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Rule of law as a guiding principle of the European Union's external action

Laurent Pech



CLEER

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**RULE OF LAW AS A GUIDING PRINCIPLE
OF THE EUROPEAN UNION'S EXTERNAL ACTION**

LAURENT PECH*

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Abstract

This paper aims to offer a comprehensive overview of how the EU promotes the rule of law abroad and to discuss the EU's normative effectiveness as an 'exporter' of values and principles. A brief exposé of the EU's constitutional framework is first offered to show that the rule of law must be viewed as a constitutional principle of a foundational nature that the EU is committed to promote in its relations with the wider world. The instruments by which the EU promotes the rule of law abroad will then be reviewed. It is argued that the EU, when acting as an exporter of values, tends to pay little attention to conceptual issues and largely equates the rule of law with a soft ideal whose content is largely delineated on a case-by-case basis. It is contended, however, that the EU is not exporting a vague or incoherent ideal. On the contrary, the EU clearly promotes a broad and substantive understanding of the rule of law and its legislative and policy instruments all defend the view that the rule of law alongside democracy and respect for human rights must be understood as a set of intertwined and mutually reinforcing principles. It logically follows that while EU instruments may offer different definitions and pursue too many distinct objectives, they nevertheless demonstrate that the EU's understanding of the rule of law goes beyond the so-called formal or thin approach. In the final part of this paper, the EU's role as an exporter of values and principles will be examined from two angles: the normative impact of EU rule of law policies and actions at the international level and their effectiveness. Two main points will be made. Firstly, as an international standard-setter, the EU cannot claim great successes but this can be directly linked to an apparent lack of interest in conceptualisation issues and the fact that the EU promotes a conception that is largely consensual amongst the foremost international organisations. Secondly, the EU should consider taking into account the multiple indexes, checklists and other indicators which have been developed to measure and monitor countries' adherence to the rule of law in order to better identify shortcomings, suggest appropriate reforms and track progress (or lack thereof) in a less impressionistic and uncoordinated manner than is currently the case.

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'One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles. ... The concept is suddenly everywhere — a venerable part of Western political philosophy enjoying a new run as a rising imperative of the era of globalization.'¹

'Of all the dreams that drive men and women into the streets, from Buenos Aires to Budapest, the "rule of law" is the most puzzling.'²

1. Introduction

The House of Lords, perhaps surprisingly, considering the ancient contribution of the English legal tradition to the principle of the rule of law, was recently forced to conclude that it 'remains a complex and in some respects uncertain concept'³ notwithstanding its inclusion in the British statute book in 2005.⁴ Despite or maybe because of its complex and protean nature, all international organisations and most, if not all, national governments are keen to articulate their support for the rule of law. Indeed, the rule of law is generally viewed as a 'good thing', not only from a legal and political point of view but also from an economic one, so much so that it is said to have 'become the motherhood and apple pie of development economics.'⁵ In other words, it is widely believed that a society governed by the rule of law is more likely to be properly governed and to enjoy peaceful as well as sustainable economic growth. Because of this prevalent consensus, it has been convincingly argued that 'no other single political ideal has ever achieved global endorsement,'⁶ which means that the rule of law 'stands in the peculiar state of being *the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means.'⁷

Whilst definitional issues will be largely addressed, the main purpose of this paper is to offer a comprehensive overview of how the EU promotes compliance with the rule of law abroad and to question the EU's effectiveness as a rule of law 'exporter'. In order to make sense of the nature and importance of the multiple provisions conferring on the EU such a role and mission, part I of this paper offers a brief and mostly descriptive exposé of the EU's constitutional framework. This introductory part aims to make clear that the rule of law must be viewed as a con-

¹ T. Carothers, 'The Rule-of-Law Revival', in T. Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington DC: Carnegie Endowment for International Peace 2006), at 3.

² G. Fletcher, *Basic Concepts of Legal Thought* (Oxford: Oxford University Press 1996), at 11.

³ House of Lords Select (Committee on the Constitution), 'Relations between the executive, the judiciary and Parliament', 151 *HL Paper* (2007) at 12, para. 24.

⁴ See Section 1 of the Constitutional Reform Act 2005: 'This Act does not adversely affect (a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle.'

⁵ 'Economics and the rule of law. Order in the Jungle', *The Economist* (London, 13 March 2008). For the argument that one should not lament the fact that intellectual and policy involvement with the rule of law are no longer the exclusive purview of lawyers and the need for lawyers to rethink how they approach the concept, see A. Magen, 'The Rule of Law and Its Promotion Abroad: Three Problems of Scope', 45 *Stanford Journal of International Law* (2009) 51.

⁶ B. Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge: Cambridge University Press 2004), at 3-4.

⁷ *Ibid.*

stitutional principle of a foundational nature, which the EU has committed to promote in its relations with the wider world.

The instruments adopted on the basis of this constitutional framework and by which the EU seeks to promote compliance with the rule of law abroad are reviewed in Part II. This assessment reveals that the EU, when acting as an exporter of values, tends to pay little attention to conceptual issues and largely equates the rule of law with a soft ideal whose content is largely delineated on a case-by-case basis. It will be shown, however, that the EU is not exporting a vague or incoherent ideal notwithstanding the use, every so often, of superficial, diverse and/or unconvincing definitions. Indeed, in virtually all instances, the EU clearly promotes a broad and substantive understanding of the rule of law. This essentially means that the EU constantly links the rule of law with the principles of democracy and respect for human rights, these principles being viewed as a set of intertwined and mutually reinforcing principles on which any polity that aspires to political stability, peaceful and sustained economic and social development, must be based. It logically follows that while EU instruments may offer different definitions and pursue too many distinct objectives, they nevertheless demonstrate that the approach promoted by the EU goes beyond the formal or so-called thin theory,⁸ which is prevalent, for instance, in US legal scholarship,⁹ and is often presented as the sole approach likely to be universally embraced.

In the third and final part of this paper, the EU's role as an exporter of values and principles is examined from two angles: the normative impact of EU rule of law policies and actions and their effectiveness. Concerning the normative impact of EU policies, in particular with respect to the development or shaping of an international standard, it is argued that the EU cannot claim much success if only because of an apparent lack of interest in conceptualisation issues and the fact that the EU promotes a broad and substantive understanding of the rule of law that is largely consensual amongst the most important international organisations. In other words, the EU should consider adopting an authoritative and comprehensive document outlining the EU's conception of the rule of law, the particular role of the EU and the comparative advantages of EU intervention. That being said, one must admit that the current international normative environment offers little room for the EU to exercise some decisive normative leadership since it is far from the sole international organisation which seeks to promote a substantive and holistic concept of the rule of law, whereas a consensus has emerged regarding 'the core meaning of

⁸ Theories emphasising the formal/procedural aspects of the rule of law are often referred to as 'thin' theories and are opposed to 'thick' theories that additionally incorporate substantive notions of justice. For further discussion, see e.g. R. Peerenboom, 'Varieties of Rule of Law. An Introduction and Provisional Conclusion', in R. Peerenboom (ed.), *Asian Discourses of Rule of Law* (London: Routledge 2004), pp. 2-10. It is nonetheless important to remember, a point forcefully made by B. Tamanaha, *supra* note 6, at 92, that one should not seek to rigidly oppose these two schools of thought as 'the formal versions have substantive implications and the substantive versions incorporate formal requirements'.

⁹ US strategies and instruments, however, are largely similar to the ones devised by the EU according to A. Magen, T. Risse and M. McFaul (eds.), *Promoting Democracy and the Rule of Law. American and European Strategies* (Basingstoke: Palgrave Macmillan 2009). It would be wrong, therefore, to seek to distinguish the EU from the US by describing the EU as a unique 'normative power' unconcerned or unwilling to use coercive tools and negative conditionality when it comes to promoting its values abroad. For a recent take on the concept of 'normative power Europe' and in particular on the different mechanisms through which normative power is exercised, see T. Forsberg, 'Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type', 49 *Journal of Common Market Studies* (2011) 1.

the rule of law and the elements contained within it.¹⁰ Finally, this paper reviews the work currently being undertaken by numerous organisations such as the World Bank or the World Justice Project on the quantifiable indicators and other benchmarks one should use to both measure a country's adherence to the rule of law and devise effective rule of law programmes. With respect to the EU, it is suggested that the time has come to reflect on the multiple indexes and indicators which have been developed in the past decade to measure and monitor countries' adherence to the rule of law. Whilst these indexes and indicators are far from perfect, they may nonetheless be helpful when it comes to identifying third countries' shortcomings, defining appropriate reforms, and tracking progress (or lack thereof) in a less impressionistic and uncoordinated manner than is currently the case.

2. The enshrinement of the rule of law in the EU Treaties

In a celebrated judgment known as *Les Verts*, the European Court of Justice referred to what was then known as the European Community as a 'Community based on the rule of law.'¹¹ This first judicial reference was followed by multiple references made to the rule of law in the EU's founding treaties. These references were largely symbolic at first as the EU's Member States, for the most part, merely decided to confirm 'their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.'¹² However, subsequent and successive treaty amendments reinforced the constitutional significance of the rule of law and made clear that this principle had both an internal (section 2.1) and external (section 2.2) dimension.

2.1 Internal dimension: rule of law as a foundational and common value¹³

The 1997 Amsterdam Treaty inserted a new important provision into the EU Treaty which provided that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.'¹⁴ By stipulating that the EU is founded on – and must not merely respect – these principles, this Treaty provision made finally clear that these are foundational or defining principles that 'underlie and inform the purpose and character'¹⁵ of the EU's politico-legal system as a whole. Another remarkable change was the provision enabling the EU to subject its Member States to EU sanctions were they found guilty of a serious and persistent breach of the principles previously mentioned.¹⁶

¹⁰ Council of Europe (Venice Commission), *Report on the Rule of Law*, Study No. 512/2009, CDL-AD(2011)003rev, Strasbourg, 4 April 2011, para. 35.

¹¹ Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, para. 23.

¹² Preamble of the TEU.

¹³ This section draws from L. Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', 6 *European Constitutional Law Review* (2010) 359.

¹⁴ Ex-Art. 6(1) TEU.

¹⁵ To paraphrase T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press 2003), at 4.

¹⁶ See ex-Art. 7 TEU. This provision was further amended by the 2001 Nice Treaty to additionally authorise *preventive* sanctions in the situation where there is a clear risk of a serious breach by a Member State. The Art. 7 TEU procedure has never been used.

For reasons that remain largely unclear, the drafters of the defunct Constitutional Treaty decided to review the 1997 formula whereby the EU is said to be founded on a number of common principles, and opted instead for the concept of common values whilst also multiplying the number of these values. As for the 2007 Lisbon Treaty, which entered into force on 1 December 2009, it merely reproduced the provision previously contained in the Constitutional Treaty, which means that the Treaty on European Union (TEU) now contains a provision known as Article 2 TEU and which provides that:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Strangely enough, the rule of law is still referred to as a principle in several other Treaty provisions.¹⁷ The use of the term value rather than principle in Article 2 TEU does not seem, however, to reflect any clear intention to introduce a new and meaningful distinction between, for instance, foundational but non-justiciable EU values and foundational legally enforceable principles. Irrespective of this ill-advised terminological change, one may nonetheless contend that Article 2 TEU represents a positive development in the sense that European citizens can only welcome the explicit linkage of the EU's constitutional system with the key and traditional tenets of Western constitutionalism. But in giving emphasis to these abstract 'ideals', the EU Treaties are not particularly innovative when compared to national constitutions.¹⁸ A more remarkable aspect is that the rule of law is hardly ever mentioned as a *stand-alone principle*. In most cases, the principles of democracy and respect for fundamental rights immediately accompany the rule of law. This is particularly true whenever the rule of law is mentioned as an objective of the EU's external policies.

2.2 External dimension: rule of law as a benchmark and guiding principle

In the EU's constitutional framework, the rule of law is not only referred to as a common foundational value but also used as a benchmark to assess the actions of candidate countries and as a transversal foreign policy objective. Viewed in light of national constitutional traditions, these features may seem quite original. Two caveats are nonetheless in order. The EU's supranational and dynamic character explains the first feature. Whilst federal states may have constitutional clauses according to which their constitutive entities must comply with *inter alia* the rule of

¹⁷ See e.g. Art. 21(1) TEU discussed *infra* in Section 2.2.

¹⁸ See e.g. Art. 1(1) of the Spanish Constitution: 'Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system'; or Art. 3 of the Croatian Constitution: 'Freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution.'

law,¹⁹ one of the EU's *raison d'être* is to expand and welcome more members. As a result, compliance with the rule of law is also a condition for EU membership. The EU, however, has not been solely concerned with increasing compliance with the rule of law in candidate countries. In fact, the EU Treaties initially assigned to the EU's foreign and security policy and development cooperation policy the same objective of developing and consolidating the rule of law²⁰ even before formally requiring that any European country wishing to join the EU must respect the principles on which the EU is founded.²¹ It must be said, however, that the principles of democracy and respect for fundamental rights have long been viewed as decisive elements any candidate country must strictly adhere to. One may refer, for instance, to the 1983 *Solemn Declaration on European Union* known as the Stuttgart Declaration, where the Heads of State and Government of the EU Member States reaffirmed that 'respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of European Communities.'²² The absence of any reference to the rule of law in the Stuttgart Declaration merely shows that this concept was not as rhetorically dominant as it later became in the early 1990s. And indeed, at the Copenhagen Summit in 1993, when faced with fresh applications for admission, the EU decided to require that candidate countries fulfil a set of 'objective' criteria. The rule of law was mentioned as one of the key elements of the political criterion, which itself is only one of three criteria:

1. The stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (political criterion);
2. The existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the EU (economic criterion);
3. The ability to take on membership obligations including adherence to the aims of political, economic and monetary union ('administrative' criterion).²³

A few years later, as described above, the Amsterdam Treaty stressed the importance of the political criteria and inserted a new provision currently known as Article 49 TEU which provides, *inter alia*, that 'any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.'²⁴ This commitment to promoting the EU's values is new but perfectly in line with the EU Member States' decision to use the Lisbon Treaty to make the promotion of these values a new transversal objective of the EU whenever it acts *externally*, and more precisely on the international scene.

¹⁹ See e.g. Art. 28(1) of the German Constitution: 'The constitutional order in the States must conform to the principles of the republican, democratic, and social state under the rule of law, within the meaning of this Constitution.'

²⁰ See ex-Art. 11 TEU and ex-Art. 177(2) TEU.

²¹ See ex-Art. 49 TEU, which was inserted into the TEU by the Amsterdam Treaty.

²² 6 *Bulletin of the European Communities* (1983) pt. 1.6.1.

²³ *European Council Conclusions of 21-22 June 1993*, SN 180/1/93 REV 1, Copenhagen, 21-22 June 1993.

²⁴ By increasing the number of values on which the EU is founded, the Lisbon Treaty formally reinforces the conditions of eligibility for accession to the EU. Not only will candidate countries have to respect additional European values, such as equality and the rights of persons belonging to minorities, they will also have to demonstrate their commitment to promoting them although the new Art. 49 TEU remains silent as to how to do so.

Before the Lisbon Treaty, it was possible to distinguish between three main areas where the rule of law was formally viewed as a 'pure' policy objective rather than a politico-legal benchmark as in the case of the EU enlargement policy. Development and consolidation of the rule of law was first mentioned as one of the EU's foreign and security policy objectives,²⁵ while the EC Treaty referred to the rule of law as one of the general objectives of the EC's policy of development cooperation and of the EC's policy in the area of economic, financial and technical cooperation measures with third countries.²⁶ The proliferation of provisions of this nature has been rightly criticised as a source of unnecessary complexity and a key factor in the proliferation of not always convergent definitions.²⁷ This criticism will be addressed below. What is indisputable and worth noting at this stage is that the EU Member States, when negotiating the Lisbon Treaty, were keen to improve the coherence of the EU's external action.²⁸ This explains, for instance, the new set of general provisions dedicated to this area, among which Article 21 TEU is the most important as far as the rule of law is concerned. Indeed, the new provision makes clear that the rule of law is to be regarded as a guiding principle of EU's foreign policy, which must be not only respected but also promoted abroad via common policies and actions:

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.
The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. ...
2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law ...

As regards the meaning and scope of the rule of law in the context of Title V on the Union's external action, two remarks can be made. Firstly, the rule of law is never defined. While one might regret this lack of a formal definition, it is far from unprecedented and does not necessarily mean that the rule of law, as a constitutional principle of EU law, is inevitably and unjustifiably vague. One must nonetheless admit that the rule of law, as a foreign policy objective, does not impose precise legal obligations on EU institutions but rather operates as a 'soft' and undefined ideal that is supposed to broadly guide – some may also restrain – EU actors when they act in the international arena or adopt and implement external policies.

²⁵ See ex-Art. 11(1) TEU.

²⁶ See ex-Art. 177(1) TEC and ex-Art. 181(a)(1) TEC, respectively.

²⁷ E. Wennerström, *The Rule of Law and the European Union* (Uppsala: Iustus Förlag 2007), chapter 5.

²⁸ See P. Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure. In Search of a New Balance between Delimitation and Consistency', 47 *Common Market Law Review* (2010) 987.

