an operational state: the Dayton Peace Agreement created a state which is highly dysfunctional, so the question is how to make this country function. There are three major political powers which are not on good terms; they do not really cooperate or communicate. The major problem in the Sejdic-Finci case is that there is a highly polarised country on open ethnic grounds. In countries where ethnic segregation still persists it is very difficult to find a compromise at the national level. This is a fact which goes far beyond the CoE. The EU and the USA were also engaged in negotiations and exercised some pressure to change the Constitution and the electoral legislation, and there was some hope until very recently, but this finally failed (High-ranking CoE official B).

When describing the most problematical aspects of the non-execution of judgements, CoE officials have stressed that another type of case belongs among the complex cases: these are the Article 18 cases, where there is an abusive limitation on human rights and freedoms. Both cases where the infringement procedure were launched belongs to this category. There are actually five states affected by Article 18 cases: Russia, Ukraine, Turkey, Azerbaijan and Georgia. There is particular attention on these cases because they are related to national developments, and in particular on how the national judicial system evolves or does not evolve. Besides global and regional challenges, national developments should also be added, because these trends could also have serious impact on the effectiveness of the system. (High-ranking CoE official B).

From the point of view of execution, the partners admitted that political and legal challenges certainly affect the functioning of the organisation, but they were confident that they do not endanger its existence in the long run. CoE was founded 70 years ago, without Russia, and since then countries have both left and joined, but so long as the member states wish for the system to function it will exist. The CoE and the convention is a living instrument, developments are ongoing in the state, and the interviewee does not think that these challenges call the Council into question. If there are fewer member states there will be a need for human rights protection, rule of law and democracy, and a need for the CoE to exist. On the other hand, the political challenges also have financial implications, and this raises a question regarding how much the exit of the Russian Federation will affect the activity of the CoE as regards the budget, but the CoE has to adapt. We feel this problem on daily basis regarding the contractual situation among colleagues. Last year there were budgetary constraints and it had a serious impact on the effectiveness of our work. Staff questions are really important and have to be clarified by the

CM. It is less problematical if there are no Russian speaking colleagues for Russian cases, what is more important to have a Russian representative in the CM, because without this communication with the respondent state the execution of the judgement cannot be supervised. (High-ranking CoE official C).

In order to complete the picture regarding the legal challenge of non-execution, the CoE officials admitted that there are a lot of uncertainties, and the presence of the Russian judge is also in doubt. There was a huge decrease in permanent staff members, certainly linked to financial problems, and there are a lot of temporary employee and experts seconded by the governments. This is also an aspect that relates to the effectiveness of the system (High-ranking CoE official B).

To the question of whether standards could tackle geopolitical conflicts, the interlocutors considered the normative tools in the field of human rights as remedies and ex post facto instruments, not preventive mechanisms. It is an absolute necessity to have normative tools to provide justice to the victims and to have an international legal framework or legal infrastructure to provide remedies at least, because prevention does not function in many cases. Long-term stability and peace cannot exist without normative rules. Many intergovernmental organisations combine preventive tools with remedial instruments. Most monitoring mechanism also have preventive instruments, theoretically at least. Despite the shortcomings of the legal instruments, this does not mean that they are not necessary; they are still required, and it is extremely important to provide justice and remedies to the victims of violation, which is not to be underestimated (High-level CoE official B).

According to the general view of respondents, domestic remedies are more effective than international instruments in tackling any challenging case, be it preventive or compensatory in manner, which the convention system or human-rights protection is confronted with. As to the concrete question of whether normative tools can tackle the political situation, the answer is no, because we have provisions in the Convention that judgements are binding, but it is up to the state to decide if it wishes to cooperate and abide by the judgements of the Court. (High-ranking CoE official C). At the same time, CoE officials admitted that sometimes it is not only a question of willingness, but of the daily operational capacity of the government agent's office. In some countries it is quite weak and underfunded, and the status, power, and authority of the agent is also questioned on the basis of whether he or she is able to react quickly and coordinate efficiently. Sometimes the discrepancy is high between the political declarations on the commitment and the real status of execution (High-ranking CoE official B).



However, the Director of the Private Office is an optimist, and there is strong wish to call for a common approach to tackle these adverse phenomena.

*“All international organisations are affected by a number of issues, before Covid and by Covid itself for sure, it influenced all international organisation including the CoE as well in one way or another. As to the challenges before Covid, the CoE has already proved why this organisation is needed: we had these challenges of political and legal natures that we can tackle through multilateral cooperation. We see the backsliding trends all over Europe in the context of human rights and rule of law, non-discrimination, hate speech on the rise proven by a number of findings and data. It is up to the member states to decide whether we want to have a multilateral forum which is going to uphold these principles or do not want to have it” (Miroslav Papa, 2021).*

The Director for Human Rights referred to the great power behaviour when emphasising that larger countries with strong political foreign policy objectives, e.g. Russia, have significant disagreements with us, and try to minimise the ambitions of the legal instruments we are developing. They try to downplay them to the lowest common denominator or they are reluctant to deal with certain issues, and that is a real problem. Russia in recent years has continued a persistent policy of making statements and reservations about CM decisions on certain policy matters, e.g. LGBTI, or gender, or freedom of expression and information. Russia says that non-professional media players cannot have the same protection as professional journalists, and they have been following this policy for many years now. A country as large as Russia definitely has influence on decision making, and in most cases CM has to vote or adopt something with consensus-1 or consensus-2 because other member states argue that beyond or rather under a certain level they would diminish the standards of the organisation (Christophe Poirel, 2021). Turkey, Russia and Azerbaijan also had problems involving strengthening the involvement of NGOs cooperating with CoE. It is not linked to a geographical position but to the political culture of a country. It's normal that the views are different, and problems arise when a more powerful country tries to influence and lower standards. There is a new phenomenon whereby a group of countries attempt to block any initiative they do not like, and it is increasing (Christophe Poirel, 2021).

As regards the relevance of normative tools and undertakings, the director of Human Rights also recalled that the countries undertook specific commitments at accession e.g. regarding Azerbaijan and Armenia, one of the major commitments of which was a promise not to settle the Nagorno-Karabakh issue by military force, and yet we see what happened in 2020. We here

in the CoE, as in the UN, have this limitation: our values are rather to regulate problems in society. When speaking about geopolitical interests, if a country feels that the only way to protect its core geopolitical interest is beyond the scope of CoE norms, I am afraid they will pursue that policy and ignore the values, requirements, or the Statute of the organisation. What the multilateral organisation can do is engage in dialogue to decrease the tension in order to prevent war. After the war in Georgia or the annexation of Crimea there were some member states who urged us to send a strong message to Russia, and would have preferred to expel Russia, but others considered it more important to keep options open, to maintain the channels for dialogue for geopolitical reasons, on the one hand to show that Russia belongs to the European family, and on the other hand to prevent further deterioration of the situation and not to leave Russian citizens without the protection of the European Court of Human Rights (Christophe Poirel, 2021).

On the other hand, the director also drew the attention to another important phenomenon connected to internal development of democratic societies. Political challenges become more intensive and there is more disagreement among member states about how to deal with certain societal developments on which there is division among the members. Legal challenges are rather linked to interstate cases, which are very difficult and complex cases, and respondent states are reluctant to make progress, but other complex cases also make it more difficult to properly execute judgements. So not only geopolitical but also societal developments challenge CoE values. Or there is the example of Central Europe: Poland recently declared that Article 6 of the ECHR is incompatible with the Polish Constitution. This is the first time in CoE history that a particular provision in the Convention was challenged by a member state – even Russia did not act like this. Russia only challenged certain judgements, but not the ECHR itself. And we see more and more this trend, unfortunately, because our societies are becoming more divided. All the values, respect for others, tolerance, non-discrimination – in short, the things everybody realized were so important after World War II, because the ignorance of those values led to genocide and mass killings, so there was an agreement at that time to promote these values, to prevent any repeat of events in World War II, but due to economic developments there is a trend to openly challenge these values, and those who advocate for them are portrayed as naïve people, or as not defending the national interest, or betraying the country, and this sentiment is unfortunately growing (Christophe Poirel, 2021).

The Council of Europe and the EU are often criticised, even by Western European members, on the charge that they defend values that are in the interest of a minority group, but which the

majority does not want to see. One excellent example of this is an anti-Muslim discrimination program as a part of the anti-hate speech campaign with the slogan “Beauty is in diversity as freedoms is in hijab” after which harsh attacks came from prominent French politicians condemning the message, as in their view hijab does not represent freedom. The more and more frequent political confrontations over the values mean that this is a real problem for the CoE in the long run (Christophe Poiriel, 2021).

However, some argue that the Council of Europe proves the utility of the existing legal framework, and even provides an answer to geopolitical threats:

*“The CoE is the best example of how geopolitical challenges can be tackled by normative tools. The CoE is capable of disassembling geopolitical problems into legal issues through its expert mechanisms, such as GRECO (anticorruption), CEPEJ (efficiency of justice) or the national minority related conventions (Framework Convention and the Language Charter) and is able to provide some partial solutions to some aspects of the complex geopolitical issue, as these partial solutions are able to depoliticize the whole picture. Then these parts should be later built up into one comprehensive response, which is more difficult, but at least the geopolitical problem is somehow tackled by being depoliticised and transformed into a legal problem, to which it is easier to find legal answers. By contrast, in the OSCE the reverse is true, and even legal issues became politicised because of the consensus-based method of decision making, so these package deals over-politicise even simple, legal issues as well” (Zoltán Taubner, 2021).*

In contrast, politicians’ views are somewhat different; they say that geopolitical challenges have security policy solutions, and cannot be tackled by normative tools, though security policy measures may also have normative aspects. The role of the CoE is to prevent or react to situations arising from a new geopolitical constellation. The normative set of instruments of the CoE is subordinate to the security policy players and measures (Zsolt Németh, 2022).

The former ambassador sees the solutions as being complex, and says that geopolitical challenges can be tackled only in a coordinated way. The latest conflict is very complex, covering the security interests of both Russia and the Euro-Atlantic area, and the principle of the self-determination of peoples, including the right of free choice to what international cooperation formats they wish to join. So it is impossible for one actor to tackle all the issues individually. Multilateral organisations should cooperate with member states in multilateral and

bilateral efforts, and the two frameworks should be combined and coordinated in order to emerge from this serious geopolitical situation (Ferenc Robák, 2022). He added that if all actors know their roles and places in the game, both the players of the CoE and the member states, the recent developments cannot endanger the functioning of the CoE in the long run. Multilateral organisations also play a political game on the ground of interests and their establishment, and if we all aware of the framework of the multilateral organisation and bear in mind why it was founded, the organisation and its members can complement each other's activities and can cooperate in a harmonious way. Ambassador Robák emphasised that the CoE has a comparative advantage, in that its role is to help the democratization process in member states. Given the fact that its geographical extent is quite large, there is no need to fear that the organisation will become unnecessary, but to achieve this purpose the organisation needs its wide membership to always include members that require support through the expert mechanism and cooperation projects. If the CoE recognizes, or rather accepts, the real objective of its existence, it may perhaps not be the representation of high-level European standards in an elite club of excellent pupils, but rather to have weaker participants in the classroom who need assistance, meaning that the functioning of the CoE is not endangered at all in the medium and long run. It is not the role and mission of the CoE to respond to geopolitical conflicts. For this purpose, the UN Security Council, NATO and the OSCE have more competence to react. The organisation should stick to its core mandate and deal with normative activity, standard- setting and monitoring (Ferenc Robák, 2022).

However, a former PACE member believes that there is a risk for the future activity of the international organisation if it fails to adapt to evolving circumstances. As he emphasised, political and legal challenges can endanger the functioning of the CoE in the long run. Multilateral organisations have a role and responsibility to adjust the status quo to reality. At the period when these international organisations were founded, after World War II, the political reality was different than it is now in 2022, but these mechanisms should follow geopolitical changes, meaning that they have an adaptive role in preserving the status quo and maintaining a platform for dialogue. Another important aspect is that when international treaties are concluded, it should be a basic principle not to humiliate the defeated countries, because the result of such punitive treaties is always continued resentment and tension, and these can re-emerge at any time. The former Hungarian PACE member argues that the normative tools are very important, but the problem is that these are legally binding but unenforceable norms. There is no efficient sanction mechanism, in the absence of which there is no chance to achieve real

progress in the enforcement of the standards codified in the treaties and conventions (Ferenc Kalmár, 2022).

