

MONITORING THE RULE OF LAW

Consolidated Framework

and

Report

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Table of Contents

List of Abbreviations	4
Executive Summary and Recommendations	5
PART ONE	
CONSOLIDATED FRAMEWORK FOR MONITORING THE RULE OF LAW	7
PART TWO	
REPORT: MONITORING THE RULE OF LAW	
Introduction	18
1. Concepts and Definitions	18
1.1 Rule of Law	18
1.2 Monitoring	19
1.3 Indicators and Methodology	20
2. A Consolidated Framework for Monitoring?	20
3. The Examples: Bosnia and Herzegovina, Kyrgyzstan, Russia and Ukraine	22
4. Monitoring Mechanisms: Methods and Criteria	23
4.1 The Council of Europe	23
4.2 The European Union	29
4.3 The Organization for Security and Cooperation in Europe	32
5. Coordination and Cooperation	34
6. Recommendations and Suggestions	36
ANNEXE:	
Recommended Reading and Internet Sources	39
Resource Persons	41
Outline of the Committee of Ministers' Thematic Monitoring Procedure	42

List of Abbreviations

CDCJ	European Committee on Legal Cooperation
CiO	Chairmanship in Office (OSCE)
CM	Committee of Ministers (CoE)
CoE	Council of Europe
CPC	Conflict Prevention Centre
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CoE)
DG	Directorate-General
EC	European Commission
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
GRECO	Group of States against Corruption (CoE)
HCNM	High Commissioner on National Minorities
HD	Human Dimension
HQ	Headquarters
HR	Human Rights
ICMPD	International Centre for Migration Policy Development
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Person
IOM	International Organization for Migration
JHA	Justice and Home Affairs
MFA	Ministry of Foreign Affairs
MoU	Memorandum of Understanding
NIP	National Indicative Programme
NIS	Newly Independent States
ODIHR	Office for Democratic Institutions and Human Rights
PA	Parliamentary Assembly (CoE)
PACO	Programme against Corruption and Organized Crime in South-Eastern Europe
PCA	Partnership and Cooperation Agreement
Relex	External Relations
RoL	Rule of Law
SAP	Stabilization and Association Process
SEE	South and Eastern Europe
SG	Secretary-General
TACIS	Technical Assistance for the Commonwealth of Independent States
UNHCR	UN High Commissioner for Refugees
WTO	World Trade Organization

Executive Summary

Strengthening the rule of law has been among the top priorities of international actors such as the Council of Europe, the EU and the OSCE. Moreover, the need to monitor the rule of law in and beyond the immediate borders of an enlarged EU is likely to remain strong in the future. The assessment of deficits and progress should be accurate, and targets for countries that are being monitored need to be clearly communicated.

Against the backdrop of the successive Dutch chairmanships and presidencies of the OSCE, CoE and EU during 2003-2004, this study aims at providing background information on the main components of the rule of law as well as applied methods and practices of monitoring the progress made towards the rule of law in transition countries. This research project was commissioned by the Netherlands Ministry of Foreign Affairs (Strategic Policy Planning, Task Force OSCE, in collaboration with the EU and CoE units).

The study is organized in two main parts. The first comprises a harmonized **Consolidated Framework for Monitoring the Rule of Law** (*pages 7-17*). The framework was elaborated on the basis of objectives and criteria applied within the Council of Europe, the EU and the OSCE in relation to their monitoring of four different examples: Bosnia and Herzegovina, Kyrgyzstan, the Russian Federation and Ukraine. Following this stocktaking, five *key objectives* as well as a number of recurrent *issues* could be identified as common concerns of all three fora, and a consolidated framework was elaborated on this basis. The result reconciles general rule-of-law values that have been declared in official documents, with more specific indicators applied during internal policy-planning and programme work. Thus the framework strikes the middle ground between abstract values and practical, specific objectives. The basic scheme drawn up on page 3 is elaborated on the following pages. Meanwhile, the second part of the study takes the form of an accompanying **Report** (*pages 18-38*), which addresses existing monitoring practices in the CoE, EU and OSCE and explores the feasibility of an increasingly harmonized approach (*pages 20 and following*).

On balance, the consolidated framework would best suggest itself to facilitate communication, cooperation and complementary *division* of tasks according to comparative advantage. Sharing and further integrating monitoring tasks would tend to level off the specificities of functions, roles and methods that each of the fora performs in fostering or monitoring the rule of law, and is not recommended. Introducing a consolidated framework should focus on common goals with the aim of improving coordination rather than harmonizing the individual methods that are applied in order to monitor and achieve these goals. Consequently, the consolidated framework has been formulated in terms of ideal objectives, and leaves individual methods of control up to the actor. Expertise, implementation capacity and the interest of the individual actors will be crucial in determining who should follow up which objectives or areas of concern. Such an agenda-setting function would require further development of the framework into an operational cross-organizational tool.

All considered, drawing on the capabilities available within the CoE, OSCE and the EU, the Netherlands Ministry of Foreign Affairs (MFA) could use the framework as a basis for developing:

- An agenda-setting tool, indicating which actor should follow up on, take the lead and possibly respond to monitoring results;
- Internal guidelines for the MFA that facilitate a structured and analytical approach;
- A set of common standards that harmonize diverging conditionalities;
- A reference source for policy-makers and/or field staff in delegations.

Concrete options for applying the consolidated framework, improving in-house management of monitoring capacities and building up more structural coordination among the three fora are further suggested as part of the recommendations (*pages 36-38*).

Consolidated Framework for Monitoring the Rule of Law

1. Inclusive, Legitimate and Effective Political System	2. Independent, Impartial and Effective Judiciary	3. Objective, Equal and Efficient Application and Enforcement of Law	4. Secure Human Rights, Fundamental Freedoms and Political Group Rights	5. Social and Economic Security
Checks and balances	Independence, checks and balances, impartiality	Prosecution and investigation	Human rights institutions and instruments	Legal and regulatory framework of a market economy
Legitimacy	Judicial powers	Detention	Fundamental rights and freedoms	Legal certainty and security
Efficient and professional institutions	Role of the Prosecutor's Office	Police, security forces and border control	Prevent/abolish torture and the death penalty	Prevent corruption
Legislation and legislative process	Appointment, dismissal and immunity regulations		Anti-discrimination and minorities	Prosecute economic crime
Election legislation and practice	Salaries and resources		Migration including refugees, IDPs and asylum seekers	
Political parties and opposition	Access to effective, fair judicial remedies			
Public administration and services	Education and career			
Media	Accountability, efficiency, and transparency of the administration of justice			
Civil society and political culture				

1. Inclusive, Legitimate and Effective Political System

1. Checks and balances

In order to strike a balance between separation of powers and accountability

- A secure legal framework separates and clearly delineates the responsibilities of legislative, executive and judicial branches on and between local and state levels, and ensures functioning mechanisms of horizontal and vertical accountability.
- Parliamentary surveillance is effectively carried out and provided for by laws, regulations and institutional procedures.
- The executive does not (attempt to) undermine certain state bodies or analogous non-state structures, particularly those that provide the 'checks and balances' to the activities of the government.

2. Legitimacy

The political system is legitimized by the population when

- Politics and the political system are democratic, representative and inclusive with regard to the overall population, and generally perceived as credible.
- The political process is characterized by civil liberties and political rights enabling citizens to participate in the selection of government and providing for maximum public participation and input in the passage of legislation.
- Institutions are capable of balancing diverse and competing interests and are socially inclusive.
- Politicians can be held accountable by their constituencies.

3. Efficient and professional institutions

The receptiveness and (implementation) capacity of institutions is satisfactory if

- Key institutions act and take decisions according to their defined responsibilities.
- State institutions on all levels implement political decisions in an efficient, transparent, accountable, democratic and coordinated fashion.
- State institutions possess adequate expertise and skills in policy formulation, and are able to draft legislation in a well-researched and timely fashion.

4. Legislation and legislative process

Laws and the making of laws comply with minimal rule of law requirements if

- Legislation is compatible and/or implements key international treaties, conventions and accession requirements (legislation to be strengthened in certain fields).
- Regional legislation complies with federal law.
- Legal norms are drafted professionally, adopted quickly and in a transparent way, and their effects regularly evaluated.
- Laws are published and accessible.

5. Election legislation and practice

A setting conducive to free and fair elections has been created once

- The electoral system ensures minimum standards for democratic, free and fair elections in terms of the institutions to be elected, the frequency of elections, and the organization of electoral units in a way that prevents gerrymandering/manipulation.
- All citizens of the age of majority are granted the right to vote and stand for election and are able to effect remedies for enforcing their electoral rights.
- The legal framework ensures secrecy of the vote.

- Limitations of electoral rights are regulated narrowly and in detail, specifying who imposes them and under what conditions, thus protecting voters from bribes or pressure.
- The timing of elections - including interim and extraordinary - is determined by legislation.
- Voting procedures are specified in detailed rules that help to prevent unlawful or fraudulent registration and to ensure equal, fair and transparent counting.
- Candidate registration is regulated by rules applying equal opportunities to all parties independently of their leaning, e.g. concerning treatment before the law and media access.
- Composition of election commissions is balanced and reflects different parties.

6. Political parties and opposition

Political parties constructively support the process of developing informed opinions and interests if

- All groups and individuals active in politics adhere to the constitutional principles, and mechanisms to deal with groups not adhering to these principles are in line with the law.
- Political candidates understand democratic values and have knowledge on governance, policy management and campaigning issues.
- Public financing is aimed at each party represented in parliament and extended to political bodies representing a significant section of the electoral body and presenting candidates for election; private financing is transparent and subject to certain restrictions.
- Political parties have the capacity to develop and formulate precise platforms, also on sensitive issues.
- Political parties have equal access to the media.
- The opposition functions as an effective counterbalance to the government.
- Campaigning takes place without intimidation and in the spirit of constructive competition within a multi-party system.
- Opposition parties stand a chance in elections.

7. Public administration and services

The efficiency and adequacy of public administration demands that

- A meritocratic, well-trained, and democratic public administration at national, regional and local levels ensures effective implementation of government decisions and efficient delivery of public services.
- Appropriate mechanisms exist to ensure accountability and transparency of the administration.
- Civil servants are remunerated adequately.
- Competences of the centre and subsidiary levels of administration are clarified and streamlined, thus preventing arbitrary or irresponsible decisions.

8. Media

The media provide a valid channel of information and articulating opinions if

- The media function as an effective corrective, and are able to operate freely at all times.
- There is no direct, structural or indirect censorship on the media.
- The media are not completely state-owned or monopolized to the benefit of certain political groups.
- Journalism is conducted in a professional way.

9. Civil society and political culture

Conditions favourable for an active involvement by civil society in the political process have been created so that

- A legal and regulatory framework defines and supports the rights and role of civil society organizations.
- A broad range of national, regional and local non-governmental institutions (lawyers, journalists, trade unions, academics, NGOs) are proactive in their relationship with the established authorities and address issues of public concern independently of whether they reflect the agenda of the government or political parties.
- Civil society groups are able to operate freely, sustain themselves and safeguard democratic advances, e.g. public and media access to information, public participation in political and policy debates, and accountability of government and its agencies.

