



Strasbourg, 8 October 2008

Study no. 470 / 2008

CDL(2008)091*
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT REPORT
ON THE NOTION OF “GOOD GOVERNANCE”

On the basis of comments by

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**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. Introduction

1. In its recommendation 1791(2007) on the state of human rights and democracy in Europe the Parliamentary Assembly of the Council of Europe called on the Committee of Ministers of the Council of Europe to reinforce its own activities in the field of democracy, in particular by reacting to identified deficits of democracy in member states. The Parliamentary Assembly called on the Committee of Ministers to continue its work on democracy and good governance in the information society. At its 2007 session, the Council of Europe's "Forum for the Future of Democracy" encouraged the Venice Commission to pursue this matter.

2. Mr Oliver Kask acted as rapporteur with Mr Asbjørn Eide, expert from Norway. They decided to examine the different existing concepts of the notion of "good governance" as well as the notion of "good administration" and the relation between "good governance" and human rights.

3. The present report was prepared on the basis of comments by Messrs Kask and Eide and adopted by the Venice Commission at its ... Plenary Session (Venice, ...).

II. "Good governance" at the international level

4. There has been a multitude of different definitions or descriptions of "good governance" at the international level. The first part of this report lists different concepts employed by international organisations and their bodies.

A. The Council of Europe

a. The 2005 Warsaw Summit

5. At the Warsaw Summit in 2005 the Heads of State and Government of the member States declared that "democracy and good governance at all levels are essential for preventing conflicts, promoting stability, facilitating economic and social progress, and hence for creating sustainable communities where people want to live and work, now and in the future".¹

b. The Committee of Ministers

6. In 2005, the Committee of Ministers adopted Recommendation Rec(2005)8 to member States on the principles of good governance in sport which include, but are not limited to:

- democratic structures for non-governmental sports organisations based on clear and regular electoral procedures open to the whole membership;
- organisation and management of a professional standard, with an appropriate code of ethics and procedures for dealing with conflicts of interest;
- accountability and transparency for decision-making and financial operations, including the open publication of yearly financial accounts duly audited;
- fairness in dealing with membership, including gender equality and solidarity.²

c. The Parliamentary Assembly

7. In Parliamentary Assembly Resolution 1060(1995) good governance was explained as including "democracy and human rights, the absence of corruption, social reform favouring the

¹ Warsaw Declaration adopted at the Third Summit of Heads of State and Government of the Council of Europe, point 3, available at: [http://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2005\)79&Language=lanEnglish&Ver=final](http://wcd.coe.int/ViewDoc.jsp?Ref=CM(2005)79&Language=lanEnglish&Ver=final) (last visited on 28 August 2008).

² Recommendation Rec(2005)8 of the Committee of Ministers to member States on the principles of good governance in sport, adopted on 20 April 2005.

disadvantaged, economic reform in the direction of market principles, adequate protection of the environment, and more open trade including trade with other developing countries”.³

8. In two recommendations of 2005 and 2006 the Parliamentary Assembly stressed the Council of Europe’s important role in improving good governance, without however defining it. Good governance was mentioned alongside democracy, the rule of law and human rights standards.⁴

9. In Parliamentary Assembly Resolution 1547(2007) on the state of human rights and democracy, the principles of subsidiarity and proportionality were considered necessary to achieve good governance, which in turn is said to be essential for strengthening democracy.⁵ In the same resolution the role of good governance in preventing corruption is stressed.⁶

d. The Conference of European Ministers responsible for local and regional government

10. The Conference of European Ministers responsible for local and regional government adopted at their fifteenth session in October 2007 the “Council of Europe Strategy on Innovation and Good Governance at Local Level”. It states that good governance has become a model for giving real effect to democracy, the protection of human rights and the rule of law. The strategy lists twelve principles of good democratic governance which draw on the Council of Europe’s *acquis* in the field of democracy, the rule of law and the protection of human rights. Those principles encompass the rule of law, the protection of human rights and democracy. Among others, they also include effectiveness and efficiency, openness and transparency, accountability and responsiveness.⁷

e. Committee of Experts on Good Governance in Health Care

11. In September 2007, the new Committee of Experts on Good Governance in Health Care (SP-GHC) started its work. Its mandate is “to help member States to promote value-based governance in health care, based on human rights, equity, transparency, accountability and participation”.⁸

B. The European Union

a. The Charter of Fundamental Rights

12. Article 41 of the Charter of Fundamental Rights of the European Union stipulates that every person has a right to good administration towards the institutions or bodies of the European Union. It reads as follows:

“1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

³ Parliamentary Assembly Resolution 1060(1995) on development co-operation policies, point 8.

