



COUNCIL OF EUROPE    CONSEIL DE L'EUROPE  
Committee of Ministers  
Comité des Ministres

*Ministers' Deputies*  
**CM Documents**

**CM(2008)170**                      21 November 2008<sup>1</sup>

---

## **1042bis Meeting, 27 November 2008**

1 General questions

### **1.2 Stocktaking of the Swedish Chairmanship and decisions to be adopted**

b. The Council of Europe and the Rule of Law - An overview

---

#### Table of contents

	Page
<b>I. INTRODUCTION</b> .....	2
<b>II. THE RULE OF LAW AS PART OF THE CORE MISSION OF THE COUNCIL OF EUROPE</b> .....	2
Basic texts .....	2
2008 Programme of activities: a snapshot .....	3
Some interim conclusions .....	4
Relationship between rule of law, democracy and human rights .....	5
<b>III. THE KEY COMPONENTS OF THE RULE OF LAW AS UNDERSTOOD BY THE COUNCIL OF EUROPE</b> .....	5
The relevance of the ECHR .....	7
A. The institutional framework and organisation of the state .....	7
B. The principle of legality: principles of lawfulness, legal certainty and equality before the law .....	8
C. Due process: judicial review, access to courts and remedies, fair trial .....	10
Conclusion .....	11
Rule of law at the international level .....	11
<b>IV. THE COUNCIL OF EUROPE'S WORK TO PROMOTE THE RULE OF LAW AND ENSURE ITS RESPECT: A TYPOLOGY</b> .....	11
A. Promoting the conditions necessary for the rule of law .....	12
B. Promoting respect for the rule of law .....	13
C. Addressing threats to the rule of law .....	15
D. Ensuring respect for the rule of law .....	16
E. Strengthening the international rule of law .....	18
<b>V. OVERVIEW OF RULE OF LAW ACTIVITIES OF OTHER ORGANISATIONS (EU, OSCE, UN)</b> .....	19
General .....	19
European Union .....	19
Organisation for Security and Co-operation in Europe (OSCE) .....	20
United Nations .....	21
<b>VI. CONCLUSION</b> .....	22

---

<sup>1</sup> This document has been classified restricted until examination by the Committee of Ministers.

*Wherever law ends, tyranny begins (John Locke)*

## **I. INTRODUCTION**

1. At the 118th Ministerial Session, the Ministers reaffirmed the importance of the principle of the rule of law for consolidating democracy and respect for human rights and asked their Deputies to examine how full use could be made of the Council of Europe's potential in promoting the rule of law and good governance and to report to them on the occasion of the handover of the Committee of Ministers Chair from Sweden to Spain in November 2008 (Document CM(2008)47 final). At their 1027th meeting on 21 May 2008, the Deputies invited their Rapporteur Group on Legal Co-operation (GR-J) to examine this matter. At its meeting on 1 July 2008, the GR-J held a first discussion on the item "Examination of how full use can be made of the Council of Europe's potential in enhancing the rule of law". This discussion took place on the basis of a document submitted by the Swedish delegation (DD(2008)393) proposing the development of a Council of Europe strategy to reinforce the promotion of the rule of law.

2. The GR-J requested the Secretariat to prepare a descriptive document seeking to define key components of the concept of rule of law and draw up a typology of activities undertaken by the Council of Europe relevant to the rule of law, notably standard-setting and co-operation activities. The document should also contain information about relevant activities of the EU and other international organisations.

3. This document was prepared in response to the GR-J's request.

## **II. THE RULE OF LAW AS PART OF THE CORE MISSION OF THE COUNCIL OF EUROPE**

### **Basic texts**

4. The rule of law is one of the three core principles of the Council of Europe, along with the enjoyment of human rights and fundamental freedoms and the concept of genuine democracy (1949 Statute, recital 3 of the preamble and Article 3). More particularly, the rule of law is, together with individual freedom and political liberty, referred to as "principles which form the basis of all genuine democracy" (recital 3 of the preamble).

5. The preamble to the European Convention on Human Rights (ECHR; 1950) expresses the resolve of governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration of Human Rights (6th recital).

6. While neither the Statute nor the ECHR elaborate on the concept of the rule of law as such, it should be noted that the rule of law is considered to be a "*principle*" and that its close links with democracy and human rights are already highlighted in these early fundamental texts of the Council of Europe. Furthermore, important guidance on the content of the rule of law principle can be derived from the ECHR, which contains many rule of law-related provisions (see Section III below).

7. The rule of law has been systematically referred to in the major political documents of the Council of Europe, as well as in numerous legal instruments such as Conventions and Recommendations. The three Summits of Heads of State and Government have resulted in Declarations and Plans of Action underlining the importance of the rule of law as central part of the Council of Europe's mission.

8. In the *Vienna Declaration* (1993), emphasis was laid on the fact that accession to the Council of Europe presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect for human rights. Observance of the principles of international law was seen as a decisive criterion for membership and acceptance of the ECHR's supervisory machinery within a short period as fundamental. The Declaration also states that the setting up of appropriate legal structures and the training of administrative personnel are essential conditions for the success of economic and political transition in Central and Eastern Europe.

9. In the *Strasbourg Final Declaration and Action Plan (1997)* the Heads of State and Government solemnly reaffirmed their attachment to the fundamental principles of the Council of Europe – pluralist democracy, respect for human rights, and the rule of law. They underlined the contribution of the Council of Europe’s essential standard-setting role to the development of international law through European conventions. The Action Plan sets out an agenda for action in five fields, including democracy and human rights. The rule of law is not included as a distinct field but there is a section entitled “Security of citizens” covering actions to combat terrorism, corruption and organised crime, to prevent drug abuse, and to protect children.

10. The *Warsaw Declaration (2005)* states that the Council of Europe shall pursue its core objective of preserving and promoting human rights, democracy and the rule of law. All its activities must contribute to this fundamental objective. The Heads of State and Government committed themselves to “developing those principles, with a view to ensuring their effective implementation by all member states. In propagating these values, we shall enhance the role of the Council of Europe as an effective mechanism of pan-European co-operation in all relevant fields.” (paragraph 1).

11. This is elaborated further in paragraph 4: “We are committed to strengthening the rule of law throughout the continent, building on the standard-setting potential of the Council of Europe and on its contribution to the development of international law. We stress the importance of an independent and efficient judiciary in the member states in this respect. We will further develop legal co-operation within the Council of Europe with a view to better protecting our citizens and to realising on a continental scale the aims enshrined in the Statute.”

12. A separate paragraph of the Declaration dealing with security of citizens states that the Council of Europe will continue to play an active role in combating terrorism, corruption, organised crime, trafficking in human beings, cybercrime and the challenges attendant on scientific and technical progress. Measures shall be promoted “consistent with our values to counter those threats.” (paragraph 8).

13. The *Warsaw Action Plan* likewise places rule of law – related action in a different section (Chapter I, section 3: Strengthening democracy, good governance and the rule of law in member states) from action designed to strengthen the security of European citizens (Chapter II).

14. As regards the rule of law, support is expressed for, and impetus given to, the work of the Venice Commission, the European Commission for the Efficiency of Justice (CEPEJ) and the Consultative Council of Judges of Europe (CCJE). Nationality law and family law are highlighted as focus points for continued Council of Europe action. More generally, the Action Plan states that full use will be made of the Council of Europe’s standard-setting potential and that implementation and further development of its legal instruments and mechanisms of legal co-operation will be promoted.

15. Regarding the security of citizens, actions are announced concerning the various security threats mentioned in the Declaration. The rule of law is explicitly mentioned in the section on the information society: “The Council of Europe shall further elaborate principles and guidelines to ensure respect for human rights and the rule of law in the information society.” (Chapter II, section 5).

16. Finally, the rule of law is referred to in the Action Plan sections dealing with co-operation with the EU and the OSCE, including in the Guidelines and Declaration appended to it. As regards the EU, the rule of law occupies a prominent place in the Memorandum of Understanding between the Council of Europe and the EU which was elaborated on the basis of the Guidelines of the Warsaw Action Plan and adopted on 10 May 2007.

### **2008 Programme of activities: a snapshot**

17. The 2008 POA structure comprises five main thematic chapters: Human Rights, Rule of Law, Democracy and good governance, Social cohesion and Culture and intercultural dialogue.

18. The rule of law chapter contains three lines of action (LoA): Functioning and efficiency of justice, Strengthening rule of law standards, and Strengthening the security of European citizens.