Secondly, the rule of law is constantly linked to the principles – or values – of democratic government and human rights protection. This would seem to strongly suggest that these principles must not be confused with each other but rather understood as *interconnected* and *interdependent* principles. In other words, they must not only be construed in light of each other, but they must be viewed as mutually reinforcing principles that are dependent on each other.²⁹ The EU's constitutional framework cannot therefore fully satisfy those faithful to a strict 'formal' understanding of this principle. Indeed, while Article 2 TEU indicates that the rule of law should not be confused with democracy, justice, equality, etc., it also makes clear that the concept is not 'compatible with gross violations of human rights' as Raz controversially suggested,³⁰ or cannot be properly satisfied by non-democratic regimes. Beyond this, the EU Treaties say very little about the meaning of the rule of law and the elements contained within it and in particular, how the EU should promote compliance with these elements. It is therefore essential to further explore the rule of law instruments adopted by the EU, in order to better understand what exactly is being promoted and how it is being promoted.

3. The EU's external upholding and promotion of the rule of law

A comprehensive overview of the wide variety of instruments used by the EU to uphold and promote the rule of law 'in its relations with the wider world'³¹ is offered below (section 3.1). Any global and transversal assessment of these instruments should lead one to conclude that the rule of law is undoubtedly a value that the EU relentlessly seeks to export 'beyond the borders of the Union by means of persuasion, incentives and negotiation,'³² but other more 'punishing' means have also been used and EU cooperation with third countries is normally conditioned to the respect of the EU's values by these countries. When looking at the evolution of all EU instruments over the past few years, it would appear that the most significant change is the 'legislative mainstreaming' of the EU's key foundational values. To put it differently, rule of law but also fundamental rights and democratisation objectives have been progressively integrated into all aspects of the EU's external policies and actions. This process of legislative mainstreaming is a logical answer to the enshrinement of these foundational values as transversal principles that must constantly guide EU action on the international scene.

As regards the diverse and numerous definitions contained in the EU instruments (section 3.2), it will be argued that notwithstanding their diversity and superficiality and the regrettable lack of a transversal and authoritative conceptual document, the EU is not seeking to 'export' a vague or incoherent ideal. Indeed, from a transversal analysis of the EU instruments studied below, one may conclude that the EU is not merely seeking compliance with a set of legal requirements on how laws are made, adopted and enforced. Indeed, the EU pursues a much more ambitious

²⁹ One may therefore regret that 'indivisible' does not precede the list of principles enumerated by this provision.

³⁰ J. Raz, 'The Rule of Law and its Virtue', in J. Raz, *The Authority of Law. Essays on Law and Morality* (Oxford: Clarendon Press 1979), at 221.

³¹ See new Art. 3(5) TEU: 'In its relations with the wider world, the Union shall uphold and promote its values and interests...'

³² Opinion of AG Mengozzi in Case C-354/04 P *Gestoras Pro Amnistia* [2007] ECR I-1579, para. 79.

agenda under the heading rule of law as its policy instruments clearly defend a 'thick' and holistic conception, that is, an understanding of the rule of law as a principle that includes substantive components as well as formal elements, and which requires a democratic and liberal constitutional order giving full effect to human rights.

3.1 *The instruments used to promote the rule of law*

The EU 'engages in promoting its values in a variety of ways'.³³ It may simultaneously rely on unilateral trade instruments, technical and financial assistance instruments, bilateral 'soft' instruments, or seek to promote EU's values by developing special 'partnerships' or by making them an 'essential element' of a contractual relationship.³⁴ Whilst other taxonomies are obviously possible,³⁵ non-legally binding instruments will be reviewed first. A distinction between legally binding unilateral (or autonomous) instruments from bilateral (or contractual) instruments will then be made.³⁶

3.1.1 Soft instruments

To uphold and promote its foundational values in relations with non-EU countries, the EU has not refrained from relying on traditional and 'soft' diplomatic instruments. In other words, EU institutions regularly publish conclusions, adopt resolutions or issue public declarations calling upon a national government or any other relevant parties to respect its values, or welcoming positive developments as regards these values. More originally, the EU has also issued non-legally binding guidelines, starting with one on the death penalty in 1998, in order to clarify its political priorities and help EU representatives advance the EU's external human rights policy.³⁷ Unsurprisingly, the eight existing guidelines do not directly seek to promote compliance with the rule of law. To do so, the EU has relied instead on another 'soft' instrument: the so-called human rights dialogues.

The EU has now established nearly forty dialogues and other dedicated discussion forums with third countries and it appears fair to say that the EU seems 'par-

³³ M. Cremona, 'Values in EU Foreign Policy', in M. Evans and P. Koutrakos (eds.), *Beyond the Established Legal Orders. Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart 2011), at 292.

³⁴ *Ibid.*, at 293 et seq.

³⁵ See e.g. T.A. Börzel and T. Risse, 'Venus Approaching Mars? The European Union's Approaches to Democracy Promotion in Comparative Perspective', in A. Magen, T. Risse, and M. McFaul, *supra* note 9, at 34. The authors usefully distinguish the diverse EU instruments linked to the promotion of its values by the nature of the steering mechanisms by which the values are being diffused: soft instruments tend to rely on persuasion and learning mechanisms; technical and financial assistance programmes favour capacity-building mechanisms whereas unilateral and bilateral cooperation agreements favour coercive means via positive and negative conditionality. They further contend that the mechanisms and incentives used by the EU vary only slightly with the type of third country (i.e. candidate country, partner country, etc.).

³⁶ One should not read into this particular order of presentation any implicit and personal normative assumption nor is it my intention to suggest that non-legally binding instruments are less effective than legally binding ones.

³⁷ European Commission, *Human Rights and Democracy in the World: Report on EU Action July 2008 to December 2009*, May 2010, at 21, available at <www.eeas.europa.eu/human_rights/docs/2010_hr_report_en.pdf>.

ticularly infatuated' with this discursive model.³⁸ Before concisely discussing the effectiveness of these dialogues, one should note that while they are primarily used to promote respect for human rights, official literature also indicates that issues linked to democracy and the rule of law ought to be included in all 'meetings and discussions with third countries and at all levels.'³⁹ In fact, the rule of law has been identified as one of the 'priority issues, which should be included on the agenda for every dialogue.'⁴⁰ Questions relating to the rule of law may furthermore be raised in the context of other forms of political dialogue and some bilateral agreements may also include specific provisions. For instance, the so-called Cotonou Agreement, which will be subject to further analysis below, commits its signatories to engage in 'comprehensive, balanced and deep' dialogue, in the context of which 'a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance' must be undertaken.⁴¹

The Commission regularly claims some success as regards the promotion of the rule of law via human rights dialogues. To give a single example, a Commissioner once argued that 'despite a lack of progress on a number of core EU concerns,' the EU-China dialogue 'has had a certain influence on some of the positive developments in China over the last years, like, for instance, the decision taken on the review of all death penalty cases by the Supreme People's Court or towards the prevention of torture' and that the dialogue 'has also allowed for the implementation of a number of cooperation projects in the field of the rule of law.'⁴² Claiming some positive influence, however, is not the same thing as proving a causal link between the substance of the dialogue and 'positive' developments in the relevant national legal system. In fact, one of the recurrent problems with human rights dialogues is that they usually take place in the absence of specific benchmarks⁴³ and that the Commission always seems intent to avoid offering any hard evidence that some specific results are due to a successful dialogue with the relevant country. The principle of the rule of law might well be mentioned as a benchmark but it is usually done in a very open-ended manner, hence making any demonstration of compliance with it *un jeu d'enfant*, that is, an easy thing. One may therefore find it difficult to disagree with the European Parliament's call for the development of

³⁸ For K. Roth, 'the EU seems to have become particularly infatuated with the idea of dialogue and cooperation, with the EU's first high representative for foreign affairs and security policy, Catherine Ashton, repeatedly expressing a preference for "quiet diplomacy" regardless of the circumstances' ('A Facade of Action: The Misuse of Dialogue and Cooperation with Rights Abusers', in Human Rights Watch, *World Report 2011. Events of 2010* (New York: Seven Stories Press 2011), at 4).

³⁹ Council of the European Union, *European Union Guidelines on Human Rights Dialogues*, 13 December 2001 (not published in OJ), para. 3.1. The guidelines were updated in 2004 and a copy of the document is available at <http://eeas.europa.eu/human_rights/dialogues/index_en.htm>.

⁴⁰ *Ibid.*, para. 5.

⁴¹ Art. 8(4) of Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 – Protocols – Final Act – Declarations, OJ 2000 L 317/3.

⁴² Response given by Ms Ferrero-Waldner on behalf of the European Commission to the written question asked by MEP Agnoletto on the 'Defence of human rights in China' (E-1285/07), OJ 2007 C 293.

⁴³ In the context of the EU-China dialogue, and to be fair, one must note that the Council did attempt to 'define the specific areas in which the European Union will be seeking progress through the dialogue process' (2327th General Affairs Council meeting (5279/01), Brussels, 22-23 January 2001, at II). To give a single example, the EU has required China to better respect the fundamental rights of all prisoners, including those arrested for membership of the political opposition, unofficial religious movements or other movements.

'specific quantifiable indices and benchmarks in order to measure the effectiveness'⁴⁴ of dialogues on human rights in order to 'avoid any repeated failures of EU human rights consultations.'⁴⁵ In a similar fashion, a recent report by Human Rights Watch further reiterated the need for 'concrete and publicly articulated benchmarks' as this 'would give clear direction to the dialogue and make participants accountable for concrete results.'⁴⁶ In the meantime, many share the European Parliament's rather gloomy diagnosis whereby a significant number of human rights dialogues and consultations with non-EU countries do not demonstrate any substantial and concrete achievements.⁴⁷

3.1.2 Legally binding unilateral trade, technical and financial instruments

3.1.2.1 Unilateral trade instruments

Since 1971, the EU has granted trade preferences to developing countries in the framework of the so-called generalised system of (tariff) preferences (GSP). The current GSP regime is detailed in Regulation 732/2008⁴⁸ and it currently provides non-reciprocal preferential access to the EU market to more than 170 developing countries. A particularly remarkable feature of this trade arrangement is that it includes a special incentive arrangement known as GSP+, which offers additional trade preferences to the most vulnerable developing countries on the condition that they ratify and effectively implement a set of core international conventions on human and labour rights, environmental protection and good governance. By the same token, temporary withdrawal of trade preferences previously granted by the EU is possible – specialists speak here of negative conditionality – where the beneficiary country is guilty of serious and systematic violations of the principles laid down in certain international conventions concerning core human rights and labour rights or related to the environment or good governance.

In order to police compliance, the EU demands that each beneficiary country accepts regular monitoring and review of its implementation record in accordance with the implementation provisions of the conventions it has ratified. It is for the Commission to keep under review the status of ratification and effective implementation of the international conventions listed in Annex III of Regulation 732/2008 by examining available information from relevant monitoring bodies. It would be wrong to think that the GSP+ regime does not ever give rise to sanctions. For instance, due to the political situation in Myanmar and in Belarus, the EU decided to maintain

⁴⁴ European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202(INI)), para. 21.

⁴⁵ *Ibid.*, para. 58.

⁴⁶ K. Roth, *supra* note 38, at 8. The author further remarks that 'the failure to set clear, public benchmarks is itself evidence of a lack of seriousness, an unwillingness to deploy even the minimum pressure needed to make dialogue meaningful' and harshly, albeit fairly, criticises the EU for arguing 'that publicly articulated benchmarks would introduce tension into a dialogue and undermine its role as a "confidence-building exercise," as if the purpose of the dialogue were to promote warm and fuzzy feelings rather than to improve respect for human rights,' *ibid.*, at 8-9.

⁴⁷ European Parliament resolution of 16 December 2010, see *supra* note 44, para. 157.

⁴⁸ Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December and amending Regulations (EC) 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007, OJ 2008 L 211/1.

the temporary withdrawal of all tariff preferences in respect of imports of products originating from these two countries.⁴⁹

Some concerns have nevertheless been expressed with regard to the functioning of the GSP+ regime,⁵⁰ but to merely focus on the rule of law, the most striking aspect of the GSP and GSP+ regimes is that they make *no* explicit reference to this cherished principle. This is rather surprising as recital 2 of Regulation 732/2008 refers to the need for the EU to implement a common commercial policy that is consistent and consolidates the objectives of development policy. And before the Lisbon Treaty, the EC Treaty did include a provision providing that EC policy in the area of development cooperation 'shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.'⁵¹ It might be that the concept of 'good governance' implicitly includes the requirement to comply with the rule of law but it is difficult to be affirmative considering the absence in Regulation 732/2008 of any precision on what good governance entails.⁵² However, with the arguable exception of the 2003 United Nations Convention against Corruption – the fight against corruption being an issue that the EU and UN tend to link with the preservation of the rule of law⁵³ – none of the international conventions mentioned in Regulation 732/2008 seek to advance any of the issues normally associated with the rule of law. Unilateral trade instruments, therefore, are not particularly instructive as far as the EU's external promotion of the rule of law is concerned.

3.1.2.2 Technical and financial assistance instruments

The technical and financial instruments used by the EU to promote its foundational values have gone through numerous and significant changes since the adoption in 1999 of two major regulations which aimed to finally create a streamlined implementing framework in order for the EU to more effectively promote the gen-

⁴⁹ *Ibid.*, recital 23.

⁵⁰ The European Parliament recently considered that the GSP+ regime 'must be more closely and transparently monitored, including by the use of detailed Human Rights Impacts Assessments, a consistent and fair benchmarking system, and open consultations when the preference is being awarded, and that trade preferences must be granted only to countries that have ratified and effectively implemented key international conventions on sustainable development, human rights – particularly child labour – and good governance,' see *supra* note 44, para. 112.

⁵¹ Ex-Art. 177 TEC. New Art. 208 TFEU confirms that this obligation remains: 'Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action.'

⁵² For a definition, see Art. 9(3) of the Cotonou Agreement. This agreement, however, does make a distinction between good governance and the rule of law.

⁵³ Signed on 9 December 2003, the UN Convention contains several references to the rule of law. Its Preamble indicates that the States Parties to the Convention share the view that corruption endangers 'sustainable development and the rule of law' and that 'the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law'. More significantly, Art. 5(1) on preventive anti-corruption policies and practices requires that 'each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law.' Regrettably, Art. 5(1) does not explain what these principles are. As for an example of EU act linking rule of law and fight against corruption, see Commission Decision 2006/929/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, OJ 2006 L 354/58. Recital 3 provides that the principle of the rule of law 'implies for all Member States the existence of an impartial, independent and effective judicial and administrative system properly equipped, *inter alia*, to fight corruption and organised crime.'

eral objective of developing and consolidating democracy and the rule of law and of respecting human rights in its relations with third countries.⁵⁴ For the sake of concision, rather than detailing this framework and the subsequent regulations that further refined it, only brief references will be made to the most important technical and financial instruments currently in force.

Regulation 1889/2006 is the main financial autonomous instrument the EU relies on to promote its values.⁵⁵ It establishes a European Instrument for Democracy and Human Rights (EIDHR) under which the EU may provide assistance in order to contribute 'to the development and consolidation of democracy and the rule of law, and of respect for all human rights and fundamental freedoms,'⁵⁶ within the framework of the EU's development and cooperation policy with third countries. The EIDHR complements other instruments such as the European Neighbourhood and Partnership Instrument (ENPI),⁵⁷ or the Development Co-operation Instrument (DCI),⁵⁸ which all provide EU assistance through bilateral development cooperation in order *inter alia* to finance activities that promote and strengthen the rule of law in relevant countries. What makes the EIDHR rather unique is its global scope and the fact that it allows for financial assistance to be directly granted to civil society

⁵⁴ See Council Regulation (EC) No 975/1999 of 29 April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms, *OJ* 1999 L 120/1 and Council Regulation (EC) No 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries, *OJ* 1999 L 120/8. Both Regulations expired on 31 December 2006.

⁵⁵ See Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, *OJ* 2006 L 386/1 (hereinafter: EIDHR Council Regulation). Replacing the previous EIDHR, this instrument is specifically designed to promote democratic principles and human rights and is supposed to complement all other EU programmes that may include democracy and human rights objectives. Whilst the rule of law is not explicitly mentioned in its title, the Regulation makes clear that EU financial assistance is available for actions that seek to strengthen the rule of law, promote the independence of the judiciary, encourage and evaluate legal and institutional reforms, and promote access to justice (Art. 2(1)(a)(ii)) or that participate to the 'strengthening of the international framework for the protection of human rights, justice, the rule of law and the promotion of democracy' (Art. 2(1)(c)).

⁵⁶ *Ibid.*, Art. 1.

⁵⁷ Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, *OJ* 2006 L 310/1. This Regulation supports the EU's European Neighbourhood Policy (ENP) by establishing an instrument to provide EU financial assistance for the development of an area of prosperity and good neighbourliness involving the EU and countries from Eastern Europe, the southern Caucasus and the Mediterranean. EU assistance shall be used, *inter alia*, to support measures 'promoting the rule of law and good governance, including strengthening the effectiveness of public administration and the impartiality and effectiveness of the judiciary, and supporting the fight against corruption and fraud' (Art. 2(a)(d)).

⁵⁸ Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, *OJ* 2006 L 378/41. Under this Regulation, the EU may finance measures aimed at supporting cooperation with developing countries in the context of the EU's development cooperation policy, which is itself guided by the Millennium Development Goals (MDGs) adopted by the United Nations General Assembly on 8 September 2000. Assistance is mostly provided to finance actions in Asia, Latin America, central Asia and the Middle East and the primary objective of this instrument is poverty eradication and the achievement of the MDGs. EU financial assistance is nonetheless also available for actions that seek to 'consolidate and support democracy, the rule of law, human rights and fundamental freedoms, good governance, gender equality and related instruments of international law' (Art. 2(1)).

groups independently of the consent of the national authorities of where these groups work or are based.