2. Independent, Impartial and Effective Judiciary

1. Independence, checks and balances, impartiality

Fundamental prerequisites for an independent, responsible and impartial judiciary are met if

- The Constitution legally safeguards the independence of the judiciary and provides for a structural balance of arms among the judiciary, legislative and executive.
- Prosecution and detention are separated, i.e. responsibility for the prison system and pre-trial facilities lies with the Justice Ministry, not the Interior Ministry.
- A transparent hierarchy of courts is established; the court system allows for a separation into criminal, civil, administrative and martial courts.
- Judges are effectively protected from threats and (political) pressure, e.g. by narrowly defined possibilities of dismissal and long-term or indefinite nomination terms.
- The presumption of innocence is legally determined.
- The functions of the Prokuratura have been changed from an organ of preliminary investigation and court supervision to an organ with solely accusatorial functions.
- Court procedures are revised if they give rise to doubts concerning impartiality (ECHR objectivity test).
- Judges do not give their opinion of the guilt of a person during the trial (ECHR subjectivity test).
- The public trusts in the independence of judges, also with regard to their political preferences.

2. Judicial powers

The powers of judicial organs are determined clearly and are fully respected to the effect that

- The judiciary reviews administrative practice.
- Judicial organs determine the constitutionality of legislation and official acts, and effectively enforce their decisions.
- The judiciary has exclusive, ultimate jurisdiction over all cases concerning civil right and liberties.
- Criminal and civil procedure codes are defined in line with European conventions and standards and clearly spell out the responsibilities of judges at all stages of the criminal justice process.
- Judicial decisions may be reversed only through the judicial appellate process.
- Judges have adequate subpoena, contempt, and/or enforcement powers, which are utilized, and these powers are respected and supported by other branches of the government.

- Alternative sentences are being explored.
- Martial courts and laws are only applicable to narrowly and transparently defined periods of time (war) and crimes (treason) or are restricted to narrowly and transparently defined groups of people (soldiers).

3. Role of the Prosecutor's Office

The following conditions facilitate and support the Prosecutors' contribution to fair and effective judicial processes:

- The main task of the prosecutor consists of bringing criminal matters before the court and ensuring the lawfulness of the investigative process.
- The Constitution, respective laws (codes and procedure codes) and international instruments regulate investigative and other competences of prosecutors at all stages of the criminal justice process.
- The General Prosecutor may introduce extraordinary appeals against judicial decisions only under certain conditions so that legal certainty is not undermined (i.e. within a limited period of time, after having exhausted all other legal avenues, in a non-discretionary way).

4. Appointment, dismissal and immunity regulations

Appointment, dismissal and immunity regulations underpin the independence of the judiciary in such a way that

- Qualified, independent, impartial judges are appointed on the basis of objective criteria such as strong professional competence.
- Appointment terms are for life or long periods.
- The transfer, suspension and dismissal of judges are governed by narrow and transparent rules contained in law or the Constitution, and must allow for an appeal process.
- Instances of and reasons for restructuring and liquidating courts are clearly regulated.
- Judges enjoy immunity for their official acts; disciplinary proceedings are regulated according to international law.
- Minorities and members of ethnic groups, including women, are adequately represented in the judiciary.

5. Salaries and resources

Financial and material resources of the judiciary are adequate and ensure that

- Salaries are sufficient to attract and retain qualified judicial staff and to support them fully without them having to look for other sources of income.
- Judges' salaries are not reduced during term.
- Tenure is guaranteed for senior-level judges until retirement or expiration of term.
- The judiciary is adequately funded through its own budget and is able to influence its amount.
- An adequate infrastructure ensures sufficient space, access, and judicial security.

6. Access to effective, fair judicial remedies

Vital conditions for ensuring the effectiveness, fairness and accessibility of the law are met once

- The right to a fair trial and independent legal counsel in private at an early stage is safeguarded for criminal defendants by national law in accordance with international standards.
- The criminal procedure code guarantees that everyone deprived of liberty has access to a judge or officer authorized by law to decide on the lawfulness of the detention, also during

pre-trial detention, and review of lawfulness is prompt and completed within four days at the most.

- A free-of-charge legal aid system ensures broadest possible access to legal advice and representation, also for geographically isolated and economically disadvantaged people.
- The judiciary reaches a decision on the guilt of the accused within reasonable time.
- Evidence collected through duress or violation of human rights is inadmissible in court.
- A process exists for facilitating and handling complaints against judicial conduct, including actual or perceived bias.
- Defendants as well as the public at large are aware of legal rights, especially during pre-trial investigations as well as procedures of appeal.
- Civil courts provide citizens with administrative decisions on issues such as property ownership, changes in marital status, births, deaths, etc.
- Public access to legal advice is supported by public legal libraries, resource centres, legal aid hot lines, etc.

7. Education and career

A professional, performance-based, motivated and independent judicial work force has been built up if

- Judges, lawyers and prosecutors have timely access to jurisprudence on all levels.
- Career prospects depend on objective criteria such as ability, integrity and experience.
- Formal legal education is a requirement for all judicial candidates.
- Judges are required to have a particular amount of professional experience and to continue legal education regularly and without cost.
- General prosecutors are trained in international norms and transparent rules.
- Training is provided in accordance with the needs expressed by the judges and deals with current legal developments.
- Judges should be trained before taking office in a code of ethics that explains major problematic issues such as conflict of interests, inappropriate political activity, etc.
- Judicial associations effectively protect and promote the interests of the judiciary, and foster an exchange of best practices.

8. Accountability, efficiency and transparency of the administration of justice

Conditions conducive to an accountable and efficient administration of justice ensure that

- Cases are processed efficiently and take place publicly, unless harmful to the privacy of a party, and in due course.
- New judicial positions are created according to need.
- Administrative procedures are
 - (i) Efficient, e.g. case filing and tracking system, computerization, budget and personnel management;
 - (ii) Streamlined and transparent, e.g. distinct budget lines for free legal aid; and
 - (iii) Accessible, e.g. information in local language, no or little fees, no posting of bonds required in civil cases, etc.
- The court's support staff is sufficient and capable of handling documentation and research.
- The appeals system clarifies which court is competent.
- Case assignment takes place according to an efficient and objective system (lottery, area of expertise).
- Licensing procedures for lawyers are not too complicated.
- Regional networks of the judiciary are built up.

- Judicial decisions are generally published and open to scrutiny.
- Trial records are publicly available.
- The public and the media are able to assist courtroom proceedings.

3. Objective, Equal and Efficient Application and Enforcement of Law

1. Prosecution and investigation

Prosecution and investigation procedures comply with standards of (international) law, and are efficient if

- Prosecutorial services follow up on allegations and recommendations for inquiries, also addressing difficult issues in a transparent and independent way.
- The law is not politically obstructed or instrumentalized against political enemies.
- Arrests do not take place arbitrarily or on the basis of questionable charges, and have to be authorized by the judiciary.
- The arrested person is promptly informed of the reasons for arrest and brought promptly before a judge or another officer authorized by law to decide on the lawfulness of detention.
- Intrusive investigative measures, e.g. wiretapping and house searches, are authorized by judicial authorities and take place in a procedure provided by the law.
- International crime cases are effectively processed by the police and prosecuted by the judiciary.
- Systems of data collection, analysis and inter-agency sharing are efficient, while safeguarding the protection of personal data.

2. Detention

Essential requirements for objective and efficient law enforcement are accomplished if

- Institutional and practical capacities of the police, justice, prosecution, and penitentiary systems ensure humane and secure conditions for detainees in respect of international HR standards.
- Sentences are reliably enforced.
- Guarantees for release are legally determined in cases of no serious risk of flight, abduction of evidence, or committing further crimes.
- Inquiries into cases and allegations of ill treatment of detainees are followed up without impunity and through a thorough, transparent, and independent process.
- Corruption among law enforcement officials is low and prevented.
- Period of detention is kept to a minimum during investigation.
- Alternative measures to imprisonment are being developed.
- Prisons are not overcrowded.

3. Police, security forces and border control

The legal obligations of the police, security forces and border control as well as their performance capacities have become evident as

- Roles and competencies of police and security forces are legally delineated; exceptions for suspending this delineation are rigidly and clearly regulated.
- Police and military conduct are monitored by civilian monitoring mechanisms (ministries of defence or interior, parliament).

- Neutrality and effectiveness of the army and police are ensured among other things by recruitment, training and retirement policies, e.g. equitable representation of major identity groups.
- Border institutions effectively support the fight against organized crime, smuggling and trafficking, increase regional and international trade, and stabilize border regions.
- Institutional capacity of the police ensures adequate investigative and information services.
- The police are well trained in the investigation of key criminal activities and in human rights.
- Border police are sufficient in number and well trained in vested (personal) rights and languages.

4. Secure Human Rights, Fundamental Freedoms and Political Group Rights

1. Human rights institutions and instruments

Vital structural conditions for securing human rights have been created if

- International human rights conventions are signed, ratified and implemented.
- Independent national institutions, such as ombudspersons, safeguard the protection of human rights and are able to resolve disputes and impose their decisions on authorities.
- The mandate of HR institutions is sufficiently broad to influence the domestic human rights situation.
- Institutions are sufficiently supported in financial and material terms.
- Competences are clear, well balanced, and institutions cooperate on a regular basis.
- A separate budget line submits the ombudsperson to the legislative, not the executive branch.
- Local administrators are aware of legal and HR issues, their role in responding to HR complaints and the competencies of the judiciary and HR institutions.

2. Fundamental rights and freedoms

Fundamental rights and freedoms are effectively safeguarded if

- Fundamental rights and civil and political liberties, such as the freedom of belief, expression, information, or to assemble peacefully, are guaranteed by law and effectively protected.
- Various forms of alternatives to compulsory military service have been introduced, which are compatible with reasons for conscientious objection.

3. Prevent/abolish torture and the death penalty

The practice of torture and the death penalty have been credibly abolished so that

- The death penalty, or at least its practice, has been ruled out as a possible form of legal punishment.
- All international and national laws aimed at the eradication of torture have been ratified and implemented; there is no impunity with regard to torture.
- A domestic strategy for the eradication of torture has been formulated that includes a mechanism for systematically reviewing anti-torture policies.
- Anti-torture and HR standards are included into the training of law enforcement bodies with particular regard to vulnerable groups.
- Victims of torture are assisted (rehabilitation, reparation).

- Reliable information exists on the use of the death penalty and prison practices.

4. Anti-discrimination and minorities

Equality of persons belonging to minorities and the equality of their rights is evident in that

- The legislative framework protects the rights of persons belonging to national minority groups, and ensures their full access to and integration in public life, e.g. representation in governmental institutions and public bodies, equal right to vote and stand for office.
- Legislation is not discriminatory, nor applied in a manner that discriminates against any group or community of believers.
- There is no discrimination taking place in employment, education nor concerning the access to pensions, insurance and health services.
- The education system promotes the equality of different social or ethnic groups and is responsive to their needs.
- The government as well as political parties identify and adequately respond to issues that are of concern to national minorities.
- Minorities are not restricted in their cultural practices, e.g. concerning language or religious observance, and are able to live at standards comparable to other identity groups.

