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The institutional balance at the Council of Europe

Report
Committee on Rules of Procedures and Immunities
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Summary

The term ”institutional balance” means generally the distribution of powers within a supranational or international organisation and the relationship between its organs. The Council of Europe (COE) has two statutory political organs of general competence, the Committee of Ministers (CM) and the Parliamentary Assembly. Since the signature of the COE’s Statute, the Congress of Local and Regional Authorities of the COE and the European Court of Human Rights were created in the COE without a formal amendment of the Statute. Furthermore, a Conference of International Non-Governmental Organisations (INGOs) of the COE was established. All these organs and institutions have carried out major reforms, taken important initiatives to enhance their status or obtained new powers.

However, all this is not or not adequately reflected in the Statute of the COE and the statutory Resolutions adopted by the CM. Furthermore, certain features of the relationship between the CM and the other main COE bodies are no longer adequate and do not correspond to the necessary democratisation of international organisations or current international standards. Therefore major institutional reforms are needed at the COE.

The report submits a series of proposals to reinforce the Assembly, the Court, the Congress, the Conference of INGOs and the CM itself with a view to achieving a more appropriate institutional balance. The main idea is to negotiate an agreement between the CM and the Assembly on improving the COE’s institutional system and to associate the Court and the Congress with these negotiations.

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A. Draft recommendation

1. The Statute of the Council of Europe (COE), signed on 5 May 1949, created two political statutory organs of general competence, the Committee of Ministers (CM) and the Parliamentary Assembly. They are served by the Secretariat (General) of the COE. According to Article 1 of the Statute, it is through the CM and the Assembly that the aims of the Organisation are pursued. Both organs have a shared responsibility to the Organisation. Their interaction is essential for an efficient fulfilment of the Council of Europe's mission.

2. Since the creation of the COE, the following institutions were created in the COE, without a formal amendment of its Statute :

2.1. the Congress of Local and Regional Authorities of the Council of Europe, which represents these authorities in the Organisation. The Congress ensures their participation in the implementation of the ideal of European unity as defined in Article 1 of the Statute of the COE as well as their representation and active involvement in the COE's work. The Committee of Ministers and the Parliamentary Assembly consult the Congress on issues which are likely to affect the responsibilities and interests of the local and/or regional authorities which the Congress represents. The Congress which, under the form of the Conference of Local and Regional Authorities of Europe, has met since January 1957, has been set up by a statutory resolution of the Committee of Ministers;

2.2. the European Court of Human Rights, which was instituted by the Convention on Human Rights of the Council of Europe (ECHR) of 1950, has been operational since 1959. The Court has a close institutional and legal relationship with and value-oriented link to the Council of Europe. Furthermore, the first condition for membership of the COE, introduced by the Parliamentary Assembly, is signature and ratification of the ECHR and its additional protocols. The Court therefore forms an essential part of the COE's legal system. However, the ECHR is not very explicit regarding the status of the European Court of Human Rights in general and the status of its judges in particular.

3. The report of the Committee of Wise Persons of the Council of Europe of 1998 rightly concluded that "the Council of Europe today has a three-pillar structure reflecting the governmental, parliamentary and judicial branches which should be recognised as such and further developed". The Wise Persons also noted that in its sphere of competence the Congress had become an important contributor to democratic development at local and regional level. Since the adoption of that report the Committee of Ministers, after having consulted the Assembly, instituted by Resolution (99) 50 the office of the COE Commissioner for Human Rights who exercises his functions independently and impartially.

4. The Conference of International Non-Governmental Organisations (INGOs) of the COE was established in January 2005 by the 400 INGOs enjoying participatory status with the COE. It builds on the longstanding experience of consultation and co-operation between the COE and INGOs as the organised part of civil society which started in 1952 with the creation of a consultative status.

5. More recently, Assembly Recommendation 1693 (2005) on the Third Summit of the Council of Europe underlined the need to reorganise the institutional system of the Council of Europe and to strengthen all its main bodies. In its Recommendation 1756 (2006) on the implementation of the decisions of the third Summit of the COE, the Assembly called on the Secretary General and the CM to continue efforts aimed at the strengthening of the COE's institutional system. Furthermore, it insisted that a set of measures is taken by the CM to reinforce the Parliamentary Assembly, in particular in the standard-setting and budgetary fields and to provide it with the right of legislative initiative.

6. On 11 April 2006, the Prime Minister of Luxembourg, Mr Juncker, presented to the Parliamentary Assembly his report entitled " Council of Europe – European Union: A sole ambition for the European continent". This report offers an overall political vision for the COE and its relations with the EU. In the view of Mr Juncker, to achieve the necessary complementarity between the two institutions, *inter alia*, the Council of Europe's Commissioner for Human Rights, parliamentary bodies and the Congress should be given a bigger role. This would have consequences for the institutional system of the COE.

7. The principle of the institutional balance, at the level of an international organisation, expresses the distribution of powers and tasks between the organs and bodies of this organisation and their relations.

8. Since 1945, the borderline between what used to be regarded as "domestic" affairs on the one hand and "foreign" affairs on the other, has been increasingly blurred, especially in Europe, as a result of European integration. The nature of "international" law has profoundly changed and it deals more and more with issues that used to be governed by national law. Many international treaties, such as COE conventions, concern areas that used to be regarded as belonging to the domestic affairs of States. A logical result of this trend has been a growing demand for democratising the conduct of international and European politics and law-making and for strengthening the democratic control of European institutions. The Assembly considers that this should also apply *mutatis mutandis* to the Council of Europe.

9. Under the 1949 Statute, most of the decision-making power in the Council of Europe is concentrated in the hands of the Committee of Ministers (e.g. adoption of legal instruments (Article 15 of the Statute), action on behalf of the COE by the sole CM (Article 13)). With a few exceptions (e.g. necessary assent of the Assembly to modify one third of the provisions of the COE's Statute, elective functions, adoption by the Assembly of its Rules of Procedure) the Assembly was conceived in 1949 mainly as a consultative organ.

10. Although there have been institutional improvements since 1949, they were not sufficient and did not substantively change the institutional system of the COE. They have kept pace neither with the fundamentally different political realities of the Organisation and its environment nor with the development of European integration, particularly within the EC/EU.

11. If one wants to prevent the COE from institutional backwardness and from turning, to a certain extent, into a "fossil", far-reaching institutional reforms will be required. The institutional balance in the COE should be improved, in particular by agreement between the Committee of Ministers and the Assembly and, where appropriate, by an updating of the COE's Statute through statutory resolutions.

I. Concerning the Parliamentary Assembly

12. Over the years the Assembly's position in the Council of Europe has considerably changed. It is generally acknowledged that the Assembly's active political role is a comparative advantage of the Council of Europe. The Assembly has played an important role in the enlargement process of the COE, which is now almost completed, by defining the frontiers of Europe, updating the political conditions for membership and negotiating to a large extent the conditions for membership. Through its debates, its action in the field, the observation of elections, its programs of parliamentary co-operation, the Assembly makes a major contribution to stabilizing and deepening democracy in the member states.

13. The introduction by the Assembly, as the first COE body, of a monitoring procedure - with a strong political dimension - for the obligations of and commitments made by European States on their accession to the Council of Europe has been of particular importance for the Organisation.

14. Through the improvement of its verification procedures for the credentials of national parliamentary delegations, the Assembly exerts a considerable political influence.

15. The Assembly elects the key political figures of the COE, the judges at the European Court of Human Rights and the COE Commissioner for Human Rights. In addition, it makes a valuable contribution to the work of the Organisation, particularly in the legal and human rights fields, and has initiated the main COE legal instruments. It thus gives democratic legitimacy to the Organisation. Furthermore, the Assembly, because of the dual, national and European mandate of its members is a natural partner of the CM for national follow-up action on COE decisions.

16. The political and media reaction to some of its reports shows the relevance and impact of the Assembly's work on the profile of the COE as a whole.

17. The Assembly considers and has stated repeatedly that its powers are by no means in line with its factual weight and potential as a driving force of the COE. It is necessary to strengthen the parliamentary dimension of the COE and to increase its participation in the decision-making process of the Organisation. This would achieve more transparency, democratic legitimacy and accountability in the Council of Europe.

18. Consequently, the Assembly invites the Committee of Ministers :

18.1. to reach an agreement with it on

18.1.1. strengthening the Assembly's involvement concerning the elaboration, adoption and implementation of the Conventions and other legal instruments of the Organisation;

18.1.2. improving interaction with the Assembly in the decision-making process of the Organisation, including:

18.1.2.1. the adoption of major political declarations or resolutions on the Council of Europe in general or on its main mechanisms;

18.1.2.2. the elaboration of co-operation agreements with other European institutions and international organisations;

18.1.3. strengthening the Assembly's role concerning:

18.1.3.1. the adoption of the budget of the COE and of its own budgetary appropriations;

18.1.3.2. supervisory functions over Council of Europe action, including the elaboration of the priorities for the COE's intergovernmental activities and their implementation; the Assembly should in particular receive the reports of the Internal Auditor and the External Auditor;

18.2. in the light of such an agreement, to up-date and complete a series of resolutions and decisions of the Committee of Ministers concerning the role and powers of the Assembly on the basis of the list included in the Appendix to the present recommendation.

19. Furthermore, the Assembly calls on the Committee of Ministers to:

19.1. consider with it if and how the Assembly should be able to bring before the European Court of Human Rights serious violations by one of the Contracting Parties of the rights guaranteed by the European Convention on Human Rights (ECHR) and its Additional Protocols;

19.2. codify by a statutory resolution its decision of February 1994 concerning the utilisation of the name of the Assembly;

19.3 consult the Assembly, also with respect to its involvement, before adopting or amending texts setting up new COE bodies and institutions;

19.4 give the Assembly more advance information on policy matters, programming of activities and budgetary issues;

19.5 ensure an efficient follow-up to the Assembly's statutory opinions and to inform it on a regular basis on action taken on these opinions.

II. Concerning the Committee of Ministers

20. The Assembly welcomes the action taken so far by the Committee of Ministers to implement Chapter V of the Warsaw Summit Action Plan: a transparent and more efficient Council of Europe. Furthermore, it welcomes:

20.1. the document which summarises the Council of Europe reform efforts 1999-2005;

20.2. the efforts of the CM to involve increasingly Assembly representatives in the work of its rapporteur groups and other subsidiary bodies.

21. The Assembly invites in particular the Committee of Ministers to:

21.1. make a greater use of the COE as a pan European political platform for dialogue between EU and non-EU member States and to ensure that the COE's expertise is taken into account in the EU's European Neighbourhood Policy;

21.2. give more political responsibility to its Chairperson, also in crisis situations;

21.3. increase the role of the COE as a think-tank to meet the challenges of the 21st century and, in particular, concerning the promotion of democracy; in this connection, the Assembly recalls its proposal in Recommendation 1756 (2006) that the Forum for the Future of Democracy should be made a real tool for promoting the values of the COE with full involvement of the Assembly;

21.4. increase the transparency of the COE both internally and externally and to give information to the Assembly on member States which are blocking

21.4.1. the adoption of draft COE legal instruments;

21.4.2. decisions on replies to Assembly or Congress recommendations, when more than six months have lapsed after their adoption by the Assembly or the Congress;

21.5. examine the possibility of other national Ministries than those of Foreign Affairs contributing to the COE's budget;

21.6. enhance the role of the Conferences of Specialised Ministers;

21.7. take action on Prime Minister Juncker's proposal that Foreign Ministers, and particularly those of EU States, should involve themselves more in the Council of Europe's work;

21.8. examine with the Assembly possibilities to enhance the role of the Joint Committee to make it a more effective instrument of dialogue between the two statutory organs, notably by setting up mixed working parties on major issues.

III. Concerning the European Court of Human Rights (the Court)

22. The Court has witnessed a most spectacular evolution. The success of individual applications has lead to a continuous increase in the Court's case-load. It is now the largest and busiest international Court and its case-law has reached the roots of the national legal systems. An increasing number of the Court's judgments raise questions which attract great legal, political and media interest in the States concerned. Due to the enlargement of the Council of Europe and the obligation of new member States to ratify the ECHR, the European human rights area and the jurisdiction of the Court were continuously extended, for the greatest benefit of human security and democratic stability on the continent.

23. The Committee of Ministers has repeatedly declared that the ECHR must remain the essential reference point for the protection of human rights of 800 million Europeans. The Third Council of Europe Summit in Warsaw (May 2005) set up a Group of Wise Persons to draw up a comprehensive strategy to secure the effectiveness of the ECHR's control system in the longer term. An interim report of the Group was submitted to the Committee of Ministers on 19 May 2006. The Group has not yet discussed institutional issues. The Ministers asked the Group to pursue its efforts in order to present them with a final report before the end of 2006.

24. However, the major role of the Court and its function as one of the three pillars in the COE's structure are not adequately reflected in the institutional system and practice of the Organisation. In particular, the Assembly underlines the importance of finding the right balance between the operational and institutional needs of the permanent and consolidated Court and its integration within the COE. It considers that a clarification of the status of the Court, of its relationship with the political

and executive authorities of the COE and of its prerogatives is now required so as to recognise the changed institutional reality and further enhance the major role played by the Court in the Council of Europe institutional framework.

25. Therefore the Assembly invites the Committee of Ministers:

25.1. to ask urgently the Group of Wise Persons created by the Third Summit to examine also the following questions:

25.1.1. the Court's status in the Council of Europe institutional framework;

25.1.2. the status of the judges;

25.1.3. the administrative functioning of the Court, including the budgetary needs of the Court, in order to guarantee its effectiveness and the position of the Court's Registry;

25.1.4 the role of the Parliamentary Assembly and also that of the national parliaments which are represented in the Assembly in assisting the Committee of Ministers in its capacity of supervising the execution of judgments of the Court (Art.46 of the ECHR);

25.2. to send the final report of the Group of Wise Persons to the Assembly and consult it before taking final decisions on the reform;

25.3. in the light of the findings of the Group of Wise Persons, to include an appropriate provision on the institutional status of the European Court of Human Rights either in an additional protocol to the Statute of the COE or in a statutory resolution.

IV. Concerning the Congress of Local and Regional Authorities of the Council of Europe

26. Over the past ten years Europe has been witnessing a significant shift in the national and local balance which resulted in an increased role of local and regional authorities in COE member states, in the Congress and in European integration in general. The Congress now is the most representative body of the 200 000 local and regional authorities on the continent. Furthermore, it has become a key interlocutor in the dialogue with member states on the issues of local and regional democracy.