Some interlocutors also drew attention to the links between different kinds of challenges. As they stressed when speaking about political and legal challenges, the two types of problem might be more interrelated than supposed, as a recent report revealed the relations between specific NGOs and some judges of the ECtHR, which gave rise to the suspicion that some judgements of the Court were taken by considering political aspects, and this trend unfortunately contributes to the strong reluctance on the part of some member states to execute judgements. Again, political considerations emerged in every field, thus strengthening the political and legal difficulties (High-ranking Hungarian official, 2022).

According to the high-ranking Hungarian official, although legal challenges gradually appeared on the scene, this phenomenon is limited to a certain group of countries, and therefore these challenges will not endanger the existence of the CoE in the long run. He recalled that in principle, in terms of international law, the only tool to tackle problems and disputes has to be the normative solution, yet we witness geopolitical incidents in which, unfortunately, it is power and force which are employed (High-ranking Hungarian official, 2022).

In view of the former ambassador, the geopolitical conflict cannot be tackled by normative tools, and the number of frozen conflicts also proves that political will and political interest are needed to solve such kind of incidents, or else political interest is needed *not* to do something. During the Cold War, nuclear weapons, not legal instruments, were the mutual guarantee that the balance would be maintained. As to protracted conflicts, there was no solution for these in the CoE either, but both parties could remain members of the organisation (Judit József, 2022).

As CoE officials reminded the political leadership of the organisation is well aware of that we are at the start of a new era. As they mentioned, the CoE has also recognized that the multilateralism in its current form seems to be inefficient. The new initiative in PACE, by the rapporteur Dora Bakoyannis – who incidentally would have had a good chance of being elected as new secretary general if she had stayed on the CM shortlist in 2019 – aims to reform and revitalise multilateralism. Earlier, the CoE secretary generals, including Tarschys, Davies, and Schwimmer, all came from PACE,<sup>202</sup> then the Juncker criteria were introduced in 2007,

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<sup>202</sup> Daniel Tarschys, Sweden (1994-1999), Walter Schwimmer, Austria (1999-2004), Terry Davis, UK (2004-2009.) The Secretaries General of the Council of Europe

requiring higher level candidates to the post of the Secretary General, namely those who had previously served as heads of state or government (High-ranking CoE Official D).

The information above also proves the interrelation among the different international organisations and efforts to increase their visibility. The Juncker criteria was adopted by the CM in 2007, following the recommendations of the Prime Minister of Luxemburg, Jean-Claude Juncker after the Third Summit of the Heads of States and Governments. The CM agreed “that it will henceforth present to the Parliamentary Assembly candidates who enjoy a high level of recognition, are well-known among their peers and the people of Europe, and have previously served as Heads of State or Government, or held senior ministerial office or similar status relevant to the post.” It was applied for the first time in 2009 in the election of the current secretary general, and resulted in the Committee of Ministers drawing up – on the basis of a commonly agreed competence framework – a shortlist which only included candidates meeting the ‘Juncker criteria’ (CM Information document 2019).

Many interlocutors believe that the future of the CoE partially or wholly depends on the success of the convention system and the implementation of the Court’s judgement. As was previously noted, Germany and France sought to keep the Russian Federation in the system in order to have influence on the country through the implementation of the Court’s judgements. However, if these rulings are not executed by members, then what is the Council of Europe for? Some years ago, MEP Daniel Cohn-Bendit talked about the future of Europe without even mentioning the Council of Europe (High-ranking CoE official D). The interlocutor then added that Russia implemented those judgements which did not run counter to the Russian constitution. This remark – that Russia is not the worst student in the classroom as regards the execution of the Court’s judgements – was confirmed by other high-level officials, too.

As the relevance of the normative tools and the principle of “*pacta sunt servanda*”<sup>203</sup>, theoretically the international agreements are of great importance and have some impact on conflicts, however the interlocutor was rather sceptical in this regard (High-ranking CoE official D). As others recalled, compared to the supranational nature of the Court during the happy 1990s and 2000s, there is no longer consensus on these issues, never mind unanimity. If they openly reject the Court’s competence the system will lose its effect. The current crisis can show to the remaining member states what happens if a member fails to comply with commitments or seriously violates the values in the Statute. If there is no political will, normative

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<sup>203</sup> “Agreements must be kept”, the oldest principle of international law, Britannica

tools cannot tackle the geopolitical problems. Negotiations and consultations did not help. Financial blackmailing will not work again, as Germany and France, the big contributors, said they would compensate the CoE if Russia withdrew. SG can keep the nominal budget as it stands. EU funding was given as an extra budgetary source for specific projects, but the cost of staff is paid from the ordinary budget, which comes from the member-state contributions. The only exception is the SOGI,<sup>204</sup> where the EU gives money for staff members too. According to the current rules at least, if the member states give more money then the CoE can survive financially. It is an open question whether the EU can give fund for running the Court, since if they become a party to the ECHR it can be solved, but how this process could unfold is still unclear. Intergovernmental structures are also financed by the ordinary budget (High-ranking CoE official A).

A politician from an EU candidate country pointed out the relative self-perceptions of the organisations, particularly the competition between the CoE and the EU, and the image of these institutions in the society. As she emphasised, it is very difficult to comment on the obvious impact of geopolitical conflicts on multilateral organisations, but legal challenges also discredit these organisations because it is very difficult to explain to citizens why the CoE is important. Serbia, as an EU candidate country, still believes in its EU prospects, and communicates to its society that until it obtains EU membership, the CoE is the most important multinational organisation for them. But doubters say that CoE norms are only recommendations, and in any case the real impact of the Strasbourg Court's judgements in the Western Balkans, for example, is questionable. She added that the normative instruments are important in cases where all actors are willing to play by the rules, but what we are witnessing now is that in practice it is impossible to tackle geopolitical conflicts by legal means (Elvira Kovács, 2022).

Other CoE officials believe in the strength of democracy and democratic institutions to overcome all kind of difficulties. As they say, there has been a change of culture which could endanger multilateralism, or at least have a serious impact on it. Legal obligations and multilateralism go hand in hand, and all we have against these political challenges is democratic culture. The organisation, unfortunately, did not react effectively to minor aggressions, so there is some responsibility in the current situation as to the war in Ukraine (High-ranking CoE official F).

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<sup>204</sup> Sexual orientation and gender identity

In the government agent's view, the CoE also has some responsibility in enhancing or mitigating the difficulties the organisation faces. As to the challenges, he believes that the political crisis or the current war more definitely endanger the functioning of the CoE than the non-implementation of judgments, but it is true that there are recurring groups of cases before the CM, which gives a lot of time for the supervision of these cases. However, the other aspect is that there are cases in which the remedy mechanism is already developed and functions, and the Court has declared the internal remedy to be efficient, yet some amendments have been introduced, similar types of cases are no longer communicated, and for some reason supervision has not yet been closed. This means extra work for the agent's office, because they have to write the updated action reports. The cases on the agenda have political implications, therefore the debates in the CM become politically motivated discussions. For example, in the case *Baka versus Hungary*<sup>205</sup>, the CM still requires further measures, but at the same time other aspects related to the independency of the judiciary have also been taken into account, which are not covered by the judgement itself, so in our view the supervision is extended to fields which were not examined by the Court in the judgement (Zoltán Tallódi, 2022). He added that theoretically the normative tools can have some implications on geopolitical challenges, because regional responses cannot be given. Instead, it requires some general arrangements and such a serious challenge than the war in Ukraine triggers some legislation initiative, but as to the utility of a legal instrument for settling a geopolitical conflict, it is questionable (Zoltán Tallódi, 2022).

The secretary general of PACE admitted that the political and legal challenges can be dangerous. This is why the CoE reacted by excluding the Russian Federation, showing clearly that red line had been crossed and that the CoE cannot tolerate that. The CoE was the first organisation to apply the harshest sanctions which could be applied against a member state. The Assembly played a major role as we convened the Joint Committee with the participation of the parliamentarians and ambassadors on the day after the outbreak of the war, and that same day the CM took a decision to suspend the member state. The Assembly convened its first extraordinary session in recent history within two weeks, and we proposed to the CM the expulsion of the Russian Federation. The organisation took this measure precisely to avoid the risks to effective multilateralism as it is exercised by the CoE. When it comes to legal challenges, I would say it is the *Kavala* judgement which is outstanding, and the CM referred back to the Court on the basis of Article 46. 4 of the ECHR, from which it is clear that if do not get *Kavala* released it will be a major blow to our effectiveness. I would say it is more concrete

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<sup>205</sup> Case of *Baka versus Hungary*, 2016



than multilateralism, it is really about the human rights protection system of the CoE. On this question we had a very interesting discussion in the Political Affairs Committee last week, and Ms Bakoyannis prepared an introductory report on multilateralism. What is more, a motion that was adopted last week on the idea of a fourth summit speaks precisely about effective multilateralism (Despina Chatzivassiliou-Tsovilis, 2022).

As the Secretary General of PACE emphasised:

*“Normative tools should normally provide a reply to geopolitical challenges, but the example with the Russia and the Budapest Memorandum do not lead to the conclusion that it is sufficient, because normative instruments should be accompanied by the political will of members states to play by the rules. If a sovereign state does not play by the rules there is nothing we can do, and this is the weakness of international law. We have nothing with which to implement these treaties, and in these cases there is no satisfactory response to these geopolitical challenges. This is the aim of international law, but perhaps we should be more careful guarantors of these treaties”* (Despina Chatzivassiliou-Tsovilis, 2022).

The former PACE member argues that it is important to understand the background of the military interventions. To demonstrate the mindset of European regions it is enough to examine the politics and attitudes towards national minority rights. In Western Europe there are well functioning models, and virtually no one thinks that the achievements of national minority rights should be rolled back. In Central Europe there are many consultations and talks on the issue, but nothing happens, while in Eastern Europe a culture of aggression prevails. There is no tradition of constructive dialogue, or of understanding the arguments of the other. Instead, only force matters, and the legislation is also built on force (Ferenc Kalmár, 2022).

#### **5. 4. Tools and means available to tackle the Copenhagen dilemma, screening of the current monitoring mechanism**

High-ranking officials warned that it was necessary to be cautious and tough-minded when speaking about overall reforms of the monitoring system. As the director of the Private Office emphasised, we all know that monitoring mechanisms should somehow be fine-tuned, but we should be realistic and not expect seismic changes. One thing we could do is facilitate the reports but for this we need the member states to agree. The UN method is a good example, but there are limits in the CoE and finally the member states should decide. The most difficult issue

is the monitoring running parallel in the CM and PACE because it is a duplication. He does not think that the PACE will recognise that this monitoring procedure in PACE is outdated. There is always a risk of having different findings in PACE for obvious political reasons which are not based on the findings of the monitoring bodies. This is not happening now, but we face serious arguments regarding different treatment, or double standards, and it is difficult to explain why some members are in monitoring while other are in post-monitoring, but the internal engagement of PACE is needed to deal with this question (Miroslav Papa, 2021). Others added that the strategic framework is important to plan for the longer term, but we should retain the possibility of being flexible if some unexpected developments happen. On the other hand, Russia argued at that time that this was the vision of the secretary general, but that it is the CM who decide (Christophe Poiriel, 2021).

The secretary to the Committee of Ministers recalled that the member states always had different views about the core mission of the CoE. As he pointed out, profile cleaning and focusing only on the concept of an efficient Europe, and on core issues such as human rights, rule of law and democracy promoted by the Nordic member states, while neglecting other fields such as culture, youth, and sport, appeared impossible, because the latter subjects are supported by the Southern members, and this could be seen as a kind of collision between the puritan, individualist, Protestant approach and the collectivist, globalist, catholic attitude, with the latter backed by the Eastern countries for tactical reasons because the more we deal with culture, youth and sport, the less time we have for human rights and rule of law issues (Zoltán Taubner, 2021).