19. The first LoA “Functioning and efficiency of justice” covers the work of CEPEJ (evaluating and improving the efficiency of Justice) as well as capacity-building concerning the organisation of independent judicial systems and the strengthening of the status, role and functions of judges and prosecutors. This LoA is linked to several Joint Programmes (CoE-EC) and VC projects which are country or region-specific.

20. The second LoA “Strengthening rule of law standards” focuses, first of all, on CM monitoring and support to states in implementing their commitments, strengthening national legal frameworks and raising awareness about European standards, and developing Council of Europe standards in public and private law<sup>2</sup> and ensuring their implementation (CDCJ). A second focus is given to the implementation of specific co-operation activities in post-conflict situations, in particular in the Chechen Republic of the Russian Federation and in Kosovo<sup>3</sup> and the coordination of Council of Europe activities in these areas. Finally, the LoA also covers the strengthening of the role and development of international law in order to promote international co-operation (CAHDI).

21. The third LoA “Strengthening the security of European citizens” comprises two programmes: Democratic responses to terrorism and European standards for crime control. The first covers the promotion of signatures, ratifications and implementation of relevant Council of Europe conventions, and the identification of gaps in international law applicable to the fight against terrorism as well as means to fill them (CODEXTER). The second covers a wide range of intergovernmental activities to help criminal justice systems to fight crime effectively and humanely, including through standard-setting and international co-operation (CDPC). It also comprises monitoring in specific fields (GRECO, MONEYVAL) and a host of technical and targeted co-operation activities in fields such as fighting (organised) economic crime and cybercrime, implementation of European standards regarding law enforcement officials, criminal sanctions policies, imprisonment and prison systems, rehabilitation, alternative sanctions, etc. Several Joint Programmes and VC projects are linked to this LoA.

### Some interim conclusions

22. The foregoing overviews are not sufficient to allow the drawing up of a list of key rule of law requirements accepted by the Council of Europe, let alone a definition. At best, they give some indirect impressions of the meaning of rule of law, by identifying (only) some areas of activity of the Council of Europe which are deemed relevant and important in rule of law terms. It would be wrong to assume, for example, that all rule of law-related activities of the Council of Europe are covered under the above-mentioned headings in the Programme of Activities.

23. However, some first conclusions can be noted concerning the Council of Europe’s understanding of the rule of law concept:

- rule of law is a principle, not a distinct area of activity for the Council of Europe (although some of its areas of activity are seen to be more closely associated with the rule of law than others); this explains why it is impossible to place *all* relevant activities together in a single chapter of the Programme of Activities;
- the rule of law principle is one of the three fundamental principles of the Council of Europe, together with pluralist democracy and respect for human rights;
- these three principles are closely interconnected: preserving and promoting human rights, democracy and the rule of law is nowadays even seen as a single objective - the core objective - of the Council of Europe.

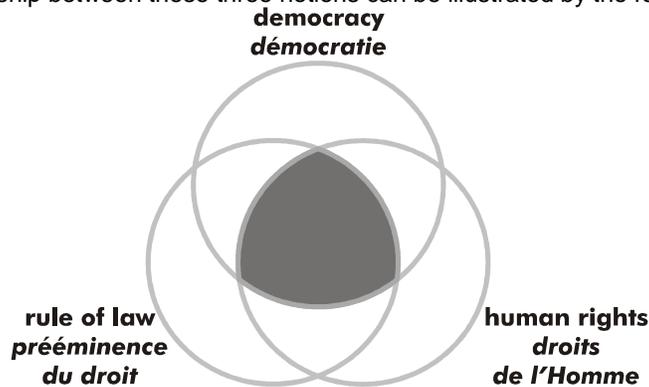
<sup>2</sup> In the POA “public law” is seen as the area of law concerning the relations between the state and the individual, whereas “private law” is seen as governing the relations between individuals (p. 73). For these two areas, the following priority fields are mentioned for the years to come: justice, family law, nationality, civil and administrative law (*ibidem*).

<sup>3</sup> All reference to Kosovo, whether the territory, institutions or population, in this text shall be understood in full compliance with United Nation’s Security Council Resolution 1244 and without prejudice to the status of Kosovo.

24. Like democracy and respect for human rights, the rule of law is a principle pertaining to the organisation and functioning of the state. In accordance with Article 3 of the Statute, Council of Europe member states must accept this principle; they are therefore expected to be states based on the rule of law.

#### **Relationship between rule of law, democracy and human rights**

25. The interrelationship between these three notions can be illustrated by the following figure:



26. Democracy, rule of law and human rights can be seen as three partly overlapping circles. Some principles, such as equality and non-discrimination, belong to all three notions (the grey area in the figure). Others are more directly associated with two of the three notions, such as the fair trial principle (rule of law and human rights) or the principles of freedom of expression, assembly and association (democracy and human rights). Still other principles operate principally in relation to one of the three notions (e.g. the human rights principle of freedom of movement).

27. However, this simplified representation does not show the *interdependence* between the three notions. There can be no democracy without the rule of law and respect for human rights; there can be no rule of law without democracy and respect for human rights, and no respect for human rights without democracy and the rule of law.

28. The fact that the three concepts, taken together, form a single fundamental objective for the Council of Europe makes it less necessary for it to adopt a particular definition of the rule of law. Such an exercise of disentangling notions that are so closely intertwined and mutually supportive might even be risky in terms of overlooking essential human rights and democratic requirements and aspects.

### **III. THE KEY COMPONENTS OF THE RULE OF LAW AS UNDERSTOOD BY THE COUNCIL OF EUROPE**

29. It is somewhat paradoxical that, although no authoritative definition of the rule of law exists within the Council of Europe,<sup>4</sup> the Organisation works pragmatically on a daily basis to promote and strengthen the rule of law in and among its member states. In fact, there is a strong consensus within the Council of Europe as to the basic requirements that flow from the rule of law principle.

<sup>4</sup> The Parliamentary Assembly Resolution 1594 (2007) "The principle of the rule of law" does not contain such a definition either, although it points out that "rule of law" (*prééminence du droit*) must not be conceived of or translated as "supremacy of statute law" (*prééminence de la loi*), as is the case in some recent democracies in eastern Europe. The Assembly considers that such a formalistic interpretation of "rule of law" runs counter to the essence of the concept.

30. A recent illustration is the White Paper on Intercultural Dialogue which was officially launched by Ministers at the 118th Session of the Committee of Ministers in May 2008, section 3.4.1 of which deals with the rule of law in the following terms: “The fundamental standards of the rule of law in democratic societies are necessary elements of the framework within which intercultural dialogue can flourish. They ensure a clear separation of powers, legal certainty and equality of all before the law. They stop public authorities taking arbitrary and discriminatory decisions, and ensure that individuals whose rights are violated can seek redress from the courts.” Contrary to other sections of the White Paper, approval of this particular paragraph required little or no debate among the member states.

31. This high degree of consensus in the Council of Europe about the basic requirements of the rule of law is all the more significant in view of the conceptual and philosophical differences between the main legal traditions in Europe on this score. The German concept of *Rechtsstaat* which began to develop in the 19th century and which French scholars adapted into the *Etat de droit* in the early 20th century, differs from the concept of the rule of law which became part of constitutional theory in the UK in the late 19th century. Although there are certainly common features and objectives (put very simply, the rule of law is about restraining the exercise of public and political power by subjecting it to certain principles such as the principle of legality), there are important conceptual differences. The British rule of law concept traditionally tends to emphasise formal/procedural requirements, whereas the German concept, in its original form and even more so today, adds an important substantive dimension by stressing the protection of fundamental rights as a *Rechtsstaat* principle.<sup>5</sup>

32. There is an ongoing discussion in legal theory about different conceptions of the rule of law: more formal (or “thinner”) conceptions vs. more substantive (or “thicker”) conceptions.<sup>6</sup> Simply put, this distinction mostly concerns the question of whether the rule of law principle consists only of process and form – related requirements or whether, in addition, it contains requirements regarding the *content* of the laws that rule. Human rights and human dignity are the key example of value requirements inherent in a substantive conception.