27. Since 2000, when a new Statutory Resolution on the Congress was adopted by the Committee of Ministers, the political role of the Congress continued to grow. This is in particular due to the monitoring process of the state of development of local and regional democracy in COE member states.

28. Monitoring and continuous political dialogue by the Congress with member states authorities on issues of local and regional democracy have helped to further develop principles enshrined in the European Charter of Local Self-Government and to shape a vision of what should be democratic local authorities and how they should operate in democracy.

29. The Congress plays an important role in observing elections at local and regional level. Based on the conclusions of election observation missions, the Congress addresses recommendations to the authorities of the countries concerned and subsequently takes measures aiming at assessing the state of their implementation.

30. To involve regions in the process of European integration, the Congress has promoted the creation of Euro-regions of a new type, including the national, regional and local level of government from both EU and non-EU member states.

31. The Congress, together with the Russian authorities, was at the origin of the idea to set up in St. Petersburg a Council of Europe Centre for interregional and cross-border co-operation. The creation of this Centre would encourage the spread of local and regional self-government and constitute an additional opportunity for promoting and strengthening co-operation between the

regions of Europe. The Congress has also decided to re-launch the study on a new draft legal instrument on regionalisation in Europe.

32. All this prompts the conclusion that the place of the Congress in the COE's institutional system no longer is the same as twelve years ago when it had been instituted by Statutory Resolution (1994) 3 of the Committee of Ministers, which had been up-dated in 2000 (Statutory Resolution (2000) 1). The Congress has progressively gone beyond the consultative nature which had been originally devised for it in the statutory texts. The Congress now plays a truly representative role within the Organisation. That is why the Congress has proposed that Statutory Resolution (2000) 1 and the Charter of the Congress be revised to bring them more in line with the Congress' current role within the COE.

33. The Assembly invites the Committee of Ministers to:

33.1. implement Recommendation 162 (2005) on the revision of Statutory Resolution (2000) 1 on the Congress and of its Charter and to make the Congress an institution entirely composed of elected members;

33.2. make full use of the Congress' potential to promote decentralisation of powers and increased local autonomy in Europe;

33.3. seek more regularly for the opinion of the Congress before taking decisions on matters within its remit.

V. Concerning the Conference of INGOs of the COE

34. International Non-Governmental Organisations (INGOs) have been closely linked to the Council of Europe since 1952 when a consultative status with the organisations was created. With a view to promoting interaction with the COE, the INGOs created their own structures, i.e. a Liaison Committee and thematic Groupings.

35. In accordance with Resolution (2003) 8 of the CM, the status of the INGOs within the COE was enhanced; this corresponded to an upgrade from consultative to participatory status.

36. The 400 INGOs holding participatory status constituted the Conference of INGOs of the COE in January 2005. This Conference is the voice of European civil society at the COE. It co-operates with other bodies of the Organisation and its INGO members, disseminates information about COE aims and activities among their constituencies and supports the promotion and application of the Organisation's legal instruments.

37. The Assembly invites its committees to enhance dialogue and co-operation with the Conference of INGOs of the COE and its relevant member organisations.

38. The Assembly invites the CM to seek more regularly the opinion of the Conference of INGOs before taking decisions on matters within its remit.

VI. Concerning follow-up action

39. Finally, the Assembly invites the CM to examine the above-made proposals with it in the Joint Committee and in a mixed working party. The European Court of Human Rights and the Congress should be closely associated with this work.

40. It also suggests that a Permanent Group of Wise Persons should be established with the mandate to give advice on institutional issues and to mediate between the organs and institutions of the COE.

40.1. This Group should be composed of seven members:

40.1.1. two members (one male, one female) appointed by the CM;

40.1.2. two members (one male, one female) appointed by the Parliamentary Assembly;

40.1.3. one member appointed by the European Court of Human Rights;

40.1.4. one member appointed by the Congress of Local and Regional Authorities of the COE;

40.1.5. one member (being the Chairperson of the Group) appointed by the Secretary General of the COE;

40.2. members should be outstanding personalities - no one of them should be an active member of the CM, the Assembly, the Court, the Congress or belong to the staff of the COE.

APPENDIX

PROPOSALS FOR UP-DATING OR COMPLETING RESOLUTIONS AND DECISIONS OF THE COMMITTEE OF MINISTERS CONCERNING THE ROLE AND POWERS OF THE ASSEMBLY

1. Statutory Resolution (51) 30 A on the **admission of new members**, by providing that:

1.1. the Assembly shall also be consulted before a member shall be suspended from its right of representation under Articles 8 and 9 of the Statute;

1.2. the Assembly shall be consulted on the number of seats to be allocated to a new member in the Assembly and on its contribution to the budget of the Council of Europe;

1.3. according to existing practice the Committee of Ministers would await the Assembly's concurring opinion before deciding on the admission of new member states or taking measures under Articles 8 and 9 of the Statute;

2. Resolution (93) 26 on **observer status** by providing for the consultation of the Assembly also before any suspension of the status;

3. Resolution (52) 26 on the **consultation of the Assembly**, which should also specify that:

3.1. the Assembly shall be consulted on all draft COE treaties it being understood that a small number of treaties of an exclusively technical nature may not require such consultation (decision of the Committee of Ministers of 1999, Docs. CM (99) 64 and 8388 of the Assembly);

3.2. the Assembly shall, unless otherwise agreed with the Committee of Ministers, have at least three months for preparing and adopting its statutory opinion on a draft treaty;

3.3. the Committee of Ministers shall arrange to start the consultation of the Assembly before the last meeting of the intergovernmental expert committee where it will agree on the draft treaty;

3.4. the details of the consultation shall be fixed by agreement between the Committee of Ministers and the Assembly, in the light of the indications given in Assembly document 8388;

4. Resolution (53) 38 on the **budgetary system of the Assembly** which, taking into account Recommendation 1728 (2005)[1] on the budgetary powers of the Parliamentary Assembly should also specify:

4.1. with respect to the Assembly's own operational expenditure, the latter shall fix the amount of its expenditure, the annual increment being determined by agreement between the Committee of Ministers and the Assembly;

4.2. with respect to the budgets of the COE, the Assembly shall be consulted by the Committee of Ministers before the latter fixes the amount of the overall budget of the Council of Europe for the coming year. This consultation shall take place at the earliest possible stage in order to allow the Assembly to take it into account in its opinion on the budget;

4.3. with respect to member States' contributions the Assembly shall be consulted by an ad hoc urgent procedure if and when a member state has not made its due contribution to the budget for a period in excess of six moths.

5. Resolution (53) 38 should also specify that the Assembly shall receive the final audited accounts for the previous financial year, any reports of the COE External Auditor, the reports of the intergovernmental Budget Committee of the Council of Europe; this shall enable the Assembly to express, if appropriate, its views on the expenditure of the Council of Europe;

[1] It is recalled that Recommendation 1728 called on the Committee of Ministers to recognise such budgetary powers of the Assembly by amending Article 38 of the Statute (according to the simplified procedure foreseen in Art. 41d of the Statute) by adding after paragraph c., two new paragraphs.

6. Statutory Resolution (51) 30 F on **relations with intergovernmental (IGOs) and non-governmental international Organisations (INGOs)** by providing for:

6.1. appropriate Assembly consultation concerning IGOs, the Assembly being already consulted on granting and withdrawal of participatory status of INGOs (Resolution (2003)8);

6.2. Assembly representation at all high level coordination meetings between the COE and the EU, OSCE and the UN.

7. Resolution (93) 27 on **majorities required for decisions of the Committee of Ministers** by integrating in it the agreement of the Committee of Ministers of November 1994 to adopt replies to Assembly recommendations by a two-thirds majority of the Representatives casting a vote and a majority of the Representatives entitled to sit on the Committee of Ministers, considering that every effort would be made to reach a consensus within a reasonable period of time.

B. Explanatory memorandum by the rapporteur, Mr Peter Schieder

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I. INTRODUCTION

1. The aim of this report is to analyse if the principle of the institutional balance is adequately recognised within the Council of Europe's institutional set-up as regards in particular the Parliamentary Assembly of the Council of Europe, the European Court of Human Rights and the Congress of Local and Regional Authorities of the Council of Europe.

2. The Committee on Rules of Procedure and Immunities also agreed to examine in this connection the role of the Committee of Ministers in the institutional framework of the Organisation. On this basis the Rapporteur will present proposals on how to better equilibrate the institutional system at the Council of Europe. For reasons of comparison the situation in the OSCE, the EU and in other European organisations if necessary will be referred to.

3. The Committee on Rules of Procedure and Immunities has agreed to seek for the advice of a consultant expert, Professor Gramlich from the Chemnitz University (Germany). He presented his study (AS/Pro (2005) 7) to a Committee meeting in March 2005, It was largely borne in mind for this draft report. On 25 November 2005 the Standing Committee referred back to the Committee on Rules of Procedure and Immunities the report on transparency of the work of the Committee of Ministers (Doc. 10 736) to be taken into account for the work on the institutional balance. Furthermore, the Committee has held hearings with representatives of the COE's organs and main bodies.

4. The Rapporteur should like to thank his predecessor, Serhiy Holovaty, who became Minister of Justice of Ukraine, for his efforts to improve the institutional balance at the Council of Europe[2].

5. Recently, the question of the institutional balance in the Council of Europe received new political momentum. First, on 11 April 2006 the Prime Minister of Luxembourg, Mr Juncker, presented to the Parliamentary Assembly his report entitled " Council of Europe - European Union : A sole ambition for the European continent". This report presents an overall political vision for the Council of Europe and for its relations with the EU. Mr Juncker said *inter alia* that to achieve the necessary complementarity between the two institutions the Council of Europe's Commissioner for Human Rights, parliamentary bodies and Congress should be given a bigger role. This would normally require changes to the current institutional system of the Organisation. In addition, the present reform process in the Council of Europe, following the Warsaw Summit, and aiming at allowing the Organisation to fulfil its mission in an efficient and transparent manner, may also result in some modifications of the institutional interaction.

II. THE PRINCIPLE OF THE INSTITUTIONAL BALANCE

i. General remarks

6. At international or supranational level the problem of the institutional balance was first raised within the EU[3]. It aims in particular at distributing the powers (and, in general, the "work") between the organs/institutions of the EC/EU and deals with the relations between these bodies. In the EU doctrine the "institutional balance" is considered to be a "coding" for the principle of the separation of powers, as doubts had been expressed with respect to the pertinence of this principle for the EU system.

ii. The principle of the institutional balance as developed by the Court of Justice

7. When in 1951/1952 the first European Community that of Coal and Steel (ECSC) was created the High Authority (Commission) had the main part of the power of decisions. However, it was already in the framework of the ECSC Treaty that the principle of the institutional balance had

[2] The rapporteur presents his thanks also to the Chairman of the Committee, Andreas Gross for having devoted many meetings to discussing the matter, to Peter Leuprecht, former Deputy SG of the COE, for his advice and to the Secretariat of the Committee (Mr Heinrich and Mrs Clamer).

[3] For a recent comprehensive description see the dissertation by Eve Sariyiannidou on "Institutional balance and democratic legitimacy in the decision-making process of the EU" (University of Bristol), July 2006

been developed in the doctrine and notably by the Court of Justice (see the judgments of 12 July 1957 (Coll. p.81) and of 13 June 1958 (Coll. p.11).

8. In particular between 1986 and 1997 the Court of Justice of the European Communities (CJEC) has in five judgments and one order completed its jurisprudence on the scope of the principle of the institutional balance in community law. A detailed description of this jurisprudence is to be found in the expert study by Professor Gramlich (see AS/Pro (2005) 7; AS/Pro(2006) 11 rev.).

9. In its judgment of 1990 in the Chernobyl case (coll. 1990 I, pp. 2041 and subs.) the CJEC recalled that the concept of the institutional balance was based on the "functional order" or repartition of functions between the EU organs established by the EU treaties and represents a system of checks and balances. The CJEC held that:

- by setting up a system for distributing powers among the different Community institutions assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community, the Treaties have created an institutional balance;
- the prerogatives of the EP are one of the elements of the institutional balance;
- observance of that balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions;
- it also requires that it should be possible to penalise any breach of that rule which may occur.

iii. The dynamic character of the principle and its links with debates on democratising International Organisations

10. The principle of the institutional balance which is not inscribed in the EC/EU treaties has been derived by the CJEC from the entirety of the institutional provisions of the Treaties. It is not only a principle to be respected at EU level but a principle which is susceptible to develop under the influence of the real factors. Moreover, it is always possible to modify institutional balance by

- unilateral decision of one institution (e.g. renunciation to exert a prerogative for the benefit of another institution);
- institutional understanding (notably the conclusion of an inter-institutional agreement);
- modification of the Treaties.

11. The principle of the institutional balance has thus been used vis-à-vis a rapidly developing EC/EU to justify the reinforcement of its parliamentary dimension, i.e. the European Parliament and to achieve a more pronounced democratisation.

12. If the institutional balance is initially a principle which applies mainly at the level of the EC/EU it has imposed itself gradually also to intergovernmental Organisations, particularly in Europe. Detailed information on this question is to be found in the study (see doc. AS/Pro (2005) 7) by Professor Gramlich the consultant expert of the Committee on Rules of Procedure and Immunities. A summary of the conclusions of this study was included in document AS/Pro (2006) 11 rev. The study includes also a chapter on ways to improve the institutional balance at the level of International Organisations. It deals in particular with:

- legal aspects of legitimacy
- parliamentary assemblies and democratic legitimacy
- shortcomings of trans-national parliamentary legitimacy
- laws and politics of reshaping the institutional balance.

13. Under the influence of the work and the recommendations of the United Nations but also of globalisation, International Organisations were called upon in particular to open themselves up and to democratize themselves increasingly. Strong pressure is exerted in this respect on international economic commercial and banking Organisation by the opponents of globalisation and the international civil society.

14. It is to be noted also that an international high level expert group (Warsaw Reflection Group) which in 2005 examined NATO, EU, OSCE and the COE with respect to complementarity among

European Security Institutions underlined that these Organisations needed to recover credibility in the eyes of states and the public by creating stronger mechanisms for accountability and transparency.

