

# OSCE EFFORTS TO PROMOTE THE RULE OF LAW

HISTORY, STRUCTURES, SURVEY

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*“Of course, every participating State is governed by the rule of law.”*

Head of a national delegation to the OSCE Vienna, June 2009

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## 1 Introduction: OSCE Efforts to Promote the Rule of Law

*Strengthening the rule of law in the OSCE area.* At the 2008 Helsinki Ministerial Council Meeting, the OSCE participating States adopted a Decision on “Further Strengthening the Rule of Law in the OSCE Area” (MC.DEC/7/08). Proposed by Germany and a number of other participating States, it called for a particular engagement with this topic as well as for contributions to projects and programmes in a total of thirteen areas relating to the rule of law.

Promoting the rule of law appears to be politically less controversial than human-rights protection or promoting democracy and good governance, even though it pervades the former and encompasses the latter. Although it is clearly far from apolitical, even regimes that tend to be sceptical of the OSCE and its agenda perceive it as less threatening. Among the things that promotion of the rule of law could potentially achieve is therefore to enable a revival of co-operation in fields where there is otherwise a tendency to reject the classical promotion of democracy.

*Rule-of-law promotion as a politically controversial issue.* Nevertheless, the OSCE’s activity to promote the rule of law is clearly political. The rule of law is inseparably intertwined with democratization in the Organization’s decisions. That both rest upon fundamental civil rights and freedoms, manifested in the form of enforceable rights of the citizens before their state is itself a sensitive political issue in the contemporary OSCE context. Members of OSCE field operations have also observed that merely the political character of the Organization is enough to place its efforts to promote the rule of law in a clearly political context.

*Conceptual vagueness, lack of doctrine.* The OSCE’s promotion of the rule of law takes place in the field of international co-operation on development and transformation, where concepts are often defined only vaguely or carry the clear stamp of specific national interests. The approaches taken by the OSCE, other international organizations and national agencies involved in rule-of-law co-operation therefore give varying weightings to the promotion of four fundamental values: (1) democracy, (2) the rule of law itself, (3) respect, protection and guarantee of human rights, and (4) good governance. Each organization has a different conceptual hierarchy in which each of these principles is seen either as a goal

in itself or as a precondition for the realization of a higher goal. For instance, democratization and the promotion of the rule of law are seen as not only means by which good governance can be achieved but also as goals that good governance seeks to bring about. The same is true with regard to the implementation of human rights. At the same time, democratization is often seen as one of the primary goals of foreign-policy co-operation, while promoting the rule of law is conceived of as a means of achieving a higher goal. In terms of their practical work in the field, national actors and international organizations occupy a wide variety of positions.<sup>1</sup> There is no doctrinal unity on the rule of law or its promotion either among the headquarters of international organizations or among practitioners on the ground. This is equally true of the OSCE and those responsible for its activities to promote the rule of law at ODIHR and in the missions.

*OSCE rule-of-law promotion in the context of democratization.* Since the Bonn, Copenhagen, and Paris decisions in 1990, the OSCE’s efforts to promote the rule of law have been placed firmly in a context of democratization. This distinguishes the OSCE from other key security organizations, such as the United Nations. The overwhelming majority of OSCE participating States actively champion the linkage of the rule of law and democracy as a necessary and unifying element of European security. Numerous participating States promote it in different ways in their national development agencies or via collective structures such as the European Union.

*OSCE rule-of-law promotion in the context of security.* Since the 1990s, the OSCE has anchored the promotion of the rule of law and democratization as instruments of stabilization within the European security dialogue and European crisis management. This was a conceptual innovation for the continent and this tandem structure remains globally unique. In the future, one of the comparative advantages that makes the OSCE different from other security organisations will continue to be its promotion of

1. An excellent overview of the field is provided by: (1) Hague Institute for the Internationalisation of Law (HiiL), Rule of Law Inventory Report, Discussion Paper for the High Level Expert Meeting on the Rule of Law of 20th April 2007, at: [http://www.hiil.org/uploads/File/1-947-Rule\\_of\\_Law\\_Inventory\\_Report\\_2007.pdf](http://www.hiil.org/uploads/File/1-947-Rule_of_Law_Inventory_Report_2007.pdf), and (2) Rachel Kleinfeld Belton, Competing Definitions of the Rule of Law. Implications for Practitioners, Carnegie Papers Number 55, January 2005, p. 26, at: <http://www.carnegieendowment.org/publications/index.cfm?a=view&id=16405>.

the democratic rule of law, which will remain a key factor in shaping the European political and security order.

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This working paper was commissioned by the Federal Foreign Office of the Federal Republic of Germany. It describes the gradually evolving definition of rule-of-law promotion in the OSCE from 1973 to the present day and describes relevant OSCE structures. It also presents the results of a survey carried out by CORE among those responsible for the rule of law in the field operations in April and May 2009. It ends with conclusions and recommendations on the OSCE's promotion of the rule of law in terms of events, personnel questions, topics, and guidelines.

## 2 The Rule of Law in C/OSCE Decisions

The C/OSCE's rule of law commitments were born in the democratisation context of the 1990s. They can be traced indirectly back to references to human rights and fundamental freedoms in the Helsinki Final Act of 1975 and explicitly to the commitments entered into in Bonn, Copenhagen and Paris. While the UN's discourse on the rule of law connects it to human rights protection, that of the OSCE places it in a democracy-related context.

"The democratic rule of law" is the frame of reference for the OSCE's debate on the rule of law.

### *2.1 The OSCE's Linkage of the Rule of Law, Human Rights and Democracy*

The starting point for the integration of rule-of-law commitments in the European understanding of security is found in respect for human rights and fundamental freedoms.

#### *European security in the context of human rights: Helsinki 1973 & 1975*

By reaffirming the human rights principle and with several other references, the Final Recommendations of the Helsinki Consultations (1973) already embodied a pre-understanding that the future European security architecture would be based not only on commitments between states but would also impact on domestic law.<sup>2</sup> This was echoed two years later in

2. Cf. Final Recommendations of the Helsinki Consultations, paragraph (19), Helsinki, 8 June 1973.

the Final Act of Helsinki (1975).<sup>3</sup> The rule of law is of course not mentioned by name in the early CSCE decisions. Nonetheless, already by the 1980s, a desire for the juridification of the foundations of European security not only in terms of international law, but also in national legislation, is clearly evident.

The juridification of CSCE principles in national law: Madrid 1983, Vienna 1989

This already found clear expression in the agreements of the Madrid Follow-Up Meeting (1980-83). In the Concluding Document of the Madrid Meeting, the participating States reaffirmed their determination

"to give legislative expression [...in their respective legislations] to the ten principles set forth in the Final Act [...and] to develop their laws and regulations in the fields of civil, political, economic, social, cultural and other human rights and fundamental freedoms [...and] to ensure the effective exercise of these rights and freedoms."<sup>4</sup>

The Vienna Meeting (1986-1989) added considerable detail to this reaffirmation, lending it enhanced political weight.<sup>5</sup> One of the many fundamental breakthroughs there was the participating States' commitment to develop their own laws and regulations on human rights and fundamental freedoms (13.1); others were commitments to publish relevant international documents, laws, regulations, and procedures (13.3, 13.4), to respect the rights of citizens to contribute actively to the promotion and protection of human rights and fundamental freedoms (13.5), to ensure fair and public hearings before independent and impartial courts (13.9), and to guarantee provide effective legal remedy and information (13.9).<sup>6</sup>

#### *The first rule-of-law commitment: Bonn 1990*

The participating States made their first explicit commitments to the principle of the rule of law at the Bonn Conference on Economic Co-operation (April 1990) and the Copenhagen Meeting of the Conference on the Human Dimension (June 1990).

3. Cf. Final Act of Helsinki, Declaration on principles guiding relations between participating States, Helsinki 1975.

4. Cf. Concluding Document of the Madrid Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, section on Questions Relating to Security in Europe, Principles, Madrid, 6 September 1983.

5. Cf. Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, section on Questions Relating to Security in Europe, Principles, item 13, Vienna, 15 January 1989.