When reforming the CoE monitoring mechanism we should keep an eye on the structures on the EU as well. As some politicians argue, tools available in the European Union are larger compared to the CoE, and include first the economic aspects, and also the integration perspective for aspirant countries, so it is very important to establish a good working relationship and burden sharing between the EU and CoE, as the latter should participate in achieving the EU's enlargement and neighbourhood policy objectives. Therefore, synergies should be strengthened and overlapping activities should be eliminated (Zsolt Németh, 2022).

As to the relationship between the EU and CoE regarding monitoring capacity, the former ambassador thinks that the EU has immense political but also economic power, which is very attractive for aspirant countries. As the financial mechanisms are linked to a common set of criteria, these conditions can be regularly checked. Compared to this, the only attraction of the CoE was the possibility to later join the EU club and acquire the “democracy” certificate. The

situation of Turkey is very interesting from this point of view. Turkey joined the organisation at the very beginning, when the criteria for the countries of the post-Soviet area had not yet been developed, and presumably Turkey never complied with all the norms and standards of the CoE. However, monitoring mechanisms formally examining respect for obligations were set up only after the Eastern enlargement. In a word, the reasoning behind Turkish membership was probably closer to other, considerations of a largely security-based and political nature, and the emphasis was not on compliance with the rules (Ferenc Robák, 2022).

The former PACE member also thinks that the CoE has no powerful tools to enforce the implementation of standards in the way the EU does, and therefore some initiatives would be needed to make the sanction mechanism more efficient. As states actually understand two aspects even in modern times - the military and economics –implementation might be linked to some investment indicators. If a state fails to properly comply with the values and norms for a long time, its classification would be lower and this could have a negative impact on the investment activities of transnational companies. The point is to make the state somehow interested in implementation, for instance via the elaboration of a system where the monitoring performance index would be connected to multinational corporations, so instead of punishment, a kind of positive feedback could better motivate countries to be more efficient (Ferenc Kalmár, 2022). In this respect, some interlocutors argue that what exists between the organisations includes more than cooperation. As they highlight, it is an open question whether, if the EU joins the European Convention of Human Rights, there will be a rivalry between the two organisations, but we have seen in the case of the Minority SafePack that once a project tries to burst the existing framework, the EU pulls on the brakes (High-level Hungarian official).

Compared to the general view of the majority, the spokesperson pointed out to a different aspect in the functioning of the two organisations. As he mentioned, the key difference between the EU and the CoE is that we have two-thirds majority here for serious decisions. Russia was expelled from the CoE, while they are still in the UN, OSCE, and the UN Human Rights Council. Exclusion from the EU requires unanimity, but the EU is very creative. In the CoE, Russia had its allies who did not vote for exclusion, but a two-thirds majority was enough, and could not be blocked by one or two countries. The CoE is now is at least as able and successful as the EU at addressing non-respect of commitments, by means of Article 46.4 or by kicking out Russia. At the moment we are not behind the EU at all (Daniel Höltingen, 2022).

The former ambassador sees the problematique from another point of view: according to her the CoE means a kind of civilizational link for member states, and the mechanism to enforce

the obligations undertaken is very slow persuasion thorough communication and dialogue with the aim to finding a compromise (Judit József, 2022). As one of the interlocutors recalled, the accession criteria were previously based on an agreement between the Ministry of Foreign Affairs of the member state and the secretary general of the Council of Europe. Then PACE also became involved in the process and rewrote the bilateral deal by completing the accession conditions with other aspects. (High-ranking CoE official D). Other noted that the best mechanism in CoE remains cooperative projects and dialogue: this is the strength of the organisation and tangible results can be achieved if the members state is ready to cooperate. They added that soft power matters a lot in international organisations, thus in the CoE as well, and greater involvement by civil actors would certainly reinforce the efficiency of the organisation, at least at the grassroots level. This should be the direction to make the CoE more credible (High-ranking CoE officials F).

From a legal and procedural point of view, others emphasised that sanctions have the objective of demonstrating to member states their own limitations, and now we see in the Russian case that there is an option of expelling states which seriously violate the provisions of the Statute. On the other hand, the CoE should also involve the state in dialogue and cooperation. However, the Covid pandemic unfortunately limited to a large extent the possibility of contacts, thus restricting the forum for dialogue. As to the transition period for the Russians, it is very controversial, since there are committee meetings in relation to the Court where in principle all state parties are present. In spite of the fact that the Russian Federation remains a party to the ECHR until 16 September 2022, they are not involved into the coordination of cases in which there are several respondent states including Russia. In fact, the procedural law is not provided for Russia to make observations or present its position. It is true that the Russian representatives already said farewell in March, but they are not involved in multilateral coordination among respondent states in certain cases (Zoltán Tallódi, 2022).

As regards the monitoring mechanisms in the EU and the CoE, the standards are not necessarily the same, but the EU often had the Council of Europe monitor EU standards in Georgia, Bosnia, Serbia in the framework of the joint programmes. This is not the mission of the CoE, but the EU finances these joint programmes. However, this is a conflicted field, because it is not about reciprocity. When a country is the member of both the EU and the CoE, which organisation monitors? (High-ranking CoE official E).

As to future relations between the CoE and EU, it is clear according to the majority of the interviewees, close EU-CoE cooperation will be even stronger now after the exclusion of the Russian Federation, and with the need to search for new sources of financing.

The war in Ukraine shows that normative tools are not sufficient, but there are well-functioning precedents, as the secretary general of PACE pointed out. She notes that the Treaty of Lausanne between Greece and Turkey, which allowed Greeks in Asia Minor to come to Greece and Muslim communities in Greece to go back to Turkey, was signed one hundred years ago. And this population exchange and the Treaty was an excellent solution to what could have been a very long war. So the Treaty of Lausanne was a definitive response to a very serious geopolitical challenge. The Dayton Agreement brought peace to Bosnia. It did not build the state we would like to see in Bosnia and Herzegovina, and we are still struggling with the functioning of democratic institutions in Bosnia, but it did stop the war (Despina Chatzivassiliou-Tsovilis, 2022).

The Secretary General of PACE gave a very detailed explanation regarding the objective and modalities of the new monitoring mechanism, which in her view could be an effective means of preventing further challenges. As he highlighted, by establishing the complementary joint procedure, adopted in January 2020 by the Assembly and in February 2020 by the CM, with the rules being adopted in various stages by the Assembly in April 2020, we have now quite clear machinery for what happens in case of non-compliance. In a minor case, first we have a public debate in the Assembly, either on the basis of a motion or of an urgent debate, and following a report, resolutions and recommendations are adopted. Or there is a discussion in the Monitoring Committee without opening formal monitoring, so if a member raises an issue, there is an opportunity to have a discussion in the Monitoring Committee. Then we can ask a member state to be put under periodic monitoring. Periodic review applies to all member states who are not under monitoring, and also applies when a situation gives rise to concerns. Then there is the possibility of opening a monitoring procedure. These are the milder but still quite effective procedures. The next step is non-ratification of the credentials of the delegation, which can still happen if this is a parliamentary responsibility. In my view this is a quite weak reaction because it prevents the attendance not only of the majority, the government parliamentarians, but of the other members too. We have done it in the past, and it may be easier than other sanctions, but by preventing parliamentarians from coming to Strasbourg we also deprive any pluralism of opposition voices. So this is why we invented the complementary joint procedure, complementary in the sense that it is added to monitoring and to the non-ratifying of credentials,

but it leads to a concerted action between the Assembly, the CM and the secretary general. It has never been used, but its very existence proved critical and determinant, in my view, when there the Russian crisis began, because I believe the idea that the Assembly could move on this procedure encouraged the CM to consider seriously and move quickly contrary to what the CM did in 2014. Its mere existence, I think, has an impact. There are voices saying that it might be used in the case of Turkey and the non-execution of the Kaval judgement. The joint provides a visit to the country of CM Chair, PACE President and Secretary General and drawing of a roadmap for how to ensure compliance. If all this fails, the road is open for the exit of the member state. And then last but not least what we just saw very recently, we thought even going through the procedure, the organisation can take the decision if a member state seriously violates its obligations under the Statute, if it does not fulfil the criteria of membership, the decision on the expulsion under Article 8. This was always referred to in our reports as a theoretical possibility which was almost applied to Greece when Greece was threatened by suspension the Colonels withdrew from the Statute, but it was applied to Russia because when Russia sent a letter saying that they wished to withdraw the debate on expulsion had almost ended. It is clear that it was the CoE which had decided to expel Russia and not Russia that withdrew. Even if for communication purposes it was presented like this. Although the complementary joint procedure had not yet been applied, it is important because the CoE has a very clear machinery system of reaction. When it comes to the EU we are in different procedural system because there are the financial sanctions. I do not know how efficient they ultimately are. I do not know to what extent the EU could take a decision on, for instance, excluding a member state. I do not think it could be done as quickly as it was done in the CoE (Despina Chatzivassiliou-Tsovilis, 2022).

## **5. 5. Possibilities and real chances of further strengthening the supervisory scheme**

Interlocutors drew attention to the fact that the background of the complementary joint procedure it is very clear. The director of the Private Office stressed that it was a common response to the Russian crisis in PACE involving all three actors, CM, PACE and the secretary general. It is difficult to say now whether it will have some financial implications in the future, but in terms of the number of mission he does not think it matters. It will have rather serious political and institutional implications. The secretary general has other means for dialogue, e.g. Article 52 [of the ECHR], she would act in more serious cases, as a last resort, if PACE and the

CM are not capable of reacting. There is a risk of politicisation of the procedure, and there is also a legal risk if it comes from a political body. What is important to decide is what can trigger the procedure. If the reason is overall non-compliance with CoE values, that is fine because it is in line with the mandate, but if there is only one such legal case, Kavala, which is in any case already in the supervision process of the CM, and there is a clear mechanism in the ECHR, Article 46.4, for launching the infringement procedure, while he thinks that there is a potential danger in the application of this procedure. We have not seen it in practice, and it depends how member states react to such an initiative. It is certain that it was a compensatory step in reaction to the PACE complaint that they let the Russian return, and there is always a need for political balance between the two bodies. The main reason behind the new procedure is to have a tool in similar serious situations when all three actors agree that a strong response is needed from the organisation, to have a mechanism between monitoring and the nuclear response, which is to ask a member state to withdraw or to expel it. We need a certain dialogue for similar serious situations (Miroslav Papa, 2021).

Other interlocutors also confirmed that the complementary joint procedure was a reaction to the return of the Russian parliamentarians to PACE. Mr. Poirel remembered that it was the Ukrainian Dmytro Kuleba, then the ambassador of Ukraine and now its foreign minister, who urged the introduction of some compensatory mechanism, some guarantee that similar serious violations cannot go unpunished in the future. Likewise, PACE was roundly criticised by the CM after introducing sanctions against the Russian delegation, and questions were asked about why PACE had decided to do so without consulting the CM in this respect. This is the reason why the CM has a decisive power in the complementary joint procedure to take into account what governments want, and the whole structure serves the objective that the main organs of the CoE speak with one voice. Personally, he thinks that it will never be worked out. He regards this initiative as hypocritical, and cannot imagine a situation in which the CM and PACE could come to an agreement to initiate such steps against a member state (Christophe Poirel, 2021).

The secretary to the Committee of Ministers believes that the setting up of the complementary joint procedure was to prove that the return of the Russian parliamentarians was not a pure geopolitical decision but that the enforcement of rules and respect of norms and values are also important for the organisation, thus it was a kind of face-saving move for the CoE. As to the first application of the procedure, there are some voices claiming that PACE may consider launching the complementary joint procedure against Turkey if there is no progress in the Kavala case (Zoltán Taubner, 2021). Mr Taubner thinks that the new procedure will be able to

remedy the situation and ensure the functioning of the CoE according to its Statute. Everyone is aware of the realities, but face-saving mechanisms are important, irrespective of the importance of personalities in history and in making major decisions. If political leaders remain realistic, European cooperation is an important interest for all actors. So the trend and developments are obvious – the question is how to sell the inevitable decisions to the voters. As Prime Minister Juncker said: “We all know what to do, but we don’t know how to get re-elected once we have done it”<sup>206</sup> (Zoltán Taubner, 2021).