Some technical and financial instruments are specifically aimed at actual and potential candidate countries. One may mention, for instance, Regulation 1085/2006, which establishes a new Instrument for Pre-Accession Assistance (IPA) for the EU's 2007-2013 budgetary period.⁵⁹ The primary aim pursued by the IPA is to help candidate countries in their progressive alignment of their administrative and legal frameworks with EU standards and policies, by financing relevant activities. Article 2 of the IPA Regulation merely requires that these activities should support a wide range of institution and capacity-building measures in all beneficiary countries with the view of strengthening inter alia the rule of law, 'including its enforcement'. Technical assistance is also available in the form of administrative cooperation measures involving public-sector experts dispatched from Member States.⁶⁰

A transversal look at the set of technical and financial instruments adopted in 2006 for the period 2007-2013, reveals the mainstreaming of the EU's objective of promoting and consolidating the values of democracy, the rule of law and respect for human rights in its relations with third countries.⁶¹ Perhaps more importantly, suspension clauses have also been quasi systematically included, and they can now be found in financial programmes dedicated to candidate countries,⁶² neighbourhood countries,⁶³ developing countries,⁶⁴ but not, for instance, in the Regulation

⁵⁹ Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), OJ 2006 L 210/82.

⁶⁰ Ibid, Art. 15(2).

⁶¹ All technical and financial instruments adopted in 2006 invariably recall the EU's commitment to the promotion of the values of democracy, the rule of law, respect for human rights and fundamental freedoms. As a result, some questioned the need for a specific financial instrument such as the EIDHR but the European Parliament was keen to retain an instrument that can directly support civil society organisations and operate without host-country consent.

⁶² See e.g. Art. 21 of Council Regulation 1085/2006, *supra* note 59, on suspension of EU assistance: '1. Respect for the principles of democracy, the rule of law and for human rights and minority rights and fundamental freedoms is an essential element for the application of this Regulation and the granting of assistance under it.'

2. Where a beneficiary country fails to respect these principles or the commitments contained in the relevant Partnership with the EU, or where progress toward fulfilment of the accession criteria is insufficient, the Council, acting by qualified majority on a proposal from the Commission, may take appropriate steps with regard to any assistance granted under this Regulation. The European Parliament shall be fully and immediately informed of any decisions taken in this context.'

⁶³ See e.g. Art. 28 of Regulation (EC) No 1638/2006, *supra* note 57, on suspension of EC assistance: '1. Without prejudice to the provisions on the suspension of aid in partnership and cooperation agreements and association agreements with partner countries and regions, where a partner country fails to observe the principles referred to in Article 1 [liberty, democracy, respect for human rights and fundamental freedoms and the rule of law], the Council, acting by a qualified majority on a proposal from the Commission, may take appropriate steps in respect of any Community assistance granted to the partner country under this Regulation.'

2. In such cases, Community assistance shall primarily be used to support non-state actors for measures aimed at promoting human rights and fundamental freedoms and supporting the democratisation process in partner countries.'

⁶⁴ See Art. 37 on suspension of assistance of Regulation 1905/2006, see *supra* note 58: 'Without prejudice to the provisions on suspension of aid in partnership and cooperation agreements with partner countries and regions, where a partner country fails to observe the principles referred to in Article 3(1) [democracy, the rule of law, respect for human rights and fundamental freedoms], and where consultations with the partner country do not lead to a solution acceptable to both parties, or if consultations are refused or in cases of special urgency, the Council, acting by a qualified majority on a proposal from the Commission, may take appropriate measures in respect of any assistance granted to the partner country under this Regulation. Such measures may include full or partial suspension of assistance.'

dedicated to the financing of cooperation actions with developed countries.⁶⁵ Where present, these clauses *negatively* condition EU financial assistance to the respect of the EU's values or principles – the two terms being used interchangeably most of the time. They may be triggered whenever a beneficiary country fails to respect them and it is up to the Council of the Union to take 'necessary measures'. Remarkably, the EU's principles are nowhere precisely defined or explained, which means that these suspension clauses offer the EU significant political leeway in terms of deciding when a beneficiary country does not satisfactorily observe *inter alia* the rule of law. This issue will be further discussed below as suspension clauses can also be found in most of the EU's external agreements, where they coexist with 'human rights clauses'.

3.1.3 Bilateral instruments: the EU's external agreements

The EU has the power to conclude with one or more third countries or international organisations different types of international agreements,⁶⁶ and it has done so on numerous occasions. What is more intriguing is that the EU, in order to better uphold and promote its values, has progressively pushed for the systematic inclusion of a 'human rights clause' in all the trade, cooperation, dialogue, partnership or association agreements signed with third parties.⁶⁷ Without entering into further details, it may be worth mentioning that the first human rights clause was inserted into the 1992 Agreement between the European Economic Community and the Republic of Albania, which dealt with trade, commercial and economic matters.⁶⁸ With the recent inclusion of a human rights clause in a new more encompassing agreement with the very same country,⁶⁹ more than 120 countries are now parties to agreements that include a human rights clause.⁷⁰

This is a significant development as these agreements also normally contain a suspension (or non-execution) clause that allows for negative measures to be adopted by the EU where non-compliance or abuses are established.⁷¹ Furthermore, the human rights clause, despite its name, is not merely concerned about the upholding of human rights in third countries but also constitutes an important tool as

⁶⁵ Council Regulation (EC) No 1934/2006 of 21 December 2006 establishing a financing instrument for cooperation with industrialised and other high-income countries and territories, *OJ* 2006 L 405/41.

⁶⁶ See Art. 216 TFEU et seq.

⁶⁷ European Commission, *Inventory of Agreements containing the Human Rights Clause*, DG RELEX/B2 – Treaties Office, 7 July 2011.

⁶⁸ *OJ* 1992 L 343/2. Art. 1 of this Agreement provides that 'Respect for the democratic principles and human rights established by the Helsinki Final Act and the Charter of Paris for a new Europe inspires the domestic and external policies of the Community and Albania and constitutes an essential element of the present agreement.'

⁶⁹ Stabilisation and Association Agreement between the European Communities and their Member States and the Republic of Albania, *OJ* 2009 L 107/166. Art. 2 of the Agreement offers a slightly expanded clause by comparison to the 1992 EEC-Albania Agreement cited above and does explicitly refer to the rule of law: 'Respect for the democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the European Convention on Human Rights, in the Helsinki Final Act and the Charter of Paris for a New Europe, respect for international law principles and the rule of law as well as the principles of market economy as reflected in the Document of the CSCE Bonn Conference on Economic Cooperation, shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement.'

⁷⁰ European Parliament resolution of 16 December 2010, see *supra* note 44, para. 114.

⁷¹ For an inventory of agreements containing a suspension-human rights clause to which the EU is a contracting party, see *supra* note 67.

regards the promotion of the rule of law. Indeed, since the signing of the partnership agreement between the EU and members of the African, Caribbean and Pacific Group of States (ACP countries) signed in Cotonou on 23 June 2000 ('Cotonou Agreement'), the rule of law has also become an 'essential element', alongside democracy and respect for human rights, of most subsequent EU's external agreements,⁷² and most 'essential elements' clauses are modelled on Article 9 of the Cotonou Agreement:

1. Cooperation shall be directed towards sustainable development centred on the human person ... Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, *democracy based on the rule of law* [author's emphasis] and transparent and accountable governance are an integral part of sustainable development.
2. The Parties refer to their international obligations and commitments concerning respect for human rights. ... *The structure of government and the prerogatives of the different powers shall be founded on rule of law, which shall entail in particular effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law.* [author's emphasis] Respect for human rights, democratic principles and the rule of law ... shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.
3. 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 ...
4. The Partnership shall actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance. These areas will be an important subject for the political dialogue ...

This provision deserves to be cited at length as the Cotonou Agreement is usually presented as the model to emulate for all substantive human rights clauses,⁷³ following the refinement in 2005 of the procedure whereby either party may withdraw from the agreement or take 'appropriate measures' when the other party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law (the agreement's 'essential elements') or in the case where a party is guilty of a serious violation of one of these essential elements.⁷⁴ It is perhaps worth pointing out that while we have several examples of 'appropriate measures' being adopted by the EU, in all cases, these measures have been adopted against ACP countries. One partial explanation is that developed countries have objected

⁷² The European Parliament has repeatedly indicated that 'the EU should include, taking account of the nature of the agreements and the situation specific to each partner country, systematic clauses relating to democracy, the rule of law and human rights, as well as social and environmental standards', see *supra* note 44, para. 110.

⁷³ See European Parliament resolution of 14 February 2006 on the human rights and democracy clause in European Union agreements (2005/2057(INI)), OJ 2006 C 290E/107, paras. 5-6.

⁷⁴ See Art. 96 as amended by Agreement amending the Partnership Agreement between the ACP countries and the EC and its Member States, OJ 2005 L 209/27. Following this revision, it has been said that this agreement 'now presides over a sophisticated system for applying human rights conditionality to partner countries', which 'is especially notable for its mechanism of political dialogue and consultations prior to the adoption of any "appropriate measures"' (L. Bartels, *The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries*, Study prepared for the European Parliament's Committee on International Trade, 2008), at 5).

to signing up to any cooperation agreements that include a human rights clause and in fact, for countries such as China, the mere suggestion that any new partnership-cooperation agreement with the EU must include such a clause has so far prevented any progress on the conclusion of a new treaty to replace the rather antiquated 1985 Economic and Cooperation Agreement.⁷⁵

This present paper, however, is not concerned with the seemingly discriminatory enforcement of human rights clauses by the EU. More problematic from a conceptual point of view is the failure of the European Commission and Council to address the European Parliament's recurrent demand for more clarity on the standards applicable in essential elements clauses.⁷⁶ Indeed, it seems quite preposterous to set up bodies to monitor respect for human rights, the rule of law and democratic principles by EU partners in the absence of a document describing some minimum requirements or offering a list of benchmarks that would enable these bodies to assess progress on these fronts. It would seem therefore reasonable to ask for the publication of a clear set of human rights, rule of law and democracy indicators and benchmarks to 'ensure that there is a clear standard and understanding for both parties on what situations and actions may trigger'⁷⁷ the application of the human rights clauses. This lack of any explicit minimum requirements, indicators or benchmarks and more generally, the relative imprecision of the diverse EU instruments mentioned above when it comes to defining the rule of law will be now addressed.

3.2 *The definition(s) offered*

EU instruments dedicated to the external promotion of its values rarely specify what the rule of law specifically entails and when concise definitions are offered, they are normally rather superficial and not perfectly consistent with each other as variable components of the rule of law tend to be referred to.⁷⁸ This can be gleaned from the following overview of the previously studied instruments:

⁷⁵ In the response given by Ms Ferrero-Waldner on behalf of the Commission to the written question asked by MEP Agnoletto, see *supra* note 42, the Commissioner recalled that 'the 1985 EU-China trade and economic cooperation agreement, which is still in force, does not contain such a clause', but that any new EU-China framework agreement on partnership and cooperation would have to 'a clause on democratic principles and fundamental human rights'.

⁷⁶ See *supra* note 73, para. 12(b): 'The Parliament calls ... for the Country Strategy Papers to pay greater attention to the human rights situation, identify the priorities and spell out the means and instruments deployed by the EU to ensure respect for the human rights and democracy clause ... [and] recommends that the Commission's Country Strategy Papers and Action Plans should contain clear benchmarks for progress on human rights and a timeframe within which changes should be accomplished.'

⁷⁷ See *supra* note 44, para. 108.

⁷⁸ For a critical assessment of this lack of uniformity and the argument that three conceptions of the rule of law – the Co-operation, Development and Security and Defence models – coexist in EU external relations, see E. Wennerström, *supra* note 27, chapter 5. For a broadly similar argument according to which EU policy makers have different understandings of rule of law promotion and that the pre-Lisbon 3-pillar treaty structure must be blamed for the lack of a single and coherent EU rule of law policy, see also N. Wichmann, 'Promoting the rule of law in the European neighbourhood policy – strategic or normative power?', *22/2 Politique européenne* (2007) 81.

<i>Guidelines on Human rights dialogues</i>	The rule of law is identified as a priority issue but no definition is offered
<i>EIDHR Regulation</i>	The objective of strengthening the rule of law is associated with the objectives of promoting access to justice, the independence of the judiciary, and encouraging and evaluating legal and institutional reforms
<i>ENPI Regulation</i>	The rule of law is linked with the promotion of good governance, and both concepts are said to encompass an effective public administration, an impartial and effective judiciary as well as the fight against corruption and fraud
<i>IPA Regulation</i>	The strengthening of the rule of law, including its enforcement, is associated with the strengthening of democratic institutions
<i>DPI Regulation</i>	The rule of law is described as one of the key elements that any political environment must guarantee in order to favour long-term development, and its strengthening is linked with improving access to justice and good governance, including actions to combat corruption
<i>EU's Bilateral Agreements</i>	The rule of law, along with democracy and respect for human rights, is normally considered an essential element on which these agreements are based but most agreements do not explain what the rule of law stands for, with the exception of the Cotonou Agreement which refers to effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law, as core elements of the rule of law

In addition to the instruments it regularly adopts, the EU – in almost all cases, the Commission – produces numerous transversal or country-specific reports. To put it concisely, they are rarely more informative than EU regulations or bilateral agreements. In addition, they do not generally include a clear list of minimum requirements to meet in any circumstances, or a set of general benchmarks or indicators which would help making sense of what the EU seeks to promote under the heading 'rule of law' or conversely, when a country may be said to fail to observe this principle. It is nevertheless possible to mention a rare example of a transversal document adopted by the Commission and dealing with the partnership between the EU and the group of ACP countries, where the meaning and scope of the rule of law are detailed as such:

The primacy of the law is a fundamental principle of any democratic system seeking to foster and promote rights, whether civil and political or economic, social and cultural. This entails means of recourse enabling individual citizens to defend their rights. The principle of placing limitations on the power of the State is best served by a representative government drawing its authority from the sovereignty of the people. The principle must shape the structure of the State and the prerogatives of the various powers. It implies, for example:

- a legislature respecting and giving full effect to human rights and fundamental freedoms;
- an independent judiciary;
- effective and accessible means of legal recourse;
- a legal system guaranteeing equality before the law;
- a prison system respecting the human person;

- a police force at the service of the law;
- an effective executive enforcing the law and capable of establishing the social and economic conditions necessary for life in society.⁷⁹

Some country reports may also offer a clear albeit generally succinct description of what the EU understands by rule of law and lists some concrete and specific reform requirements. To give a single example, as the EU was concerned with Bulgaria's well-known rule of law shortcomings, an unusual 'Co-operation and Verification Mechanism' (CVM) was set up in order to monitor the country's progress in addressing specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime post accession.⁸⁰ These two issues were explicitly linked with the principle of the rule of law, which was defined as implying 'the existence of an impartial, independent and effective judicial and administrative system properly equipped, *inter alia*, to fight corruption and organised crime.'⁸¹ Six specific benchmarks to be addressed by Bulgaria were then defined:

1. Adopt constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system;
2. Ensure a more transparent and efficient judicial process by adopting and implementing a new judicial system act and the new civil procedure code. Report on the impact of these new laws and of the penal and administrative procedure codes, notably on the pre-trial phase;
3. Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency. Evaluate the impact of this reform and publish the results annually;
4. Conduct and report on professional, non-partisan investigations into allegations of high-level corruption. Report on internal inspections of public institutions and on the publication of assets of high-level officials;
5. Take further measures to prevent and fight corruption, in particular at the borders and within local government;
6. Implement a strategy to fight organised crime, focussing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals. Report on new and ongoing investigations, indictments and convictions in these areas.⁸²

To monitor progress on meeting these benchmarks, annual reports are produced and in the most recent report to date, the Commission invited Bulgaria to implement a long, comprehensive and detailed set of institutional, administrative and legal reforms and actions, which were listed under the following seven headings: (i) Reform of the judicial system; (ii) Transparency and accountability of the judiciary; (iii) Judicial practices in criminal cases; (iv) Fight against organised crime; (v) Asset forfeiture; (vi) Fight against corruption and (vii) Preventing corruption.⁸³

⁷⁹ European Commission, *Democratisation, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States*, COM(98) 146, 24 February 1998, at 4.

⁸⁰ Commission Decision 2006/929/EC of 13 December 2006, see *supra* note 53. A similar mechanism was devised in relation to Romania. Both countries joined the EU on January 1, 2007. For further discussion and the argument that in the absence of accession rewards combined with the absence of sanctions for non-compliance, these CVMs are not effective, see E. Gateva, 'Post-Accession Conditionality – Support Instrument for Continuous Pressure', 18 *KFG Working Paper* (2010).

⁸¹ Commission Decision 2006/929/EC of 13 December 2006, see *supra* note 53, recital 3.

⁸² *Ibid.*, annex to the Decision.

⁸³ European Commission, *Report On Progress in Bulgaria under the Co-operation and Verification Mechanism*, COM(2011) 459 final, Brussels, 20 July 2011.