6. Ibid.

This initially occurred in relation to policies on market economy, pluralism, democracy and human rights as a common commitment to

“[t]he rule of law and equal protection under the law for all, based on respect for human rights and effective, accessible and just legal systems” (Bonn, April 1990).<sup>7</sup>

In Bonn, detailed statements were also made on economic liberalization and on “full recognition and protection of all types of property including private property”.<sup>8</sup>

#### *Rule of law and democratization: Copenhagen 1990*

During the early stages of the transformation of Eastern Europe, these statements of economic policy represented a fundamental political commitment. This later increased in urgency by means of a commitment to the democratic rule of law, which leaned on Western political traditions. The participating States stressed that “democracy is an inherent element of the rule of law” (Copenhagen, June 1990, Moscow, October 1991).<sup>9</sup>

Linking democracy and the rule of law was the key measure in shaping the political order of a Europe that was at that time undergoing a process of unification conceived of as “prerequisites for progress in setting up [...] a lasting order of peace, security, justice and co-operation” (Copenhagen 1990).<sup>10</sup>

Democracy and the rule of law made up the new and expanded subject matter of the human dimension of the C/OSCE process that, in Helsinki in 1975, had only been defined in terms of the respect for human rights and fundamental freedoms and humanitarian co-operation – above all human contacts and information, cultural, and educational exchange.<sup>11</sup>

The 1990 Copenhagen Document can be considered to have set the pattern for all the C/OSCE’s

conceptions of the rule of law and rule-of-law promotion that were to follow. It enshrined principles of democracy and the rule of law in detail, defining the rule of law as an instrument for the establishment of the rule of justice.<sup>12</sup> In this way, it made a vital contribution to the future understanding of security in Europe. As one of the most often quoted passages has it:

“the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.” (Copenhagen Document, 1990)<sup>13</sup>

This understanding of the interconnectedness and mutual influence of democracy and the rule of law (as well as respect, protection and guarantee of human rights) has been contained since then in all the fundamental documents of the OSCE, including the Charter of Paris (November 1990), the Charter for European Security (Istanbul, November 1999), and the Strategy to Address Threats to Security and Stability in the Twenty-First Century (Maastricht, December 2003), and was most recently reaffirmed at the Ministerial Council Meeting in Athens (2009).<sup>14</sup> It is a central component of the European conception of security.

The rule of law and conflict management: Moscow 1991, Prague & Stockholm 1992, Athens 2009

At their meeting in Moscow (October 1991), the participating States considered the relationship between conflict management and commitments in the human dimension. The meeting took place immediately after the three-day coup attempt of 19-21 August. The participating States committed themselves to

“support vigorously [...], in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law, recognizing their common

rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, and section on Co-operation in Humanitarian and Other Fields, Helsinki 1975.

12. Cf. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, I (5), II (24), III (26, 27), Copenhagen, 29 June 1990.

13. Ibid. section I (2).

14. *Further OSCE Efforts to Address Transnational Threats and Challenges to Security and Stability* (MC.DEC/2/09), Athens, 2 December 2009.

7. Cf. Document of the Bonn Conference on Economic Co-operation in Europe Convened in Accordance with the Relevant Provisions of the Concluding Document of the Vienna Meeting of the Conference on Security and Co-operation in Europe, preamble, Bonn, 11 April 1990.

8. Ibid.

9. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, I (3), Copenhagen, 29 June 1990; Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, II (18), Moscow, 3 October 1991.

10. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, preamble, Copenhagen, 29 June 1990.

11. Cf. Final Act of Helsinki, section on Questions Relating to Security in Europe, a) Declaration on principles guiding relations between participating States, VII Respect for human

commitment to countering any attempt to curb these basic values” (Moscow Document 1991).<sup>15</sup>

In the same context, the participating States famously stated that responsibility for human-dimension commitments was not exclusively a matter for the state in question, declaring that such matters are “of direct and legitimate concern to all participating States and do not belong to the internal affairs of the State concerned”.<sup>16</sup> Questions of human rights, fundamental freedom, democracy, and the rule of law were described as matters of international concern.<sup>17</sup>

The Moscow Meeting played a special role in both the development of the integrated and comprehensive security concept of the OSCE and – with the creation of the field missions – in the preparation of a flexible instrument for crisis prevention and crisis resolution on the ground.<sup>18</sup> The proposal to enable the creation of field missions made explicit reference to the promotion of democratization and the rule of law as instruments of long-term stabilization – a linkage that has become a standard aspect of European crisis management.

Since Prague (January 1992), it has also been possible

“that appropriate action may be taken [...], if necessary in the absence of the consent of the State concerned, in cases of clear, gross and uncorrected violations of relevant CSCE commitments [to human rights, democracy and the rule of law].”<sup>19</sup>

In Stockholm (December 1992), the participating States made a commitment to “consolidate [...] the rule of law [...] to prevent, manage and resolve conflicts in the CSCE area.”<sup>20</sup> Here, the structural adaptation of the CSCE to the requirements of conflict management operations was linked the promotion of democratization and the rule of law.

15. *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE*, II (18), Moscow, section II (17.2), Moscow, 3 October 1991.

16. *Ibid.*, Preamble.

17. *Ibid.*, Preamble.

18. *Ibid.*, section IV (16).

19. The document goes on: “Such actions would consist of political declarations or other political steps to apply outside the territory of the State concerned.” See: Prague Document on Further Development of CSCE Institutions and Structures, Section IV “Safeguarding human rights, democracy and the rule of law”, para. 16., Prague, 30-31 January 1992.

20. *Stockholm Meeting of the CSCE Council, Summary of conclusions*, Shaping a new Europe – the role of the CSCE, Stockholm, 15 December 1992.

In Istanbul (November 1999), the OSCE underscored its responsibility for increasing security in the domestic sphere, where the participating States pledged to

“strengthen existing co-operative instruments and develop new ones in order to respond efficiently to requests for assistance from [...] and to] explore ways to further increase the effectiveness of the Organization to deal with cases of clear, gross and continuing violations of those principles and commitments.”<sup>21</sup>

At the Ministerial Council in Athens 2009, the participating States reaffirmed once again “that strict compliance with the international law and principles of the Charter of the United Nations remains the focus of efforts to prevent and combat threats to stability and security [...] and that] strong democratic institutions and the rule of law play an important role in preventing transnational threats from arising”.<sup>22</sup>

*Rule of law, economy and environment: Bonn & Paris 1990, Copenhagen 1997, Maastricht 2003*

Not only do questions related to the rule of law have a special place in the economic and environmental dimension of the OSCE, as mentioned above, this was the area in which they were mentioned for the very first time in the CSCE context (Bonn 1990). The Final Act of Helsinki (1975) made the earliest reference to legally binding measures in the area of economic relations, as the reference to “the protection of the interests of the partners in industrial co-operation projects, including the legal protection of the various kinds of property involved”.<sup>23</sup> A decade and a half later, at the groundbreaking Bonn Conference in 1990, there was agreement on the connection between political pluralism and the market economy as well as “the rule of law and equal protection under the law for all, based on respect for human rights and effective, accessible and just legal systems”.<sup>24</sup> The Charter of Paris (November 1990) includes the assertion that “[t]he free will of

21. *Charter for European Security*, III. Our Common Response, Solidarity and Partnership, para. 14, Istanbul, 19 November 1999.

22. *Further OSCE Efforts to Address Transnational Threats and Challenges to Security and Stability* (MC.DEC/2/09), Athens, 2 December 2009.

23. *Final Act of Helsinki*, Co-operation in the Field of Economics of Science and Technology and of the Environment, 2. Industrial co-operation and projects of common interest, Industrial co-operation, Helsinki 1975.

24. *Document of the Bonn Conference on Economic Co-operation in Europe*, preamble, Bonn, 11 April 1990.



the individual, exercised in democracy and protected by the rule of law, forms the basis for successful economic and social development".<sup>25</sup>

In the Copenhagen Document (December 1997), the participating States announced their intention to

“ensure that the economic dimension receives appropriate attention as an element of the early warning and conflict prevention activities of the OSCE and provides further political impetus to the work carried out by specialized economic and financial and other relevant institutions, inter alia, with a view [...] to ensuring within the OSCE area the rule of law and the development of a transparent and predictable legal system in the economic sphere.”<sup>26</sup>

In substantive terms, this has to be considered a matter of long-term development co-operation. Indicators that can provide unequivocal early-warning signs in the economic dimension are generally hard to measure, and conflict prevention is hardly a matter of short-term goals. This has been a frequent subject of discussion at the OSCE’s Economic and Environmental Forum, held each year in Prague.

The OSCE Strategy Document for the Economic and Environmental Dimension (Maastricht 2003) stated that

“lack of the rule of law, weak governance, corruption, widespread poverty and high unemployment are among the factors that contribute to global threats such as terrorism, violent extremism, transnational organized crime, and also to illegal economic activities, including money-laundering, trafficking of all kinds, and illegal migration.”<sup>27</sup>

In terms of promoting the rule of law, the key tasks highlighted in this document comprise strengthening good governance, promoting transparency, and combating corruption.<sup>28</sup>

*The rule of law in the politico-military context: Budapest 1994*

The key document for the promotion of the rule of law in the politico-military context is the Code

25. *CSCE Charter of Paris for a New Europe, A New Era of Democracy, Peace and Unity, Economic Liberty and Responsibility*, Paris, 21 November 1991.