As regards the future of the new procedure, the former ambassador thinks that the complementary joint procedure could be efficient, but only in the case of a less serious violation by a more adaptive, conformist member state. For countries which have territorial ambitions and violate the territorial integrity of their neighbours, this procedure cannot work. Any kind of monitoring mechanism has some kind of impact, but generally only on those countries which generally respect the normative framework of the system. The monitoring structure functions in the case of countries which want to belong to the club (Judit József, 2022).

According to the director of Human Rights, the complementary procedure is of a similar nature to the infringement procedure. It was first launched against Azerbaijan, but it should have been used against many member states earlier, e.g. Moldova, Turkey, and the Russian Federation. If the CM launched the procedure because Mammadov was in jail, it should be launched against Turkey and the Russian Federation as well, since other political activists, such as Kavala and Navalny, are also in jail. There is little chance of using the complementary procedure against a smaller, less powerful and influential member for the mistreatment of NGOs, because the CM would say we have more serious problems than this, the whole procedure will lead to expulsion in the end, this is the last resort, is of an extraordinary nature, and the credibility of the CM is at stake by launching the procedure. In his view, the first objective was to send a positive signal to Ukraine by establishing this procedure, while the second goal was to send a message to PACE: do not react without the CM (Christophe Poirel, 2021).

PACE members argue that the complementary joint procedure is an important mechanism, and recent developments prove that consensus can be reached in important cases, but we are now faced with a situation in which the CoE proactive approach is praiseworthy, but it is to be feared that one of its main achievements, that platform for dialogue and communication between

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<sup>206</sup>Jean-Claude Juncker, Prime Minister of Luxembourg and President of the Eurogroup. *The Economist* (2007), "The Quest for Prosperity", March 15<sup>th</sup> cited in Buti et al (2008) p. 2.



Europe and the Russian Federation, will be lost. The reason behind the decision to first suspend Russia and not to launch the complementary joint procedure was that the CoE did not want to be criticised for entering into lengthy, detailed, slow administrative procedures instead of sending an immediate, strong political message with the hope of de-escalating the situation. This was the concrete request of Ukraine (Zsolt Németh, 2022).

The Secretary General of PACE was apparently one of the leading personalities who strongly advocate the new mechanism. As she recalls:

*“The complementary joint procedure had two categories of opponents. You had those, I think, who were afraid of being subject to the procedure, mainly Russia or Turkey, and you could have those who thought that the joint procedure would weaken the response system in the Assembly. Because in the CM there was nothing to weaken, they could simply ask for the exclusion of a member state. Some argued that by the joint procedure, in reality, we underestimate the monitoring procedure and other sanctions of the Assembly. I think none of these arguments were valid and we saw it again with the Russian case because I honestly believe that the joint procedure strengthened our position in the sense that if now the Assembly decides with this very specific and quite strict majority on the complementary joint procedure, the CM and the secretary general are obliged and bound by starting this procedure”* (Despina Chatzivassiliou-Tsovilis, 2022).

She added that previously you could sanction parliamentarians in the Assembly, but it had no impact at the CM level, as the Assembly could always request exclusion, but there was no guarantee that the CM would even reply. Now either the Assembly, or the CM, or the secretary general can put this machinery into motion, in itself it is a very strong signal for the state concerned. She was glad that it has not been applied in the Russian case, as in an open war against another member state there is no reason to go through this procedure. It is clear that this member state cannot be the member of the club. But its very existence is important. As to the financial implications, it would not cost more than a mission to the country concerned. There were no alternative options discussed, though the opposition raised some suspicions, and those who voiced these concerns made amendments to the final text, and its complementary character was emphasised. It does not prevent the use of any other tools in the Assembly. (Despina Chatzivassiliou-Tsovilis, 2022)

As the secretary general of PACE explained:

*“It is complementary because it does not change the prospects of the CM to go directly for Article 8 and it does not prevent the Assembly from opposing the ratification of credentials and using other already existing means. The complementary joint procedure can run parallel to a monitoring procedure, it is not a reason to stop the monitoring, you can go with both. I believe it can be efficient and is a strong message not only by being launched, but by being in the books. In the current war situation, when the escalation of aggression happened from one day to another, the discussion immediately started on whether we shall apply”* (Despina Chatzivassiliou-Tsovilis, 2022).

She further noted that its impact is important, as is the message that a high-level delegation will visit the country. The drafting of the roadmap with a deadline and certain measures is important, and at end of the day it can be stated that the measures taken are satisfactory. The CM makes the assessment about the efficiency of measures, but the Assembly supervises the whole process through the progress report, and at any stage the Assembly can have an urgent debate in case the PACE is not happy about how it is progressing. There have been debates whether you can apply the procedure in the case of the non-implementation of a judgement. If there are measures required from the state, the complementary joint procedure can be also applied, and the roadmap negotiated with the state concerned gives a concrete timetable for the measure needed. In case Kavala it is more difficult to see a roadmap, because there is only one measure required, which is release from Russia (Despina Chatzivassiliou-Tsovilis, 2022).

As the head of the Hungarian PACE delegation recalls concerning the different options for PACE, the strengthening of the PACE decision-making process and the decision of ratifying the Russian credentials was a necessary development, though the recent events relativized earlier efforts. In 2019, the possibility was open for a long time whether to invite the Russians back or maintain the position, but finally the alternative scenario was established, in light of the Russian aggression against Ukraine. He added that there is a strategic interdependence between the EU and the Russian Federation, so the pragmatic approach towards Russia was always there, though the military attack put it now into a bracket which does not exclude, and the CoE will not have any role in this respect (Zsolt Németh, 2022).

Concerning the background of the suspension of the Russian delegation in the PACE, the former ambassador thinks that the reaction in PACE towards the Russian parliamentary delegation after the annexation of Crimea was exaggerated. After a while they also recognized that they cannot sanction a delegation if they are not there. The Russian non-payment was a natural consequence of the PACE decision to suspend the Russian delegation, and finally the

major contributors realized that the situation is unsustainable – the CoE needs Russia, as without this country one of its comparative advantages is lost (Ferenc Robák, 2022). As regards the utility of the new mechanism, Ambassador Robák believes that the complementary joint procedure could be a useful and efficient mechanism, at least in the sense that PACE cannot make decisions for short-term political purposes, so the new procedure can be seen from the point of view that it provides a kind of control over PACE, and serves as a guarantee that the CoE could speak with one voice in serious cases in the future. However, in his view the procedure cannot lead to the exclusion of a member state, or at least not a great power, but perhaps at most a medium player, to show a representative example (Ferenc Robák, 2022).

Another interlocutor argued that it is important to avoid the politicization of the new instrument. He thinks that it is very important to have a mechanism which could be equally applied to all member states. The existence of the complementary joint procedure is promising, but the success of the mechanism also depends on which state the procedure is launched against. The new mechanism could be efficient against small- and medium-sized countries, but its efficiency is questionable in the case of a more powerful, influential member state (Ferenc Kalmár, 2022).

Many interlocutors argued that CoE methods are built on cooperation, dialogue, and assistance, and in principle exclusion runs counter to this practice, but we see that the CoE cannot achieve results and chastise the renitent, non-compliant member even if the CoE keeps the country in indefinitely (High-ranking Hungarian official, 2022). Many partners shared the view about the efficiency of the new complementary joint procedure, believing that it will be efficient and will work if the member state under review is willing to cooperate, but that otherwise the mechanism will be unsuccessful (High-ranking CoE official D).

On the basis of the painful experience in PACE in 2019, some PACE members consider that cooperation serves other purposes, as the Serbian parliamentarian thinks that cooperation between the CM and PACE also allows responsibility for any decision to be shared. The joint committee meeting was immediately convened after the outbreak of the war to begin joint thinking about potential sanctions (Elvira Kovács, 2022).

## **5. 6. Role of the Parliamentary Assembly to detect the dominance of political interests in the functioning of the Organisation**

Some interlocutors noted that burden and responsibility sharing is a regular process, with the CM sending important questions of opinion to PACE and letting them react first regarding the Russian case, because in the CM there was no unanimity regarding the possible exclusion of Russia. The CoE has added value in keeping the pan European character, while also having non-EU members on board (High-ranking CoE official A).

As to the general perception about the new joint procedure, the head of the Hungarian PACE delegation thinks that PACE gave up certain sovereign powers by adopting the complementary joint procedure, while the Assembly was reluctant to do so for long time, but finally PACE recognised that internal paralyzing debates should be eliminated at the level of the whole organisation in order to solve similar serious situations (Zsolt Németh, 2022).

Diplomats recalled that the rules are always tailored to the situations in which they were adopted, and if the situation changes, or if reality overwrites the rules, then new rules have to be made which are adapted to the new circumstances, rather than trying to adjust reality to old rules reflecting a previous status quo (Ferenc Robák, 2022). The former ambassador added that it is obvious that European countries behave in line with the different roles of international organisations. They know how the same foreign policy interests should be represented in the EU or in the CoE (Ferenc Robák, 2022).

Former PACE members also think that the change of the rules is not a problem in itself – multilateral organisations always have to adapt their internal procedures to the reality, and PACE should be urged to develop new mechanisms. It is not realistic to have unchanged statutes elaborated several decades ago, as flexibility is expected of the international organizations though of course while maintaining their fundamental values (Ferenc Kalmár, 2022). As he remembered there was no alternative scenario to the return of the Russian delegation, because no countries were willing to pay the bill instead of Russia. This also explains the difference between the EU and CoE approach to the crisis. The EU could be more rigorous without Russia among its members, but the CoE had more to lose without solving the situation (Ferenc Kalmár, 2022). CoE officials also think that the PACE rules of procedure are not inscribed in stone. The purpose of the rules is to help the functioning of the statutory organ, and if there is a need to evolve, they must be changed. However, power of credentials derives from the authorization of the national parliaments, which were overruled by the PACE decision when refusing to ratify them (High-ranking CoE official D).

The secretary general of PACE also underlined that PACE did not derogate from the rules, but only changed them, and this was nothing extraordinary. As she highlights:

*“We were trapped by our own decisions. At that time there was no reaction from the CM, perhaps we could have drafted and adopted a recommendation to the CM with the proposal of suspension and/or exclusion, then the CM could have assumed its own responsibilities. By not doing this we found ourselves for five consecutive years in a situation when a member state was represented and fully functioning at the governmental level while their parliamentarians were absent from the Assembly. The strengthening of the decision-making process was put in place once we had the joint procedure, and that was in January 2020. I agree with the conclusion of the report that we should never have deprived any parliamentarians of the right of vote. I don’t think it should be on the menu of possible sanctions. For me to deprive parliamentarians of voting rights but still to ratify their credentials is equivalent to the situation when you have a player on your football team, but you tell him not to touch the ball. Then why is he in the team? I will not say we should not sanction, but in a situation which is serious, just ask the player to leave the team. And now we saw retroactively the difference in how things were when we acted in concert with the CM, not on our own – it was more effective” (Despina Chatzivassiliou-Tsovilis, 2022).*

As to the accusations by the human rights organisations that a financial blackmail was behind the PACE decision permitting the Russian delegation to return to the Assembly, the secretary general does not see the issue like this: in her view the Assembly did not give in to the blackmail, because it was more of a political discussion, and the Assembly took two decisions. First, it changed the rules, and said that parliamentarians cannot be deprived of their voting rights. Secondly, it decided that despite all these measures it was politically important to maintain dialogue with the Russian Federation. In any event, the developments and experiences in 2019 accelerated and facilitated the decision-making process in 2022. As the secretary general said:

*“Whether it was a right or wrong decision is difficult for me to judge, but there was a very large majority for this in the Assembly. We did everything to keep Russia in, and the advantage is that we have a clear conscience, as in the marriage where we tried*

*everything before divorce. The Assembly exhausted all possibilities for dialogue, but unfortunately there were no other choices”* (Despina Chatzivassiliou-Tsovilis, 2022).

