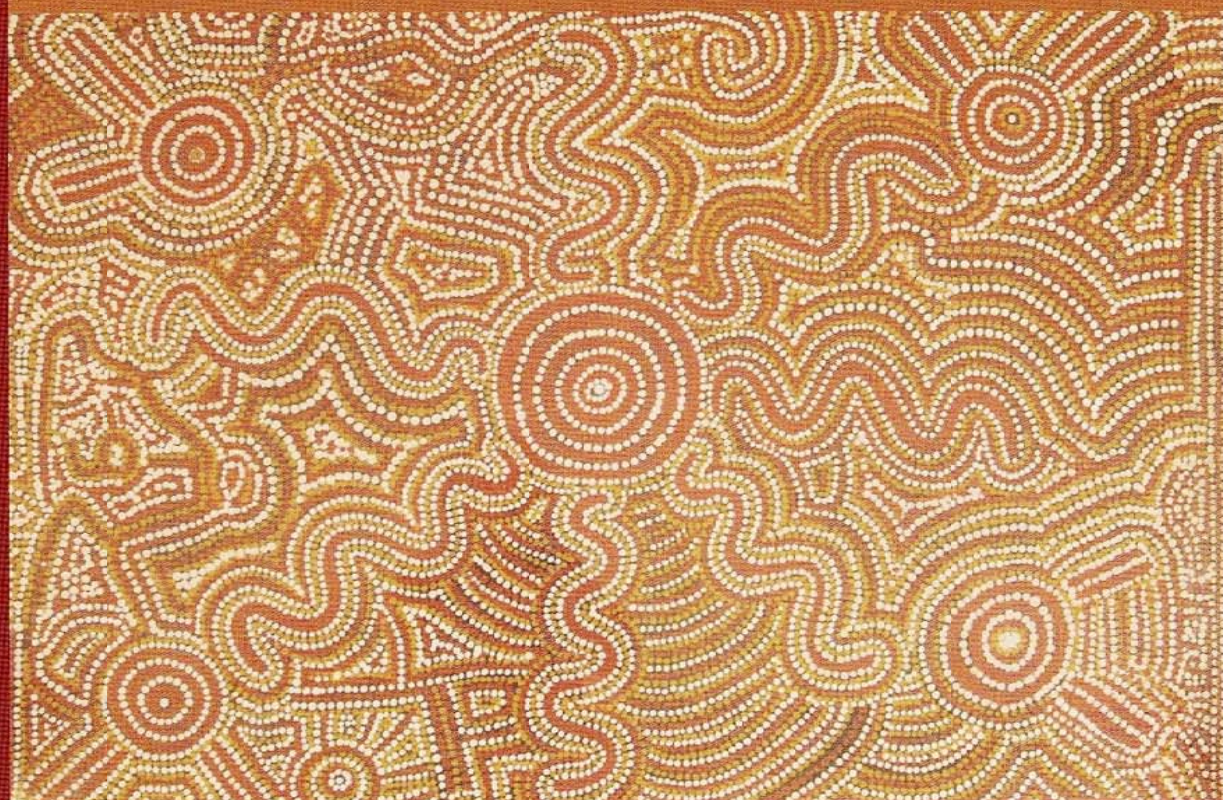


# Making Peoples Heard

Essays on Human Rights  
in Honour of  
Gudmundur Alfredsson

Edited by Asbjørn Eide,  
Jakob Th. Möller & Ineta Ziemele



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## Part 2

# **The United Nations and Human Rights**

## Chapter 6

# What Makes Democracy Good?

Lyal S. Sunga\*

*I have had the privilege to know Professor Dr. Gudmundur Alfredsson since our first meeting in 1989. At the time, Gudmundur was a Human Rights Officer at the United Nations Centre for Human Rights in Geneva, and I was auditing an evening class he gave on international human rights law at the Graduate Institute of International Studies where I was completing my Doctorate. Ever since then, I have kept close contact with Gudmundur, delighted in his intellectual insights and often sought his wise counsel. A major reason for my moving from Hong Kong to Sweden back in 2005 was the chance to work more closely with Gudmundur who was then serving as Director of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in Lund. It is a pleasure to contribute an essay to this collection in honour of Gudmundur whom I consider a great friend, a top-notch scholar and above all, an illustrious gentleman who continues to inspire so many of us working in the field of human rights.*

### 1. Introduction

Democracy is not an absolute guarantor of human rights. Neither is the rule of law. Democracy can produce highly questionable results and unless properly restrained, it can trample the rights of minorities and even self-destruct. The rule of law can be interpreted to mean 'law and order' where legal enactments and decrees enslave rather than guide us. The perennial challenge has been to ensure that democracy and the rule of law faithfully reflect the sovereign will of the people without violating basic human rights and fundamental freedoms.

The Nazi Government's policy against German Jews, Sinti and Roma populations which eventually culminated in the Final Solution and the extermination of millions represents only the more obvious and extreme example of the misuse of democratic means for undemocratic ends.<sup>1</sup> The cynical use of democracy to spread intolerance and install dictatorship has been seen in many other countries and times, even if not

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1 See Ian Kershaw, "How Democracy Produced a Monster" New York Times (Op-Ed pages), 3 February 2008.

on the scale of the Nazi horrors. Recall Slobodan Milosevic's whipping up of Serbian nationalism which led to full-scale genocide through so-called 'ethnic cleansing' campaigns, the tearing apart of Yugoslavia and the ruination of millions of lives. The January 2006 democratic election win of Hamas – widely considered among western countries to be a terrorist group – with an outright majority in the Palestinian Legislative Council,<sup>2</sup> and the reaction of many western countries to this unanticipated result, raise many troubling issues. The episode was reminiscent of the December 1991 elections in Algeria where the Islamic Salvation Front was on the verge of coming to power,<sup>3</sup> seemingly intent to use democratic means to end democracy through "one man, one vote, one time";<sup>4</sup> before the army stepped in and took power, thereby itself ending democracy in Algeria even more quickly! At the time of writing, political leaders of several countries were busily pushing their democracies to the brink of dictatorship: Hugo Chavez in Venezuela through a relentless campaign to centralize power in his own hands and silence critics; Mahmoud Ahmedinejad's clumsy Israel-baiting and Holocaust revisionism to pump up his own flagging popular support, topping it all off in June 2009 with outright election fraud in Iran; and Robert Mugabe's ugly populism, hard-line party politics and unleashing of bare-knuckled goon squads to intimidate political opponents and tighten his dictatorial choke-hold over Zimbabwe.<sup>5</sup>

Even in the heart of Enlightenment Europe, racism and xenophobia – these days directed heavily against Muslims – have assumed disturbing dimensions through the enactment of symbolic legal measures and shrill public debates over 'national identity'. Publication on 30 September 2005 of deprecating caricatures of the Prophet Mohammed in the Danish *Jyllands-Posten* newspaper seemed deliberately calculated to insult and humiliate the Muslim minority in Denmark. Fundamentalist political Islamists were baited into predictable outrage, then countered with jingoistic versions

2 See Marina Ottaway, "Promoting Democracy after Hamas' Victory" Carnegie Endowment for Peace Web Commentary, 30 February 2006 at <<http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=17978>>, last accessed on 8 February 2010.