The above-mentioned reports, however, constitute exceptions to the general rule whereby very little attention is normally given to what the rule of law means in terms of institutional arrangements, procedural and substantive norms and standards, and how the EU is going to monitor progress on that front. For instance, in the official literature dedicated to the EU's enlargement policy, one may easily find abundant references to the need for candidate countries to make substantial progress as regards the consolidation or strengthening of the rule of law, and yet find it virtually impossible to come across clear and comprehensive definitions, descriptions or indicators. In a recent communication on the EU's enlargement strategy, the Commission indicated that it 'will further step up its work and intensify the dialogue on the rule of law with candidate countries and potential candidates' and that 'the use of peer missions and of benchmarking will be extended'.⁸⁴ The meaning and scope of the rule of law in this context is left mostly unclear. Furthermore, the benchmarks to be met by the relevant countries are elaborated in a predominantly impressionistic manner, and take the form of more or less concrete and specific reform priorities imposed by EU officials on the basis of a mostly undefined principle of the rule of law. For example, the Commission Opinion on Montenegro's application for EU membership naturally refers to the Copenhagen political criteria requiring the stability of institutions guaranteeing notably the rule of law, the meaning and scope of which are left unexplained. It is merely stated that Montenegro needs to strengthen the rule of law 'in particular through de-politicised and merit-based appointments of members of the judicial and prosecutorial councils and of state prosecutors as well as through reinforcement of the independence, autonomy, efficiency and accountability of judges and prosecutors'.⁸⁵ The detailed analysis on which this opinion is based is contained in a voluminous separate 'analytical report', which does not, however, give any meaningful precision on the EU's understanding of the rule of law.⁸⁶ After offering a formal description and review of the practical functioning of Montenegro's administrative, judicial system and anti-corruption and security forces, the report concludes that Montenegro 'has in recent years strengthened the legal and institutional framework of rule of law',⁸⁷ without offering once any explanation as to what a 'legal and institutional framework of rule of law' actually means or implies, or explaining how this strengthening was achieved and measured.

The political advantages of using and monitoring the rule of law in a loose and open-ended manner are obvious.⁸⁸ One must also accept that a case-by-case analysis is at times not only required and that it makes sense not to drastically

⁸⁴ European Commission, *Enlargement Strategy and Main Challenges 2010-2011*, COM(2010) 660, Brussels, 9 November 2010, at 8.

⁸⁵ European Commission, *Opinion on Montenegro's application for membership of the European Union*, COM(2010) 670, Brussels, 9 November 2010.

⁸⁶ European Commission, *Analytical Report accompanying the Commission's Opinion on Montenegro's application for membership of the European Union*, COM(2010) 670, SEC(2010) 1334, Brussels, 9 November 2010.

⁸⁷ *Ibid.*, at 33.

⁸⁸ This does not necessarily imply that the EU is not an effective actor when it comes to favouring the adoption of democratic rule of law policies in third countries. For a study focusing on four countries (Romania, Serbia, Turkey and Ukraine) and the argument that the EU has been, in most cases, successful in terms of removing obstacles to the adoption of democratic rule of law reforms, see E. Baracani, 'EU Democratic Rule of Law Promotion', in A. Magen and L. Morlino (eds.), *International Actors, Democratization and the Rule of Law: Anchoring Democracy* (London: Routledge 2008), 54.

circumvent the Commission's room for manoeuvre in order to avoid situations where the best may become the enemy of the good. However, in the absence of a transversal and authoritative policy or legislative document offering a clear and exhaustive explanation of what the rule of law precisely entails, EU institutions may adopt unconvincing or undemanding rule of law policies for reasons of pure political convenience. Furthermore, representatives from third countries may find it difficult to get a grasp of what the EU's understanding of the rule of law precisely encompasses either institutionally or legally speaking. From a global and inductive look at the diverse instruments used by the EU and the plethora of EU reports and other documents in which some concrete findings of rule of law deficiencies have been noted, one may nevertheless conclude that the EU tends to promote a broad and substantive concept whereby the rule of law includes and requires effective and accessible means of legal redress, an independent and impartial judicial system, an effective legal framework in order to guarantee *inter alia* that governments are subject to the law, that corruption and fraud are repressed, and more generally, that national legal systems give full effect to fundamental rights.⁸⁹

Accordingly, in the context of its external action, the EU can be said to go beyond the formal concept favoured by Raz, to mention but one eminent scholar according to whom, legal norms should possess a number of 'formal' attributes in order to constitute standards capable of providing effective guidance for natural and legal persons:⁹⁰ they must be prospective, adequately publicised, clear, relatively stable and lawmaking should also be guided by open, stable, clear and general rules. It is important, however, to point out that formal conceptions of the rule of law also often imply compliance with some *institutional* requirements (the principle of separation of powers and in particular the existence of an independent judiciary, the power of judicial review, etc.) as well as individual *procedural* rights (e.g. the right to be heard, the right to effective judicial remedies, the right to access to courts, etc.). That being said, it is quite evident that EU instruments and policy documents illustrate a 'thick/substantive' rather than a 'thin/formal' understanding of the rule of law,⁹¹ which is not indifferent to the content or the substantive aims of the law and encompasses elements of political morality such as democracy and substantive individual rights. In other words, the EU seeks to promote, notwithstanding the rather confusing and too often rudimentary definitions contained in the acts and policy documents it adopts, a broad concept of the rule of law which is understood as an 'umbrella principle'⁹² that requires an independent, impartial, accessible and effective judiciary as well as the subjecting of public power to formal and substantive legal constraints with a view to guaranteeing the primacy and dignity of the individual and its protection against the arbitrary or unlawful use of public power.

This broad, substantive understanding is a logical consequence of a constitutional framework which quite clearly indicates that the values on which the EU is founded must be viewed as interdependent and mutually reinforcing as they are

⁸⁹ For a similar conclusion reached in the context of a study focusing on a region where EU assistance has been particularly important, see L. Appicciafuoco, 'The Promotion of the Rule of Law in the Western Balkans: The European Union's Role', 11 *German Law Journal* (2010) 741, at 762 et seq.

⁹⁰ J. Raz, 'The Rule of Law and its Virtue', in J. Raz, *The Authority of Law. Essays on Law and Morality* (Oxford: Clarendon Press 1979), pp. 214-218.

⁹¹ For further discussion, see e.g. R. Peerenboom, *supra* note 8, pp. 2-10.

⁹² See G. Marshall, 'The Rule of Law. Its Meaning, Scope and Problems', 24 *Cahiers de philosophie politique et juridique* (1993) at 43.

understood as crucial preconditions for political, social and economic development – a point made earlier and which is further confirmed by statements such as this:

'Democracy and human rights are inextricably linked. The fundamental freedoms of expression and association are the preconditions for political pluralism and democratic process, whereas democratic control and separation of powers are essential to sustain an independent judiciary and the rule of law which in turn are required for effective protection of human rights.'⁹³

Interestingly, the most recent case law of the Court of Justice also suggests a 'deepening' of the Court's understanding of the rule of law, which is also more clearly linked with the principles of fundamental rights and, in a less open manner, of democracy.⁹⁴ Without suggesting that evolution is connected to policy and legislative developments in EU external relations law, the Court has progressively made clear that the EU rule of law does not merely encompass compliance with formal requirements. It has a substantive dimension in the sense that it also demands judicial remedies and processes to protect all fundamental rights. Indeed, one important, if not the most important, purpose of judicial review, according to the Court itself, lies in the protection of natural and legal persons' fundamental rights.⁹⁵

To bring this definitional review to a close, let us stress once more that it would be excessive to conclude that the EU is seeking to 'export' a vague or incoherent ideal notwithstanding the absence of an authoritative and cross-cutting policy document precisely setting out what the EU rule of law entails.⁹⁶ On the contrary, the EU promotes an ideological apparatus that constantly links the three key values on which the EU is founded: democracy, the rule of law and respect for human rights. It logically follows that while EU instruments or other documents may offer variable definitions, they nonetheless all demonstrate that the EU promotes a concept that goes beyond the formal or so-called thin approach. By contrast, the EU seeks to export a broad and holistic understanding of the rule of law as a principle that includes substantive components as well as formal elements and which requires a democratic and liberal constitutional order giving full effect to human rights. In other words, we can be certain of at least one thing: an oppressive legal order cannot satisfy the EU's understanding of the rule of law. It must also be said that the different emphasis put on distinct components of the rule of law, depending on the subject matter and the scope of the relevant EU instrument, is not necessarily to be criticised. Indeed, it would seem reasonable for EU institutions to emphasize compliance with different components in order to reflect different priorities and contexts. Furthermore, the core demands of the rule of law (principle of legality and existence of effective legal remedies to guarantee the protection of fundamental rights) appear to be always taken into account. This is not to say that the credibility of EU external action would not benefit from the publication of a single document comprehensively setting out what its foundational principles entail, the indicators to be used when it comes to assessing a particular country's adherence to the rule of law, and the minimum requirements third countries are expected to

⁹³ Recital 8 of the EIDHR Regulation.

⁹⁴ For further discussion, see Pech, *supra* note 13, at 369 et seq.

⁹⁵ See Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351, para. 316.

⁹⁶ See proposal made *supra* in section 4.2.

meet. This would allow the EU to act more effectively as an international standard-setter and may also help define more effective rule of law policies as well as help monitoring compliance and progress in a less ad hoc and subjective manner. These aspects and suggestions are further developed below.

4. The EU as an exporter of values and principles: the normative impact and practical effectiveness of EU rule of law policies and actions

The normative impact of EU's external action is distinguished here from the question of its effectiveness. Both aspects, however, present a common feature as the task of documenting and measuring the normative impact of EU rule of law policies and actions⁹⁷ is as difficult as the task of documenting and measuring their effectiveness. Notwithstanding this difficulty, with respect to the EU's role as an international standard-setter, one may argue that there has always been an extremely limited room for normative leadership by the EU (section 4.1). Indeed, a consensus amongst most significant international organisations has progressively emerged in the past two decades whereby the rule of law is promoted as a broad, substantive and holistic ideal and one which cannot be given full effect unless the principles of democracy and respect for human rights are also complied with. That being said, the adoption by the EU of a comprehensive and authoritative guidance note on the rule of law should be considered in order for relevant stakeholders to easily make sense of the EU's understanding and make it their own. As regards the effectiveness of EU's external action (section 4.2), and to remain at a macro-level, it will be suggested that the EU should refine the analytical framework it relies on to globally assess and monitor third countries' adherence to the rule of law. Indeed, it would seem that before seeking to define sound policies and actions, one first needs to precisely identify a country's shortcomings and then agrees on indicators and other benchmarks so as to be able to track change over time. The diverse and recent attempts at developing rule of law indexes, indicators and other checklists will hence be explored with the view of questioning their usefulness from the EU's point of view.

4.1 The EU's limited normative influence on the international plane

The EU's influence over the Council of Europe is limited given that the EU has formally recognised the Council's normative pre-eminence. Indeed, while the Memorandum of Understanding between the Council of Europe and the EU, adopted on 10 May 2007, sensibly provides that they must 'develop their relationship in all areas of common interest, in particular the promotion and protection of

⁹⁷ As noted by M. Cremona, it is particularly difficult to document the EU's contribution to international norm-building, that is, according to the author's excellent definition, its 'contribution to building values, spearheading or influencing the production of new norms, their adoption, interpretation and enforcement through diplomacy and participation in international organisations and agencies', because 'EU action of this kind is necessarily often more informal' and it is therefore difficult to determine 'what influence the EU as such has had on the development of an international norm' (M. Cremona, *supra* note 33, at 278 and 307).

... the rule of law,⁹⁸ it adds the following and critical caveat: 'The Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe.'⁹⁹ The advertised ambition to establish common legal standards as regards the rule of law through, *inter alia*, improved legal cooperation and reciprocal consultations at an early stage in the process of elaborating standards,¹⁰⁰ should therefore be understood in this light.¹⁰¹ There is no doubt, however, that a process of mutual normative influence has been taking place in Europe, which is not to say that there is room for a process of normative *competition*. Indeed, even in the absence of a formal recognition of the Council of Europe's role as the primary standard-setter in Europe in the fields mentioned above, there would be little room for competition between the EU and the Council of Europe. As a matter of fact, a significant number of common features between the EU and the Council of Europe's understandings of the principle of the rule of law can be highlighted.

Similarly to the EU Treaties, the Council of Europe's most important legal texts lack any precision as regards the meaning and scope of the rule of law. After reviewing provisions such as Article 3 of the Statute of the Council of Europe, which provides that 'every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms,' an official and instructive report rightly noted that 'neither the Statute nor the ECHR elaborate on the concept of the rule of law as such'¹⁰² and that in fact 'no authoritative definition of the rule of law exists within the Council of Europe.'¹⁰³

Both organisations have similarly struggled with the issue of conceptualising and referring to the principle of the rule of law in a context where national legal systems may use different concepts and understand them in a different manner. This led the Council of Europe to deplore the confusion created by 'the variability in terminology and understanding of the term, both within the Council of Europe and in its member states'¹⁰⁴ and state 'the terms "rule of law" and *prééminence du droit* are substantive legal concepts which are synonymous.'¹⁰⁵ Without entering

⁹⁸ Memorandum of Understanding between the Council of Europe and the European Union, 23 May 2007, para. 9, available at: <http://eeas.europa.eu/delegations/council_europe/more_info/useful_links/index_en.htm>.

⁹⁹ *Ibid.*, para. 10. See also the Juncker Report, written by an influential EU player in a personal capacity, and which was the first to forcefully and clearly promote the view that 'the Council of Europe must remain the benchmark for human rights in Europe' (J.-C. Juncker, *Council of Europe-European Union: 'A Sole Ambition for the European Continent'*, (Strasbourg: Council of Europe 2006), at 7). As regards the rule of law, the respected politician suggested, *inter alia*, that the EU, when devising its policies, must base itself on the evaluations carried out by the Council's various legal co-operation systems, and participate in these in an appropriate manner.

¹⁰⁰ See *supra* note 98, paras. 22-25.

¹⁰¹ For more practical details on how the Council of Europe and the EU cooperate, see Council of Europe, *Co-operation between the Council of Europe and the European Union. Overview of arrangements for co-operation between the Council of Europe and the European Union*, DER (2009)1, 30 September 2009.

¹⁰² Council of Europe (Committee of Ministers), *The Council of Europe and the Rule of Law – An overview*, CM(2008)170, 21 November 2008, para. 6.

¹⁰³ *Ibid.*, para. 29.

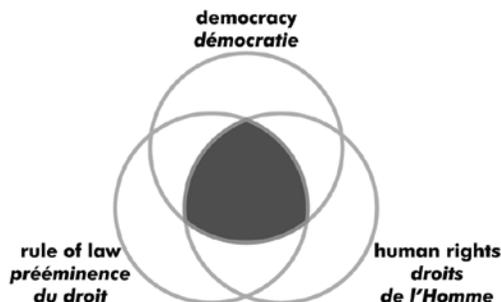
¹⁰⁴ Council of Europe (Parliamentary Assembly), Resolution 1594 (2007): 'The principle of the rule of law', 23 November 2007, para. 3. The resolution refers to several problems such as the use of two expressions in French – *Etat de droit* and *prééminence du droit* – to reflect the English notion, and a trend in some Eastern European countries, whereby 'rule of law' is equated with 'supremacy of statute law'.

¹⁰⁵ *Ibid.*, para. 6.

into further details, lexical issues have also commanded the attention of EU lawyers.¹⁰⁶

Both organisations have also failed to produce a single and authoritative document clarifying what the rule of law entails and how one may assess a country's adherence to this principle in theory as well as in practice. From a transversal look at the Council of Europe's legal and policy instruments and the European Court of Human Rights' case law, one may nevertheless conclude that the Council of Europe understands the rule of law in a similar fashion than the EU. In other words, the same core elements have been identified, which furthermore indicate that the EU and the Council of Europe both promote a *substantive* and *holistic* conception. Amongst these core elements, one may refer to the principles of separation of powers, legal certainty, equality of all before the law, access to justice, judicial review and independence of the judiciary. Furthermore, and again similarly to what the EU does, the Council of Europe links the strengthening of the rule of law with efforts to fight phenomena such as corruption, organised crime and money laundering.¹⁰⁷

Last but not least, the EU and the Council of Europe view the upholding and the promotion of rule of law as one of their *raison d'être*, and both recognise the rule of law as being one of the 'interrelated trinity of concepts'.¹⁰⁸ To put it differently, as clearly explained in an extremely enlightening report, the rule of law along with democracy and respect for human rights are *interconnected* principles whose inter-relationship can be illustrated by the following figure:



They are furthermore *interdependent* principles as 'there can be no democracy without the rule of law and respect for human rights; there can be no rule of law without democracy and respect for human rights, and no respect for human rights without democracy and the rule of law'.¹⁰⁹ The same report goes on to interestingly explain that this might be the reason for the lack or even the necessity of defining the rule of law as the promotion of this principle along with democracy and respect for human rights 'form a single fundamental objective for the Council of Europe' and that it would be in fact risky to disentangle notions 'that are so closely intertwined and mutually supportive'.¹¹⁰

¹⁰⁶ For further discussion, see L. Pech, 'The Rule of Law as a Constitutional Principle of the EU', 4 *Jean Monnet Working Papers* (2009).

¹⁰⁷ See *supra* note 98, para. 26.

¹⁰⁸ Council of Europe (Parliamentary Assembly), *Report of the Committee on Legal Affairs and Human Rights: The Principle of the Rule of Law*, Doc. No. 11343, 6 July 2007, para. 5.

