

Summary

Background to the present study

This study was written in the context of a larger research project that seeks to identify ways to maintain and improve mutual trust amongst EU Member States, notably in the area of police cooperation and judicial cooperation in criminal matters.

The overall idea underlying this project is that co-operation between Member States in this area is sustainable only if they may assume that all other Member States comply with common standards as regards human rights and the rule of law. Serious shortcomings in one Member State may cause immediate problems in other Member States. The case of *S.D. v. Greece* may serve as an example. After the European Court of Human Rights had found that Greek detention facilities for irregular migrants were “degrading” and hence incompatible with Article 3 ECHR, the Court immediately received dozens of complaints *addressed against the Netherlands*. The applicants were third-country nationals who found themselves in the Netherlands after they had entered the EU via Greece. They were about to be sent back by Dutch authorities to Greece, pursuant to the so-called ‘Dublin II system’. Relying on *S.D.*, the applicants claimed that the Netherlands was under an obligation not expose them to a situation incompatible with Article 3 ECHR.

Since the EU at present does not have the means to review Member State compliance with the rule of law and human rights, and considering that it would be desirable to have such means, a number of questions were raised as a starting point for the present research project. How to design a mechanism that will be best in securing compliance, by all EU Member States, with common standards in the field of the rule of law and human rights? Which lessons can be learned from existing mechanisms – what are strong points, what are weak points? Is there a relationship between the way in which monitoring is organised and the level of compliance? Are there any attempts to remedy perceived shortcomings? Against that background two reports were written: one report focuses on monitoring mechanisms in the first and third pillars of the EU, whereas the Council of Europe (CoE) is the subject of the present report.

There are several reasons to look at ‘Strasbourg’ in this connection. The Council of Europe has developed extensive experience in the field of monitoring, and the Memorandum of Understanding between the CoE and the EU confirms that the two organisations shall co-operate and make use of existing structures and expertise where possible. It is therefore important to see what the Council of Europe has to offer: it may enable us to identify ‘what works’, which mechanisms are effective, and which factors contribute to effectiveness, or diminish it. In addition the findings of Strasbourg mechanisms (CPT reports, GRECO recommendations and so on) will play an important role in EU monitoring.

But one could go further and argue that the EU should only create new mechanisms if it is clear that the existing CoE mechanisms cannot do the job *and* cannot be improved so as to do the job. Indeed, this is all the more imperative given the ‘monitoring fatigue’ that many observers have noted: this is a political argument to exercise restraint when contemplating the introduction of new reporting requirements.

Six CoE bodies have been examined for the purposes of this study: the Parliamentary

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

A significant methodological problem is that one cannot make any firm statements about the effectiveness of these bodies. Experiences will differ from one state to another. Moreover it is often very difficult to establish a causal link between the criticism of a supervisory committee, and subsequent changes in the law and practice of the country concerned. There is a clear danger of *post hoc, ergo propter hoc* arguments. It may well occur, for instance, that a high security prison is the subject of criticism by the CPT, the ECtHR and the CHR – with different arguments and varying degrees of intensity. Who may claim the credit if subsequently the prison regime is loosened? It is likewise quite difficult to determine with certainty if specific features of a supervisory body add to its effectiveness, or rather weaken it. To what extent is the Court's authority affected by the possibility for judges to write dissenting opinions?

Against that background it was decided to avoid statements about the capability of individual bodies to bring about changes in the domestic laws and policies of the Member States and increase the degree of compliance with their international obligations. Instead, this study has concentrated on factors that appear to be relevant for the impact of the various monitoring bodies: their mandate, their membership, the quality of the information that they possess, the standards that they use and their power to refine and development standards, the way in which their review process is organised, and the outcome of their activities.

In addition to a survey of existing literature, a series of face-to-face interviews with 'insiders' working in Strasbourg was held in order to identify strong points and weak points as they are perceived in actual practice. I spoke to nine CoE officials as well as two diplomats based in Strasbourg. Use was also made of a study written in 2009 by an intern at the Permanent Representation of the Netherlands in Strasbourg.

Outcome of the research

Considerable differences exist between the various monitoring bodies set up by the Council of Europe. Some differences have a historical background, others have been inserted on purpose, taking into account the subject-matter of the monitoring exercise. But one thing is clear: there is no single blueprint. The main findings are as follows.

• *mandate*

With the CoE, monitoring is perceived as an essentially *legal* process. Both the ECtHR and the CPT are based on a treaty and apply legal standards. GRECO and the Commissioner for Human Rights (CHR) do not operate on the basis of a binding convention, but the standards that they supervise are legally binding standards. This implies that the process of monitoring is in essence a legal matter as well. It is not subject to prioritisation or *quid pro quo*. It may be helpful to its impact if the legal work is amplified at one stage in the political arena (notably the Committee of Ministers (CM) or the Parliamentary Assembly (PACE)), but this should not dilute the outcome of the legal

assessments made. Concern has been voiced within the CoE that new monitoring mechanisms within the EU, by contrast, might be primarily political in nature. If that were the case, these EU mechanisms might jeopardise the work of the CoE – so the argument goes – even if the applicable standards are the same.

Another interesting point is to what extent countries are treated differently. Does the monitoring focus on specific countries that experience particular problems, or are *all* countries treated equally? Remarkably the CPT, GRECO and the CHR address all countries, but they have devised various ways to pay extra attention to those countries that are found to be in default of their obligations. It is also noteworthy that PACE started its monitoring activities with an exclusive focus on the new CoE Member States, then expanded so as to include *all* Member States, and then developed specific instruments for ‘problematic’ countries.

