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**CIVIL AND POLITICAL RIGHTS**

**Interdependence between democracy and human rights**

**Report of the second expert seminar “Democracy and the rule of law”<sup>\*</sup>  
(Geneva, 28 February-2 March 2005)**

**Note by the secretariat**

The secretariat has the honour to transmit to the members of the Commission on Human Rights the report of the second expert seminar “Democracy and the rule of law”, convened pursuant to Commission resolution 2003/36.

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\* The annexes are being circulated in the language of submission only.

## **Summary**

Pursuant to the request of the Commission on Human Rights, the Office of the High Commissioner for Human Rights convened an expert seminar on democracy and the rule of law in Geneva from 28 February to 2 March 2005. Twelve experts from different regions were invited. The seminar was also attended by observers from interested Governments, the United Nations specialized agencies, funds and programmes, and intergovernmental and non-governmental organizations.

The seminar was designed to promote an analytical approach leading towards practical and action-oriented conclusions on the subject of democracy and the rule of law. In so doing, the seminar built upon the contributions of the first expert seminar, held on 25 and 26 November 2002, taking into account its conclusions and the list of issues identified for further elaboration.

The main themes of the discussions of the seminar and its conclusions are contained in the present report.

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## **Introduction**

1. In accordance with Commission on Human Rights resolution 2003/36, the Office of the High Commissioner for Human Rights (OHCHR) convened an expert seminar from 28 February to 2 March 2005 to examine further the interdependence between democracy and human rights, on the topic "Democracy and the rule of law". Twelve experts were invited. The seminar was also attended by observers from States, United Nations specialized agencies, funds and programmes and intergovernmental and non-governmental organizations. The list of participants is contained in annex I.

2. The agenda of the seminar (annex II) was elaborated on the basis of the principles, challenges and priorities defined in the relevant resolutions of the General Assembly<sup>1</sup> and the Commission on Human Rights and in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights held in Vienna in 1993. Due account was also taken of the conclusions of the first expert seminar (E/CN.4/2003/59, sect. VII), issues identified for further elaboration and the recommendations of the International Conferences of New or Restored Democracies initiated in 1988, in particular the Fifth Conference held in Mongolia in September 2003.

3. The organizational concept of the seminar was designed to promote an analytical approach leading towards practical and action-oriented conclusions. Group discussions and the ensuing general debates provided forums for addressing national and regional practices relevant to the topics under consideration. The present report contains a summary of the seminar's proceedings as well as the experts' conclusions.

### **I. OPENING OF THE SEMINAR**

4. The meeting was opened by Mehr Khan-Williams, Deputy United Nations High Commissioner for Human Rights, followed by the keynote address of Dr. Freny Ginwala, former Speaker of the Parliament of South Africa, Chairperson of the seminar, and a second keynote address by Prof. Dinah Shelton.

5. In her statement, the Deputy High Commissioner defined the main objective of the seminar, namely, to facilitate a constructive dialogue on the interaction between democracy, human rights and the rule of law. She noted that the first seminar had contributed to a better understanding of democratic institutions and processes from the perspective of individual rights holders. Democracy and democratic structures, involving all elements of the State including the judiciary, and in which the rule of law remained integral, was increasingly viewed as a powerful vehicle for serving citizens. While the rule of law was a dynamic concept, it had clear parameters. In his important report to the Security Council on the rule of law and transitional justice in conflict and post-conflict, the Secretary-General referred to certain essential principles of democratic governance, namely, equality before the law, participation in decision-making, and

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<sup>1</sup> The Secretary-General identified a framework for strengthening the rule of law in his report to the General Assembly (A/49/512). These elements provided essential guidance for the seminar's work in this area.

procedural and legal transparency. Deterioration in one or other element could seriously weaken the overall framework of democracy and human rights. The Deputy High Commissioner stressed the need to move forward in practical ways to promote democracy, the rule of law and human rights, including the right to development, as priorities laid down in the Millennium Declaration. Specific measures were necessary for the concrete realization of the full range of civil and political rights and minority rights, to address violence against women and xenophobia, to achieve a more inclusive political process and to enshrine freedom of the press and the right of access to information, among other rights and freedoms. Finally, she emphasized that the rule of law must be considered as a necessity, not as a luxury, and that the indispensable contribution of civil society to the promotion and consolidation of democracy and human rights must be further encouraged.