15. Already the universal declaration on democracy adopted by the IPU in 1997[4] underlines that democracy must also be recognised as an international principle applicable to international organisations and to States in their international relations ("internationalization of democracy", "redress of power imbalance"). The "agenda for democratisation" of the then UN Secretary General Boutros-Ghali of 1996 includes the following passages[5]:

- there are of course substantial differences between democratisation at the international level and democratisation within States. At the international level there are International Organisations and institutions and international decision-making and international law but there is no international structure equivalent to that of State government. International society is both a society of States and a society of individual persons. Nonetheless the concept of democratisation as a process which can create a more open, more participatory, less authoritarian society applies both nationally and internationally;

- once decision-making in world affairs could have only a limited effect on the internal affairs of States and the daily lives of their peoples. Today decisions concerning global matters carry with them far-reaching domestic consequences blurring the lines between international and domestic policy. In this way unrepresentative decisions on global issues can run counter to democratisation within a State and undermine a people's commitment to it.

16. The report on human development (2002) of the UN development programme deals also with the democratisation of international economic Organisations .it proposes *inter alia* an increased responsibility of these Organisations vis-à-vis citizens, by creating for instance appropriate organs, ombudsmen or supervisory bodies.

17. In its Resolutions 1289 (2002) on parliamentary scrutiny of international institutions and 1353 (2003) on future of democracy, the Parliamentary Assembly of the COE has underlined that the inter-parliamentary dimension in multilateral cooperation of states is an essential requirement for bringing international decision-making closer to the citizen and for broad democratic legitimacy. The Assembly has regularly supported the creation of a parliamentary body for the United Nations. In a report of 2002 (Doc.9478, par.93 to 104) the Assembly proposes to strengthen the legitimacy and accountability of the World Bank and the International Monetary Funds (IMF).

III. THE COUNCIL OF EUROPE AND THE PRINCIPLE OF THE INSTITUTIONAL BALANCE

i. General

18. The creation of the Council of Europe had been asked for by a large Assembly of the (West-) European elites meeting in The Hague in May 1948. Furthermore, the Preamble of the Statute of the Council of Europe refers twice to the European peoples: first to the common heritage of the peoples of the ten Founder States of the Organisation and then to the (European) aspirations of their peoples. By the creation of the Parliamentary Assembly as a statutory organ of the Council of Europe, the national parliaments and therefore the representatives of the European peoples were associated with the European project. The will of the Founding Fathers of the Council of Europe to make it an Organisation which is close to the European citizens was therefore obvious.

19. However, neither the institutional balance nor democratic legitimacy have been inscribed in the Statute or the other principal texts making up the Council's legal system. This is not astonishing as in the 50s it was widely considered that the diplomatic legitimacy and the rather summary control exerted by national parliaments over the foreign policy of the respective Governments was sufficient for the action taken by Governments within such International Organisations. In case of IOs such as

[4] See the publication "democracy, its principles and achievements", by the Inter-Parliamentary Union (IPU), Geneva, 1998, pp III to VIII, 14, 15.
[5] See the text reproduced in the afore-mentioned IPU publication, pp 17 to 19.

the Council of Europe which had a parliamentary organ composed of elected national parliamentarians, this provided additional legitimacy.

20. The Committee of Ministers' of the COE or its subordinate bodies had occasionally recourse to the principle of "institutional balance" when they examined replies to Assembly recommendations which they considered to include very far-reaching proposals[6]. It is to be noted also that a report drafted by a joint working group of the Committee of Ministers and the Assembly (Doc. AS/CM-Mix/Working Group (2001)1) which was approved by the Joint Committee in January 2001 develops the concept of the shared responsibility of the Committee of Ministers and the Assembly to the Council of Europe.

ii. The main organs and institutions of the COE and the current distribution of powers in the COE

a. Main organs and institutions

21. According to Article 10 of the COE's Statute the Committee of Ministers and the Assembly (then termed "consultative") are the (political) statutory organs of the COE, of general competence. They are served by the Secretariat General of the COE. The Council of Europe was the first International Organisation into which an Assembly was integrated as a statutory organ. This conferred on the Council a certain experimental character.

22. Since the creation of the COE the following institutions were created in the COE, without a formal amendment of the Statute, on the basis either of a convention or of a (statutory) resolution:

i. the Congress of Local and Regional Authorities of the COE which represents these authorities in the COE; it exists on an ad hoc basis since 1957 and as a permanent institution (Standing Conference) since 1961; it has been set up by Statutory Resolution (94)3 of the CM which was modified in 2000 by Statutory Resolution (2000) 1 of the CM;

ii. the European Court of Human Rights which was instituted by the European Convention on Human Rights and is operational since 1959. It ensures on a permanent basis the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto. The Court is part of the three pillar structure of the COE reflecting the governmental, parliamentary and judicial branches of the COE (see report of the Committee of Wise Persons of the COE of 1998).

23. In 1999 the CM instituted the office of the COE Commissioner for Human Rights, who exercises his functions independently and impartially. The Conference of International Non-Governmental Organisations (INGOs) of the COE was established in January 2005 by the about 400 INGOs enjoying participatory status with the COE. Consultation and cooperation between the COE and INGOs as organised part of civil society started in 1952 with the creation of a consultative status. Several Resolutions of the CM deal with INGOs and consultative/participatory status (e.g. Resolutions (51)30 F, (72)35, (93)38, (2003) 8, (2003)9). In this connection it is interesting to note that Resolution (51) 30 F which was the first COE institutional text on relations with INGOs was never up-dated.

24. COE Convention No.126 (1987) created the European Committee for the Prevention of Torture and following the first COE Summit in Vienna, the European Commission against Racism and Intolerance was set up. Moreover, special Council of Europe bodies (such as the Venice Commission, the Development Bank, the North-South Centre) were created in the framework of partial agreements. The Assembly has close working relations with the Venice Commission and the North-South Centre and has concluded cooperation agreements with them. It appreciates the excellent legal and constitutional law advice from the Venice Commission.

b. General observations on the distribution of powers in the COE

[6] See the discussions on Assembly Recommendation 1458 (2000); in its opinion on this text (see.Doc. 9497) one expert committee (CAHDI) said that the implementation of the recommendation would change the very way in which the COE has functioned so far.

25. The main features of the distributions of powers in the COE according to its Statute are

- the CM is the organ which acts on behalf of the COE in accordance with Rules 15 and 16 (Article13 of the COE Statute);
- it adopts in particular the legal instruments of the organisation, conventions, agreements (Article 15a of the Statute) and recommendations to member States (Article 15 b, Statute); however even unanimous decisions of the CM are not, as such, binding on the member states;
- the Assembly and the Congress (which is not mentioned on the Statute) have to a differing extent rights of self-organisation, of adopting their Rules of Procedure and elective rights, and of establishing external relations;
- the Statute, statutory resolutions and other decisions of the CM give the Assembly additional powers of co-decision and, in particular, of being consulted on major matters.

26. The European Court of Human Rights is not mentioned in the Statute which has never been updated concerning the organs and institutions of the COE. According to the European Convention on Human Rights the Court has in particular rights of election (Article 26 of the Convention),of self-organisation (including a certain "operational independence") and of adopting its Rule of Procedure. Article 25 of the ECHR stipulates that the Court shall have a Registry the functions and organisation of which shall be laid down in the Rules of the Court.

27. Whereas the Committee of Ministers has the possibility to refer certain matters to the European Court for Human Rights (see Articles 47-49 ECHR, and Art.46 as amended when Protocol No.14 to the ECHR will enter into force), the Court has according to the ECHR no prerogatives vis-à-vis the Committee of Ministers. For some years, there has been a Liaison Committee between the Court and the Committee of Ministers. It is interesting that the ECHR contains a provision (Article 54) stipulating that "Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the COE"

28. Since the inception of the COE the Assembly and the CM have sought procedures and other means for improving relations and facilitating communication between them. Whereas over the years considerable progress has been made it is generally agreed that procedural devices will never suffice to surmount inevitable difficulties of functioning between a parliamentary organ and an intergovernmental organ, for example concerning the political dialogue in the COE or the right of initiative (Art.15 (a) of the Statute) shared by the Committee of Ministers and the Assembly (see for more details Guy de Vel, The Committee of Ministers of the Council of Europe, 1995, p.99).

29. The Committee of Ministers has affirmed on may occasions that the Assembly it its main institutional partner, that the Assembly and the CM have a shared responsibility to the COE, that the CM counts on the promotional and initiatory action of the Assembly, that it relies on close and fruitful cooperation with the Assembly concerning the COE's programme of work. More recently the CM has expressed that it counted on the Assembly to promote the execution of (certain) judgments of the European Court of Human Rights (for details see AS/JUR (2006) 18).

iii. The evolution of the Council of Europe's structures since 1949 including the amendments to the Statute of 1951,1953, 1970 and 1978

30. In the early days of the Council of Europe the intergovernmental action taken in the Organisation had only limited direct consequences for the member states. There was no monitoring of commitments and obligations of states, no sanctions were taken with respect to member states in fault. Furthermore, requests for membership of the COE were not debated in public plenary session in the Assembly and one had to wait for this until 1965. The jurisprudence of the European Court of Human Rights has started in 1961 only.

31. However since those times the Organisation has very much changed and important institutional developments took place at all levels. A not negligible number of Council of Europe bodies are preparing reports on the situation in each member State in particular fields. The Committee of Ministers of the Organisation and other bodies of the COE now exercise powers which

are of immediate relevance to member states and indirectly to their citizens. This becomes apparent in:

- resolutions and decisions adopted by the Committee of Ministers in connection with its supervisory functions regarding the execution of judgments by the member states[7];

- decisions taken by the Committee of Ministers in the framework of ongoing monitoring procedures for individual countries, including special cooperation programmes with some member States.

32. Several functions of the Parliamentary Assembly have been strengthened, for example its consultation by the Committee of Ministers on the legal instruments of the Council of Europe, the budget, the accession of new member states, on sanctions to be taken by the CM and on certain matters regarding the external relations of the Council of Europe. It was also entitled to elect its Secretary General, the judges to the European Court of Human Rights and the Council of Europe Commissioner for Human Rights.

33. The Committee of Ministers granted the Assembly the right to adopt its agenda and its representative character was improved (election of its members by national parliaments). In the 50s political groups were set up in the Assembly and their role was gradually strengthened. Furthermore, the Assembly has in connection with its right to self-organisation, taken a series of important measures which have modified its functioning, including the observation of elections. These changes were achieved by several techniques, particularly by the modification of the statutory provisions regarding the Assembly and of Article 38 of the Statute in 1951, 1953, 1970 and 1978[8] and by the adoption by the Assembly of resolutions, or of decisions by the Bureau, approved by the Assembly. Although the Assembly has in various texts (e.g. Recommendations 1027 (1986), 1212 (1993), 1728 (2005)) asked for revisions of the Statute or of specific provisions of the Statute, it has remained unchanged since 1978, except the adaptation of Article 26 (number of seats in the Assembly) of the Statute after the accession of a new member State.

34. New institutions and bodies were created in the Council of Europe (see above par.22 to 24),

35. It is certainly the European Court of Human Rights which from relatively modest beginnings has witnessed the most spectacular evolution of all Council of Europe organs and institutions. Since November 1998 it is a permanent Court which can be appealed directly by individual citizens. The Court now delivers more than 1100 judgements a year.

iv. The adoption of statutory resolutions by the Committee of Ministers since 1993

36. To take account of these institutional changes but also with a view to secure adaptation of the Council of Europe's political mandate to the developments, the Assembly tried on several occasions to convince the Committee of Ministers to modify the whole Statute of the Council of Europe or to adapt it to the Organisation's practice. In 1993 the first Summit of Heads of State and Governments of Council of Europe member States instructed the Committee of Ministers to adapt the Organisation's Statute as necessary for its functioning having regard to the proposals put forward by the Assembly, in particular in its Recommendation 1212 (1993) on the adoption of a revised Statute of the Council of Europe. As a follow-up to the first Summit, the Committee of Ministers adopted several statutory resolutions and various decisions of an institutional character[9]. However, the Statute as such remained unchanged.

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[7] It is recalled however that between 1955 and 1998 the decisions taken by the Committee of Ministers which established if there had been a violation or not by a Contracting State of the European Convention on Human Rights were binding on the State concerned

[8] In 1951 several articles of the Statute relating to the Assembly (articles 23 to 35) and article 38 (budget) were amended. Since then only article 25 (composition of the Assembly) was modified in 1953 and in 1970 and article 26 (number of seats of member states on the Assembly) was modified in 1978 and regularly adapted in case of the accession of new member States to the Council of Europe.

[9] Since 1949 the Committee of Ministers of the Council of Europe has adopted a series of "statutory resolutions" which while being explicitly compatible with the Statute, either have completed statutory provisions (articles 4, 5, 8 on accession and sanctions), article 15 (on conventions) ,article 20 (on majorities required for decisions of the Committee of Ministers); articles 36, 37 (on the election by the Assembly also of its own

v. The work of the Committee of Wise Persons of the Council of Europe

37. The important changes of the institutional system of the Council of Europe were taken into account for the work of the Committee of Wise Persons of the Council of Europe, which was set up following its Second Summit. In its report presented to the Committee of Ministers in November 1998 the Committee of Wise Persons analysed the internal structures and functioning of the Council of Europe. It noted in particular the changed roles and functions of the Parliamentary Assembly, the Congress of Local and Regional Authorities and the European Court of Human Rights.

38. The report of the Committee of Wise Persons concluded as follows:

"22. The Council today has a three-pillar structure reflecting the governmental, parliamentary and judicial branches, which should be recognised as such and further developed.

23. The system of checks and balances, resulting from the interaction of the Committee of Ministers and the whole intergovernmental structure, the Parliamentary Assembly, the European Court of Human Rights and other supervisory bodies, the Congress of Local and Regional Authorities of the Council of Europe and the secretariat constitutes a major asset as it provides for a stability of values and standards essential for promoting and monitoring the Organisation's values and standards throughout Europe.

24. While the existing institutional system is considered fundamentally sound, its different branches should be strengthened and the relations between them clarified, in order to develop genuine synergy. A stronger Committee of Ministers, Parliamentary Assembly, Court and Congress, each playing an important role in their respective sphere of competence, should be productive for the Organisation as a whole."

39. For the Rapporteur it is not doubtful that the words checks and balances used in the passage above are representative for the principle of the institutional balance.

vi. Developments since 1999 and consequences

40. Since the report by the Committee of Wise Persons, further changes have taken place in the Council of Europe, such as an increase in the activity of the European Court of Human Rights, the adoption of Protocol No 14 to the European Convention on Human Rights, and an improvement in the Assembly's representativeness (taking into account of gender equality in the composition of national delegations). The monitoring activities of the Committee of Ministers, the Assembly and the Congress of Local and Regional Authorities of the Council of Europe have been intensified. The office of COE Commissioner for Human Rights was instituted.