¹⁰⁹ See *supra* note 102, para. 27.

¹¹⁰ *Ibid.*, para. 28.

Moving on to other international organisations,¹¹¹ documents such as the 'Multilateral organisations' rule of law pledge' adopted by high-level representatives of the Council of Europe, the Organisation for Security and Co-operation in Europe (OSCE) and the United Nations (UN) further demonstrate that these organisations promote a concept of the rule of law that is similar to the one promoted by the EU.¹¹² The rule of law is indeed presented as 'a prerequisite for maintaining and building peace, consolidating democracy and promoting sustainable development' and its central role in conflict prevention, the protection and promotion of human rights and other issues, is also highlighted. The multilateral organisations' rule of law pledge remains, however, extremely superficial, and does not go beyond the affirmation that the principles previously mentioned are interconnected and interdependent ones. One must therefore refer to additional documents from the OSCE and the UN to give further evidence that a formalistic understanding of the rule of law is not the conception currently promoted at the international level, which means, incidentally, that there is not much room left for the EU to shape an original international understanding of the rule of law.

The OSCE's role must first be rapidly highlighted as it embraced the promotion of the rule of law much earlier than the UN and other international multilateral organisations. Taking rapidly note of the new political environment in Europe following the end of the East-West divide, Members of the OSCE consensually agreed to promote state compliance with the rule of law which, decisively, was understood in a thick and holistic manner as this short excerpt from the so-called 1990 Copenhagen document shows:

[The participating States] are determined to support and advance those principles of justice which form the basis of the rule of law. They consider that 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.¹¹³

The document further states that 'democracy is an inherent element of the rule of law,'¹¹⁴ and lists a long list of principles to be complied with as they would constitute 'elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings.'¹¹⁵ Amongst those principles, one may mention the principle of having an executive accountable to the elected legislature, the principle of legality, the principle of separation of powers, the accessibility of the law, the principle of equality of all before the law, effective

¹¹¹ For an excellent overview, see *supra* note 10.

¹¹² Joint Press release issued at the close of the 14th High-level Tripartite meeting between the Council of Europe, the OSCE and the UN (Strasbourg, 18 February 2005), CM/Inf(2005)17, 28 February 2005. Officials from the EU (European Commission and Council), the International Organization for Migration and the International Committee of the Red Cross also participated to this meeting.

¹¹³ Conference on Security and Co-operation in Europe, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, Copenhagen, 29 June 1990, para. 2, available at <www.osce.org/odihr/elections/14304>. See also the OSCE's website (<<http://www.osce.org/what/rule-of-law>>) for a more concise account: 'The concept of rule of law ... not only describes formal legal frameworks, but also aims at justice based on the full acceptance of human dignity.'

¹¹⁴ *Ibid.*, para. 3.

¹¹⁵ *Ibid.*, para. 5.

access to justice, an independent judiciary and compliance with international human rights standards.

Since the adoption of the 1990 Copenhagen document, the states from Europe, Central Asia and North America which comprise the OSCE, have regularly recalled their commitment to the rule of law and the OSCE frequently seeks to encourage its members to strengthen the rule of law by monitoring political and legal developments in individual countries and providing technical assistance and training, quite often in cooperation with the Council of Europe and/or the EU. The UN did not embrace the rule of law as early as the Council of Europe, the OSCE or even the EU, despite the concept being referred to in the preamble to the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948: 'Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.' This early and concise reference nevertheless indicates that the rule of law was initially conceived as sharing a consubstantial link with the protection of human rights. However, it was not until 2004 that the UN Secretary General published a report focusing explicitly, exclusively and exhaustively on the rule of law and in which the following definition of what is described as 'a concept at the very heart of the Organization's mission' was offered:

'The rule of law ... refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.'¹¹⁶

While it might be that 'this expansive definition – thick with human rights, fairness, participation – almost certainly goes beyond what states would actually implement',¹¹⁷ it is perfectly compatible with the EU's understanding.

The references made to the rule of law in an important UN resolution adopted by the General Assembly the year following the publication of the Secretary General's report cited above, further demonstrate the continued dominance of an open-ended, substantive and holistic conception similar to the one promoted by the EU in its relations with non-EU countries. Indeed, after recalling that the Heads of State and Government, who gathered at UN Headquarters from 14 to 16 September 2005, 'acknowledge that good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger,' the 2005 World Summit Outcome resolution stresses that respect for all human rights, the rule of law and democracy 'are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.'¹¹⁸ This

¹¹⁶ UN Security Council, *Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616, 23 August 2004, para 6.

¹¹⁷ S. Chesterman, "'I'll Take Manhattan": The International Rule of Law and the United Nations Security Council', 1 *Hague Journal on the Rule of Law* (2009) at 2.

¹¹⁸ UN General Assembly, *Resolution: 2005 World Summit Outcome, A/RES/60/1*, 24 October 2005, respectively paras. 11 and 119. The World Summit Resolution builds up on the *UN Millennium*

concept is now regularly reaffirmed and promoted by the UN Secretary General¹¹⁹ as well as the UN General Assembly in its resolutions on *The rule of law at the national and international levels*, adopted each year since 2005.¹²⁰ In this particular context, the EU's normative influence is necessarily limited considering that the dialogue initiated by the so-called UN Rule of Law Coordination and Resource Group and the Rule of Law Unit only takes place with Member States.¹²¹ But as suggested above, the EU does not defend an alternative conceptual understanding and the lack of an official forum where UN and EU officials could explore issues of relevance to the rule of law at the international and domestic levels would therefore appear largely inconsequential as regards the shaping of an international rule of law standard.

To end this overview on the rule of law rhetoric used by major international and regional intergovernmental organisations, a brief analysis of the World Bank's reliance on the concept will now be made as the World Bank is regularly presented as promoting a 'rather thin conception of the rule of law'¹²² in contrast to the one promoted by most organisations such as the UN, the Council of Europe or the EU. Indeed, according to Ibrahim Shihata, senior vice president of the World Bank from 1983 until 1998, and often presented as the 'architect' of the World Bank's rule of law policies, the rule of law essentially requires foreseeable and binding rules as well as a framework guaranteeing their proper application under the control of an independent judicial branch, and known procedures for eventually amending them.¹²³ It might be, however, that this conceptual exception to the rule is due to 'the fact that different organisations have different mandates or purposes and that rule of law promotion can only be on the agenda of these organisations if it somehow falls within the mandate or contributes to the purpose of the organisation.'¹²⁴ In other

Declaration (adopted by the General Assembly, A/RES/55/2, 18 September 2000). Its para. 24 provides that UN Member States 'will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.'

¹¹⁹ See in particular Guidance note of the Secretary-General, *UN Approach to Rule of Law Assistance*, April 2008.

¹²⁰ See recently UN General Assembly, *Resolution on the rule of law at the national and international levels*, A/RES/64/116, 15 January 2010. For further discussion, see S. Barriga and G. Kerschichnig, 'The UN General Assembly Resolution on the Rule of Law: Ambition Meets Pragmatism', *2 Hague Journal on the Rule of Law* (2010) 253 (authors notably regret the limited manner in which the rich contributions given by numerous individual delegations are reflected in the resolution itself).

¹²¹ UN General Assembly Resolution, *ibid.*, para. 7. Since 2007, responsibility for the coordination and coherence of rule of law within the UN system rests with the Rule of Law Coordination and Resource Group, an inter-agency body. The Group is chaired by the Deputy Secretary-General and supported by its secretariat, the Rule of Law Unit, which was established in 2006. For more information, see the remarkably informative UN Rule of Law Website and Document Repository (<<http://www.unrol.org>>).

¹²² The Hague Institute for the Internationalisation of Law (HiIL), *Rule of Law Inventory Report. (Academic Part)*, April 2007, at 27. Available at <<http://www.hiil.org/research/main-themes/rule-of-law/publications/>>.

¹²³ *Ibid.*, at 28, citing in fn. 96 A. Santos, 'The World Bank's uses of the "Rule of Law" promise in Economic Development', in D. Trubek and A. Santos (eds.), *The New Land and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press 2006), at 270. It is important to note that Santos also contends (at 273) that 'Shihata swayed back and forth from a Weberian to a Hayekian version of the rule of law.' In other words, some of the World Bank's policies and actions would also illustrate a substantive approach and an interest in the content of the legal rules to guarantee their compliance with some substantive rights.

¹²⁴ See *supra* note 122, at 28.

words, contrary, for instance, to the EU, the World Bank has a more limited and specialised remit and is furthermore explicitly prohibited from considering political criteria when assessing countries' requests for financial assistance,¹²⁵ factors which may explain why the World Bank tends to promote a thin concept of the rule of law.

To conclude, the current international normative environment offers little room for the EU to exercise some decisive normative leadership. Indeed, it is far from being the sole international organisation which views the rule of law, along with democracy and human rights, as one of 'the three pillars'¹²⁶ on which any polity must be founded. Furthermore, when one looks at 'the legal instruments, national and international, and the writings of scholars, judges and others, it seems as if there is now a consensus on the core meaning of the rule of law and the elements contained within it.'¹²⁷ This is indeed one of the main points defended above and according to which the EU is not unique when it comes to promoting a substantive and holistic concept. However broad and open-ended this understanding may be, it remains that the EU also constantly refers to a number of sub-components of the rule of law which one may appropriately refer to as its core elements and *conditiones sine quibus*:¹²⁸

1. Legality, including a transparent, accountable and democratic process for enacting law;
2. Legal certainty;
3. Prohibition of arbitrariness;
4. Access to justice before independent and impartial courts, including judicial review of administrative acts;
5. Respect for human rights;
6. Non-discrimination and equality before the law.

Were the EU anxious to improve its normative influence at the international as well as national levels, I would suggest the adoption of an authoritative and comprehensive document outlining the EU's concept of the rule of law, the particular role of the EU and the comparative advantages of EU intervention, in the form of the European Consensus on Development, a policy statement which describes the shared values, goals, principles and commitments which the European Commission and EU Member States will implement in their development policies, and on the basis of which the EU and its Member States committed themselves to better co-ordination of their positions and actions in international fora.¹²⁹ The UN Secretary

¹²⁵ See e.g. Art. 5, Section 1, pt. g of the *International Development Association's Articles of Agreement* (the IDA is the World Bank's fund for the poorest countries): 'The Association shall make arrangements to ensure that the proceeds of any financing are used only for the purposes for which the financing was provided, with due attention to considerations of economy, efficiency and competitive international trade and without regard to political or other non-economic influences or considerations.' See also Section 6: 'The Association and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in this Agreement.'

¹²⁶ To borrow the expression from the Venice Commission Report, see *supra* note 10, para. 1.

¹²⁷ *Ibid.*, para. 35.

¹²⁸ *Ibid.*, para. 41.

¹²⁹ See Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus', *OJ* 2006 C 46/1.

General's guidance note on the UN approach to rule of law assistance could also usefully serve as another source of inspiration. Indeed, this note offers a clear overview of 'the guiding principles and framework for UN rule of law activities at the national level that apply in all circumstances,' with the aims of offering 'a comprehensive and coherent UN approach' derived from UN norms, standards and guidance, and a framework outlining 'the fundamental constituent elements of rule of law efforts.'¹³⁰ It may also be time for the EU to consider revisiting the tools it relies on to assess and monitor third countries' adherence to the rule of law in the light of the sophisticated – albeit not flawless – checklists and other indexes which have been recently developed. These tools may also prove useful when it comes to devising and measuring the effectiveness of EU rule of law policies and actions.

4.2 *Measuring countries' adherence to the rule of law and the impact of EU policies and actions*

Measuring the impact of EU rule of law policies and actions is no easy task if only because the EU has not shown any serious interest in the issue of defining and measuring the rule of law in the first place. In other words, the EU has sought to promote better compliance with the rule of law in third countries without first seeking to exhaustively identify and assess particular countries' shortcomings on the basis of a comprehensive definition and a list of requirements and indicators.¹³¹ This is regrettable as the EU can hardly adopt policies, recommend sensible reforms and evaluate their effectiveness in the absence of any comprehensive and authoritative framework enabling the EU to take stock and subsequently monitor rule of law compliance in any particular country in any given year. Such a framework would also (reasonably) limit the discretion of the relevant EU actors and preclude them from adopting variable definitions depending on their political priorities *du jour*.¹³² Accordingly, it is suggested here that the EU should consider relying on the various checklists, indexes and other indicators which have been recently developed.¹³³ Whilst the absolutely perfect measurement instrument is yet to be devised, it would nevertheless be imprudent for the EU to remain on the sideline at a time when decisive work is undertaken by numerous organisations on the quantifiable

¹³⁰ See Guidance Note of the Secretary General, *supra* note 119.

¹³¹ Unsurprisingly, scholars have rightly noted that third countries have rarely been subject to a consistent, objective and demanding assessment of their compliance with EU's values. See in particular D. Kochenov, *EU Enlargement and the Failure of Conditionality* (The Hague: Kluwer Law International 2008).

¹³² For the argument that the EU's foundational values can be compared to largely undefined targets whose meaning changes on a case-by-case basis depending on the Commission's priorities when devising national action plans as regards third countries covered by the ENP, see P. Leino and R. Petrov, 'Between "Common Values" and Competing Universals – The Promotion of the EU's Common Values through the European Neighbourhood Policy', 15 *European Law Journal* (2009) at 665 et seq.

¹³³ For an excellent article on the multiplication of indicators as tools for assessing and promoting a variety of social justice and reform strategies around the world since the mid-1990s, see S. Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance', 52(S3) *Current Anthropology* (2011) S83. While it may very well be, as the author contends, that this 'growing reliance on indicators is an instance of the dissemination of the corporate form of thinking and governance into broader social spheres' (at 83), EU policies and actions would certainly benefit from a more comprehensive and conceptually sound analytical framework to assess and monitor countries' adherence to the rule of law. This is not to say that qualitative and in particular, quantitative indicators are the panacea and must completely replace political judgment as well as contextual and case-by-case analysis.

indicators and other benchmarks one should use to both measure a country's adherence to the rule of law and devise effective rule of law programmes. After all, this is how one should expect a 'normative power' to exercise normative leadership.

4.2.1 Measuring countries' compliance¹³⁴

The World Bank has been at the forefront as regards the development of measurement tools to monitor the performance of national politico-legal systems over time. The Worldwide Governance Indicators (WGI) project¹³⁵ is particularly impressive in that respect as it reports aggregate and individual governance indicators for 213 economies over the period 1996–2009, for six dimensions of governance, one of which is the rule of law:

- Voice and Accountability
- Political Stability and Absence of Violence
- Government Effectiveness
- Regulatory Quality
- Rule of Law
- Control of Corruption

Data on the six composite indicators are available online and the WGI's website enables anyone to undertake cross-country comparisons as well as monitoring progress over time in relation to all or any of the six indicators mentioned above. Charts, maps and tables may then be generated.¹³⁶ By selecting the rule of law and the pre-defined group 'Eastern Europe and Baltics', one may, for instance, effortlessly identify the candidate countries that would seem to require closer monitoring by the EU, or the countries that are clearly not ready for EU membership (see the chart on p. 37).¹³⁷

The WGI project, however, relies on a rather rudimentary, if not inadequate understanding of the rule of law. Indeed, its rule of law indicator merely 'captures *perceptions* [emphasis added] of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.'¹³⁸ No attention is paid to what one may call the law on the books

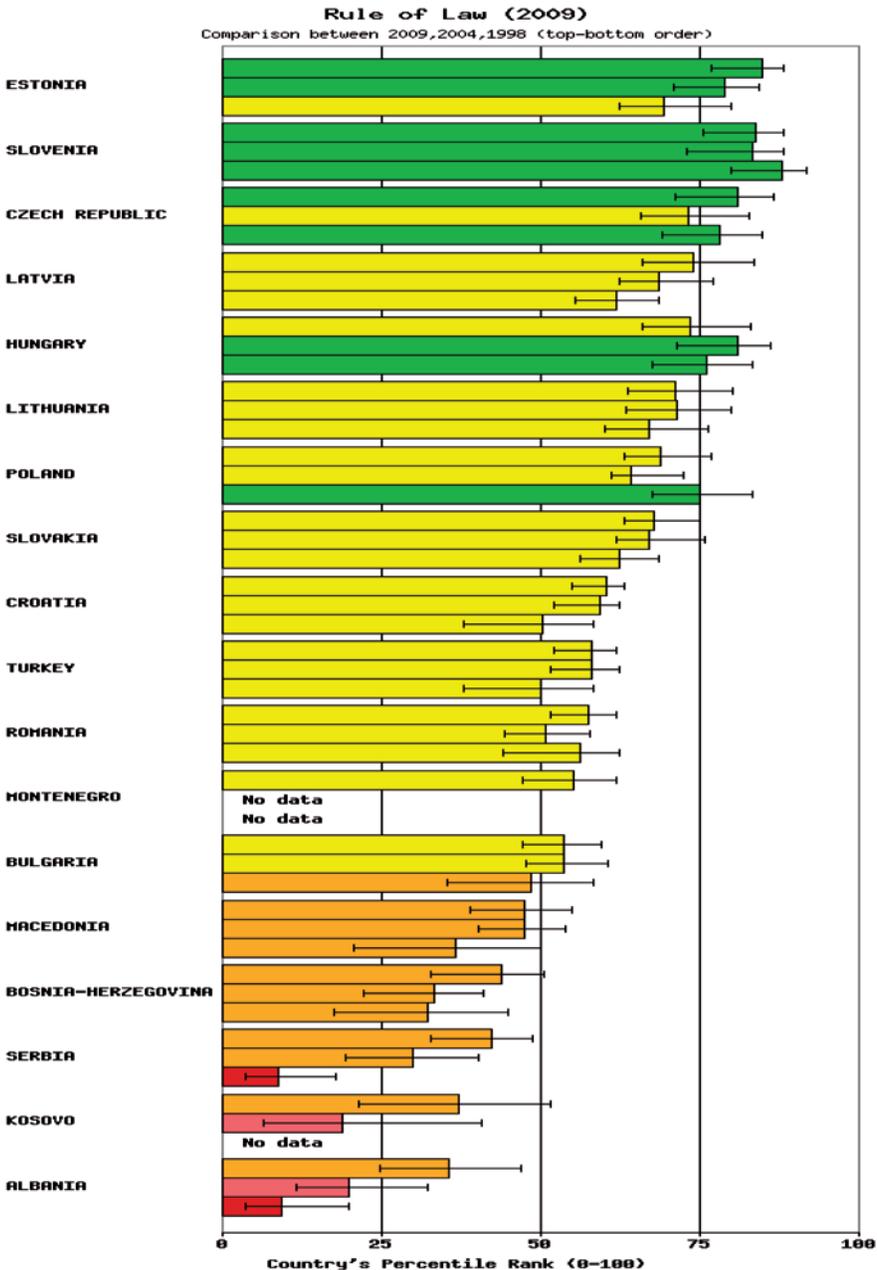
¹³⁴ See generally the special issue of the *Hague Journal on the Rule of Law*, published in September 2011 and which is entirely dedicated to measurement of institutional indicators across countries.