⁴ Parliamentary Assembly Recommendation 1708(2005): Current situation in Kosovo, adopted on 21 June 2005, point 1; Parliamentary Assembly Recommendation 1771(2006): The establishment of a stability pact for the South Caucasus, adopted on 17 November 2006, point 1.

⁵ Parliamentary Assembly Resolution 1547(2007): State of human rights and democracy in Europe, adopted on 18 April 2007, paragraph 62.

⁶ Id. at paragraph 83.

⁷ The Council of Europe Strategy on Innovation and Good Governance at Local Level, MCL-15(2007)8, adopted on 16 October 2007.

⁸ http://www.coe.int/t/dg3/health/goodgov_en.asp (last visited on 28 August 2008).

- *the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
 - *the obligation of the administration to give reasons for its decisions.*
3. *Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.*
4. *Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.*⁹

13. In the framework of the Austrian Presidency of the European Union the Association of European Parliamentarians for Africa (AWEPA) and the North-South Centre of the Council of Europe organised a seminar in Cape Town in 2006 for African and European Parliamentarians to discuss the new EU-Strategy for Africa. In the "Recommendations for Action" good governance figures alongside democracy and human rights as the key elements for improving living standards. Furthermore, it is said that good governance requires effective parliamentary action and a consensus on the definition of good governance and its relationship with development.¹⁰

b. The European Council

14. In 1991 the European Council adopted a resolution on human rights, democracy and development setting guidelines for the co-operation with developing countries. It was stated that "[a]t the same time, human rights and democracy form part of a larger set of requirements in order to achieve balanced and sustainable development. In this context, account should be taken of the issue of good governance as well as of military spending". However, no definition of good governance was given.¹¹

c. The European Community

15. In 2000 the European Community defined good governance in the Partnership Agreement between the States of the African, Caribbean and Pacific Group and the European Community (Cotonou Agreement) as follows:

*"In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption."*¹²

⁹ Article 41 of the Charter of Fundamental Rights of the European Union, available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf (last visited on 28 August 2008).

¹⁰ Euro-African Pact for Africa's development: The role of Parliamentarians, Recommendations for Action, Cape Town, 25 - 26 May, available at: http://www.coe.int/t/e/north%2Dsouth_centre/programmes/5_europe%2Dafrica_dialogue/b_hr_and_democratic_governance/Declaration_Cape-Town_mai2006.pdf#xml (last visited on 28 August 2008).

¹¹ Resolution of the Council and the member States meeting in the Council on human rights, democracy and development, paragraph 2, available at: http://ec.europa.eu/external_relations/human_rights/doc/cr28_11_91_en.htm (last visited on 28 August 2008).

¹² Article 9(3) of the Partnership Agreement between the States of the African, Caribbean and Pacific group of States on the one part, and the European Community and its member States on the another part, available at: http://ec.europa.eu/development/icenter/repository/agr01_en.pdf (last visited on 28 August 2008).

d. The European Commission

16. In 2001, the European Commission identified five principles of “good governance” in a White Paper on European governance: openness, participation, accountability, effectiveness and coherence.¹³

C. The United Nations

a. The “Agenda for Development”

17. The “Agenda for Development” submitted by Secretary General Boutros Boutros-Ghali to the General Assembly in 1994 addressed the importance of development and its basis for peace. The agenda’s purpose was to give a new impetus to the discussion of development building on the United Nations’ experience. The agenda stressed the important role of good governance in development¹⁴ while stating that democracy is “inherently attached to the question of governance”¹⁵. Democracy is described as the only reliable means to achieve improved governance.¹⁶