5. Migration including refugees, IDPs and asylum seekers

The integration, management and protection of rights of refugees, asylum seekers, IDPs and other migrants are supported so that

- Legislation, measures and institutional capacities facilitate the return of refugees, the resolution of claims (property, housing) and refugees' reintegration.
- Modern and comprehensive systems of managing and administering migration, entry permission, asylum and border management have sufficient capacities at their disposal, aim at reducing the scale of illegal immigration, and produce reliable information.
- Returnees have equal access to and are not subject to discrimination in employment, education, pension and health services.
- National authorities, interior ministries, police and border control agencies cooperate and exchange information regularly on national, regional, and international (Europol, Interpol) levels.

5. Social and Economic Security

1. Legal and regulatory framework of a market economy

Preconditions for free markets and a predictable economic environment are legally determined providing that

- The constitution contains principles that ensure the stability and predictability of free markets; application of principles is left to ordinary legislation.
- The constitution proclaims and recognizes certain economic rights and freedoms:
 - (i) Protection of different forms of property;
 - (ii) Freedom of trade and industry;
 - (iii) Freedom of contract;
 - (iv) Freedom of association; and
 - (v) Principle of equality before the law and non-discrimination.
- Restrictions of these rights are regulated narrowly by law.
- Economic legislation is in line with international standards (conventions, CSCE Bonn document, WTO membership requirements, UN Pact on Economic and Social Rights).

- The principle of free competition ensures that authorities engage in economic activities only under conditions that do not exempt them from normal legal requirements.
- The state remedies deficiencies in the market economy through ensuring the rights of employees and providing a social welfare framework, i.e. regulates certain economic activity or creates public enterprises to fill gaps where the market economy is not performing properly.
- An effective price mechanism has been established.
- Monetary mechanisms are effectively controlled by the state, i.e. restrictive and stable monetary policy, creation of an independent central bank.
- Restrictions on foreign trade have been removed, e.g. via introducing realistic exchange rates.
- An effective tax system has been established, general state subsidies have been abolished, and there is strict budgetary policy.

2. Legal certainty and security

Economic activity is protected and stimulated when

- Legislation and sentences are put into effect reliably; litigation, particularly in commercial law, is swift; and judgments are effectively enforced.
- Government composition and (economic/reform) policy direction are stable and supported by a qualitatively and institutionally strong bureaucracy that is capable of absorbing shocks in case of government changes.
- Legislation and bureaucratic regulation affecting business operations (taxation, customs, transaction costs, etc., as described below) are simple and transparent.
- Economic operators are protected from organized crime and delinquency, among other things with the help of internationally interlinked information systems, efficient customs operation and availability of comparable statistics.
- Consistent enforcement of contracts is part of regular business practice.
- A system of professional accounting standards coupled with requiring larger companies, banks and other financial institutions to publish accounts subject to internationally accepted accounting standards.
- Specialized courts are established to handle economic cases and to relieve civil courts from the additional workload of converted economic affairs cases.

3. Prevent corruption

A legislative and regulatory framework helps to fight and prevent corruption if

- Corruption is a criminal offence as defined in the Criminal Law Convention and Civil Law Convention on Corruption that have been incorporated into domestic anti-corruption legislation.
- Financial resources (salaries, separated budgets, etc.), training (codes of ethics) and other practices are part of preventive measures of corruption.
- Criminal liability between natural and legal persons is closely linked with regard to crimes committed for the benefit of the legal person.
- Politicians need to lay open all financial resources on a regular basis.
- Corruption cases within the police result in disciplinary or criminal proceedings that are implemented by the prosecutor.
- The judiciary is trained in and implements anti-corruption measures.

4. Prosecute economic crime

Legislation and regulations combat money laundering and illegal trafficking, particularly in drugs and human beings, provided that

- The criminal code defines illegal trafficking and money laundering as offences.
- Investigation, prosecution and protection mechanisms build on international cooperation and are based on a legislative and regulatory framework.
- Law enforcement agencies, customs services, and border guards are sufficiently equipped to foster technical capabilities for supply-reduction measures concerning drug trafficking and preventive measures for drug abuse.

Monitoring the Rule of Law

Introduction

Legislation is increasingly targeted to achieve certain goals. Drafting appropriate laws and applying them properly is no longer sufficient to ensure a state of rule of law. Follow-up is also necessary in order to control and confirm that the intended impact and objectives have been achieved. This consolidated framework demonstrates attempts to tie the evaluation of the *effects* of laws into the practice of international actors. It maps out the field of the rule of law in a comprehensive and logical way, integrating essential objectives and issues that have been pursued by the Council of Europe (the CoE), the Organization for Security and Cooperation in Europe (OSCE) and the European Union (EU).

Gathering quality information has been a challenge during this study, as approaches vary considerably even within the institutions. Although monitoring procedures take place in a more (CoE) or less (OSCE) systematic way, it has been impossible to conclude overall 'institutional' approaches. Greater input and feedback from interviews would be needed to reinforce further the practical relevance of a common monitoring scheme. This report and framework are consequently limited mainly to non-confidential material.

1. Concepts and Definitions

1.1 Rule of Law

The concept of the rule of law has been evolving in a process of continuous adaptation since the eighteenth and nineteenth centuries when the notion first developed against the background of the liberalization of the bourgeoisie. This ongoing process means that a final and definite definition is impossible. However, the principle components of the concept can be derived from its aims and constitutional specifications. From this it becomes evident that the execution of state power must be based on laws that were made according to the constitution, and with the aim of safeguarding freedom, justice and legal certainty.¹

One can thus distinguish formal and material aspects in the concept of the rule of law: separation of powers, lawfulness and legal certainty - i.e. the predictability of decisions by the state - describe *formal* objectives of the rule of law; the *material* objectives, on the other hand, are to achieve justice in the sense of freedom and equality in fields that are under state influence. The protection of basic rights is the principle aim that links both notions.

By its nature, the rule of law cuts across various policy fields and comprises political, constitutional, legal as well as human rights issues. A useful working definition is provided by the Conflict Prevention Network (CPN) describing the rule of law as:

The primacy of the law as fundamental principle of any democratic system, which seeks to foster and promote rights, whether civil, political or economic, social and cultural. This notably entails means of recourse enabling citizens to defend their rights as well as shaping the structure of the State and the prerogatives of various powers, with a view to placing limitation on their power.²

¹ Stern in Wolfgang Rohr, *Staatsrecht* (Cologne: Carl Heymanns Verlag KG, June 2001).

² Conflict Prevention Network, *Peace-building and Conflict Prevention in Developing Countries: A Practical Guide* (2001).

Different actors do not emphasize all components equally, and definitions vary accordingly in depth, scope and degree of politicization. In its *Communication on Democratization, the Rule of Law, the Respect for Human Rights and Good Governance* (1998) the European Commission defines the rule of law as including:

1. Representative and accountable government drawing its authority from the sovereignty of the people;
2. Legislature respecting and giving full effect to human rights and fundamental freedoms;
3. Independent judiciary;
4. Effective and accessible means of legal recourse;
5. Legal system guaranteeing equality before the law;
6. Prison system respecting the human person;
7. Police force at the service of the law;
8. Effective executive enforcing the law and capable of establishing the social and economic conditions necessary for life in society.

In the *Copenhagen Document* of 1990, OSCE participating states commit to promoting the rule of law and its components of:

1. A democratic political framework;
2. Functioning independent judiciary;
3. Human rights and fundamental freedoms;
4. Equal rights and status for all citizens;
5. The free expression of legitimate interests and aspirations;
6. Political pluralism and social tolerance;
7. The implementation of legal rules that place effective restraints on the abuse of governmental power.

Almost the entire thematic scope of the CoE circles around the rule of law. Indeed, the CoE has reached unrivalled comprehensiveness and sophistication on the subject in Europe. Its strong rule of law focus is well demonstrated by the monitoring themes of the Committee of Ministers:

1. Freedom of expression and information;
2. Functioning and protection of democratic institutions;
3. Functioning of the judicial system;
4. Local democracy;
5. Capital punishment;
6. Police and security forces;
7. Effectiveness of judicial remedies;
8. Non-discrimination with emphasis on the fight against intolerance and racism.

These sets of objectives were the basis for a first referencing of various applied indicators in the institutions. In a second step, common key objectives and recurrent issues were identified, substantiated, and grouped within the harmonized structure of the consolidated monitoring framework.

1.2 Monitoring

As a useful management tool, monitoring provides information on an ongoing basis on the implementation and progress of certain programmes and goals, with the aim of identifying corrective action. It consists of a regular and reliable flow of information that may provide the factual basis and input for assessments and evaluations. Monitoring implies a standardized, systematic and sustained effort to gather data from various sources on the basis of a set

framework, with the objective of making policy recommendations. *Ex post* evaluations, in contrast, focus on impact, draw conclusions, and can be produced by external independent evaluators. Evaluation criteria are more strategic and results-oriented, indicating to what degree objectives have been achieved, instead of progress in the *process* of achieving them.

1.3 Indicators and Methodology

The initial stocktaking included indicators applied by the institutions in the widest relevant scope although completeness of sources is hardly possible. In most cases the indicators did not reflect a methodology or system of monitoring. They ranged from criteria taken into account in the preparation or follow-up of programmes, to legalistic requirements for fulfilling commitments laid down in conventions. Thus ‘indicators’ varied greatly in function, level of concreteness, application and indicative value. Some constituted *prerequisites* for achieving the respective objectives; others were signs of the *degree of progress* towards an objective, and yet others indicated the *level of achievement*, a pre-stage, or even constituted a facet or *part of* the objective itself. In their original form, the indicators were referenced according to the components of the official rule of law definitions.

On the basis of this institutional comparison, five common key objectives (see below in section 2) and a number of recurrent issues could be identified that would provide the structure for a common harmonized, thematic scheme.

The next step then was to bring the indicators in line with the common structure of key objectives and issues, eliminate duplication, streamline their logical connection to higher objectives, and to substantiate them further if necessary. Indicators were formulated as ideal-type objectives that require a qualitative comment on the degree of achievement in the particular case. They indicate essential requirements for reaching or approving the state of the rule of law. The hierarchy of the framework reads as follows, for example:

1. Key objective: Independent, Impartial and Effective Judiciary

1. Issue: Judicial powers

- **Indicative objective:** The judiciary reviews administrative practice.

Developing the framework into a tool that links objectives to potential measures would further increase its policy relevance significantly. It could also be practical to indicate which organization would be best suited to follow up on or take the lead within a certain objective or issue, although this has not been undertaken in the present framework.

2. A Consolidated Framework for Monitoring?

The official definitions reveal a certain symmetry in objectives. But current monitoring is not spread evenly across all rule-of-law components that were officially set out, and a common, refined working definition will be helpful. For example, issues such as civil society development or corruption have become much more prominent than originally considered in the formal definition. Better understanding of the relevant processes and responding to new challenges and/or organizational change may be possible reasons for this development in policies. The profile of rule-of-law monitoring criteria thus needs sharpening. The consolidated framework tries to map out the rule of law in a more precise and - in relation to the indicators - more logical way. It comprises five key objectives that reflect the criteria applied, but do not reflect organization-specific terminology of either of the three fora:

1. Independent, Impartial and Effective Judiciary;
2. Inclusive, Legitimate and Effective Political System;
3. Objective, Equal and Efficient Application and Enforcement of Law;
4. Secure Human Rights, Fundamental Freedoms and Political Group Rights;
5. Social and Economic Security.