¹³⁵ More information on the World Bank's WGI project is available at <<http://info.worldbank.org/governance/wgi/index.asp>>.

¹³⁶ <http://info.worldbank.org/governance/wgi/mc_countries.asp>.

¹³⁷ The EU may also consider relying on WGI indicators to monitor EU Member States, in particular with respect to Art. 7 TEU, which theoretically enables the Council to take measures against any EU country guilty of 'a serious and persistent breach' of the principles mentioned in Art. 2 TEU. One should note, however, that no EU institution or body has been granted the task of monitoring the situation in the EU's Member States with respect to Art. 7 TEU. It has been suggested that the EU Fundamental Rights Agency based in Vienna should have an Art. 7 remit but unsurprisingly, some national governments have strongly opposed any move in this direction. For further discussion, see G. Toggenburg, 'The role of the new EU Fundamental Rights Agency: Debating the "sex of angels" or improving Europe's human rights performance?', 33 *European Law Review* (2008) 385. This means that William's argument that the EU's claims to a credible human rights policy are suspect as a system of double standards has been instituted to the detriment of non-EU countries, may also be valid as regards the EU's rule of law policy. See A. Williams, *EU Human Rights Policies. A Study in Irony* (Oxford: Oxford University Press 2004).

¹³⁸ <<http://info.worldbank.org/governance/wgi/resources.htm>>.



Source: Kaufmann D., A. Kraay, and M. Mastruzzi (2010), The Worldwide Governance Indicators Methodology and Analytical Issues
 Note: The governance indicators presented here aggregate the views on the quality of governance provided by a large number of enterprise, citizen and expert survey respondents in industrial and developing countries. These data are gathered from a number of survey institutes, think tanks, non-governmental organizations, and international organizations. The WGI do not reflect the official views of the World Bank, its Executive Directors, or the countries they represent. The WGI are not used by the World Bank Group to allocate resources.

and furthermore, the WGI collects data on a narrow set of issues whereas the practical functioning of criminal justice institutions from the point of views of economic agents seems to be the primary concern.¹³⁹ By contrast and as previously shown, the EU has a much broader understanding of the rule of law and develop policies as well as provide assistance with the aim of improving the politico-legal system as a whole. In doing so, the EU is not merely concerned with the law in practice and also pays due attention to the law on the books. In fact, the EU initially tends to always prioritise formal compliance with its norms and standards. Irrespective of this difference in terms of focus, it must finally be said that the WGI documentation does not make it particularly easy to understand how the concept is precisely measured once data has been obtained, mostly via surveys and reports from international intergovernmental and non-governmental bodies, and how the different and rather disparate components of what the rule of law entails according to the WGI project, are weighted.

Seeking to emulate the World Bank, the UN also launched its own Rule of Law Indicators Project in June 2008 as a joint initiative of the UN Department of Peacekeeping Operations and the Office of the UN High Commissioner for Human Rights. The primary objective of the UN Rule of Law Indicators Project is to identify the strengths and shortcomings of national rule of law institutions in order to assist both national authorities and international donors. In 2011, the UN finally published an exhaustive implementation guide to clarify its conception of the rule of law and how its measuring instrument ought to be applied.¹⁴⁰ A common feature of the UN and WGI projects is their focus on the performance of criminal justice institutions and the development of 'a set of measures (the indicators) that can be used to assess and monitor a country's law enforcement agencies, courts and other judicial operations, and corrections agencies and to monitor transformation in these institutions over time.'¹⁴¹ By contrast to the WGI project, the UN instrument is exclusively concerned with post-conflict countries and more importantly, is not designed to rate, rank or compare countries in terms of performance of their institutions and legal frameworks. And while the UN indicators are directly inspired by or reflect international human rights and criminal justice norms and standards, it is explicitly stated that the UN instrument 'is not designed to assess compliance with such norms and standards.'¹⁴² Another difference concerns the number, nature and structure of the indicators used to measure a country's adherence to the rule of law. Instead of the rather impressionistic list of indicators and other factors considered by the World Bank's experts, the 2011 UN guide suggests relying on 135 indicators in order to measure four major dimensions of each cluster of criminal justice institutions:

- I. Performance;
- II. Integrity, transparency and accountability;
- III. Treatment of members of vulnerable groups; and
- IV. Capacity.

¹³⁹ See Annex 1 of this Paper for a full list of the factors and sources used by the WGI project to measure a country's adherence to the rule of law.

¹⁴⁰ United Nations, *The United Nations Rule of Law Indicators: Implementation Guide and Project Tools*, UN Editions, 2011, available at <<http://www.unrol.org/doc.aspx?d=3061>>.

¹⁴¹ *Ibid.*, p. v.

¹⁴² *Ibid.*

To put it differently, 'the 135 indicators are grouped under three institutions: the police (41 indicators); the judicial system (51 indicators); and prisons (43 indicators). For each institution, indicators are grouped into several baskets, each relating to one of the four main dimensions'¹⁴³ previously mentioned. The figure below, which concerns the judicial system, should help clarify how the UN instrument is structured:



Each of the nine 'baskets' derived from the four dimensions of the rule of law are measured on the basis of different indicators. For instance, the basket on 'integrity and independence' of the judiciary 'assesses whether courts violate human rights or abuse their power and are free from undue influence of political and private interests'¹⁴⁴ by means of four indicators:

- Independence of judiciary – tenure (indicator 56);
- Independence of judiciary – discipline (indicator 57);
- Public perception of judicial independence (indicator 58); and
- Bribes to judges, prosecutors or court personnel (indicator 59).

A positive feature of the UN instrument is that its implementation guide provides straightforward and thorough information on the source of data and the manner in which each indicator is to be measured or rated. If we take, for instance, indicator 56, the guide indicates that relevant legal and/or administrative documents must be reviewed to determine the 'percentage of judges who are appointed for fixed terms that provide a guaranteed tenure, which is protected until retirement age or the expiration of a defined term of substantial duration.'¹⁴⁵ Other indicators may be rated or measured on the basis of experts survey (e.g. indicator 57), of public survey (e.g. indicators 58 and 59), or administrative and field data (e.g. indicator 54 on pre-sentence detention and which aims to measure the percentage of all

¹⁴³ Ibid., at 4.

¹⁴⁴ Ibid., at 7.

¹⁴⁵ Ibid., at 51.

detainees who have been held in detention for more than 12 months while awaiting sentencing or a final disposition of their case).

Last but not least, another noteworthy effort at measuring countries' compliance with the rule of law must be highlighted. Based in Washington D.C., The World Justice Project (WJP) is a non-governmental organisation, which, unlike the WGI, is exclusively dedicated to the advancement of the rule of law and which, contrary to the UN project, is concerned with all countries regardless of their political situation and level of development.¹⁴⁶ Set up in 2009, the WJP has developed a remarkably ambitious 'quantitative assessment tool designed to offer a detailed and comprehensive picture of the extent to which countries adhere to the rule of law in practice.'¹⁴⁷ Known as the WJP Rule of Law Index, this tool seeks to monitor 'the health of a country's institutional environment'¹⁴⁸ by providing data on the following nine dimensions of the rule of law:

1. Limited government powers
2. Absence of corruption
3. Order and security
4. Fundamental rights
5. Open government
6. Regulatory enforcement
7. Access to civil justice
8. Effective criminal justice
9. Informal justice

While the emphasis on the rule in practice, rather than the law on the books, is a common feature with the WGI project or the UN instrument, the WJP Index is not limited to the measurement of the performance of criminal justice institutions and gives less room to non-legal concepts such as management capacity. It may prove therefore more useful to the generally more legalistic organisation that is the EU than the tools developed by the World Bank or the UN. The WJP Index is also based on a more convincing understanding of what the rule of law entails as its drafters sought to strike a balance between the so-called thin and thick conceptions, which means that it incorporates both substantive and procedural elements and is therefore closer to the EU's understanding than the World Bank's one. In other words, the WJP understands the rule of law as a set of four *interrelated* 'universal principles':¹⁴⁹

1. The government and its officials and agents are accountable under the law;
2. The laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property;
3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient;
4. Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

¹⁴⁶ More information is available at <<http://worldjusticeproject.org>>.

¹⁴⁷ M. Agrast, J. Botero and A. Ponce, *WJP Rule of Law Index 2011* (Washington D.C.: The World Justice Project 2011), at 7.

¹⁴⁸ *Ibid.*, at 1.

¹⁴⁹ *Ibid.*, at 9.

In part because of this broader and more substantive working definition, and the absence of an exclusive and narrow focus on criminal justice institutions in post-conflict countries, the WJP Index offers a more universal, sophisticated and persuasive measurement tool. The nine factors mentioned above are indeed further disaggregated into 52 sub-factors and 'the scores of these sub-factors are built from over 400 variables drawn from assessments of the general public (1,000 respondents per country) and local legal experts,'¹⁵⁰ which leads the WJP to claim that 'the outcome of this exercise is one of the world's most comprehensive data sets measuring the extent to which countries adhere to the rule of law – not in theory but in practice.'¹⁵¹

Space constraints preclude a critical review of each of the 52 sub-factors and of how they are structured and weighted.¹⁵² For this author, viewed as a whole, the WJP Index offers a sound footing on the basis of which one can assess practical compliance with the rule of law in any given country, identify shortcomings and strengths, which in turn should help devising appropriate policies, or track changes over time. But as the WJP itself admits, the Index cannot 'provide a full diagnosis or dictate concrete priorities for action' and 'rule of law analysis requires a careful consideration of multiple dimensions – which may vary from country to country – and a combination of sources, instruments, and methods.'¹⁵³ Severe criticism has nevertheless been expressed in relation to the WJP Index. In a nutshell, the Index has been criticised, rather unfairly in our opinion, for the excessively abstract and general nature of some of the factors used; for its Western approach to institutionalising the rule of law and for concealing the real and everyday dilemmas that any polity governed by the rule of law faces.¹⁵⁴ The fact that the WJP, but this is a shared trait with the WGI and UN instruments, predominantly relies on data collected through expert and citizen polls instead of facts is also a recurrent source of concern.¹⁵⁵

An additional problem – from the EU's perspective – may be the exclusive focus on outputs. This means that the WJP Index is concerned with measuring 'where countries stand with regard to a number of widely accepted outcomes that rule of law societies seek to achieve, as opposed to measuring the institutional means, such as the legal and regulatory frameworks, by which a given society may seek to attain them. Some examples of outcomes measured by the Index include respect for fundamental rights, absence of corruption, and access to justice. Examples of inputs might include the number of courts, the number of police officers, and the judicial budget.'¹⁵⁶ While the number of courts, etc., would not be a matter of direct interest for the EU, the EU does, however, require that national politico-legal frameworks present some theoretical features, for instance, an independent judiciary, which must be given effect by means of laws and regulations. For the EU, and this does not seem an insensible concern, the law in the books is as important as the

¹⁵⁰ *Ibid.*, at 1.

¹⁵¹ *Ibid.*

¹⁵² See Annex 2 of this Paper for a full list.

¹⁵³ See *supra* note 147, at 2.

¹⁵⁴ S. Zouridis, 'The Rule of Law in the 21st Century: Bridging the Compliance Deficit', in S. Muller et al. (eds.), *The Law of the Future and the Future of the Law* (Oslo: Torkel Opshal Academic EPublisher 2011), at 93.

¹⁵⁵ *Ibid.*, at 95.

¹⁵⁶ See *supra* note 147, at 14.

law in practice, and one may even argue that it should be viewed as more important considering that sound practices are unlikely to develop in the absence of a sound legal framework. Accordingly, the EU needs an instrument that also relies on qualitative indicators and help measure legal and other relevant institutional inputs. And contrary to the UN, the EU also needs an instrument that can measure compliance of all public institutions with relevant norms and standards and not simply have a list of indicators inspired by those norms and standards. That being said, the WJP Index offers useful and concise country reports on the basis of which EU officials or any interested party may rapidly assess a country’s adherence to the rule of law in practice; identify the country’s strengths and weaknesses in comparison to similarly situated countries, and track changes over time – these being the three primary aims pursued by the WJP project when it first devised its measuring instrument in 2008. Let us have a look, for instance, at Croatia’s profile – Croatia’s Accession Treaty to the EU was signed on 9 December 2011 – as set out in the WJP 2011 report:¹⁵⁷

1. WJP Rule of Law Index						
Income High	WJP Rule of Law Index Factors		Score	Global Ranking	Regional Ranking	Income Group Ranking
	Region Eastern Europe & Central Asia	Factor 1: Limited Government Powers		0.55	33/66	4/12
Factor 2: Absence of Corruption			0.54	35/66	5/12	23/23
Factor 3: Order and Security			0.78	29/66	7/12	22/23
Factor 4: Fundamental Rights			0.67	26/66	5/12	21/23
Factor 5: Open Government			0.47	33/66	4/12	22/23
Factor 6: Regulatory Enforcement			0.52	37/66	6/12	23/23
Factor 7: Access to Civil Justice			0.57	32/66	6/12	22/23
Factor 8: Effective Criminal Justice			0.50	37/66	6/12	23/23
Population 4m (2010) 58% Urban 23% in three largest cities						

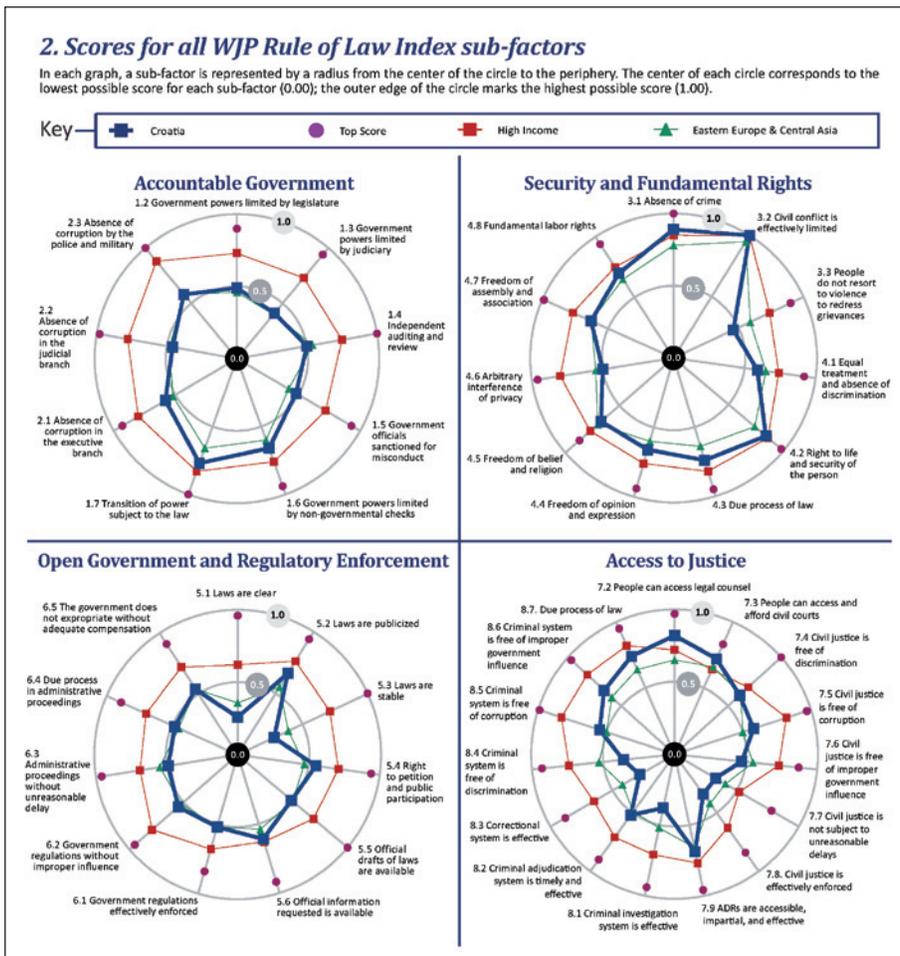
The above table displays Croatia’s aggregate scores by factor.¹⁵⁸ Considering that the best aggregate score a country can obtain is 1.00, it would seem that Croatia, on this front at least, is not quite ready for EU membership. Several rankings are also offered: a global, regional and income group rankings (the country’s ranking among countries with comparable per capita income levels). Unfortunately, the WJP Index does not regroup EU Member States and EU candidate and potential candidate countries in a single “region” and as a result, the Index does not provide us with average EU scores for the eight factors distinguished above and equally does not enable us to assess the rule-of-law readiness of non-EU countries.