18. Good Governance is described as having several meanings in the context of development:

“In particular however, it means the design and pursuit of a comprehensive national strategy for development. It means ensuring the capacity, reliability and integrity of the core institutions of the modern State. It means improving the ability of government to carry out governmental policies and functions, including the management of implementation systems. It means accountability for actions and transparency in decision-making.”¹⁷

19. The Agenda for Development resulted in General Assembly Resolution 49/126, which took note of the Secretary General’s report and put the item “Agenda for development” on the provisional agenda for its fiftieth session.¹⁸ However, no further action was taken by the General Assembly.¹⁹

b. The United Nations Millennium Declaration

20. The Millennium Declaration was adopted by the General Assembly in 2000 to reaffirm the organisation’s role in the new millennium. It mentioned good governance in connection with the eradication of poverty, stressing that its success depended on good governance at the national and the international level.²⁰ Good Governance was also mentioned in the title of Part V called “Human rights, democracy and good governance”, but was not dealt with in the substantial text. The term “good governance” was not defined in any part of the declaration.

¹³ European Commission, European Governance – a White Paper, 25 July 2001, COM(2001) 428 final, p. 10, available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf (last visited on 5 September 2008).

¹⁴ An Agenda for Development, Report of the Secretary General, 6 May 1994, A/48/935, paragraph 125; available at: <http://www.globalpolicy.org/reform/initiatives/ghali/1994/0506development.htm> (last visited on 28 August 2008).

¹⁵ Id. at paragraph 120.

¹⁶ Id. at paragraph 128.

¹⁷ Id. at paragraph 126.

¹⁸ Resolution adopted by the General Assembly on 20 January 1995, A/RES/49/126.

¹⁹ Beate Rudolf, “Is ‘Good Governance’ a Norm of International Law?”, in: Common Values in International Law: Essays in honour of Christian Tomuschat, Pierre-Marie Dupuy et al. (editors), 2006, p. 1010.

²⁰ The United Nations Millennium Declaration, Resolution adopted by the General Assembly on 18 September 2000, A/RES/55/2, paragraph 13.

c. The United Nations Commission on Human Rights

21. In 2000, 2003 and 2004 the Commission stated that the foundation of good governance is “transparent, responsible, accountable, and participatory government, responsive to the needs and aspirations of the people”. The Commission noted, however, that good governance practices may vary from society to society and that determining and implementing such practices rests with the States concerned.²¹

d. The United Nations Development Program (UNDP)

22. The UNDP considers that human development and good governance are indivisible. It describes good governance as follows:

“Good governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law. Good governance ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources.”²²

e. The Third United Nations Conference on the Least Developed Countries

23. The “Brussels Declaration” adopted at this conference in May 2001 considered that good governance at the national and international level was a means to achieve the eradication of poverty. The rule of law, respect for human rights and the promotion of democracy were listed as other means figuring alongside good governance.²³ This was repeated in the “Brussels Programme of Action for the Least Developed Countries” adopted on the last day of the conference.²⁴

f. The “Monterrey Consensus” of the International Conference on Financing for Development

24. The International Conference on Financing for Development in Monterrey in March 2002 was the first United Nations-hosted conference on key financial and development issues.²⁵ In the “Monterrey Consensus” the States committed themselves to good governance in order to achieve, among others, the goals set in the Millennium Declaration.²⁶ However, no definition of good governance was provided.

²¹ The role of good governance in the promotion of human rights, Commission on Human Rights Resolutions 2000/64, 2003/65 and 2004/70.

²² UNDP, Good Governance – and sustainable human development, available at:

<http://mirror.undp.org/magnet/policy/chapter1.htm> (last visited on 28 August 2008).

²³ Brussels Declaration, adopted at the third United Nations Conference on the Least Developed Countries, A/CONF.191/12, point 2, available at: <http://www.unctad.org/en/docs/aconf191d12.en.pdf> (last visited on 28 August 2008).