6. In her keynote address, Dr. Ginwala highlighted a number of conclusions of the first expert seminar, in particular, the inseparable and interdependent character of democracy and human rights as holistic concepts that had spread around the globe. At the same time, there was no single universal model of democracy. Democratic institutions existed in all societies. The challenge, according to Dr. Ginwala, was not to take one model of democracy, but to stress the universal elements in concept and practice in a way that built upon and strengthened existing cultures and institutions. Part of the value of the current expert seminar was to inform the concept of democracy with clear elements, because every State claimed to be democratic while in fact many were not. As there could not be a claim to a perfect democratic State, democracy had to be considered an ever-evolving process that needed continual development and support to advance the quality of life of all human beings. In that sense, there was no division between social and economic progress, on the one hand, and democracy on the other. Dr. Ginwala identified a number of challenges to democracy and human rights since the first expert seminar. They included deepening poverty in some countries that had worsened human security; illegal occupation and paternalistic approaches involving the use of force; the related question of illegal intervention; the erosion of human rights in some of the more established democracies; infringements of the rights of prisoners of war in the fight against terrorism; ongoing clashes between freedom of religion and freedom of expression; the systematic subordination of women and their poor access to justice. The challenge remained, she concluded, to build a more holistic concept of human rights that integrated the components of democracy into the human rights agenda.

7. By identifying guiding principles for democracy, human rights and the rule of law, stressed Prof. Shelton, the seminar aimed to ascertain the institutions and processes necessary to achieve a just society. The rule of law was the third pillar upholding a just society. Law provided the framework under which democratic institutions operated and tempered democratic rule by ensuring minimum guarantees for human rights and fundamental freedoms. Conversely, rule of law that was neither democratic nor respectful of human rights was a dictatorship. The rule of law should provide equal justice and included the principle of equity in order to ensure just results in specific situations. It should seek to ensure substantive equality, including differential treatment where warranted.

8. She noted that the rule of law was increasingly challenged at the same time by claims of exceptionalism and by violations of international obligations. However, people in countries around the globe continued to fight for the right to democracy. While the rule of law, human rights and democracy were equally important, circumstances at different moments in the

evolution of a society, might require greater emphasis to be placed on one element, without detaching it from the others. Concluding her statement, Prof. Shelton emphasized that, in a practical sense, democracy, rule of law and respect for human rights were indivisible and interdependent because democracy without human rights and the rule of law was oppression, human rights without democracy and rule of law was anarchy, and rule of law without democracy and human rights was tyranny.

## **II. THE INTERACTION BETWEEN DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW AND POWER DYNAMICS**

### **A. Periodic, fair and free elections: important elements for the promotion and protection of human rights**

9. Presenting his paper, Prof. Daniel Thürer observed that periodic, fair and free elections were not merely instruments of democratic governance, but valuable aspects of the process in their own right. Moreover, the right to periodic, fair and free elections overlapped conceptually with the principle of universal and equal suffrage. Events in 2004 - popularly dubbed the Year of the Ballot - highlighted the centrality of citizens around the world in their own political systems, while at the same time, certain other countries had suffered serious setbacks. Core to the advance of democratic participation and the engagement of the international community in that process was the emergence of a "cosmopolitan law", in which the division between international and constitutional law had become blurred. This integrated approach to constitution-making was evidenced by the involvement of peacekeeping efforts and the international community's efforts to strengthen domestic infrastructure. Prof. Thürer pointed out that people had the right to vote at intermittent intervals to ensure that democracy retained the essential capacity to vote a Government out of office and halt the opaque accumulation of power and repression that inevitably followed from a lack of transparency. Nor was it acceptable that a Government merely rule by plebiscite or conduct consultations, seeking to provide a substitute for genuinely democratic periodic elections. The concept of free elections required the existence and operation of plural political parties and contested elections permitted by the State. In this connection, the expert called attention to three optimizing constitutional conditions for representative democracy, namely negative freedom (liberty), the rule of law, and non-centralization.