Common terminology would certainly enhance understanding and cooperation among different actors who, dealing with a broad cross-cutting issue like the rule of law, are likely to have at their disposal different professional backgrounds (political scientists, constitutional law experts, economists, legal advisers, etc.). A consolidated scheme would not only function as a common denominator for different professionals, but would also enhance their own understanding, and structure their thinking on the subject.

Another advantage of a consolidated monitoring approach is the building up of an inter-institutional understanding of essential rule-of-law ingredients. This could make an almost all embracing subject much more transparent, create a common terminology, and thus prevent unnecessary duplication and disjointed agendas. Practical examples of when common understanding is crucial are the CoE and European Commission (EC) joint cooperation programmes for promoting the rule of law in specific countries, e.g. Albania, Moldova and Russia. Better understanding of the respective roles and aptitude for monitoring and implementation will further facilitate such cooperation.

A consolidated approach would initiate and ensure regular communication on various levels within and among the fora. This would reinforce the interconnectedness of various policy fields. While individual monitoring processes overlap to a great extent, a consolidated framework may more easily prevent and make loopholes in existing monitoring processes more visible.

A shared perspective would facilitate coordinated responses to rule-of-law deficits and an improved division of tasks. A 'common basis' may bring the decision on and distribution of tasks more transparently and objectively in line with the means, strategic interests and expertise of the actors. Monitoring must be accompanied by back-up activities including communication strategies and feedback mechanisms. Rule-of-law deficits in particular require a change in mentality and practices, and must not be restricted to legalistic adaptations. The question of implementation capacity is thus crucial. Coordinated responses are likely to mobilize greater leverage, for example with the view of potential accession or suspension in (one of) the three institutions. Thus, in coordination with each other, the fora would have more defined 'sticks' and 'carrots' at their disposal.

On the other hand, there are limits to common monitoring. Firstly, with regard to the idea of a framework, a common framework must not become an obstacle to its flexible adaptation and application. Each case is different as is each organization that is monitoring case-specific processes. A checklist approach is not only likely to lead to inaccurate judgement, but would also limit considerations of the wider political scope. A common framework should not be an end in itself, but a means for achieving a purpose, for example to serve as internal guidelines for negotiations, fieldwork or monitoring of programmes, either on national or (cross-) organizational levels (see suggestions and recommendations).

A more general point concerns the question of perspective: Who defines the rule of law and deficits thereof? The growing number of conditions and concessions increasingly blurs the essence of the rule of law. In the end, this remains a question of political will in the countries concerned.

On balance, introducing a consolidated framework should focus on common goals, and should aim at a more complementary coordination, rather than levelling off, of different methods pursued for achieving these goals. For this reason, the draft framework has been formulated in terms of ideal objectives, and leaves individual methods of control up to the actor. If flexibly and purposefully applied, a Consolidated Framework will be policy-relevant as long as it takes into consideration the capacity and interest of the individual institution/forum. If developed into an operational cross-organizational tool, the framework should indicate which organization should be concerned for follow-up and communication to the other two.

3. The Examples: Bosnia and Herzegovina, Kyrgyzstan, Russia and Ukraine

Country-specific programmes, agreements and strategies of the CoE, OSCE and EU provide a good understanding of the main areas of concern specifically in transition countries. While the focus of this study lies primarily on countries in (political and economic) transition - as reflected in the choice of examples - it is equally important to look at monitoring practices in Western countries. In its consolidated form, the framework no longer refers to country-specific problem areas and may well be used to examine the state of the rule of law in Western countries. A second consideration in the choice of examples has been to include countries that differ in size and membership in the three fora, and that serve to reflect rule-of-law deficits that vary in scope and degree.

Some of the most pressing issues in relation to the rule of law in post-conflict Bosnia and Herzegovina have been to improve the functioning of state institutions (shared presidency, military forces), to make the application of the law consistent, to improve the competences and professionalism of courts, to develop a national election law (fulfilled), to reduce corruption, and to promote further respect for human rights and fundamental freedoms particularly in human rights institutions (HR chambers, ombudspersons, commissions for displaced persons and refugees), the constitutional court, the judicial system, the education system, penitentiary institutions, and concerning property laws, the return of refugees and cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY).

The following issues have been calls for concern regarding the rule-of-law situation in Kyrgyzstan: intimidation of the opposition and the media; underdeveloped party politics; weak parliament and judiciary as opposed to a strong president (rule by decree); rise in crime particularly in corruption, drug-trafficking, money laundering and personal security; unenforceable court decisions; insufficiently qualified judges; ineffective implementation of appeal procedures; the death penalty; improper election practice (exclusion of opposition candidates, fraud, harassment of voters); allegations of political imprisonment; restricted access to justice; unprofessional civil service; and deficient compliance with obligations under the International Covenant on Civil and Political Rights.

With regard to Russia, the situation in Chechnya and the conduct of governmental authorities are clearly of overarching concern. Other rule-of-law-related issues are the maltreatment of

conscripts in the military, support for re-establishing the death penalty, pre-trial detention, prison conditions, torture, legislation on alternatives to military service, freedom of the media, discrimination against religious groups other than the orthodox church, and outstanding conditions of membership in the CoE.

Meanwhile, international actors in Ukraine have focused among other things on preventing torture, the legal protection of rights and freedoms, electoral legislation and practice, especially regulations regarding limitations of electoral rights and formation of constituencies, constitutional reform, guarantees against outside pressure on the judiciary, and regulating disciplinary measures against judges.

4. Monitoring Mechanisms: Methods and Criteria

4.1 The Council of Europe

The EU and CoE are both *acquis*-based organizations. The ingredients of the rule of law are essentially enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as interpreted and developed by the European Court of Human Rights, the only truly judicial organ established by the Convention. The peculiar feature of the CoE is the duality of its monitoring system: legal procedures include the judicial control exercised by the European Court of Human Rights as well as other independent verification mechanisms created by charters, conventions or framework conventions, which are legally binding for the states that ratified them; on the other hand, the CoE's political organs also monitor member states' compliance with obligations that include commitments related to the rule of law among other principles and rules.³ This includes both political obligations and also legal obligations where no independent verification procedure exists.

Legal mechanisms

The following are the main conventions that, including their complaints systems, form part and parcel of the commitments of most member states:

- ECHR: Core human rights monitoring ('monitoring par excellence') is carried out by the European Court of Human Rights. Any state party and individual may refer an alleged violation of the ECHR to the Court of Human Rights once domestic remedies have been exhausted. The Secretary-General may request an explanation of any state party as to the implementation of the Convention in internal law, although this possibility has rarely been used. Should a breach of the Convention result in systematic human rights violations, the effectiveness of the ECHR mechanism depends crucially on the political will of the Committee of Ministers (CM) and member states to take initiative and joint action. With the rising number of such cases, the Court of Human Rights increasingly needs to undertake expensive fact-finding missions. A second major strain on the capacities of the Court is the need to help applicant states to adapt their standards to those of the ECHR and the need to monitor this development politically. The compliance with judgments often requires changes in domestic legislation. The CM supervises the execution of judgments under art. 46 of the ECHR.

³ 'All member States of the Council of Europe are required to respect their obligations under the Statute, the ECHR and other Conventions to which they are Parties as well as to observe a series of principles, rules, standards and values that have been elaborated over the past 50 years within the Organization with regard to democratic pluralism, human rights and the rule of law;' in 'Monitoring of Compliance with Commitments entered into by the Council of Europe Member States: An Overview', 6 March 2000, *Monitor/Inf* (2000) 1*, available at <http://cm.coe.int/reports/monitoring/2000/2000monitorinf1.htm>.

- European Social Charter: The Charter safeguards social and economic human rights and provides for a systematic and regular control mechanism. State parties send reports on the domestic application of the Charter to the Secretary-General. The Committee of Social Rights together with the International Labour Organization (ILO) legally assess these reports, and the Governmental Committee of the Social Charter prepares the CM's decisions by selecting situations that should be the subject of individual recommendations. The resolutions adopted by the CM contain individual recommendations to the states concerned. Collective complaints alleging violations of the Charter⁴ can be submitted by European organizations of employers and trade unions, international NGOs with consultative status within the CoE, national organizations of employers and trade unions of the contracting party concerned. The admissibility of complaints is examined by the European Committee of Social Rights. If admissibility is granted, the Committee reports its assessment of the satisfactory application of the Charter by the State concerned to the CM.
- European Convention for the Prevention of Torture: State parties agree to accept visits by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which has strong monitoring powers. The CPT undertakes periodic and *ad hoc* visits and conducts interviews with detainees without restrictions. This is only possible because cooperation and confidentiality are the two pillars upon which this procedure rests. Reports are confidential, but in practice are made public with the permission of the state and once the state has had the possibility to react (within six months).
- European Commission against Racism and Intolerance (ECRI): The Commission produces confidential reviews on a country-by-country approach and in-depth studies with a view to drafting specific recommendations. Currently a second round of country reports is being prepared on the follow-up to the Commission's proposals. The reporting round covers all member states and takes up to four years.⁵
- Framework Convention for the Protection of National Minorities: State parties submit reports within one year of entry into force as well as on a periodic basis and on request of the CM. The reports become public upon receipt by the CoE and are examined by the Advisory Committee of independent experts. The Advisory Committee prepares and passes an opinion to the CM, which adopts conclusions and recommendations in respect of the state party. Both the opinions of the Advisory Committee as well as the recommendations of the CM are made public.
- Group of States against Corruption (GRECO): This partial agreement monitors the implementation of the Criminal Law Convention on Corruption and Civil Law Convention on Corruption, provides best-practice reports and runs country-specific and prioritized projects. It comprises *ad hoc* teams of experts who evaluate and examine replies to questionnaires, request and analyse additional information, and visit member states.

Other useful monitoring mechanisms concerning human rights are the reports, opinions and recommendations of the Commissioner for Human Rights, who is an independent institution within the CoE. He may alert the CoE whenever he has identified problems in the law and its practice concerning Human Rights.

As all member states have or will have incorporated the ECHR into domestic law in the near future, the ECHR - so far the CoE's main monitoring body - will become a subsidiary as a

⁴ Provided by the *Additional Protocol to the European Social Charter* (1 July 1998).

⁵ For general policy recommendations issued by the ECRI, see <http://www.coe.int/ecri>.

verification mechanism. In addition to the key conventions mentioned above, the CoE *acquis* is based on approximately 180 additional treaties; hardly any of them contain a provision about monitoring. Hence monitoring is a mutual exercise that takes place *among* parties. The CM can request any state for information on its follow-up of the Committee's recommendations. For the purpose of treaty monitoring, a number of steering committees, currently over 20, and *ad hoc* committees of experts have been set up to examine specific legal issues (*see committees mentioned below under 5.*). The committees then prepare draft conventions or recommendations for the CM. Since expert committees are composed of specialists, who are usually not perceived as representatives of the seconding government, this procedure allows for an objective, critical and comparative analysis. Monitoring reports are forwarded to the CM, often proposing very concrete action.