In any event, the WJP index should also be praised for offering additional information on most of the 52 sub-factors previously mentioned by means of four graphs. One may well ask why the WJP adopt four graphs rather than nine, considering that the index distinguishes nine dimensions to the rule of law. The reasoning behind this is that the Index’s authors decided to regroup these nine dimensions under four headings, each of them constituting one of the four universal principles understood to constitute the heart of the rule of law. In other words, the principle of an

¹⁵⁷ Ibid., at 55.

¹⁵⁸ Data is yet to be collected regarding factor 9 on ‘informal justice’ but it is obvious that informal systems of law do not play any role in Croatia.

accountable government covers factors 1 and 2 (and the sub-factors within these two factors); the second principle regroups factors 3 and 4 (and relevant sub-factors); the third principle includes factors 5 and 6 (and relevant sub-factors), while the last principle of access to justice encompasses factors 7, 8 and 9 (and, as always, the relevant sub-factors). With respect to Croatia, the four graphs show, for instance, that its public administrative bodies 'are inefficient and the judicial system, while generally accessible, is still slow and subject to political influence and corruption' and that 'further work is needed in terms of openness ... and equal treatment of ethnic minorities.'¹⁵⁹



4.2.2 Devising a list of minimum legal requirements

The WGI and the WJP projects should be praised for offering much-needed innovative and useful quantitative tools to assess a country's adherence to the rule

¹⁵⁹ See *supra* note 147, at 31.

of law in practice and monitor progress or conversely, departure from the rule of law. The EU should also consider clarifying the *minimum legal requirements* any country which seeks to trade or more generally, cooperate with the EU, must meet in terms of the law on the books as well as the law in practice. In other words, the focus cannot merely be on outcomes but inputs must also be taken into account. It would also make sense to adopt different minimum requirements depending on whether third countries seek to develop closer links with the EU, wish to be granted the status of candidate countries or have already been granted this status. Once the minimum requirements are met on the basis of benchmarks as precisely defined as possible, a country's adherence to the rule of law may be investigated on a year-to-year basis and policies and actions developed to answer the identified shortcomings. In this respect, EU officials may want to consider the Venice Commission's 'Checklist for evaluating the state of the rule of law in single states', which was recently published and which could usefully serve as a model for the EU when it comes to defining a list of minimum requirements advocated above and monitoring progress over time.¹⁶⁰

Another 'checklist' worth considering can be found in the 2008 UN guidance note on its approach to rule of law assistance. In this document, the Secretary General offers a 'framework for strengthening the rule of law', which one would be forgiven to mistake for a list of minimum legal requirements any modern political system ought to meet according to the UN.¹⁶¹ The full framework is available in this paper's Annex 5 but to clarify its level of details and the nature of these minimum requirements, let us refer below to one of the six dimensions or fundamental constituent elements of the rule of law addressed in this document: the presence of a legal framework, and the implementation thereof, consistent with international norms and standards, and which protects human rights and provides for effective redress. For the UN, this means that any national legal system must have or adopt:

- Fair immigration, nationality and asylum laws;
- Penal laws ... consistent with, among others, the Basic Principles of Justice for Victims of Crime and Abuse of Power;
- Prison laws and regulations that are consistent with, among others, the Standard Minimum Rules for the Treatment of Prisoners;
- Laws for the protection of minorities, children, displaced and returning populations, and other marginalized or vulnerable groups that take into account their special status and international standards for their protection, and that outlaw and address the effects of discrimination;
- Laws that establish legal protection for the rights of women on an equal basis with men, and that ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- Laws protecting free association and assembly, and guarantees that press, libel, broadcasting and other laws respect free expression, opinion and information;
- Security legislation that protects non-derogable human rights, and ensures civilian control and oversight;
- Laws on the judiciary, legal practice and prosecution that reflect, among others, the standards embodied in the Basic Principles on the Independence of the Judiciary, Basic Principles on the Role of Lawyers, and Guidelines on the Role of Prosecutors;

¹⁶⁰ See *supra* note 10, at 15. See also Annex 4 of this paper.

¹⁶¹ See Guidance Note of the Secretary General, *supra* note 119, at 4.

- Laws, guidelines and directives that govern the conduct of police and other security forces consistent with, among others, the Code of Conduct for Law Enforcement Officials and Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;
- Fair procedures for the settlement of civil entitlements and disputes under the law and fair administration of laws, regulations, procedures and institutions.

The EU may want to make clear whether it is happy with this UN checklist or were the EU to decide to come up with its own, it would then make sense to clarify what are the fundamental constituent elements of the EU's concept of rule of law. The EU may also consider listing the most important legal and soft law instruments third countries – and perhaps its own Member States – should fully implement.

4.2.3 Defining sound policies and actions and evaluating their effectiveness

Once a country's shortcomings have been identified, a recurring and delicate question is how to define sound policies or actions and measure their effectiveness? The EU is too often guilty of operating in the absence of indicators or benchmarks. For instance, EU officials may be well aware of problems regarding the independence of the judicial branch in a particular country and they may suggest in their country report or any other relevant document that this be remedied. But should not the EU go further and define precise and quantifiable benchmarks in the form, for instance, of the benchmarks applied in the case of Bulgaria and Romania with respect to the independence of their judiciary? The UN and WJP instruments could be usefully relied on in this context as they offer comprehensive information on how to measure the rule of law indicators they adopted. To give a single example, the UN instrument seeks to measure the independence of the judicial branch by measuring the percentage of judges who are appointed for fixed terms that provide a guaranteed tenure, which is protected until retirement age or the expiration of a defined term of substantial duration. Were this to be identified as a shortcoming, the EU could then suggest to the relevant third country to adopt a piece of legislation on tenure which would conform to EU, the Council of Europe and/or UN standards, and monitor the direction and level of change over time by regularly reviewing how the suggested legislation is applied in practice.

Unlike the EU, which might be intent on preserving some extensive degree of political leeway when it comes to assessing third countries' compliance with the rule of law, the Council of Europe has begun addressing or rather debating these problems. In a report entitled 'Review of the Rule of Law situation: feasibility and methodology', it is suggested that a 'rule of law review' would enhance normative coherence and efficiency in the activities carried out by the Council of Europe in this field.¹⁶² With respect to the efficiency issue, the overall and long-term aim of the drafters of this report is to work out a methodology and define precise performance indicators in order to define and measure effectively the impact of the Council of Europe's rule of law activities in the areas of standard-setting, monitoring and co-operation.¹⁶³ 'Recognising that the different types of activities of the Council of

¹⁶² Council of Europe, *Review of the rule of law situation: feasibility and methodology* (prepared by Dr. Erik Wennerström in collaboration with the rule of law team at the Folke Bernadotte Academy and the Secretariat), DG-HL (2010) 21, 22 October 2010, at 21.

¹⁶³ *Ibid.*, para. 21 et seq.

Europe all employ a diverse range of measurement strategies today, and the fact that the needs, purposes and outputs of these strategies are interlinked with the function of each activity,¹⁶⁴ a modular and adaptable approach is proposed whereby the Council of Europe should rely on different measurements strategies and methods of verification to assess the effectiveness of its activities. To clarify the meaning of a modular approach, the following examples are given:

Examples of a Modular approach to measuring rule of law indicators for the different activities of the CoE		
Indicators based on CoE Rule of Law Acquis	Sources/method of Verification	Data
<p><i>The supremacy of law:</i> The principle of legality, including principles of lawfulness, legal certainty, and equality;</p> <p><i>An independent judiciary:</i> The institutional framework and organisation of state, including the separation of powers, a legal order guaranteeing the protection of fundamental rights;</p> <p><i>Protection of human rights and fundamental freedoms:</i> The upholding of the law and ensuring security for all, the duty for the state to respect and apply the law, and the role of judiciary;</p> <p><i>Access to justice:</i> Due process, including the right to a fair trial, access to court and remedies, and judicial review.</p>	<p>(1) <i>Document Review</i> (CoE experts/national experts)</p> <p>Purpose: Undertake the formal mapping in order to show how the laws and institutions are structured in relation to rule of law.</p> <p>Considerations: Does not tell us the broader picture of the system.</p>	<ul style="list-style-type: none"> • Execution of judgments from ECtHR (drawing upon CM-EXEC) • Constitutional law, laws, regulations (...) • Statistics from judicial and supervisory authorities (...) • CoE and Experts' mission reports • Reports of CoE Structures (...)
	<p>(2) <i>Focus Expert Groups: National legal experts and/or Civil Society Organisations</i></p> <p>(...)</p>	<ul style="list-style-type: none"> • Structured surveys/ interviews
	<p>(3) <i>General public survey</i></p> <p>(...)</p>	<ul style="list-style-type: none"> • Structured surveys/ interviews

The Council of Europe's report concludes by suggesting that pilot activities be selected in order to test and validate the recommended assessment tools and indicators before sharing them 'with other international organisations and institutions which promote the rule of law ... thus reaffirming the Council of Europe's leading role in this field.'¹⁶⁵ Whilst some further refinement of this so-called modular approach would seem to be clearly required, it is hoped that the EU will seek to be

¹⁶⁴ Ibid., para. 33.

¹⁶⁵ Ibid., para. 43.

associated to the Council of Europe's ongoing work on how to measure compliance with the rule of law so that it can become a more effective exporter of the values or principles on which it is formally founded.

5. Conclusion: Summary of key findings and recommendations

So as not to add to the already lengthy nature of this paper, this concluding section will take the form of a collection of bullet points that convey the paper's core findings before providing readers with a short set of recommendations.

5.1 Key findings

The rule of law as a constitutional principle: Subsequent and successive treaty amendments have reinforced the constitutional significance of the rule of law and made clear that this principle has both an internal and external dimension.

The rule of law as a foreign policy objective: The lack of any formal definition in the EU Treaties means that the rule of law, as a foreign policy objective, does not impose precise legal obligations but operates as a 'soft' ideal. The fact that the EU Treaties constantly link the rule of law to the principles of democratic government and human rights protection suggests however that these principles must be understood and promoted as interconnected and interdependent principles.

Nature of the EU's instruments aimed at upholding and promoting the rule of law abroad: The EU relies on soft instruments as well as legally binding unilateral and bilateral instruments to promote the rule of law abroad and these instruments show that the EU seeks to export this value by means of positive and negative incentives.

Evolution of the EU's instruments: A process of 'legislative mainstreaming' of the EU's foundational values has been taking place and this process is a logical answer to the enshrinement of these values as transversal principles that must constantly guide EU action on the international scene.

Meaning and Scope of the Rule of Law as a Value to be 'Exported': EU instruments – and more generally EU policy reports – rarely specify what the rule of law entails and when definitions are offered, they tend to be rather superficial and not perfectly consistent with each other as variable components tend to be referred to. Furthermore, EU instruments and reports do not generally include a clear list of minimum requirements to be met in any circumstances, or a set of general benchmarks or indicators which would help making sense of what the EU seeks to promote under the heading 'rule of law' or conversely, when a country may be said to fail to observe this principle.

The EU's thick and holistic conception: From a transversal analysis of the EU instruments and reports criticized above, one may nonetheless conclude that the EU is not merely seeking compliance with a set of legal requirements on how laws are made, adopted and enforced, but that the EU generally pursues a more ambitious agenda as its instruments clearly promote an understanding of the rule of law as a principle that includes substantive components as well as formal elements and which requires a democratic and liberal constitutional order giving full effect to hu-

man rights. To put it differently, the EU tends to promote a thick and holistic conception whereby the rule of law includes and requires effective and accessible means of legal redress, an independent and impartial judicial system, an effective legal framework in order to guarantee inter alia that governments are subject to the law, that corruption and fraud are repressed, and more generally, that national legal systems give full effect to fundamental rights.

The EU's normative leadership: The current international environment offers little room for EU to exercise some decisive normative leadership as the EU is not unique when it comes to promoting a substantive and holistic conception of the rule of law or financing actions that seek to increase compliance with particular sub-components of the rule of law such as access to justice and an independent judiciary.

Effectiveness of the EU as an exporter of values: Measuring the impact of EU rule of law policies and actions is no easy task as the EU has not shown any serious interest in the issue of defining and measuring the rule of law and operates in the absence of any comprehensive and authoritative analytical framework enabling the EU to take stock and subsequently monitor rule of law compliance in any particular country in any given year.

5.2 Key recommendations

Publication of an EU Rule of Law Guidance Note: The absence of a comprehensive, transversal and authoritative document offering a clear and exhaustive explanation of what the rule of law precisely entails, has favoured the adoption of unconvincing or undemanding rule of law policies and *à la carte* monitoring of third countries. Furthermore, this situation also negatively impacts on the EU's normative leadership and effectiveness as an international standard-setter. Accordingly, it is recommended that the EU starts working on the publication of a single document comprehensively setting out what its foundational principles entail and outlining the framework for EU rule of law activities as well as the comparative advantages of EU intervention.

Develop an EU Rule of Law Index: The EU should furthermore refine the analytical framework it relies on to assess and monitor countries' adherence to the rule of law, devise its policies and actions, and measure their effectiveness. In other words, the EU should devise its own qualitative and quantitative assessment tool in the light of the indexes, checklists and other indicators and benchmarks that have been developed by several international organisations in the past few years.

Adopt an EU minimum requirements checklist: The EU should also consider clarifying the minimum legal requirements any country which seeks to trade or more generally, cooperate with it, must meet in terms of the law on the books as well as the law in practice, and may also consider adopting different requirements depending on whether third countries seek to develop closer links with the EU, wish to be granted the status of candidate countries or have already been granted this status.

ANNEX 1: Rule of Law Indicator and Sources used in the Worldwide Governance Indicators (WGI) Project
 (<http://info.worldbank.org/governance/wgi/resources.htm>)

Code	Concept Measured
Representative Sources	
EU	Violent crime Organized crime Fairness of judicial process Enforceability of contracts Speediness of judicial process Confiscation/expropriation Intellectual property rights protection Private property protection
GCS	Common crime imposes costs on business Organized crime imposes costs on business Money laundering through banks is pervasive Effectiveness of Police The judiciary is independent from political influences of government, citizens, or firms Legal framework to challenge the legality of government actions is inefficient Intellectual Property protection is weak Protection of financial assets is weak Illegal donation to parties are frequent Percentage of firms which are unofficial or unregistered / Tax evasion
GWP	Confidence in the police force Confidence in judicial system Have you been a victim of crime?
HER	Property Rights
HUM	Independence of judiciary (CIRI)
IPD	Respect for law in relations between citizens and the administration Security of persons and goods Organised criminal activity (drug-trafficking, arms-trafficking, etc.) Effectiveness of fiscal system (tax evasion, informal economy, customs, etc.) Effectiveness of the justice system Security of property rights Security of contracts between private agents Government respect for contracts Settlement of economic disputes: justice in commercial matters Intellectual property protection Effectiveness of arrangements for the protection of intellectual property Agricultural sector: security of rights and property transactions
PRS	Law and Order
TPR	Trafficking in People Report
WMO	<i>Judicial Independence</i> An assessment of how far the state and other outside actors can influence and distort the legal system. This will determine the level of legal impartiality investors can expect. <i>Crime</i> How much of a threat businesses face from crime such as kidnapping, extortion, street violence, burglary and so on. These
Non-representative Sources	
ADB	Property rights and rule based governance
AFR	Over the past year, how often have you or anyone in your family feared crime in your own home? Over the past year, how often have you or anyone in your family had something stolen from your house? Over the past year, how often have you or anyone in your family been physically attacked? How much do you trust the courts of law? Trust in police
ASD	Property rights and rule based governance
BPS	How often is following characteristic associated with the court system: Fair and honest? How often is following characteristic associated with the court system: Enforceable? How often is following characteristic associated with the court system: Quick? How problematic is crime for the growth of your business? How problematic is judiciary for the growth of your business?
BTI	Rule of Law (SI)
CCR	Rule of Law
FRH	Judicial framework and independence (FNT)
GII	Executive Accountability Judicial Accountability Rule of Law Law Enforcement
IFD	Access to land Access to water for agriculture

Code	Concept Measured
Representative Sources	
LBO	Trust in Judiciary Trust in Police Have you been a victim of crime?
PIA	Property rights and rule based governance
VAB	Trust in Justice Trust in Police Trust in Supreme Court Have you been a victim of crime?
WCY	Tax evasion is a common practice in your country Justice is not fairly administered in society Personal security and private property are not adequately protected Parallel economy impairs economic development in your country Patent and copyright protection is not adequately enforced in your country