²⁴ Brussels Programme of Action for the Least Developed Countries for the Decade 2001–2010, A/CONF.191/11, paragraph 25, available at: <http://www.un-documents.net/ac191-11.htm> (last visited on 28 August 2008).

²⁵ <http://www.un.org/esa/ffd/ffdconf/> (last visited on 5 September 2008).

²⁶ Monterrey Consensus adopted at the International Conference for Financing for Development, A/CONF.198/3, annex, point 4, available at:

<http://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/267/66/doc/N0226766.DOC?OpenElement> (last visited on 20 August 2008).

g. “Plan of Implementation of the World Summit on Sustainable Development”

25. This plan of September 2002 stressed once again the importance of good governance at the national and international level for sustainable development.²⁷ The need for respect for human rights and democracy figured alongside good governance.²⁸

D. Organisation for Economic Co-operation and Development (OECD)

26. The OECD lists the principles of good governance as follows: respect for the rule of law; openness, transparency and accountability to democratic institutions; fairness and equity in dealings with citizens, including mechanisms for consultation and participation; efficient, effective services; clear, transparent and applicable laws and regulations; consistency and coherence in policy formation; and high standards of ethical behaviour.²⁹

E. The World Bank

27. In 1989 the World Bank identified “bad governance” as the main obstacle to development, describing “bad governance” as the absence of accountability, transparency and efficient administration combined with corruption in respect of financial spending.³⁰

28. In 1992 the World Bank defined “governance” as “the manner in which power is exercised in the management of a country’s economic and social resources for development”.³¹

29. In 2007, in the context of the bank’s 2007 governance and anticorruption strategy, the World Bank defined governance as “the manner in which public officials and institutions acquire and exercise the authority to shape public policy and provide public goods and service”.³²

30. When granting a loan the World Bank may only take into account economic factors; the consideration of political factors is expressly excluded.³³

F. The International Monetary Fund (IMF)

31. The IMF places good governance next to combating corruption as outlined in its 1997 “Guide on the IMF’s Approach to Good Governance and Combating Corruption” and the term has a purely economic meaning. It encompasses the transparency and accountability of public resource management and the financial sector.³⁴

²⁷ The Plan of Implementation of the World Summit on Sustainable Development, paragraphs. 4,138 and 141, available at: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (last visited on 28 August 2008).

²⁸ Id. at paragraph 62.

²⁹ OECD: Public Governance and Management, available at: http://www.oecd.org/about/0,3347,en_2649_37405_1_1_1_1_37405,00.html (last visited on 28 August 2008).

³⁰ Beate Rudolf, “Is ‘Good Governance’ a Norm of International Law?”, in: Common Values in International Law: Essays in honour of Christian Tomuschat, Pierre-Marie Dupuy et al. (editors), 2006, p. 1009.

³¹ Governance Indicators: Where Are We, Where Should We Be Going? Policy Research Working Paper 4730, Daniel Kaufmann, Aart Kraay, p. 4, available at: http://www.wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2007/10/31/000158349_20071031085226/Rendered/PDF/wps4370.pdf (last visited on 28 August 2008).

³² Id.

³³ Article IV section 10 of the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD).

³⁴ The IMF and good governance – a fact sheet (May 2008): <http://www.imf.org/external/np/exr/facts/gov.htm#top> (last visited on 28 August 2008).

G. The African Development Bank

32. In its policy paper on good governance of March 2001 the African Development Bank named five elements of good governance: Accountability, Transparency, Combating corruption, Participation and Legal and Judicial Reform. The Bank stated that “good governance is a necessary condition for the success of the bank’s core interventions to promote economic and social development in its regional member countries”.³⁵

H. The Inter-American Development Bank

33. In a strategy document of July 2003 the Inter-American Development Bank viewed the requirements of (democratic) governance in light of the general goals of sustainable growth and poverty reduction and focused mainly on strengthening democracy, the rule of law and justice reform.³⁶

I. The Asian Development Bank

34. The Asian Development Bank identifies four elements of good governance: accountability, participation, predictability and transparency.³⁷ Accountability is described as public officials’ responsibility for their behaviour, but also the measuring of their performance. Participation means that people have access to the institutions that promote development, thus participating actively in economic life. Predictability refers to the existence of laws, regulations and policies and their fair and consistent application. Transparency refers to the availability of information to the public and clarity about government rules, regulations and decisions. It is therefore linked to predictability.³⁸

III. “Good governance” at the national level

35. While the term “good governance” is frequently used at the international level, it appears only rarely at the national level. The Venice Commission examined whether the term is used or defined in constitutions, legislation or case-law.