Many interlocutors shared the view that what happened in PACE between 2014-2019 to prepare the ground for the return of the Russian parliamentarians is based on political and geopolitical reasons. There was no alternative to keeping the Russians in PACE and in the organisation, and the more rigorous EU position is attributable to economic reasons (High-ranking Hungarian official, 2022).

Others added that the PACE decision at that time was the last chance. We were not talking about Crimea and the causes of the crisis but about non-payment. At the expert level there were general expectations that Russian would return to PACE in order to solve the financial difficulties of the Organisation (Zoltán Tallódi, 2022). Other officials believed more in the normative aspects, as they see the human rights commitments and importance of dialogue, and this was the reason why the member states opted to allow Russia’s return to the CoE. Russia is not in the EU, and this was also the reason why the EU was stricter towards Russia and its aggression (High-ranking CoE official A).

The spokesperson remembered that Germany was very outspoken in the EU against Russia, but at the end of the day the conviction prevailed that it would have more impact to keep Russia in the organisation, to maintain channels of communication. Germany was critical of Russia, condemning Russian’s actions but still keeping it in the CoE in order to condemn it as a member state and make it return to its commitments, but that did not work. He recalled the recent statements of German political leaders about how they had made a mistake in their judgements about Russia<sup>207</sup> (Daniel Hölting, 2022). Diplomats also think that the PACE decision to change the rules in order to let the Russian delegation come back to PACE was a political decision, and that the rules in the Assembly always serve political purposes, geopolitical interests and power games. Russian participation was important for the CoE; the Russian membership was an added value for the CoE compared to the EU. The current situation is absolutely different, faith in eternal peace after World War II has disappeared, and there is also a fear of migration provoked by the food crisis, which is one of the results of the war in Ukraine. This will particularly affect

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<sup>207</sup> German President Steinmeier admits 'mistakes' over Russia policy, DW Politics, 5 April 2022

France because of migration from the Maghreb countries. Impoverishment and massive migration – these are the prospects for France in the case of a protracted war (Judit József, 2022).

But at that time, in 2019, the only alternative could have been excluding the option of return for the Russian parliamentarians, but it was not a realistic scenario, according to the former ambassador. The military attack was most probably planned earlier, there are serious debates about the relevance of the timing, and there are views that the end of the Covid pandemic was the best timing for very exhausted European societies, because the level of resilience is much lower in Western Europe than in the Russian Federation (Judit József, 2022).

As to the role of PACE in the whole organisation, some CoE officials think that PACE is only the facade of the building, and that the key players of the European Union wanted to keep Russia in the Council of Europe because of the payments and the implementation of the Court's judgements. They also opted for the full-fledged participation of the Russian Federation in the Council of Europe. It should be noted that there was no unanimity in the Committee of Ministers when this body decided to cancel Russia's membership (High-ranking CoE official D).

One PACE member pointed out the pressure coming from the political leadership of the CoE regarding the return of the Russian delegation in 2019. According to her view, theoretically there were other options to the return of the Russians into PACE, but in practice the secretary general of the CoE always reported about financial difficulties in staffing, informed PACE of how many contracts they had had to terminate, and about the risk of daily operations to CoE personnel. In PACE, the parliamentarians were not as affected by these financial problems, because it actually affected only the number of the fact-finding missions and other official visits, so the position was always that the level of quality should be retained in the reports, while the other impacts were not directly faced by parliamentarians. So the pressure became so great from the CoE leadership that in reality there was no other scenario left than the restoration of the full rights of the Russian PACE delegation (Elvira Kovács, 2022). She added that compared to the vast efforts PACE made to prepare for the return of the Russian parliamentary delegation after 2017, it was extremely surprising that PACE voted nearly unanimously for the exclusion of the Russian Federation, at the urging of the current president. This may be due to personal considerations too, since “the current PACE president, was considered the most pro-Russian during the PACE plenary debates in 2019, and the whole parliamentary organ saw him as the person who reversed the general rejectionist attitude in PACE. Perhaps it was his personal intent

to shade his image in this sense (Elvira Kovács, 2022). She also recalled that the turbulence in PACE about exclusion was not clear to the parliamentarians, either, as a number of meetings, Bureau meeting, and Joint Committees were convened to analyse the situation, until finally an extraordinary PACE session was held on 14 and 15 March 2022, where PACE members voted on Russian membership, but the final decision was not taken by PACE but by the CM, which also caused some confusion for PACE. According to some internal information sources, the last extraordinary plenary session of PACE was held more than 50 years ago, in 1966 (Elvira Kovács, 2022).

The secretary general of PACE also confirmed the general assessment that there was no other alternative scenario to the return of the Russians in 2019: I would not call as a scenario, there were individual decisions and you could never know if the Russian would return or not, because Russia takes what they want, it is important to say. They wanted the abolition of the ratification system of the Assembly. They wanted the Assembly not to have the right not to ratify credentials. The Assembly did maintain this right and it is important that they could still be threatened with non-ratification (Despina Chatzivassiliou-Tsovilis, 2022).

As regards the importance of general monitoring, the Serbian PACE member drew attention to the fact that Serbia is the best example in respect of any monitoring mechanisms, because for all members, EU or non EU members, the *acquis* of the European Union is the most relevant. But in the field of minority protection there is no regulation at EU level, and in this case the CoE standards are the reference point. In this context the best “sanction” or motivation is the promise of the prospect of EU membership, but it obviously works only for non-EU members (Elvira Kovács, 2022).

The majority of interlocutors agreed that the different EU and CoE positions of the key member states derive from their different natures and approaches, as well as their membership of the two organisations. According to the Hungarian agent, the more lenient position of great players in the CoE compared to the EU could be explained by the difference in membership on the one hand, and the intention to send a message on the close cooperation between the EU and the CoE on the other, namely that different roles are allocated to the organisations according to their mission and core functions (Zoltán Tallódi, 2022).

The differing behaviour of the EU and CoE is justified by the difference between the aims of the two organisations. In the EU we have an integration mechanism. The CoE is a classical intergovernmental organisation and is based on dialogue regarding the pursuit of peace as one



of the main goals. You wanted to have the biggest member state in the world within the organisation to at least be able to maintain contact with them and also to have the competence of the jurisdiction of the European Court of Human Rights. While in the EU it is clear there are financial sanctions that are thought to be efficient, and the CoE does not have this kind of sanction (Despina Chatzivassiliou-Tsovilis, 2022).

## **5. 7. Future relations between bilateralism and multilateralism**

The issue in the questionnaire referred to the bilateral relations between states, but the interviewees sometimes had different views on the concept of bilateralism. Most interlocutors admitted that bilateral talks can be helpful in alleviating concrete issues such as the situation of minorities in a country, even if it does not solve the issue but help build momentum. When you have a multilateral problem you need everybody on board, as it is impossible to solve by bilateral means. But the potential of bilateralism should be not underestimated. Bilateral talks are rather diplomatic techniques. If the issue is of bilateral nature, bilateral relations work. As regards the Framework Convention, if we want to solve it bilaterally it will kill the whole instrument. In a bilateral dimension, the stronger, more influential actor can impose its interest on the weaker player, but the multilateral dimension provides a more balanced framework in which nothing is achieved at the detriment of the other, and multilateral cooperation is a kind of protection for small and medium-sized countries, which is the advantage and primary value of multilateralism (Christophe Poiriel, 2021).

The Secretary to the Committee of Ministers underlined this aspect in the following:

*“The question is how we define the bilateral talks. If we look at the Russia-related problems, the EU is on the one side and Russia is on the other. Even in the 46 member CoE there is rather bipolarity in most of the issues and not multipolarity, which means the EU bloc faces Russia”* (Zoltán Taubner, 2021).

Others highlighted the impact of membership obligation on bilateral relations. According to the head of the Hungarian delegation, as regards bilateral relations between two countries it can be affected by membership in multilateral organisations. Between Hungary and Russia, bilateral cooperation was very spectacular and fruitful, but EU and NATO membership determines the manoeuvring room for Hungary in this respect (Zsolt Németh, 2022).

However, most interlocutors believe in both, as each format of cooperation has its advantages in certain cases. As the partners emphasised, “Bilateralism and multilateralism cannot exist without each other. The foundation of the UN proves the importance of multilateralism, and shows that all acts have some international consequences and vice versa. The multilateral initiatives cannot be implemented without the political will of the member states. I do not believe in one world government or in the exclusivity of bilateral relations either” (Ferenc Robák, 2022).

A former PACE member also underlined that multilateral relations could provide the perfect framework for bilateral relations, as the latter could be useful for tackling particularities. So bilateralism and multilateralism complement and strengthen each other (Ferenc Kalmár, 2022). Others put more emphasis on bilateralism, saying that good bilateral relations are indispensable for efficient multilateralism, so both cooperation mechanisms are equally important (High-ranking Hungarian official, 2022). Not surprisingly, the CoE officials preferred the multilateral context, highlighting that CoE is not about bilateral relations, but the ideal is a mixture of both. Sometimes bilateral elements become important in a multilateral context to help move forward. The multilateral context is more able to solve bilateral conflicts. The importance of multilateral legal instruments is unquestionable. There is no alternative to multilateralism. The current war is a consequence of bilateralism (High-ranking CoE official A, 2022).

Other CoE officials also pointed out that bilateral cooperation is embedded in multilateral cooperation, that multilateral instruments can help, and that there is no contradiction between the two. Bilateral cooperation need not undermine it, while together they can be successful and show more results, rather strengthening each other. They emphasised that multilateralism relies to a great extent on bilateralism, but that the success of bilateral cooperation wholly depends on bilateral relations, especially in complex cases very much linked to the history and identity of a nation. If countries cannot overcome identity crises of this kind, it has a direct, adverse impact on bilateral relations and as a consequence on the multilateral system, so they are absolutely interrelated. Non-constructive reactions between member states hinder the progress in many cases related to national minorities, also in conflict related issues. If it is used for the right purpose, and not to circumvent multilateral instruments, the bilateral dialogue could be useful. However, the aspect of reciprocity is important in a bilateral framework, but is an absolutely no-go for human rights standards. There are clear obligations irrespective of what the other does. It is a step backwards for the whole system if the action-reaction based approach is followed, which absolutely reflects national interest. Countries somehow cannot manage to

overcome the stereotypes which have existed for centuries. As for the national minority issue, and the question of how to deal with national identity, it also depends on how mature the society or nation is, and how strong the instruments are. For example, the mechanisms of the CoE for national minorities are important but they are not enough, and there is an urgent need to strengthen these tools (High-ranking CoE official B, 2022). Other CoE officials also warn regarding the possible danger if bilateral relations predominate. Bilateralism can be a threat in certain fields, such as national minorities or migration issues, because national legislation on disabled people will probably not generate much interest from other states. By contrast, the situation of national minorities and migrants will derive from the status of bilateral relations, which have a very negative, adverse effect on these groups (High-ranking CoE official E, 2022).

The former ambassador thinks that the best example for bilateral relations is the rapprochement between Russia and China, as the latter was never compatible with international organisations. It was only a Euro-Atlantic dream to get China closer to or a member of international organisations, which are only built on Euro-Atlantic concepts and norms (Judit József, 2022).

Mainstream players consider multilateralism to come first. But the relationship between bilateralism and multilateralism very much depends on what we mean by multilateralism. It is only the coalition of some states, or it is to bypass global issues (instead of solving problems). (High-ranking CoE official D, 2022). Others think that bilateral contacts and relations obviously matter a lot to move forward (High-ranking CoE official F, 2022). In specified areas, it complements the multilateral dimension, and two the approaches strengthen each other.

Some parliamentarians think that it is not necessarily bilateral relations which are important, but the lobbying in small groups, which is a very effective platform for representing different interests, and is often applied in PACE. In my experience, special interest groups influence multilateral organisations to a large extent, and decisions are taken following the position of the strongest lobbying group (Elvira Kovács, 2022). Bilateralism and multilateralism have an impact on the other formats of cooperation. This crisis will point out more on the importance of bilateral and multilateral contacts and the future will show the extent to which one or the other will prevail (Zoltán Tallódi, 2022).