3 A number of Islamic Salvation Front (FIS) leaders advocated that Shari'a Law should form the supreme law of Algeria and that democracy could be dispensed with entirely. The FIS had won landslide victories in local elections in December 1991 and was poised to win a massive majority in national elections until the army annulled the elections process, declared a state of emergency and banned the FIS. See Tibi Bassam, "Islamic Law / Shari'a, Human Rights, Universal Morality and International Relations", 16 (2) *Human Rights Quarterly* (1994) 277.

4 This is the phrase of Edward P. Djerejian, former Ambassador of the United States to Syria and Israel in an interview entitled "One Man, One Vote, One Time Is Not Democracy" 13(4) *New Perspectives Quarterly* (1996).

5 See Martin Meredith, *Mugabe: Power, Plunder, and the Struggle for Zimbabwe's Future* (New York: Public Affairs) 2007; Kevin Woods, *The Kevin Woods Story: In the Shadows of Mugabe's Gallows* (Johannesburg: 30 Degrees South Publishers) 2008; Heidi Holland, *Dinner with Mugabe: The Untold Story of a Freedom Fighter Who Became a Tyrant* (Johannesburg: Penguin) 2008; and Stephen Chan, *Robert Mugabe: A Life of Power and Violence* (Ann Arbor: University of Michigan Press) 2003.

of an absolute right to free speech and the defense of ‘Danish values.’<sup>6</sup> At the time of writing, other examples seemed to arise almost weekly. The French Government’s ill-considered prohibition on the wearing of religious symbols in public educational institutions was clearly a reaction to the wearing of the Muslim head scarf. In January 2010, a French parliamentary commission recommended that the French Parliament adopt a legal ban on the wearing of the face veil in public.<sup>7</sup> Such measures were put forward ostensibly to protect *La Douce France* – an image blithely unaccommodating of Mahgrebi or other cultures.<sup>8</sup> To be sure, the wearing of full face veils in public raises some complex non-discrimination issues connected to the right to freedom of religion, cultural and minority rights, as well as the status and rights of women living in heavily sexist, oppressive, male-dominated communities. Yet all this policy and legislative activity to address the few women who wear a full face veil – estimated in France to be around two thousand – smacks of highly politicized and heavy-handed targeting of a particular cultural minority. The Flanders region of Belgium banned the wearing of the Muslim head scarf in 700 schools in September 2009.<sup>9</sup> On 29 November 2009, 57.5 per cent of Swiss voters comprising a majority of Cantons and drawn from a high turnout of some 53 per cent, voted in a referendum to insert the phrase

6 Over the following months, a number of Danish and other Embassies in Syria, Lebanon and Iran were attacked and a total of 139 persons died when protests and police reaction turned violent. In a number of Middle East countries, consumer boycotts were launched against Danish goods. Extremists issue a series of death threats against the cartoonists many of whom were forced into hiding. On 1 January 2010, a Somali man was reported to have attacked cartoonist Kurt Westergaard who lives under police protection in his fortified Aarhus home with an axe and knife while shouting his intention to kill Westergaard. Luckily, Westergaard and his five-year old granddaughter were unharmed. See “Danish Police Shoot Intruder at Cartoonist’s Home” *BBC News* On-line at <<http://news.bbc.co.uk/2/hi/europe/8437433.stm>>, last accessed on 8 February 2010.

7 One must distinguish among the ‘hijab’ or head scarf – a square scarf covering the head and neck not covering the face, the ‘al-amira’ – a two-piece veil consisting of a cap and accompanying tube-like scarf, the ‘shayla’ – a rectangular scarf often worn in the Persian Gulf, the ‘khimar’ – a long veil that covers hair, neck and shoulders but not the face, the ‘chador’ – worn by women in Iran outside the house that cloaks the entire body but not necessarily the face, the ‘niqab’ which veils the face and might or might not screen also the eyes with a separate additional veil and the ‘burqa’ which covers the entire face, body and eyes with only a mesh screen to allow vision. See further, <[http://news.bbc.co.uk/2/shared/spl/hi/pop\\_ups/05/europe\\_muslim\\_veils/html/1.stm](http://news.bbc.co.uk/2/shared/spl/hi/pop_ups/05/europe_muslim_veils/html/1.stm)>, last accessed on 8 February 2010. See also “French report calls for veil ban,” *Al-Jazeera* of 27 January 2010 at <<http://english.aljazeera.net/news/europe/2010/01/20101269170257444.html>>, last accessed 8 February 2010.

8 See “Sarkozy Plans New Patriotism Based on Values of ‘La Douce France’” *The Times*, 27 October 2009, available on-line at <<http://www.timesonline.co.uk/tol/news/world/europe/article6891255.ece>>, last accessed on 8 February 2010. The article explains that “Eric Besson, the Minister for Immigration and the National Identity, will conduct a two-month national debate on what it means to be French in the 21st century.”

9 See ‘Belgian Schools Ban Muslim Head Scarf: Tribunal’ *Agence France Press*, 11 September 2009.

“The building of minarets is forbidden” into the Constitution of the Swiss Confederation – a move clearly targeting the Muslim minority in Switzerland, a country reported to have only four minarets in its entire territory.<sup>10</sup> A few days later, Roberto Calderoli, a Minister in Silvio Berlusconi’s Government, from the Lega Nord, Italy’s anti-immigration political party, vowed to hold a similar referendum to ban minarets in Italy.<sup>11</sup> On 1 January 2010, the Mosque in Malmo, Sweden, was attacked.<sup>12</sup> On 20 January 2010, the trial of Geert Wilders – a Dutch anti-Islamic politician – began for incitement of racial hatred in the Netherlands.<sup>13</sup> Fortunately, most of these sailing adventures in legislative intolerance are likely to crash and sink as soon as they hit the rocks of European Court of Human Rights jurisprudence.