A. Constitutions

36. The Finnish constitution is the only constitution that contains an explicit right to good governance.

“Section 21 - Protection under the law

Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice.

³⁵ African Development Bank, Operational Guidelines for Bank Group Policy on Good Governance, II., 2.1, March 2001, available at:

http://www.afdb.org/pls/portal/docs/PAGE/ADB_ADMIN_PG/DOCUMENTS/NEWS/OPERATIONAL%20GUIDELINES%20FOR%20BANK%20GROUP%20POLICY%20ON%20GOOD%20GOVERNANCE.PDF (last visited on 28 August 2008).

³⁶ Inter-American Development Bank, Modernization of the State (Strategy Document), 4.7, July 2003, available at: <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1441783> (last visited on 28 August 2008).

³⁷ <http://www.adb.org/Documents/Policies/Strategy2020/Strategy2020-print.pdf> (last visited on 28 August 2008).

³⁸ <http://www.adb.org/Documents/Policies/Governance/gov310.asp?p=policies> (last visited on 28 August 2008).

Provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as the other guarantees of a fair trial and good governance shall be laid down by an Act.”

B. Legislation

a. The Netherlands

aa) Section 16 of the Media Act (*Mediawet*)

37. Section 16(5) of the Media Act prescribes that the Netherlands Broadcasting Corporation must draw up a code of conduct in order to advance good governance and integrity for the benefit of the institutions which have obtained national broadcasting time. The code refers in any case to a) recommendations to the point of administrative organisation, including rewards and supervision, b) rules of conduct to the point of integrity, c) rules of conduct to the point of public and transparent accountability and reporting procedures, d) procedures for processing notifications and suspicions of alleged abuses, and e) supervision of and compliance with the codes of conduct.

bb) Section 33 of the Pension Act (*Pensioenwet*) and section 42 of the Pension Fund (Obligatory Participation) Act (*Wet verplichte beroepspensioenregeling*)

38. Sections 33 of the Pension Act and 42 of the Pension Fund (Obligatory Participation) Act provide in the first paragraph that a pension scheme administrator must organise him-/ herself in such a way that good governance is guaranteed, which means in any case that a) he/she is accountable to those who may claim a pension or who are eligible for a pension and to employers, and b) that internal supervision is provided for. The second paragraphs of these sections provide for a legal basis for supplementary legislation.

b. Latvia

39. Section 10(5) of the State Administration Structure Law

“State administration and its activities shall observe the principle of good governance. Such a principle shall include openness with respect to private individuals and the public, the protection of data, the fair implementation of procedures within a reasonable time period and other regulations, the aim of which is to ensure that State administration observes the rights and lawful interests of private individuals.”

C. Case-law

a. Estonia

40. The Constitutional Review Chamber of the Supreme Court of Estonia held that a right to good administration could be derived from Article 14 of the Constitution taken together with the principles of administrative law in the European legal space. According to the Court those principles are: legal certainty, legitimate expectation, proportionality, non-discrimination, right to be heard, right to a decision in reasonable time, effectiveness and efficiency. It took also recourse to Article 21(2) of the Finnish constitution, Article 31(2) of the Spanish constitution³⁹ and Article 41 of the Charter of Fundamental Rights of the European Union. The Court considered the right to good administration to be a fundamental right.⁴⁰

³⁹ “Public expenditure shall be incurred in such a way that an equitable allocation of public resources may be achieved, and its planning and execution shall comply with criteria of efficiency and economy.”