33. In practice, however, rule of law (*Rechtsstaat*; *Etat de droit*) conceptions are not static but evolving. Especially since WW II, there has been a significant and steady process, not necessarily of convergence of traditionally different rule of law conceptions in national legal systems in Europe (these conceptions remain quite strongly impregnated by national traditions and contexts), but of recognition of a common core of rule of law requirements that apply in Europe across different national traditions and contexts.<sup>7</sup> Notions of *Rechtsstaat*, *Etat de droit* and rule of law tend to amalgamate in the European legal order.<sup>8</sup> The process of European integration and co-operation both in the EC/EU and in the Council of Europe has indeed been (and continues to be) an important factor, as has the development of European human rights law as part of that process. The adherence of all Council of Europe member states to the ECHR and their being subject to the jurisdiction of the European Court of Human Rights was highly instrumental in creating a common European core of rule of law requirements which is still developing further.

<sup>5</sup> For a helpful comparative overview, see Erik O. Wennerström, *The Rule of Law and the European Union*, Uppsala 2007, pp. 61–76.

<sup>6</sup> See Wennerström 2007, p. 76-84, and the report by the Hague Institute for the Internationalisation of Law on its second High level expert meeting on the rule of law (pp. 2–3):

<http://hiil.tritac.com/uploads/File/Second%20High%20Level%20Expert%20RoL%2020%2004%202007%20Report.pdf>

<sup>7</sup> These common requirements have thus become “decontextualised” so as to become either principles of general application in very different national legal systems (the Council of Europe method) or principles that apply in the distinct EC/EU legal system and are “recontextualised” when and by becoming part of that system’s legal tradition (the Community method). See, as far as the EU is concerned, Wennerström 2007, p. 89.

<sup>8</sup> Guy Canivet, L’incidence de la *rule of law* sur le système juridique français, in S. Breitenmoser et al. (eds), *Human Rights, democracy and the rule of law – Menschenrechte, Demokratie unter Rechtsstaat – Droits de l’homme, démocratie et Etat de droit* (Liber amicorum Luzius Wildhaber), Zürich/Baden-Baden 2007, pp. 1169-1184.

## The relevance of the ECHR

34. As was stated in Section II above, the ECHR contains many rule of law-related provisions. But the relevance of the ECHR for the rule of law and vice versa does not stop here. In its landmark judgment in the *Golder* case (21.2.1975, § 34), the Court underlined the relevance of the rule of law for the interpretation of the ECHR. Referring to the preamble, the Court stated that “one of the reasons why the signatory Governments decided to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration of Human Rights was their profound belief in the rule of law.” Many subsequent judgments have confirmed that the rule of law clearly is a fundamental guiding principle to the application and interpretation of the ECHR.

The case-law has clarified that the principle inspires the whole Convention and is inherent in all the Articles of the Convention (see, e.g., *Engel and Others*, 8.6.1976, § 69; *Amuur*, 25.6.1996, § 50). Today, there exists such an impressive body of case-law on rule of law-related requirements that it is not exaggerated to state that the ECHR and the Court are not only instruments for the protection of human rights but also tools for the protection of the rule of law and the collective enforcement of its requirements.<sup>9</sup>

35. On the basis of that case-law, it is possible to list a number of rule of law-related requirements (components, constitutive elements or sub-principles) that form part of the law of the ECHR.<sup>10</sup>

36. These can be grouped under three main headings.

### A. The institutional framework and organisation of the state

37. It is in this context that the Court tends to refer to *Etat de droit* (“State based on the rule of law”)<sup>11</sup> rather than *prééminence du droit* (“rule of law”), the expression used in the preamble to the ECHR.

38. The notion of **separation of powers**, notably between the political organs of the state (executive, legislature) and the judiciary has assumed a growing importance in the Court’s case-law. While the Court has refrained from elaborating a general theory on separation of powers or on checks and balances between the legislature, the executive and the judiciary, it is careful to protect the judicial process from interferences by the legislature or the executive (e.g. *Stafford*, 28.5.2002 § 78; *Beaumartin*, 24.11.1994, § 38; *Öcalan*, 12.5.2005, §§112 and 114; *Kleyn and Others*, 6.3.2003, §§ 193 and 200; *Zielinski and Pradal & Gonzales*, 28.10.1999, § 57; *Stran Greek Refineries and Stratis Andreadis*, 9.12.1994, § 49). Furthermore, it is not compatible with the rule of law if the legislature gives excessive discretion to the executive (*Malone*, 2.8.1984, § 68) or the judiciary (*Kruslin and Huvig*, 24.4.1990, § 36) to take measures which negatively affect human rights.

39. The **role of the judiciary** is essential in a state based on the rule of law. It is the guarantor of justice, a fundamental value in a law-governed state (*De Haes and Gijssels*, 27.1.1997, § 37). In criminal matters its role in the prevention and repression of crime, in particular when committed by State agents, is linked to the notion of the rule of law notably when **procedural obligations under Articles 2 (right to life) and 3 (prohibition of torture) ECHR** are at stake. **Impunity**, de jure or de facto, for violations of these Articles, is incompatible with the principle of the rule of law. In this context, the Court has repeatedly stressed the importance of maintaining public confidence in the (authorities’ adherence to) the rule of law and preventing any appearance of the authorities’ tolerance of or collusion in unlawful acts (*Hugh Jordan*, 4.5.2001, § 108; *Okkali*, 17.10.2006, § 65). A state based on the rule of law has the duty to employ the necessary measures **to uphold the law on its territory and to ensure the security of all** as well as the enjoyment of human rights (*Lelièvre*, 8.11.2007, § 104). As one element of a state subject to the rule of law, prosecuting authorities must show the necessary diligence in the implementation of criminal law in order to prevent and repress crime and protect the citizens (*Saygili*, 8.1.2008, § 35).

<sup>9</sup> Much the same could be said about the requirements of a democratic society.

<sup>10</sup> The Court’s Registry (Research Division) provided very valuable assistance for this section. References to the Court’s judgments are non-exhaustive.

<sup>11</sup> Sometimes: “law-governed State” or “State subject to the rule of law”.

40. Article 6 § 1 ECHR requires that **a tribunal must always be established by law**. This reflects the principle of the rule of law inherent in the whole ECHR system. Legislation on the establishment and competence of judicial organs must be enacted by parliament, failing which a tribunal would lack the necessary legitimacy in a democratic society to hear the cases of individuals (*Lavents*, 28.11.2002, § 81; *Jorgic*, 12.7.2007, § 65).

41. More generally as regards the legislature, the Court has systematically described the right to vote and stand for election as a right “central to democracy and the rule of law”, thus illustrating the interdependence between these notions (*Hirst*, 6.10.2005, § 58; *Albanese*, 23.3.2006, § 44).

42. The **duty of the state, notably the executive, to respect and apply the law**, including the duty to enforce final domestic judgments, will be further addressed under the principle of legality below. Here, reference should be made to the importance of **administrative courts** which the Court has highlighted as one of the most conspicuous achievements of a state based on the rule of law, in particular because the jurisdiction of those courts to adjudicate on acts of the administrative authorities was not accepted without a struggle (*Kress*, 7.1. 2001, § 69).

## B. The principle of legality: principles of lawfulness, legal certainty and equality before the law

43. The principle of legality (sometimes referred to as supremacy of the law) forms a traditional core part of the rule of law concept. The rule of law requires that the state acts on the basis of, and in accordance with, the law. This offers essential legal protection of the individual vis-à-vis the state and its organs and agents. Many ECHR provisions reflect this principle through references to the notion of “law”, in most cases in the form of a requirement that interference with human rights must be lawful.<sup>12</sup>

- Principle of lawfulness

44. The notion of law systematically used by the Court is a material or substantive one.<sup>13</sup> It covers not only statute law but also unwritten law (case-law) and regulations. The Court assesses whether domestic law as a whole has been complied with in the context of interferences with ECHR rights. In the context of deprivation of liberty (Article 5), the Court stresses the importance of the lawfulness of the detention, both procedurally and substantively, requiring scrupulous adherence to the rule of law (*Winterwerp*, 24.10.1979, § 39). Non-compliance with domestic law leads to a violation of Article 5 (*Bozano*, 18.12.1986, § 58; *Wassink*, 27.9.1990, § 27). In some cases, even where the law may have been formally respected, the Court has found a breach of the requirements of lawfulness on the ground that the authorities have attempted to circumvent the applicable legislation (*Karagöz*, 8.11.2005, § 59; *John*, 10.5.2007, § 33).

45. The state is not only obliged to respect and apply, in a foreseeable and consistent manner, the laws it has enacted, but also, as a corollary of this duty, to ensure the legal and practical conditions for their implementation (*Broniowski*, 22.6.2004, § 184).