26. *Decision on guidelines on an OSCE Document-Charter on European Security* (MC(6).DEC/5), Copenhagen, 18-19 December 1997.

27. *OSCE Strategy Document for the Economic and Environmental Dimension*, “Challenges and threats in the economic and environmental dimension” (MC.DOC/1/03), Maastricht, 2 December 2003.

28. Cf. *ibid.*, Chapter 2, “Our response and action”.

of Conduct on Politico-Military Aspects of Security, which was adopted at Budapest in December 1994. It establishes a number of norms for armed forces, applicable to both inter-state and intra-state contexts. This document contains the most important norms relating to democratic control of the armed forces, which is a key concern in connection with the rule of law, specifically “democratic political control of military, paramilitary and internal security forces as well as of intelligence services and the police”.<sup>29</sup> The implementation of these norms is monitored in the FSC context.

## *2.2 Successive Definitions of the Rule of Law and the Promotion of the Rule of Law by the OSCE*

Rule of law and rule-of-law promotion have become necessary elements of the OSCE’s cross-dimensional, integrated and comprehensive concept of security and of the Organization’s work in practice. However, the OSCE’s documents contain no conclusive definition of either. Nor do detailed illustrations exist of the specific features of state organization or governance, such as checks and balances, that are intrinsic to the separation of powers of the modern state under the rule of law or its democratic character. Nonetheless, the interconnectedness with human rights and democracy is the indispensable feature of the OSCE’s concept of the rule of law.

As is usual in the OSCE, the participating States have over time come to agree on core aspects of a concept of rule of law, and above all, of course, on the positive security benefits of its promotion. An overview is provided in table 1 in the appendices. A readable encapsulation of the OSCE’s understanding of the rule of law was also prepared by the Spanish Chairman-in-Office for internal circulation (appendix of MC.GAL/9/07, section 3.5).

*The conceptual specification of rule-of-law promotion by ODIHR*

As the OSCE’s leading institution for the promotion of the rule of law, ODIHR has defined “rule of law”, together with “elections” and “democratic institutions”, as one of the three “structural components of a democratic society”. Details of this may be found in ODIHR’s “thematic compilation” of “OSCE Human Dimension Commitments” (2005) under the heading

29. 91st Plenary Meeting of the Special Committee of the CSCE Forum for Security Co-operation, *Code of Conduct on Politico-Military Aspects of Security* (DOC.FSC/1/95), para. 20, Budapest, 3 December 1994.

“Specific Human Dimension Commitments”.

Here, ODIHR divides rule-of-law commitments into: General Provisions, Independence of the Judiciary and Legal Practitioners, and Impartial Operations of the Public Judicial Service; Administration of Justice (A. Law Enforcement; B. Treatment of Persons Deprived of Their Liberty); Fulfillment of International Obligations.<sup>30</sup>

ODIHR has stressed that it considers the rule-of-law commitments to consist largely of compliance with existing legislation together with the creation of institutions for democratic lawmaking, human rights protection, and the proper administration of justice. It considers strengthening the institutional framework for the rule of law to be its particular task. Its activities form three clusters: (1) providing information to policy makers, (2) working with legal communities and other stakeholders, and (3) cooperating with OSCE field operations, international organizations, and other actors (ODIHR Annual Report 2007).<sup>31</sup>

This structure illustrates the topics that ODIHR has defined as its priorities in promoting the rule of law – in distinction or complementary to the OSCE’s many rule-of-law activities “under a different label” and the rule-of-law activities of the field missions.

#### *Little need for a definition of rule of law*

The OSCE’s promotion of the rule of law is situated at the intersection of various legal cultures. Both its roots and its goals are derived from a range of legal and value systems. Concepts such as Rechtsstaat, état de droit, правовое государство and Rule of Law are clearly not one and the same thing. The Continental and Anglo-Saxon legal traditions are different from those of Eastern Europe, Russia, Turkey, the Caucasus, and Central Asia, for instance. Different conceptions emphasize different things: from restricting the power of the state, via the regulation of relations between equal citizens, to safeguarding the political order above all. Although this is undoubtedly the case, the rule of law is not one of those topics within the OSCE that arouses much heated controversy. The lack of a definition is not currently subject to major criticism by anyone. Rather, the dangers of attempting a definition have occasionally

30. Cf. OSCE ODIHR, *OSCE Human Dimension Commitments*, Volume 1, Thematic Compilation, 2nd Edition, Warsaw 2005, pp. 88ff.

31. Cf. OSCE Office for Democratic Institutions and Human Rights, *Annual Report 2007*, “Democratization, Activities, I. Rule of Law”, Warsaw 2008.

been noted, in which context it has frequently been remarked that there are other fundamental values and key concepts such as “democracy” and “national minority” for which no single definition exists, but upon which everyone can agree. This corresponds to the German position, according to which it is not the definition of concepts but the delineation of fields of activity and operational opportunities that are of paramount importance for bilateral and multilateral co-operation.<sup>32</sup> For the OSCE, this is above all a matter of determining its contributions to promoting the rule of law in concrete security-relevant contexts in specific participating States.

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For reasons of completeness it should be mentioned that a number of participating States have tried to introduce the OSCE’s lack of legal personality into the OSCE’s discussions on the rule of law. The topic was also addressed in the decision on “Further Strengthening the Rule of Law in the OSCE Area” (MC.DEC/7/08).<sup>33</sup>

### **3 Structures for Promoting the Rule of Law in the OSCE**

As always in the OSCE, the distribution of responsibilities for promoting the rule of law among the Organization’s structures is not based on any master plan. Relevant activities, materials, and personnel resources are distributed around the OSCE’s entire organizational structure, including both central institutions and field activities, and have their origins in these organs’ specific histories and mandates.

#### *3.1 Rule-of-Law Promotion “Under a Different Label”*

Promoting the rule of law is an aspect of virtually every area of the OSCE’s work in all three dimensions, but is frequently not identified as such. The activities of the two specialist units in ODIHR’s

32. Cf. Auswärtiges Amt, Arbeitsstab Rechtsstaatsförderung, *Der Rechtsstaat als Infrastruktur einer modernen zivilen Gesellschaft und Ressource für Freiheit, Gerechtigkeit und Frieden. Konzept für die Förderung der Rechtsstaatlichkeit durch das Auswärtige Amt*, Berlin, internal working paper, 7 April 2009.

33. Cf. 16th Meeting of the OSCE Ministerial Council, Decision on “Further Strengthening the Rule of Law in the OSCE Area”, MC.DEC 7/08, Helsinki, 5 December 2008.

democratization department – the Rule of Law Unit and the Legislative Support Unit – are exceptions, as are the specialist rule of law units or individual experts in the field operations. The Legal Services Unit in the Secretariat has merely an internal advisory function. The OSCE Court of Conciliation and Arbitration, which many see in the context of rule-of-law promotion, has never convened.

The activities of the OSCE to promote the rule of law “under a different label” cannot be presented here. Activities carried out under headings such as security sector reform, combating terrorism, good governance, gender equality, media freedom, and minority rights include more or less explicit efforts to promote the rule of law in terms of values and/or institutions. In the Secretariat, activities such as those of the Strategic Police Matters Unit (SPMU) clearly extend into rule-of-law promotion, as do those of the Special Representative for Combating Trafficking in Human Beings, the Action against Terrorism Unit (ATU), the Border Management Group, the Coordinator for Economic and Environmental Activities (CEEAA) and his office, and the Gender Section, where the OSCE’s Senior Advisor on Gender Issues is based.

The OSCE Representative for Freedom of the Media (FOM) makes a “rapid response to serious non-compliance” in the area of his mandate. He gathers information, makes reports, and delivers recommendations.<sup>34</sup> His mandate explicitly denies him any juridical function. Nor is his activity supposed to prejudge any national or international legal proceedings concerning alleged human rights violations. But nor should the existence of such proceedings interfere with the performance of his mandate.<sup>35</sup> The OSCE Representative on Freedom of the Media is an outstanding example of a legal advisor. In the past five years, he has written or caused to be written more than four dozen opinions on specific topics, on draft laws or legal amendments, or with generally applicable recommendations: “legal reviews [...] reviews of draft or adopted laws or amendments [...] special reports on OSCE-wide legislation, thematic

34. Cf. Mandate of the OSCE Representation on Freedom of the Media, PC.DEC 193, 5 November 1997.

35. “The OSCE Representative on Freedom of the Media does not exercise a juridical function, nor can his or her involvement in any way prejudge national or international legal proceedings concerning alleged human rights violations. Equally, national or international proceedings concerning alleged human rights violations will not necessarily preclude the performance of his or her tasks as outlined in this mandate.” (Ibid.)

position papers or analyses of best practices”.<sup>36</sup>

The OSCE High Commissioner on National Minorities (HCNM) also provides legislative advice and supports the implementation of national laws. His activities on questions related to minorities range from the drafting of constitutions and state-building documents – e.g. with relation to autonomy arrangements – to legislative arrangements in the areas of education, language, and participation in public life, election processes, and the media. While the HCNM largely makes use of quiet diplomacy, he also occasionally publishes recommendations intended for the general public (Den Haag 1996, Oslo 1998, Lund 1999, Minority Languages 2003, Policing 2006, Bolzano/Bozen 2008). The activities of the HCNM are also part of his general mandate and not explicitly identified as rule-of-law promotion.