⁴⁰ Judgment of the Constitutional Review Chamber of the Supreme Court of 17 February 2003, paragraphs 14-16, EST-2003-2-002 (CODICES).

b. the Netherlands

41. Dutch courts have held in the context of administrative proceedings that it was incompatible with the principles of good governance to deviate from policy rules set by the Government in circulars.⁴¹

c. Latvia

42. The Constitutional Court of Latvia held that the principle of good governance may be derived from Articles 1⁴² and 89⁴³ of the Constitution. According to the Court it includes *inter alia* the termination of proceedings within a reasonable time and the respect of provisions protecting human rights.⁴⁴

43. In another judgment the Constitutional Court derived the principle of good governance from Article 89 of the Constitution taken together with Section 10(5) of the State Administration Structure Law. It interpreted those provisions as entailing the State's duty to simplify, improve and efficiently organise procedures.⁴⁵

d. Poland

44. In its judgment of 12 March 2007 the Polish Constitutional Tribunal held that the duties of organs of public authority creating the fundament and standard of "good administration" stem from the constitutional rule of law and the principle of legality. However, it does not mean that the individual has the constitutional right to good administration understood as given procedural rights making administrative proceedings similar to court proceedings, in which an individual has wide guarantees.⁴⁶

IV. Analysis of the existing definitions

45. As seen above, the definitions of "good governance" or "good administration" vary considerably. The different definitions of good governance contain a multitude of elements, for example:

- accountability
- transparency
- responsiveness to the people's needs
- efficiency
- effectiveness
- openness
- participation
- predictability
- rule of law
- coherence
- equity
- ethical behaviour

⁴¹ See the following judgments of the European Court of Human Rights: *Ahmut v. The Netherlands*, application no. 21702/93, judgment of 28 November 1996, paragraph 35; *Nsona v. The Netherlands*, application no. 23366/94, judgment of 28 November 1996, paragraph 49.

⁴² "Latvia is an independent democratic republic."

⁴³ "The State shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia".

⁴⁴ Judgment of the Constitutional Court of Latvia, 25 March 2003, paragraph 6, LAT-2003-1-04 (CODICES).

⁴⁵ Judgment of the Constitutional Court of Latvia, 6 April 2005, paragraph 9.3.1., (no. 2004-21-01).

⁴⁶ Judgment of the Polish Constitutional Tribunal of 12 March 2007, ref. No. K 54/05.

- combating corruption
- termination of proceedings within a reasonable time
- protection of human rights
- simplification of procedures.

Accountability, transparency and participation are the most frequently mentioned elements, but they seem to have different meanings according to the context in which they are used.

46. There appears to be no consensus on the question whether good governance is a means to achieve a certain aim, for example the protection of human rights, or whether it is an end in itself. This is closely related to the question as to whether good governance encompasses democracy, the rule of law or the protection of human rights or whether it has a separate existence.

47. As regards "good administration", this term seems to refer to some of the rights enshrined in Article 6 of the European Convention on Human Rights. Some of the elements mentioned are, for example:

- impartiality
- fairness
- termination of proceedings within a reasonable time
- legal certainty
- proportionality, non-discrimination
- right to be heard
- effectiveness
- efficiency

48. To date there is no case-law on good governance or good administration by the European Court of Human Rights. For the time being there appears to be no enforceable ("justiciable") right to good governance or to good administration, unless expressly provided for at the national level.

V. Human rights requirements to good governance

A. Introduction

49. As shown by the survey above, there is no universally recognized definition of 'good governance'. The present preoccupation with the issue appears to have originated in the World Bank and the other financial institutions, whose primary concern was to ensure that government became a reliable institution for sustainable growth. The World Bank focussed initially on four elements: Good public sector management, a reliable legal framework for development (predictability, rule of law, respect for private property and investments), accountability (to the public and to donors), transparency and information. While all of these are desirable elements in good governance, some important elements are missing, in particular the human rights component and its many dimensions, as discussed below. The neglect of the human rights dimension in the World Bank concept can be explained by its own Articles of Agreement (Article IV section 10) which precludes it when giving loans from taking anything else than economic factors into account.