### **B. The separation of powers and limitations on discretionary powers**

10. In his presentation on the separation of powers and limitations on discretionary powers, Judge Mirosław Wyrzykowski endeavoured to delineate common denominators between the concepts of democracy and the rule of law. A central point in the presentation concerned the procedures that embodied, in a constitutional democracy, the rules of cooperation and which were conditioned by the particular form of democracy in question; the principle of political pluralism in all its forms; the centrality of the electoral system as a venue for the implementation of the principle of representation within a milieu of free and equal participation; and the principle of the parliament's confidence in the executive as a form of democratic accountability. He also emphasized the rise of bicameral parliamentary institutions as a reflection of different conceptualizations of popular representation. In this connection, he underlined the reach of the political process into the broad domain of policy-making as well as the variety of stable mechanisms for democratic governance. Judge Wyrzykowski pointed out that where the burden

of proof lay as to the constitutional legality of a given enactment determined in large part the degree to which the judiciary would be more or less “activist” in interpreting the constitution. He concluded by highlighting the increased “normativization” of politics, the consolidated role of judicial review in reducing arbitrariness on the part of constitutional organs, and the relationship between the legitimacy of State functions (based on constitutional rules), on the one hand, and the democratically expressed will of the people on the other.

11. Participants referred to general comment No. 25 of the Human Rights Committee. They also pinpointed the importance of international and regional jurisprudence. They stressed that elections were one component of the rule of law. In recent years, there had been distance between a popular and a corporate approach to elections. Also, the implementation of economic, social and cultural rights was deemed essential for democratic governance within which the requirement of periodic, free and fair elections had to be fulfilled. It was also noted that an attitude of suspicion on the part of the executive towards the judiciary where the latter performed its critical function of judicial review of constitutional provisions often rested on a fundamental misunderstanding of the judicial role as neutral arbiter and interpreter of law.

12. Issues highlighted during the discussions included the importance of collective rights, particularly the right to self-determination, in democratic governance, prospects for a more participatory democracy, and the essential role of constitutional courts in ensuring that electoral procedures remained periodic, free and fair. In regard to the separation of powers and limits on discretionary authority, the principle of exclusive jurisdiction should operate in the sense of the constitutional distribution of law-making, interpretation and enforcement among various State organs and their interrelation.

### **III. CHALLENGES TO DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW: HOW TO ADDRESS ISSUES OF EQUALITY, PARTICIPATION AND ACCOUNTABILITY**

#### **A. Management of internal disorder, emergencies and conflicts**

13. In this session, Dr. Mohamed Mahmoud Mohamedou, Associate Director of the Harvard University Programme on Humanitarian Policy and Conflict Research, addressed the role of law as part of the toolbox for ensuring democratic governance and human rights. He said that law remained distinct from moral or religious normative systems. He underlined the interconnections between international humanitarian law and international human rights law as well as the status and effect of derogations from the latter. In this context, article 4 of the International Covenant on Civil and Political Rights, the Siracusa Principles and general comment No. 29 of the Human Rights Committee lent further clarity to the law on derogations. Recalling that, as established bodies of law, both human rights and humanitarian law represented the consensus and will of the international community as a whole towards the better protection of human dignity, Dr. Mohamedou characterized the era following 11 September 2001 as a definite step backwards in human rights promotion and protection because of a prevailing mood of inflammatory rhetoric, political bias and a generally divisive international atmosphere. He cautioned that the practice in scholarship and policy-making of pitting security and human rights as opposing forces was dangerous and counterproductive. Finally, Dr. Mohamedou identified a number of operational benchmarks to facilitate a return to peace and normality.

14. Comments were made during the discussion on the complexity of states of emergency in the Latin American context, and how those situations undermined the rule of law. It was pointed out that, even though derogations from certain human rights under certain circumstances might be legally permissible and understandable, it was important that democratic debates took place to spread a proper understanding as to why such derogations might have been necessary. There was also discussion of challenges to the administration of criminal justice and the problem of delays in appeals concerning cases of administrative detention.