46. The notion of “law” in the ECHR does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law. In particular, the **law must be sufficiently accessible and foreseeable** (*Sunday Times (No. 1)*, 26.4.1979, § 49). These requirements have been developed in a rich case-law. Foreseeability means that the law must be foreseeable as to its effects, that is formulated with **sufficient precision** to enable the individual to regulate his conduct. In this context, a law which confers a discretion to a state authority must indicate the scope of that discretion. **It would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion and the manner of its exercise with sufficient clarity, to give the individual adequate protection against arbitrariness.** (*Malone*, 2.8.1984, § 68).

<sup>12</sup> Articles 2,5,6,7,8,9,10,11, 1 of Protocol No.1, 2 of Protocol No. 4, Protocol No. 7.

<sup>13</sup> With the exception of the right to a tribunal “established by law” (Article 6 § 1) dealt with under A above.

47. The **principle of legality takes on a special importance in criminal matters**. Article 7, ECHR enshrines two principles essential to the rule of law: a criminal conviction must be based on a norm which existed at the time of the act or omission (*nullum crimen sine lege*), and no heavier penalty may be imposed than the one applicable at the time the offence was committed (*nulla poena sine lege*). Neither is it permissible to apply new, more severe legislation to an ongoing situation that arose before the legislation came into force (*Achour*, 10.11.2004, § 37). In addition, the authority applying the criminal law may not interpret it extensively, for example by analogy, to the accused's detriment. The offence must be clearly defined in law (here, too, requirements of accessibility and foreseeability apply) (*Coême*, 22.6.2000, § 145). This is also true in respect of the penalty imposed (*Kafkaris*, 12.2.2008, § 145). These principles all serve to offer essential safeguards against arbitrary prosecution, conviction and punishment (*Kokkinakis*, 25.5.1993, § 52).

- Principle of legal certainty

48. This principle is one of the basic elements of the rule of law (*Beian*, 6.12.2007, § 39). It can be linked to some of the principles and requirements set out above (such as lawfulness and foreseeability). The state has a duty to respect and apply, **in a foreseeable and consistent manner**, the laws it has enacted (*Broniowski*, 22.6.2004, § 184).

Legal certainty requires respect for the **principle of *res judicata***. Final judgments by domestic courts should not be called into question; systems which allow for the quashing of final judgments for an indefinite period of time are incompatible with the principle of legal certainty (*Brumarescu*, 28.10.1999, § 61; *Riabykh*, 24.7.2003, §§ 54 and 57).

49. The rule of law, in particular the principles of legality and legal certainty, also requires that **final court judgments be enforced**. In private disputes, enforcement of final judgments may require the assistance of the police in order to avoid any risk of "private justice" contrary to the rule of law (*Matheus*, 31.3.2005, § 70). The **administration of the state's obligation to execute final domestic judgments** is an essential feature of a state founded on the rule of law and the principle of legal certainty (*Taskin and Others*, 30.3.2005, § 136). Violations of this obligation are sanctioned under different ECHR provisions.

50. Likewise, authorities are obliged to **respect final decisions ordering the release of a person from detention**. A practice of detaining a person without the basis of a concrete legal provision or judicial decision is itself contrary to the principle of legal certainty (*Baranowski*, 28.3.2000, § 56; *Svipsta*, 9.3.2006, § 86).

51. The existence of **conflicting decisions within a supreme court** is contrary to the principle of legal certainty. It is therefore required that the courts, especially the highest courts, establish **mechanisms to avoid conflicts and ensure the coherence** of their case-law. The principle of legal certainty is essential to the public's confidence in the judicial system and the rule of law (*Beian*, 6.12.2007, § 39).

52. The principle of legal certainty may also justify certain limitations of rights, notably in the form of **time-limits for lodging appeals or the use of statutory limitations**. However, the ECHR may still be violated in case of particularly strict interpretations or rigid application of time-limits regardless of individual circumstances (*Miragall Escolano*, 25.1.2000, § 33; *Phinikaridou*, 20.12.2007, § 51).

- Principle of equality before the law

53. The principle that all are equal before the law is reflected in various ways in the ECHR. Article 1 requires states to secure ECHR rights to “everyone” within their jurisdiction, and most ECHR rights are similarly framed: “Everyone has the right ...”. In addition, Article 14 prohibits any discrimination in the enjoyment of ECHR rights, and Article 1 of Protocol No. 12 prohibits discrimination generally, including as regards the enjoyment of any right set forth by law and any other discrimination by a public authority. Equality before the law and non-discrimination are human rights principles as much as they are rule of law principles, and the Court’s case-law tends to apply the prohibition of discrimination without there being a special need to refer to it as a rule of law principle, although there is some recognition that equality in rights and duties of all human beings before the law is an aspect of the rule of law.<sup>14</sup>

### C. Due process: judicial review, access to courts and remedies, fair trial

54. The principle of the rule of law implies that an interference by the executive authorities with an individual’s rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure (*Klass and Others*, 6.9.1978, § 55); This **principle of judicial control of the executive** was reaffirmed in more recent cases (*Dumitru Popescu (No. 2)*, 26.4.2007, § 76; *Sissanis*, 25.1.2007, § 71). As regards deprivation of liberty, the requirements of Article 5 §§ 3 and 4 ECHR, with their emphasis on promptitude and judicial control, assume a particular importance in the context of secret detentions and disappearances. What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection (*Kurt*, 25.5.1998, § 123).

55. The due process aspect of the rule of law entails certain **positive obligations of the state in the form of procedural requirements and safeguards** (such as the right to be heard and have one’s views considered, e.g. for a pregnant woman concerning the therapeutic termination of her pregnancy: *Tysiack*, 20.3.2007, §§ 112 and 117).

56. **The right of access to a court** was established on the basis of the rule of law principle. In the *Golder judgment* (21.2.1975, § 35), the Court rejected an interpretation of Article 6 § 1 which would allow states to abolish their courts, take away their jurisdiction to decide certain classes of civil actions and entrust it to organs dependent of the government. Individuals must have a clear, practical opportunity to challenge an act that interferes with their rights (*Bellet*, 4.12.1995, § 36). This right may imply an obligation to provide for legal aid in civil disputes (*Airey*, 9.10.1979, § 26) or to exempt actions for damages from high and inflexible court fees (*Stankov*, 12.7.2007, § 59). The right of access to court may be subject to certain limitations, but these, in turn, are themselves subject to certain requirements.

57. The **right to an effective remedy** (Article 13 ECHR) for any arguable claim about violation of ECHR rights is also closely linked to the rule of law. Referring to that principle, the Court has established that, in expulsion cases, Article 13 may require a remedy with an automatic suspensive effect especially where there is a serious risk of torture or ill-treatment in case of deportation (*Conka*, 5.2.2002, § 83; *Gebremedhin*, 26.4.2007, § 66).

<sup>14</sup> *Refah Partisi and Others*, Chamber judgment of 31.7.2001. The *GC judgment* of 13.2.2003 did not refer to equality but to the principle of secularism. The principle of equality before the law is also expressed through specific ECHR requirements concerning judicial proceedings such as equality of arms and impartiality of the judge (Article 6 ECHR).

58. The **right to a fair trial** enshrined in Article 6 ECHR reflects the fundamental principle of the rule of law (*Sunday Times (No. 1)*, 26.4.1979, § 55) and occupies a prominent place in a democratic society (*Kostovski*, 20.11.1989, § 44). Unsurprisingly, the notion of the rule of law is used in the interpretation and application of the different guarantees of Article 6, such as the presumption of innocence (*Salabiaku*, 7.10.1988, § 28), the rights of the defence (*Leempoel*, 9.11.2006, § 75) and the right to a fair trial within a reasonable time (*Sürmeli*, 8.6.2006, § 104).<sup>15</sup> In the latter judgment, attention was drawn to the important danger that exists for the rule of law within national legal orders when **excessive delays in the administration of justice** occur in respect of which litigants have no domestic remedy. **Article 6 also applies to the execution of a judicial decision**: where authorities fail to execute such a decision, the fair trial guarantees enjoyed by a litigant during the proceedings are rendered devoid of purpose (*Hornsby*, 19.3.1997, § 40; *Immobiliare Saffi*, 28.7.1999, § 63). This again illustrates the relevance of enforcement of the law as a rule of law principle (see under legal certainty above).