50. A large part of human rights deal of course also with non-economic matters and must therefore be included in a satisfactory concept of good governance. This now widely recognised, e.g. in Council of Europe Parliamentary Assembly resolution 1060(1995) quoted above, where democracy and human rights are the first elements mentioned, though without spelling out what the human rights requirements to good governance are.

51. In this note, the democracy/human rights linkage will be explored and elaborated. It starts from the premise that the best governance is that which optimally applies and implements human rights, ensuring that all human rights can be enjoyed by everyone under the jurisdiction

of that state. The links between human rights and governance include the institutional requirements contained in human rights law, and the state obligations which are necessary corollaries of the rights contained in the international instruments.

B. State responsibility for human rights: Levels and nature of obligations

52. Wherever there is a right, there must be a duty-holder. Under human rights law the state has the primary responsibility for the implementation of human rights. Governance must therefore be so constructed as to obtain the optimal realization of human rights for all under the jurisdiction of the state. Additionally, governance should also be such that it facilitates the co-operation by states in respecting, promoting and protecting human rights in other countries and thus in the world community as a whole, as reflected i.a. in the passage quoted above from the Cotonou Partnership Agreement between the States of African, Caribbean and Pacific Group and the European Community, adopted in 2000.

53. Criteria for good governance should focus on institutions and process (obligations of conduct), participation (political rights and cultural rights), and outcomes (obligations of result). Democratic governance in terms of institutions and political processes is a necessary, but not sufficient guarantee for full realization of human rights, which set requirements both to the process of governance and to its results. Even fully democratic states, behaving in accordance with the political will of the majority of its population, must recognise the limitations and duties set by human rights.

54. While every state member of the United Nations has a general duty under the UN Charter to promote and protect the human rights set out in the Universal Declaration, these duties are made more specific in the relevant global and regional international instruments to which they are parties.

C. Institutional requirements

55. Modern constitutional doctrines of state government are generally built on variations of the threefold institutional division of competence between the legislative, the executive and the adjudicative branch. There are no explicit requirements under international law for states to conform to that division, but there are significant elements in the normative system of human rights which point in that direction, some implicitly and others explicitly. The requirement of independent courts is explicitly inscribed in international human rights instruments (Article 14 ICCPR and Article 6 ECHR being the most prominent provisions). Furthermore, international human rights law require legality: Many provisions require the use of law as a safeguard, e.g. against illegitimate deprivation of liberty or arbitrary limitations of freedoms of action. The underlying concern is that any tampering with the freedoms and rights of an individual must be based on pre-existing, general norms. Consequently, there must be a legislature which fulfils the procedural requirements of law-making, and it must be separate from the executive branch which implements the law and which often takes the initiative to propose new laws, but which cannot adopt the general norms.

56. It can also be shown that human rights norms require financial accountability and transparency, which also has consequences for the institutional set-up. This includes the requirement of abstention from and prevention of corruption, and responsibility for a human rights-based allocation of available resources. Under Article 2 of the Covenant on Economic, Social and Cultural Rights, states are obliged to take steps *to the maximum of their available resources* to implement the economic, social and cultural rights contained in the Covenant. Corruption by the state or its agents is a direct violation of human rights since it reduces the resources available. Transparency in financial matters is necessary to be able to monitor whether benchmarks have been met by appropriate use of available resources.

D. Requirements of participation

57. Human rights contain requirements of participation in the exercise of public power at the legislative and the executive branch. The core provisions are found in UDHR Article 21 and ICCPR Article 25, and (with less elaboration) in protocol 1 para. 4 of ECHR. These provisions are built on the principle of inclusive, popular sovereignty. It is not intended in this Chapter to discuss in general the scope of the right to participation as set out or implicit in international human rights law, but a good reference can be found in a resolution of the United Nations Commission on Human Rights at its 55th session in 1999 which proclaimed a right to democracy as part of human rights, and pointed out that

