I. Introduction

According to the conclusions of the Justice and Home Affairs Council on 28 and 29 May 1998 concerning the item "Rule of law: Follow-up to the Noordwijk Conference", the Council will have particular regard to rule-of-law criteria in future discussions on enlargement.

The Presidency is proceeding on the assumption that there is agreement between the Member States in at least one key area about the rule-of-law considerations to be taken into account in criminal matters. This assumption is based on the common European tradition of democracy and the rule of law, which exists independently of the need to respect the differing structures of national legal systems. The most significant embodiment of this European tradition is the area of agreement constituting the European Convention on Human Rights and the resulting case law of the European Court of Human Rights.
This tradition provides the framework within the Member States for the functioning of police authorities, public prosecutors’ offices, courts and other criminal prosecution authorities and therefore also influences the common procedures of the Member States in the fields of police and judicial cooperation in criminal matters pursuant to Title VI of the EU Treaty.

In the present document, the Presidency will attempt to sum up with regard to criminal matters the fundamental principles resulting from this common tradition of the rule of law. It is hoped that this will provide the applicant countries with an outline of the beliefs common to all the Member States about the rule of law in criminal matters as an element in the process of enlargement.

II. Legal framework

According to Article F(2) of the Treaty on European Union, the EU undertakes to respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Article K.2(1) stipulates compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms in matters dealt with by the Third Pillar.

With the entry into force of the Treaty of Amsterdam, the EU’s objectives will, according to Article 2 of the EU Treaty, include the maintaining and developing of the Union as an area of freedom, security and justice. Article 6 of the EU Treaty refers not only to respect for fundamental rights but also to the fact that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law as principles which are common to the Member States. Respect for these principles is laid down expressly in Article 49 of the EU Treaty as a precondition for accession.
III. Rule of law as part of the enlargement process

The "Copenhagen criteria" include among the requirements for EU membership the achieving of institutional stability as a guarantee of democracy and the rule of law, the safeguarding of human rights and respect for and protection of minorities by the applicant States. The decisions of the Council of 30 March 1998 on the principles, priorities, intermediate objectives and conditions applicable to the Accession Partnerships with the CCEE also refer to the Copenhagen criteria. These decisions further call upon all applicant States in the short or medium term to give priority to improving judicial procedures and strengthening the authorities responsible for justice and home affairs. With regard to individual applicants, priorities also include ensuring the independence of justice, making the police accountable, developing a training strategy in the field of justice, continuing judicial reforms and ratifying and implementing the international legal instruments necessary for alignment with the Community "acquis".

The "Liste des Acquis" of the Union and its Member States in the fields of justice and home affairs (as at 30 March 1998) adopted by the General Affairs Council on 8 June 1998 includes under point XII ("Human rights instruments") the following agreements which are regarded as inseparable from the Union's objectives:

○ European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950);

○ United Nations Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966);

○ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 28 January 1981);
IV. List of common principles for the rule of law

These instruments in the Liste des Acquis are of fundamental importance to the rule of law in general and criminal matters in particular. However, the Presidency thinks that there is a need for a systematic overall picture of the principles for the rule of law resulting from these instruments and the constitutional traditions common to the Member States. Important preliminary work on this was done by the Netherlands Presidency at the Conference on the Rule of Law held in Nordwijk on 23 and 24 June 1997, which dealt with the rule of law in general. In the particular case of criminal matters and as a framework for police and judicial cooperation in criminal matters, a common list of rule-of-law requirements should be drawn up and forwarded to the applicant countries.

V. Conclusions

The Presidency is herewith submitting to the K.4 Committee the attached draft conclusions for discussion by the Council. These conclusions list common principles for the rule of law in criminal matters and recommend that account be taken of them in the enlargement process. The Presidency would request the K.4 Committee to approve submission of this draft to the Justice and Home Affairs Council.
Draft conclusions of the Council on
common principles for the rule of law in criminal matters

I. List of common principles for
the rule of law in criminal matters

The Council accepts the following principles for the rule of law in criminal matters as an expression of the traditions and beliefs common to the Member States and recommends that they be taken into account in the enlargement process:

1. Conviction for a criminal offence may only occur on the basis of an explicit stipulation that an act is punishable by law applicable at the time the offence was committed. Interference with the rights of the accused or other persons may only occur on the basis and within the limits of legislation.