With a view to its increasing membership and tasks, the question arises of whether the CoE has adequate means at its disposal (logistics, infrastructure, support from capitals) to monitor the rule of law? New tasks reflecting the geographical enlargement, such as democracy-building, are stretching the CoE's monitoring mechanisms. On occasions, political considerations have made the organization adopt a much more concessionary approach than strictly permissible by its conventional standards.

*Political monitoring*⁶

Upon entering into accession negotiations with a candidate state, the CoE's political monitoring officially starts. The CM requests the opinion of the Parliamentary Assembly (PA), which is not legally binding, but in practice serves as a strong reference for the CM. In order to be considered as a potential member, the applicant state must be: (i) a European state; (ii) willing and able to comply with the CoE statute (note: full compliance is not necessary at the time of accession); (iii) prepared to sign and ratify the ECHR; and (iv) constitute a 'genuine' democracy. The actual achievement of a state of rule of law is therefore not a necessary prerequisite for accession but indeed the candidate's willingness and ability are.⁷ With the accession of Central and Eastern European countries, the number of conditional accessions has been increasing, and the PA's opinions specify individual commitments to be fulfilled by the new member. These requirements are included in the preceding consolidated monitoring framework, as they reflect criteria for follow-up observations. They are determined by the CM and the PA, which follow the efforts undertaken by aspirant member states to live up to these commitments. Upon accession, the respect for the rule of law, human rights and fundamental freedoms becomes a binding obligation (articles 3 and 4 of the Statute).

A *single* overall monitoring approach does not exist in the CoE. Diverse internal structures differ too much in roles and competencies. The question is rather whether the various systems are complementary and whether further coordination at the Secretariat level could improve synergies without starting a turf war.

⁶ This section draws extensively on information provided by Andrew Drzemczewski, Head of Monitoring Department, Council of Europe.

⁷ Article 4 of the Statute defines that invitations for membership may only be issued to states that are deemed 'able and willing to fulfil the provisions of article 3', which relate to the rule of law, human rights and fundamental freedoms. The exact text of the Statute including all successive amendments can be found at <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>.

1. Committee of Ministers (CM): Theme-oriented, consensus-based, non-discriminatory, confidential

The Declaration on Compliance with Commitments accepted by Member States of the Council of Europe, adopted by the CM on 10 November 1994, is the key legal text giving monitoring powers to the CM.⁸ Upon the request of any member state, the Secretary-General (although this has only happened once), or based on a recommendation from the PA (§ 1 of the Declaration), the CM considers the implementation of rule-of-law commitments in a certain member state. As the main executive organ, the CM invites states to become members of the CoE, may suspend them, and encourages and in practice monitors their fulfilment of obligations under the Statute. It functions mainly as a forum for diplomatic persuasion and peer pressure, pressing for corrective measures by a member state. The possibility of suspension has proved to be a valid deterrent.

Regular monitoring within the CM takes place on the basis of national contributions.⁹ As a first step, the Monitoring Department¹⁰ prepares country ‘overviews’ for the CM, including confidential comments by the Department (‘preparatory phase’). These overviews focus on eight themes in all member states – one ‘chapter’ per country and issue:

1. Freedom of expression and information;
2. Functioning and protection of democratic institutions;
3. Functioning of judicial system;
4. Local democracy;
5. Capital punishment;
6. Police and security forces;
7. Effectiveness of judicial remedies;
8. Non-discrimination with emphasis on the fight against intolerance and racism.

The problem with this procedure is that many states do not provide information on time or not at all, which causes inaccuracies in the assessment. Following consultations between the Monitoring Department and the state concerned, the country overview is circulated, and compliance is discussed among member states. The monitoring itself takes place in closed sessions that usually last for two days, during which the CM encourages member states to conform to the principles of the Statute in the themes under discussion. The CM may consider all relevant information submitted to the CoE Secretariat, including information provided by NGOs and other actors.¹¹ Every year, at least three such monitoring meetings take place.

In follow-up to the conclusions, the CM (‘operational phase’) may decide to adjust intergovernmental work through the relevant Steering Committees, review cooperation programmes or take ‘specific action’.¹² The PA needs to be informed of any follow-up decisions. Confidentiality, peer pressure, and the possibility of specific action under paragraph 4 or suspension in case of serious violations of article 3 of the Statute make this a constructive monitoring procedure.

In addition to the regular theme-oriented monitoring, an *ad hoc* procedure has been in operation since the accession of Azerbaijan and Armenia. Regarding the potential

⁸ The Declaration can be found at <http://cm.coe.int/ta/decl/1994/94dec4.htm>; see also the vade-mecum on the Committee of Ministers’ Thematic Monitoring Procedure at <http://www.coe.int/cm>.

⁹ See ‘Outline of the Committee of Ministers’ Thematic Monitoring Procedure’ in the annexe.

¹⁰ In September 2000, the Monitoring Unit at the Secretary General’s Office was integrated into the Directorate of Strategic Planning (DSP) and given the new name of ‘Monitoring Department’.

¹¹ See Declaration on Compliance with Commitments accepted by Member States of the Council of Europe.

¹² Declaration on Compliance with Commitments accepted by Member States of the Council of Europe, para. 4.

membership of the two countries, the CM decided to monitor democratic developments in both countries regularly in order to sway hesitant member states to accept them in. At the same time, the Secretary-General sent two 'Information Missions' to both countries and appointed three independent experts to prepare confidential reports concerning the allegation of political prisoners being held. After field visits and extensive study of case files, in May 2001 the experts concluded that political imprisonment existed in Azerbaijan but not in Armenia. The Secretary-General informed the CM and eventually made the report available to the PA. This *ad hoc* procedure has not yet been activated in other cases.

Despite its strengths the weaknesses of this procedure are also obvious, as shown by the fact that the ECHR was not seized by the blatant rule-of-law deficits concerning the situation in Chechnya. Moreover, the CM does not always follow up the monthly reports from the Secretariat in an active way. Further criticism draws on the CM's relationship with its own Steering Committee. Information directly relevant to the committees, which should bring cooperation programmes in line with CM decisions, is too often not transmitted to the committees.

2. Parliamentary Assembly (PA): Country-specific scrutiny, cross-thematic, eventually public
The PA monitors the honouring of commitments entered into upon accession, and prepares opinions and recommendations on matters requested by the CM (article 23 (a) of the Statute), mainly on the basis of on-the-spot visits and ongoing dialogue. Its opinion must be sought in the cases of (invitations to) accession, suspension or withdrawal of a member state (Statutory Resolution (51) 30).

The PA and CM coordinate during the Annual Joint Committee meeting on compliance with commitments (since 1998) and within institutionalized exchanges between the CM's Chairman and the PA's Monitoring Committee. During the Joint Committee meetings, the CM shares information submitted by states on each CM theme. The PA, on the other hand, may interact with the CM by bringing issues to its attention.

The main monitoring structure within the PA is the Committee on Honouring of Obligations and Commitments (Monitoring Committee). It follows up obligations with regard to the rule of law and human rights, the CoE Statute, the ECHR, other conventions, and accession commitments. The Committee prepares reports for the PA, including specific proposals for improving the situation in a specific country, which are developed in close cooperation with national parliamentary delegations. Usually two co-rapporteurs, of different political convictions and representing different regions, visit the state in question.

If the state concerned fails to cooperate or comply with its commitments, the PA may sanction a state by not approving the credentials of its parliamentary delegation or annulling its ratified credentials. The PA may also refer the issue to the CM.¹³ Usually, 'issues of concern' relate to specific commitments such as the independence of the judiciary, role of public prosecutors, prison conditions, freedom of the media, and rights of minorities. After concluding the monitoring procedure, the Committee will continue dialogue with the State on critical issues,

¹³ For example, Resolution 1179 (1999) on Ukraine: The PA 'considers that the Ukrainian authorities, including the Verkhovna Rada, are responsible to a great extent for the failure to respect the commitments Ukraine entered into when becoming a member of the CoE' (para. 14) and 'should substantial progress in honouring these commitments not be made [...], it shall i. Proceed to the annulment of the credentials of the Ukrainian parliamentary delegation...; ii. Recommend that the Committee of Ministers proceed to suspend Ukraine from its rights of representation...' (para. 15).

leaving the door open for reopening monitoring. In addition to the country monitoring, the Monitoring Committee has also started to issue thematic reports. Common commitments under the Monitoring Committee's scrutiny refer to the judicial system, prison conditions, freedom of the media and minority rights.

Two other committees dealing with rule-of-law issues are the Committee on Political Affairs and the Committee on Legal Affairs and Human Rights. The Committee on Political Affairs examines requests for membership and focuses on the Caucasus and Balkan (Stability Pact) regions. Terrorism and the reinforcement of legal instruments and cooperation in this regard have also moved up on the Committee's agenda. Meanwhile, it is a key task of the Committee on Legal Affairs and Human Rights to give its opinion in the cases of applications for membership and to set out a number of conditions in terms of commitments to be fulfilled.

3. Venice Commission: Theme- and country-oriented, public

The European Commission for Democracy through Law (known as the Venice Commission), currently an enlarged agreement, is an independent, consultative body. It cooperates with the member states of the Council of Europe, interested non-member states and international organizations and bodies. Member states can consult the Venice Commission on constitutional, legislative and administrative questions that are part of the basic principles of the CoE. Thus its remit is wide, but it tends to focus on constitutional assistance. The Commission usually acts on the request of the countries, but can also be invited by the PA and the Secretary-General to scrutinize an issue. The Venice Commission's opinions relate to specific issues and countries. Rule-of-law-relevant issues include laws on constitutional courts and national minorities, federalism and state succession, division of powers, efficient democratic institutions, citizenships, political parties, participation of citizens in public life, electoral laws, self-rule for certain territories (Kosovo, Bosnia and Herzegovina). In southern and eastern Europe the Venice Commission has played a guiding role in engineering constitutions that conform to Western standards, e.g. in Bosnia and Herzegovina and Ukraine.

4. Secretary-General (SG)¹⁴

The SG is responsible to the CM and has a support function for the CM and PA. In the intergovernmental work programme for 2001-2005, which is coordinated and implemented primarily through the Directorates-General, Walter Schwimmer has set out a seven-point plan of action that focuses on rule-of-law related issues.

Only in 1994 was the SG explicitly mandated with monitoring. He has the power of inquiry under Art. 52 of the ECHR, i.e. he may request contracting parties to explain how ECHR provisions are being legally implemented. The SG has access to various sources of information: the PA, OSCE, CoE field offices, SG field visits, etc. This information is presented to the Ministers' Deputies on a regular basis.¹⁵

Upon the suggestion of the SG, the CM may request sending a Secretariat mission to assist a member state in fulfilling specific commitments. This occurred, for example, in the case of Ukraine following PA Recommendation 1513, which expressed concerns about the freedom of the media. After the internal dissemination of the mission's report, negotiations followed, and resulted in adjusting CoE cooperation programmes with Ukraine. This included a new action plan and a joint programme with the European Commission. The PA's monitoring

¹⁴ The role of the SG's Monitoring Department is explained under the section on the Committee of Ministers.