“the rights of democratic governance include, *inter alia*, the following: (a) The rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly; (b) The right to freedom to seek, receive and impart information and ideas through any media; (c) The rule of law, including legal protection of citizens' rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary; (d) The right of universal and equal suffrage, as well as free voting procedures and periodic and free elections; (e) The right of political participation, including equal opportunity for all citizens to become candidates; (f) Transparent and accountable government institutions; (g) The right of citizens to choose their governmental system through constitutional or other democratic means; (h) The right to equal access to public service in one's own country.”⁴⁷

58. The Commission also noted, in the same resolution, that the realization of all human rights - civil, cultural, economic, political and social, including the right to development - are indispensable to human dignity and the full development of human potential and are also integral to democratic society.⁴⁸

E. Obligations of conduct and result, and the obligations to respect, protect and fulfil

59. This brings us to the third important point, beyond institutions and participation. One function of human rights provisions is to set limits to or give guidance to process of governance: The state and its agents cannot use arbitrary deprivation of liberty, denial of freedom of expression or information, or prohibition of association and assembly as part of its governance. Another function is to direct the government to achieve certain results: It must ensure generally healthy conditions in society free from avoidable health risks, the government must ensure access to education for all and that everyone has a social insurance or social security. Good governance requires an active, agile state which can draw the appropriate balance in respecting the freedoms of its inhabitants and yet ensuring the results which are required from it under human rights law.

60. In light of evolving practice at the international level, there is now a broad consensus that human rights impose three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide*.⁴⁹

61. These obligations apply to all categories of human rights, but there is a difference of emphasis: For some of the civil rights, the main concern is with the obligation to respect, while for some economic and social rights, the elements of protection and provision become more important. Nevertheless, the threefold set of obligations for states - to respect, protect and fulfil -

⁴⁷ Commission on Human Rights Resolution 1999/57.

⁴⁸ Commission on Human Rights Resolution 1999/57.

⁴⁹ This tripartite level of state obligations were first officially made use of by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 12 (May 1999) para. 15: it has since been widely used in practice and scholarship.

applies to the whole system of human rights, and should therefore be taken into account in the construction of our understanding of what would constitute good governance from a human rights perspective.

62. States must, at the primary level, *respect* the integrity and freedom of the individual, her or his freedom of action, his or her use of own resources, the freedom to find a job freely chosen or accepted, and the freedom to take the necessary actions and use the necessary resources—alone or in association with others—to satisfy his or her own needs.

63. State obligations to *protect* consist of the protection of the integrity and freedom of action, including their use of own resources, against other, more aggressive or assertive subjects—protection of the child against maltreatment or exploitation, protecting the woman against violence, protection against fraud, against unethical behaviour in trade and contractual relations, against the marketing and dumping of hazardous or dangerous products. This protective function of the State applies both to civil and to economic and social rights.

64. States have also obligations to *fulfil* the rights of everyone, particularly under economic, social and cultural rights, by way of facilitation or direct provision. The duty to facilitate takes many forms, some of which are spelled out in the relevant instruments. As an example, we can refer to the European Social Charter Article 1 (concerning the right to work) para. 2, whereby states undertake to establish or maintain free employment services for all workers, and under para. 3, to provide or promote appropriate vocational guidance, training and rehabilitation. The implementation of such obligations facilitates the opportunities of the individual to obtain a work freely chosen or accepted.

65. The obligation to fulfil by way of provision consist in making available what is required to satisfy basic need when necessary. Examples of the duty to fulfil could be taken from the European Social Charter, e.g. Article 12 (the right to social security) and Article 13 (the right to social and medical assistance).

VI. Preliminary Conclusion

66. As the use of the notion “good governance” at the international and the national level shows, there is no consensus on a definition. Among the bodies of the Council of Europe there seems to be hardly any consistency or co-ordination in respect of the concept of “good governance”.

67. While it is not the purpose of this note to suggest an exact definition of good governance, the Venice Commission considers that the following elements should be included: Good governance exist in societies where democratic institutions and processes including transparency and accountability prevail, and where the authorities respect and comply with the full range of human rights.

68. It would be useful if, in order to ensure consistency on the part of the Council of Europe at least, the Council of Europe identified and adopted a definition of the term “good governance” to be used consistently within the organisation. The Venice Commission stands ready to assist in this matter.