It is not that democracy is inherently bad,<sup>14</sup> but that democracy can ignore or diminish human rights, or worse, become thoroughly implicated in the active suppression of human rights, particularly those of minorities. The question ‘what makes democracy good?’ – one of classical antiquity – has lost none of its relevance for today because democracy, or at least a formal commitment to it, has become *de rigueur* for all States. Almost every State claims to be democratic. The problem is that what States say and what they do often do not match. It has therefore become more obvious that the quality of democratic governance should be evaluated not only by whether the formal, procedural ‘rules of the game’ have been followed during election time and the passage of legislation etc., but also by whether democracy itself respects and promotes human rights. In other words, human rights norms have to figure as part and parcel of the modern concept of democracy itself as well as the standard by which democracy must be judged.

The present enquiry revisits the question of the relationship among democracy, the rule of law and human rights in order to identify elements which enhance the quality of democratic governance.<sup>15</sup> The meanings of ‘democracy’ and ‘the rule of law’

10 See the Statement of the President of the International Progress Organization, Dr Hans Koechler ‘Swiss minaret ban violates basic human rights and threatens religious peace in Europe’, 3 December 2009 at <[http://i-p-o.org/Swiss-minaret\\_ban-IPO-nr-03Dec09.htm](http://i-p-o.org/Swiss-minaret_ban-IPO-nr-03Dec09.htm)>, last accessed on 8 February 2010.

11 See Nick Pisa, ‘Now Italy May Follow Switzerland with Referendum on Islamic Minarets’ *The Daily Mail*, 1 December 2009, online at <<http://www.mailonsunday.co.uk/news/worldnews/article-1232337>>, last accessed on 8 February 2010.

12 See ‘No Suspects in Attack against Malmo Mosque’, *The Local*, 2 January 2010 at <<http://www.thelocal.se/24160/20100102/>>, last accessed on 8 February 2010.

13 See Toby Sterling, ‘Dutch Anti-Islam Lawmaker Faces Hate Speech Trial’, *Associated Press* at <<http://www.washingtonpost.com/wp-dyn/content/article/2010/01/20/AR2010012000544.html>>, last accessed on 8 February 2010.

14 As Winston Churchill said in a speech to the British House of Commons: “No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.” See Winston Churchill, then United Kingdom Leader of the Opposition, in Hansard, House of Commons Debate of 11 November 1947 at 206-207.

15 This paper is based on my presentation at an expert seminar convened by the UN Office of the High Commissioner for Human Rights in Geneva in February-March 2005 on the

date back centuries, but they have more recently become influenced by the human rights movement, particularly since the end of the Cold War. It is therefore pertinent to review the international community's increasing recognition of normative interdependence among democracy, the rule of law and human rights, in historical context. It is instructive in particular to take note of the conceptual refinement of 'democracy', 'the rule of law' and 'human rights' since the adoption of the Charter of the United Nations, as well as of the insights offered by the International Conferences on New or Restored Democracies, the Vienna Declaration and Programme of Action and the UN Commission on Human Rights.<sup>16</sup> This leads to a consideration of practical measures that States, intergovernmental organizations and civil society should undertake to enhance the quality of democratic governance and to prevent the abuse of democratic means for undemocratic ends.

## 2. Democracy and the Rule of Law – Narrower and Broader Interpretations

In its most basic sense, the term 'democracy', originating from the ancient Greek word *demokratia*, denotes rule of or by 'the people'.<sup>17</sup> 'Rule by the people' does not relate necessarily to the rights of individuals but rather to 'rule by the many' or even to 'majority rule'. Alexis de Tocqueville warned against democracy degenerating into a 'tyranny of the majority'<sup>18</sup> – a concern voiced years earlier by James Madison and other drafters of the Constitution of the United States.<sup>19</sup> Thomas Jefferson quipped: "A democracy is nothing more than mob rule, where fifty-one percent of the people may take away the rights of the other forty-nine."<sup>20</sup> Although this image is of course a caricature, it does make the point that democracy without limitations can result in the arbitrary use of power and complete denial of the rights of minorities. One could

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interdependence between democracy and human rights, pursuant to Commission on Human Rights resolution 2003/36. See Report of the second expert seminar 'Democracy and the rule of law' (Geneva, 28 February-2 March 2005), Note by the secretariat E/CN.4/2005/58, 18 March 2005.

- 16 The Commission held its final session on 27 March 2006, and pursuant to a request of the UN General Assembly, the Economic and Social Council formally dissolved the Commission on 16 June 2006. See UN General Assembly resolution A/Res/60/251, adopted 15 March 2006. The UN Human Rights Council held its first meeting on 19 June 2006.
- 17 See e.g. Webster's New Universal Unabridged Dictionary entry under 'democracy' (1996) or the same in the Oxford Dictionary (Open University Press) 2004.
- 18 See Alexis de Tocqueville, *On Democracy in America 1835* (originally in French "*De la démocratie en Amérique*") Volume I, Chapters XV and XVI referring to the 'tyranny of the majority'.
- 19 Noting that the ancient Roman Empire lasted much longer than the ancient Greek democracies, James Madison and John Adams considered that the United States might be more likely to endure as a republic rather than as a democracy. See generally *The Federalist Papers* 1788.
- 20 This statement is widely attributed to Thomas Jefferson, the Third President of the United States (1801-09) and author of the Declaration of Independence.



say that in a strict and narrow sense, ‘democracy’ has no necessary connection at all to ‘human rights.’

So on the one hand, democracy may be ‘too democratic’ where it harnesses or manipulates the will of the majority to suppress the rights of minorities, yet on the other hand, democracy has rarely ever been truly ‘democratic enough.’ As Jean-Jacques Rousseau remarked in his *Discourse on Political Economy*, even “Athens was not in fact a democracy, but a highly tyrannical aristocracy, governed by learned men and orators.”<sup>21</sup> Faithful representation of the people’s ‘general will’ in practice has been challenged by the ‘iron law of oligarchy’ to use Robert Michels’ famous phrase.<sup>22</sup> Moreover, governance in modern States is much more complex than it was in the ancient Greek city-States because of the range of issues requiring policy review, decision making and action, the number of eligible voters, and in most cases, the size of the polity as well. As a practical matter, the exigencies of modern governance and the increasing magnitude and complexity of policy making, demand in effect ‘rule by the few’, particularly in larger polities, and this naturally increases the risks of abuse of power, and the need to temper democracy with the rule of law and human rights.