Promoting the rule of law is naturally an integral component of the activities of all five of ODIHR’s specialist areas of activity: democratization, elections, human rights, tolerance and non-discrimination, and Sinti and Roma. As already mentioned, the leading role in this area is played by the Rule of Law Unit and the Legislative Support Unit. Both belong to the Democratization Department. They are discussed in further detail below.

The work of ODIHR’s Election Department serves to directly promote the rule of law, even if it is not identified as such. It works hand-in-hand with participating States, observing, evaluating, and advising on their electoral processes. Its work is based on international commitments and relevant national legislation and covers everything from the holding of ballots to the announcement of results and appeals. The work of this department concerns the most politically sensitive element of the promotion of the democratic rule of law.

ODIHR’s Programme for Tolerance and Non-Discrimination is involved above all with the provision of technical support to participating States, in areas that include legislation and law enforcement. ODIHR’s has a particularly high profile in the area of combating hate crime, where its activities include the drafting of practical guides and legislative guidelines. The ODIHR Advisory Panel of Experts on Freedom of Religion or Belief is a pool of experts

36. Cf. Slava Shayman, Legal review as instrument of change: the work of the RFOM in the sphere of legislative reform, in: Miklós Haraszti, OSCE Representative on Freedom of the Media (ed.), *Ten Years for Media Freedom. An OSCE Anniversary Current and Forthcoming Challenges*, Vienna 2008, pp. 133ff.

that will provide legal advice, on the request of a participating State or ODIHR.

The Parliamentary Assembly of the OSCE considers the rule of law above all in the context of good governance. This includes, as far as it is concerned, regional co-operation, democratic institutions, transparency, and the fight against corruption (Bucharest Declaration 2000<sup>37</sup>). In its declarations, the Parliamentary Assembly considers national developments related to the rule of law. In several reports, it has dealt with problematic situations relating to the rule of law that are more usually avoided in the OSCE context, such as Guantanamo and the issue of torture.

As an instrument for managing all kinds of disputes between states, the OSCE Court of Conciliation and Arbitration, established in 1995, can potentially contribute to strengthening the rule of law and international legal security in the OSCE. The court is designed to convene only when called upon, and that has not yet been the case.

### *3.2 Promotion of the Rule of Law by ODIHR's two Specialist Units*

Structurally, the Rule of Law and Legislative Support Units are located within ODIHR's Democratization Department and not, for instance, in the departments responsible for human rights or elections. That makes sense, as the former are primarily involved in advisory and capacity-building, while the latter perform mostly watchdog and monitoring functions. (The Rule of Law Unit also addresses topics including the prosecution of war criminals, judicial independence, and monitoring of trials, though these are mostly left to the field operations.) OSCE staff have noted that it is hard to engage in co-operation with a partner whom you are also monitoring. Behind this division of responsibilities, however, is hidden a fundamental conceptual question concerning whether ODIHR should concentrate more on positive promotional activities or on verifying and monitoring.

37. Cf. Parliamentary Assembly of the OSCE, *Good Governance: Regional Co-operation, Strengthening Democratic Institutions, Promoting Transparency, Enforcing the Rule of Law and Combating Corruption*, in: *Bucharest Declaration of the Parliamentary Assembly of the OSCE*, Bucharest, 10 July 2000. See also: *European Security and Conflict Prevention: Challenges to the OSCE in the 21st Century*, Chapter II, Economic Affairs, Science, Technology and Environment, section 46, in: *Paris Declaration of the Parliamentary Assembly of the OSCE*, Paris, 10 July 2001.

#### *3.2.1 The Rule of Law Unit*

One of the OSCE's leading units for promoting the rule of law is, as already indicated, located within ODIHR's Democratization Department. It currently has eight members of staff which includes a rule-of-law co-ordinator for Central Asia, who is based in Kazakhstan.

##### *Leadership without a controlling function*

While the Rule of Law Unit is the senior specialist rule-of-law section, it does not have a controlling function with regard to the rule-of-law sections and the experts in the field operations in the OSCE's hierarchy, neither in a managerial sense nor in terms of determining content, and does not assign work to them. It does not possess the mandate that would allow it to do this. The Rule of Law Unit complements the work of the field operations, aims to be a resource centre for the field, and provides direct guidance and other assistance for the benefit of these operations. It furthermore develops its own activities and programmes and includes field operations in their implementation. To promote institutional memory, it also publishes summary documents, including handbooks.

##### *Structure of Rule of Law Unit programmes*

The Rule of Law Unit is active in two programme areas:

- A. Criminal Justice Support (War Crimes; Criminal Justice Reform in Central Asia and the South Caucasus)
- B. Fair Trial Rights and Effective Legal Remedies (Independence of the Judiciary, Administrative Justice, Trial Monitoring)<sup>38</sup>

ODIHR has dealt with rule-of-law issues at specialist seminars on the topics of: Rule of Law (1995), Democratic Institutions and Ombudsmen and National Human Rights Protection Institutions (1998), Judicial Systems and Human Rights (2002), Democratic Governance (2004), Upholding the Rule of Law and Due Process in Criminal Justice Systems (2006), Constitutional Justice (2008), Democratic Lawmaking (2008), and Strengthening the Rule of Law (2009).

38. This summary is based on information provided by the ODIHR Rule of Law Unit to the author of this paper in March 2010.

### 3.2.2 *The Legislative Support Unit*

Alongside the Rule of Law Unit, the Legislative Support Unit, which is also located within the Democratization Department and nominally has eight members of staff, supports interested participating States in organizing legislative processes. It offers assistance for the legislative activities of individual participating States where, for instance, they lack the necessary capacities or have too little experience in specialized interdisciplinary and international law-related areas. It provides support services for the creation of effective and transparent legislative processes. ODIHR possesses a “pool of in-house experts to review draft legislation issues relating to human dimension commitments”.<sup>39</sup> The Unit also maintains and provides free access to an online database via the Legislationline.org service. The website provides information on the topics of Access to Information and Data Protection, Citizenship, the Death Penalty, The Right to a Fair Trial, Freedom of Assembly, Freedom of Association, Elections, Gender, Hate Crimes, the Independence of the Judiciary, Migration, Police, Prison Service, Terrorism and Trafficking in Human Beings. The site offers information on international democratic norms and standards from the UN, the Council of Europe, the OSCE, the OECD and other international organizations, as well as the constitutions and other legal documents of OSCE participating States. Some of these offerings are still in development. ODIHR considers legislative support to be one of its core activities.<sup>40</sup>

### 3.3 *Promotion of the Rule of Law by the OSCE’s Field Operations (Survey Results)*

Giving an overview of the efforts of the OSCE’s field operations to promote the rule of law is not simple. What is true of the promotion of the rule of law “under a different label” by the OSCE’s central institutions is true here too. The activities vary in terms of structure, scale, and topic. Material providing a concise overview simply does not exist. Therefore, as part of the process of researching and writing this working paper, CORE carried out a survey of the then 18 OSCE field operations in April and May 2009. With eleven operations participating,

39. ODIHR, *Annual Report 2008*, Warsaw 2009, p. 26.

40. Cf. OSCE 2009 *Unified Budget Proposal*, Volume Secretariat and Institutions, B.3.2 Programme: Democratization, Description of Budget Changes, Vienna, 1 October 2008.

the survey had a response rate of 61 per cent.<sup>41</sup>

#### *Variation in structures of rule-of-law activities in field operations*

The location of rule-of-law promotion activities in the organizational structures of the field operations is highly varied, as we would expect. The existing forms range from independent rule-of-law departments and units, via departments that combine two or more topics (rule of law and human rights) and the incorporation of rule-of-law activities in departments for “human rights and communities” or “trial monitoring units”, to individual rule-of-law officers, legal advisers or advisers with responsibility for a broader area, such as the human dimension as a whole or project management in general.

