

Admission to Membership of the Council of Europe and Legal Significance of Commitments Entered into by New Member States

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Since the beginning of the 1990s, more than twenty former communist states from Eastern and Central Europe have become members of the Council of Europe (CoE). Before their accession, the applicant states entered into certain commitments mainly related to human rights, the rule of law and democracy. The main purpose of this article is to analyze the legal significance of these commitments. The first part of the article will deal with the admission requirements, procedure of admission to the Council of Europe, and the impact of the commitments on the meaning of CoE membership obligations. The second part will deal with the legal significance of the commitments through an analysis both of their acceptance by new member states and of decisions of the CoE organs in this context.

1. Admission to the Council of Europe

1.1. Membership Requirements

The main purpose of the CoE is to achieve “a greater unity” between its members in order to safeguard and realize their common heritage which is the “true source of individual freedom, political liberty and the rule of law ... which form the basis of all genuine democracy.”¹ The obligations of member states and requirements for admission to the organization closely reflect the aims of the CoE. According to article 3 of the CoE Statute, members of the organization have the following obligations:

“Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.”

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Abbreviations: CoE – Council of Europe; CM – Committee of Ministers of the CoE; ECHR – European Convention on Human Rights; PA – Parliamentary (Consultative) Assembly of the CoE.

¹ CoE Statute, Preamble, para. 3.

Article 3 establishes not only the obligations of member states but also the requirements for admission of new members. According to article 4 of the CoE Statute, any European² state "which is deemed to be able and willing" to fulfill the requirements of article 3, may be invited by the Committee of Ministers (CM) to become a member.³ Therefore, both membership obligations and admission requirements explicitly require the acceptance of the principles of the rule of law and the enjoyment of human rights "by all persons within [the state's] jurisdiction."

An additional membership obligation and admission requirement is that a member state must be a pluralist democracy. Although this requirement is not expressly stated in the Statute, various legal arguments have been used to support the proposition that being a pluralist democracy is necessary for CoE membership. According to one, existence of a pluralist democracy is a part of the membership requirement that human rights are respected, which is confirmed by the guarantees of the right to free and fair elections contained in the First Protocol to the ECHR.⁴ Another argument holds that the provisions of article 3 together with the Preamble to the CoE Statute clearly require democracy as an indispensable membership criterion.⁵ Long standing CoE practice supports the argument that being a pluralist democracy is both a membership obligation and an admission requirement.⁶

² When the accession of Eastern European states began, the CoE had to determine what states of the former Soviet Union would be regarded as fulfilling the condition of being a "European state." In addition to Belarus, Ukraine, Russia and the Baltic republics, which are situated within the generally accepted geographical limits of Europe, the decision was taken that Azerbaijan, Georgia and Armenia should also be eligible for admission. See PA Recommendation 1247 (1994), and the PA document *The Geographical Enlargement of the Council of Europe: Policy Options and Consequences* (Apr. 22, 1992), 13 HRLJ 230 (1992).

³ CoE Statute, art. 4. When making the decision the CM takes into account opinion of the Parliamentary Assembly. See *infra* text accompanying note 17.

⁴ See A. H. Robertson, *The Council of Europe: Its Structure, Functions and Achievements* 16 (2nd ed. 1961).

⁵ For more, see Krzysztof Drzewicki, *The Future Relations between Eastern Europe and the Council of Europe*, in: Arie Bloed/Wilco de Jonge (eds.), *Legal Aspects of A New European Structure* 41, 47-48 (1992). For similar views of the PA, see *Opinion on the Readmission of Greece to the Council of Europe*, PA Doc. 3514 (Nov. 26, 1974), para. 8, and a document of the Bureau of the PA, *The Geographical Enlargement of the Council of Europe*, *supra* note 2.

⁶ For instance, after the end of the dictatorship, Greece could not be readmitted to membership until the new civilian government organized democratic elections. Subsequently, the PA declared that Greece "now has the parliamentary regime essential for becoming a Member ...", PA Opinion No. 69 (1974), para. 3 (emphasis added). In cases of Portugal and Spain, which were admitted in 1976 and 1977 respectively, there could be no accession until multiparty elections were held. For Portugal see, e.g., PA Resolution 593 (1975), para. 7, and Opinion No. 78 (1976), paras. 5-6 (democratic institutions were established after the elections and thus Portugal is able to comply with membership requirements); for Spain see, e.g., Resolution 575 (1974), para. 3 (Spain a long way from meeting membership conditions, as it has no democratic and representative institutions). In the case of Poland, which had held national democratic elections only for one house of parliament, the PA's favorable opinion and the CM's invitation were conditional upon the holding of free general elections, PA Opinion No. 154 (1990), para. 8 (i), and CM Resolution (90) 18. This practice has been reaffirmed by the Vienna Declaration of the Heads of States and Governments of the CoE member states (1993),

The admission of new members was a very predictable exercise until the 1990s. When the Council of Europe was created, it was taken for granted that its original members fulfilled membership conditions. This was also the case when the CM, at its first session, simply invited Greece, Iceland and Turkey to join the organization.⁷ In subsequent cases of admission of Western European states, fulfillment of admission requirements by the applicant states was not subject to thorough examination either. Even in the cases of states that had been previously ruled by dictatorships, such as Greece, Portugal and Spain, the CoE was content that democratic elections were held and that human rights were guaranteed in the constitution.⁸ It has been noted that before 1989 the major question regarding compliance with membership obligations did not relate to admission but rather to the continuing compliance of old members.⁹ Since the fall of communism, however, the admission practice has changed radically, as the CoE started to examine more thoroughly whether the applicants fulfilled membership conditions.

In order to complete democratic transition and prevent the resurgence of totalitarianism, formerly communist states of Eastern and Central Europe needed assistance from the West. The CoE viewed itself as perfectly fitting this role and developed a number of programmes of cooperation and assistance to Eastern European states.¹⁰ At the same time, it was politically necessary to include these states in some form of European structure, so their speedy admission became a priority for the CoE. This approach was reaffirmed in the Vienna Declaration of the Heads of States and Governments of the CoE member states, adopted in 1993:

“The Council of Europe is the pre-eminent European political institution capable of welcoming, on an equal footing and in permanent structures, the democracies of Europe freed from communist oppression. For that reason the accession of those countries to

which emphasized that democracy meant that “[t]he peoples’ representatives must have been chosen by means of free and fair elections based on universal suffrage.” See Vienna Declaration of the First CoE Summit (Oct. 9, 1993) available at <http://www.coe.fr/eng/std/viennad.htm>.

⁷ See communiqué issued after the first session of the CM, reprinted in: Report on the Proceedings of the First Session of the Council of Europe, presented by the Secretary of State for Foreign Affairs to Parliament (London, 1949) at 3.

⁸ For Greece, see PA Resolution 558 (1974) and PA Opinion No. 69 (1974); for Portugal, see PA Opinion No. 78 (1976) and Report on the Accession of Portugal to the Council of Europe, PA Doc. 3829 (Sept. 14, 1976); for Spain, see PA Recommendation 820 (1977) as well as Report on the Situation in Spain, PA Doc. 4037 (Oct. 1, 1977), and Opinion on the Situation in Spain, PA Doc. 4049 (Oct. 10, 1977). See also Heinrich Klebes, Human Rights and Parliamentary Democracy in the Parliamentary Assembly, in: Franz Matscher/Herbert Petzold (eds.), Protection of Human Rights: The European Dimension, Studies in Honour of Gérard Wiarda 307, 307–310 (1988).

⁹ Hans Winkler, Democracy and Human Rights – A Survey of the Admission Practice of the Council of Europe, 47 Austrian J. Pub. & Int’l L. 147, 149 (1995). For a survey of CoE admission practice before 1990 see *id.*, at 149–155.