41. It is generally acknowledged that if the activities of the organs and institutions of an international organisation have increased effects on the member states and, indirectly, their populations, those bodies have a greater responsibility and a need for appropriate democratic legitimacy. This legitimacy can be conferred by the national parliaments of the member states, but also by an international parliamentary forum, where one exists.

42. There have been major institutional advances in the EU, and a reform process took place in 2005 in the OSCE (see reports by the Panel of Eminent Persons on strengthening the effectiveness of the OSCE and by the Swiss Institute for World Affairs on the future of the OSCE). Reforms are also in progress in European regional organisations (Nordic Council, Benelux).

43. It is obvious that the Council of Europe cannot disregard these developments, especially when one considers that, in the OSCE, the status of the Secretary General was reinforced in 2004 and the above-mentioned reports propose - among other things - institutional improvements with regard to the OSCE Assembly.

Secretary General) or have established new bodies for the Council of Europe (Congress of Local and Regional Authorities, Joint Committee,...) and mechanisms (observer status, partial and enlarged agreements; relations with International Organisations, NGOs and the possibility of creating specialised authorities).

44. The question that arises, therefore, is whether the Council of Europe's constitutional instrument (of 1949/51), as supplemented by the statutory resolutions and the various institutional arrangements which have been adopted, provides a satisfactory basis for the operation of the Council of Europe's legal and institutional system in 2006, having regard to modern conceptions of democratic governance and, in particular, the requirements of the principle of institutional balance as it is understood today.

IV. THE CURRENT STATUS OF THE PARLIAMENTARY ASSEMBLY WITHIN THE COE

i. General remarks

45. Some articles of the Statute provide for a full equality between the CM and the Assembly (e.g. preamble, Articles 1 d, 9, 10, 12,15a (first sentence)).[10] However, when the Statute is considered as a whole, it is marked by a clear preponderance of the ministerial organ over the Assembly. The CM has, according to the spirit prevailing in 1949, the power of decision and action in the Organisation and to approach directly the Governments (see in particular article 13). The Statute stipulates that the Assembly is the deliberative organ of the Council of Europe (Article 22). The existence of this article which belongs to the hard core of the Statute, is from a purely legal point of view a problem for the Assembly. For the WEU Assembly, which is also embedded in an intergovernmental Organisation a much more elegant solution has been found in the institutional texts: "The Assembly carries out the parliamentary functions arising from the application of the Brussels Treaty". The Parliamentary Assembly of the COE is the first embodiment of the progress of the democratic spirit in the international relations. It expresses the will to more closely associate the peoples to the efforts to safeguard peace and achieve greater unity in Europe.

46. In addition to the Statute several important rights of the Assembly have been laid down in statutory Resolutions ((49)20, (51)30, (55)29) or in Resolutions ((52)26, (53) 38). Other matters concerning the Assembly have been settled in "simple" decisions of the CM. The Assembly has on various occasions invited the CM to regroup these scattered texts (see Recommendation 871 (1979), report of the Committee of Wise Persons and Doc. CM (2000)57).

47. Its composition made up of national parliamentarians is the Assembly's particularity. The Assembly members go through a dual appointment process. They are first elected by the national parliaments. Then the Assembly examines their credentials and may refuse to ratify them if the required criteria are not fulfilled (Rule 6-9 of the Assembly's Rules of Procedure). Their term of office within the Assembly takes effect only after their credentials have been ratified. This means that representatives and substitutes to the Assembly have:

- legitimacy as members of a national parliament,
- and legitimacy at the level of the COE, resulting in their enjoyment of the specific immunities provided for in the General Agreement on Privileges and Immunities of the COE.

Therefore, the Assembly is - as was underlined by its then Secretary General in a meeting of the Ministers' Deputies on 14 December 2005 -, endowed with the dual nature of an inter-state Assembly and an Assembly representative of national parliaments[11]. This accordingly gives it a unique status, enabling it to perform its European role.

48. The Assembly has the right to internal self-organisation and to adopt its Rules of Procedure. Its bodies (committee system etc.), working methods and procedures are the same as those of national parliaments. Through the Assembly, national parliaments were, from the outset, indirectly linked with the building of Europe. Rather astonishingly, one finds already in the provisions of the original Statute all types of co-operation between a governmental (Committee of Ministers) and a parliamentary body. This co-operation reaches from consultation (Article 23, 27) to the need of

[10] From a historical point of view it is interesting that in an article of 6 May 1949, describing the ceremony of the signature of the Council of Europe's Statute, "the Times" called the Assembly the "Second House" of the Council of Europe.

[11] See in this connection Georges Rencki, "L'Assemblée du Conseil de l'Europe,- essai de définition de sa nature juridique", Paris, 1956 ,and some more recent publications such as Jerzy Jaskiernia, "The Parliamentary Assembly of the Council of Europe", Warsaw, 2003

concurring decisions or co-decision (Articles 32, 33, 41(d)) with the Committee of Ministers. It is particularly important that 15 of the 42 Articles of the COE's Statute can only be changed with the assent of the Assembly. Furthermore, with respect to associate members of the COE, the Assembly has, in comparison to the Committee of Ministers a privileged status. According to Article 5 of the Statute of the COE, associate members are represented in the Parliamentary Assembly only. However, since 1.1.1957 this status has no longer been granted.

49. Moreover, several articles of the original Statute give the Assembly specific rights ("powers", see Article 16 of the Statute) concerning its own organisation and entrust it with the election of the Secretary General and Deputy Secretary General of the Council of Europe. The Assembly has certain control and supervisory possibilities for its members by:

- asking oral and written questions to the CM and its chairman (this is currently particularly important with respect to the Assembly's contribution to securing the execution of certain judgments of the Court (see doc. AS/Jur (2006)18);
- taking action in national parliaments;
- raising a matter when they are invited to participate in CM rapporteur and other groups;
- their participation in meetings of intergovernmental expert committees of the COE.

50. The Committee of Ministers and the Assembly have created a body of cooperation and coordination, the Joint Committee, which is also expected to examine any problems between the two organs. It is chaired by the President of the Assembly.

51. Interestingly, possibilities were provided for in the Statute of 1949 to allow the widening of the Assembly's powers. According to Article 41 (d) of the Statute, the following Articles of the Statute may be changed, completed or updated by a concurring decision of the Committee of Ministers and the Assembly, without the need for ratification by national parliaments:

- the articles relating to the functions (however, any changes of the nature of the Assembly would have to take into account Article 22 of the Statute) , membership, organisation of the Assembly (Articles 23 to 35) ; these provisions could be up-dated or new provisions could be inserted in this section of the Statute;

- the articles relating to the budget of the Council of Europe (Articles 38 and 39),including the admittedly very limited budgetary "powers" of the Assembly could also be up-dated, re-written or , with respect to the Assembly, be completed.

According to Professor Poidevin, the possibilities for simplified amendment of the Statute were built into it on a proposal from France in order to allow the Assembly to conceive and build European unity and to preserve the chances for a future adaptation of the new Organisation (see "Histoire des débuts de la construction européenne " (March 1948- May 1950), 1986 p.193).

52. The Rapporteur wishes to point out in this connection that consideration had been given at one time in the 1950s by the Private Office of the President of the Assembly to the possibility of incorporating into Articles 23-35 of the Statute, on the basis of a concurring decision of the Committee of Ministers and the Assembly, a new provision relating to the election of the Secretary General of the Assembly.

53. From the outset the Assembly has been empowered to participate on a consultative basis in the elaboration of the Council of Europe's law (legal instruments). This started with the European Convention on Human Rights, and continued with the European Cultural Convention, the European Social Charter, etc.

ii. The evolution of the Assembly's role and possibilities of action

54. The history of the Assembly demonstrates its political role and its innovative work. It was always a defender of the Organisation, much more than other organs and it was more courageous, more innovative. This has also been acknowledged by Prime Minister Juncker of Luxembourg in connection with the elaboration of his report on the relations between the EU and the COE. He said (see his interview in Neue Zürcher Zeitung of 12 April 2006) that the COE is an intergovernmental

institution with an underlying Parliamentary Assembly which however very often detaches itself from the sole intergovernmental cooperation with a view to realising common progress in Europe. Since its creation the Assembly's parliamentary character but also its possibilities for practical action have been constantly developed. From the outset it mattered for the Assembly to have its consultative functions better defined and, particularly, extended by the Committee of Ministers and to find ways for an active and prospective political role. Some examples of the Assembly's institutional evolution were given above.

55. What is probably even more important, are the various initiatives the Assembly has taken to develop its practical action on the one side and its weight in the Organisation on the other. This was also in line with a growing tendency to increase "parliamentarisation" and democratisation in international relations and Organisations. Where appropriate the Assembly has not hesitated to take unilateral action to enhance its status (e.g. the 1974 decision to change its name into "Parliamentary Assembly") or to extend its possibilities for action (e.g. election observation).

56. Some of the results achieved by the Assembly are:

- creation of autonomous (that is independently from the governments) possibilities for reaction by the Assembly in case of violation of the Council of Europe's values (contestation of unratified credentials of delegations and their members, reconsideration of ratified credentials, ...);

- contribution to developing the concept of the COE's enlargement policy, adaptation of the political conditions for COE membership, negotiation of the particular conditions for each new member state and definition of the frontiers of the COE;

- introduction of monitoring procedures concerning the honouring of obligations and commitments of new (and old) member states, including the possibility of sanctions;

- monitoring of the implementation of judgments of the Court by the member States;

- action on the spot related to fact-finding in general, to the consideration of requests for COE membership, to monitoring of obligations and commitments; the observation of elections; contributions concerning specific situations in European states and in case of crises; implementation of parliamentary cooperation programmes;

- development of the Assembly's external relations (see Recommendation 1753 (2006) and Resolution 1506 (2006)) and creation of the necessary mechanisms (introduction of observer status with the Assembly long before the Governments created such a status in the COE; creation of special guest status with the Assembly, setting-up - for special purposes - of parliamentary troikas with the European Parliament and the OSCE Assembly, conclusion of co-operation agreements with national parliaments of non-member states, with different Council of Europe bodies and with Intergovernmental Organisations).

57. Sometimes the Assembly's soft-law (resolutions, recommendations) has deployed direct effects in the member states. For example Assembly Resolution 803 (1983) on Turkey was quoted directly in a judgement of the German Federal and was used as a major argument in an extradition case. Assembly Recommendation 1201 (1993) on the protection of national minorities in Europe was directly quoted as a standard in the Treaty between Hungary and Slovakia and in the appendix to the Treaty between Hungary and Romania.

58. Because of its dynamism, dedication and function as "think-tank", the Assembly has recently been considered by a Foreign Minister to be "the true engine of the Council of Europe." In a report of the Warsaw Reflection Group of 2005 (on achieving complementarity between NATO, EU, OSCE and the Council of Europe) the active role of its Parliamentary Assembly is described as a comparative advantage of the COE.

59. The Committee of Ministers recognises the Assembly as its key partner in the COE [see doc.CM/AS (2006)4]. Furthermore, it results from comparative studies published in the last years on international inter-parliamentary institutions in Europe that the Assembly is, with the exception of the European Parliament, the most effective institution (see in particular: Beat Habegger,

Parlamentarismus in der internationalen Politik (Europarat, OSZE und IPU), Baden-Baden, 2005; Rudolf Geiger, Neuere Probleme der parlamentarischen Legitimation im Bereich der auswärtigen Gewalt, Baden-Baden; 2003; Stefan Marschall, Transnationale Repräsentation in parlamentarischen Versammlungen, Baden-Baden, 2005). It is to be noted that questions concerning inter-parliamentary institutions in Europe are regularly dealt with by the Conferences of the Speakers of the EU Parliaments (e.g. in 2005 and 2006). On 8 and 9 May 2006 the Polish Parliament and the European Centre for Parliamentary Research and Documentation organised a Seminar in Warsaw on the theme "Supranational parliamentary and interparliamentary assemblies in 21st century Europe".

V. THE ASSEMBLY AND DEMOCRATIC LEGITIMACY

60. The Assembly constitutes the democratic underpinning of the Council of Europe.[12] By way of its statutory opinions to the CM, by the active accompaniment of the COE's work, by electing the SG the Deputy SG of the Organisation, the judges of the ECtHR and the HR Commissioner, the Assembly composed of elected members of national parliaments, gives democratic legitimacy to the Organisation. Through its contribution it confers also democratic legitimacy on the international law created by the elaboration of COE Conventions.

61. On several occasions the Assembly has stated (e.g. in Resolution 1289 (2002) on parliamentary scrutiny of international institutions) that the imbalance between the increasing power of international institutions and the absence of democratic scrutiny of their activities constitutes a major challenge for democracy. In the Assembly's view it was necessary to make good the democratic deficit at present suffered by international institutions which seriously hampered their efficiency and to make them more accountable to society. The public through its democratically elected representatives needed to be able to take part in the decision-making process effectively.

62. In its Opinion No. 208 (1999) to the CM on the report of the Committee of Wise Persons, the Assembly insisted on its increasingly important political role[13], notably since the beginning of the enlargement process. This recognition should, according to that Opinion, be reflected in increased budgetary and administrative powers of the Assembly. The Assembly also has regularly supported initiatives for a parliamentary dimension of major international Organisations which do not yet have one (e.g. UN, WTO…). It also serves as a kind of parliamentary forum to the OECD (see the enlarged debates on the activities of OECD).

63. It is also argued that in case the governmental body (Committee of Ministers) of an international Organisation is strengthened, also the role of any parliamentary organ existing in such an Organisation should be developed. Obviously, the activities of the Council of Europe, including the European Court of Human Rights, are increasingly concerned with the domestic matters of member states and have more frequently a direct bearing on these states and their peoples. In academic circles the Council of Europe therefore is no longer considered as a classic Intergovernmental Organisation but as an Organisation sui generis (see in particular, Michaela Wittinger, Der Europarat: Die Entwicklung seines Rechts und der europäischen Verfassungswerte, Baden-Baden, 2005, S.546). In these circumstances the Rapporteur is of the opinion that democratic legitimacy of the Council of Europe could only win if the Assembly's role was stepped up. This is the more important as currently significant efforts are undertaken to adapt parliamentary democracy in Europe to the new context of multiform European co-operation.

64. The consultant expert of the Committee on Rules of Procedure and Immunities has rightly considered that when an International Organisation is particularly committed to the safeguard and development of democracy, to the respect of the rule of law, this should also have an impact on its internal organisation. In other words, such an International Organisation should as far as possible be democratised and the existing institutional balance be adapted to new needs and general trends in the law and practice of international and, more particularly, European Organisations.