Sources of Governance Data Used in latest Update of WGI

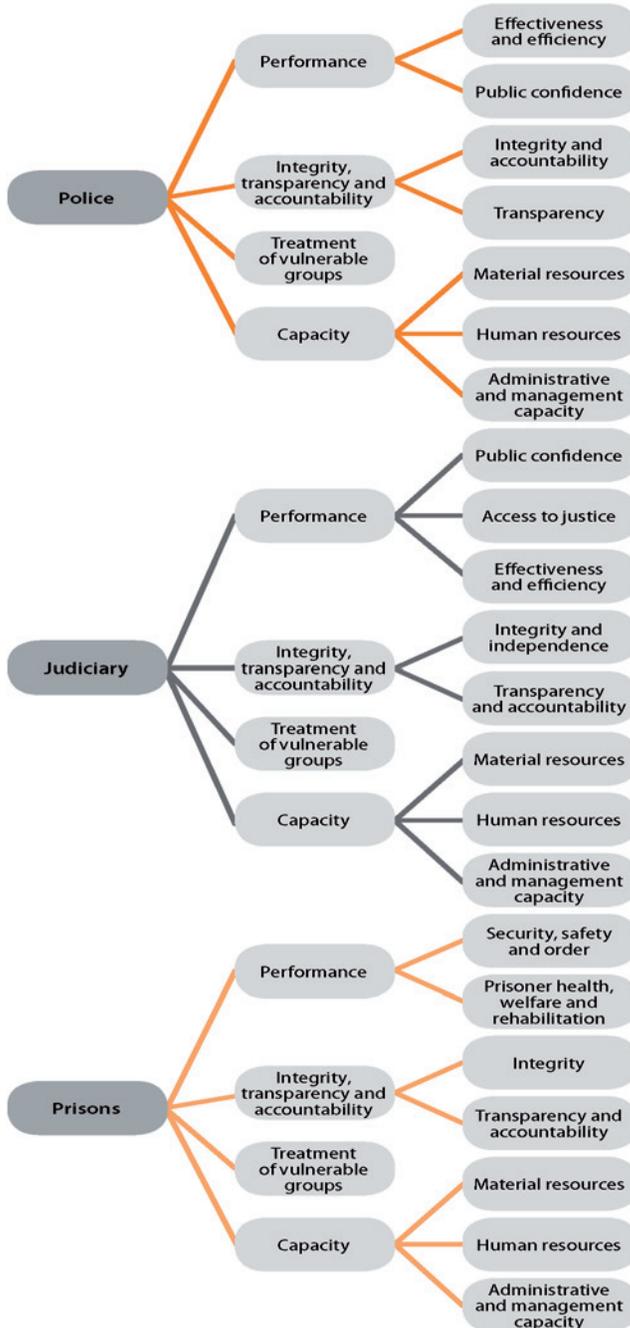
	Source	Type*
ADB	African Development Bank Country Policy and Institutional Assessments	Expert (GOV)
AFR	Afro-barometer	Survey
ASD	Asian Development Bank Country Policy and Institutional Assessments	Expert (GOV)
BPS	Business Enterprise Environment Survey	Survey
BTI	Bertelsmann Transformation Index	Expert (NGO)
CCR	Freedom House Countries at the Crossroads	Expert (NGO)
EBR	European Bank for Reconstruction and Development Transition Report	Expert (GOV)
EIU	Economist Intelligence Unit Risk-wire & Democracy Index	Expert (CBIP)
FRH	Freedom House	Expert (NGO)
GCB	Transparency International Global Corruption Barometer Survey	Survey
GCS	World Economic Forum Global Competitiveness Report	Survey
GII	Global Integrity Index	Expert (NGO)
GWP	Gallup World Poll	Survey
HER	Heritage Foundation Index of Economic Freedom	Expert (NGO)
HUM	Cingranelli Richards Human Rights Database and Political Terror Scale	Expert (GOV)
IFD	IFAD Rural Sector Performance Assessments	Expert (GOV)
IJT	iJET Country Security Risk Ratings	Expert (CBIP)
IPD	Institutional Profiles Database	Expert (GOV)
IRP	African Electoral Index	Expert (NGO)
LBO	Latino-barometro	Survey
MSI	International Research and Exchanges Board Media Sustainability Index	Expert (NGO)
OBI	International Budget Project Open Budget Index	Expert (NGO)
PIA	World Bank Country Policy and Institutional Assessments	Expert (GOV)
PRC	Political Economic Risk Consultancy Corruption in Asia Survey	Survey
PRS	Political Risk Services International Country Risk Guide	Expert (CBIP)
RSF	Reporters Without Borders Press Freedom Index	Expert (NGO)
TPR	US State Department Trafficking in People report	Expert (GOV)
VAB	Vanderbilt University Americas Barometer	Survey
WCY	Institute for Management and Development World Competitiveness Yearbook	Survey
WMO	Global Insight Business Conditions and Risk Indicators	Expert (CBIP)

*CBIP -- Commercial Business Information Provider, GOV -- Public Sector Data Provider, NGO -- Non-Governmental Organization Data Provider

ANNEX 2: The United Nations Rule of Law Indicators: Implementation Guide and Project Tools (UN Editions, 2011), p. 11.

Available at <http://www.unrol.org/doc.aspx?d=3061>.

Structure of the instrument



ANNEX 3: The WJP Rule of Law Index (2011), p. 11.

Full report available here: <http://www.worldjusticeproject.org/rule-of-law-index/>

WJP Rule of Law Index

Factor 1: Limited Government Powers

- 1.1 Government powers are defined in the fundamental law.
- 1.2 Government powers are effectively limited by the legislature.
- 1.3 Government powers are effectively limited by the judiciary.
- 1.4 Government powers are effectively limited by independent auditing and review.
- 1.5 Government officials are sanctioned for misconduct.
- 1.6 Government powers are effectively limited by non-governmental checks.
- 1.7 Transfers of power occur in accordance with the law.

Factor 2: Absence of Corruption

- 2.1 Government officials in the executive branch do not use public office for private gain.
- 2.2 Government officials in the judicial branch do not use public office for private gain.
- 2.3 Government officials in the police and the military do not use public office for private gain.
- 2.4 Government officials in the legislature do not use public office for private gain.

Factor 3: Order and Security

- 3.1 Crime is effectively controlled.
- 3.2 Civil conflict is effectively limited.
- 3.3 People do not resort to violence to redress personal grievances.

Factor 4: Fundamental Rights

- 4.1 Equal treatment and absence of discrimination are effectively guaranteed.
- 4.2 The right to life and security of the person is effectively guaranteed.
- 4.3 Due process of law and the rights of the accused are effectively guaranteed.
- 4.4 Freedom of opinion and expression is effectively guaranteed.
- 4.5 Freedom of belief and religion is effectively guaranteed.
- 4.6 The right to privacy is effectively guaranteed.
- 4.7 Freedom of assembly and association is effectively guaranteed.
- 4.8 Fundamental labor rights are effectively guaranteed.

Factor 5: Open Government

- 5.1 The laws are comprehensible to the public.
- 5.2 The laws are publicized and widely accessible.
- 5.3 The laws are stable.
- 5.4 The right of petition and public participation is effectively guaranteed.
- 5.5 Official drafts of laws are available to the public.
- 5.6 Official information is available to the public.

Factor 6: Effective Regulatory Enforcement

- 6.1 Government regulations are effectively enforced.
- 6.2 Government regulations are applied and enforced without improper influence.
- 6.3 Administrative proceedings are conducted without unreasonable delay.
- 6.4 Due process is respected in administrative proceedings.
- 6.5 The Government does not expropriate property without adequate compensation.

Factor 7: Access to Civil Justice

- 7.1 People are aware of available remedies.
- 7.2 People can access and afford legal advice and representation.
- 7.3 People can access and afford civil courts.
- 7.4 Civil justice is free of discrimination.
- 7.5 Civil justice is free of corruption.
- 7.6 Civil justice is free of improper government influence.
- 7.7 Civil justice is not subject to unreasonable delays.
- 7.8 Civil justice is effectively enforced.
- 7.9 ADR systems are accessible, impartial, and effective.

Factor 8: Effective Criminal Justice

- 8.1 Crimes are effectively investigated.
- 8.2 Crimes are effectively and timely adjudicated.
- 8.3 The correctional system is effective in reducing criminal behavior.
- 8.4 The criminal justice system is impartial.
- 8.5 The criminal justice system is free of corruption.
- 8.6 The criminal justice system is free of improper government influence.
- 8.7 The criminal justice system accords the accused due process of law.

Factor 9: Informal Justice

- 9.1 Informal justice is timely and effective.
- 9.2 Informal justice is impartial and free of improper influence.
- 9.3 Informal justice respects and protects fundamental rights.

ANNEX 4: The Venice Commission's checklist for evaluating the state of the rule of law in single states in Venice Commission Report on the Rule of Law, Study No. 512/2009, CDL-AD(2011)003rev, Strasbourg, 4 April 2011 (2011), p. 15.

Report available here: [www.venice.coe.int/docs/2011/CDL-AD\(2011\)003rev-f.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)003rev-f.pdf)

1. Legality (supremacy of the law)

- a) Does the State act on the basis of, and in accordance with the law?
- b) Is the process for enacting law transparent, accountable and democratic?
- c) Is the exercise of power authorised by law?
- d) To what extent is the law applied and enforced?
- e) To what extent does the government operate without using law?
- f) To what extent does the government use incidental measures instead of general rules?
- g) Are there exception clauses in the law of the State, allowing for special measures?
- h) Are there internal rules ensuring that the state abides by international law?
- i) Does the *nulla poena sine lege* system apply?

2. Legal certainty

- a) Are all the laws published?
- b) If there is any unwritten law, is it accessible?
- c) Are there limits to the legal discretion granted to the executive?
- d) Are there many exception clauses in the laws?
- e) Are the laws written in an intelligible language?
- f) Is retroactivity of laws prohibited?
- g) Is there a duty to maintain the law?
- h) Are final judgments by domestic courts called into question?
- i) Is the case-law of the courts coherent?
- j) Is legislation generally implementable and implemented?
- k) Are laws foreseeable as to their effects?
- l) Is legislative evaluation practiced on a regular basis?

3. Prohibition of arbitrariness

- a) Are there specific rules prohibiting arbitrariness?
- b) Are there limits to discretionary power?
- c) Is there a system of full publicity of government information?
- d) Are reasons required for decisions?

4. Access to Justice before independent and impartial courts

- a) Is the judiciary independent?
- b) Is the department of public prosecution to some degree autonomous from the state apparatus? Does it act on the basis of the law and not of political expediency?
- c) Are single judges subject to political influence or manipulation?
- d) Is the judiciary impartial? What provisions ensure its impartiality on a case-by-case basis?
- e) Do citizens have effective access to the judiciary, also for judicial review of governmental action?
- f) Does the judiciary have sufficient remedial powers?
- g) Is there a recognised, organised and independent legal profession?
- h) Are judgments implemented?
- i) Is respect of *res iudicata* ensured?

5. Respect for human rights: Are the following rights guaranteed (in practice)?

- a) The right of access to justice: Do citizens have effective access to the judiciary?
- b) The right to a legally competent judge

- c) The right to be heard
- d) *Ne bis in idem*
- e) Non-retroactivity of measures
- f) The right to an effective remedy
- g) The presumption of innocence
- h) The right to a fair trial

6. Non-discrimination and equality before the law

- a) Are the laws applied generally and without discrimination?
- b) Are there laws that discriminate against certain individuals or groups?
- c) Are laws interpreted in a discriminatory way?
- d) Are there individuals or groups with special legal privileges?

ANNEX 5: “Framework for strengthening the rule of law” in Guidance Note of UN the Secretary General, *UN Approach to Rule of Law Assistance* (April 2008), pp. 4-7.

Note available here: available at: http://www.unrol.org/doc.aspx?doc_id=2124.

- 1. A Constitution or equivalent**, which, as the highest law of the land, *inter alia*:
 - Incorporates internationally recognized human rights and fundamental freedoms as set out in international treaties, provides for their applicability in domestic law, and establishes effective and justiciable remedies at law for violations;
 - Provides for non-discrimination on the basis of race, color, gender, language, religion, political or other opinion, national or social origin, property, birth or other status, and which protects national minorities;
 - Provides for the equality of men and women;
 - Defines and limits the powers of government and its various branches, vis-à-vis each other, and the people;
 - Limits emergency powers and derogations of human rights and freedoms under states of emergency to those permissible under international standards;
 - Empowers an independent and impartial judiciary.
- 2. A legal framework, and the implementation thereof**, consistent with international norms and standards, which protects human rights and provides for effective redress, including:
 - Fair immigration, nationality and asylum laws;
 - Penal laws, including for transnational crimes, and criminal procedure laws that ensure the effective and fair administration of justice for perpetrators, including juveniles in conflict with the law as well as victims and witnesses, consistent with, among others, the Basic Principles of Justice for Victims of Crime and Abuse of Power;
 - Prison laws and regulations that are consistent with, among others, the Standard Minimum Rules for the Treatment of Prisoners;
 - Laws for the protection of minorities, children, displaced and returning populations, and other marginalized or vulnerable groups that take into account their special status and international standards for their protection, and that outlaw and address the effects of discrimination;
 - Laws that establish legal protection for the rights of women on an equal basis with men, and that ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
 - Laws protecting free association and assembly, and guarantees that press, libel, broadcasting and other laws respect free expression, opinion and information;
 - Security legislation that protects non-derogable human rights, and ensures civilian control and oversight;

- Laws on the judiciary, legal practice and prosecution that reflect, among others, the standards embodied in the Basic Principles on the Independence of the Judiciary, Basic Principles on the Role of Lawyers, and Guidelines on the Role of Prosecutors;
 - Laws, guidelines and directives that govern the conduct of police and other security forces consistent with, among others, the Code of Conduct for Law Enforcement Officials and Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;
 - Fair procedures for the settlement of civil entitlements and disputes under the law and fair administration of laws, regulations, procedures and institutions.
- 3. An electoral system, which, *inter alia*:**
- Assures, through periodic and genuine elections, that the will of the people shall be the basis of the authority of government;
 - Assures the right of everyone to take part in the government of his or her country, either directly or through freely chosen representatives, including through the application of temporary special measures;
 - Assures equal access to public service, including elective public service;
 - Guarantees universal and equal suffrage, and secrecy of the ballot;
 - Provides for non-discrimination in the area of political rights, and secures an electoral atmosphere that is free of intimidation and respectful of certain prerequisite rights, such as freedom of opinion, expression, information, assembly and association;
 - Provides for objective, unbiased and independent electoral administration, and independent review of alleged irregularities;
 - Provides for the transfer of power to victorious parties and candidates under the law.
- 4. Institutions of justice, governance, security and human rights** that are well-structured and financed, trained and equipped to make, promulgate, enforce and adjudicate the law in a manner that ensures the equal enjoyment of all human rights for all, including:
- A legislative institution or mechanism for the formulation and public promulgation of laws in a procedurally transparent manner;
 - Effective oversight institutions or mechanisms (e.g., anti-corruption bodies, parliamentary committees, national human rights institutions, independent commissions on human rights and ombudsman offices consistent with the Paris Principles);
 - A judiciary, which is independent, impartial and adequately empowered to adjudicate the law with integrity and ensure its equal application to all within its jurisdiction;
 - State institutional capacities to make policy for and manage the effective administration of justice, the provision of security, crime prevention, and to investigate and prosecute violations of the law;
 - Police and other law enforcement agencies that protect individuals and communities, enforce the law without discrimination and take appropriate action against alleged violations of the law, including appropriate oversight mechanisms;
 - Corrections services that provide for a safe, secure and humane prison and rehabilitation system, including alternatives to deprivation of liberty and diversion measures;
 - An accessible capacity to provide legal and paralegal assistance to those unable to afford it, and adequate and effective defense for those alleged to have violated the law;
 - A social service capacity to assist victims and witnesses of crime and abuse of power, including children, to participate effectively in the administration of justice in a manner that ensures redress for harm suffered;
 - A system to effectively adjudicate rights and responsibilities within the family, on the basis of gender equality and in the best interest of the child, which ensures that the protection of children from abuse, exploitation, harm and neglect;
 - A professional training regime for lawyers, judges, prosecutors, law enforcement and prison officials that promotes a culture of service, discipline and ethics;
 - Military and civil defense forces that has allegiance to the Constitution, or equivalent, and other laws of the land, and to the democratic government, and follows international humanitarian law;

- Effective and accessible mechanisms for resolution of entitlements and disputes between and among individuals, State organs, and groups in society, including courts, administrative tribunals, alternative or traditional dispute resolution mechanisms, and commissions or mechanisms for, among others, the fair settlement of property and housing disputes.
- 5. **Transitional justice processes and mechanisms** that respond to country contexts while anchored in international norms and standards to address the legacy of large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation, which may include both judicial and non-judicial mechanisms such as ad hoc criminal tribunals, truth commissions, vetting processes and reparations programmes.
- 6. **A public and civil society that contributes to strengthening the rule of law and holds public officials and institutions accountable**, including:
 - A system of governance that promotes a culture of legality, legal empowerment and ensures the public is aware of and educated in the full-range of its rights and responsibilities;
 - Communities that have equal access to justice and are empowered to participate in resolving disputes peacefully and responding to community safety needs and concerns;
 - Full access to judicial and other mechanisms for independent oversight of the exercise of executive authority and abuse of power;
 - A strong civil society, including, *inter alia*, adequately trained, equipped, financed and organized non-governmental organizations and professional associations, women's groups, labor unions and community organizations;
 - A free, responsible and flourishing mass media.