#### *Variations in definitions of the rule of law and rule-of-law promotion*

The field operations have no recourse to a standardized, conclusive definition of the rule of law or rule-of-law promotion. A number of field operations (30 per cent) work without any definition whatsoever. The majority, however, define the rule of law or rule-of-law promotion, some with reference to Kofi Annan’s 2004 report for UN rule-of-law promotion,<sup>42</sup> the Copenhagen Document (1990), or the Ljubljana decision (MC.DEC/12/05), and others according to their own preferences. In conversations, field mission staff identified the lack of clear definitions and

41. The survey asked the following ten questions: “1. Do you base your activities on any particular (OSCE or other) definition of rule-of-law assistance? 2. If yes, could you please give this definition? 3. What was the basis for setting up your rule-of-law projects and other rule-of-law activities in the region? (OSCE instructions, governmental request, NGO proposal, spontaneously as a result of daily contacts, etc.) 4. Do you have criteria for distinguishing your tasks from democratization and HR tasks? 5. Did you define overall goals for your rule-of-law work? 6. What specific rule-of-law subjects have you worked on in recent years? 7. Who are your key national and international partner institutions or organizations? 8. What topics, projects, cooperation formats, etc. would you propose for OSCE rule-of-law assistance, both in the field and generally? 9. In your experience, what are the key advantages of OSCE rule-of-law assistance? 10. In your experience, what are the main shortcomings of OSCE rule-of-law assistance? What would you change?” The reply of the OSCE Mission to Georgia merely announced its imminent closure. The evaluation of the survey therefore rests on the answers of ten missions.

42. Cf. Kofi Annan, *The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General*, III. Articulating a common language of justice for the United Nations, (S/2004/616), 23 August 2004, at: <http://reliefweb.int/rw/lib.nsf/db900SID/SSHN-797F7P?OpenDocument>.

conceptual frameworks as a definite handicap. They indicated a need for material that would provide a survey of the field and give definitions of terminology related to rule-of-law promotion by the OSCE or an OSCE handbook for relevant activities in the field.

#### *Patterns of objectives and institutional goal-setting*

The overall objectives of rule-of-law promotion are generally (70 per cent) formulated in the form of ends-based objectives. In application to concrete forms of activity such as legislative reform, judicial reform, criminal prosecution or war-crime trials, objectives are formulated in terms such as enhancing respect for human rights, raising public awareness, enforcing international standards, creating public trust in the prosecution of war crimes, or creating transparency in public administration. Institutional objectives are also formulated, such as improving administrative procedures and mechanisms.<sup>43</sup> In some cases (20 per cent), no general goals are defined.

In contrast to this, specific projects are almost always motivated by institutional objectives. The motives for specific project activities are drawn to 80 per cent from mandates and international agreements. Some 60 per cent of survey answers referred to partner institutions – and 50 per cent made direct reference to requests or need of assistance from government or NGOs. The formal setting of goals for each individual project is carried out as part of the OSCE's performance-based programme budgeting process.

#### *Fuzzy boundaries between rule-of-law assistance and other fields*

In the OSCE's field activities, there is little delineation between rule-of-law assistance and other closely related areas such as democratization, good governance, and human-rights protection. In 80 per cent of the field operations, the division of labour between departments or individuals responsible for a certain topic is not based on any precise criteria. This situation is often experienced as not facilitating project planning. It means that projects are often planned based on nothing more than existing traditions in the handling of specific topics in individual missions or by a given staff member or on existing forms of co-operation with existing implementation

partners. The professional background and qualifications of the individual responsible for rule-of-law issues is also a key motivational factor. "Everything legal is for the rule of law department. More common issues are for the democratization department," was the comment made by a member of staff at one mission.

#### *Broad spectrum of topics and instruments for rule-of-law assistance*

The promotion of the rule of law in the field operations encompasses a broad range of topics. According to our survey, this ranges from *state-building, legislation, and the judicial system* (transparency and effectiveness of legislative processes, constitutional and administrative law, judicial and legal reform, the administration of justice, public prosecutors, juvenile criminal law, juvenile justice, the legal profession, transitional justice), via the *courts and criminal justice* (standards for fair court proceedings, judicial independence, criminal law reform, the reform of detention and prison systems, alternative punishments), *human rights* (ombudsman institutions, human rights protection for prisoners and defendants, access to justice and legal assistance, police human rights monitoring, standards of human rights protection in cases of human rights violation, minority rights), *democracy and fundamental freedoms* (rights of assembly, election law, anti-discrimination, gender equality, legal education), *new threats and challenges* (combating terrorism, organized and white-collar crime, trafficking in human beings, anti-corruption measures, the prevention of torture and abuse, hate crimes, domestic violence), to *war-crime-related topics* in the missions in the Balkans (war-crime trials, reparations for victims of war crimes, unprosecuted war crimes, unpunished perpetrators). Key topics in the field of rule-of-law assistance by the OSCE field operations and the two specialist units at ODIHR are summarized in table 2.

The OSCE's instruments for promoting the rule of law are so many and varied that it is hard to categorize them systematically. They correspond to the instruments commonly used in the OSCE, including lobbying and PR, capacity-building, the provision of legal advice and monitoring. Target institutions and partners include parliaments and presidential administrations; ministries and courts; professional associations; education, training and research institutions; media companies; NGOs; and individuals.

43. On the classification of goals used here, see. Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law. Implications for Practitioners*, Carnegie Papers Number 55, January 2005, P.3, at: <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=16405>.

### *Project and topic proposals by the field missions*

The field missions would like more policy guidance from ODIHR. The majority spoke in favour of the exchange of experience (best practices, lessons learned) between the field missions within European subregions (Balkans, South Caucasus, Central Asia). There were also calls for ODIHR to provide training updates to people with responsibility for rule-of-law issues who have been in the field for a long time. Respondents noted their positive experiences with the first exchange of experience on trial monitoring (2008). Most of the topics proposed for future activities on the ground were already included in existing activities. In general, each field operation's members were concerned with increasing the support that their operation receives. Some of the proposals are given in the concluding recommendations of this paper.

### *Comparative advantages of rule-of-law promotion by OSCE field missions*

In the view of mission members, rule-of-law assistance by the OSCE field missions possesses the following four comparative advantages:

- *Flexibility* – relatively high ability to adapt operational priorities, and relative flexibility of project administration,
- *Networks* – all relevant stakeholders possess extensive networks of international and national experts, consulting expertise thanks to a broad range of information sources from wide-ranging advisory and observation activities, opportunities for cross-border transfer of skills between the field missions, and the potential to provide complex and systematic advice thanks to extensive staff and financial resources in the larger missions.
- *Access to governments and the general public* – opportunities to make direct contact in critical situations, direct access to state authorities at all levels, co-operative approaches to working with national and international decision-makers (joint review of progress rather than naming and shaming),
- *Long-termism* – Sustainability of rule-of-law co-operation via permanent field presences and a long-term approach to project work.

### *Staffing ODIHR and field operations*

As a result of the secondment system, the rule-of-law activities of ODIHR and the field operations suffer

from major personnel problems. Finding experts with both the legal background and the regional and linguistic knowledge and skills is extremely difficult, especially since they generally have to be available in the short term but only for a limited period. The ODIHR leadership stressed that rule-of-law assistance is seriously limited by the lack of experts with contracts. This is illustrated by the fact that, on average only two people apply for each seconded position, while the number who apply for each permanent position is generally in three figures. The process of recruiting for field missions is also difficult, since highly qualified specialists are needed who must be available at short notice, but for limited periods only.

## **4 Conclusions and Recommendations**

*The central issue: The rule of law and security.* Rule-of-law promotion by the OSCE is a particular contribution to the creation of European security. The OSCE has, since the 1990s, given it a central place as an instrument of stabilization in the European security dialogue and crisis management, while developing appropriate structures for implementation. The fact that it has done this in the absence of a standardized terminology or even a consensual set of definitions can, but need not, be perceived as a handicap. There are other fundamental values and concepts in the OSCE that remain equally undefined. Nonetheless, there is clearly a need here for an ongoing discussion of values. The central question has to be: *What specific contributions (topics, formats, provision of manpower and assistance) can the OSCE make to rule-of-law promotion in concrete security-relevant situations in specific participating States?*

*Promotion of the democratic rule of law.* The OSCE's promotion of the rule of law is the promotion of the democratic rule of law. In contrast to democracy, the rule of law is, for even the more sceptical participating States, a less alien yardstick to be measured against, as an observer wisely commented. At the same time, democracy and the rule of law are complementary values and need to be seen as such in the OSCE context. "You have to change the mindset" was the word in delegation circles. "Moreover, it is extremely difficult to separate 'strengthening the rule of law' and 'promoting democracy' from each

other in practice.”<sup>44</sup>

*Rule-of-law promotion in relation to other issues and dimensions.* Rule-of-law promotion is a cross-cutting issue that touches upon fields of activity such as the promotion of democracy, respect, protection and guarantee of human rights, civil crisis prevention, the reconstruction of societies destroyed by war and economic and development co-operation.<sup>45</sup> It is present throughout the OSCE, though often “under a different label”. It is included in first-dimension topics such as security-sector reform (police, borders, military, terrorism) and the protection of national minorities; in second-dimension topics, such as responsible governance and public participation in environmental issues; and in third-dimension topics including human rights, media freedom, trafficking in human beings, questions of equality and tolerance and non-discrimination. Rule-of-law promotion has intra-state, inter-state and multilateral aspects.