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[12] See the statement of the Chairman of the CM at the meeting of the Standing Committee in Maastricht on 25 November 2003; see also comparatively with respect to the "European Parliament as "repository" of democratic legitimacy" the above-mentioned dissertation by Eve Sariyiannidou, pp. 81 to 100 .

[13] In his reply to Written Question N° 418 the Chair person of the Committee of Ministers reaffirmed his deeply-held belief in the value of the Assembly's work for the Council of Europe as a whole, for its member States who are its beneficiaries and the process of European construction.

65. It is sometimes argued that, even in the case of international intergovernmental Organisations (IGOs) having a parliamentary assembly, it is ultimately the national parliaments which confer democratic legitimacy on the functioning of these bodies and the decisions they take. This is true in formal terms because, where IGOs are concerned, national parliaments are the place where:

- their budgets are adopted (national parliaments adopt the foreign affairs budget, which contains the contributions paid by governments to the IGOs of which they are members);

- the ratification of treaties (conventions) drawn up by IGOs is approved;

- the policies pursued by governments in the various IGOs are monitored in debates on foreign affairs, or on specific IGOs, and through discussions held in their foreign or European affairs committees;

- amendments to the core provisions of the treaties establishing IGOs are approved.

66. However, the day-to-day life and practice of IGOs should also be taken into consideration:

- with the occasional exception, in their discussions on national contributions to IGOs national parliaments do not single out the Council of Europe budget and rarely take any initiatives with regard to it; the Rapporteur has not heard of any cases in which COE budget officials were given a hearing by national parliamentary committees;

- generally, the national parliaments of IGO member states do not have a concerted attitude when it comes to launching the drafting of a convention within an IGO or closely monitoring its drafting by the relevant committee of experts; the Rapporteur does not know of any cases where the chairs or secretaries of such COE committees were given a hearing by national parliamentary committees.

67. Without playing down the important role of national parliaments, the Rapporteur wishes to emphasize the competence and experience of the Parliamentary Assembly's specialized committees in handling Council of Europe business and the fact that they are very close to the Organisation.

VI. THE NEED FOR FURTHER DEVELOPMENT - WHAT CAN BE DONE TO IMPROVE THE DISTRIBUTION OF "POWERS" BETWEEN THE COMMITTEE OF MINISTERS (CM) AND THE ASSEMBLY?

68. It results from the observations above that in particular the following problems would have to be addressed

- the current institutional arrangements within the COE do not acknowledge the increased political role of the Assembly
- the system for involving the Assembly in the elaboration, adoption and implementation of COE conventions is not satisfactory
- CM replies to Assembly recommendations and opinions are not adequate
- the budgetary powers of the Assembly are insufficient
- no co-ordination of Assembly and CM positions during Joint Committee meetings
- the problem of special COE bodies and Assembly involvement.

69. This shows that the Assembly should not only get more budgetary and administrative "powers". It should in general obtain more political weight in the Organisation and its policy and decision-making process seen as a whole.

70. A whole series of proposals to strengthen the Assembly's position is contained in Recommendation 1212 (1993) on the adoption of a revised Statute for the Council of Europe. Further proposals were submitted by the Assembly's representative on the Committee of Wise persons, in Assembly Opinion No. 208 (1999) and Resolution 1177(1999) on the report of the Wise persons. Moreover, several proposals concerning the Assembly's role regarding its own operational expenditure, the Council of Europe's programme of intergovernmental activities and budget are

contained in Assembly Opinions Nos. 256 and 257 of May 2005 and in Recommendation 1728 (2005).

i. Political matters of the Council of Europe (COE) and decision-making

a. Strengthening the Assembly's status and role

71. The name of "Parliamentary Assembly", which in practice still has not been adopted by everybody, could be recognised by the Committee of Ministers (CM) in a formal legal text such as a statutory resolution. Currently, it is based on "simple" decisions of the Committee of Ministers (1994) and the Assembly (1974).

72. Although the enlargement of the COE is almost finished it could be politically important if:

- the CM agreed to step up the value of the PACE's statutory opinions on requests for membership of the COE and officially confirmed the current practice that it would not "impose" a new member State on the Assembly against its will and would also not take sanctions (including that foreseen in Article 9 of the Statute) against a member State without the Assembly's prior approval;

- the CM also confirmed officially that with respect to the fixing of the number of seats of a new member state on the Assembly it would always base this decision on the Assembly's proposal (see e.g.Doc. 1287);

- the CM duly mentioned the necessary assent by the Assembly (see Article 41 (d) of the Statute) in its Resolutions changing the distribution of seats in the Assembly in Article 26 of the Statute (see e.g. Resolution (78) 1) and when due to the accession of new member States (or the change of the name of a member State) Article 26 has to be modified.

73. At the meeting of the Committee on Rules of Procedure and Immunities on 1 June 2006 the proposal was made to enhance the role of the Joint Committee by setting up mixed working groups for major issues (see Rule 55.1. of the Assembly's Rules of Procedure). In the past this possibility has been envisaged several times but was not followed up, with the exception of 2000 when a special problem had arisen between the two statutory organs. Already long time ago (see Doc.1286, p.4) it has been suggested to hold meetings of the Joint Committee before the CM has taken a final decision on a major question on which the CM and the Assembly hold divergent views.

74. Despite important progress achieved[14], there are still several matters where the cooperation between the Assembly and the Committee of Ministers could be improved. For example the Assembly could be:

- consulted before the conclusion of major co-operation agreements between the COE and other International Organisations and before an important convention is opened for accession by a non-member state;

- closely associated with all high-level contacts with other International Organisations and , in particular with the quadripartite meetings between the Council of Europe and the European Union ;

- consulted on the priorities of the intergovernmental work programme for the coming year (admittedly the Assembly's recommendations already constitute a major input for fixing these priorities), see Assembly Opinion N° 256 to the Com mittee of Ministers.

75. The Assembly is also not consulted before the adoption by the Committee of Ministers of major political declarations on the COE in general (e.g. those 40th and 50th anniversaries of the COE, declarations on strengthening of the protection system of the European Convention on Human Rights).

[14] A very good example for the cooperation between the CM and the Assembly was the elaboration of a draft resolution for the General Assembly of the United Nations on co-operation between the UN and the Council of Europe two years ago.

76. In case new partial agreements are concluded, or new bodies are created in the COE, whose members would have to be elected, it would be useful if the Assembly's potential respectively for co-operation or as election body was fully taken into account. The absence of more detailed provisions concerning interaction with the Assembly in the founding resolutions of some partial agreements has incited the Assembly to find bilateral arrangements with them (Venice Commission, North-South Centre).

77. In this connection, the Rapporteur should also like to refer to the problems which were raised in the first months of 2005 with respect to the COE Commissioner for Human Rights. At a certain moment it had been envisaged that Resolution (99) 50, which instituted the office of Commissioner, be amended either unilaterally by the Ministers' Deputies or after consultation of the Assembly to allow for the prolongation of the mandate of the first Commissioner. It is recalled that the Assembly had been consulted by the CM before the adoption of Resolution (99)50 (see also Assembly Recommendation 1640 (2004) and the reply of the CM, of September 2006).

Another question which has been dealt with by the Assembly for a long while is if and how it should have the possibility of bringing cases of serious violations of the ECHR by member States before the Court. Some aspects of this problem were considered in the CM's reply to Assembly Recommendation 1640 (2004).

78. The Rapporteur considers that because of a lack of general rules, there is a kind of legal grey zone concerning the Assembly's role with respect to the preparation and amendment of resolutions of the Committee of Ministers creating new Council of Europe bodies. This was also the case with respect to the Assembly's participation in the following initiatives launched at the Third Summit:

- Forum for the Future of Democracy (in its report on the follow-up to the Third Summit the Assembly proposed that a working group be set up with the task of determining modalities of functioning of the Forum and to associate the Assembly's representatives with the work of group);

- the creation of a high-level task force to review the Council of Europe's social cohesion strategy;

- the establishment of a Group of Wise Persons to consider the long-term effectiveness of the control mechanism of the European Court of Human Rights.

79. Admittedly, in the meantime generally satisfactory arrangements were found concerning the Assembly's involvement. However, the Assembly would wish to play a more important role with respect to the Forum for the Future of Democracy. This is the more justified as few persons would be better qualified to discuss parliamentary democracy as members of parliament themselves. In the past Assembly participation in similar new COE bodies was mainly decided on an ad hoc or precedent basis by the Committee of Ministers. A positive development is the invitation by the Committee of Ministers to the Assembly to be represented in the CM's Rapporteur Group in which the draft memorandum of understanding with the EU is negotiated. The Assembly has also asked to be formally consulted on the final draft memorandum [see Rec. 1743 (2006)].

b. Reform of the decision-making process

80. With respect to the decision-making process in the Council of Europe in general and with respect to legal instruments in particular, the Rapporteur considers that:

- the status of the Assembly's statutory opinions to the CM could be upgraded if the CM accepted to inform the Assembly on the action taken on them and explain why the Assembly's proposals had not been approved;

- in case of diverging opinions between the Committee of Ministers and the Assembly on the latter's proposals for amendments to a draft convention (or on other important matters on which the Assembly has been consulted), a formal conciliation procedure could be introduced between the Committee of Ministers and the Assembly. This could be a working party of the Joint Committee, as has already been proposed in paragraph 48 of the afore-mentioned report of the Committee of Wise Persons.

81. During an exchange of views of the Committee on Rules of Procedure and Immunities with a member of the Committee of Ministers on 1 June 2006 the problem of finalising draft conventions in time for dates of their official opening of signature, sometimes fixed months in advance, was highlighted. The proposal was then discussed to better associate the Assembly and its committees with the work in intergovernmental expert committees which prepared the draft conventions. In the past it has happened sometimes that Assembly committees were consulted in advance on draft conventions (e.g. on the preliminary draft Protocol No.14 to the European Convention on Human Rights). However concerning draft Protocol No.14 an additional consultation of the Assembly as a whole was then considered to be indispensable (see Opinion No. 251 (2004) par.16). This issue and the best way to handle it, deserves further consideration by the Assembly committees concerned.

82. In this connection the Rapporteur should like to mention the criticism voiced by the Assembly in its Recommendation 1695 (2005) concerning the rejection of two-thirds of the amendments proposed by the Assembly to the draft Convention on action against trafficking in human beings. Tables analysing in how far amendment proposals by the Assembly on draft Council of Europe conventions have been accepted by the CM are to be found in the report of Mr Cekuolis on transparency of the work of the Committee of Ministers (Doc.10736). They show that the current mechanisms for consulting the Assembly on draft conventions are not satisfactory. Furthermore, the explanatory reports to COE Conventions should give more information on the Assembly's contribution to these instruments. Another problem is that there is no rule or guideline fixing the minimum time the Assembly should have for preparing an opinion on a draft COE legal instrument.

83. These and other matters could be settled in the form of an agreement between the CM and the Assembly.

84. It should also be considered how the Assembly's potential could in general be taken better into account in conventions which are related to the functioning of the Council of Europe[15] and which provide new means for action (e.g. Protocol No.14 to the European Convention on Human Rights, Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment). If one has a look on the 200 Conventions, Agreements and Protocols only some of them foresee a specific role for the Assembly , such as electing persons (e.g. judges) proposing candidates (for the committee for the prevention of torture). If the information of the Rapporteur is correct, only in one case (European Social Charter of 1961) the Assembly is mentioned in the control mechanism for the monitoring of a convention. This is insufficient and is not compatible with the Assembly's role in the whole Organisation.

85. Although the decision-making process at the EU cannot be compared with that of the COE, it is appropriate to recall that the co-operation between the EP and the European Commission for the preparation of EU legal acts is the subject of a very substantial "inter-institutional agreement" of December 2003, revised in May 2005. This agreement mentions *inter alia* democratic legitimacy as one of the general principles to be borne in mind for the EU's legal acts. It would be most useful if at the beginning of a new year the Assembly would be informed by means of a short communication on the number and subjects of Conventions and recommendations to member States to be elaborated during that year. It results from an information document of 31 August 2006, that 8 draft Conventions and Protocols and about 32 draft recommendations to member states are under preparation in the COE.

86. Recently, another important matter has arisen with the preparation of legal instruments. The meeting of the Joint Committee on 28 April 2005 discussed three draft Council of Europe conventions on trafficking in human beings, on laundering, search, seizure and confiscation of the proceeds from crime and the financing of terrorism as well as on the prevention of terrorism, which were adopted by the Ministers' Deputies only some days later. During that meeting, no text of the draft conventions was made available to Assembly members. Despite several efforts the draft documents for the Third Council of Europe Summit were not made available for Assembly members when this matter was discussed in the Joint Committee. This has as a practical consequence that Assembly members of the Joint Committee are less well informed than the CM members. To solve

[15] For instance the European Court of Human Rights may not receive applications from the Assembly; the Assembly is also not mentioned in Article 46 of the ECHR (after its amendment by Protocol N°14).

these problems, the President of the Assembly has proposed that ways should be found to make, under certain conditions, confidential information available to Assembly members. Special procedures to this end exist in other Organisations. The above-mentioned report by Mr Cekuolis (Doc.10736) proposed that information on sensitive matters could be dealt with in regular meetings between the CM's Bureau and the Assembly's ad hoc Committee of Chairpersons of Political Groups (Presidential Committee).

87. Unlike other European Assemblies (e.g. the Nordic Council) the Parliamentary Assembly receives no report from the Committee of Ministers on the progress of European cooperation and on cooperation between the member states of the Council of Europe on international issues. The Assembly only rarely submits to the Committee of Ministers proposals for the agenda of ministerial sessions. Furthermore, a provision of statutory Resolution (51) 30 according to which the Joint Committee may make proposals for the draft agenda of the sessions of the Committee of Ministers and of the Parliamentary Assembly is not applied. The Rapporteur should finally like to observe that debates on matters referred to the Assembly for opinion by the Committee of Ministers constitute less than 10 % of the texts adopted by the Assembly. More use could also be made of Rules 50.1 and 51.1 of the Assembly's Rules of Procedure which allows the Committee of Ministers to request Assembly and Standing Committee debates under urgent procedure.

88. Furthermore, the Assembly could allow a certain number of member States to submit proposals for issues to be debated by the Assembly.

c. Possibilities for giving the Assembly the right to adopt conventions

89. It has been proposed that the Assembly should be able to adopt COE conventions, similar to the national parliaments which adopt national legislation. Currently, the CM has under Articles 13 and 15 of the COE Statute and complementary texts the sole right to adopt conventions and to decide on their opening for signature. Article 22 of the Statute which is the fundamental provision concerning the Assembly would also form an obstacle for granting to the Assembly the right to adopt conventions. Articles 15 and 22 of the Statute may only be changed by a unanimous decision of the CM and ratification by member States. Furthermore, according to the two Vienna conventions on the law of treaties the governments have the power to conclude (and adopt) conventions.