References to the rule of law can be found in Plato’s *Republic*,<sup>23</sup> and Aristotle’s *Politics*<sup>24</sup> which surveys the constitutions of more than 200 city-States in ancient Greece. Although ancient in origin, the rule of law began to operate as an important principle of constitutional law and practice in relation to the modern State only once the sovereign will of the people began to triumph over absolute monarchy in Europe. Perhaps the clearest articulation of the rule of law in the context of basic democratic principles finds expression in the classic writings of John Locke, Thomas Hobbes, John Stuart Mill, and the great *philosophes* of the Enlightenment, in particular, Jean-Jacques Rousseau, Baron de Montesquieu and Voltaire. Having developed over centuries, the doctrine of ‘the rule of law’ has become reflected in the forms of parliamentary supremacy, separation of powers, responsible government, pluralism, free and regular elections and mass political participation, equality before the law, independence of the judiciary, and general transparency and accountability of the public service. The doctrine of the rule of law continues to develop in theory and practice, tempered and nourished by the prevailing social and political conditions of the times.

Among the variety of meanings ‘the rule of law’ has acquired over time, one can distinguish a narrower sense from a wider one. In a narrow sense, ‘the rule of law’ focuses more on ‘supremacy of law’, prescribing that ‘no one is above the law’ and that ‘everyone is equal under the law’. It therefore implies the illegality of the arbitrary use of public authority and calls for limitations on discretionary authority. In this sense, ‘the rule of law’ approximates the principle of legality, or is a little wider, if we include Joseph Raz’s procedural requirements that law must be clear, ‘open’ or

21 Jean-Jacques Rousseau, ‘On the Social Contract’ with Geneva Manuscript and Political Economy, (ed. Masters) (New York: St. Martin’s Press) 1978 at 213. Not only that, but women, slaves and non-citizens were not allowed to vote.

22 Robert Michels, *Political Parties* (New York: Free Press Paperback) 1966.

23 Plato, *The Republic* (trans. Desmond Lee) (New York: Penguin Classics) 2003.

24 Aristotle, *Politics* (trans. T. A. Sinclair) (New York: Penguin Classics) 1981.

public (rather than secret), prospective and relatively stable.<sup>25</sup> The emphasis on law, order and equality does not however import very much in terms of human rights guarantees beyond the principle of non-discrimination. In a wider sense, 'the rule of law' refers not only to procedural requirements of legality, but also to substantive elements of law, as in Lon Fuller's 'inner morality of law',<sup>26</sup> H.L.A. Hart's 'minimum content of natural law',<sup>27</sup> or in explicitly rights-based legal theories, such as those of Ronald Dworkin<sup>28</sup> or the Natural Law approach of John M. Finnis.<sup>29</sup>

Classical, narrower interpretations of 'democracy' and 'the rule of law' carry little human rights content, a shortcoming only partially addressed in the academic treatises of Fuller, Hart, Dworkin, Finnis, and to a certain extent John Rawls.<sup>30</sup> Much more influential has been international human rights law which has helped to expand, enrich and embrace the meanings of democracy and the rule of law, thereby revitalizing the practical importance of the classic debate on what makes democracy good, as discussed next.

### 3. The Rise and Influence of International Human Rights Law on Democracy and the Rule of Law

Prior to 1945, human rights were considered to be matters of almost exclusive domestic jurisdiction, except for minority rights guarantees found in certain peace treaties, and international labour law. World War Two changed that. The systematic character and mass scale of Hitler's Final Solution, first against minorities in Germany, then against peoples in other lands, and the immense human cost of the Second World War in general, forced the international community to realize that it could not ignore serious human rights violations, even where they were perpetrated within the boundaries of a single State. Serious human rights violations at the domestic level have to be considered not only as symptoms but also as root causes of social unrest and political instability, and if left unchecked, they could escalate, eventually posing a threat to regional or international peace and security. 'Human rights' were therefore accorded prominent place in the principles and purposes of the Charter of the United Nations and made an integral part of the international community's 'peace strategy' – to use Professor Georges Abi-Saab's phrase.<sup>31</sup> Read together, Articles 55(c) and 56 oblige the UN to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'

25 See generally Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press) 1979.

26 Lon L. Fuller, *The Morality of Law* (London: Yale University Press) 1969.

27 H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon) 1961 at 189.

28 Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press) 1977.

29 See John M Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press) 1980.

30 See generally John Rawls, *A Theory of Justice* (Oxford: Clarendon Press) 1972.

31 See Georges Abi-Saab, 'The Role of International Law in the Peace Strategy of the Charter', in *Is Universality in Jeopardy?* (New York: UN Department of Public Information) (1987) 35-49.

and UN Member States ‘to take joint and separate action in cooperation with the Organization’ to these ends. These provisions, with Articles 13, 62, 68 and 76, form the juridical platform upon which human rights were elevated from being considered matters mainly of domestic concern to those of legitimate international concern and cooperation and which set the stage for the subsequent development of international human rights law and implementation.

While Prime Minister Churchill and President Roosevelt referred in the Atlantic Charter<sup>32</sup> to “the right of all peoples to choose the form of government under which they will live”; the Charter of the United Nations does not refer to ‘democracy’ but only to the “principle of equal rights and self-determination of peoples.” That explicit references to ‘democracy’ cannot be found in the UN Charter should not be too surprising because at the time, metropolitan governments showed little intention to end their colonial domination of peoples in Africa and Asia – a thoroughly undemocratic practice. Indeed, it is unlikely that ‘self-determination’ would have been inserted into the UN Charter without the insistence of the Soviet Union, supported by China, and even then, the colonial Powers could only agree to its inclusion once diluted, as it was, to the status of a ‘principle’ rather than a legally binding ‘right.’<sup>33</sup>

While ‘democracy’ did not figure explicitly in the UN Charter, it was, after much debate, to become reflected clearly in Article 21 of the Universal Declaration of Human Rights (UDHR) which lays down the minimum elements that: everyone has the right to take part in the government of his or her country directly or through freely chosen representatives; everyone has the right to equal access to public service in his country; and that the will of the people shall be the basis of the authority of government as expressed in periodic and genuine elections through universal and equal suffrage held by secret vote or equivalent free voting procedures.<sup>34</sup> Also, Article 29(2) of the UDHR provides that “everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society” implying not only that restrictions placed on rights themselves must be limited, but that democratic protection of human rights must not constitute *abus de droit* in one way or another. Simi-

32 Point 3 of the Atlantic Charter, signed 14 August 1941 by United Kingdom Prime Minister Winston Churchill and United States President Franklin Roosevelt.