¹⁰ See Report on the Council of Europe and the new sovereign republics of Eastern Europe, PA Doc. 6484 (Sept. 13, 1991), para. 21: “With a view to our comparative advantage it would seem reasonable to concentrate, at least at the outset, on two main areas of activity: support for democratic development, and support for the protection of civic rights with particular emphasis on minority rights”.

the Council of Europe is a central factor in the process of European construction based on our Organisation's values."¹¹

As already mentioned, the CoE Statute requires that a new member must be "deemed to be able and willing to fulfill" the membership obligations of respect for human rights, the rule of law, and pluralist democracy. This means that the organization must decide, first, that an applicant state is objectively in a position to fulfill the membership obligations (to be "able") and, second, that its government has the will to do so. As far as the government's willingness to fulfill the membership obligations is concerned, there was a consensus in Eastern European states that they should as soon as possible become members of the CoE. Membership of the CoE has been considered a hallmark of "European" legitimacy, a sign that a country has regained its place among the family of European nations. This has also been perceived as a first step in the process of fuller integration into Europe, the ultimate result of which should be accession to the European Union.¹² The wishes of Eastern European states matched with the policy of the CoE which was to achieve their rapid accession. Consequently, it would appear that most of the time the CoE has almost presumed the states' willingness to respect membership obligations. One case when the willingness to abide by membership obligations was not taken for granted was that of the FR Yugoslavia (Serbia and Montenegro): the CM decided to suspend the discussion of the application for membership due to its "lack of seriousness and credibility". The CM went on to say that "[a] radical change of policy by Belgrade would be needed before the application can be considered."¹³

The ability of applicant states from Eastern Europe to fulfill the membership obligations was not as unquestionable as their professed willingness to do so. Although the CoE pledged not to lower its human rights standards,¹⁴ in most cases, it seems, their requirements were not met by legal systems and practices of the applicant states. One of the means adopted to achieve the necessary compatibility has been to establish a variety of programmes of assistance and cooperation. Their goal is to strengthen and assist the process of democratic transition, as well as to prepare the applicant state for accession and integration into the CoE system.¹⁵ At the same time, the admission procedure itself has also become an important vehicle through which the CoE has tried to bring about change in the legal systems and practices of applicant states. As there was an increasing number

¹¹ Vienna Declaration, *supra* note 6.

¹² See Peter Leuprecht, *Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?*, 8 *Transnat'l L. & Contemp. Probs.* 313, 332 (1998).

¹³ Decisions of the CM (Deputies), 639th Meeting (Sept. 7–9, 1998), Item 2.4.

¹⁴ See, for example, Vienna Declaration, *supra* note 6, and *The Geographical Enlargement of the Council of Europe*, *supra* note 2.

¹⁵ This in particular means expert assistance in reforming the legal system, as well as education in human rights for judges, attorneys, government officials, journalists and other groups concerned with human rights. For an overview of CoE's assistance and cooperation activities see Andrew Drzemczewski, *The Council of Europe's Co-operation and Assistance Programmes with Central and Eastern European Countries in the Human Rights Field*, 14 *HRLJ* 229 (1993).

of applicants whose compliance with the membership requirements was in doubt, the procedure has latterly involved a much more detailed examination of the state's legal system and practice than before.

1.2. Admission Procedure

According to the CoE Statute, the CM is the sole organ which is entitled to invite new members to join the organization.¹⁶ But almost since the very beginning of the CoE, the CM has always invited the PA to give its opinion on admission.¹⁷ It seems hardly conceivable that the CM would disregard the opinion of the PA and admit a state in respect of which the PA gave a negative opinion. Indeed, in practice the PA plays a very important role in the process of admission, especially in the examination of whether the applicant state fulfills the admission criteria. As noted by one commentator:

“Although the final political responsibility of admitting new members according to the Statute lies with the CM, in practical terms the burden of ascertaining whether the conditions for membership are being met shifted entirely to the PA with the Secretariat playing an important role behind the scenes.”¹⁸

During the admission procedure, the main work is done by rapporteurs on behalf of the PA, who visit the state several times. They meet not only governmental officials, but also representatives of opposition political parties, trade unions, non-governmental groups, minorities and other relevant actors in order to fully comprehend and appraise the situation. The rapporteurs also play a very important role in the dialogue with the state's government. Finally, when the PA adopts a positive opinion on the state's application, the matter goes back to the CM, which then issues a resolution inviting the state to become a member.

Throughout the admission procedure the CoE tries to bring about changes in those laws, policies, and practices of the state, which are not in accordance with CoE standards of human rights, democracy and the rule of law.¹⁹ The crucial element of the admission process is a dialogue between the applicant state and the CoE in which the outstanding issues should be resolved. During that process, the prospect of being admitted to the organization serves as an incentive for the state to change its laws and practices in accordance with the proposals of the CoE. Apart from the overall situation and objective difficulties in the applicant state, the achievement of full compliance with the CoE membership criteria and human

¹⁶ CoE Statute, art. 4. For more details on the admission procedure see, for example, Winkler, *supra* note 9, at 156 and 160–161.

¹⁷ This was formalized in Statutory resolution 51(30), but did not result in an amendment to the Statute.

¹⁸ Winkler, *supra* note 9, at 156.

¹⁹ It should be noted that an important role in the admission procedure is played by “eminent lawyers” – these were usually one member of the European Court and of the European Commission of Human Rights – who at the invitation of the PA examine the compatibility of the state's legal system with the CoE standards. Their report is extremely important as it identifies the legal problems and deficiencies which should be remedied.

rights standards to a large extent depends on the strength of influence exercised by the CoE, on the one hand, and on the willingness of the state to cooperate, on the other. Of course, as the admission procedure is a political process of negotiations between various CoE organs and the state, political considerations play a crucial role. They can either speed up the procedure or slow it down.²⁰

Most of the time, the PA and CM have been ready to give the applicant states the benefit of the doubt and invite them to join the organization in cases where some of the outstanding issues identified in the admission procedure were still not remedied by the state. At the same time, however, the PA has started to request that applicant states commit themselves to resolve these problems after the accession in a manner and within a time-frame specified by the CoE. Some of these commitments have been demanded from all new member states,²¹ while others have been introduced as the admission practice evolved and have been requested from only a number of states.²² Further, still, some commitments have been "personalized" – specifically designed to address particular problems in a new member state.²³

The practice of demanding further commitments implies that the new member states did not fully comply with the CoE admission requirements.²⁴ In this respect, the CoE has relied on the willingness of governments to improve their performance and achieve compliance in the supposedly near future. This presumption that compliance could be achieved within a reasonable time-frame with the good will of governments seems to have underestimated the gravity and nature of the problems in the new member states. However, the lack of ability of the states to comply has not been seen to be of crucial importance as membership has been perceived as a way to promote human rights, the rule of law and democracy in the new member states from Eastern Europe. The argument has been that admission would result in a continuing and indeed much stronger influence of the CoE than would be the case if the country were not a member.²⁵

²⁰ In some cases, political considerations have been so strong that they tipped the balance in favor of admission, even when it was clear that the admission criteria were not satisfied. One example is the case of Russia, where it was clear that the country did not fully comply with the admission criteria, while at the same time political pressure to admit it was huge. For different arguments voiced for and against admission of Russia see PA Official Report of Debates (Jan. 25, 1996).

²¹ For example, to ratify the ECHR. See *infra* text accompanying notes 26–27.

²² For example, to base their policies in regard to minorities on principles contained in the PA Recommendation 1201 (1993), see *infra* text accompanying notes 38–43.

²³ For example, Croatia's commitment to implement its constitutional law on human rights and minorities, see *infra* text accompanying note 46.

²⁴ See Leuprecht, *supra* note 12, at 328–329.

²⁵ For instance, the report on Russia's accession claimed that "membership of the Council of Europe would provide the support and pressure that have so often been identified as essential to progress in Russia, in particular as regards the development of the rule of law.", Report on Russia's request for membership of the Council of Europe, PA Doc. 7443 (Jan. 2, 1996), para. 29.

1.3. Commitments and the Meaning of Membership Obligations

The purpose of requesting applicant states to undertake certain commitments has been to ensure that these states will comply with the membership obligations of the CoE. At the same time, it is submitted, the substance of the commitments which have been requested resulted in a clarification and extension of the interpretation of the membership obligations. This effect of the commitments will be demonstrated in respect of the membership obligation and the admission requirement according to which the state should respect human rights.