90. It could be envisaged in principle that the Committee of Ministers delegates on an ad hoc basis the right to the Assembly to adopt conventions.

91. A precedent exists concerning the delegation by the CM to a Conference of Specialised Ministers to adopt a legal instrument. In Resolution (89) 40 the Foreign Ministers instructed the Ministers' Deputies to examine pragmatically and flexibly the possibility of delegating the CM's powers on an ad hoc basis to this or that Conferences of Specialised Ministers, particularly with regard to the choice of priorities for the intergovernmental activities of the COE. In 1990 the Committee of Ministers delegated to the 6the European Ministerial Conference on the Environment the adoption of a draft recommendation to member States on the European conservation strategy. It is to be noted that such delegation has only been foreseen on an ad hoc basis and has only been applied on one occasion in 17 years for a draft recommendation to member states. This would not meet with the intentions of the movers of the proposal to grant the Assembly the right to adopt conventions.

92. In this connection it is recalled that the Assembly has in the past used the possibility of appending a draft convention to a recommendation addressed to the Committee of Ministers. Furthermore, it has prepared draft model laws, appended them to recommendations or resolutions and sent them also to the national parliaments of member States.

93. The Assembly has already twice proposed (see mainly Recommendation 1361 (1998)) to the CM to recognise the principle of co-decision with the Assembly for the adoption of conventions. This proposal has been rejected by the CM. The rapporteur should rather like to propose the introduction of a real cooperation procedure. He recalls in this connection that many years before co-decision with the EP was introduced at EU level, a cooperation procedure (including a conciliatory system) with the EP was applied.

d. The Assembly and Article 13 of the COE Statute

94. Another proposal is to know in how far the principle according to which the CM acts on behalf of the COE (Art.13 of the Statute) can be opened up to the advantage of the Assembly. This provision gives the Committee of Ministers a powerful position by stipulating that it acts on behalf of he Council of Europe. It would be difficult to modify this provision as this would necessitate ratification by member States. Furthermore, the preparatory work for the COE Statute and the history of the Organisation shows that no Government wanted an Assembly with executive/legislative powers. It is to be noted however that Article 13 of the Statute has not hindered the Assembly to create special guest status, to develop the political conditions for accession to the COE and to introduce the monitoring of obligations and commitments made by member States. In addition, despite of Article 13, the Assembly managed to impose a change of its name. When this proposal was made in the Assembly, on the occasion of the 25th anniversary of the COE in May 1974 many other proposals were made to strengthen the role of the Assembly and one member claimed legislative powers for the Assembly. Other interesting proposals concerning the Assembly's role and functions are also contained in the report by Mr Hofer on direct elections to the EP and the role of the Parliamentary Assembly of the COE (Resolution 693 (1979) and in an article by Mr Adinolfi on "Pouvoirs limités mais influence réelle d'un organe consultatif: L'Assemblée Parlementaire du Conseil de l'Europe" (in : Annuaire européen Volume XXVII, pp.25 to 54.

ii. Budget of the Council of Europe and budgetary appropriations of the Assembly

95. The Assembly adopts statutory opinions to the Committee of Ministers on both its own budgetary appropriations and on the draft ordinary budget of the Council of Europe for the following year. On the basis of the Secretary General's proposals for priorities for the following year and their budgetary implications, including the ceiling, a consultation meeting is held between representatives of the Ministers' Deputies and the Assembly (usually at the April part-session) before the Deputies take a decision on these matters.

a. Budgetary appropriations of the Assembly

96. The Rapporteur should like to underline that differently from the OSCE and WEU Assemblies the Parliamentary Assembly has no budget of its own , but "operational expenditure" (or just "expenditure"). This question could be examined in greater detail.

97. In its Recommendation 1728 (2005) the Assembly has proposed that the Statute of the Council of Europe be amended as follows, to add after Article 38 , paragraph c, a new paragraph worded as follows: "*The Assembly shall fix the amount of its expenditure, the annual increment being determined by agreement between the Committee of Ministers and the Assembly*."

98. Since some years the Assembly does not receive any more detailed replies to its statutory opinions regarding the Assembly's expenditure for the forthcoming year.

99. In this connection the rapporteur recalls that at a time when the European Parliament was not yet directly elected, in 1970, the Council of the EC/EU agreed that within certain conditions (e.g. respect of the agreed growth rate of the EC/EU's budget) it would not amend the estimates submitted by the EP for its own operational expenditure.

b. Council of Europe budget

100. Concerning the Assembly's consultation on the draft ordinary budget of the Council of Europe as a whole, a problem is raised by the fact that the Assembly under the current budgetary timetable adopts its opinion to the Committee of Ministers several months before the detailed draft becomes available in the Autumn. The Assembly's Committee on Economic Affairs and Development has noted that the Assembly:

- no longer considers the reports on the last closed financial years of the Council of Europe,
- does not receive officially the reports of the Council of Europe's auditors,
- is not associated when the Committee of Ministers considers revising the scales of the budgetary contributions of member States,

- is not involved in the evaluation of the validity and outcome of the Council's various activities and does not make any recommendations for improving, rectifying, redirecting or even discarding some of them, for ensuring that the programme meets the needs and expectations of member states and is in keeping with the aims of the Organisation.

101. The Committee considers that the Assembly should also proceed with evaluating its own activities and establish the function of parliamentary "questeurs" in charge of controlling the Assembly's expenditure [see also Recommendation 1728 (2005)].

102. The current budgetary system of the COE is not satisfactory. It does not allow the Assembly to influence either the overall amount or the implementation of the budget of the Council of Europe. This is incompatible with the Assembly's status as the Council of Europe's parliamentary and political body. Therefore, the Assembly has rightly proposed in its Recommendation 1728 (2005) that the Statute be amended by inserting a new paragraph after Article 38 c, worded as follows:

"*The Assembly shall be consulted by the Committee of Ministers before the latter fixes the amount of the overall budget of the COE for the coming year. This consultation shall take place at the earliest possible stage in order to allow the Assembly to take it into account in its opinion on the budget*."

The Assembly has also invited the Committee of Ministers to consult it if and when a member state has not made its due contribution to the budget for a period in excess of six months.

103. The Rapporteur proposes that these questions should be considered with the Secretary General of the Council of Europe and the Committee of Ministers with the aim of reaching an agreement between them and the Assembly.

iii. Secretariat of the Assembly

104. It is on the basis of Articles 10, 36 and 37 of the Statute of the Council of Europe that the principle of the corporate unity ("unicité") of the Secretariat of the Council of Europe has been elaborated. According to this principle the Secretary General of the Council of Europe is responsible for the application of the staff regulations to all staff of the Council of Europe. Details on this issue were given during the exchange of views between the Committee on Rules of Procedure and Immunities and representatives of the Staff Committee of the COE on 15 March 2006.

105. However, it has also to be taken into account that over the years specific secretariats were established in the Council of Europe: the Secretariat of the Assembly, that of the Committee of Ministers, the Secretariats of Partial Agreements, the Office of the Human Rights Commissioner.

106. From the Organisation's earliest years the question of the role and the powers of the Secretary General of the Assembly within the Secretariat of the Council of Europe was a matter of concern to both the Committee of Ministers and the Assembly. This is also witnessed by the fact that between 1949 and 1955 three statutory resolutions were adopted by the Committee of Ministers concerning the Secretary General of the Assembly (Resolutions (49) 20, (51) 30 D and (55) 29). The Assembly has in particular been authorised since 1949 to elect its Secretary General. Resolution (53) 38 of the Committee of Ministers also states that "within such limits as he may define, the Secretary General of the Council of Europe shall delegate to the Secretary General of the Assembly the duties of "ordonnateur" empowered to incur financial commitments in respect of appropriations figuring in the Vote of the Budget relating to the operation of the Assembly and its committees". This "delegation" now is operational for more then fifty years.

107. Another specific provision relating to the Assembly is Article 37 (b), 2nd sentence of the statute. According to it the Secretary General shall, subject to Article 38 (d) provide such secretariat and other assistance as the Assembly may require.

108. The Assembly has clarified the functions and the accountability of its Secretary General in the Rules of Procedure; Rule 64 stipulates:

64.1. The Secretariat of the Parliamentary Assembly shall be run by the Secretary General of the Assembly who is elected by it and shall be assisted by the administrative staff required for its work.

64.2. The Secretary General of the Assembly shall perform his/her duties under the authority of the Assembly and shall be responsible and accountable to its Bureau."

109. The Assembly has thus established that responsibility lies with its Secretary General whom it elects and who is accountable to the Bureau for the performance of his duties.

110. This has moreover been borne out by practice, since for many years the Secretary General of the Assembly has been carrying out his duties independently under the direct responsibility of the Bureau of the Assembly. With regard to staff in the Assembly, the Secretary General of the Council of Europe and the Secretary General of the Assembly consult each other on recruitment, transfer and promotion of staff members, in accordance with the regulatory procedures. In the case of appointments to the highest-ranking posts[16] in the Secretariat of the Assembly the regulations on appointments provide that the Secretary General of the Council of Europe shall inform the Bureau of the Assembly of his/her intentions at an informal exchange of views, in which the Secretary General of the Assembly participates.

VII. THE COMMITTEE OF MINISTERS (CM)

i. Composition, functioning and secretariat of the CM

a. General

111. The Committee of Ministers is the Council of Europe's decision-making body. It comprises the Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives in Strasbourg. It is both a governmental body, where national approaches to problems facing European society can be discussed on an equal footing, and a collective forum, where Europe-wide responses to such challenges are formulated. In collaboration with the Parliamentary Assembly, it is the guardian of the Council's fundamental values, and monitors member states' compliance with their undertakings.

b. Composition of the CM and meetings

112. At its ministerial level the Ministers of Foreign Affairs of each member State sit on the CM. In May 1951 the Committee of Ministers invited each member State to appoint a Permanent Representative who would be in constant touch with the organisation. All Permanent Representatives reside in Strasbourg. They are usually senior diplomats with Ambassadorial rank, occasionally chargés d'affaires. In 1952 the Committee of Ministers decided that each Minister could appoint a Deputy. The Deputies have the same decision-making powers as the Ministers. A Deputy is usually also the Permanent Representative of the member State to the Council of Europe.

113. The CM meets at ministerial level once a year, usually in May. The meetings, known as "sessions", are normally held in Strasbourg. While the greater part of each session is usually devoted to political dialogue, the Ministers may discuss all matters of mutual interest with the exception of national defense. Although the records of the sessions are confidential, a final Communiqué and Conclusions by the Chair are issued at the end of each meeting. The Ministers may also issue one or more declarations.

c. Operation of the CM

Chairmanship and Bureau of the Ministers' Deputies

[16] For the procedure concerning appointments to A6 and A7 posts in the assembly between 1963 and 1994 see AS/Pro (2006) 11 rev.); concerning major administrative (staff) reforms in the COE it may be recalled that in the past the Assembly has occasionally regretted a lack of consultation (e.g. Bureau meeting of 23 March 1973 concerning the "Management Survey" of the COE)

114. The chairmanship of the Committee is rotated on a six-monthly basis, changing with each session in the English alphabetical order of member States. A Bureau was set up in 1975 to assist the Deputies. The Bureau exercises management and protocol functions, including the preparation of Committee of Ministers' meetings. It is also used as a discussion forum to coordinate action under successive chairmanships, particularly concerning the drawing up and implementation of their programmes. The specific responsibility for ensuring continuity between successive chairmanships and programmes is entrusted to the Vice-Chairman of the Deputies, in co-operation with the Secretariat of the Committee of Ministers.

Rapporteurs, Rapporteur Groups and Working Parties

115. The system of Rapporteur groups was introduced by the Deputies in 1985. The groups help to prepare the meetings of the Deputies. They are composed of Deputies, who are often represented by substitutes, and assisted by members of the Secretariat. Rapporteur groups were reorganised in 1999 to reflect the new organisational chart (one group by directorate), with additional Rapporteurs nominated for specific activities.

Rules of Procedure of the CM

116. Sessions and meetings of the Ministers and the Deputies are conducted according to their Rules of Procedure which stem from respectively 1964 and 1971 (with a minor change in June 2005).

d. Secretariat of the CM and CM functions concerning staff appointments

117. The Secretariat of the Committee of Ministers (SECCM) comprises some 28 members of the General Secretariat. It is headed by the "Secretary to the Committee of Ministers", who has the rank of a Director General. The SECCM services the meetings of the Ministers and Ministers' Deputies. The appointment of the Secretary to the Committee of Ministers is subject to the approval of the CM. Under the Regulations on staff appointments the SG of the COE makes an appointment of COE staff at the highest levels (A6 and A7) after an informal exchange of views with the CM during which he makes known his intentions and the reasons for his choice.

118. It is to be noted that also the appointment of the internal auditor of the COE is subject to the approval of the CM.

ii. Role of the CM

119. The work and activities of the Committee of Ministers include:

- political dialogue
- interacting with the Parliamentary Assembly
- interacting with the Congress of Local and Regional Authorities of the Council of Europe
- interacting with the Conference of INGOs of the COE
- inviting new member States to join the Organisation
- monitoring respect of commitments by member states
- concluding Conventions and agreements
- adopting recommendations to member States.
- adopting the budget and the intergovernmental programme of activities
- implementing cooperation and assistance programmes
- supervising the execution of judgments of the European Court of Human Rights

a. Interaction with the Parliamentary Assembly

120. Relations between the Committee of Ministers and the Parliamentary Assembly take several forms:

- the Statutory report of the CM and its presentation to the Assembly by the CM Chairman
- requests for the Assembly's opinion

- follow-up to recommendations of the Assembly
- replies to oral and written questions by members of the Assembly
- the Joint Committee.

b. Interaction with the Congress

121. The Chairmanship of the CM presents a statement on the CM's activities at the May session of the Congress, followed by questions for oral answer. The President of the Congress holds regular exchanges of views with the Ministers' Deputies. Representatives of the Congress are more regularly invited to relevant meetings of the rapporteur and other subsidiary groups of the CM. The Congress is consulted by the CM on matters within its remit.

c. Interaction with the Conference of INGOs

122. Relations between the CM and the Conference of INGOs take the form of regular exchanges of opinion between the Ministers' Deputies and the President of the INGO Conference. Occasionally the Chairperson of the Ministers 'Deputies participates in meetings of the INGO Conference.

d. Inviting new member States to join the Organisation

123. The Committee of Ministers has the authority to invite European States to become members of the Council of Europe (Articles 4, 5 and 6 of the Statute). It may also suspend or terminate membership. The process of admission begins when the Committee of Ministers, having received an official application for membership, consults the Parliamentary Assembly (under Statutory Resolution (51) 30). If the Committee decides that a State can be admitted, it adopts a resolution inviting that State to become a member. The invitation specifies the number of seats that the State will have in the Assembly as well as its contribution to the budget (Article 6 of the Statute). Recently, the invitations have included a number of conditions concerning the implementation of democratic reforms in the applicant State.

e. Concluding Conventions and Agreements, adopting recommendations to member States

124. Article 15.a. of the Statute states that the Committee of Ministers "shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions and agreements". 200 treaties have now been opened for signature.