## Conclusion

59. All these rule of law requirements under the ECHR pursue an important objective: to avoid arbitrariness and offer individuals protection from arbitrariness, especially in the relations between the individual and the state.<sup>16</sup> In addition, there are some indications that the rule of law may on occasion take on a broader meaning in the Court's case-law, for example when the Court refers to the state's duty to uphold the law on its territory (see para. 39 above). In this broader sense, the rule of law means that not only the state and its agents but all individuals are subject to the law ("no one is above the law"). This explains why the state's duty to ensure the security of all persons as well as everyone's enjoyment of human rights (see para. 39 above) also extends to countering threats posed by other individuals.<sup>17</sup>

## Rule of law at the international level

60. There is also an important *international* dimension to the rule of law. As was reaffirmed in the 2005 UN World Summit Outcome, an international order based on law where rule of law principles are respected is essential for peaceful coexistence and co-operation among states. Itself an example of regional co-operation promoting a European legal order founded on the principle of the rule of law, the Council of Europe is also active in this international dimension. This is true, first of all, as regards the operation of its own instruments (accountability and monitoring of states' compliance with legal obligations; the ECHR system and supervision of execution of Court judgments – to that extent the Council of Europe itself can be seen as a rule of law institution at European level). As regards the rule of law at the global level, the Council of Europe works towards the strengthening of international law and promoting the rule of law in international affairs (see section IV under E below).

## IV. THE COUNCIL OF EUROPE'S WORK TO PROMOTE THE RULE OF LAW AND ENSURE ITS RESPECT: A TYPOLOGY

61. The Council of Europe is a mechanism of pan-European co-operation for preserving and promoting the rule of law (see para. 10 above). Its co-operation in the legal and human rights fields, where common European standards are developed and monitored and assistance is provided towards the implementation of these standards and the results of such monitoring, is itself an essential contribution to the rule of law in Europe. The Parliamentary Assembly's recommendations are an important driving force for such activities. Among other things, this co-operation leads to further *rapprochement* between different legal systems and greater coherence between them on essential points, it facilitates co-operation between states in the justice field and it gives rise to common legal standards – which themselves reflect rule of law principles – thus building a common European legal space.

<sup>15</sup> The requirements concerning judicial independence are dealt with under point A. above.

<sup>16</sup> This is borne out by numerous judgments of the Court. See, e.g., *Winterwerp*, 24.10.1979, § 39, and *Malone*, 2.8.1984, § 67.

<sup>17</sup> While an individual criminal act, as such, would not normally be considered as being contrary to the rule of law (but simply as being contrary to the law), a lack of adequate measures by the state to uphold the law by investigation, prosecution and punishment of such crime would be a rule of law issue (see para 39 above).

62. The Council of Europe works to preserve and promote the rule of law in different ways. Using the *manner in which its activities further the rule of law* as a criterion, several categories of activities can be distinguished.<sup>18</sup> There are no sharp dividing lines between these categories: some activities may well fall in several of them. The categories proposed below pretend nothing more than to offer an analytical matrix in order to illustrate with examples *how* the Council of Europe's work contributes to strengthening the rule of law. Their purpose is not to give an exhaustive overview of all rule of law-related activities.<sup>19</sup>

#### **A. Promoting the conditions necessary for the rule of law**

63. Many activities promote the conditions necessary for the rule of law. This primarily concerns issues related to the existence, organisation and efficient functioning of institutions necessary for the rule of law: institutions of justice (civil, criminal, administrative), independence of judges, institutions of law enforcement and execution of judgments, non-judicial institutions such as the Ombudsman and national human rights institutions.

64. These activities take the form of standard-setting instruments, country-specific recommendations and co-operation activities.

65. There are numerous legal instruments in this area, covering a wide range of issues, such as the independence, efficiency and role of judges; appeal systems in civil and commercial matters, the role of public prosecution in the criminal justice system, the freedom of exercise of the profession of lawyer, judicial review of administrative acts, enforcement of judicial decisions, design of court systems and legal information systems, various aspects of management of prison sentences, prison overcrowding, the setting-up of Ombudsmen and national human rights institutions.

66. Three Steering Committees were responsible for the drafting of these instruments: most of them were prepared by the CDCJ or the CDPC and some by the CDDH. It may be noted that the CDCJ is currently working on a revision of *Recommendation No. R (94)12 on the independence, efficiency and role of judges*, with the purpose of tackling new challenges faced by national judicial systems in this field.<sup>20</sup>

67. In addition, the European Commission for the Efficiency of Justice (CEPEJ) drafts measures and prepares pragmatic tools for policy makers and judicial practitioners to improve the efficiency and quality of the functioning of judicial systems (expl: Time management Checklist; Compendium of best practices on judicial time management; Checklist for the promotion of the quality of justice and courts; Guidelines on mediation; Specific studies on the functioning of court systems) and develops networking between courts of the member states.

68. The Consultative Council of European Judges (CCJE) and Prosecutors (CCPE) define European standards for the status and activity of judges / prosecutors through their Opinions to the Committee of Ministers.

---

<sup>18</sup> Several of the examples of activities mentioned under each category below are not "pure" rule of law activities in that they also serve to promote and protect other core values of the Council of Europe. This is true, for example, for activities in the field of prisons, which usually promote both the proper functioning of prisons and the respect for human rights as regards prison conditions. Similarly, anti-corruption activities are important from the rule of law perspective and from the point of view of democratic principles. The interdependence between rule of law, human rights and democracy is thus also borne out in the concrete activities of the Council of Europe.

<sup>19</sup> In addition, some important activities that seek to promote the rule of law in indirect ways, such as education for democratic citizenship and human rights, are not categorised here.

<sup>20</sup> The Recommendation addresses issues such as the role of independent authorities (for example the High Councils of the Judiciary); the safeguards to the independence of judges with respect to the remuneration, irrevocability, criminal and civil liability of judges and avenues of appeal available to them, balance between freedom of expression and judicial independence; as well as training and ways of reconciling efficiency of justice and judicial independence.

69. Country-specific recommendations regarding the requirement of an independent judiciary (including separation of prosecutors' powers and functions) and on the enforcement of judicial decisions are made by the Council of Europe Commissioner for Human Rights in the context of his country visits and reports. He also publishes "Viewpoints" on the rule of law and issues closely related to it. The recommendations and standards contained in CPT reports also cover aspects concerning the organisation of institutions such as prisons, psychiatric establishments and police stations (and other places of deprivation of liberty).

70. The Commissioner also promotes the setting-up of national human rights structures (ombudsman and human rights institutions) that are created and function in accordance with the Paris Principles so as to enhance respect of the rule of law by non-judicial means.

71. The Council of Europe also promotes the conditions necessary for the rule of law through its **co-operation activities**.<sup>21</sup> The relevant projects include activities aimed at:

- helping set up or strengthening high judicial councils;
- improving transparency of the judicial systems, for example as regards the public character of hearings, well-drafted reasoned judicial decisions and systematic public access to all laws and regulations;
- putting in place or strengthening effective systems of free legal aid;
- strengthening the formal role and status of the lawyer's profession;
- improving the enforcement of judicial decisions;
- developing well-functioning penitentiary establishments and alternatives thereto such as probation services.

#### **B. Promoting respect for the rule of law**

72. The Council of Europe's work in this area is again a combination of standard-setting, country-specific recommendations and co-operation activities.

73. While much of the Council of Europe's standard-setting work on specific themes (e.g., in recent years: conventions on trafficking in human beings, adoption of children, sexual exploitation and abuse of children) may be associated more directly with the protection of human rights and human dignity, it also bears a natural relationship with the duty of a state based on the rule of law to ensure the security of all persons as well as everyone's enjoyment of human rights (see § 59 above).

74. In the fields of **public and private law**, many standards have been drawn up through the CDCJ, as a body that promotes law reform and co-operation in these fields. The rule of law is at heart of this work, and in particular in standard setting activities concerning justice, administrative law, civil law, family law, nationality, refugees and asylum seekers and data protection. One example is its work in the area of *administrative law*, where legal instruments have been adopted on key rule of law issues such as the protection of the individual in relation to the acts of the administrative authorities, and the exercise of discretionary powers by administrative authorities. The latest achievements are the Recommendation (2007)7 on Good Administration and the Report of the Project Group on Administrative Law (CJ-DA) on the desirability of preparing a recommendation on administrative appeals which concluded to the importance of preparing such a legal instrument. In its ongoing process of identifying its future priorities in the field of administrative law, the CDCJ is also considering reviewing the handbook "The Administration and you", published in 1996.

<sup>21</sup> The majority of projects are funded fully or partially (50-90%) by the EC. Some are funded by voluntary contributions by member states. The same applies to co-operation activities mentioned below in this Section.