Although the membership obligation of the respect for human rights had been, from the very beginning, interpreted by reference to the ECHR and the rights protected therein, the link with the ECHR was further strengthened with the gradual development of a requirement for new member states to adhere to the ECHR.²⁶ When the accession of Eastern and Central European states began, this practice was already established, not as a legal obligation but as a political expectation which, for all practical purposes, bound the states.²⁷ This expectation was further confirmed and even expanded during the 1990s: states have been expected not only to sign the ECHR and ratify it within a short period of time, but also to recognize the right of individual petition. As stated in the Vienna Declaration of the Heads of States and Governments of the CoE member states:

“[a]n undertaking to sign [ECHR] and accept the Convention’s supervisory machinery in its entirety within a short period is also fundamental [for accession].”²⁸

In addition to this, a number of the new members were required to commit themselves to acceptance of Protocols Nos. 1, 2, 4, and 7 to the ECHR, which guaranteed additional rights. It should be noted that a number of the “old” members has not ratified some of these protocols, especially Protocol No. 7, which adds to the ECHR procedural guarantees with regard to expulsion of aliens.²⁹

Some new member states also had to commit themselves to the signing of Protocol No. 6 to the ECHR, which abolishes the death penalty. This commitment has been demanded in case of all acceding states since the accession of Latvia and usually requires states to sign Protocol No. 6 within one year and to ratify it

²⁶ The PA was first to begin to make reference to the ECHR in its opinions. The first such case was the opinion on the admission of Malta in 1965. See PA Opinion No. 44 (1965), para. 3. Then, most of the new member states started to express their intention to sign and ratify the ECHR upon accession. Finally, in 1977, when inviting Spain to become a member, the CM for the first time made reference to the intention of the Spanish government to ratify the ECHR. See CM Resolution (77) 32 (Oct. 18, 1977). For an account of how this practice developed, see Winkler, *supra* note 9, at 151–154.

²⁷ Winkler, *ibid.*, at 154.

²⁸ Vienna Declaration, *supra* note 6.

²⁹ As of January 24, 2000, Protocol No. 7 was not signed by Belgium, Liechtenstein, Malta, and the United Kingdom, and was signed but not ratified by Cyprus, Germany, Ireland, the Netherlands, Portugal, Spain, and Turkey. See <http://www.coe.fr/tablconv/117t.htm>. As of November 11, 1999, Protocol No. 4 was not signed by Switzerland, Malta, Liechtenstein and Greece, and was signed but not ratified by the United Kingdom. See <http://www.coe.fr/tablconv/46t.htm>.

within three years of accession.³⁰ Those states in which the death penalty was still carried out had to introduce a *de facto* moratorium on executions from the moment of accession. As is well known, the death penalty is not prohibited by the ECHR, but there is a *de facto* moratorium on executions in all member states of the CoE.³¹ This may be regarded as a well-established CoE standard. Thus, it is understandable why the new member states which still had the death penalty were requested to give an undertaking to ratify Protocol No. 6 and institute a moratorium on executions.³²

Since the admission of Latvia all new member states have been requested to commit themselves to ratify the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment³³ within one year of accession.³⁴ This commitment, albeit with some delays, has been respected. The Convention is widely regarded as a very important mechanism within the CoE system of human rights protection and has been accepted by all "old" CoE member states, while the new member states from Eastern and Central Europe have ratified it, usually within a few years of accession.³⁵

So far, the discussion focused on the commitments which, by referring to the ECHR and its protocols as well as to the other human rights documents adopted in the CoE, further clarified the membership requirement of the respect for human rights. This also applies to most of the specific commitments demanded from member states, which were also in the function of implementation of generally accepted CoE standards. For instance, freedom of the media was a considerable problem in the case of Croatia, which was constantly emphasized in the CoE reports of the legal experts, election observers and PA rapporteurs.³⁶ Media freedoms in Croatia were also included in the CM "priority commitments" which explicitly stated, *inter alia*, that Croatia

³⁰ See PA Opinion No. 183 (1995), para. 10 (b) (Latvia); PA Opinion No. 188 (1995), para. 11 (c) (Moldova); Opinion No. 189 (1995), para. 17 (ii) (Albania); Opinion No. 190 (1995), para. 12 (ii) (Ukraine); Opinion No. 191 (1995), para. 10 (ii) (Macedonia); Opinion No. 193 (1996), para. 10 (ii) (Russia); Opinion No. 195 (1996), para. 9 (iv) (Croatia); Opinion No. 209 (1999), para. 10 (i) (b) (Georgia – to ratify within a year after accession).

³¹ See, for example, Report on the abolition of death penalty, PA Doc. 7589 (June 25, 1996).

³² This commitment was seriously violated by Russia, Latvia and Ukraine, where there were cases of executions. See PA Resolution 1097 (1996), para. 4, and PA Resolution 1111 (1997), paras. 2 and 5.

³³ ETS No. 126.

³⁴ See PA Opinion No. 183 (1995), para. 10 (d) (Latvia); PA Opinion No. 188 (1995), para. 11 (f) (Moldova); Opinion No. 189 (1995), para. 17 (iii) (Albania); Opinion No. 190 (1995), para. 12 (iv) (Ukraine); Opinion No. 191 (1995), para. 10 (iii) (Macedonia); Opinion No. 193 (1996), para. 10 (iii) (Russia); Opinion No. 195 (1996), para. 9 (v) (Croatia); Opinion No. 209 (1999), para. 10. (i) (c) (Georgia).

³⁵ The only exception being Lithuania which ratified five and a half years after accession, on November 26, 1998. See <http://www.coe.fr/tablconv/126t.htm>.

³⁶ Report on Croatia's request for membership of the Council of Europe, PA Doc. 7510 (March 29, 1996), paras. 86–91. For observations of the eminent lawyers, see Report on the legislation of the Republic of Croatia, Parliamentary Assembly, Doc. AS/Bur/Croatia (1994) 2 (Jan. 24, 1995), reprinted in: 16 HRLJ 326, 335–336 (1995).

"should take immediate steps to stop all interference in the exercise of freedom of information and expression ... and should not exert any pressure on the media and journalists."³⁷

This was a specific commitment requested from Croatia, but its content did not go beyond the generally accepted scope of the right to freedom of expression recognized in the ECHR. However, the substance of other commitments entered by new member states seems to have gone further than the generally accepted human rights standards of the organization. In this way, the commitments started to play a role in broadening the meaning of the membership obligations. This was particularly clear as regards commitments dealing with the protection of minorities. A growing emphasis on the protection of minorities has been one of the most important developments during the admission practice of the 1990s. In addition to the reference made to the protection of minorities in the Vienna Declaration,³⁸ the PA had also started to demand various commitments relating to minority rights. On February 1, 1993, the PA adopted Recommendation 1201 in which it proposed the adoption of an additional protocol on the rights of national minorities to the ECHR. At the same time, however, it instructed its Committee on Legal Affairs and Human Rights

"to make scrupulously sure when examining requests for accession to the Council of Europe that the rights included in this protocol are respected by the applicant countries."³⁹

The draft protocol contained in Recommendation 1201 provides a list of minority rights.⁴⁰ A person belonging to a national minority would have, *inter alia*, the right to express, preserve, and develop his/her minority identity; to be protected against discrimination based on membership of a national minority; the right to use freely minority language in public and private; the right to education in a minority language and the right to set up minority educational institutions. Furthermore, the protocol would guarantee the right to an effective remedy for violations of the rights guaranteed therein. Of course, as this would be a protocol to the ECHR, there would be also the right of individual petition to the European Court of Human Rights for violations of minority rights contained in the protocol.

The first three applicant states to be considered after PA Recommendation 1201 was adopted were Estonia, Lithuania and Slovenia. Among them, Estonia had serious problems with the status of its sizeable Russian speaking population, which was not granted Estonian citizenship and was thus precluded from partici-

³⁷ See Communication from the Committee of Ministers concerning the accession of Croatia to the Council of Europe, PA Doc. 7617 (July 15, 1996), Appendix II, at 3.

³⁸ Protection of minorities, freedom of expression and the observance of the principles of international law, were singled out as the "decisive criteria for assessing any application for membership." See Vienna Declaration, *supra* note 6.

³⁹ PA Order No. 484 (1993), para. 2 (ii).

⁴⁰ For more details, see Heinrich Klebes, Draft Protocol on Minority Rights to the ECHR: Introduction, 14 HRLJ 140 (1993). The recommendation of the PA was not followed by the CM.

pation in elections and in the political process.⁴¹ This was a problem of deep concern for the CoE. In its opinion on Estonia's application for membership the PA expressly stated that it expected the Estonian authorities "to base their policy regarding the protection of minorities on the principles laid down in Recommendation 1201 ...".⁴² Since then, a reference to Recommendation 1201 has always been included in the PA opinions on accession of new member states.⁴³ Furthermore, since the admission of Moldova, in all cases the PA has required applicant states to commit themselves to ratify the Framework Convention for the Protection of National Minorities and the Charter for Regional or Minority Languages within one year of accession.⁴⁴

At the same time, in cases of states with minority problems the PA requested specific commitments designed to ensure better protection. For instance, in the case of Slovakia the PA opinion referred to the government's commitment to adopt legislation providing for the right of persons belonging to minorities to use their own personal names in their language in public, as well as the right of minorities to display in their language local names and signs in regions where they live in substantial numbers, which had been an outstanding issue with the Hun-

⁴¹ About one-third of the population was not able to take part in the 1992 elections in Estonia according to the Report on the application of the Republic of Estonia for membership of the Council of Europe (Rapporteur: Mr. Bratinka), PA Doc. 6810 (April 14, 1993), para. 30. For a legal appraisal of the situation see Raimo Pekkanen/Hans Danelius, Human Rights in the Republic of Estonia, CoE Doc. AS/Ad hoc-Bur-EE (43) (Dec. 17, 1991), para. 36, reprinted in: 13 HRLJ 236, 239 (1992).