*Rule-of-law promotion by specialist units.* The central responsibility for promoting the rule of law lies with ODIHR’s Democratization Department – and specifically with the Rule of Law and Legislative Support Units. Both work together with rule-of-law departments, units or responsible individual staff members in the field operations, and complement their activities, but have no management function. Their work concentrates on criminal justice, judicial independence, assistance to training institutions, trial monitoring, etc. Support is also provided for legislative activities. In the field, rule-of-law promotion covers a range of topics from state-building, legislation, judicial systems, courts, and prisons, to new threats and challenges such as organized crime and corruption.

#### 4.1 Recommendations on Rule-of-Law Events

The following recommendations on potential rule-of-law events take up, to a large extent, suggestions made by those working in the area of rule-of-law at ODIHR in the field missions, and among the

44. Cf. Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung, *Die Bedeutung rechtsstaatlich-demokratischer Strukturen für den Prozess politischer Partizipation. Eine Stellungnahme des Wissenschaftlichen Beirats beim BMZ*, p. 8, Bonn, May 2004.

45. Cf. Auswärtiges Amt, Arbeitsstab Rechtsstaatsförderung, *Der Rechtsstaat als Infrastruktur einer modernen zivilen Gesellschaft und Ressource für Freiheit, Gerechtigkeit und Frieden. Konzept für die Förderung der Rechtsstaatlichkeit durch das Auswärtige Amt*, Berlin, internal working paper, 7 April 2009.

delegations in Vienna.

- 1) *Open-ended Informal Working Group on the Rule-of-Law.* It is proposed that an open-ended informal working group on the rule of law for interested delegations be established. The working group could meet regularly under the aegis of the Human Dimension Committee. It could facilitate the exchange of opinions between experts, representatives of the field missions, and the Secretariat (e.g. from Legal Services) and develop recommendations for the Human Dimension Committee.
- 2) *Rule of Law at Annual Heads of Mission Meetings.* It is proposed that the planning of rule-of-law promotion be discussed as a specific topic at the annual heads of mission meetings in Vienna.
- 3) *Discussion of issues to pursue with those responsible for rule-of-law in the missions.* It is proposed that ODIHR’s Rule of Law Unit hold a discussion with those responsible for the rule of law in the missions on future field activities. (The regional meeting in Almaty in April 2010 with the rule-of-law officers who are stationed in Central Asia is a good example of this kind of activity.) Most of the topics proposed by the missions are already included within their existing activities and often require only enhanced support. New proposals should also be made on new topics, such as reform of administrative law and the ethics of legal professions. Discussions could also be held on project goals and formats, such as rule-of-law work carried out directly in regions, cities, and communities or training activities to teach professional skills to, e.g., lawyers and those who work in the judiciary. Representatives of (potential) donor countries can also be invited to these events.
- 4) *Regional exchange of experiences and training updates.* It is proposed that further efforts be undertaken to enable the exchange of experiences (best practices, lessons learned) between the field missions in the various subregions of Europe (Balkans, South Caucasus, Central Asia), as has been called for by those responsible for rule-of-law issues in the field operations. (Good examples of these activities are the meetings on trial monitoring that are organized annually by ODIHR.) There have also been calls for refresher training courses



(known as “updates”) to be provided for rule-of-law representatives that have been in the field for a long time. These activities should be the responsibility of ODIHR’s Rule of Law Unit.

- 5) *Discussion of comparative advantages.* It is proposed that a discussion be held with those responsible for rule-of-law issues in the missions on how to make better use of the comparative advantages of rule-of-law promotion by the OSCE’s field missions. Those responsible for rule-of-law activities generally consider that these consist, in the first instance, of flexibility, networks, access to governments and the public, and long-term commitment. They see the main disadvantages a shortage of co-ordination and insufficient exchange of information and experience, short-planning horizons for individual projects and above all in staffing issues.
- 6) *Showcase of the work of a mission.* It is proposed by one of the delegations that the work in the area of the rule of law of one or two selected field missions be presented in Vienna. This could be carried out by ODIHR and those responsible for rule-of-law issues in the missions as well as interested delegations.

#### 4.2 *Recommendations on Personnel Issues in Relation to Rule-of-Law Promotion*

- 1) *Personnel issues and rule-of-law consulting.* It is recommended that ODIHR’s potential to directly employ experts, instead of seconding them from the participating States, be expanded. For this, participating States would need to agree to convert appropriate seconded positions at ODIHR into contracted ones. It is also conceivable that support for ODIHR’s Rule of Law Unit and the field missions in personnel matters could be expanded by using extra-budgetary financing to pay legal consultants. At the same time, there must be no question of core ODIHR activities being predominantly funded by the OSCE’s regular annual budget. Financial support by the delegations that have so far been involved in rule-of-law promotion is also being sharply reined in as a result of the financial crisis.
- 2) *ODIHR Advisory Panel of Rule of Law Experts.* It is recommended that an *ODIHR Advisory Panel of Rule of Law Experts* be established. Similar to the *ODIHR Advisory Panel of Ex-*

*perts on Freedom of Religion or Belief*, the expert members of this pool could be nominated by the participating States and called upon to provide legal advice or to assist in capacity building. By this means, extensive consultations prior to advertising a vacancy could be dispensed with. This proposal was made by the rule-of-law experts in the field operations. An alternative would be to establish an ODIHR Roster of Rule of Law Experts – a somewhat smaller format than a panel and one that is apparently preferred by ODIHR’s Rule of Law Unit.

#### 4.3 *Recommendations on Specific Topics within the Promotion of the Rule of Law*

- 1) *Rule-of-law promotion and public administration.* It is recommended that particular attention be paid to discussing and promoting the topic of the rule of law and public administration. This touches on a key point of contact between citizens and the state and affects, among other areas, administrative law, administrative procedures, the liability of the public administration, and administrative justice.<sup>46</sup> Administrative justice is one of the areas that ODIHR wishes to stress in the future. ODIHR’s Rule of Law Unit has already started to deal with these issues by looking into the matter of electoral dispute resolution. The Unit is currently reviewing the 2000 ODIHR handbook on the topic.
- 2) *Rule of Law and Protracted Conflicts.* It is recommended that the possibilities be discussed for promoting the rule of law in the context of unresolved conflicts. That can be achieved by means of national or regional OSCE workshops on “OSCE Rule of Law Assistance and OSCE Conflict Management”. Points for discussion could include the legitimacy of administration, the problems of rights violations and the unrecognized legislation in conflict regions or the problems of providing access to justice to the civilian population in a conflict region.
- 3) *Human rights and the interests of state security.* It is recommended that respect, protection and guarantee of human rights be dis-

46. See also Per Bergling et al., *Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development*, Folke Bernadotte Academy Publications, Stockholm 2008.

cussed in connection with court proceedings that are subject to particular national restrictions and exceptions as a result of state security considerations. The topic is particularly relevant in connection with combating terrorism. The same is true of discussions of the rule of law in connection with the prevention of torture and the right to a fair trial.