75. Another important cluster of standard-setting work (CDCJ; CDDH) concerns issues such as access to justice, legal aid, availability of domestic remedies for ECHR claims, non-criminal remedies for crime victims and alternative dispute resolution systems. Access to justice for vulnerable groups is an important theme, with work under way on the drafting of European Guidelines on Child-Friendly justice. Rule of law principles are also promoted through the drafting of guidelines on human rights protection in the context of accelerated asylum procedures.

76. In the **criminal law** field, the implementation of the set of relevant Council of Europe conventions and recommendations (transfer of sentenced persons, extradition, mutual legal assistance, cybercrime, prison issues) is regularly discussed within the framework of the CDPC and its subordinate bodies PC-OC and PC-CP. Where needed, specific measures to promote their effective implementation are agreed, including through amendments to the existing legal instruments, targeted assistance, discussion of topical issues at Ministerial Conferences and adoption of resolutions thereon.

77. It is especially important to promote respect for the rule of law as regards **new societal or technological developments**, because they may give rise to uncertainty regarding the applicable legal regime and principles. Here, the Council of Europe is often at the forefront of elaborating innovative instruments and approaches. Prime examples of relevant Council of Europe sectors are its work concerning the information society (cf. the CM Declaration of 2005 on human rights and the rule of law in the Information Society, the Cybercrime Convention and many other legal instruments ) and the field of bio-ethics (the Convention on Human Rights and Biomedicine and its additional protocols).

78. The *Venice Commission* plays an important role in promoting respect for rule of law principles. Article 1.2 of the Statute of the Venice Commission establishes that its work will focus on the "constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law". The principle of the rule of law is promoted in different activities of constitutional assistance provided by the Commission to different countries, including the principle of separation of powers. Through its recommendations and opinions prepared for its Member States on draft constitutions and legislation in different fields, the Venice Commission promotes the idea that the definition and assimilation of the idea of the State based on the rule of law is a basic feature of European constitutionalism.<sup>22</sup>

79. The Venice Commission has also elaborated a number of recommendations that contribute to the strengthening of the principle of the rule of law, such as the Guidelines on prohibition and dissolution of political parties and analogous measures, the Report on the Democratic oversight of the Security Services, Report on the Democratic Control of the Armed Forces and others.

80. The CEPEJ supports individual member states in their judicial reforms, on the basis of European standards and other member states' experience. It contributes specific expertise to the debate on the functioning of the justice system in Europe and beyond: it provides the legal and judicial community with a forum for discussion and suggestions and brings justice systems and their users closer (including through its internet web site and its publications in the Series: "CEPEJ Studies"). The Council of Europe co-organises (with the European Commission) the European Day of civil Justice, including the European Prize of innovative practice contributing to the quality of justice: "The Crystal Scales of Justice".

81. The CCJE and the CCPE may be called upon to provide practical assistance to help States comply with standards relating to judges and prosecutors.

---

<sup>22</sup> One of the Venice Commission's conferences focussed on issues related to the principle of the rule of law:  
[http://www.venice.coe.int/docs/1996/CDL-STD\(1996\)018-e.asp#\\_Toc90369210](http://www.venice.coe.int/docs/1996/CDL-STD(1996)018-e.asp#_Toc90369210)

82. The Lisbon Network (judicial training institutions in Europe) promotes the initial and in-service training of judges and prosecutors from common standards and shared experience and supports individual member states in developing their judicial training systems. The HELP Programme promotes the integration of training on the ECHR in national training schemes for judges and prosecutors.

83. Networking and co-operation also takes place with national human rights structures in the member states. Through intensive and ongoing co-operation with the national human rights structures in the member states and by nurturing an active network of them, the Commissioner for Human Rights increases the ability and readiness of these structures to defend the rule of law at domestic level.

84. The Council of Europe also promotes respect for rule of law principles through its **co-operation activities**. They focus on the manner in which those structures and institutions operate, seeking to ensure that qualitatively they respect the requirements of rule of law and of course of the specific treaty obligations to which the state is a party. The relevant projects include activities to:

- train:
  - \* legal professionals (judges, prosecutors, lawyers);
  - \* members of the high judicial councils so as to strengthen the administration of justice;
  - \* auxiliary court personnel (clerks, registrars) and bailiffs;
  - \* civil society groups and their legal representatives on how to contribute to the public debate, how to be a "check" on the administration and the judiciary, and how to advocate specific human rights/judiciary related issues;
- strengthen awareness of the specific requirements related to the appointment, dismissal and salaries for judges and prosecutors;
- provide legislative expertise to ensure that national regulatory frameworks conform to the requirements of the rule of law and that member states are aware of the implications as regards actual implementation;
- improve the management of detention facilities (pre-trial and following sentencing).

85. Where possible, such activities are conducted in co-operation with other international organisations. Co-operation with the OSCE on rule of law issues has included capacity building for non-judicial protection mechanisms, data protection within the civil registry framework, and training for civil society on freedom of assembly. Joint activities with the UNHCR concern ECHR-related issues in the field of immigration and asylum, especially Article 5 and 6 issues.

### C. Addressing threats to the rule of law

86. Certain phenomena such as terrorism or corruption pose a threat to the rule of law because they directly challenge, or gradually undermine, the state's authority and capacity to uphold the law and the state's respect for rule of law principles.

87. The Council of Europe assists states in **combating economic crime** as a major threat to democracy and the rule law. This is the very aim of the projects run by the Council of Europe. These include projects against economic crime, against corruption, money laundering and terrorist financing, and cybercrime.

88. Activities aimed at improvement of legislation (workshops, legal opinions) or training of professionals (including judges, law enforcement, prosecutors etc) may, depending on the specific subject, address the conditions necessary for the rule of law (category A above) and/or promote respect for rule of law principles (category B above). In particular, the activities to strengthen capacities of the member states to fight corruption certainly fall in both categories.

89. The Council of Europe is highly active in the area of **fighting terrorism**. It has adopted a number of legal instruments in this field:

- Revised Convention of the Suppression of Terrorism,
- Convention on the Prevention of Terrorism,

- Convention on Laundering, Search, Seizure and Confiscation of the proceeds from Crime and on the Financing of Terrorism.

90. The Committee of Experts on Terrorism (CODEXTER) monitors the signatures and ratifications of the conventions mentioned above and promotes their effective implementation.

91. In creating a legal framework that allows substantial international co-operation the Council of Europe seeks to **ensure that rule of law principles are fully respected in countering terrorism**. This is borne out by the safeguards contained in the above-mentioned instruments, but also by other instruments such as the two sets of CM Guidelines (on human rights and the fight against terrorism, and on the protection of victims of terrorist acts) prepared by the CDDH and based on the ECHR case-law. Mention should also be made of work of the Parliamentary Assembly, which has adopted several Recommendations in this field. In various reports by the Parliamentary Assembly, the Secretary General (acting under Article 52, ECHR) and the Venice Commission, a strong focus was placed on the need to ensure full respect for the rule of law in inter-state co-operation regarding the detention and transfer of persons suspected of involvement in acts of terrorism, and as regards oversight and accountability of security services.

92. One of the CODEXTER's priorities lies in research on the concepts of "apologie du terrorisme" and "incitement to terrorism". In addition **causes of terrorism** are addressed by exploring ways to reduce the tensions existing in today's society (see the Council of Europe conference on "Why terrorism? – Addressing the reasons conducive to the spread of terrorism").

93. It is clear that conditions conducive to the spread of terrorism must be addressed through promotion of inter-cultural dialogue, activities in the field of education, youth and the media, ensuring the protection of minorities and fighting intolerance, racism and social exclusion, thereby weakening sources of discontent that may fuel terrorism. Much of the Council of Europe's work in these areas therefore contributes to addressing the threat to the rule of law that terrorism poses.

94. In addition, the Council of Europe has set up a number of specific legal co-operation programmes designed to help the beneficiary countries to proceed with their institutional, legislative and administrative reforms in order to strengthen the rule of law in the fight against terrorism. Co-operation projects include workshops and seminars on specific themes related to the fight against terrorism, such as mutual extradition of terrorist suspects or financing of terrorism.

95. The Commissioner for Human Rights raises the issues of impunity, counter-terrorism measures, corruption, the rule of law in exceptional circumstances and the rule of law in dealing with the past in the context of his country visits and makes recommendations to the authorities with a view to addressing shortcomings. He publishes relevant "Viewpoints" on these topics. Specific workshops/seminars have been organised on the themes of anti-terrorism measures and data protection and of complaints mechanisms against police misconduct.