### **B. Impunity**

15. Presenting his paper on impunity as a challenge to democracy, human rights and the rule of law, Dr. Lyal S. Sunga, offered an analysis of the conceptual, logical and normative interrelationship between democracy, human rights and the rule of law. The consideration of democratic rights by the international community was also reviewed through the historical evolution and the dynamics of the post-Second World War period, political and legal cooperation and relevant developments in the aftermath of the cold war era. The end of the cold war had enabled the international community to develop a broader normative concept of democracy beyond the formal, institutional, procedural approach enunciated in article 21 of the Universal Declaration of Human Rights, article 25 of the International Covenant on Civil and Political Rights and article 7 of the Convention on the Elimination of All Forms of Discrimination against Women, encompassing also other civil and political rights essential to democratic governance, as well as certain economic, social and cultural rights. Accountability remained essential to democratic governance both in terms of general political accountability, and responsibility of individual public officials. The expert highlighted current government concerns over impunity for certain kinds of crimes that were expressed in the International Conferences of New or Restored Democracies. Finally, he offered a set of 10 recommendations for practical action to fight impunity and invited discussion on them. Those recommendations included an invitation to Governments to share best practices on fighting impunity, ensure that the military remains accountable to civilians, maintain cooperation in criminal matters, and ratify the Rome Statute of the International Criminal Court.

16. The ensuing discussion tackled the need for domestic implementation of the treaties ratified by Member States; the important role of national truth and reconciliation commissions in addition to established mechanisms to enforce individual criminal responsibility such as the International Criminal Court and the International Criminal Tribunals for the former Yugoslavia and Rwanda. It was proposed that the High Commissioner for Human Rights should be able to call on the Security Council to act urgently with regard to serious violations of human rights and humanitarian law occurring in a particular country, and that this capacity be formalized within the current United Nations reform package. Governments should develop national action plans to address problems of impunity.

### **C. Corruption**

17. Addressing electoral corruption as a challenge to the promotion of democracy, human rights and the rule of law, Mr. Palan Mulonda offered a critical analysis of electoral corrupt practices and abuse of authority using a Zambian case study which centred on a parliamentary election petition. Zambia, a country that had returned to political pluralism and multi-party democracy in 1991, reviewed its constitutional framework, which resulted in the establishment

of governance institutions such as the Electoral and Human Rights Commissions to conduct elections in line with international human rights standards. However, these positive developments had not gone unchallenged. In this regard, corruption, and in particular electoral corruption, constituted a major threat. Bringing forward evidence of abuse of public trust and resources by a parliamentary candidate (a former minister of Government) to buy votes in an election, the case study brought out concretely the corrosive character of political corruption on the pillars of democracy. It further illustrated the capital role of the High Court, and later the Supreme Court of Zambia in upholding the rule of law and securing human rights when declaring the elections null and void, thereby calling for fresh polls. The expert further raised the issue of the difference in treatment of economic and political corruption at the global, regional and subregional levels. International, regional and subregional instruments tended to place emphasis on economic corruption as opposed to political corruption, when in fact the two were mutually reinforcing. In this connection, reference was made to the United Nations Convention against Corruption, opened for signature in December 2003, the African Union Convention on Preventing and Combating against Corruption adopted in July 2003 and, at the subregional level, the Southern African Development Community Protocol against Corruption adopted in August 2001. The importance of setting up practical and appropriate implementation mechanisms for all these instruments as a matter of urgency was emphasized during the discussions.

#### **D. Access to justice by disadvantaged groups**

18. On the question of access to justice by disadvantaged groups, Dr. S. Muralidhar identified a wide range of disadvantaged groups whose status was primarily characterized by their functional incapacity to access resources and services. Delving into the relevant provisions of international human rights instruments, including Human Rights Committee general comment on article 2. The expert provided examples of several constitutional, and Supreme Court ruling drawing on the provisions of the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women, respectively, in South Africa and India, although a number of cases, such as those related to sexual harassment of women in the workplace, had not been dealt with by domestic legislative enactment or official government policy. Dr. Muralidhar referred to other cases where judges had relied on international legal principles and norms to reach a more activist result than might otherwise have been reached through a strict interpretation of applicable domestic law. Challenges impeding the exercise of the right of access to justice are mainly linked to the lack of respect for the universality of human rights, the justiciability of economic, social and cultural rights, the absence of affordability, immunity and impunity. Difficulties inherent in poverty are major factors in the denial of a fair access to justice. In effect, the stigmatization of sex work, vagrancy, illegal dwelling, wandering mentally ill, and other social conditions drove people into the criminal justice system as offenders on the basis of their status: more for who they were and less for their actual conduct. The problem of enforcing responsibility on the part of private corporations for major harm, for example, the Bhopal gas disaster, needed urgent attention also, so that victims could at some point receive reparations. A strong emphasis was placed during the discussion on the need for appropriate action to improve women's access to justice, as well as their participation in democratic governance. Poverty was cited as a serious barrier.