¹⁵ See SG information documents at www.coe.int/SG.

report on Ukraine subsequently reflected this work.¹⁶ This demonstrates the complementarity of the CM and PA and also the increasing role of the Secretariat. Collecting information on the spot will enable much more accurate, informed insights. However, the Secretariat must be careful to maintain its objectivity.

5. Directorates-General (DG) of Legal Affairs and Human Rights: Programme-based, coordinator role

One of the Steering Committees within DG Legal Affairs is the European Committee on Legal Cooperation (CDCJ). The contents of the CDCJ assistance programmes reflect discussions with the country concerned on problematic issues that have usually been identified during monitoring by the PA, the CM or the European Court of Human Rights. Programmes like the cooperation programmes to strengthen the rule of law are thus a response to, rather than a way of monitoring, deficits in the rule of law. They aim at providing expert assistance to the countries (either member states or candidates), in order for them to integrate European norms and practices into national legislation. Other examples of CDCJ projects are the law-making project that supports countries in evaluating legislation and in improving access to the law, the Programmes for Democratic Stability (formerly Activities for the Development and Consolidation of Democratic Stability), a joint effort with the European Commission, and the Octopus and PACO programmes, which mainly target corruption. Other (subordinate) committees and additional mechanisms that operate mainly on the basis of peer pressure include the:

- Committee of Experts on the Efficiency of Justice: This is a subcommittee of the CDCJ. Its main task is to identify cost-effective measures for increasing the efficiency of judicial actors, procedures and organization, while ensuring the fairness of justice. The Committee holds hearings and consultations with other CoE Committees, as well as with external consultants. Its work is structured in three fields: functioning of the judicial system; alternative dispute procedures; and legal advice and assistance.
- European Committee on Crime Prevention: The Committee elaborates common policies concerning criminal law, criminal procedure, crime prevention and the treatment of offenders, taking into account, in particular, the context of an enlarged Europe. It periodically reviews crime policy in Europe by means of conferences on crime policy.
- Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures: This Committee monitors legislation and practices against money laundering.

Meanwhile, programmes of the DG Human Rights target rule-of-law deficits if related to human rights concerns, for example quality management in the police (police and human rights programme), national minorities, or torture. The European Committee for the Prevention of Torture undertakes periodic visits and spot checks. Its confidential reports include recommendations to the state concerned, which has to reply within six months. Other useful monitoring mechanisms concerning human rights are the reports, opinions and recommendations of the Commissioner for Human Rights, who is an independent institution within the CoE. He may alert the CoE whenever he has identified problems in the law and its practice concerning Human Rights.

4.2 The European Union

Enlargement

Since 1998, the annual *Reports of the European Commission on the Progress towards Accession* assess the reforms undertaken by applicant states and outline areas that require

¹⁶ Document 9226 on <http://stars.coe.fr>.

further action. Each of the Reports, which are passed on to the European Council, deal with three sets of criteria:

1. Political criteria including chapters on democracy and the rule of law and human rights and the protection of minorities;
2. Economic criteria, mainly in terms of the Copenhagen criteria;
3. The ability to assume the obligations of membership based on the 29 chapters of the *acquis*.

Rule-of-law issues¹⁷ fall into four categories focusing on the:

- Legislature: Fast and efficient legislature, streamlined procedures for amending legislation, basic democratic consensus among parties, representation in parliament, protection of civil rights, relationship between executive and legislature, limited legislation by ordinance, etc.
- Executive: Accountable, efficient and qualified civil service, anti-corruption measures, decentralization, training, interministerial cooperation, policy-making and -formulation capacity, consultation with stakeholders when drafting legislation, demilitarization of the police, public services, votes of no confidence, right to veto legislation, civilian control over the military, etc.
- Judiciary: Structure of court system, civil and criminal procedure codes, independence, self-administration, appointment, dismissal and promotion procedures, systematic training, number of judges, prosecutor's office, technical equipment, wage policy, immunity, equal access to justice, separate and transparent budget, clear responsibilities of the judiciary as opposed to the Interior Ministry, efficient case management, fair trial, narrow remit of military and juvenile courts, protection of civil and political rights, prison reform, etc.
- Anti-corruption measures: Laws and regulations on lobbyism, conflicts of interest, declarations on income and financial records and on funding of political parties, transparent public procurement procedures and related appeals systems, disciplinary measures and criminal proceedings, capacity of judicial staff, investigators and police to combat corruption, code of ethics for civil servants, independent state-owned banks, transparent liberalization of the energy market, effective regime of sanctions, etc.

Overall, all the negotiating countries (except Turkey) have been assessed to fulfil the political criteria. In relation to the *acquis*, the major challenge remains to strengthen the administrative capacity in such a way that it ensures:

- (i) Smooth functioning of the internal market;
- (ii) Sustainable living conditions in the EU;
- (iii) Overall protection of the EU's citizens;
- (iv) Proper management of Union's funds.¹⁸

With a view to economic criteria related to the rule of law, efforts need to be continued to strengthen the institutional and legal frameworks of a market economy, to reinforce horizontal administrative infrastructure, to strengthen the enforcement of industrial and intellectual property rights, to reduce barriers to market entry and exit further, to create a climate of predictability, to strengthen enforcement capacity of state aid rules and anti-trust provisions, and to strengthen administrative capacity for the fight against fraud.

¹⁷ Examples draw on the assessments of Bulgaria, Hungary, Romania and Turkey in 2001 and 2000.

¹⁸ *Report of the European Commission on the Progress towards Accession*, 2001.

The chapters on Justice and Home Affairs (JHA) in the 2001 *Report of the European Commission on the Progress towards Accession* stress across the board the need for improving border management, particularly at future EU external borders, the preparations for introducing the Schengen system, as well as increased cooperation in fighting organized crime.

The catalogue of conditions, including criteria that are neither part of the Copenhagen criteria nor explicitly mentioned in the Europe Agreements, have been expanding steadily. Additional conditions become legally valid through the accession partnership between the Commission and the applicant state, which identifies long- and short-term priorities on a yearly basis. The increase in conditions, however, can easily lead to applying different, intransparent standards, i.e. more or less concessionary requirements. With reference to these priority areas, the Commission elaborates national action plans in collaboration with candidate countries. Monitoring actions, such as regular reports, monitoring tables, and peer reviews, inform the Commission and subsequently the Council of progress made in the preparations of each candidate country. Peer reviews are conducted by experts from member states and the Commission, and usually look into areas of particular concern that were identified either by the progress reports, proposals for revised accession partnerships or during negotiations.

*External Relations*¹⁹

In the context of EU enlargement and a future free-trade area including the new EU neighbours respecting the rule of law,²⁰ the EU has been redefining its policies towards future neighbouring regions: in the western Balkans the Stabilization and Association Process (SAP); for Russia, Ukraine and other newly independent states (NIS) the Partnership and Cooperation Framework, as well as Country Strategies; and the Barcelona process for the Mediterranean. The main concerns and interests relate to uncontrolled and illegal migration and trafficking in human beings, creating a transparent regulatory framework and progressing alignment with the rules of the EU's internal market.

These issues have been considered in part in the Country and Regional Strategies and National Indicative Programmes (NIPs), which elaborate programmes for each major objective specifying expected results, conditionality and indicators. An example is the judicial reform programme in the Russian NIP. Its main objective is 'to strengthen the independence, competence and effectiveness of the judiciary, particularly in economic matters',²¹ and an expected result is, among other things, stronger training institutions. In most cases conditionality refers to the commitment of the authorities to cooperate, and the indicators applied in this case illustrate the range of different meanings, indicative values, formulation and levels of concreteness and application of so-called 'indicators':

- '400 judges re-trained per year;
- Number/share of courts exposed to new training methods;
- Improved independence of the judiciary and better access to justice'.²²

¹⁹ According to Alessandro Palmero, a *system* of monitoring the rule of law does not exist within Relex.

²⁰ 'In which democracy and respect for human rights and the rule of law prevail', *Report of the European Commission on the Progress towards Accession by each of the Candidate Countries*.

²¹ National Indicative Programme 2002-2003, http://europa.eu.int/external_relations.

²² Country Strategy Paper 2002-2006, National Indicative Programme 2002-2003, Russian Federation; p. 21 at http://europa.eu.int/external_relations.

The Partnership and Cooperation Agreements (PCAs) are another platform for discussion with non-applicant states. PCAs mostly deal with issues related to the impact of EU enlargement. As an instrument of cooperation rather than control, the PCAs focus on mutual priority areas, such as legislative approximation and cooperation in JHA, and do not reflect systematic monitoring. In the case of Russia for example, regulations concerning future visa and border formalities governing traffic over EU territory between Russia and Kaliningrad are being discussed.

Justice and Home Affairs (JHA)

JHA aspects are integrated into the Commission's Country and Regional Strategies, Partnership and Cooperation Frameworks and SAPs. In terms of information gathering, JHA uses all the available sources of international actors that are present on the ground (various UN agencies, the CoE, OSCE and some NGOs such as the International Organization for Migration (IOM) or the International Centre for Migration Policy Development (ICMPD)). However, the Directorate mainly relies on its own sources, i.e. JHA contact points in Commission delegations and also the expert assessment mission during which a team of ten to twelve experts cover a country JHA sector in a five-to-ten-day period. These missions collect information directly relevant for JHA, are able to assess the gap between the local situation and the EU target, and may prepare follow-ups on specific issues.

Different indicators of achievement are attached to each programme. Most of them are relevant to the security level, but too often JHA cannot get reliable data from local institutions. To encourage local institutions to build up instruments for measuring their own performance is often part of EC assistance programmes. In the meantime, JHA and Relex rely on direct observation and information available among international organizations (Interpol, Europol, etc.). Relevant data is neither gathered nor processed in a systematic way. Therefore an assessment system has to be built up in many cases. This will be an objective for the near future, especially in the perspective of the next SAP reports.

4.3 The Organization for Security and Cooperation in Europe

The OSCE emphasizes the rule of law as a practical concept rather than emphasizing formal legality. The main expertise on rule-of-law issues lies within ODIHR, particularly the Rule of Law Unit in the Democratization Unit, and to a certain extent the field missions, which act as the 'eyes and ears' of the organization.²³ Monitoring is essentially linked to the preparation and follow-up of ODIHR project work. Very concrete guidelines have been elaborated, mainly for field staff, concerning certain areas of work such as elections (for example, *Guidelines for Reviewing a Legal Framework for Elections*) or the prevention of torture. Together with the field missions, ODIHR is a crucial source of information that the Chairman-in-Office can draw on in order to obtain direct early-warning information and to prepare adequate political reactions.

Overall, the comparative advantage of the OSCE lies in its comprehensive membership and field presence, which enable the organization to collect reliable information on a continuous basis, including in those participating or partner states that are not members of the EU or CoE. Coordination with the EU and the CoE should thus cash in on this specific strength. In this regard, it is important to mention the role of the UN for including all OSCE-participating states. Its treaties relating to the rule of law are a crucial reference for OSCE work. ODIHR

²³ In some cases ODIHR finances an additional staff member within a mission who works as an implementing officer for ODIHR projects. It is important to ensure in this respect that ODIHR programmes are well linked to mission activities.

maintains direct contacts with the UN, in particular with the Special Representatives of the Secretary-General, who are often briefed informally by ODIHR.