The secretary general concluded that *“I would like to believe that these are complementary processes and multilateralism should prevail at the end”* (Despina Chatzivassiliou-Tsovilis, 2022). However, she recalled a very interesting exercise in the field of national minorities, when the Assembly proposed drafting a protocol to the ECHR, but it failed in the CM. On the other

hand, the protocol was drafted in coordination between Hungary and Romania, and is annexed to the PACE Recommendation, which also proves the necessity and utility of bilateralism, depending of course on the nature of the issue.

## **5. 8. General summary**

The specific questions of the interview generated additional considerations in most of the cases. As regards the major cause of the 2019 financial crisis, the majority of interviewees considered the Russian non-payment as a main factor in the situation, but also Russian behaviour, as they concluded was only a response to an earlier decision of PACE, which raised other aspects, such as the lack of coordination between the two statutory organs. It was difficult to disconnect the experiences of the financial crisis, both in terms of precedents and solutions, from the recent decision of the CM about the exclusion of Russia. The financial crisis as a case study was obviously compared by many interlocutors with current circumstances, and the PACE response to the 2019 crisis was evaluated in the context of current developments, casting the interpretation in a different light. The overall picture was even more interesting when the different dates of the interviews were considered. Even among the conversations registered this spring, there were major differences in the evaluation depending on whether the interview was held before the Russian aggression against Ukraine, between suspension and exclusion, during the extraordinary session of the PACE and the extraordinary session of the CM about the decision on expulsion, or much later, in May. Hindsight might retrospectively change perceptions of the Russian behaviour and approach, the prospects of the future cooperation with Russia, the effectiveness of the organisation, and last but not least the future of the Council of Europe. The questions on the impact of political and legal problems, as well as the comparison between the relevance and efficiency of geopolitics and normative tools, and the role of the treaties and conventions, all raised more complex issues. Some interviewees had pessimistic views on future prospects, while others, by contrast, were confident that the unique *acquis* of the Council of Europe will save the organisation, allowing it to keep its fundamental character in the medium and long run if the necessary conclusion are drawn from the latest developments, including the expulsion of Russia. The highest-ranking officials praised the efficiency and rapid reaction capacity of the organisation in so quickly expelling Russia, as the first among the international organisations, and all referred to the previous case in 2019 as a kind of explanation which confirmed the impression that without developments in PACE, including the financial

crisis and accusations of blackmailing, PACE opinion would not have changed so quickly and the CM decision on expulsion would not have been taken so easily. The interviewees who no longer had daily contact with CoE could for this reason perceive the functioning of the CoE from a certain distance, and agreed that the exclusion of the Russian Federation was not necessarily a well thought-through step as regards the comparative advantage of the CoE in competition with the European Union, though they admit and accept the arguments that the CoE had to somehow react to the war as a human rights organisation. However, the general conclusions were that political, geopolitical, legal challenges, and all major development definitely have an impact on the effective functioning of the organisation. Still, most believe in the future of the CoE, and do not think that it is endangered in the long run. On the contrary, they think that the Court could increase the reputation and credibility of the CoE once it overcomes the odium of non-execution. Nevertheless, it should be noted that anonymous interviewees had rather pessimistic views on the long-term effect of geopolitical and legal challenges on the Council of Europe and on effective multilateralism in general. One official was particularly sceptical regarding the future prospects of the European Court of Human Rights without real reforms, implementing only minor, aesthetic procedural modifications. According to this view this process would lead to the situation when the Strasbourg Court will play a second fiddle compared to the Luxemburg Court, the stage of the negotiations about the accession of the EU to the European Convention on Human Rights make it crystal clear what tendency the Strasbourg Court will face without introducing substantial reforms. This section of the interviews underlined only partially the previous assumptions that paid CoE officials would have positive assessments about the impact of the challenges and would relativize the risks of these political and legal difficulties on the future prospects of the Council of Europe. It was surprising to note some fatigue and concern from the part of some officials regarding the future effectivity of the organisation and the general attitude of member states to value-based approach of multilateralism. They highlighted the role and importance of the norms but also admitted that ultimately, these are the member states who decide at the end of the day whether they are willing to play by the rules or not.

Regarding the tools and means available to tackle the Copenhagen dilemma and the possible strengthening of the supervisory scheme, the majority shared the assessment that the absence of enforcement capacity of the CoE mechanism prevents the system from being efficient, and general reference was also made in this respect to the political will of member states regarding the extent to which they are willing to play by the rules, and to which they are committed to

effective multilateralism. Some interlocutors paid special attention to the new complementary joint procedure, which is known among CoE officials, but other interlocutors have minimal knowledge about the new system as it has never been applied yet. Supporters of the new procedure advocated its innovations, point out that both statutory organs together with the secretary general had ownership over the initiative and for the first time in the history of the CoE it is possible for CM with PACE to react jointly, beyond the existing sanctioning options for both the CM and PACE. Some said that the mere existence of the new procedure could have a kind of deterrent impact, and even those interviewees who now see the CoE from a distance believed that the joint procedure could be useful in some circumstances. Analogies were mentioned between the infringement procedure in the execution field and the complementary joint procedure highlight that infringement already had some results. However, there was an agreement that the important thing is when, if ever, the procedure is launched, and against which member state.

The role and strengthening of the rules in PACE obviously served political considerations, and as the interlocutors highlighted, there is nothing special in changing the rules of procedure of the Council or Europe: this has already been happened in the Council of Europe on numerous occasions. According to the conversations, the biggest problem was the non-coordination of the two bodies, and this led PACE into a trap.

The worrying bilateralist trend of tackling national minority or migrant issues were confirmed by the interviewees, highlighting the negative, adverse effect of this approach on multilateralism. The majority of the interviewees believed in the complementarity of the two approaches, which could strengthen each other while multilateralism prevails in general.

In summary, the interview questions shed light the interrelation of numerous areas, and many participants highlighted the responsibility of both statutory organs and the CoE as a whole to give adequate responses, avoiding double standards or any kind of discriminatory approach at any level. While admitting the deficiencies of the system and the real power of legal instruments, the final conclusion is rather optimistic about the future of the organisation and the importance of the normative framework in preventing further escalations. As a first step to effective multilateralism, the need of recommitment to the legal framework and the political will to participate in and play by the rules of the multilateral organisations were highlighted.

## Chapter 6: CONCLUSIONS

The Council of Europe celebrated its 70<sup>th</sup> anniversary in 2019. With the experience of seven decades in the protection of human rights, guaranteeing the rule of law and democratic principles, this organisation undoubtedly contributed to developing the normative basis for the single European legal area. Through its close cooperation with other international organisations, by inspiring and mutually strengthening each other's activities, the Council of Europe became an active part of the European human rights construction. In some fields its role and mission go beyond the standard setting activity of the United Nations or the European Union. The legally binding conventions in the protection of national minorities and their supervisory mechanisms elaborated in the mid-nineties could be considered unique. However, sceptical voices could say that every rule is only worth as much as is implemented of it. The policy of the Council of Europe focused on dialogue, cooperation, follow-up activities and assistance. The organisation sought to evade sanctions or confrontations and, as a matter of fact, did not really dispose of any kind of efficient restrictive measures. After the historical series of events in the 1990s, the Council of Europe faces now another type of challenge. Soft-power human rights instruments now face off against classical power politics, which implies new approaches and methods. No one can predict how the newly established complementary procedure will succeed in achieving what its committed supporters hoped for in terms of the enforcement of norms and standards. Bearing in mind that the real goal is not to punish the members states but to motivate them with strengthened tools, whenever the Committee of Ministers decides to apply the exclusion option, the mechanism is considered to have failed.<sup>208</sup>

But the research has some conclusions of a general nature regarding the future functioning of all intergovernmental organisations in light of the possibly continuing and alarming trend that geopolitical interests and ethnic tensions prevail over normative commitments. Institutionalist theories give an overview of the ordinary activities of international institutions, highlighting that they are characterized by regulative, normative and cultural-cognitive pillars, within which the rule-setting, monitoring and sanctioning activities are at the forefront of their mandates. However, these organisations face now challenges of a completely different nature, which are far from their regularizing scope. Recent developments in Europe unfortunately show more than anything so far that neither the multilateral framework, the normative scheme of international organisations, nor the obligations undertaken could not domesticate the great

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<sup>208</sup> The Conclusion reflects the author's opinion.

power reflex – the only remaining tool is to send strong signals regarding what is tolerated and what crosses a red line in international organisations.

However normative the Council of Europe is, its responsibility is first and foremost to provide a certain degree of guidance in fields which are indispensable to establishing a common European space of human rights and the rule of law, while the lenient position the Council of Europe took on several occasions when the organisation faced another round of armed conflicts in the CoE region can be seen as a form of encouragement to the aggressor, sending the message that apart from some animated debates, a “business-as-usual” scenario continues at the end of the day. Actually, the organisation has neither the purview nor the tools to have an impact on such geopolitical developments. In the case of Bosnia and Herzegovina, its arguments against secession are likely human-rights related aspects. The citizens residing in the territory of Republika Srpska would probably lose their right to be protected by the European Convention on Human Rights. The Council of Europe argued in the same vein when the Parliamentary Assembly decided to let the Russian parliamentary delegation return to the Assembly in 2019. The human rights organisation referred to the 140 million Russian citizens who would lose the protection of the European Convention of Human Rights and the right to lodge an individual complaint with the Court of the Human Rights if the Committee of Ministers were to take the decision to exclude the Russian Federation. This argument from the PACE leadership and Western European countries was immediately criticised when announced. Bearing in mind that the Russian Federation is the one of the two member states of the Council of Europe which openly contested the supremacy of the Strasbourg Court, and that the implementation of the Court’s judgement depends on the cooperation of the Russian government, according to human rights defenders, the protection of Russian citizens does not seem a credible point. Garry Kasparov, the chairman of the Human Rights Foundation, a prominent Russian pro-democracy opposition leader, declared that “the excuse that a handful of persecuted Russians can use the CoE and the Court of Human Rights to sue Putin for a few dollars is like putting a bandage on stage four cancer.”<sup>209</sup>

The unconditional return of Russians to the Parliamentary Assembly might have had longer consequences for the credibility of the whole Organisation. “Human Rights organizations argued that PACE should not have made unilateral concessions without forcing Russia to fulfil its human rights commitments, as doing so undermines the effectiveness of

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<sup>209</sup> Europe is for sale and Putin is buying, Euromaidan Press, 28 June 2019. <http://euromaidanpress.com/2019/06/28/europe-is-for-sale-and-putin-is-buying/>



international legal protection mechanisms.” (Gigitashvili, 2019)<sup>210</sup> If trust is eroded even in the intention of the human rights organisation, because there is already clear that its abilities are rather limited, how are the member states to take seriously any principles later formulated? The complementary procedure adopted by the Committee of Ministers contains so many assurances and relies on the different forms of dialogue to such a large extent that it is very difficult to disregard the long-term political motivations behind the possible future initiative to apply the procedure against a member state. At the same time, the latest geopolitical developments, including the war in Ukraine and the clear response of the Council of Europe, have cast a new light upon earlier events in PACE, such as the previous discussions and political efforts to maintain Russia’s CoE membership. The Council of Europe was the first and is still the only international organisation which categorically reacted to the Russian aggression by first suspending and then expelling the Russian Federation from the organisation. This step certainly rectified to some extent the reputation of the Council of Europe, which was deeply undermined in the eye of the human rights defenders in 2019. To complete the picture, it should be also noted that the CoE Statute always contained this procedural possibility without unanimity, by voting two third majority, but until now the political will to take this firm decision was not there. Without seeking to analyse the possibilities in other international organisations, where unanimity is required to take decisions, this option was of course not available. The CoE decision on exclusion in many respects restored the reputation of the organisation, which suffered in 2019 when the Russian delegation returned to PACE without complying with the conditions set earlier for the full restoration of their rights in the Assembly. Foreign policy analysts also blamed earlier the international community, including the Council of Europe, for not responding to smaller armed conflicts, arguing that this looking away led to further geopolitical challenges. As highlighted in Chapter 4, the absence of any clear reaction from the international community to the Georgian–Russian war in 2008 had serious consequences in Ukraine a couple of years later, when the Russians annexed Crimea, and we can add the military incidents in Eastern Ukraine and the full scale Russian aggression against Ukraine that started on 24 February 2022.