⁴² PA Opinion No. 170 (1993), para. 5. It should be noted that the additional protocol on the protection of minorities would only be applicable to minorities whose members were citizens of a state, which was not the case with the Russian minority in Estonia. See article 1 of the proposed additional protocol, Recommendation 1201 (1993). However, it seems that the PA expected that members of the Russian minority in Estonia would acquire citizenship relatively soon, which would make the rights contained in Recommendation 1201 applicable to them: "the first electoral period covers only three years in the course of which non-citizens, now residing in the country and wishing to apply for Estonian citizenship, will have the possibility of acquiring it.", PA Opinion No. 170 (1993), para. 3.

⁴³ According to Winkler, this "goes far beyond anything the PA had so far requested from candidate States.", Winkler, *supra* note 9, at 159. For further references to Recommendation 1201, see Opinion No. 174 (1993), para. 8 (Czech Republic); Opinion No. 175 (1993), para. 8 (Slovakia); Opinion No. 176 (1993), para. 5 (Romania); Opinion No. 183 (1995), para. 10 (e) (Latvia); Opinion No. 188 (1995), para. 11 (g) (Moldova); Opinion No. 189 (1995), para. 17 (iv) (Albania); Opinion No. 190 (1995), para. 11 (xiii) (Ukraine); Opinion No. 191 (1995), para. 10 (iv) (Macedonia); Opinion No. 193 (1996), para. 10 (iv) (Russia); Opinion No. 195 (1996), para. 9 (vi) (Croatia); Opinion No. 209 (1999), para. 10 (ii) (i) (Georgia).

⁴⁴ See PA Opinion No. 188 (1995), para. 11 (g) & (h) (Moldova – asked to study the Charter with a view to ratification); Opinion No. 189 (1995), para. 17 (iv) & (xi) (Albania – asked to study the Charter with a view to ratification); Opinion No. 190 (1995), para. 12 (v) & (vii) (Ukraine); Opinion No. 191 (1995), para. 10 (iv) (Macedonia); Opinion No. 193 (1996), para. 10 (iv) & (v) (Russia); Opinion No. 195 (1996), para. 9 (vi) (Croatia); Opinion No. 209 (1999), para. 10 (i) (d) (Georgia). The Framework Convention for the Protection of National Minorities, ETS No. 157, entered into force on February 1, 1998, and the European Charter for Regional and Minority Languages, ETS No. 148, entered into force on March 1, 1998. See www.coe.fr/tablconv/157t.htm & www.coe.fr/tablconv/148t.htm.

garian minority for a long time.⁴⁵ Croatia had to commit itself explicitly to implementation of a constitutional law on human rights and minorities, which provided significant minority rights for the Serbs, including a special status for minority districts, and guaranteed proportional representation of the Serbs in public institutions.⁴⁶

Increasing emphasis on minority rights reveals how the interpretation of the admission requirement of the respect for human rights was modified through admission practice and how it reflected concerns of the CoE. This process seems to be the result of a consciousness in the PA and in the CoE that the protection of minorities is essential for the stability of new member states and their safe transition towards democracy. Also, it is probably a reflection of the gradual development within the CoE of a body of standards dealing with the protection of minorities. Of particular interest is the way in which the PA used its Recommendation 1201, which was an unsuccessful attempt to include to the ECHR an additional protocol on minority rights, as a means to introduce a specified list of minority rights in the admission procedure and demand from the applicant states "to base their policy" upon it. In this way, Recommendation 1201 has come to serve a completely different purpose than that which was originally intended. Intended to be an extension of the "hard" law of the ECHR, Recommendation 1201 instead became a set of guidelines, an orientation norm for states to follow.⁴⁷ Although the PA did not succeed in adding the new protocol on minority rights to the ECHR, subsequently two major CoE conventions on minority rights came into force.⁴⁸ As noted above, their ratification has also been one of the commitments requested from the new members.

This overview shows, however, that not all new member states were required to undertake the commitments relating to minority rights. In the case of the Eastern and Central European states which acceded before Estonia no such commitments were required, although some of them had substantial minority populations (e.g. Bulgaria). Moreover, some of the "old" member states, like France, have traditionally been reluctant to undertake international obligations regarding minority rights or even to recognize the existence of minority populations.⁴⁹ The Frame-

⁴⁵ See PA Opinion No. 175 (1993), para. 9.

⁴⁶ See Communication from the Committee of Ministers concerning the accession of Croatia to the Council of Europe, PA Doc. 7617 (July 15, 1996), Appendix II, para. 2.4, and Croatia: Commitments accepted when becoming a member of the Council of Europe, CoE Doc. CM/Inf(98) 18 revised (April 24, 1998), at 3–6.

⁴⁷ See Jean-François Flauss, *Les conditions d'admission des pays d'Europe centrale et orientale au sein du Conseil de l'Europe*, 5 EJIL 401, 411 (1994).

⁴⁸ See *supra* note 44.

⁴⁹ According to the French declaration upon signing the European Charter on Regional and Minority Languages: "[i]n so far as the aim of the Charter is not to recognise or protect minorities but to promote the European language heritage ... the French Government interprets this instrument in a manner compatible with the Preamble to the Constitution ...". For the full text see <http://www.coe.fr/tablconv/reservedcl/dr148e.htm#FRANCE>. Similarly, the French declaration upon accession to the ICCPR states that Article 27 of the Covenant, which guarantees rights of persons belonging to minorities, is not applicable "as far as the Republic is concerned" in the light of

work Convention for the Protection of National Minorities has not been signed by Belgium, France, and Turkey and has not been ratified by a substantial number of other CoE members.⁵⁰ Similarly, a substantial number of "old" members has not signed the Charter for Regional and Minority Languages.⁵¹

2. Legal Significance of the Commitments Undertaken by New Member States

2.1. General

The main purpose of the commitments has been to ensure that new member states would, within a certain period of time after accession, rectify deficiencies in their laws and practice which were incompatible with the CoE human rights standards. Although some of the commitments have been requested from the new member states almost uniformly, others, such as the one invoking Recommendation 1201, were requested by the PA only when the process of admission of Central and Eastern European states was well underway. Furthermore, a number of commitments was the result of *ad hoc* considerations related to a particular problem in a state. As a result, the commitments undertaken by the new member states differ, which raises the question as to whether these states are equal in membership position and obligations. A further difference exists between the new member states and those states which had been members before 1990, as the former were required to undertake some commitments which called for action not required of the latter, such as to ratify the Framework Convention for the Protection of National Minorities. All this raises a question about the effects of the commitments. Are they only political undertakings or do some have legal effects, including binding force? If they are legally binding, does that mean that member states have different membership obligations?

It should be noted that analyzing, in general terms, the possible legal effects of the commitments involves considerable difficulties because the way in which they were accepted by states, the wording of these acceptances, as well as the wording of the commitments themselves, differs from case to case. A further difficulty lies in the fact that the declarations of acceptance, when made public, are to be found in different documents of the CoE and are not readily available. For this reason, the following discussion will try to provide some guidelines for interpretation. The conclusions with regard to the legal effects of the commitments should be taken as tentative. The discussion will consider the nature of the interaction

article 2 of the French Constitution ("La France est une République indivisible ..."). For the full text of the declaration, see Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 755 (1993).

⁵⁰ As of January 21, 2000, 14 out of 41 CoE members have not ratified the Framework Convention. See www.coe.fr/tablconv/157t.htm.

⁵¹ As of November 2, 1999, the Charter was not signed by Andorra, Belgium, Greece, Ireland, Italy, Portugal, San Marino, Sweden, Turkey and the United Kingdom. See www.coe.fr/tablconv/148t.htm.

between the CoE and the member states, which arose from the acceptance of the commitments by the state authorities. Therefore, the discussion will not dwell on the substance of the specific commitments entered into by the member states, but will rather deal with a preliminary question as regards these commitments – what were the competencies of the CoE organs and states' authorities and what is the effect of their actions in this context?