33 See generally Edward A. Laing, ‘The Norm of Self-Determination, 1941-1991’, 22 (No. 2) *California Western International Law Journal* (1991-92) 209-308; Robert McCorquodale, ‘Self-Determination beyond the Colonial Context and its Potential Impact on Africa’, 4 (No. 3) *African Journal of International and Comparative Law* (1992) 592-608; Christian Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht, Boston, London: Martinus Nijhof) 1993, 347; and Anthony Whelan, ‘Wilsonian Self-Determination and the Versailles Settlement’, 43 *International and Comparative Law Quarterly* (1994) 99-115.

34 For an interesting discussion of the *travaux préparatoires* to Article 21 of the UDHR, see Allan Rosas, ‘Article 21’ in Gudmundur Alfredsson and Asbjørn Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff) 1999, 431-451.



larly, Article 30 seeks to prevent the Declaration from being interpreted to destroy the rights and freedoms set out therein. Although minimal in form and content, the provisions of the UDHR are very important because they signal the international community's recognition in 1948 to include democratic rights as part of the 'common standard of achievement for all peoples and all nations.'

One might wonder how ideologically opposed superpowers and their allies could agree to the adoption of the UDHR that comprises democratic rights – inherently political, even revolutionary concepts – just as the Cold War was beginning.<sup>35</sup> Democratic rights, like other international human rights norms, could develop during the Cold War partly because each side brandished human rights as weapons of ideological warfare. In this contentious international climate, human rights quickly gained currency as grounds for political condemnation, ideological leverage, and diplomatic persuasion. While this guaranteed human rights much attention in newspaper headlines and international diplomacy throughout the Cold War, it also stunted the universality of human rights in practice, simply because international cooperation to make human rights effective as a set of juridically binding norms, was lacking.

Western countries, hoping to undermine totalitarianism in Warsaw Pact States and woo developing countries away from nationalization policies and toward the international trading system, insisted on a narrow, formal idea of democratic rights that had everything to do with civil and political rights and virtually nothing to do with economic, social and cultural rights. Socialist Bloc countries, which systematically denied multiparty elections and a range of civil and political rights closely related to democracy, claimed that the real aim of democratic governance had to be the elimination of class inequality and the establishment of minimum conditions of human welfare and social security both at home and abroad, particularly for countries at the bottom rungs of the international division of labour. 'Permanent sovereignty over natural resources' became the rallying cry in the late 1950's to protect developing countries from the ravages of international capitalist exploitation as decolonization gained full swing.<sup>36</sup>

#### 4. Post Cold War Focus on Normative Interdependence among Democracy, Human Rights and the Rule of Law

Since the end of the Cold War, the international community's consideration of democracy from the human rights angle has broadened beyond the formal, institu-

35 The onset of the Cold War is marked by Prime Minister Churchill's famous speech at Westminster College, in Fulton, Missouri, on 5 March 1946, in which he declared that: "From Stettin in the Baltic to Trieste in the Adriatic an iron curtain has descended across the Continent. Behind that line lie all the capitals of the ancient states of Central and Eastern Europe".

36 See General Assembly resolution 1803 (XVII) on "Permanent Sovereignty over Natural Resources", *adopted* 14 December 1962. See also Human Rights Committee General Comment 12 on "The Right to Self-Determination of Peoples (Article 1)" of 13 March 1984.

tional, procedural approach, enunciated in Article 21 of the UDHR,<sup>37</sup> Article 25 of the ICCPR<sup>38</sup> and Article 7 of the CEDAW,<sup>39</sup> to encompass also other civil and political rights essential to the realization of genuine forms of democratic governance, such as the freedoms of association, opinion and expression, as well as certain economic, social and cultural rights, in particular, the rights to education<sup>40</sup> and an adequate standard of living.<sup>41</sup>

Over the last several years, the international community has paid greater attention to interdependence among democracy, human rights and the rule of law, which is reflected in numerous resolutions of the General Assembly and Commission on Human Rights.<sup>42</sup> This focus featured also as a key theme in the six International Con-

37 Universal Declaration of Human Rights, *adopted* by UN General Assembly resolution 217A (III) of 10 December 1948.

38 The International Covenant on Civil and Political Rights, *adopted* 16 December 1966; *entered into force* 23 March 1976; U.N.T.S. No. 14668, vol 999 (1976) at 171, provides in Article 25 that: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; c) To have access, on general terms of equality, to public service in his country."

39 The Convention on the Elimination of All Forms of Discrimination against Women, *adopted* by the General Assembly in resolution 34/180 of 18 December 1979, *entered into force*, 3 September 1981, provides in Article 7 that: "States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country." *See also* CEDAW General Recommendation No. 23 on Political and Public Life, *adopted* 13 January 1997.

40 ICESCR General Comment No. 13 on the Right to Education observes that: "Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make." UN Doc. E/C.12/1999/10 of 8 December 1999.

41 As provided for in the International Covenant on Economic, Social and Cultural Rights, *adopted* 16 December 1966; *entered into force* 3 January 1976; U.N.T.S. No. 14531, vol. 993 (1976) at 3.

