

Renate Kicker

Standard-Setting through Monitoring?

The Role of Selected Council of Europe Bodies in the Development of the European Human Rights Order

INTRODUCTION TO THE COURSE PROGRAM

A. Context

The topic “alternatives to treaty-making for the development of international law” has been on the agenda of academic discussions and research for some time. The central question is whether independent experts with the mandate to comment on the contracting parties’ legal systems and practices when examining compliance with commitments entered under international conventions may contribute to the international norm-creating process. Such situations may arise more frequently and consistently within the boundaries of a region and within a specific legal order, *e.g.* the European human rights order.

In the framework of a research project four bodies established within the Council of Europe (CoE) were chosen in order to assess whether the practice of monitoring compliance with legally binding human rights obligations (*norm standards*) – when carried out by independent experts – may lead to the development of (legally non-binding) *implementation standards*. The expert bodies under research were the European Committee on the Prevention of Torture (CPT), the European Committee on Social Rights (ECSR), the Advisory Committee under the Framework Convention for the Protection of National Minorities (ACFNM), and the European Commission against Racism and Intolerance (ECRI). While the CPT and ECRI work in direct contact with the states concerned by way of on site-inspections/visits and on the basis of an on-going dialogue, the other two bodies have been established to support the Committee of Ministers, the political body of the CoE, in its task to monitor compliance by states parties with treaty obligations. The work of the experts is not a repressive judicial activity but one of advice and as such preventive in nature. The advice given by the expert bodies to prevent the violation of international obligations is expressed in the form of recommendations (CPT), conclusions (ECSR), opinions (Advisory Committee), and general policy recommendations (ECRI).

These bodies derive their legitimacy mainly from their expertise, a quality that in turn may lead states to accept their authority and to take them into account when implementing the binding norms of the respective treaty (convention). It appears from country studies that these bodies have in fact more force than their official mandate suggests. Consequently, one may ask whether the substantive sections published in annual reports of the CPT, the digest of the case law of the ECSR, as well as the general policy recommendations of ECRI are sources which may eventually contribute to the dynamic development of the European human rights order? The research project tried to assess whether standards set by these expert bodies may eventually gain the status of regional customary law.

The question is, however, whether member states of the CoE would be prepared to agree to a monitoring system that results in legally binding decisions. Furthermore, it needs to be pointed out that these implementation standards are developed dynamically and in

response to the situations found in the different member states. On the one hand it appears to be important to create uniform standards applicable all over Europe, on the other hand it is equally important that these standards remain flexible, and changeable according to new insights/developments. The preliminary results of this research will be shared with the audience and discussed.

B. Topics

- What constitutes the normative order today? The role of hard law, soft law, and non-law
- Mechanisms to monitor compliance with legally binding human rights obligations in the Council of Europe
- The legal framework, mandate, composition and procedures of selected independent CoE monitoring bodies
- Assessment criteria and implementation standards
- The role of treaty monitoring bodies for the development of the European human rights order

C. Learning objectives

- To study the concept of sources in international law and its dynamic development
- To assess the legal basis and procedures of Council of Europe monitoring mechanisms
- To research the dialogue between one of the monitoring bodies and a chosen state (case study)
- To analyse whether standards set by expert bodies may contribute to the dynamic development of human rights in Europe
- *To read, speak and write in English as a preparation for future professional activities*

D. Reference material

A reading list will be distributed and an electronic version of the recommended literature made available

E. Tasks and exam

Students are expected to study the reading material and to undertake a **case study** following the instructions provided before the seminar. Each participant is asked to choose one of the four monitoring bodies under examination as well as a European state. (e.g. the CPT and Germany) The task will be to assess the ongoing dialogue between the monitoring body and the state chosen. Participants are then asked to prepare a draft version of the case study beforehand and to present its results in the seminar. The whole system of monitoring will be explained in more depth in the seminar. In light of the explanations given and the group discussion the draft case study can then be amended and forms the basis for the final grading.