One difficulty in analyzing the commitments lies in terminology. First, there is no uniform use of the term "commitments" in the CoE. Terminology used in documents of the PA, especially those regulating its monitoring procedure, indicates that commitments are understood as something different from membership obligations. For instance, the PA Resolution 1115 (1997) defines the terms of reference of the PA Monitoring Committee in the following way:

"The Monitoring Committee shall be responsible for verifying the fulfillment of the obligations assumed by the member states under the terms of the Council of Europe Statute, the European Convention on Human Rights and all other Council of Europe conventions to which they are parties, as well as the honouring of the commitments entered into by the authorities of member states upon their accession to the Council of Europe."⁵²

Therefore, in the language of the PA, membership obligations as well as other international legal obligations are "assumed by the member states" and should be "fulfilled," while the commitments are "entered into by the authorities of the member states" and should be "honoured." This signifies some distinction between membership obligations and commitments. At the same time, however, some CM documents have used the term "commitments" in the opposite sense from the PA – to signify obligations under the CoE Statute as well as the ECHR and other conventions adopted within the CoE framework to which a member state is a party.⁵³ The topic of the present discussion is, of course, the commitments in the sense the PA uses the term, i.e. the commitments accepted during the accession procedure by new member states, as distinguished from the state obligations under the CoE Statute, ECHR and other CoE instruments to which they are parties.

The second terminological difficulty is that the PA itself has used the term "commitment" to describe different things. First, it has been used to determine a very general feature or direction of governmental policy, such as that the authorities have "demonstrated their European commitment."⁵⁴ Second, the term has

⁵² PA Resolution 1115, para. 5 (Jan. 29, 1997).

⁵³ CM Declaration on Compliance with Commitments Accepted by Member States of the Council of Europe in para. 2 of its Preamble mentions "... the commitments to democracy, human rights and the rule of law accepted by the member states under the Council's Statute, the European Convention on Human Rights and other legal instruments[.]" On the other hand, a document issued by the CoE Secretary General's Monitoring Unit, mentions "individualized commitments" when talking about the commitments that have been entered into by member states upon accession. See *Compliance with Commitments Entered into by Member States: Development of the Committee of Ministers Monitoring Procedure*, CoE Doc. Monitor/Inf(98)2 (Nov. 23, 1998), at 4.

⁵⁴ See, for example, PA Opinion No. 153 (1990), para. 5 (Hungary); PA Opinion No. 161 (1992), para. 3 (Bulgaria); PA Opinion No. 169 (1993), para. 3 (Slovenia); PA Opinion 174 (1993), para. 5 (Czech Republic).

been used to connote certain promise of action by the government. Here, as well, there have been differences. On the one hand, a commitment could express a general undertaking which can be attained progressively and not immediately, such as to improve conditions of detention.⁵⁵ On the other, a commitment may require a specific action of the government, such as to enact, within a year, a new criminal code which will be in accordance with the CoE standards.⁵⁶ It should also be noted that the future undertakings of the applicant states were in various PA opinions referred to not only as "commitments" but also as expectations of the PA⁵⁷ or as something which the government "intends" to do.⁵⁸ It seems, however, that the PA itself during its monitoring procedure has treated all these undertakings in a similar way, as something which the states should "honour."

2.2. Acceptance of Commitments by State's Authorities

It seems that the CoE (or at least the PA) tends to treat commitments as being binding on states.⁵⁹ At the same time, the new member states have never explicitly accepted or rejected the contention that the commitments are binding, although some officials have made statements calling into question the binding force of commitments.⁶⁰ In practice, in a number of cases commitments were disregarded.

The commitments have been accepted by different state authorities and in various forms. The main source from which the state acceptance of the commitments

⁵⁵ See PA Opinion No. 193 (1996), para. 7 (ix) (Russia).

⁵⁶ See PA Opinion No. 190, para. 11 (v) (Ukraine).

⁵⁷ "10. The Parliamentary Assembly expects Georgia to undertake ... [various undertakings follow] (...) 13. On the basis of the commitments set out above, the Assembly recommends that the Committee of Ministers ... invite Georgia to become a member ...", PA Opinion No. 209 (1999) (Georgia). See, also, PA Opinion No. 195 (1996), para. 10 (Croatia).

⁵⁸ The following phrase has been frequently repeated in the PA opinions on admission: "The Parliamentary Assembly notes that Ukraine shares its interpretation of commitments entered into as spelt out in paragraph 11, and intends ... [various undertakings follow]", PA Opinion No. 190 (1995), para. 12 (Ukraine). A similar phrase can be found, for example, in PA Opinion No. 193 (1996), para. 10 (Russia); Opinion No. 191 (1995), para. 10 (Macedonia); Opinion No. 189 (1995), para. 17 (Albania).

⁵⁹ In Resolution 1115 (1997), the PA stressed "that it is important for the Council of Europe to ensure full compliance with the undertaking made by all its member states ..." while earlier the PA held that "persistent failure to honour commitments freely entered will have consequences ...", PA Resolution 1031 (1994). Worth noting is that some NGOs seem to regard the commitments as legally binding, see Russian Federation: A Review of the Compliance with Council of Europe Commitments and Other Human Rights Obligations on the First Anniversary of its Accession to the Council of Europe, Human Rights Watch/Helsinki Report, Vol. 9, No. 3 (D), February 1997, at 10.

⁶⁰ There have been news reports of state officials' statements indicating that they consider commitments as non-binding. For instance, with regard to the death penalty, the Russian Prime Minister was quoted as saying that in some instances "not to execute was out of question" while Russia had entered into the commitment to institute a *de facto* moratorium on executions. See Human Rights Watch report, Russian Federation, *supra* note 59, *ibid*. Commitments were widely interpreted as being of "recommendatory character" during the debate in the Russian Duma on joining the CoE. See Bill Bowering, Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes, 2 EHRLR 628, 633 (1997).

can be inferred are documents and decisions of the PA. However, they do not say much about the precise content of the acceptance, which is crucial to determine the intent of the state. Only in some cases do the PA documents contain annexes with letters from the state authorities, this being the only available direct evidence of the state intent.

As admission procedure involves not only governments but also parliaments, in a number of cases the commitments were accepted by state officials such as the president of the parliament.⁶¹ Under international law, parliamentarians cannot be considered representatives capable of incurring legal obligations on behalf of the state by their actions, unless having been authorized to do so, or unless such an intention appears from the practice of the states concerned or from other circumstances.⁶² There are no indications that this occurred in the cases of admission to the CoE. Thus, when undertaken by parliamentary authorities the commitments could not bind the state under international law. However, there were also cases in which the CoE entered into correspondence with presidents, prime ministers, or foreign ministers.⁶³ Under international law these officials are, "in virtue of their functions" capable of binding the state by their acts.⁶⁴ The crucial factor is whether there existed an intention to bind the state, which primarily can be inferred from the text. For example, in the case of Russia, the letter signed by the president, prime minister and chairmen of both houses of parliament, said that Russia's "desire to gain full membership is a logical consequence of our current policies aimed at establishing the rule of law, strengthening democracy and genuinely securing human rights ...". Further, the letter expresses belief that Russia's admission will not lower standards of the CoE and ends with the following paragraph:

"We expect that, after joining the Council of Europe and acceding to its most important fundamental conventions (first and foremost, the European Convention on Human Rights), we will observe in full the obligations thereby accepted by us and will be able, in collaboration with all the structures of the Organisation, to continue with even greater perseverance and effectiveness our efforts to improve legislation and its application in the Russian Federation, in accordance with the standards of the Council."⁶⁵

⁶¹ For instance, in case of Albania. See Letter of 23 June 1995 from Mr. Arbënor, Speaker of the Albanian Parliament, to Mr. Columberg, reprinted in: Opinion on the Application by Albania for Membership of the Council of Europe, PA Doc. 7338 (June 27, 1995), Annex IV, at 20–21.

⁶² Article 7 (1) of the Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1980) (concluded on May 23, 1969, entered into force on January 27, 1980).

⁶³ For example, in cases of Croatia, Romania, Russia, and Ukraine. See Report on Croatia's request for membership of the Council of Europe, PA Doc. 7510 (Mar. 29, 1996), Appendix VIII; Report on the Application by Romania for Membership of the Council of Europe, PA Doc. 6901 (July 19, 1993), Appendix II; Report on Russia's Request for Membership of the Council of Europe, PA Doc. 7443 (Jan. 2, 1996), Appendix III; Report on the Application by Ukraine for Membership of the Council of Europe, PA Doc. 7370 (Sept. 7, 1995), Addendum.