- ***membership***

The common feeling within the Council of Europe is that independent experts are essential. Several observers note that individuals may make or break any procedure. Experts bring (or are supposed to bring) expertise, impartiality and credibility. The ECtHR and CPT are composed of, and GRECO relies to a large extent on, independent experts, who derive their authority from their own qualifications and from the fact that they were nominated by their own countries and elected by PACE or the Committee of Ministers. At a different level the same phenomenon occurs at the secretariats of the monitoring bodies: often they operate in the shadow, but they can be extremely influential in supporting, and steering, their ‘bosses’.

At the same time politicians and government representatives can play a useful role as well. GRECO has developed an interesting formula which is worth close study: the experts provide the factual analysis and propose recommendations; the government representatives discuss and decide, thereby securing political support for the final outcome. The system seems to work well in practice

- ***quality of input***

Accurate information is of key importance to any monitoring exercise. In this respect CEPEJ faces two problems. A clear weakness of CEPEJ is its dependence on self-reporting by national correspondents. There are no means to consult other sources and to verify the information. In addition, as soon as one goes into the details, it becomes apparent that different countries have different definitions and methodologies. This makes it difficult to compare data. On-site visits play a key role for CPT, CHR and GRECO, both in order to collect information and to liaise with the relevant players (legislator, parliament, the judiciary, *civil society*) and to involve them in the monitoring exercise.

- ***review process***

Again there are huge differences between the monitoring bodies when it comes to the processing of information. The CPT collects its own information, discusses the situation internally and formulates its opinions in a report. In this respect the CPT resembles the ECtHR to some extent, but a difference is that the CPT then purposefully engages in a dialogue with the national authorities on how to implement these recommendations. In GRECO, by contrast, the State concerned is involved in the formulation of the

recommendations themselves, but it is subject to considerable *peer pressure*. The same peer pressure could also occur in the Committee of Ministers which supervises, *inter alia*, the execution of Court judgments. Indeed, a whole machinery has developed in recent years to strengthen this task. In each case where a violation was found, the respondent State must indicate how it has ‘absorbed’ the judgment (that is both at the individual level and in terms of adapting law and practice where necessary so as to prevent similar violations in the future).

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

- ***standard-setting through monitoring***

Both the European Court of Human Rights and the CPT refine their standards continuously through their work. There should be sufficient scope for this ‘judicial’ standard-setting, especially in areas where the standards under review are loosely drafted and open to various interpretations.

- ***outcome***

All observers agree that publicity is of key importance. At one stage the CM operated a strictly confidential monitoring procedure, but this gradually withered away without yielding any tangible results. But again, there are differences. The Commissioner is very active in seeking publicity; the ECtHR puts its judgments on the internet, and CPT reports are only made public after the respondent State has authorised publication.

It is striking to observe that most monitoring bodies hardly ever react to current developments. If a human rights violation occurs, it will typically take five to six years – after exhaustion of domestic remedies! – before the European Court of Human Rights rules on the case. CEPEJ published a highly detailed report in October 2008 – but the data related to 2006. The CPT for its part visits countries in principle only once every four years; its reports usually become public between one and two years after the visit took place. If one wants to know more about the current state of affairs in, say, Polish prisons, one will have to base oneself, as far as CPT is concerned, on a report from 2006, relating to a visit that took place in 2004. Of course the CPT and its staff are well-informed, but the point is that the CPT does not provide policy-makers – or NGOs, or the general public – with its analysis of events occurring here and now. Admittedly the CPT may raise issues in a confidential dialogue with the domestic authorities, but one thing is sure: the element of publicity, and therefore an opportunity to mobilize shame, is absent.

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

monitoring bodies, which is still a far cry from an overall and integrated analysis.

Quite a different remark relates to assistance. It is unfortunate that so much attention tends to go to the possibility to impose sanctions. It is perhaps more constructive to assist countries that experience problems. It could also be argued that countries may be more keen to discuss their problems, if they know that they will be helped solving them, rather than just criticized. Seen in this perspective, the establishment of the Human Rights Trust Fund in 2008, and the substantial contribution of the Dutch government, are important steps.

Recommendations concerning an EU monitoring mechanism

What lessons can we draw for the EU? As was stated above, the EU should only create new mechanisms if it is clear that existing CoE mechanisms cannot do the job *and* cannot be improved so as to do the job. Put differently: a clear and convincing case must be brought if the introduction of a new monitoring mechanism in the context of the EU is contemplated – the added value of such a step should be clear. Leaving the possibility aside that the EU can agree on higher standards, this added value might reside in the creation of an EU mechanism

- (1) that is able to respond quickly to current developments, and which therefore retains sufficient flexibility, even if its activities are based on a multi-annual framework;
- (2) that is sufficiently flexible to address issues which are directly relevant to the purpose of the monitoring exercise, but which happen to fall outside the ambit of the current evaluation round;
- (3) that features sufficient independent expertise to allow for an accurate assessment of the facts and a review of compliance with legal standards, but that also involves, where useful and appropriate, governmental representatives when politically charged questions arise, especially when it concerns supervision of compliance with judgments and recommendations;
- (4) that has up-to-date information at its disposal and the possibility to verify this information, and which gives due weight to the relevant CoE materials;
- (5) that operates in a transparent way and does not shy away from publicity, but at the same time acknowledges that assistance is part and parcel of monitoring.