125. Under Article 20 of the Statute adoption of a treaty requires a two-thirds majority of the representatives casting a vote and a majority of those entitled to vote. Conventions are only binding on those States which ratify them.

126. Article 15.b. of the Statute provides for the Committee of Ministers to make recommendations to member states on matters for which the Committee has agreed "a common policy". Under Article 20 of the Statute, adoption of a recommendation requires a unanimous vote of all representatives present and a majority of those entitled to vote. However, at their 519th bis meeting (November 1994) the Ministers' Deputies decided to make their voting procedure more flexible and made a "Gentleman's agreement" not to apply the unanimity rule to recommendations. Recommendations are not legally binding on member States. Since 1993 the Committee has also adopted recommendations in accordance with its role in the implementation of the European Social Charter (Article 29 of the Social Charter).

f. Adopting the budget and the programme of activities

127. Under Article 38.c. of the Statute, the Secretary General is required to prepare a draft budget each year and submit it to the Committee of Ministers for adoption.

128. The draft budget is presented to the Deputies in November of each year. It is adopted, along with the Programme of Activities, in the form of resolutions. Under Article 29 of the Financial Regulations the Deputies are assisted by a Budget Committee composed of eleven independent experts, appointed by the Committee of Ministers acting on proposals from member governments.

129. Since 1966 the Council of Europe has organised, planned and budgeted its activities according to an annual work programme, published as the "Programme of Activities". The Deputies adopt the programme towards the end of each year and are entrusted with overseeing its implementation. Article 17 of the Statute authorizes the Committee of Ministers to set up "advisory or technical committees". This has led to the creation of some 30 steering committees and a large number (about 70 as at 1 September 2006) of ad hoc expert committees and convention committees, which assist the Committee of Ministers in the implementation of the programme of activities.

g. Supervising the execution of judgments of the European Court of Human Rights

130. Since 1989 one of the then two monthly meetings held at Deputies' level was devoted to the functions incumbent on the CM under the European Convention on Human Rights In accordance with Article 46 of the Convention as amended by Protocol No. 11 which entered into force in November 1998 the Committee of Ministers ensures that member states comply with the judgments of the European Court of Human Rights. The Committee completes each case by adopting a final resolution. In some cases, interim resolutions may prove appropriate. Both kinds of Resolutions are public.

h. CM and Conferences of Specialized Ministers

131. The principles governing relations between the COE and the Conferences are set out in Resolution (71) 44 of the CM. The part played by the CM regarding the Organisation's links with the conferences regards establishing of particular working relations with a conference, preparing conferences, participation by non-member States and international Organisations ,discussing the draft agenda and follow-up to conferences.

iii. Observations by the Rapporteur

132. Since the presentation of the report by the Committee of Wise Persons (1998) (see paragraphs 37 to 39 above) the Committee of Ministers has taken a series of decisions to reform the working methods, structures and procedures of the COE. They were reproduced and commented in a document which is entitled "Stock-taking of Council of Europe reform efforts: 1999 - 2005" and was prepared by the Directorate of Strategic Planning. Some of the main reforms are listed below:

- in 2003 the Committee of Ministers (CM) agreed on a new system for Sessions, providing for in principle- one ministerial session; one of the remaining problems is the participation at ministerial sessions which is widely considered to be dependent on the agenda; since 2000 the President of the Assembly is invited to participate in the ministerial sessions;

- since May 2001 the Bureau of the CM has consisted of six members, the Chairman, the two previous chairmen and the three future chairmen; no decision has yet been taken on proposals concerning the role of the Bureau as a discussion forum to coordinate action under successive chairmanships, particularly concerning programming aspects; any upgrading of the Bureau's role would be of interest for the Assembly; currently there is no equivalent at CM level to the Assembly's Presidential Committee; in 1999 draft terms of reference for a new Joint Working party CM-Assembly under the aegis of the Joint Committee were prepared, however no meeting took place yet;

- since 1999 the Assembly is consulted on all draft conventions and protocols with the exception of a small number of treaties of an entirely technical nature (see par. 32 above).

Concerning the decision-making procedure in the CM, the above-mentioned document says that a greater use of majority decisions in the CM could be envisaged.

iv. Proposals

133. In the last years the Assembly has adopted several texts which submitted proposals either for a more dynamic and more political CM or for closer relations between the CM and the Assembly. In the light of these initiatives and newer developments the following proposals are submitted:

- the governments should make greater use of the COE and the CM as a place for dialogue between EU and Non-EU members;
- the CM should give more political responsibility to its chairman , also in crisis situations;
- the Foreign Ministers should involve themselves more in the work of the CM and the COE ;
- the role of the COE as a think-tank to meet the challenges of the 21st century should be strengthened;
- the CM should increase the transparency of the COE, both internally and externally;
- the role of the Joint Committee should be enhanced, particularly its capacity for better coordination of the positions of the CM and the Assembly.

VIII. INSTITUTIONAL RELATIONS BETWEEN THE EUROPEAN COURT OF HUMAN RIGHTS ("THE COURT") AND THE COUNCIL OF EUROPE

i. General

134. The defence and development of human rights and the activities of the Court are the major Council of Europe priorities. This was confirmed in the texts adopted by the 3rd Summit of the Council of Europe in May 2005.

135. The Court, which was instituted by the European Convention on Human Rights of 4 November 1950, has been operational since 1959, It is not a *"statutory*" organ of the Council of Europe which was already set up on 5 May 1949[17] and it is not mentioned in the Council's Statute at all as the Statute has never been updated concerning the organs and institutions of the Organisation. However, if one takes a more functional approach defining the concept of an *"organ"* of an international organisation to mean any institution or body of persons through which the organisation acts, it is obvious that the European Court could be easily subsumed under this definition. Although the European Convention on Human Rights allows for no ambiguity about the judicial character of the Court's status and mission, no text was yet adopted spelling out what this means in terms of the COE's administrative and institutional organisation.

136. The Court is an international fully judicial body of regional character. It is the largest and busiest international Court. The European Convention on Human Rights (ECHR), an international treaty, contains relatively few provisions regarding the organisation of the Court. This technique is illustrative of the will of the contracting states to leave great flexibility to the Court in settling its status. This has mainly been done by the adoption by the Court of its rules of procedure.

137. During his exchange of views with the Committee on Rules of Procedure and Immunities on 4 October 2005 the President of the Court said that the adaptation of the COE's institutional arrangements should include the adoption of a written text clarifying the Court's position within the Organisation and resolving three existing anomalies. These were the Court's responsibility for and supervisory authority over its own staff, the Court's competence in budgetary matters and the principles that should apply in respect of the Judges' social protection and pensions.

138. A main concern in this connection is that the Court despite its increasing importance in Europe is administratively subordinated to the political and executive authorities of the COE. It cannot be excluded that this may have consequences on the Court's internal organisation particularly with respect to the staff and budget.

ii. The status of the European Court of Human Rights ("the Court")

139. The ECHR does not provide for a separate legal personality of the Court. As there is no separate agreement on the Court's seat it is covered by the Agreement relating to the seat of the Council of Europe of 2 September 1949. Several provisions of the ECHR refer explicitly to the Council of Europe[18]. Furthermore, the Council of Europe provides the Court's accommodation as well

[17] The efforts of Ireland and France to integrate a Human Rights catalogue into the Council of Europe Statute could not be accomplished.

[18] Article 22 (the election of the judges), Article 46 paragraph 2 (the execution of judgments), Article 50 (the expenditure on the Court), Article 51 (privileges and immunities of the judges) and Article 52 (Secretary

as the Registry staff members, who are staff members of the Council of Europe. That is why the Administrative Tribunal of the Council of Europe has exercised its jurisdiction with respect to members of the Court's registry[19].

140. When Protocol No. 11 to the ECHR restructuring the Convention's control mechanism came into force, the Committee of Ministers adopted Resolution (97) 9 on the status and conditions of service of judges of the European Court of Human Rights. It was adopted on the basis of Article 16 of the Statute of the Council of Europe, which allows the Committee of Ministers to *"decide with binding effect all matters relating to the internal organisation and arrangements of the Council of Europe"* (emphasis added)[20]. In December 2004 the Committee of Ministers adopted Resolution (2004) 50 on the status and conditions of service of judges of the European Court of Human Rights which repealed and replaced Resolution (97)9.

141. The Court has a close institutional and legal relationship with and value-oriented link to the Council of Europe. It forms an essential part of the Council's legal system and cannot be seen in isolation from it, for the first condition for membership of the Council of Europe is signature and ratification of the ECHR and its additional protocols.

a. Current situation

142. The opinions about the status of the Court range from it being an international organisation with an own legal personality[21], over being a common organ of the contracting parties to the ECHR to being a *"part"* or even an organ[22] of the Council of Europe. These different approaches and existing uncertainties show the necessity of an explicit incorporation of the Court into the Council of Europe or a clear definition of the Court as a separate legal entity besides the Council, as it has been proposed in academic circles.

143. In particular since 1998 the Court's Registry has assumed an increasing degree of administrative autonomy for reasons relating both to requirements of judicial independence and operational efficiency.

144. Nevertheless, the Court undoubtedly remains part of the Council of Europe. The Committee of Wise Persons reporting to the C**o**mmittee of Ministers in 1998 correctly stated that in reality *"the Council today has a three-pillar structure reflecting the governmental, parliamentary and judicial branches."* [23]

145. From a historical point of view it is interesting to note that already the draft European Convention on Human Rights presented by the European Movement to the Council of Europe in July 1949 refers in its title to the Council: *"The States Parties to this convention, members of the Council of Europe"*. The appendix to the draft contains a draft statute of the Court composed of 63 Articles[24]. Also the drafters of the European Convention on Human Rights started from the premise that the

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General's right to issue inquiries). Moreover, Article 54 of the ECHR provides that the Convention does not affect the competences of the Committee of Ministers according to the Statute of the Council of Europe.

[19] Decision of 25.11.1994 concerning Appeal 191/1994; decision of 27.03.2000 concerning Appeal 255/1999.

[20] It is also to be noted that in its submissions to the United States District Court concerning the Morgan case, the Council of Europe thus referred consistently to the main defendant as *"the Council of Europe* including the European Court of Human Rights" (Case 02-CV-891 (CBA) (LB), United States District Court, Eastern District of New York, Report and Recommendation by the Hon. Lois Bloom, United States Magistrate Judge; Order of 31.12.2002 (not published)).

[21] Cf. Georg Ress, Die Organisationsstruktur internationaler Gerichte, insbesondere des neuen Europäischen Gerichtshofes für Menschenrechte, in: Liber Amicorum, Prof. Seidl-Hohenveldern, 541, 546 f., 553, 573.

[22] J. Velu / R. Ergec*, "La Convention européenne des droits de l'homme",* Bruxelles, Bruylant; 1990, pp. 702-703.

[23] 'Building Greater Europe without dividing lines', Report of the Committee of Wise Persons to the Committee of Ministers, 1998, I.2 Nr 22.

[24] The draft establishes several links with the Council of Europe concerning the election of judges; the fixing of the Court's seat by the Council; the fixing of salaries, allowances and compensation of judges, the retirement scheme for judges and the registrar, the refunding of their travel expenses, by those members of the Council's Committee of Ministers who represent the contracting parties. The draft statute also stipulates that the Court's expenses should be borne by the States parties to the ECHR.

Court would be created within the institutional framework of the Council of Europe: *"If a European Court is set up, this Court should be an organ of the Council of Europe whose member States should participate in the election of its members"* (Report of the Conference of Senior Officials of 19.06.1950, Doc. CM/Working Party 4 (50) 19 rev.; A 1431, Collected Edition of the *"Travaux Préparatoires"*, vol. IV (The Hague: Nijhoff 1977), p. 266).

b. Proposals

146. The Rapporteur proposes that the Assembly invites the Committee of Ministers to instruct the Committee of Wise Persons on the effectiveness of the ECHR's control system, set up by the Third COE Summit, to examine the Court's status in the institutional system of the COE.

147. In this connection it is recalled that the report of a working group "strategy of Switzerland in the Council of Europe" (Bern, February 2005) also suggests to establish a status for the European Court of Human Rights.

iii. The budgetary resources of the European Court of Human Rights

a. The current situation

148. In accordance with Article 50 of the ECHR, the expenditure of the Court is to be borne by the Council of Europe's general budget. The Court's budget constitutes a particular vote of the Council of Europe's ordinary budget. In practice, the Court prepares and approves a draft budget for the next financial year on the basis of proposals from its Registry. The draft is then forwarded to the Secretary General of the Council of Europe, for inclusion in the draft budget which he submits annually to the Committee of Ministers (cf. Article 38.c. of the Statute).[25]

b. Possible avenues for reform and proposals

149**.** It has been proposed that the Court should prepare its own draft budget and submit it directly to the Committee of Ministers for approval as a separate or special budget[26]. A separate budget would according to that approach, in particular lead to more flexibility concerning the – due to uncontrollable inflow of applications – unpredictable resources.

150. In this connection it is increasingly considered that budgetary resources allocated to some other COE activities and services are threatened to be absorbed by the ECtHR. This argument plays a major role in the preparation of the COE's general budget for 2007 (see for instance Assembly Doc. 10918 (2006).

151. An Evaluation Group to the Committee of Ministers on the Court has concluded in its report of 2001 that at least increases in the budget of the Court should be treated separately and without regard to the bases applied in fixing the Council of Europe's ordinary budget[27].