Rule of Law Unit

The Unit currently runs 24 technical assistance projects in relation to the rule of law, focusing on the administration of justice (e.g. by providing training, legal reform and legislative review projects), and legal education in human rights (e.g. by supporting law schools and legal clinics). Programmes in the selected examples used for this study relate to:

- Prison service reform (Bosnia and Herzegovina);
- Prison service training (Kyrgyzstan);
- Student legal aid initiative on criminal law (Kyrgyzstan);
- Legislation Alert and Assistance Programme (Kyrgyzstan);
- Legislative reform assistance (Kyrgyzstan);
- Training for judges, prosecutors and defence lawyers (Kyrgyzstan);
- Human rights training for judicial and legal practitioners, local administrators and human rights workers in the Chechen Republic (Russian Federation);
- Assistance for national human rights institutions such as ombudsmen (Kyrgyzstan);
- Regional ombudsperson institution project (Bosnia and Herzegovina);
- ODIHR anti-torture programme (whole OSCE region).

Looking at these examples one can identify a number of recurrent themes in which the Rule of Law Unit has built up particular expertise: prison service, legislative reform, training of judicial staff and human rights institutions. These fields of expertise are complemented by other thematic areas related to the rule of law, including those run by other units, for example prevention of torture, elections, migration, trafficking, freedom of religion and civil society.²⁴

Because monitoring mainly takes place on the basis of preparing or following up programmes, the collected information may not fully or accurately reflect the requirements that a country should fulfil in terms of the rule of law. Most programmes are launched in response to a request by the state concerned, often through an OSCE mission on the ground. Some programmes however may have been launched in order to reinforce further (or define) the OSCE's expertise in a particular field of intervention.

OSCE activities and monitoring reflect, not only thematically but also regionally, a division of labour among international actors. Given the overwhelming international presence in Bosnia for example, it should not be surprising that ODIHR either focuses on niche tasks (such as elections), takes a different approach (such as regional approach of the Ombudsperson Institution Project in SEE) or joins efforts with the CoE and the EU (such as with the Prison Service Reform in SEE).

In the case of Kyrgyzstan, on the other hand, the OSCE is comparatively better positioned to deal with and monitor rule-of-law developments. As opposed to the CoE and the EU, the OSCE is continuously present on the ground (as in all other four Central Asian republics),

²⁴ For a complete overview of ODIHR projects, see http://www.osce.org/odihr/projects/index.php?country=0®ion=0&thm_area=0&year=2002&keywords=&st=0&pp=5.

while the CoE has not been active in Kyrgyzstan since 1996 and the EU limits itself mainly to the TACIS programme.²⁵

Monitoring Section

A relatively new structure within ODIHR, the Section is tasked with preparing the OSCE's Human Dimension Implementation Meetings, the annual Human Dimension Seminar and Supplementary Human Dimension Meetings. Monitoring takes place in relation to more or less imminent threats and in order to inform ODIHR management. The Section may also alert the OSCE's Chairman-in-Office if there are serious deteriorations concerning human rights, and prepares background briefings for ODIHR's Director, the Chairman-in-Office, the Troika and, upon request, the Secretary-General. Information is collected and verified mainly on the basis of contacts with OSCE missions and, possibly, visits on the ground.

The Section does not focus specifically on the rule of law. For 2002, for example, the Section started two specific monitoring projects for the first time.²⁶ It is not clear, however, to what extent the Section complements the Democratization Unit, to what degree it is linked to ongoing projects, and whether its capacity is sufficient for the task (there are currently four staff).

Ways of cooperating with the CoE's Monitoring Department are currently being explored. Key problems in this regard are the delayed flow of information (only once declassified) and differences in approach (pronounced legal approach of the CoE).

5. Coordination and Cooperation

Joint rule-of-law programmes between the CoE, EU and OSCE have already been undertaken. This makes mandatory an understanding of the issue, which is shared by all three actors, as well as close contact, regular exchange and coordination.

1. OSCE/ODIHR-CoE

Besides formal cooperation meetings ('2+2'/'3+3') there has been regular exchange of information between the CoE's Monitoring Department and ODIHR's Monitoring Section. The CM frequently uses the OSCE as a source of information. The main obstacles, however, are the delay in information, which is due to clearing requirements in the CoE, and differences in approach. ODIHR's Monitoring Unit reacts to current events, and ODIHR generally follows a practical, broad approach considering the rule of law in the context of political and democratic developments. The CoE's Monitoring Department, on the other hand, functions on an ongoing basis, works in confidentiality, comprises legal experts and usually produces in-depth analyses focused on a specific issue.

Formal and informal contacts have existed between ODIHR and the Legal and Human Rights Directorates. But differently structured competences make cooperation between the two organizations generally a challenge. In the case of prison reform, for example, the primary contact point for ODIHR within the CoE is the Legal Directorate; if inhuman treatment comes

²⁵ Main priority areas are: (i) support for institutional, legal and administrative reform; (ii) support of the private sector and economic development; and (iii) infrastructure development.

²⁶ The objectives of these projects are to raise awareness on the national level of children's rights by training school teachers (Kyrgyzstan), and to support dialogue on legislation and normative bases regarding religion and religious freedom (Central Asia).

into play it would be the Human Rights Department. Informal working-level contacts have been more effective between ODIHR and CoE officers dealing with the rule of law as a theme or on a country-specific basis. Exchange and mutual complementation are more likely to take place in a matter-of-fact way and without institutional jealousy. On this level, awareness of the added value of OSCE missions and ODIHR, in terms of their fast and flexible project work, tends to be greater. The Commissioner for Human Rights and ODIHR also maintain good working-level contacts. Gil Robles usually informs ODIHR before visiting a country. Cooperation with the Venice Commission also seems to be satisfactory as ODIHR is included as an observer.

Again with regard to prison projects, the CoE's Steering Groups include ODIHR representatives as observers. Such initiatives could further improve coordination between the CoE and the OSCE in other fields as well. In some cases, it may be an advantage to hold such topic-related Steering Group meetings locally, in the country concerned, rather than in Strasbourg, and to include NGOs. The network of OSCE local contacts could be a valuable resource in this regard.

2. CoE-EU

Both the CoE and EU are based on a body of law (*acquis*). Until now, CoE conventions and treaties have considerably influenced the development of EU *acquis juridique*, especially in the human rights field.²⁷ They are also part of the legal standards for the High Commissioner on National Minorities' (HCNM) operations. Ways of pooling information and setting up a coherent system of human rights protection are being explored at this moment (for example, at the International Conference on the Council of Europe's Contribution to the European Union's *Acquis*, 3-4 June 2002). This might be a good opportunity for improving interrelated monitoring objectives such as the EU's Copenhagen criteria and CM monitoring procedures. Drawing on the extensive network of CoE treaties for judicial cooperation will be highly useful for further developing the EU *acquis*, particularly in view of the enlargement process.

Among the efforts to build up expertise in the rule of law are EU plans to set up a consortium of think tanks, NGOs and experts by the end of 2002 to collect and pool policy-relevant information on governance and human rights related issues. Plans to involve the CoE or OSCE on a structural basis do not exist, although the legal expertise of the CoE and the local presence of OSCE missions would certainly be an asset for the EU, as would being in touch with their agendas.

3. EU-OSCE/ODIHR

Practical cooperation on the ground between the EU and OSCE/ODIHR generally seems to take place without major problems. Particularly with regard to the OSCE's potential in preparing candidate countries for accession to the EU, it is striking that coordination on a strategic level, e.g. in the form of a structured debate on EU enlargement policies and OSCE (mission) policy in Bosnia and Herzegovina, does not take place. The recent Memorandum of Understanding (MoU) between the OSCE and the EU with regard to the former Yugoslav Republic of Macedonia could be a first step towards more strategic coordination of capacities of the two organizations within the region. This indeed would be desirable, as it would add significant political weight if positions are taken by the international community.

²⁷ The EU Charter of Fundamental Rights adopted at the Nice summit (2000) is largely based on the European Convention on Human Rights, thus illustrating the key role that the Council of Europe plays in this respect.

EU-OSCE joint programmes, such as Prison Service Reform in South and Eastern Europe, are rarely initiated. The downside of joint programmes is the risk of levelling off too much specificity in capacity and expertise. It may be preferable to introduce a coordinating mechanism and undertake only certain elements jointly. An example is the current discussion on structural prison reform. Such a discussion should involve all three actors - the EU, CoE and OSCE - in order to mount political pressure. Implementation methods differ, however. Compared to the EU, the OSCE usually has more adequate implementation capacity at its disposal due to its expertise on the topic and its experience in holding regular NGO-government roundtables, training activities, etc. Thus in many cases a *division*, depending on competence and response capacity, rather than a sharing of tasks adds greater value.

Another practical benefit of EU-OSCE coordination is to draw on OSCE missions for debriefing EU ambassadors. Positive experience has been gained in this respect during the discussion on new laws on religious freedom in Central Asia. This was said to have consolidated an 'international voice' on the matter, and could be expanded on a more structural basis.

6. Recommendations and Suggestions

With regard to applying the framework

- The three actors pursue the same or at least compatible goals, but their monitoring *methods* differ significantly. This should be exploited to a greater extent. For reasons of efficiency and effectiveness the CoE, OSCE and EU should try to divide up monitoring tasks in a more complementary way, focus and limit themselves to certain areas of monitoring in which they have accumulated expertise. The framework could be a useful basis for exploring and stimulating a discussion on such institutional emphases. Introducing a common framework should thus be linked to the objective of a more optimal *division* rather than sharing of tasks.
- The framework could also be developed into an instrument of agenda setting, indicating which actor should be involved in following up monitoring tasks or in responding to rule of law deficits directly. The framework could thus be a basis for better coordinating both monitoring and responses along the lines of common and specific objectives and issues. This might be promoted by holding (bi-)annual working-level meetings between units of the OSCE, CoE and EU.
- The framework could provide a basis for developing rule-of-law guidelines for internal use within the Dutch MFA. The framework could be adapted to serve as a reference in political negotiations or, alternatively, as guidelines for staff in the field and delegations (appraising and developing programmes, analytical reference for reporting). Such guidelines could be helpful in further structuring the thinking and analysis of policy-makers and practitioners.
- They could furthermore be introduced within the three fora and developed into official and common standards that harmonize differing conditionalities. The upcoming Dutch OSCE chairmanship may be an opportunity to initiate a common 'code of conduct' in rule-of-law-related aspects (of security) together with the CoE and the EU.

- Only a framework including *general* objectives will make it possible to foster a common language, which would save time and improve cooperation. However, the differences in diversification in the CoE, EU and OSCE are considerable, so that introducing common terms only seems feasible on a general, overall level.