At the same time, the earlier ambiance around the Parliamentary Assembly described above and the historic decision of the Council of Europe on Russia, or the geopolitically motivated

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<sup>210</sup>Russia’s return to PACE. Irrational compromise or defending Russian citizens from their government?  
<https://neweasterneurope.eu/2019/07/10/russias-return-to-pace/>

interventions presented in previous chapters of the present thesis, could give a clear response to the research questions elaborated in Chapter I.

In my view, the political and legal challenges to effective multilateralism definitely affect the functioning of the institutions of the Council of Europe, in two ways. The behaviour of the great powers, neglecting their commitments towards the Council of Europe when this ignorance is in their interest, or selectively implementing undertakings, could be interpreted by the Council as showing that its relevance is higher than ever before. Human rights and its defenders are in danger, and the only possible way to remedy the situation is to at least keep an eye on the member states violating the rules, since this is still better than disposing of any means of exerting some pressure. On the other hand, the fact that the Council could not prevent the continuation of Russia's *à la carte* participation erodes to a large extent the credibility of the Organisation in the eyes of small or medium-sized member states. Russia often accused the Council of applying double standards among the member states, and this charge has already been endorsed by some experts and scholars. As already mentioned above in Chapter 3, Petra Roter recalled that the question of national minorities is the best example of double standards, as the new members had to ratify the Framework Convention for the Protection of National Minorities before or immediately after their accession, while older member states could afford to simply ignore the existence of minorities or national minorities as such (Roter 2017. p. 34). In my opinion, this inconsistent attitude also influenced the selective and arbitrary approach of Russia in the Council of Europe, backed by its great power and great contributor status, which made it possible to realize this behaviour in practice.

Thus, the recent political and legal challenges undeniably affected effective multilateralism and not only decreased its perceived usefulness, but also dented its credibility. However, in the light of the well-known limits of multilateralism, I believe that these events will not endanger the functioning of the Council of Europe in the long run. So long as the leading members of the Council deem it useful to maintain this regulatory and cooperative framework it will function, and if and when the Council ceases to exist it will not be connected to this crisis but rather to the general utility of international institutions. Despite the fact that intergovernmental organisations are not able to enforce their normative rules, the growing need to handle transnational threats and global challenges where real international cooperation is required, means that the *raison d'être* of international institutions will be secure. As was highlighted in the interviews, the issue of reputation is a key aspect in the future functioning of the Council of Europe, and if its successes can be better communicated to the public, the perception of

usefulness will be strengthened. In my view, so long as there is either one non-EU member state in the Council of Europe having the aspiration to become a member of the European Union, the Council has its *raison d'être*. Even if the so-called sanctions available do not function properly or efficiently, the EU prospect could be sufficient motivation for aspirant countries to cooperate with the organisation and comply with its norms and values. As long as there is hope that at least one of the tasks below could be achieved or further continued, the Council of Europe will certainly function. Brummer described these achievements in the following order: “1) Pan-Europeanisation and the Erosion of the Organisation’s Core Principles, 2) The Establishment of the Most Advanced International Human Rights Protection System for Individuals and the System’s Overload, 3) Preparing Former Communist Countries for EU Membership and the EU’s Challenge, 4) Providing a Forum for Dialogue with Russia, 5) Contributing to an Inter-institutional European Stability Policy, 6) Deepening the Pan-European Legal Space” (Brummer, 2012, p. 404-413).

As far as the efficiency of the rule of law complementary procedure is concerned, I am sceptical that this new tool, which rather complements the previous and already extant means set out in the Statute and used in the Assembly, could ever remedy the situation and ensure the functioning of the Council of Europe according to its Statute. When compared with the rule of law mechanism of the European Union, the differences and the weak points of the complementary procedure become even clearer. In very simple terms, the European Union, when developing this new procedure, decided to link EU money to respect for the rule of law criteria. This clause, in spite of the deal approved and announced by the heads of state and government at the summit in Brussels on 10 December 2020, to refrain from the implementing the new mechanism while a member state is challenging its legality at the Court of Justice of the European Union, empowers the EU to sanction in a painful way the non-respect of its values. By contrast, the Council of Europe does not possess such an enforcing mechanism, and moreover the great contributors could blackmail the organisation any time if their interests so required, as we witnessed in the political case study in the present thesis.

I hazard to suggest that the weakness of the complementary procedure was clear from the outset to the initiators. The decision by the Session of the Committee of Ministers in Helsinki was taken only one month before, on 17 May 2019, then the Russian parliamentarians returned to the Parliamentary Assembly at the end of June. At that time the decision of the Parliamentary Assembly was something that we could safely assume. It was well prepared by the adoption of

a series of resolutions. The PACE decided to strengthen its decision-making process concerning credentials and voting, which meant in practice that PACE empowered itself by means of a derogation from its own Rules of Procedure to make the late submission of the credentials possible (PACE 2287 (2019)). Originally the credentials had to be transmitted not less than one week before the opening of the Session, regularly held in January. Furthermore, as a safeguard to avoid similar cases in the future, the Assembly also amended point 10 of its rules of procedure by highlighting that *“The members’ rights to vote, to speak and to be represented in the Assembly and its bodies shall not be suspended or withdrawn in the context of a challenge to or reconsideration of credentials.”*

Parallel to the adoption of the PACE decision to call on the Russian Federation, in accordance with its statutory obligations, to appoint a delegation to the Assembly and to resume obligatory payment of its contribution to the organisation’s budget (PACE Resolution 2277 (2019)), a recommendation was adopted during the same part-time session in April 2019.

In this document, the Parliamentary Assembly “asks the Committee of Ministers to consider its proposal to put in place [...] a joint response procedure which could be triggered by either the Parliamentary Assembly, the Committee of Ministers or the Secretary General and in which all three of them would participate; [...] this joint procedure would ensure enhanced legitimacy, credibility, impact, relevance and synergy of the measures to be taken, both regarding the member State concerned and within the Organisation, without prejudice to each organ’s existing separate powers and responsibilities; political action could also be combined, where appropriate, with technical support to the State concerned” (PACE Recommendation 2153 (2019)).

Taking into account that the initiative of the complementary joint procedure actually came from, or was at least strongly supported by, the Parliamentary Assembly, it is presumed that the idea to develop a “clearly defined complementary procedure” (CM Decision of 129th Session) was only a compensatory step, a so-called beauty spot to somehow overshadow the Assembly’s controversial decision to save its face after inviting the parliamentarians of the Russian Federation back to PACE without the expectation that they would comply with some of the criteria set before. The interlocutors during the interviews confirmed that the idea of the complementary joint procedure was a compensatory element and a piece of “window dressing”.

As regards the second research question – whether normative institutionalism prevails over the great powers’ geopolitical interests, and if so, to what extent – the responses of the interviewees

were varied, but no answer in the affirmative was received. Most interlocutors were quite sceptical as to whether political and geopolitical challenges can be tackled by normative tools, but the majority also pointed out to the necessity of such legal instruments, and one interviewee drew attention to the fact that the enforcement of regulations in certain fields is constantly evolving, so that what was impossible several decades earlier is now the reality. For instance, the case law of the European Court of Human Rights already tackles to some extent environment-related aspects. On the other hand, as majority of the partners highlighted in Chapter 5, standard-setting is of utmost importance to prevent further challenges. In the field of criminal law, for example, we all see that crimes are still committed, but that the possible deterrent impact of the penalties cannot be underestimated. “Without legislations and norms, and this is valid in the field of international law, we might face even more challenges” as the high-ranking CoE official E recalled. The answer to the second research question is certainly not obvious, as here too nothing is black and white. The response of the Council of Europe to Russian aggression sends a promising message in the sense that there is hope to rule the world by law. Obviously, normative regulation is respected by those states which are willing to play by the rules, and which have more interest in staying in the club. Current developments at a global level, including the introduction of sanctions against states which violate the rules, show that normative frameworks should ultimately prevail over the old, outdated power reflexes. My answer to the research question is twofold: Normative institutionalism and normative frameworks could only prevail in cases in which the players have an interest in maintaining the legal system, and that it lasts so long as the functioning of the normative regime are in the interests of the powers concerned. However, rules are needed, as the interviewees also highlighted, and if preventive measures are impossible then at least remedial instruments are vital. This approach implies, of course, that the real answer is that it still depends on the participants of the game, if and so long as they respect the rules. But the question has another aspect as well: regional character. The intention to establish a European legal space is connected to the Euro-Atlantic institutional system. Although the examination of other global players’ policies outside Europe is not the focus of the present thesis, even without specific research the simple fact that many countries are not state parties to the International Criminal Court at The Hague could help draw conclusions about the real intentions of those who did not join this intergovernmental organisation. As the Director of the Private Office also noted, three members out of five of the UN Security Council are not the party to the Criminal Court (Rome Statute, State Parties). However, the secretary general of PACE referred to additional examples in which

an international treaty brought a viable solution. She cited the Treaty of Lausanne<sup>211</sup> between Greece and Turkey and the Dayton Peace Agreement<sup>212</sup>, which ended the Bosnian war in 1995. However, we saw that actually all these treaties and agreements are binding upon the parties only so long as they recognize them, since Russia as a guarantor of the territorial integrity of Ukraine in the Budapest Memorandum<sup>213</sup>, and was the first to breach this agreement. So the conclusion in respect of the second research question is that as states are subject to the treaties, they decide how long they will choose to accept their provisions. As a recent example, the Russian Federation informed the secretary general of the Council of Europe on 15 March 2022 that they denounced the European Convention of Human Rights. The Director of Amnesty International expressed serious concerns over this step: “Russia’s pre-emptive decision to leave Europe’s principal guardian of human rights and the rule of law, and to denounce the European Convention on Human Rights, is a tragedy for the victims of the Kremlin’s human rights abuses” (Struthers, 2022). To conclude the answer to the research question, I believe that geopolitical conflicts cannot be prevented by normative tools, but that as a remedy, a legal framework is able to settle conflicts afterwards, and in cases where parties have mutual interests it can bring durable solutions so long as the circumstances which were valid at the time of the adoption of the treaty or agreement are not changed.

Related to the hypothesis formulated in Chapter 1 of the thesis, I relied to a large extent on my findings and on the opinions of the interviewees. After analysing the CoE documents and the discussions in the Committee of Ministers before the accession of the Russian Federation, and assessing the process of gradually appearing and deepening political and legal challenges, I conclude that my initial hypothesis – that the Eastern Enlargement, with the accession of the Russian Federation as a great power, largely contributed to the political and legal challenges of the Council of Europe – is justified. As the implications of the substantial Eastern Enlargement were predicted in detail as early as 1994, the Council determined its own path towards these inevitable structural and political challenges. Bearing in mind the circumstances around the accession of the Russian Federation, whereby the Council of Europe invited the country to join when it was between its two military interventions in Chechnya, had already violated the most fundamental accession criteria, and was also a belligerent power in many other armed conflicts

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<sup>211</sup> Treaty of Lausanne (1923). Société des Nations, Recueil des Traités et des Engagements Internationaux enregistrés par le Secrétariat de la Société des Nations

<sup>212</sup> General Framework Agreement for Peace in Bosnia and Herzegovina (1995)

<sup>213</sup> See the reference in Chapter 3 on p. 123 of the present thesis.

(Abkhazia, South-Ossetia in 2008 or Crimea and Eastern part of Ukraine in 2014 and since then), the question of what the Council of Europe was expecting of Russia is inescapable. Sooner or later the Council of Europe organs had to react to the permanent violation of fundamental values, but the problem was that the member states did not agree on a general and common approach towards Russia, which was dictated by the leading and pragmatic powers of the Council.