42 *See* General Assembly resolution 55/96 *adopted* 4 December 2000, entitled "Promoting and Consolidating Democracy"; and Commission resolutions 1999/57 *adopted* 27 April 1999, on "Promotion of the Right to Democracy", 2000/47 *adopted* 25 April 2000 on "Promoting and Consolidating Democracy", 2001/41 *adopted* 23 April 2001 on "Continu-

ferences of New or Restored Democracies, convened since 1988, and in the Vienna Declaration and Programme of Action.<sup>43</sup>

The World Conference on Human Rights, convened in Vienna from 14 to 25 June 1993, only a few years after the Berlin Wall fell in November 1989 and the Union of Soviet Socialist Republics disappeared into thin air in December 1991,<sup>44</sup> is very much a product of its time. No World Conference delegate could have been completely unaware of the genocidal atrocities of the Bosnian War which raged on only a few hundred kilometres from the doorsteps of the Vienna International Centre and which were portrayed daily in vivid newspaper and television reports. Only a few weeks before the opening of the World Conference, the Security Council had taken the bold step to establish the International Criminal Tribunal for the Former Yugoslavia, raising hopes that the international community could finally revive its long-dormant project to establish a permanent international criminal code and court, which was launched in 1947 but put on hold for more than 40 Cold War years. So while the World Conference has become best known perhaps for its statement that “All human rights are universal, indivisible and interdependent and interrelated”<sup>45</sup> and its recommendation to the UN General Assembly to establish a High Commissioner for Human Rights, it also supported wider recognition of the normative connections among democracy, human rights and the rule of law, as well as nascent concern for the threat that impunity poses against all three, particularly in regard to developing countries and countries in post-conflict transition.<sup>46</sup>

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ing Dialogue on Measures to Promote and Consolidate Democracy”, and 2002/46 on “Further Measures to Promote and Consolidate Democracy” *adopted* 23 April 2002.

- 43 See paras. 8, 9, 17, 27, 34, 66, 68, 74, 79, 80 and 81, of the Vienna Declaration and Programme of Action, *adopted* by the World Conference on Human Rights in 1993.
- 44 The Union of Soviet Socialist Republics was formally dissolved on 8 December 1991 with the conclusion of the Belavezha Accords, *signed* in Belarus, by the Presidents of Russia, Belarus and Ukraine.
- 45 Paragraph 5 of the Vienna Declaration and Programme of Action, Note by the Secretariat, World Conference on Human Rights, Vienna, 14-25 June 1993; A/CONF.157/23 of 12 July 1993.
- 46 Para. 8 of the Vienna Declaration recognizes that: “8. Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing” and para. 27 that: “The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.” In following para. 28 the World Conference expressed its dismay over “massive violations of human rights especially in the form of genocide, ‘ethnic cleansing’ and systematic rape of women in war situations, creating mass exodus of refugees and displaced persons. While strongly condemning such abhorrent practices it reiterates the call that perpetrators of such crimes be punished and such practices immediately stopped.” Para. 34 relates human rights to the rule of law and democracy. See also paras. 64 and 68. Para. 74 enjoins



At its 1999 session, the Commission on Human Rights adopted resolution 1999/57 entitled “Promotion of the Right to Democracy”<sup>47</sup> which affirms “that democracy fosters the full realization of all human rights, and vice versa” and spells out various elements and aspects of democratic governance in terms of rights.<sup>48</sup> In Part V of the Millennium Declaration<sup>49</sup> on “Human Rights, Democracy and Good Governance”, Member States resolved to “... 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.”<sup>50</sup> Importantly, General Assembly resolution 55/96<sup>51</sup> calls upon States to promote and consolidate democracy by *inter alia* promoting sustainable development through effective measures aimed

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actors in development cooperation to recall that: “mutually reinforcing interrelationship between development, democracy and human rights.”

- 47 Commission resolution 1999/57, *adopted* on 27 April 1999 by a roll call vote of 51 votes to none, with 2 abstentions.
- 48 Para. 2 of resolution 1999/57 affirms that “the rights of democratic governance include, inter alia, the following: (a) The rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly; (b) The right to freedom to seek, receive and impart information and ideas through any media; (c) The rule of law, including legal protection of citizens’ rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary; (d) The right of universal and equal suffrage, as well as free voting procedures and periodic and free elections; (e) The right of political participation, including equal opportunity for all citizens to become candidates; (f) Transparent and accountable government institutions; (g) The right of citizens to choose their governmental system through constitutional or other democratic means; (h) The right to equal access to public service in one’s own country” and para. 3 notes that the realisation of all human rights including the right to development remain are indispensable to human dignity and are also integral to democratic society.
- 49 United Nations Millennium Declaration, General Assembly resolution A/55/2 of 18 September 2000, *adopted* by all 189 Member States at the Millennium Summit, 6-8 September 2000. See UN Press Release PI/1380 of 19 September 2001.
- 50 This comes from para. 24 of the Millennium Declaration. Para. 25 declares the Member States’ resolve to: respect fully and uphold the UDHR; strive for the full protection and promotion in all our countries of civil, political, economic, social and cultural rights for all; strengthen the capacity of all our countries to implement the principles and practices of democracy and respect for human rights, including minority rights; combat all forms of violence against women and to implement the Convention on the Elimination of All Forms of Discrimination against Women; take measures to ensure respect for and protection of the human rights of migrants, migrant workers and their families, to eliminate the increasing acts of racism and xenophobia in many societies and to promote greater harmony and tolerance in all societies; to work collectively for more inclusive political processes, allowing genuine participation by all citizens in all our countries; ensure the freedom of the media to perform their essential role and the right of the public to have access to information.
- 51 Assembly resolution 55/96 on “Promoting and Consolidating Democracy”, *adopted* 28 February 2001.

at the progressive realization of economic, social and cultural rights, overcoming social inequalities, and creating an environment conducive to development and poverty elimination.<sup>52</sup>

In this vein, at its fifty-ninth session, the Commission adopted resolution 2003/36 on “Interdependence between Democracy and Human Rights”<sup>53</sup> which refers not only to the principle of periodic and genuine elections by universal suffrage and by secret ballot, but notes also the “close link between democracy, good governance on the one hand, and economic development and poverty alleviation on the other hand”. In the same resolution, the Commission reaffirmed the mutually reinforcing interdependence of democracy, development and respect for human rights, “based on the freely expressed will of the people to determine their own political, economic, social and cultural systems”.<sup>54</sup>

The end of the Cold War opened up avenues for developing a wider approach to the concept and practice of democracy based much more on shared values as enshrined in universal human rights standards. Democracy is increasingly viewed as the most promising prospect for offering human rights implementation that comprises minority rights as well as fair and effective promotion and protection of civil, political, economic, social and cultural rights – an approach reflected in the Chairperson’s final conclusions from an expert seminar on the topic held in Geneva in 2002.<sup>55</sup> This