96. The Council of Europe's monitoring mechanisms in the field of combating corruption (GRECO) and countering money laundering and terrorist financing (MONEYVAL) will be addressed in the next section.

#### **D. Ensuring respect for the rule of law**

97. Within the Council of Europe, there is no mechanism to ensure respect for the principle of the rule of law as such. However, various mechanisms exist which contribute significantly to ensuring that rule of law requirements are respected. Leaving aside the crucial role of the European Court of Human Rights (see the conclusions in § 34 above), mention should first of all be made of the political monitoring of member states' commitments by the Parliamentary Assembly and by the Committee of Ministers, which covers rule of law-related commitments.

98. Furthermore, there are other mechanisms that help ensure respect for the rule of law. Some do so in the context of their competence in the field of human rights; others in the context of a specific thematic mandate in other fields.

99. The CM supervision of execution of the Court's judgments ensures that the obligations of states under Article 46 ECHR are respected. Apart from this general contribution to upholding the rule of law, such supervision also ensures respect for the rule of law in a more specific manner wherever the violation found by the Court concerns rule of law-related shortcomings in a national legal system (see the overview of case-law in Section III. above). A clear example of such dysfunctioning of national systems which states are obliged to remedy under Article 46, ECHR are the cases concerning non-execution of domestic courts' judgments.

100. Other human rights bodies such as the CPT and ECRI each have a monitoring role that extends to respect of rule of law principles in specific settings and contexts. The monitoring mechanism set up under the Social Charter, especially the collective complaints system, makes an important contribution to the legal protection and justiciability of social rights in Europe. As from 2009, monitoring in the field of states' action against trafficking in human beings will be conducted by GRETA, a body that is being set up under the Convention on Action against Trafficking in Human Beings.

101. In the context of his country visits the Commissioner for Human Rights examines whether due process, legal certainty and lawfulness stemming from the rule of law principle are afforded and makes recommendations for possible improvement. He publishes "Viewpoints" on these topics.

102. A number of Council of Europe conventions in the field of criminal law designate the CDPC as the body in the framework of which disputes are settled regarding the implementation of those conventions and/or as the body through which amendments of the conventions may be proposed.

103. The Group of States against Corruption (GRECO) monitors states' compliance with the Council of Europe's anti-corruption standards. Its objective is to improve the capacity of its members to fight corruption by monitoring their compliance with anti-corruption standards through a dynamic process of mutual evaluation and peer pressure. It helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms. GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption. GRECO draws up recommendations and assesses compliance with those recommendations.

104. The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) is a monitoring mechanism set up with the aim of ensuring that its member states have effective systems in place to counter money laundering and terrorist financing and comply with the relevant international standards in these fields. Such compliance is assessed through a peer review process of mutual evaluation, leading to detailed recommendations to improve the effectiveness of domestic regimes. MONEYVAL also conducts typology studies of money laundering and terrorist financing methods, trends and techniques.

105. The CEPEJ evaluates the functioning of the member states' judicial systems through a regular process for collecting and analysing quantitative and qualitative data on the functioning of justice systems. Its SATURN Centre is due to develop towards a European Observatory of timeframes of court proceedings.

106. The Consultative Council of European Judges (CCJE) and Prosecutors (CCPE) may be requested by relevant Council of Europe bodies or relevant authorities in the member states to analyse specific situations regarding judges / prosecutors in specific member states and to draft opinions (which might include recommendations) to improve given situations.

107. The Council of Europe Convention for the **Protection of Individuals with regard to Automatic Processing of Personal Data** lays down essential principles and safeguards for respecting everyone's right to privacy in accordance with rule of law principles. The Consultative Committee of the Convention for the Protection of Individuals (T-PD) interprets the provisions and improves the implementation of the Convention.

#### **E. Strengthening the international rule of law**

108. Council of Europe activities to strengthen the rule of law at the international (global) level do not fit neatly into one of the above-mentioned categories. Most of them are a mixture of promoting the conditions necessary for the rule of law and promoting respect for rule of law principles.

109. Through the Committee of Legal Advisers on Public International Law (CAHDI), the Council of Europe aims at creating a framework for international co-operation to strengthen the role of public international law and influence its development, and to bring national viewpoints closer together. All of its activities are aimed at promoting the rule of law in international affairs.

110. The item "Advancing the international rule of law" appears regularly on the agenda of the CAHDI and the work of the Committee on this matter is based on the 2005 UN World Summit Outcome, when Heads of State and Government reaffirmed their "commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and co-operation among States".

111. The CAHDI considers a number of questions to be related to the concept of international rule of law. The following activities may serve as an example:

- law and practice on reservations and interpretative declarations to treaties, including those applicable to the fight against terrorism: CAHDI activity in its capacity of the European Observatory of Reservations to International Treaties (EORIT);
- jurisdiction of the international tribunals: consideration of the jurisdiction of the International Court of Justice (ICJ) under the optional Clause and under selected treaties and in particular the position of the Council of Europe's member and observer States in that regard as well as consideration of the overlapping jurisdiction of international courts and tribunals;
- preparation of the draft recommendations in the field of dispute settlement: CM/Rec(2008)8 on the acceptance of the jurisdiction of the ICJ and CM/Rec(2008)9 on the nomination of international arbitrators and conciliators. As from October 2008 CAHDI will monitor the implementation of the CM/Rec(2008) 9;
- following pending and decided cases of the European Court of Human Rights involving issues of public international law and exchanges of views on the developments concerning the International ad hoc tribunals (Yugoslavia, Rwanda, Lebanon);
- following developments concerning international humanitarian law;
- databases on State Practice regarding State Immunities; the Organisation and Functions of the Office of the Legal Adviser in the Ministry for Foreign Affairs; and the Implementation of UN Sanctions and Respect for Human Rights ;
- Moreover, the Council of Europe actively supports the International Criminal Court and over the past years organised four consultation meetings which fostered exchanges of views on the legal problems encountered in the implementation of the Rome Statute.

112. Finally, it should be noted that on four occasions (in 2004, 2005 and 2007) the Committee of Ministers submitted a “statement of interest” in support of EU amicus curiae briefs in various stages of a case before the US Supreme Court and the Supreme Court of Texas concerning a Mexican (Mr Medellin) sentenced to death. These proceedings took place after the International Court of Justice had ordered that the case of Mr Medellin be reviewed. The CM statements insisted on respect for the Vienna Convention on Consular Relations and stated that “respect for judgments of the International Court of Justice by states that are party to litigation is a basic requirement of the rule of law at the international level, as expressed in Article 94 of the United Nations Charter.”<sup>23</sup>

## V. OVERVIEW OF RULE OF LAW ACTIVITIES OF OTHER ORGANISATIONS (EU, OSCE, UN)

### General

113. Reference should be made to the “Multilateral organisations’ rule of law pledge” issued as a joint press release at the close of the 14th High-level Tripartite meeting between the Council of Europe, the OSCE and the United Nations (Strasbourg, 18 February 2005) (CM/Inf(2005)17 of 28 February 2005). The pledge states that the rule of law is a prerequisite for maintaining and building peace, consolidating democracy and promoting sustainable development.

114. Highlighting the central role of the rule of law in conflict prevention, the protection and promotion of human rights and other issues such as human displacement, participants urged close co-operation between partner organisations and stressed the importance of social cohesion for achieving long-term stability in post-conflict societies.

115. The rule of law pledge points to certain specific areas of action and co-operation, such as the need for a common and effective framework for responding to terrorism in accordance with the rule of law; the need to step up the fight against racism, xenophobia, intolerance, anti-Semitism, Islamophobia and any other forms of discrimination, and co-operation between international organisations in the field on issues related to legislative transparency, the independence of the judiciary, ombudsmen and national human rights institutions as well as reform of legislation, justice and prisons.

### European Union

116. The rule of law is referred to in Article 6 § 1 of the Treaty on European Union as a principle, common to the member states, on which the Union is founded. The Copenhagen criteria of 1993 for EU membership include “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities” as a condition for membership.

117. Within the legal order of the Community, an essential contribution to upholding the rule of law, and developing rule of law principles, is made by the Community courts, notably through the decisions and the case-law of the European Court of Justice.<sup>24</sup>

118. The European Union promotes the rule of law both within the Union and beyond. It co-operates with the Council of Europe in both aspects.

119. Inside its borders, the Union is developing a European area of “Justice, Security and Liberty”. To this end, it adopts legal norms and financial instruments. When adopting new norms in this area, it consults the Council of Europe’s *acquis* in the same field (e.g. in the fields of terrorism, fight against human trafficking).