⁶⁴ Article 7 (2) of the Vienna Convention on the Law of Treaties, *supra* note 62.

⁶⁵ "High-level Russian message", Report on Russia's Request for Membership of the Council of Europe, PA Doc. 7443 (Jan. 2, 1996), Appendix III, at 26–27 (*emphasis added*).

This formulation seems to indicate only Russia's willingness to abide by the conventions it accepts in the future, i.e. after accession, as well as an expectation that this will enable Russia to continue its reforms in accordance with the standards of the CoE. However, the letter contains no reference to the commitments. In other cases, as well, letters of the highest state officials contained a rather vague and non-committal language.⁶⁶

In the case of Croatia, however, the state president together with the president of the parliament signed the list of commitments requested by the PA. Additionally, in a letter accompanying the signed list of commitments, the Croatian minister of foreign affairs, in rather unambiguous language, undertook to respect the commitments:

"I have the honour to inform you that the proposed commitments of the Council of Europe have been carefully considered by our government as well as by the members of the parliament ... Croatia is ready to meet the criteria of the commitments proposed by the Council of Europe to the highest possible degree."⁶⁷

It has been argued that Croatia's declaration was a unilateral act of the state, binding under international law.⁶⁸ According to the argument, the fact that the PA, as the addressee of the declaration, is not a subject of international law does not have real significance, as the acceptance of a unilateral act is not necessary for its legally binding effect.⁶⁹ Furthermore, the intention of Croatia to be bound by its declaration seems clear not least from the above quoted statements by the Croatian minister of foreign affairs.⁷⁰ Thus, Croatia could be considered respon-

⁶⁶ See, for example, a letter by the Ukrainian president and other officials, reprinted in: Report on the Application by Ukraine for Membership of the Council of Europe, PA Doc. 7370 (Sept. 7, 1995), Addendum.

⁶⁷ The letter is reprinted in: Report on Croatia's Request for Membership of the Council of Europe, PA Doc. 7510, Appendix VIII, at 34. The acceptance of commitments was reconfirmed in a letter from the minister of foreign affairs to the chairman of the CM: "I hereby would like to reiterate that Croatia remains true to its commitments ...", see Communication from the Committee of Ministers Concerning the Accession of Croatia to the Council of Europe, PA Doc. 7617 (July 15, 1996), Appendix III.

⁶⁸ See Frank Hoffmeister, Kroatiens Beitritt zum Europarat und seine Auswirkung auf die kroatische Verfassungsgerichtsbarkeit, 24 EuGRZ 93, 94 (1997).

⁶⁹ *Ibid.*, citing the decision of the International Court of Justice in *Nuclear Tests Case*: "... nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made." See *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, I.C.J. Reports 1974, 267, and *Nuclear Tests (New Zealand v. France)*, Judgment of 20 December 1974, I.C.J. Reports 1974, 472.

⁷⁰ Sometimes the intention to be bound is not at all clear. Consider pronouncements by the Romanian minister of foreign affairs: "President and Romanian Government took your observation and suggestions most seriously and constructively, determined to follow them in good faith in formulating and implementing government domestic policies. (...) President ... reconfirmed the resolute option of Romania ... to undertake in the shortest possible time measures recommended by the rapporteurs ... (...) President ... is determined to make use of his constitutional prerogatives in order to have [the point of common understanding] considered and implemented as soon as possible by competent governmental and legislative bodies. (...) In conclusion, I wish to assure you of the

sible under international law in case of non-compliance with its commitments. At the same time, however, although the Croatian commitments, strictly speaking, do not form a part of membership obligations under the CoE Statute, their formal undertaking by the Croatian government in the course of Croatia's accession to the Statute is strong evidence of an understanding attached to the membership obligations both by Croatia and the CoE organs.⁷¹

Except for the case of Croatia, the available evidence in other cases of admission seems to indicate that the acceptance of commitments by state authorities could not, as such, legally bind the state. Either they were undertaken by unauthorized officials or contained non-committal language. However, non-committal and vague language in the state acceptance does not exclude the possibility that in the final analysis the state may still be bound by the commitments. Some have argued that the commitments may in some cases acquire binding force through decisions of the PA or the CM. For this reason, this article will next examine the effects of those decisions of CoE organs which referred to or contained the commitments. The discussion will first deal with the commitments contained in the opinions of the PA. Then it will analyze the significance of the reference to the commitments made by the CM in its resolutions inviting a state to become a member.

2.3. Commitments Given to the PA During the Admission Procedure

It has been contended, albeit only in passing, that commitments contained in the opinion of the PA and their acceptance by the state authorities may create obligations under international law. For instance, one commentator notes that in the case of Slovakia

“[t]he PA ... concluded that certain political circumstances warranted the inclusion of special commitments that the Slovak government took upon itself to fulfill within a reasonable period of time, thereby creating in relation to the PA obligations under international law.”⁷²

This pronouncement seems to indicate that the acceptance by the Slovak government of certain commitments created obligations under international law between that government and the PA. As has already been discussed, most of the acceptances of commitments by the state authorities were not made in a manner which bind the state. However, the question may be asked whether “obligations

disposition of the President and ... Government to examine in an open and constructive manner, and good faith, the issues you have raised in your discussion with Romanian authorities.”, Report on the Application by Romania for Membership of the Council of Europe, PA Doc. 6901 (July 19, 1993), Appendix II. According to Winkler, *supra* note 9, at 164, the Romanian government was extremely cooperative as it wanted Romania to become a member and be present in that status at the CoE summit in Vienna in 1993.

⁷¹ In this context, the question can also be raised whether this might be an agreement between the CM and the state. See *supra* text accompanying note 91.

⁷² Winkler, *supra* note 9, at 162 (emphasis added).

under international law” can exist in relation to the PA at all, supposing, for the sake of argument, that the government did bind itself by the acceptance of commitments. In relation to this, first it should be noted that the PA is a “deliberative organ” of the CoE.⁷³ It does not have competence to make decisions that are legally binding on member states. Furthermore, the PA’s role in the admission procedure is advisory, notwithstanding its political importance. As the name “opinion” itself indicates and bearing in mind the competencies of the PA, it seems that the PA cannot legally bind states by its opinions.⁷⁴ At the same time, it should be noted that the PA does not have an international legal personality, which belongs to the CoE as such. The CoE is represented by the CM and not by the PA.⁷⁵ All this points to the conclusion that the PA cannot enter into an international agreement or claim, under international law, fulfillment of certain obligations. Therefore, the commitments contained in the PA opinions cannot be, without more, regarded as legally binding on applicant states.

At the same time, it should also be noted that the PA’s role (although not statutory) in the admission procedure means that it, similarly to the CM, applies article 4 of the CoE Statute by ascertaining: a) whether statutory conditions of membership have been fulfilled by the state and b) whether, politically, the state should be invited to become a member. In the former case, the PA engages in the business of legal interpretation of the statutory conditions for membership. By attaching commitments it in fact asks the state to improve its practice, and to bring itself closer to compliance with the membership requirements and CoE standards. At the same time, by attaching commitments, the PA gives its own interpretation of what is meant by the respect for human rights, democracy and the rule of law. Although this interpretation is not legally binding, it has a certain legal significance, because it provides important evidence of what could be the meaning of the membership requirements of the CoE, given the fact that the PA is one of its two main organs.⁷⁶ In that regard, the PA’s insistence on an undertaking of certain commitments by new member states, such as the requirement that they base their policies towards minorities on the PA Recommendation 1201, may contribute to an evolving interpretation of the membership obligations under the CoE Statute. Finally, the PA may to a certain extent enforce compliance with the commitments. In the first place, the PA may, politically, condition its favorable opinion on admission upon the state’s undertaking of certain commitments. Furthermore, the PA may prevent the state delegation from taking part in the PA sessions or

⁷³ CoE Statute, art. 22.

⁷⁴ Furthermore, unlike the UN General Assembly, whose resolutions may have a far reaching legal effect, the PA is composed of delegations of national parliaments and not of the representatives of governments of member states.

⁷⁵ Article 13 of the CoE Statute. See, also, Heinrich Klebes, *L’Élargissement du Conseil de l’Europe vers l’Est: réalisation du rêve des pères fondateurs*, in: *Le Conseil de l’Europe acteur de la recomposition du territoire européen* 9, 16 (Catherine Schneider [ed.], Espace Europe, GRECER, Cahier n° 10, 1997).