52 General Assembly resolution 55/96 also welcomed efforts on the part of the: Assembly of Heads of State and Government of the Organization of African Unity (AHG/Dec.141 (XXXV) *adopted* in 1999); the Organization of American States (6 resolution AG/RES.1080 (XXI-091) *adopted* in 1991); the Conference for Security and Cooperation in Europe which committed Member to take certain steps in the event of an interruption of democratic government (Moscow Document on the Human Dimension *adopted* in 1991); the Commonwealth Heads of Government (Commonwealth Declaration *adopted* in Harare in 1991); the International Conferences of New or Restored Democracies held in Manila (June 1988), Managua (July 1994), Bucharest (September 1997), Cotonou (4-6 December 2000); as well as the Ministerial Conference hosted by the Government of Poland at Warsaw (26 and 27 June 2000); the Forum on Emerging Democracies held at Sanaa (27-30 June 1999); as well as the Eighth Summit of la Francophonie in Moncton (September 1999). The fifth International Conference on New or Restored Democracies held in Mongolia *adopted* the Ulaanbaatar Declaration and Plan of Action in September 2003. The sixth Conference was held in Doha, Qatar, from 29 October to 1 November 2006, and on 2 February 2010, the Ambassador of Venezuela to the UN in New York announced that his country will assume the presidency over the Movement of New or Restored Democracies and make preparations for the seventh Conference to be held in 2012; *see further* <http://www.vheadline.com/readnews.asp?id=88065> last accessed on 8 February 2010.

53 Commission on Human Rights resolution 2003/36 on Interdependence between Democracy and Human Rights *adopted* on 23 April 2003.

54 Para. 2 of Commission resolution 2003/36.

55 For example, para. 4 of the Chairperson’s Conclusions considers that democracy “goes beyond formal processes and institutions, and should be measured by the degree to which these principles, norms, standards and values are given effect and the extent to which they advance the realization of human rights.” *See* Chairperson’s Conclusions, Ex-

expert seminar concluded that genuine democracy should be founded on a “freely functioning, well-organized, vibrant and responsible civil society” which “presumes an active role for NGOs, women’s groups, social movements, trade unions, minority organizations, professional societies and community groups, watchdog associations and others.”

The international community’s emphasis on the interdependence among democracy, the rule of law and human rights, affirms what Jürgen Habermas calls their ‘conceptual or internal relation’ as opposed to a merely ‘historically contingent association.’<sup>56</sup> In other words, ‘democracy’, ‘the rule of law’ and ‘human rights’ are increasingly recognized to be inextricably linked and interdependent conceptually and in practice. In this sense, democracy should not be viewed as a value-neutral procedural instrument for translating majority preferences into law through the ballot box, but as a continual process of consultation, negotiation, compromise and political legitimation, that itself promotes the welfare of the community as a whole as well as the rights and freedoms of individuals and minority groups. Law has to be developed and refined through open, transparent and accountable democratic governance in order to serve as an effective means by which to prescribe, communicate and share expectations among members of the community on legitimate public policy and action. This implies that democratic governance should not just tolerate or accommodate but rather enshrine and embrace human rights at all levels.

The international community’s focus on the logical, ideological and practical interdependence among democracy, the rule of law and human rights, has brought with it increasing recognition that the health and integrity of democratic governance should in fact be measured against universal human rights standards. It was in this sense that the late High Commissioner for Human Rights, Sergio Vieira de Mello, referred to “a conception of democracy that accommodates the procedural and the substantive, formal institutions and informal processes, majorities and minorities, male and female, government and civil society, the political and the economic, the national and the international.”<sup>57</sup> Significantly, Governments participating at the Fifth Conference of New or Restored Democracies in Ulaanbaatar, recognized that:

“democratic governance is legitimate and responsive, representative and participatory, transparent and accountable, and rights and law based. While it empowers, it offers

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pert Seminar on the Interdependence between Democracy and Human Rights, Geneva, 25-26 November 2002; UN Doc. E/CN.4/2003/59 of 27 January 2003.

56 See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (trans. William Rehg) (Cambridge: MIT Press) 1996 at 449.

57 See Sergio Vieira de Mello, “Holistic Democracy: The Human Rights Content of Legitimate Governance”, Opening Statement of the UN High Commissioner for Human Rights to the Seminar on the Interdependence Between Democracy and Human Rights, held in Geneva, 25-26 February 2002.



checks and balances on authority to prevent abuse and enhances the promotion and protection of human rights, gender equality, and respect for the rule of law.”<sup>58</sup>

They also declared their commitment to speed up ratification, acceptance or accession of international human rights and international humanitarian law instruments. The Sixth Conference, held in Doha, laid emphasis on “the need to develop home-grown democratic reforms” in harmony with cultural diversity and peace and that there “is no single model of democracy or of democratic institutions.”<sup>59</sup> It also underlined the cardinal principles of State sovereignty and non-interference in domestic affairs as well as the inalienable right of all peoples to self-determination as an essential ingredient of ‘peace, democracy and social justice’ and condemned foreign occupation.<sup>60</sup> The Doha Declaration also reaffirmed statements from the previous five Conferences concerning structural vulnerabilities of democracy, and “the relationship between democracy, peace and development, enhancing the rule of law, improving accountability and transparency in democratic institutions of government, the establishment of free and independent media etc.”<sup>61</sup>

Even a government’s willingness to be held accountable for its actions rests on its tolerance of scrutiny, criticism and challenge, so that public policy, law and practice, remain responsive to the will of the people. Governmental accountability is more likely to be preserved where individuals and groups can exercise: the right to an effective remedy; equality before the law, the freedoms of thought, opinion, expression, association and of the press; the right to be free from arbitrary arrest and detention and arbitrary interference with privacy, family, home or correspondence, honour and reputation, and other civil and political rights. Equally, the right of everyone to enjoy, on a non-discriminatory basis, a minimum standard of economic, social and cultural rights, such as the right to education, right to work and to form trade unions in association with others, as well as the right to an adequate standard of living, all remain essential to the promotion and consolidation of democratic governance through public accountability.

The general requirements of accountability and transparency ultimately bring us back full circle to the importance of empowering people from all walks of life, particularly the disadvantaged, poor and underprivileged, through effective human rights promotion and protection. Accordingly, more current theoretical models of democratic governance increasingly embrace the ‘rule of law’ (‘état de droit’, ‘estado de derecho’, ‘stato di diritto’, ‘Rechtsstaat’, etc.), as a central, constituent element that refers directly to government accountability specifically in regard to human rights observance.