<sup>23</sup> See, most recently, CM/Del/Dec(2007)996/13.2 of 23 May 2007.

<sup>24</sup> See, e.g., Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, § 23, and the recent judgment of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation*, §§ 281-284 and 316-326.

120. When promoting the rule of law outside its borders, the Commission frequently co-operates with the Council of Europe as far as non-EU member States of the Council of Europe are concerned (i.e. mostly South-East Europe, the south Caucasus, Russia and Turkey). Through "joint programmes", assistance is being given to those States in order to adapt their legislation, practice and institutions to the European standards which form part of the "acquis communautaire". These programmes focus notably on the development of the judiciary, on penitentiary reforms, on the fight against various forms of economic and organized crime as well as on international co-operation in criminal matters.

121. The European Commission also attaches great importance to the respect of the rule of law in its relations with acceding countries and with countries of the Neighbourhood policy. When assessing the situation in the countries concerned, the EC is consulting the Council of Europe.

122. A memorandum of understanding between the two organisations (May 2007) formalises their commitment to co-operate in the development of a European area based on law.

123. The EU and the Council of Europe have also put in place various forms of concrete co-operation between its institutions/bodies:

- The European Judicial Network in civil and commercial matters, the European Judicial Network in criminal matters and EUROJUST are key EU bodies to foster judicial assistance between EU member states and ensure the implementation of the EU instruments in the judicial field (directives in civil and commercial matters, European Arrest Warrant, etc...). These three bodies co-operate regularly with the Council of Europe's relevant bodies (CEPEJ, CCPE, CDCJ, CDPC, etc.).
- The European Commission has set up in 2008 a Forum for Justice aimed to develop regular exchanges between judicial practitioners in Europe. The CEPEJ is a privileged partner in this Forum.
- The EC co-organises with the Council of Europe the European Day of Justice (see above under IV.).
- The European Training Network is supported by the EU (EC) to develop co-operation between EU member states for judicial training. It closely co-operates with the Council of Europe's Lisbon Network.
- The European Network of Judicial Councils is supported by the EU to develop co-operation between the Councils for the judiciary in the EU countries and on issues regarding the functioning of judicial systems and the management of the careers of judges (prosecutors). It has observer status with the CEPEJ and CCJE.

124. In addressing particular topics related to the rule of law, through conferences, workshops, or other specific events, the European Union is regularly consulting and co-operating with the Council of Europe.

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

125. The OSCE's political commitments in the human dimension include commitments concerning the rule of law. According to the 1990 Copenhagen document (§ 2), the rule of law "does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression." Democracy is seen as "an inherent element of the rule of law" (§3) and free elections are accordingly considered as an element of justice (§ 5.1).

126. This general rule of law commitment also comprises several other commitments to specific rule of law principles (“elements of justice”) which have been set out in the Copenhagen and other OSCE documents. Many of these are expressions of the principles of legality, accountability, equality and non-discrimination, accessibility of the law, and of human rights standards concerning detention and fair trial rights.<sup>25</sup>

127. The rule of law is a recurrent theme at the OSCE Human Dimension Implementation meetings. Under that heading discussion takes place on topics such as legislative transparency, independence of the judiciary, right to a fair trial, constitutional justice, the question of the abolition of capital punishment, prevention of torture, and protection of human rights and fighting terrorism.

128. The main OSCE body active on rule of law issues is the Office for Democratic Institutions and Human Rights (ODIHR). Its mandate, as set out in the 1992 Helsinki Document, resembles the statutory aims of the Council of Europe: to help participating states “ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and [...] to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society.” ODIHR has a rule of law unit within its Democratization Department.

129. The ODIHR implements various technical assistance projects designed to foster the development of the rule of law. Practical assistance and training is provided through programmes in the areas of criminal justice reform and fair trials. A trial monitoring programme provides for monitoring of criminal trials in Central Asia. Legislative support is also provided through reviews of (draft) legislation, in fields such as electoral legislation, gender equality, freedom of religion, freedom of assembly, counter-terrorism, etc.<sup>26</sup>

130. Specific rule of law-related activities are carried out by OSCE missions in several countries. Examples of co-operation with the Council of Europe on rule of law activities are given in section IV above.

## United Nations

131. The rule of law-related activities of the different organs, agencies and bodies of the United Nations system are so manifold and extensive that they cannot be adequately summed up in a short overview. Some general information is given below.

132. The rule of law was referred to in the preamble to the Universal Declaration of Human Rights of 1948: “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”. This underlines the function of the rule of law (“régime de droit” in the French version) as an indispensable framework for the protection of human rights.

133. The UN’s work on the rule of law finds its normative basis in the UN Charter, international law, and the range of treaties, declaration, guidelines and bodies of principles developed within the UN in order to promote national societies and an international order based on the rule of law.

134. Like the Council of Europe, the UN has developed a host of legal instruments in the legal and human rights fields which contain and develop rule of law-related standards and provide for monitoring of these standards. These are often supplemented by specific principles for certain rule of law sectors and institutions.<sup>27</sup>

---

<sup>25</sup> See the rule of law section in the ODIHR document OSCE Commitments relating to Judicial Systems and Human Rights, Warsaw 2002.

<sup>26</sup> See ODIHR’s annual report 2006.

<sup>27</sup> To give just one example: the so-called Bangalore Principles have been drafted as the UN standards on rights and duties of judges. The Council of Europe’s CCJE has been closely involved in this work (namely on the basis of the European Charter on the Statute of Judges) and continues to co-operate with the UN as regards their implementation.

135. At the national level, rule of law work by the UN takes the form of technical assistance and capacity building for member states. Strengthening the rule of law at the international level is a natural role of the UN. The UN's Millennium Declaration of 2000 calls upon all member states to strengthen respect for the rule of law, notably through complying with the decisions of the International Court of Justice.

136. Following the 2005 World Summit, a Rule of law Coordination and Resource Group was established as an inter-Agency coordination mechanism and a Rule of law Unit was created in the office of the UNSG.<sup>28</sup> These steps were supported by member states in A/RES/62/70, § 4.

137. The Unit's objectives are:

- ensuring coordination among the many United Nations departments, agencies, funds and programmes engaged in rule of law activities;
- developing guidelines, best practices and other tools for guiding the Organization's activities in promoting the rule of law;
- developing partnerships between the United Nations and the many other actors engaged in rule of law activities.

138. The Unit is not a new operational capacity within the United Nations system. Operational roles within the three "baskets" of rule of law activities (rule of law at the international level, the rule of law in the context of conflict and post-conflict situations, and the rule of law in the context of long-term development) remain with the various UN departments, agencies, funds and programmes.

139. These steps were inspired by the fact that the dispersal of rule of law entities across the UN system has made coordinated action difficult. Examples of such entities are the Office of Legal Affairs (rule of law issues at international level), the Office of the High Commissioner for Human Rights (transitional justice, national human rights institutions, national justice sectors), the UN Development Programme (capacity-building in the justice sector in the framework of long-term development) and the Department of Peacekeeping Operations (rule of law assistance in support of peacekeeping operations).

140. An overview of relevant co-operation between the Council of Europe and the UN can be found in document DER/PR/Inf(2008)2 containing an inventory on the status of implementation of the UN General Assembly Resolution 61/13 on Co-operation between the United Nations and the Council of Europe. This includes many rule of law-related activities.

## VI. CONCLUSION

141. The main purpose of this document was to provide insight into how the concept of the rule of law is understood within the Council of Europe and how various activities of the Organisation contribute to strengthening and upholding the rule of law.

142. The Council of Europe *acquis* regarding rule of law principles demonstrates a high degree of consensus among member states which allows the Organisation to work pragmatically for the promotion and protection of those principles. This state of affairs explains why no need was felt so far to develop a Council of Europe definition of the rule of law concept. In particular, the case-law of the Court provides a solid reference for all rule of law-related activities of the Organisation.

143. However, it is probably also true, precisely because the rule of law is "everywhere" in the work of the Council of Europe, that the principle has to some extent suffered from a lack of visibility in that work.

144. To remedy that shortcoming, this paper has sought to do justice to the vital importance of the rule of law as a core principle promoted by the Council of Europe, by articulating more clearly the rule of law dimension of its activities.

---

<sup>28</sup> This and the following information is based on an Information Note on the Rule of Law Coordination and Resource Group and Rule of Law Unit which was received from the Director of the Rule of Law Unit.