⁷⁶ Compare Klebes, *ibid.*

recommend to the CM the adoption of membership sanctions against the state, which are provided under the CoE Statute.⁷⁷

2.4. Reference to Commitments in the CM Resolutions

When the process of accession of states from Eastern and Central Europe started, the CM resolutions inviting them to join were stating that the state "complies with the conditions laid down in Article 4 of the Statute" and that the PA had been consulted and "expressed a favourable opinion" regarding membership of the state concerned.⁷⁸ When the PA opinions began to contain the main commitments entered into by applicant states, the CM reference to the PA opinions became also an implicit reference to these commitments and, to some degree, their acceptance. The CM resolutions also made reference to the declared intention of the government to sign the ECHR upon accession.⁷⁹ This was also one of the commitments of the new members, although it was always mentioned separately.

Since the membership invitation to Romania, however, the CM has somewhat changed the wording of its resolutions of invitation and has started to include an express reference to the commitments. An additional paragraph stated that the CM resolved to invite the state, *inter alia*,

"[i]n the light of the commitments entered into and the assurances for their fulfillment given by the [state government] in its contacts, both with the Committee of Ministers and the Parliamentary Assembly of the Council of Europe, with a view to membership of the Council of Europe."⁸⁰

There have been different interpretations of this CM practice. Winkler said that, through this practice, the CM "associated itself" with the findings of the PA.⁸¹

⁷⁷ The PA may sanction a persistent failure to honor membership obligations and commitments accepted by states, or the lack of cooperation in monitoring, by the following measures: 1. adoption of a resolution and/or a recommendation; 2. decision not to ratify credentials of the parliamentary delegation of the state concerned at the beginning of the next ordinary session; 3. annulment of already ratified credentials of the parliamentary delegation. In the case of continuing non-compliance, the PA may recommend to the CM to invoke statutory sanctions (suspension and expulsion) against the state, PA Resolution 1115 (2997), para. 12. The PA has threatened to suspend some rights of the Ukrainian parliamentary delegation if there is no substantial progress in the honoring of the commitments. See PA Resolution 1194 (1999), para. 4.

⁷⁸ See CM resolutions (90) 17 (Hungary), (90) 18 (Poland), (91) 5 (Czecho-Slovakia), (92) 8 (Bulgaria), (93) 23 (Estonia), (93) 24 (Lithuania), (93) 25 (Slovenia), (93) 32 (Czech Republic) and (93) 33 (Slovakia).

⁷⁹ See *supra* text accompanying note 26.

⁸⁰ See CM resolutions (93) 37 (Romania), (95) 3 (Latvia), (95) 7 (Moldova), (95) 8 (Albania), (95) 22 (Ukraine), (95) 23 (Macedonia), (96) 2 (Russia). With regard to Croatia and Georgia, however, the CM used different wording than the one in the quoted paragraph. In the case of Georgia, it stated that "the assurances" for the fulfillment of commitments were given by the Georgian minister for foreign affairs in the correspondence with the Chairman of the CM, instead of the previous formulation which only referred to the assurances given by the state government, CM Resolution (99) 4 (Georgia). In the case of Croatia, which was a special one because the government formally accepted the commitments, the usual paragraph was replaced with a reference to the correspondence between the Chairman of the CM and the Croatian minister of foreign affairs, CM Resolution (96) 31 (Croatia).

⁸¹ Winkler, *supra* note 9, at 165.

In the case of Romania, of particular importance, according to this commentator, were the commitments which required specific changes to the Romanian legislation, by which the PA, for the first time, became involved in the detail of the legislation of a candidate state. Then, significantly, Winkler concluded:

"It is therefore justified to assume that Romania is the only country so far admitted under specific conditions, although it remains not entirely clear which of these conditions are legal obligations and which are just political engagements and recommendatory in nature."⁸²

Unfortunately, this statement was not further elaborated, but it could be implied that the author contended that Romania was admitted under a legal condition to fulfill its commitments, at least those which "are legal obligations" and whose breach could be objectively ascertained. It follows, furthermore, that if Romania was really admitted under such conditions, then its membership could be revoked should they not be fulfilled.⁸³ This deserves closer scrutiny.

The intention of parties⁸⁴ to stipulate a legal condition must be clearly established.⁸⁵ According to McNair, a condition need not be expressly stipulated and may be implied from the text, but this should be done with "great circumspection."⁸⁶ In the CM resolution (93) 37 on Romania, the reference to commitments was placed in the preamble, along with other considerations which had led the CM to resolve to invite Romania to become a member. The wording indicates that the decision was made, *inter alia*, "in the light of the commitments ...". In contrast to this, one should note the resolution inviting Poland to join, according to which the CM

"[r]esolves ... to invite Poland to become a member ... immediately after the Committee of Ministers has acknowledged in the light of the conclusions of the Assembly's observer mission that free general elections have been held, and that all conditions under the Statute are fulfilled ...".⁸⁷

Here, the CM used a wording which clearly stipulated a condition and included it in the operative part of the resolution.⁸⁸ The intention of the CM was obvious

⁸² *Ibid.*, at 166.

⁸³ Legal condition can either operate as a condition precedent, whose fulfillment is the prerequisite for the operation of a treaty, or as a condition subsequent or resolute condition, the occurrence of which may *ipso facto* terminate the treaty, or suspend its operation or empower a party to terminate or suspend it. Arnold (Lord) McNair, *The Law of Treaties* 436–437 (1961). Therefore, if there were legal conditions for the admission of Romania to the CoE, they would be resolute conditions.

⁸⁴ Conditions can either be contained in an agreement or in a unilateral act, but this is not relevant to the present analysis which however treats them only as a part of the CM invitation. The view that a reference to commitments in a CM resolution inviting the state to accede and the subsequent accession of the state form an agreement between the two will be dealt with below.

⁸⁵ Interpretation of the Statute of the Memel Territory (Preliminary Objection), PCIJ, Ser. A/B, No. 47 (1932), at 248.

⁸⁶ McNair, *supra* note 83, at 241.

⁸⁷ CM Resolution (90) 18.

⁸⁸ This was also the case with the invitation to Croatia, which stated that the CM resolved to invite Croatia: "subject to the possibility for the Committee of Ministers ... to reconsider this decision in the light of the manner in which, according to information they may receive from all relevant

– there would be no admission unless free general elections were held in Poland.⁸⁹ In the case of Romania, however, the wording of the reference to commitments did not clearly stipulate a condition. On the contrary, it seems that the undertaking of commitments was only one of the considerations which led the CM to take positive decision. This contention is further strengthened by the fact that the reference is placed in the preamble and not in the operative part of the resolution. Finally, there is not the slightest hint in the resolution that a violation of the commitments might lead to termination or suspension of the membership, which would be the case were the membership subject to a legal condition. Such sanctions are possible under article 8 of the CoE Statute, but only for the violation of membership conditions, which were clearly differentiated from the commitments in the resolution.⁹⁰ Therefore, it is submitted, the reference to commitments, contained in the CM resolution inviting Romania to membership, cannot be regarded as stipulating a condition in the legal sense.

There has also been an opinion which indicated, with reservations, that commitments may acquire the character of international legal obligations. The argument is the following: the CM has never rejected a PA opinion on accession or distanced itself from any of the commitments contained therein, but has regularly referred to the opinion in the resolution inviting the state, while, at the same time, the state invited has never rejected any of the commitments but has accepted the invitation. At that moment, arguably, the commitments may have become international obligations.⁹¹

The question, however, is whether there has really been an intention to regard the commitments as legally binding in this case, at least on the side of the CM. It is submitted that the wording and the place of the CM references to the commitments indicate that their acceptance was one of the considerations which led the CM to invite the state to join, rather than there being an intention on the part of the CM to regard the commitments as legal obligations.

2.5. Legal Effects of Commitments Referred to in the CM Resolutions

According to article 4 of the CoE Statute, there are two elements in the CM decision on admission. First, the state must be deemed by the CM to be able and

sources, Croatia [*inter alia*] (...) has demonstrated its willingness to honour all its commitments and to respond to the priority expectations of the Council of Europe ... as well as its ability to comply with the other conditions required by the Statute", CM Resolution (96) 31.

⁸⁹ The juridical nature of conditions in these two cases differs to some extent, as the one in the case of Poland is a condition precedent, while the purported condition in the case of Romania would be a condition subsequent. For the difference, see *supra* note 83.

⁹⁰ The paragraph which precedes the paragraph referring to commitments states the following: "Observing with satisfaction that Romania complies with the conditions laid down in Article 4 of the Statute ...", CM Resolution (93) 37, para. 5.