2. To ensure the impartiality of judges, every conceivable measure should be taken, and in particular it should be made impossible to remove judges from office, care should be taken to ensure the widest separation of courts from the activities of public prosecutors, administrators, legislators and the government, as well as appropriate remuneration, and appointments to the courts should be made on the basis of objective criteria. Decisions concerning the partiality of a judge and disciplinary measures against judges should be a matter for the courts alone.

3. It is necessary to establish an objective system of criminal prosecution avoiding political, social, religious, racial, ethnic, national, sexual and other forms of discrimination and making it subject in practice (ultimately answerable) to a judicial authority, normally the public prosecutor.

4. It is necessary to establish a system of liability on the part of the police for their activities in solving and investigating criminal offences. This means
   - establishing effective supervisory rights and monitoring checks by a judicial authority,
– creating an effective channel of complaint for citizens involved,

– taking precautions against torture and inhuman or degrading treatment and ensuring impartial investigation of any accusations of such treatment,

– recognising compensation claims (usually against the State) in the case of damages caused illegally by executive bodies.

5. Irrespective of the type of criminal offence committed, the defence rights of the accused and the principles of fair procedure must be ensured. The accused must on principle be guaranteed the possibility of personally attending proceedings, calling upon the services of a lawyer of his choice and properly preparing his defence. It is also necessary to make sure that, where appropriate, the State bears the cost of defending an accused person without means, that an accused person who cannot understand the language of the Court is enabled genuinely to participate in the proceedings through the provision of translation assistance and that the accused is kept sufficiently informed about the state of affairs and legal situation through access to documents or in some other way. No fundamental limits may be imposed on the accused's right to question witnesses for the prosecution or have them questioned and to demand the acceptance of exonerating pieces of evidence.

6. The person concerned must at every stage in the proceedings be given the possibility of a judicial check on decisions and investigations. This normally means monitoring police and other operational activities, in particular coercive measures, and making any serious interference with basic rights subject to prior court authorisation. In the case of detention while awaiting trial and measures depriving an individual of his freedom for an unlimited period of time, a check must be made at appropriate intervals to ensure that the legal preconditions still obtain.

7. There must be a guarantee of independent legal representation within appropriate economic limits.
8. The presumption of innocence must be respected until there is a final conviction and safeguarded by appropriate provisions inter alia against serious interference through media coverage.

9. An appropriate duration of proceedings must be ensured not only with regard to the rights of the accused but also in the interest of the victim and to maintain public confidence in the effective administration of justice.

10. Where there is infringement of procedural provisions designed to protect basic rights, consideration must be given to prohibiting the use of evidence obtained in an unauthorised way.

11. Court judgements and other decisions constituting final settlement of the rights of those concerned must be subject to appeal to a higher court.

12. Restrictions on the public nature of principal proceedings before criminal courts must be avoided unless justified by concerns of morality, public order or national security.

13. The Council of Europe's minimum principles for the treatment of prisoners (R (87) 3) must be complied with.

14. Appropriate systems of basic and further training must be established in order to ensure that those in office and executive bodies are professional and highly qualified and that they exercise their functions impartially and in accordance with the rule of law.
II. Taking account of the common principles in the enlargement process

The list of common principles for the rule of law should be taken into account in several ways in the process of enlargement:

1. The list should assist the applicant States in their institutional reforms and their preparation of national programmes for adopting the Community "acquis" in the fields of justice and home affairs, with particular reference to the priorities of improving judicial procedures and strengthening the authorities responsible for justice and home affairs.

2. The list will be available to the European Commission as additional guidance for the support measures in the fields of justice and home affairs to be made available to the applicant countries as part of Accession Partnerships, with particular reference to the priorities of improving judicial procedures and strengthening the authorities responsible for justice and home affairs. The Commission is also invited to take account of the list in any relevant proposals for adjusting the priorities and objectives of Accession Partnerships pursuant to Article 2 of Regulation (EEC) No 622/98 and as part of "acquis" screening.

3. Finally, the list will provide key guidance in the context of the mechanism for joint evaluation of the adoption, implementation and effective transposal of the European Union "acquis" by the applicant States in the fields of justice and home affairs.