- 4) *Legal assistance and appropriate procedures in the context of terrorism.* It is recommended that steps be taken to address the implementation of commitments under international law as related to legal assistance with the extradition of those suspected of terrorism and to the right to fair proceedings. That would be a task for co-operation between the Action Against Terrorism Unit (ATU) and the Human Rights Department, which is the section responsible for addressing anti-terrorism issues (including legal issues) at ODIHR.
- 5) *Torture prevention.* It is recommended that the topic of torture prevention continue to be granted a prominent position on the OSCE agenda. A side event to this purpose can be arranged at the HDIM. As this is a particularly difficult topic, however, it can also be discussed in a smaller format between those responsible for rule of law issues and interested delegation members.
- 6) *The rule of law and media freedom.* It is proposed to discuss rule-of-law questions with the OSCE Representative on Freedom of the Media. One subject could be the legal foundation of media freedom against the background of new developments in IT. Also in relation to promoting the rule of law, the formulation of a standing invitation for country visits by the FOM should be advocated.
- 7) *The rule of law and economics.* It is proposed to discuss the topic of promoting the rule of law with a particular focus on economic and environmental issues. This could also provide an excellent opportunity for participating States to showcase their specific consulting strengths. The comparative advantages of different jurisdictions (e.g. Germany as a legal jurisdiction) can be discussed in co-operation with organizations such as the “Alliance for German Law” (“Bündnis für das deutsche Recht”), which consists of the Federal Ministry of Justice and

German judicial organizations.<sup>47</sup>

- 8) *The rule-of-law contributions of the OSCE and the Council of Europe.* It is proposed that a discussion be held on the specific profiles and corresponding added value of the rule-of-law work of the OSCE and the Council of Europe in selected target countries.
- 9) *Accountability of heads of state in the system of state power.* It is proposed that the ODIHR Rule of Law Unit holds an event on the accountability of the head of state in the system of state power. This topic was proposed by ODIHR in its contribution to OSCE reform “Common Responsibility” (2006).<sup>48</sup>
- 10) *Follow-up checks after trial monitoring.* It is recommended that the OSCE’s field operations expand follow-up checks after trial monitoring. Expanding monitoring in this way should be discussed directly with those responsible for rule-of-law activities.
- 11) *Domestic violence monitoring networks.* It is recommended that the OSCE’s field presences advise and support in the establishment and maintenance of national pools of domestic violence monitors. OSCE activities could range from the training of professional mediators via public campaigns, to promoting the targeted deployment of mediators.

#### 4.4 Recommendations on Developing Handbooks, Guidelines and Reference Works

- 1) *OSCE Rule-of-Law Handbook.* It is recommended that the OSCE summarize the Organization’s approaches and practices in the area of the rule of law in a general guide to the field. ODIHR should also compile a handbook

47. See: Bundesministerium für Justiz et al, *Bündnispapier: Bündnis für das deutsche Recht*, at: [http://www.bmj.bund.de/enid/5a0978ae855eed758abe2de568d76bad,c1b2c85f7472636964092d0935323933/Rechtsstaatsentwicklung/Buendnis\\_fuer\\_das\\_deutsche\\_Recht\\_1j4.html](http://www.bmj.bund.de/enid/5a0978ae855eed758abe2de568d76bad,c1b2c85f7472636964092d0935323933/Rechtsstaatsentwicklung/Buendnis_fuer_das_deutsche_Recht_1j4.html).

48. “Additional commitments could clarify the role of the executive branch, including heads of state, vis-à-vis other branches in a democratic system of government. Constitutional arrangements that place the executive above other branches of government, without effective checks and balances on this power, are incompatible with the participating States’ commitment to democracy and the rule of law.” ODIHR, *Common Responsibility. Commitments and Implementation, Report submitted to the OSCE Ministerial Council in response to MC Decision No. 17/05 on Strengthening the Effectiveness of the OSCE*, II. Possible Supplementary Commitments, B. Democracy and the rule of law, para. 84, Warsaw, 10 November 2006.

- on OSCE rule-of-law promotion as has already been done on the topic of election monitoring.
- 2) *Definitions*. It is recommended that a document be drawn up containing definitions relevant to the promotion of the rule of law by the OSCE. This and the previous proposal originate with those responsible for the rule of law in the missions.
  - 3) *Reference cases on LEGISLATION-LINE.ORG*. It is proposed that support be provided to the work of those responsible for rule-of-law in the missions by making a collection of legislative solutions to selected reference cases on the website LEGISLATIONLINE.ORG.
  - 4) *Guidelines for Democratic Law-making Processes*. It is recommended that a set of guidelines for democratic law-making processes be compiled.<sup>49</sup> ODIHR has recently held events on this topic.

49. A relevant recommendation can be found here: *OSCE Supplementary Human Dimension Meeting on Democratic Lawmaking, Final Report*, section III. Recommendations, Vienna, 6-7 November 2008.

## Annex

Table 1

### The Ongoing Definition of the Rule of Law and Rule-of-Law Promotion by the C/OSCE Selected Commitments and Affirmations

Event	Comittment/Affirmation
Helsinki 1973 / Helsinki 1975	<ul style="list-style-type: none"> <li>• Commitment to respect the rights inherent in sovereignty, respect human rights and fundamental freedoms as well as to fulfill obligations under international law</li> </ul>
Madrid 1983	<ul style="list-style-type: none"> <li>• Reaffirmation to fully “respect and apply [... the Principles Guiding Relations between Participating States] and accordingly, to promote by all means, both in law and practice, their increased effectiveness”</li> <li>• Respect for human rights and fundamental freedoms as “an essential factor for [...] peace, justice and well-being”</li> <li>• Commitment to develop “laws and regulations in the field of civil, political, economic, social, cultural and other human rights and fundamental freedoms [...] to ensure the effective exercise of these rights and freedoms”</li> <li>• Reaffirmation of “the right of the individual to know and act upon his rights and duties in the field of human rights and fundamental freedoms” and the willingness to “take the necessary action in their respective countries to effectively ensure this right.”</li> </ul>
Vienna 1989	<ul style="list-style-type: none"> <li>• Commitment to a first catalogue of legislative and other measures to ensure human rights and fundamental freedoms</li> <li>• Commitment to legal and administrative regulation of human contacts</li> </ul>
Bonn 1990	<ul style="list-style-type: none"> <li>• <i>First explicit rule-of-law commitment</i>: commitment to “[t]he rule of law and equal protection under the law for all, based on respect for human rights and effective, accessible and just legal systems”</li> <li>• Commitment to a legal and administrative framework for market economy, protection of private property, investments, etc.</li> </ul>
Copenhagen 1990	<ul style="list-style-type: none"> <li>• First commitment on the inherent interconnectedness of the rule of law, democracy and human rights</li> <li>• “[D]emocracy is an inherent element of the rule of law”</li> <li>• Commitment to a comprehensive catalogue of principles of justice that form the basis of the rule of law</li> </ul>
Paris 1990	<ul style="list-style-type: none"> <li>• Development of new structures and institutions in the CSCE process relating to human rights, democracy, the rule of law, the consolidation of peace and European unity</li> </ul>
Moscow 1991	<ul style="list-style-type: none"> <li>• Declaration that “issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order [and ...] that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned”</li> <li>• Mutual support in case of a coup, maintaining the rule of law during a state of emergency and deployment of an OSCE mission where possible</li> <li>• Commitment to “countering any attempt to curb” basic values such as “human rights, democracy and the rule of law” “in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means”</li> <li>• Commitments to a legal basis for deprivation of liberty</li> <li>• Confirmation of the right to protection of private life</li> </ul>