With regard to the OSCE, EU and CoE

- Within the OSCE, synergies could be reinforced by linking missions more closely with ODIHR expertise, i.e. providing missions with a set of common rule-of-law guidelines that could serve as a basis for reporting. This could be a useful reference and would make standards more explicit while leaving scope for case-specific application.
- Rule-of-law standards should be developed that bridge broad human dimension (HD) commitments and programme-level monitoring. This would require translating the first into more concrete terms and broadening the programme lens of the second.
- Economic aspects of the rule of law have been covered less prominently, or monitored separately from political issues. This could be an opportunity for involving the OSCE Economic Coordinator on political/economic issues such as corruption. Within this ‘key objective’ his platform function could be increasingly used for informally monitoring the rule of law.
- Connections with the CoE seem to be sought by both the EU and OSCE. The EU and the OSCE, however, need to coordinate much more closely with each other. This presupposes a definition of their roles and profiles. A more structured dialogue between the two at an earlier stage could avoid competition for the same tasks. Especially with regard to the monitoring of future EU members, the OSCE should be used as a resource for best practices and on-the-ground expertise. This could be in the form of regular coordination meetings per region, for example EU accession countries and areas outside of the EU’s scope such as Central Asia. At least the EU should be included in coordination meetings as convened by the OSCE’s Conflict Prevention Centre in July 2001 where high-level representatives of the CoE, UNHCR, IOM and OSCE field offices and HQ participated. Another concrete possibility would be to build up and increase coordination between the CoE/CM monitoring and EU work carried out on the basis of the Copenhagen criteria (e.g. in Bosnia and Herzegovina), which strongly interrelate in content.
- Thematic monitoring by the CM needs to be revised in a way that ensures efficient and equal assessment of ‘national contributions’. So far, delegations handing in their contributions late or not at all may appear in a better light than those states providing (unflattering) information on time.
- Some structures within the CoE may be too sophisticated and diversified, and thus duplicate efforts. In fact, many committees are dealing with only slightly different issues that, in practice, are related to the same problem. Awareness-raising concerning capacities that already exist in-house would support greater synergies and prevent potential internal competition. An example is the assessment procedure of ombudsman laws, which can be undertaken by the Directorates, the Commissioner or the Venice Commission. This overlap is rarely beneficial and reinforces the problem of (lacking) common standards as the Venice Commission and the Commissioner continuously expand their areas of work.

- Political monitoring by the CoE must not water down the monitoring of obligations and commitments put forward in key conventions such as the ECHR. Political monitoring must continue to strike a balance between maintaining vested interest by member states in strengthening the rule of law and exercising admonitory leverage.

Recommended Reading and Internet Sources

1. Council of Europe

Andrew Drzemczewski 'Monitoring by the Committee of Ministers of the Council of Europe: A Useful "Human Rights" Mechanism?' in *Baltic Yearbook of International Law*, forthcoming in 2002.

'The Prevention of Human Rights Violations: Monitoring Mechanisms of the Council of Europe' in *The Prevention of Human Rights Violations*, Kluwer Law International, 2001.

See also: <http://www.gddc.pt/actividade-editorial/pdfs-publicacoes/8182AndrewDRZ.pdf>

- For information on **CoE bodies, committees and monitoring documents** on the compliance with member states' commitments, see: <http://www.coe.int>.
- For a brief **overview of CoE monitoring mechanisms**, see <http://press.coe.int/files/topics/e-respengag.htm>. A more comprehensive overview can be found at <http://cm.coe.int/reports/monitoring/2000/2000monitorinf1.htm>.
- **HR monitoring mechanisms:**
<http://www.echr.coe.int>, <http://www.dhdir.coe.int>, <http://www.cpt.coe.int>, and http://www.coe.int/t/E/human_rights/ecri/
- **SG information documents:**
http://www.coe.int/T/E/Secretary%5Fgeneral/Documents/Information_documents/default.asp#TopOfPage
- **CM monitoring documents:**
<http://cm.coe.int/site2/ref/dynamic/monitoring.asp>
- **Statute of the Council of Europe:**
<http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>

2. OSCE

OSCE/ODIHR *OSCE Human Dimension Commitments*, a reference guide (particular reference to rule-of-law commitments).

Pre-trial Detention in the OSCE Area, background paper by Jeremy McBride, September 1999.

Preventing Torture: A Handbook for OSCE Field Staff
(especially chapters on monitoring).

Guidelines for Reviewing a Legal Framework for Elections.

- The main websites of the OSCE and ODIHR (www.osce.org and www.osce.org/odihr) provide links to documents and information on **OSCE monitoring activities** including mission programmes, Human Dimension Implementation Meetings, ODIHR programmes and analysis, *Guidelines for Reviewing a Legal Framework for Elections*, *Guidelines to Assist National Minority Participation in the Electoral Process*, etc.
- **Legislationonline** is a service provided by ODIHR that compiles international and domestic legislation related to the rule of law. It is the recommended source for legal texts and references. The user can select texts according to the subject, country, or international actor including the EC, OSCE, and CoE: www.legislationline.org
- Information on rule-of-law-related projects of ODIHR's **Rule of Law Unit** can be found at www.osce.org/odihr/democratization/law/
- Various **ODIHR reports** are available at www.osce.org/odihr/documents/reports/

3. European Commission

European Commission *Making Success of Enlargement*, Strategy Paper, 2001.

Regular Reports on progress towards accession by each of the candidate countries.

- **EU documents** indicating monitoring criteria can be found at the websites of the respective Directorates-General, which provide links to Regional and Country Strategy Papers, Common Strategies, National Indicative Programmes, Partnership and Cooperation Agreements, PHARE, TACIS and other technical programmes: <http://europe.eu.int/comm>
- **Human rights related documents** in particular can be found at http://europa.eu.int/comm/external_relations/human_rights/intro/index.htm

4. Other

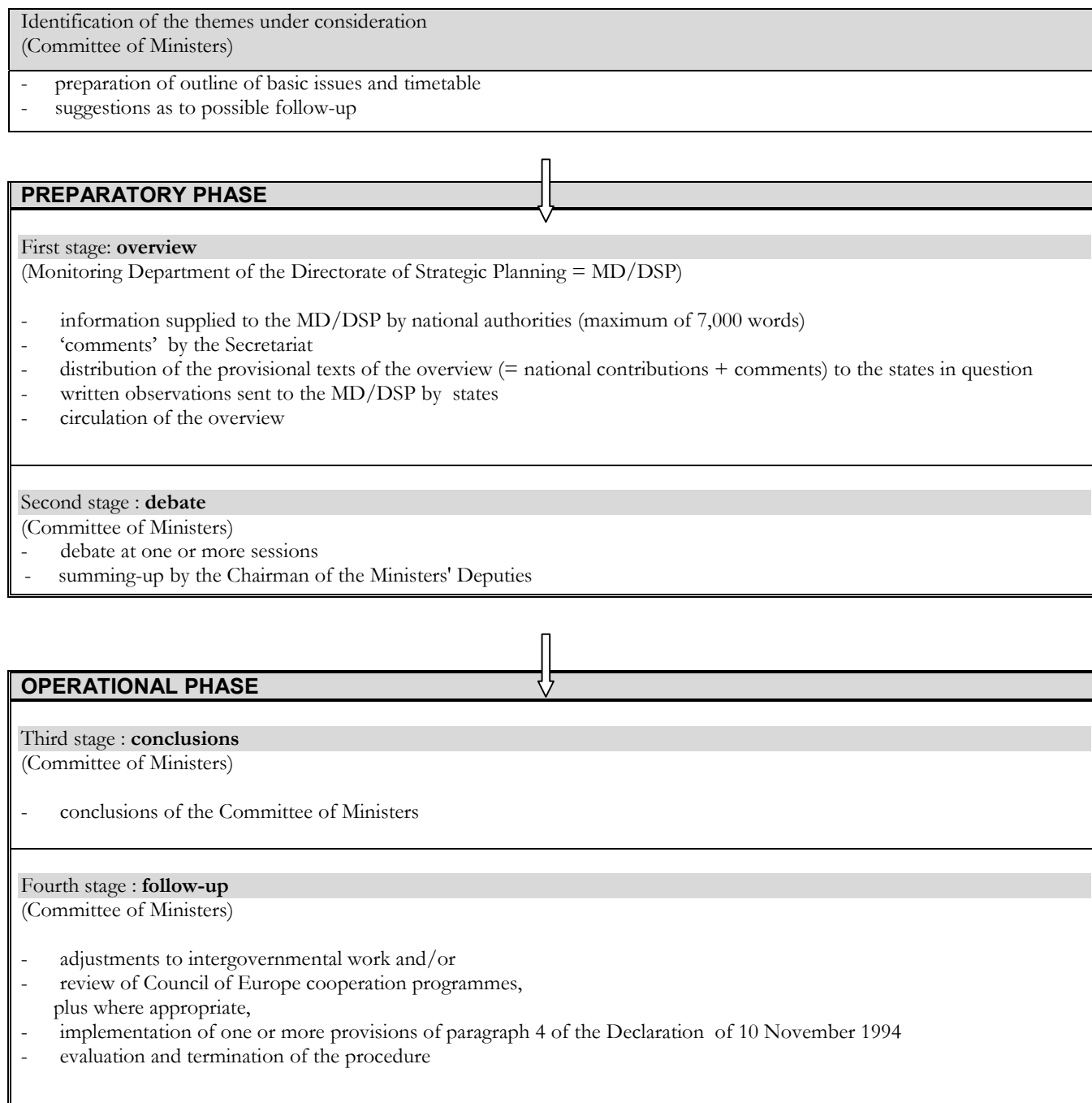
IBRD/World Bank, *Initiatives in Legal and Judicial Reform*
Central and East European Law Initiative, *Judicial Reform Indices*

- Rule-of-law approach of the **World Bank**:
<http://www1.worldbank.org/publicsector/legal/building.htm>
<http://www1.worldbank.org/publicsector/legal/role.htm>
- UN Framework for Strengthening the Rule of Law:
<http://www.arts.mcgill.ca/programs/polisci/faculty/rexb/unsco-ruleoflaw/a11-1.html>
- Links to **other websites** related to the rule of law:
<http://democracy.stanford.edu/law.html>

Resource Persons

De Biolley	CoE, DG Legal Affairs, Rule-of-law Cooperation Programmes
Muriel Decot	CoE, DG Legal Affairs, Expert Committee on the Efficiency of Justice
Andrew Drzemczewski	CoE, Head of Monitoring Department of the Directorate of Strategic Planning
Gianluca Esposito	CoE, DG Legal Affairs, Expert Committee on the Efficiency of Justice
Margaret Killerby	CoE, Head of DG Legal Affairs
Irene Kitsou-Milonas	CoE, Monitoring Department of the Directorate of Strategic Planning
Dominique Lapprand	European Commission, JHA
Alessandro Palmero	European Commission, Relex
Gerald Staberock	ODIHR, Rule of Law Officer, Democratization Unit
Monika Wohlfeldt	OSCE Secretariat, Head of External Cooperation
Leo Zwaak	Netherlands Institute of Human Rights, Utrecht University

Outline of the Committee of Ministers' Thematic Monitoring Procedure²⁸



²⁸ Provided by Andrew Drzemczewski.