⁹¹ Heinrich Klebes, *Die Rechtsstruktur des Europarats und insbesondere der Parlamentarischen Versammlung* 26–27 (1996) and Klebes, *supra* note 75, at 16.

willing to fulfill the admission requirements of respect for human rights, the rule of law and democracy (as set forth in article 3). Second, if this is so, the CM may invite the state to join the CoE.

In all its resolutions inviting states to join, the CM has used the same phrase to declare that the first element obtained: "[o]bserving with satisfaction that [state X] complies with the conditions laid down in Article 4 of the Statute."⁹² One of the requirements of article 4 of the Statute is the state's willingness to fulfill the admission requirements. In this context, the fact that the authorities of the candidate state accepted the commitments may be strong evidence of the state's willingness. This is reflected in the CM resolutions which say that the commitments were entered into by the government in its contacts with the CoE organs "with the view to membership ...". Thus, it seems that the CM "deemed" the state to be willing to fulfill the admission requirements, at least in part because the state undertook the commitments.

As for the second element of the decision on admission, the provision that the CM may invite to join the CoE a state which fulfills membership conditions, clearly indicates that the CM has discretion in deciding whether to do so. The CM's decision to invite or not is a political one. It may take into account different considerations, but ideally the member states should consider what is the best for the fulfillment of the purposes of the organization.⁹³ The wording of the clauses in the CM resolutions referring to the commitments and PA opinions clearly shows that the state's acceptance of the commitments, as well as a favorable PA opinion were considerations which led to the CM decision to invite the state to become a member. As such, these considerations are expressly mentioned in the resolution. The usual formula is that "having taken note" of the intention to ratify the ECHR, "in the light of the commitments ... and the assurances ..." of the state, "having ... consulted the [PA]" – the CM resolves to invite the state to become a member. Thus, it may be concluded that the CM resolutions on admission have recognized the state's acceptance of the commitments as one of the important considerations which led the CM to take a political decision to invite the state to join the CoE.

In conclusion, references to the commitments in CM resolutions inviting states to join the CoE have a twofold meaning. On the one hand, the fact that the state entered into certain commitments shows its willingness to abide by the membership requirements and helps the CM to judge whether the state fulfills the membership criteria as stated in article 4 of the CoE Statute. On the other, the fact that the state entered into certain commitments is an important consideration which

⁹² In the case of Croatia, it used a slightly different formulation: "[o]bserving that Croatia is willing to comply ...". This indicates that the CM deemed that Croatia still did not comply but shows willingness to do so in the future, CM Resolution (96) 31. This is related to the conditional character of the invitation to Croatia.

⁹³ See Henry G. Schermers/Niels M. Blokker, *International Institutional Law: Unity within Diversity* 64–65 (3rd rev. ed. 1995), and Inis L. Claude, *Swords into Plowshares* 85–86 (4th ed. 1971).

the CM takes into account when exercising its discretion whether or not to invite the state to join. It may even be said that the state acceptance of commitments demanded by the PA and the CM has been a political condition for a favorable CM decision.

It has already been seen that the commitments referred to in the CM resolutions can neither be seen as legal conditions nor legally binding international obligations entered into on the basis of an "agreement" between the state and the CM. However, this is not to say that the commitments are devoid of any legal significance. Apart from being a very important consideration in the CM's decision to invite the state, the commitments also give evidence as to what may be the CM's interpretation of membership obligations. Every organ of an international organization has the right to interpret the constitution of that organization in the performance of its duties.⁹⁴ The CM interprets the membership conditions when deciding on states' applications to join the CoE. Because commitments have been used as evidence of the state's willingness to abide by the membership obligations of the respect for human rights, the rule of law and democracy, they must also be an indication of the CM's understanding of the meaning of these categories. This even more so, as the CM has never expressly disavowed any of the commitments, but has in fact endorsed them with the references in its resolutions. For instance, when the CM takes into account the state commitment to ratify the ECHR, as evidence of the state's willingness to comply with the membership criterion of the respect for human rights, then it could be said that in fact the CM holds that the state's readiness to ratify the ECHR is evidence of the state's willingness to respect the rights contained therein – which implies that the membership obligation to respect human rights encompasses the rights guaranteed by the ECHR.

Thus, by demanding from the state to undertake certain commitments and by referring to the commitments undertaken both in the state's contacts with the PA and itself, the CM provides an indication of what is its interpretation of the membership requirements and obligations. However, the CM has never expressly said that the commitments undertaken are a part of the membership obligations. Rather, its referral to the commitments should be seen as evidence of what the CM's interpretation of these obligations might be. For instance, in a lot of cases commitments included an undertaking to ratify the Framework Convention for the Protection of National Minorities or to conduct the state policy towards minorities on the principles set forth in the PA Recommendation 1201 (1993). Does the reference to these commitments in the CM resolutions mean that the membership obligations should be interpreted so as to include minority rights? Not necessarily, as there is no explicit CM pronouncement to that effect, and as a number of states of the CoE still has not been willing to undertake guarantees of minority rights. Alone, the CM references to the commitments related to minority rights cannot be deemed sufficient to make minority protection a part of the

⁹⁴ See *Certain Expenses of U.N.*, Advisory Opinion, I.C.J. Reports 1962, at 168.

membership obligations. But together with other practice⁹⁵ they clearly constitute evidence of an evolving interpretation of membership obligations.

The claim that the commitments are not legally binding obligations also means that membership sanctions under article 8 of the CoE Statute could not be applied against a state that does not respect one of its commitments, as such. But as the commitments, together with other practice, constitute evidence of the meaning of a membership obligation, the state's non-compliance with them may be an indication that the state is not complying with its membership obligations. If this is the case, then the statutory sanctions could be applied.

3. Conclusion

Although the CoE, and especially the PA, generally regard the commitments entered into by new member states as binding in some sense, it has been shown that the commitments, by themselves, can only be politically binding. This means that they may be enforced by political pressure that the CoE may put on the state. The commitments cannot be regarded as binding international obligations, no matter whether contained in the PA opinions or referred to explicitly or implicitly in the CM resolutions (the only exception being a formal acceptance of the commitments, such as in the case of Croatia).

If the commitments were regarded as legally binding this would also mean that the states which entered into them had different membership obligations than other member states of the CoE. However, if the commitments are not legally binding, then the new member states have no additional legal obligations in comparison with the "old" members, but rather certain political undertakings. This way, the inequality of treatment between the "new" and "old" members as well as between the "new" members themselves is less troublesome as it is a necessary product of the political nature of the admission procedure. Admission of a state to an international organization may be politically conditioned by its acceptance of various commitments. As the Central and Eastern European states have been eager to become members, they gladly accepted various commitments, including those that go beyond what had been required of other member states. At the same time, it should be noted that the acceptance of certain commitments by a large number of "new" member states might, to some extent, increase pressure on the "old" ones to move in the same direction and, for example, accept certain standards of minority protection.

The emphasis on the essentially political nature of the commitments does not mean that they are without any legal significance. Despite their political nature, the PA may sanction the state which does not comply with the commitments

⁹⁵ This practice includes repeated pronouncements of the heads of the member states, the CM and the PA on the importance of protection of minorities. See, e.g., the Vienna Declaration, Appendix II, *supra* note 6; Final Communiqué of the 95th Session of the Committee of Ministers of the Council of Europe, (Nov. 10, 1994), para. 5. For some examples of the PA practice, see *supra* text accompanying notes 39–46.

through suspension of the state's rights of representation in the Assembly. Furthermore, the commitments provide evidence of the PA's interpretation and understanding of the membership obligations. Although legally not binding, this interpretation has a very strong persuasive force considering that it has been given by one of the two principal organs of the CoE. As far as the explicit or implicit referrals to the commitments in the CM resolutions are concerned, they indicate what have been the considerations of the CM when making the political decision to invite the state to become a member. The commitments also served as proof to the CM of the state's "willingness" to comply with membership obligations. In this way, the commitments provide evidence of what has been the CM's understanding of the membership obligations.

Some of the commitments demanded from member states dealt with matters which were undoubtedly a part of membership obligations, such as the independence of the judiciary, freedom of the press or democratic elections. In this respect, the commitments have supplied more detail and sophistication in the interpretation of these rather general categories. In addition, some of the commitments asked for undertakings which were not usually regarded as part of the CoE membership obligations. Here, the commitments may serve as evidence of an emerging interpretation, which would eventually broaden the scope of the membership obligations. Together with other evidence, the commitments may contribute to the establishing of a new interpretation of membership obligations. Once this happens, the substance of the commitments would be regarded as applicable to all member states and not only to those that specifically undertook the commitments during the admission procedure.