Prague 1992	<ul style="list-style-type: none"> <li>• Commitment to protecting human rights, democracy and the rule of law “if necessary in the absence of the consent of the State concerned”</li> </ul>
Stockholm 1992	<ul style="list-style-type: none"> <li>• Adoption of democratization and rule-of-law promotion in the concept of operational conflict management</li> </ul>
Budapest 1994	<ul style="list-style-type: none"> <li>• Commitment to the deployment of armed forces on the basis of the rule of law, including for domestic security purposes (Code of Conduct on Politico-Military Aspects of Security)</li> </ul>
Lisbon 1996	<ul style="list-style-type: none"> <li>• Commitment to “co-operative security based on democracy, respect for human rights, fundamental freedoms and the rule of law, market economy and social justice” as key approach to the Common and Comprehensive Security Model for Europe for the Twenty-First Century</li> <li>• Emphasis of “developing democratic structures and the rule of law, maintaining stability and preventing conflicts” in Central Asia</li> <li>• Promotion of the rule of law in the areas of military and paramilitary security forces</li> </ul>
Copenhagen 1997	<ul style="list-style-type: none"> <li>• Emphasis to provide “further political impetus to the work carried out by specialized economic and financial and other relevant institutions, inter alia, with a view to promoting the integration of economies in transition into the world economy and to ensuring within the OSCE area the rule of law and the development of a transparent and predictable legal system in the economic sphere”</li> </ul>
Oslo 1998	<ul style="list-style-type: none"> <li>• Confirmation of the intention to enhance OSCE police operations and their capacity to “provide an important contribution to building a society based on the rule of law that can consolidate democracy and enhance respect for human rights and fundamental freedoms”</li> </ul>
Istanbul 1999	<ul style="list-style-type: none"> <li>• Emphasis of the importance of “democracy, the rule of law and respect for human rights” for upholding peace and security (“Charter for European Security”)</li> <li>• Promotion of the rule of law in the fight against international terrorism, violent extremism, organized crime, drug trafficking, corruption and torture</li> </ul>
Bucharest 2001	<ul style="list-style-type: none"> <li>• Affirmation of ODIHR’s role in “strengthening domestic legal frameworks and institutions that uphold the rule of law [...] and in] efforts to combat trafficking in human beings and to support victims of trafficking [..., ] support prison reform and improvements in criminal procedure”</li> </ul>
Maastricht 2003	<ul style="list-style-type: none"> <li>• Affirmation of “respect for human rights and fundamental freedoms, democracy and the rule of law” as a core element of the “OSCE Strategy to Address Threats to Security and Stability in the Twenty-First Century</li> <li>• Affirmation of the interconnectedness of the rule of law and good governance as contributing to prosperity, stability and security (“OSCE Strategy Document for the Economic and Environmental Dimension”)</li> </ul>
Ljubljana 2005	<ul style="list-style-type: none"> <li>• Decision on “Upholding Human Rights and the Rule of Law in Criminal Justice Systems”</li> </ul>
Madrid 2007	<ul style="list-style-type: none"> <li>• Comprehensive description of “Governance based on rule of law” (“Chairman’s Perception Paper on OSCE Basic Norms and Principles in the Field of Security Sector Governance/Reform”)</li> </ul>
Helsinki 2008	<ul style="list-style-type: none"> <li>• Decision on “Further Strengthening the Rule of Law in the OSCE Area”</li> </ul>
Athens 2009	<ul style="list-style-type: none"> <li>• Reaffirmation of “respect for human rights and fundamental freedoms, democracy and the rule of law [...] being] at the core of the OSCE’s comprehensive concept of security”</li> <li>• Reaffirmation of “strong democratic institutions and the rule of law play[ing] an important role in preventing transnational threats from arising”</li> </ul>

Table 2

**Topics in the Promotion of the Rule of Law by ODIHR's Specialist Units and the OSCE's Field Operations<sup>50</sup>**

Structure / Staff	Topic / Area of Activity
<i>ODIHR</i> Rule of Law Unit	Professional skills development and institutional support within two programmatic components: 1) Criminal Justice Support War crimes a) Criminal justice support in Central Asia b) Criminal Justice Support in the South Caucasus 2) Fair Trial Rights and Effective Legal Remedies a) Independence of the judiciary b) Administrative Justice c) Trial Monitoring
<i>ODIHR</i> Legislative Support Unit	<ul style="list-style-type: none"> <li>• Assistance in establishing effective and transparent legislative procedures</li> <li>• Draft legislation review with regard to human dimension commitments</li> </ul>
<b>South-eastern Europe</b>	
<i>Albania</i> Department of Rule of Law and Human Rights	<ul style="list-style-type: none"> <li>• Legislative support</li> <li>• Judicial reform</li> </ul>
<i>Bosnia and Herzegovina</i> Department of Human Rights	<ul style="list-style-type: none"> <li>• Justice sector reform</li> <li>• War crimes</li> <li>• Prison reform</li> <li>• Vulnerable groups facing the judiciary</li> <li>• National human rights institutions</li> </ul>
<i>Croatia</i> Trial Monitoring Unit	<ul style="list-style-type: none"> <li>• War crimes prosecution</li> </ul>
<i>FYROM</i> Rule of Law Department	<ul style="list-style-type: none"> <li>• Anti-trafficking</li> <li>• Judicial reform</li> <li>• Capacity building of civil society and human rights institutions</li> <li>• Reform of the law-making process</li> </ul>
<i>Kosovo</i> Department of Human Rights and Communities	<ul style="list-style-type: none"> <li>• Assisting newly established institutions (Ombudsperson Institution, Kosovo Judicial Institute)</li> <li>• Review of draft legislation to ensure human rights compliance</li> <li>• Legal systems monitoring</li> <li>• Property issues</li> </ul>
<i>Montenegro</i> Human Rights and Rule of Law Section	<ul style="list-style-type: none"> <li>• Judicial reform</li> <li>• Administration of criminal justice</li> <li>• Fight against organized crime and corruption</li> <li>• Strengthening human rights institutions</li> <li>• Legislative assistance</li> </ul>

50. This overview is based on a presentation by the ODIHR Rule of Law Unit in Vienna in June 2009 as well as additional information provided by staff.

<p><i>Serbia</i> Legislative Support Unit</p>	<ul style="list-style-type: none"> <li>• Judicial reform</li> <li>• Organized crime</li> <li>• Legal reform</li> <li>• War crimes</li> <li>• Economic transparency</li> <li>• Prison reform</li> <li>• Ombudsperson</li> </ul>
<p><b>Eastern Europe</b></p>	
<p><i>Belarus</i> Human Dimension Officer / Programme Manager</p>	<ul style="list-style-type: none"> <li>• Trial monitoring</li> <li>• Detention monitoring</li> <li>• Anti-trafficking</li> </ul>
<p><i>Moldova</i> Department of Human Rights and Democratization</p>	<ul style="list-style-type: none"> <li>• Trial monitoring</li> <li>• Legislative review</li> <li>• Training</li> <li>• Rule of law co-ordination</li> </ul>
<p><i>Ukraine</i> National Project Manager</p>	<ul style="list-style-type: none"> <li>• Development of National Preventive Mechanism (NPM) as to prevention of torture and inhuman or degrading treatment or punishment</li> <li>• Legislative review</li> </ul> <p><i>Specific projects:</i></p> <ul style="list-style-type: none"> <li>• Assistance in effective implementation of ECHR standards</li> <li>• Fostering development of appropriate remedy standards of state liability in human rights violation cases</li> <li>• Constitutional complaints</li> <li>• Assistance in development of rule of law courses at law faculties</li> <li>• Administrative Law</li> </ul>
<p><b>South Caucasus</b></p>	
<p><i>Armenia</i> Human Rights Programme</p>	<ul style="list-style-type: none"> <li>• Judicial Reform</li> <li>• Assistance in developing</li> <li>• National Preventive Mechanism (NPM) as to prevention of torture and inhuman or degrading treatment or punishment</li> <li>• Trial monitoring (ODIHR)</li> </ul>
<p><i>Azerbaijan</i> Rule of Law Department</p>	<ul style="list-style-type: none"> <li>• Training and capacity building</li> <li>• Trial monitoring</li> <li>• Monitoring detention conditions and rights of suspects and accused in custody</li> <li>• Legal resource centres</li> <li>• Juvenile justice reform</li> <li>• Justice reform strategy related activities</li> </ul>
<p><b>Central Asia</b></p>	
<p><i>ODIHR (since 2002; stationed in Kazakhstan)</i> Regional Rule-of-Law Co-ordinator for Central Asia</p>	<ul style="list-style-type: none"> <li>• Policy advice on issues like criminal justice and prison reform</li> <li>• Infrequent arrangement of regional rule-of-law events</li> </ul>
<p><i>Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan</i> Small operations with usually one Human Dimension Officer</p>	<ul style="list-style-type: none"> <li>• [These missions have made no detailed information available.]</li> </ul>

### **About the Author**

Dr Frank Evers is Deputy Head of the Centre for OSCE Research (CORE). He has taught Russian economic and legal affairs at the Berlin East-European Institute as well as OSCE economic and environmental activities at the OSCE Academy in Bishkek. He has worked for OSCE field operations in various capacities. In 1996, he became Economic Adviser to the OSCE Mission to Ukraine, later becoming Deputy Head of that Mission and Head of the Mission's Branch Office in Simferopol (Autonomous Republic of Crimea). From 2000 until 2002, he worked as Economic and Environmental Adviser to the OSCE Office in Yerevan (Armenia).

Dr Evers is a generalist in the field of OSCE conflict management in the broadest sense. Regionally, his main concentration is on the East-Slavic and South Caucasus countries, and adjoining regions. Substantively, his research focuses on various components of security-building, including minority issues, inter-confessional relations and economic, social and environmental affairs.



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The Centre for OSCE Research (CORE), founded in 2000, is the only institute specifically dedicated to research on the OSCE. Located in Hamburg, Germany, within the Institute for Peace Research and Security Policy (IFSH), CORE operates as a politically independent think tank, combining basic research on the evolution of the OSCE with demand-driven capacity-building projects and teaching. Addressing political actors, the academic community and the interested general public in Germany and abroad, CORE strives to contribute to the OSCE's development with analysis and critique that provide insight into the problems faced by and opportunities open to the Organization. For more information about CORE or this paper, please contact:

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