58 Declaration and Plan of Action, *adopted* by the Fifth International Conference of New or Restored Democracies, Ulaanbaatar, 10-12 September 2003; A/58/387 of 23 September 2003 at para ii of the Declaration.

59 Declaration, *adopted* by the Sixth International Conference of New or Restored Democracies, Doha, 29 October – 1 November 2006 at preambular paras. 13, 14 and 15.

60 *Id.* at preambular paras 20 and 21.

61 *Id.* at operative para. 2.

What then, must be done to improve the quality of democratic governance?

### **5. Concrete Measures to Protect and Strengthen Democracy, Human Rights and the Rule of Law**

In much of the world, the United Nations human rights project has been a stunning success – at least at a formal level. Few if any Governments today claim that human rights are not the proper concern of international law, even if they may disagree with one another on the precise contours and application of its norms. Many of the main multilateral human rights treaties have become widely ratified and the great majority of countries have put in place a range of human rights laws and policies. Human rights have become integrated in everyday life in many countries and perhaps even have become taken for granted in some. Yet the practical effect of human rights norms everywhere remains heavily dependent on the quality of democratic governance and the rule of law and vice-versa. Consequently, human rights can disappear quickly in situations where democracy and the rule of law fail or become largely ineffective, for example, during civil war, rising impunity for serious violations, coup d'état, uncontrolled corruption, the infiltration of transnational organized illicit drug trafficking syndicates, or the weakening of State institutions concerned with democratic governance and the rule of law in other serious ways. These threats have motivated the international community to recognize the interdependent character of democracy, human rights and the rule of law and to consider the kinds of measures that should be taken to safeguard them.

As the discussions, Declarations and Plans of Actions of the International Conferences on New or Restored Democracies indicate, many Governments recognize the need to work together with the international community at large to strengthen and protect democracy, human rights and the rule of law, which can be placed in jeopardy from all sides at once. However, efforts that are too narrowly focused, for example, only on judicial reform, can become easily blocked where greater accountability and transparency in democratic processes to prevent corruption in the public service is not achieved at the same time. On the other hand, the adoption of overly broad policies can lack focus and end up dissipating the limited resources and political will necessary to make them work. That is why Governments should develop national human rights action plans to chart the optimum path for tackling the problem in the most coherent, comprehensive and sustained way, with the help of the UN, other intergovernmental agencies, bodies and programmes, research centres and institutes and in consultation with NGOs and civil society at large. The development of practical strategies should draw from the best practices of other jurisdictions and be designed to meet the particular needs and challenges faced by the State, for example, in relation to the threat of criminal activity. Purely domestic approaches many times are no match for transnational organized crime, drug-trafficking, money laundering, corruption, terrorism or serious violations of human rights or humanitarian law, the influence of which reaches beyond national boundaries. Fortunately however, Governments do not have to face the various threats to democracy, human rights and the

rule of law single-handedly because of the wide range of possibilities for international cooperation.

Broadly speaking, every Government should:

1. establish or strengthen independent national human rights and anti-corruption institutions in line with the Paris Principles,<sup>62</sup> vested with strong authority to investigate individual cases and either enforce sanctions themselves or turn the matter over to the criminal courts;
2. share best practices with other States on measures to strengthen the judiciary and its independence. Governments emerging from totalitarian rule or post conflict situations should avail themselves of the expert advisory assistance of the UN Office of the High Commissioner for Human Rights, regional intergovernmental organizations and bilateral arrangements to step up training of judges and law enforcement officials in safeguarding human rights and the rule of law;
3. take all measures to ensure the military remains accountable to democratically elected civilian government. Supervisory mechanisms to ensure command responsibility within the military, effective military prosecutions in case of abuse, and civilian control over the military should be strengthened;
4. sign and ratify the following conventions and additional protocols thereto if they have not already done so, and ensure that their law, policy and practice conform fully to the norms set out therein: UN Convention against Corruption; UN Convention against Transnational Organized Crime; the thirteen UN Conventions against Terrorism; the principal multilateral human rights conventions: and the Rome Statute of the International Criminal Court. Becoming a party to all universal treaties on human rights including optional complaints procedures and on humanitarian law can help to empower individuals and groups through stronger international cooperation which in turn remains an essential element in promoting democracy, human rights and the rule of law. Over the longer term, such cooperation, together with human rights education and the spread of a culture of peace, can help open up regular, public and legitimate avenues in society to air and address grievances, reducing breeding grounds for terrorism, drug-trafficking and other serious criminal activities;
5. Governments should deepen their human rights commitments at all levels. Many States that have become parties to multilateral human rights and humanitarian law treaties, have entered serious reservations that extend far beyond any reasonable limit, frustrating the objects and purposes of such treaties.<sup>63</sup> Governments therefore should review their international commitments in these fields with a view to participating more fully in multilateral human rights and humani-

62 The Paris Principles were adopted as the conclusions of a workshop, held in Paris in October 1991. These conclusions were transmitted by the Commission on Human Rights, in resolution 1992/54, as the “Principles relating to the Status of National Institutions,” to the General Assembly. The General Assembly adopted the Principles in 1993 as the Annex to resolution 48/134 (1993).

63 See Ineta Ziemele, *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Leiden: Martinus Nijhoff) 2004.

- tarian law and clearing away unnecessary reservations where they have entered them;
6. cooperate fully with the UN Human Rights Council and all its investigation, monitoring and reporting mechanisms, working groups and special rapporteurs and support current efforts to reform and improve coordination among them.<sup>64</sup> These bodies remain essential components of multilateral cooperation in the field of human rights to assist Governments in bringing their policy, law and practice into better conformity with international human rights standards. Donor Governments should support OHCHR's technical cooperation fund, and Governments which need advisory assistance in the field of human rights should call upon OHCHR to provide it; and
  7. support the efforts to develop a comprehensive multilateral convention on terrorism and cooperate fully with the Security Council's Counter-Terrorism Committee. Governments must remain vigilant to ensure that efforts at all levels to counter the threat of terrorism conform fully with international law.

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64 See "The Report of the Chairpersons of the Human Rights Treaty Bodies on Their Sixteenth Meeting", held at Geneva, 23-25 June 2004, pursuant to General Assembly resolution 57/202 of 18 December 2002; A/59/254 of 11 August 2004.