As the majority of the interlocutors confirmed, the relation between the Eastern Enlargement and the later political and legal challenges is clear. However, the problem is complex, since it was not only a matter of incorporating states with utterly different histories, cultures, languages and democratic cultures from the post-Soviet area, but also simply the sudden increase in the number of new members in a quite short period. The interlocutors also admitted that apart from Russia, it was not the Central and Eastern European countries that challenge the norms and standards of the Council of Europe, but Turkey, which is nearly a founding member. As the Secretary to the Committee of Ministers recalled during the interview, the principal issue for the organisation was that the growing geographical extent was inevitably accompanied by a lowering of standard with regard to human rights and the rule of law. The EU has gradually extended its activity to some traditional areas of competence of the CoE, and exceeds in many cases the level of its norms. The political and legal challenges are not only the result of the Eastward Enlargement, but other worrying trends have also gradually appeared. The CoE director of Human Rights pointed to the societal developments in Europe as a whole, including the Western part, as in his view the alarming phenomenon is that the values of respect for others, tolerance, and non-discrimination, which were unquestionable after World War II, are being openly challenged, and those who support these norms are considered naïve or, which is more dangerous, they are regarded as disloyal citizens who do not respect the national interest.

The issue of the efficiency of institutional tools and means are closely related to both research questions. Although the monitoring mechanism will certainly be strengthened, as the director of the Private Office mentioned, seismic shifts should not be expected. The elaboration and adoption of the complementary joint procedure as a possible solution to the Copenhagen dilemma in the Council of Europe could be seen as an argument that the organisation is very keen to find effective solutions. However, with full knowledge of the background and reasons behind the new mechanism, I personally have reservations about the future success of the procedure. As we witnessed in the Russian case, when an immediate political response is needed, there is no time to launch a lengthy and complicated mechanism. In any case, the new

joint mechanism may not entirely meet expectations, but the success of the procedure will largely depend on which member state will be the first towards which the secretary general, the Committee of Ministers and the Parliamentary Assembly unanimously recommend the application of the procedure.

As a general conclusion, I believe that the main tenets of the theory of neorealism are still valid when researching the prospects and future effectiveness of multilateralism, and more particularly the future functioning of the Council of Europe. The neorealist answers are definitely adequate to respond to the confrontation between power politics and normative institutionalism in the organisation. But I am also confident that these challenges do not endanger the organisation; on the contrary, the legal challenges and all responses to them could justify the need for such an organisation. However, states, especially the major players, continue to act according to their primary interests, as was also confirmed in the literature: “the lack of ‘world government’ means that states continue to act in ways which preserve their own interests as this is the only way to ensure their preservation.” (Jepson, 2012. p. 2.). On the other hand, in my view the different institutional approaches have the same level of legitimacy when analysing the medium and longer term operation of the Council of Europe. As one high-ranking official mentioned during the interview, history proves that the direction of development is from the small structures of the society (families, clans, tribes), then city states of the ancient times to the greater state structures and empires and he made a parallel with the current situation, where international organisations, especially the European Union represents the ‘empire’. According to his view, this means the advancement contrary to the national sovereignty approach, which brakes on this development. However, this opinion did not take into account the eternal lesson of history that the bigger an empire is, the faster it can collapse. And yet I do conclude that utility of the international organisations cannot be ignored. Beyond classical, geopolitical challenges the modern world face transnational, global threats to which only common approaches and unified governments efforts will be able to respond. Institutionalism is and will always be challenged by power politics, but the majority of the states are not great powers and the medium and small sized states will always have more interest to join a club and respect the rules to have more policy making influence in return. Therefore, I am convinced that the international organisations have and will maintain their proper place in the globalized world and a kind of cyclicity will be observed between realist and institutionalist approaches, when resonating the world politics. The recent developments in the Council of Europe, the increasing political and legal challenges and the war in Ukraine justify the tenets of neorealism. On the



other hand, the decision of the Council of Europe on excluding one of its member states underlines the relevance of the normative institutionalist approach. Until sovereign states are the main actors of international relations, the national interests and realist approaches will play a crucial role. However, the more and more interconnected and interdependent world also needs a kind of global governance, so international organisations and supranational institutions, which are adapted to the prevailing circumstances, are certainly justified.

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3. Interview prepared with the Secretary to the CM, CoE, Mr. Zoltán Taubner, on 7 December 2021 in Strasbourg
4. Interview prepared with the former Permanent Representative of Hungary to the CoE (2011-2016), Mr. Ambassador Ferenc Robák, on 7 February 2022 in Budapest
5. Interview prepared with the Ministerial commissioner of the Ministry of Foreign Affairs and Trade, former member of the Hungarian PACE delegation between 2010-2014, Mr. Ambassador Ferenc Kalmár, on 28 February 2022 in Budapest
6. Interview prepared with the Chairman of the Parliamentary Committee on Foreign Affairs of the Hungarian National Assembly, Head of the Hungarian PACE delegation, Mr. Zsolt Németh on 28 February 2022 in Budapest
7. Interview prepared with a high-ranking Hungarian official, on 8 March 2022 in Budapest
8. Interview prepared with a high-ranking CoE official A, on 15 March 2022 in Rome

9. Interview prepared with the CoE Director of Communication, Mr. Daniel Hölting, on 6 April 2022 in Strasbourg
10. Interview prepared with a high-ranking CoE official B, on 6 April 2022 in Strasbourg.
11. Interview prepared with a high-ranking CoE official C, on 6 April 2022 in Strasbourg
12. Interview prepared with a high-ranking CoE official D, on 7 April 2022 in Strasbourg
13. Interview prepared with the former Permanent Representative of Hungary to the CoE (2007-2011), Ms. Ambassador Judit József, on 7 April 2022 in Paris
14. Interview prepared with a high-ranking CoE official E, on 8 April 2022 in Strasbourg
15. Interview prepared with the Member of the Serbian PACE delegation, Ms. Elvira Kovács, on 27 April 2022, online
16. Interview prepared with a high-ranking CoE official F, on 28 April 2022, online
17. Interview prepared with the agent of Hungary before the European Court of Human Rights, Mr. Zoltán Tallódi on 11 May 2022 in Budapest
18. Interview prepared with the Secretary General of the PACE, Ms. Despina Chatzivassiliou-Tsovilis, on 24 May 2022, online

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APPENDIX I

COMPLETED INTERSTATE APPLICATIONS			
CASE	DECISION	JUDGEMENT	RESOLUTION OF THE COMMITTEE OF MINISTERS
<b>Latvia v. Denmark (no. 9717/20)</b>  Date lodged: 19.02.2020	<u>16.06.2020</u>  (struck off the list)	-	-
<b>Slovenia v. Croatia (no. 54155/16)</b>  Date lodged: 15.09.2016	<u>18.11.2020</u>		
<b>Georgia v. Russian Federation (III) (no. 61186/09)</b>  Date lodged: 03.12.2009  <b>Georgia v. Russian Federation (I) (no. 13255/07)</b>  Dates lodged: 26.03.2007	<u>16.03.2010</u>  (struck off the list)    <u>30.06.2009</u>	-   <u>03.07.2014</u>  <u>31.01.2019</u> (just satisfaction)	-     -
<b>Denmark v. Turkey (no. 34382/97)</b>  Date lodged: 07.01.1997	<u>08.06.1999</u>	<u>05.04.2000</u>	<u>09.12.2004</u>
<b>Cyprus v. Turkey (IV) (no. 25781/94)</b>  Date lodged: 22.11.1994	<u>28.06.1996</u>	<u>10.05.2001</u> <u>12.05.2014</u>  (just satisfaction)	<u>11.07.1997</u>  <u>07.06.2005</u>  <u>04.04.2007</u>
<b>Denmark, France, Norway, Sweden &amp; the Netherlands v. Turkey (nos. 9940/82 to 9944/82)</b>  Date lodged: 01.07.1982	<u>06.12.1983</u>	-	-
<b>Cyprus v. Turkey (III) (no. 8007/77)</b>  Date lodged: 06.09.1977	<u>10.07.1978</u>	-	-

<b>Cyprus v. Turkey (I) and (II) (nos. 6780/74 and 6950/75)</b>  Dates lodged: 10.09.1974 (I) and 21.03.1975 (II)	<u>26.05.1975</u>	-	<u>20.01.1979</u>
<b>Ireland v. United Kingdom (II) (no. 5451/72)</b>  Date lodged: 06.03.1972	<u>01.10.1972</u> (struck off the list)	-	
<b>Ireland v. United Kingdom (I) (no. 5310/71)</b>  Date lodged: 16.12.1971	<u>01.10.1972</u>	<u>18.01.1978</u> Revision: <u>20.03.2018</u>	<u>27.06.1978</u>
<b>Denmark, Norway, Sweden &amp; the Netherlands v. Greece (II) (no. 4448/70)</b>  Date lodged: 10.04.1970	<u>26.05.1970</u>  <u>16.07.1970</u>	.	.
<b>Denmark, Norway, Sweden &amp; the Netherlands v. Greece (I) (nos. 3321/67 to 3323/67 and 3344/67)</b>  Dates lodged: 27.09.1967 and 25.03.1968	<u>24.01.1968</u>  <u>31.05.1968</u>	-	<u>15.04.1970</u> <u>26.11.1974</u>
<b>Austria v. Italy (no. 788/60)</b>  Date lodged: 11.07.1960	<u>11.01.1961</u>	-	<u>23.10.1963</u>
<b>Greece v. United Kingdom (II) (no. 299/57)</b>  Date lodged: 17.07.1957	<u>12.10.1957</u>	-	<u>14.12.1959</u> <u>05.04.2006</u>
<b>Greece v. United Kingdom (I) (no. 176/56)</b>  Date lodged: 07.05.1956	<u>02.06.1956</u>	-	<u>20.04.1959</u> <u>17.09.1997</u>

Table 1: Chart completed interstate applications by the Author

Source: Website of the European Court of Human Rights

<https://www.echr.coe.int/Pages/home.aspx?p=caselaw/interstate&c=>

## APPENDIX II

PENDING INTERSTATE APPLICATIONS			
CASE	DATE LODGED	DECISIONS	JUDGEMENT
<b>Georgia v. Russian Federation (II) (no. 38263/08)</b> Just satisfaction  Relinquishment of jurisdiction to the Grand Chamber  <u>Chamber hearing</u> (22.09.2011)  <u>Grand Chamber hearing</u> (23.05.2018)	12.08.2008	<u>13.12.2011</u>	<u>Grand Chamber Judgment</u>  (21.01.2021)
<b>Ukraine v. Russian Federation (re Crimea) (no. 20958/14)</b>  Relinquishment of jurisdiction to the Grand Chamber <u>Grand Chamber hearing</u> (11/09/2019)  <b>and Ukraine v. Russian Federation (VII) (no. 38334/18)</b>	13.03.2014  11.08.2018	<u>14.01.2021</u>  (partially admissible)  <u>14.01.2021</u>	-
<b>Ukraine and the Netherlands v. Russian Federation (nos. 8019/16, 43800/14 and 28525/20)</b>  <u>Grand Chamber hearing</u> (26/01/2022)	13.03.2014		.
<b>Georgia v. Russian Federation (IV) (no. 39611/18)</b>	22.08.2018		
<b>Ukraine v. Russian Federation (VIII) (no. 55855/18)</b>	29.11.2018  <a href="http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-3213">http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-3213</a>		
<b>Liechtenstein v. the Czech Republic (no. 35738/20)</b>	19.08.2020		
<b>Armenia v. Azerbaijan (no. 42521/20)</b>	27.09.2020		
<b>Armenia v. Turkey (no. 43517/20)</b>	04.10.2020		

<b>Azerbaijan v. Armenia (no. 47319/20)</b>	27.10.2020		
<b>Ukraine v. Russian Federation (IX) (no. 10691/21)</b>	19.02.2021		
<b>Russia v. Ukraine (no. 36958/21)</b>	22.07.2021		
<b>Armenia v. Azerbaijan (II) (no. 33412/21)</b>	29.06.2021		
<b>Armenia v. Azerbaijan (III) (no. 42445/21)</b>	24.08.2021		
<b>Ukraine v. Russia (X) (no. 11055/22)</b>	28.02.2022		
<b>Armenia v. Azerbaijan (IV) (no. 15389/22)</b>	24.03.2022		

Table 2: Chart of pending interstate applications by the Author

Source: Website of the European Court of Human Rights

<https://www.echr.coe.int/Pages/home.aspx?p=caselaw/interstate&c>