152. During his exchange of views with the Committee on Rules of Procedure and Immunities on 4 October 2005 the President of the European Court of Human Rights said that the Court's role concerning budgetary matters involved questions of principle and of practical effectiveness. In terms of principle no other authority than the Court should make an assessment of the need for appropriations relating to the conduct of its judicial business. It was obvious that the Court was accountable to the Committee for Ministers for its expenditure and had to make its own case on its merits to the Governments in respect of its budgetary needs. With regard to the practical aspects it was more efficient and transparent for the Court to present its own budget, with the assistance of the COE administration if necessary. The Rapporteur suggests that the Assembly invites the Committee

[25] It is to be noted that when adopting Resolution (97) 9 on the status and conditions of service of judges to the European Court of Human Rights, the Committee of Ministers decided "*that the appropriations for the functioning of the Court (including the judges' salaries) shall form an integral part of the budget of the Council of Europe under a clearly identified vote"*.

[26] Norbert Paul Engel, EuGRZ 2003, 122, 133.

[27] See in this connection for a different approach, Maud de Boer-Buquicchio, EuGRZ 2003, 561, 562.

of Ministers to instruct the Group of Wise Persons created by the Third COE Summit to examine the budgetary system of the Court.

iv The staff of the Court

a. The current situation

153. According to Rule 18 paragraph 3 of the Rules of Procedure of the Court in their present version (March 2005) stipulates that "The officials of the Registry including the legal secretaries but not the Registrar and the Deputy Registrar shall be appointed by the Secretary General of the Council of Europe with the agreement of the President of the Court or of the Registrar acting on the President's instructions". The Registrar and the Deputy Registrar are elected by the Court.

154. Article 25 of the ECHR provides that *"The Court shall have a Registry, the functions of which shall be laid down in the rules of the Court".* The Court has argued that the appointment of staff is to be understood as an integral part of the organisation of the Registry. Moreover, the Court alone is competent to interpret the meaning of Article 25 of the Convention. The Court has considered that, as a matter of judicial independence and operational efficiency, it must have the final say in staff matters, including appointment and promotion. However, on this issue different views are expressed at the level of the Council of Europe.

155. Proponents of the contrary view generally refer to paragraph 66 of the Explanatory Report to Protocol No. 11 to the ECHR[28] which in their opinion shows that the drafters of Protocol No. 11 intended that the Secretary General should have authority over Registry staff. That said, views differ as to the legal authority the provisions of the explanatory report should be given.

156. According to Article 37.b. of the Statute of the Council of Europe *"the Secretary General is responsible to the Committee of Ministers for the work of the Secretariat"*. Some consider that this may constitute a basis for the Secretary General's authority over Registry staff. On the other hand it is argued that since the Court and the Registry did not exist in 1949 when the Statute of the Council of Europe was elaborated, Article 37.b. of the Statute of the Council of Europe cannot provide such a basis and that the ECHR takes precedence as a subsequent treaty, whose Article 25 confers a specific rule-making power to the Court[29].

157. The fact that the Secretary General of the Council of Europe appoints the staff of the Court's Registry may give rise to several concerns. It is mainly considered that if staff is appointed by persons outside of the Court, there may be both the appearance and the reality of outside influence.[30]

158. An analysis of other international courts shows that the effective power of appointment over the staff invariably lies within the courts themselves[31]. In this connection it is argued that in general outside authorities have little practical experience or knowledge of the complex working procedures of a Court's Registry.

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[28] Explanatory Report, http://conventions.COE.int/Treaty/en/Reports/Html/155.htm

[29] This point of view is supported by the fact that discussions within the Secretariat of the Council of Europe in 1953, thus prior to the foundation of the ECtHR, tended towards "a Clerks office answerable only to the Court and the duties of which will be governed by the Rules of Procedure established by the Court (Article 55)", Doc. CM (53) 135, "Memorandum concerning the Secretariat of the European Commission on Human Rights", p.2. However, in 1958 the Directorate of Human Rights prepared a document forwarded to the Committee of Ministers on behalf of the Secretary General in which it envisaged that eventually it "may, nevertheless, appear *expedient* to the Court, before deciding [on the Duties of its clerk and the organisation of his office] to consult the Committee of Ministers and the Secretary General in order that a solution may be found which will safeguard the independence of the Court and assure its satisfactory operation, while avoiding dissipation of energy, duplication of work and unnecessary expense" (emphasis added), Doc. CM (58) 114, "European Court of Human Rights Constitution Problems".

[30] See "Appointment of Staff in the Registry" from 8 July 2004 prepared by the Court's Rules Committee, p.6.

[31] Cf. Article 25 of the Rules of the Court for the International Court of Justice; Article 20 § 1 of the Rules of Procedure for the European Court of Justice. It is to be noted however, that the staff serving the WTO Appellate Body is appointed by the Director General of WTO.

159. On the other hand the *"unity of staff"* between the ECtHR and the Council of Europe avoids unnecessary duplication of administration and allows for transfers of staff between the Court and the Council of Europe. Moreover the independence of the Court is guaranteed by the Registrar and the Deputy Registrar being elected directly by the judges, as well as the approval of the President of the Court which is required for all other appointments[32]. It is the judges and not the Registry who take the decisions so that judicial independence is not jeopardised. Judicial independence of the judges is guaranteed by the manner of their appointment and the relevant provisions of the Convention as well as by the fact that the Registry lawyers act on the Court's instructions.

160. Where there is a disagreement between the Secretary General and the President of the Court the current rules may result in a stalemate for appointments to the Registry. At the very least it is necessary to consider a mechanism to avoid such blockages.

161. Efforts to achieve a relationship agreement[33] between the Secretary General of the Council of Europe and the President of the Court had in the past not succeeded. During the summer of 2004 the previous Secretary General of the Council of Europe had suggested the creation of an arbitration committee to solve disagreements about appointments. It is to be noted finally, that in connection with the draft budget for 2007 the upgrading of the post of Registrar of the Court (A7) to "specially appointed official" and the upgrading of the post of Deputy Registrar (A6) to A7 were proposed.

b. Proposals

162. During his exchange of views with members of the Committee on Rules of Procedure and Immunities on 4 October 2005 the President of the European Court of Human Rights underlined *inter alia* that the Court was unable to appoint, promote or discipline its own staff despite the fact that they were an indispensable part of the judicial process. The court should have responsibility for and supervisory authority over its own staff.

163. The Rapporteur proposes that the Assembly should invite the Committee of Ministers to instruct the Group of Wise Persons created at the Third Council of Europe Summit to examine the administrative functioning of the Court.

v. Status of the judges and proposals

164. According to Article 22 of the ECHR the judges of the ECtHR are elected by the Parliamentary Assembly for a term of six years and may be re-elected. Protocol No. 14 to the ECHR (adopted in May 2004) in its Article 2 changes the term of office for judges to a single nine-year term in order to secure greater continuity in the work of the Court as well as a higher level of independence and impartiality for the individual judges.

165. As regards social protection Article 5 (Appendix) of Resolution (2004) 50 of the Committee of Ministers provides that judges make their own arrangements at their own expense. On 4 October 2005 the President of the European Court of Human Rights informed the Committee on Rules of Procedure and Immunities that the judges had no possibility of acquiring pension rights.

166. The report of the afore-mentioned working group "Strategy of Switzerland in the Council of Europe" considers that a statute of the Court should contain employment conditions which correspond to those of other judges at international level.

167. The Rapporteur proposes that the Assembly invites the Committee of Ministers to instruct the Group of Wise Persons created by the Third COE Summit to examine the status of the judges.

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[32] Article 18 paragraph 3 of the Rules of the Court.

[33] Such relationship agreements exist for example at the Inter-American Court of Human Rights or the International Tribunal for the Law of the Sea. A relationship agreement between the Secretary General of the Council of Europe and the European Court of Human Rights as a minimum was suggested by Paul Mahoney in his contribution to the Human Rights Law Journal, Vol.24, 2003, p.152-161: "Separation of powers in the Council of Europe: The status of the European Court of Human rights vis-à-vis the authorities of the Council of Europe".

vi. Execution of the judgments of the Court

168. Taking into account the Assembly's great commitment with respect to the implementation of judgments of the Court (see AS/Jur (2006) 18) the Committee on Rules of Procedure and Immunities has considered it as essential to propose that the Group of Wise Persons should also examine the role of the Assembly and national parliaments in assisting the CM in its capacity of supervising the decisions of the Court.

IX. CONGRESS OF LOCAL AND REGIONAL AUTHORITIES OF THE COUNCIL OF EUROPE

i. Evolution

169. Since the creation of the Congress by statutory Resolution (94)3 the role of local and regional authorities in Europe has considerably changed. At the same time a decentralisation of public power has taken place almost everywhere. Therefore the place of the Congress in the COE's institutional system now is different from that in 1994. Through its activities the Congress has gone beyond the consultative nature which has been devised for it in the statutory texts. It has been given important new tasks by the CM such as the monitoring activity referring to territorial democracy which is based on the European Charter on Local Self Government. The Congress supports the creation of national associations and of networks for local authorities, particularly in complicated areas like South-Eastern Europe, the Balkans or the South Caucasus. It implements another important Council of Europe Convention, the Madrid Convention on trans-frontier co-operation between territorial communities or authorities. In this connection the Congress works intensely for creating Euro-regions of a new type which should gather all EU and non-EU countries around the semi-closed seas of Europe, the Adriatic Sea, the Baltic Sea and the Black Sea. With a view to giving a technical support to the Madrid Convention the Congress has proposed to create in St. Petersburg a European Centre for territorial and trans-bonder co-operation,

ii. Proposals

170. On 12 April 2006 the then President of the Congress, Mr di Stasi said before the Committee on Rules of Procedure and Immunities that a Congress with such far-reaching functions and responsibilities and similar positive evolution could not be a purely consultative body. The new role and profile of the Congress should be recognised as such in the institutional set-up of the COE. The COE needs a strong Congress. The new President of the Congress, Mr Skard, underlined the strengthened political role of the Congress and its major function of developing territorial democracy in Europe (see e.g. his statement before the Ministers' Deputies on 13 September 2006).

171. The Rapporteur agrees with these statements and proposes to invite the Committee of Ministers:

- to implement Congress Recommendation 162 (2005) and to make the Congress an institution entirely composed of elected members
- to make full use of the Congress' potential to promote decentralisation of powers and increased local autonomy in Europe
- to seek more regularly for the opinion of the Congress before taking decisions on matters within its remit.

X. CONFERENCE OF INGOs OF THE COE

i. Evolution

172. The Heads of State and Government of the COE member States decided at the Warsaw Summit to "enhance the participation of NGOs in COE activities as an essential element of civil society's contribution to the transparency and accountability of democratic government".

173. Since the creation of consultative status of INGOs in 1952, INGOs have played an ever-increasing and structured role within the COE. Their status was upgraded from consultative to participatory status in accordance with Resolution (2003)8 of the CM. The INGOs have created their own Liaison Committee, 10 thematic groupings and, since January 2005, are represented at the

COE by the Conference of INGOs. Over the years the INGOs enjoying participatory status and these structures have been actively participating in intergovernmental work and parliamentary hearings.

174. This development is reflected in CM Resolution (2005) 47 which enables the Conference of INGOs to take part in meetings of governmental committees and subordinate bodies as a "participant", enjoying the same status as the representatives of the Assembly and the Congress.

ii. Proposals

175. The situation of the representation of INGOS within the COE is now different from that in 1952 when the consultative status was instituted. The Conference of INGOs has evolved into a political actor in the COE institutional set-up. The dialogue and co-operation between Assembly Committees and the Conference o**f** INGOs of the COE and its relevant groupings could be enhanced. The Committee of Ministers should seek more regularly the opinion of the Conference of INGOs before taking decisions on matters within its remit.

XI. CONCLUSIONS

176. If one wants to prevent the COE from institutional backwardness, far-reaching institutional reforms will be required. The institutional balance at the COE should be improved in particular by agreement between the CM and the Assembly and, where appropriate, by an updating of the COE's Statute by statutory resolutions. The status of the European Court of Human Rights within the COE should be clarified in a written text. Furthermore, the role of the Congress and of the Conference of INGOs in the relationship with the CM should be strengthened.

177. The proposals made in the recommendation included in this report should be examined in the Joint Committee and a mixed working party of the CM and the Assembly. The European Court of Human Rights and the Assembly should be closely associated. Furthermore, a Permanent Group should be created to advice on institutional issues and to mediate between the organs and institutions of the COE.

178. A report on the relations between the Committee of Ministers and the Assembly, which was approved by the Joint Committee in January 2001, developed the concept of the shared responsibility to the Council of Europe of the Committee of Ministers and the Assembly (see Doc. AS/CM/Mix/Working Group (2001) 1). It would be to the advantage of the Organisation as a whole if following the proposals of its closest institutional partner, the Assembly, the Committee of Ministers agreed to reinforce the major COE institutions

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Reporting committee: Committee on Rules of Procedure and Immunities

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Members of the Committee: Mr Andreas **Gross** (Chair), Mr Andrea **Manzella** (1st Vice-Chair), Mrs Ganka Samoilovska-Cvetanova (2nd Vice-Chair), Mr Mats Einarsson (3rd Vice-Chair), Mr Sándor Albert, Mr Alexander Arabadjiev, Mr Birgir Ármansson, Mrs Olena Bondarenko, Mrs Anne **Brasseur,** Mr Erol Aslan **Cebeci**, Mr Manlio Collavini, Mrs Helen d'Amato, Mr Miljenko Dorić, Mr Adolfo Fernández Aguilar, Mr Herbert Frankenhauser, Mr Tihomir Gligorić, Mr John **Greenway**, Mrs Arlette Grosskost, Mr Gerd **Höfer**, Mr Ali Huseynov, Mr Tomáš Jirsa, Mr Armand Jung, Mr Erik **Jurgens**, Mr Attila Gruber, Mrs Mojca Kucler-Dolinar (alternate: Mr Dimitrij **Kovačič**), Mr Markku Laukanen, Mr Jan Filip Libicki, Mr Alan **Meale**, Mrs Ana Caterina **Mendonça**, Mr Jakob-Axel Nielsen, Mr Nikolaos Nikolopoulos, Mr Alexey Ostrovsky, Ms Eli Sollied Øveraas, Mrs Maria Postoico, Mr Christos Pourgourides, Mr Armen Rustamyan, Mr Peter **Schieder**, Mr Yuri Sharandin, Mr Gintaras **Šileikis**, Mrs Rodica Mihaela Stănoiu, Mr Karin Van Overmeire, Mr G. V. Wright (alternate: Mr Paschal **Mooney**)

N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the Committee: Mr Heinrich, Mrs Clamer