#### **IV. MEASURES TO ENHANCE DEMOCRACY AND THE RULE OF LAW - LESSONS LEARNT: NATIONAL AND REGIONAL PERSPECTIVES**

##### **A. United Nations technical cooperation programmes**

19. Several United Nations agencies reviewed issues relating to democracy, the rule of law, cooperation with the judiciary, conflict and post-conflict situations and human rights support to countries in transition. The representative of the Department of Peacekeeping Operations introduced the question of United Nations peacekeeping operations during conflict and post-conflict situations, focusing on the importance of strengthening local police, the judiciary and the rule of law during the time of transition. The Department considered local leadership as essential and local ownership as crucial. Current projects were directed towards bringing local laws into conformity with international standards. Local customs and traditions were being used to contribute to peacekeeping processes for countries in transition. The representative of the Department of Political Affairs focused on democracy and rule of law reform projects in new or restored democracies, emphasizing that there was no perfect system to follow in these situations, and that each approach had to be tailor-made to meet specific needs. The Department stressed the importance of having a focal point on electoral matters, with voter registration seen as an opportunity to begin education, such as in Afghanistan. The United Nations Development Programme (UNDP) approached the question of parliaments and law enforcement agencies by stressing that democracy and human rights were not just a means to development, but also an end in themselves. Concern was raised over the fact that democracy and human rights could not progress where the police were not trusted by the poor, and judges and policemen were seen as unreliable and biased. OHCHR outlined its activities in support of countries in transition, stressing the importance of not being exclusively process-oriented. The main goal of OHCHR was to empower rights holders on the ground, and to enhance implementation. That had to be done in cooperation with other agencies. All speakers stressed the need for enhanced cooperation among themselves. In the ensuing discussion, the importance of engaging closely with civil society at the local level was emphasized, not only in terms of delivery of services, but also in terms of identifying priorities and strategies at the outset of the launch of technical assistance programmes.

##### **B. Measures for strengthening judicial infrastructure and related training, teaching and education**

20. Mr. Param Cumaraswamy discussed measures that could be taken for strengthening judicial infrastructure and related training, teaching and education of judges. The judiciary needed to be insulated from outside pressures if it was to remain independent. He reiterated that some of the core values of judicial independence, including security of tenure, financial security, institutional independence, and judicial appointments and promotions, were based on objective factors. However, the judiciary, like other public authorities, still had to be accountable in some form, and there had to be a careful balance struck between judicial independence and accountability.

21. Participants in the discussion group brought up the challenges to educating the legal profession on the proper application of human rights treaties in force; the need for stricter judicial accountability; the question of the appointment of judges; the necessity of providing regular technical assistance to support developing countries in judicial training; and guarding the independence of the judiciary.

### **C. Assistance to parliaments**

22. Senator Dulce Maria Sauri addressed the question of assistance to parliament from the beneficiary countries' perspective in the Latin American region. Democracy was the predominant government system in today's world of a globalized economy, where human rights represented the ethical dimension. Difficulties and challenges imposed by the political reality in many Latin American countries affected the perception of democracy. The growing discredit of democratic political systems was due to the incapacity of democratically elected Governments to meet the development imperatives of their societies, in particular reducing economic inequality. As a result, the ratio of poor people in the region, according to UNDP reports, exceeded 40 per cent. Within this context of political distrust, parliaments were perceived as being insensitive and inaccessible to the electorate's demands. Thus, great efforts were needed to strengthen the representative legitimacy and the credibility of parliamentarians, and strengthen the legislative and organizational functions of parliaments and the financial autonomy of legislators. The only alternative to enhancing and strengthening democracy was its full and efficient linkage to the promotion of human rights. Parliament had an essential role in the development of democracy while observing the social and economic imperatives of the society by maintaining political stability, equity in representation and efficiency in the development of public policies.

23. Professor François Borel addressed assistance to parliaments from the provider countries' perspective. Parliaments were described as the visible expression of democracy. In that connection, he stressed that membership of parliaments had to be representative and noted women's under-representation in parliaments in most parts of the world. Assistance to parliamentary institutions was crucial for development and human rights. Professor Borel underscored the need to provide parliaments with the necessary technical and substantive support. In addition to improving the infrastructure, i.e. the provision of library and archival resources, computer services and logistics, parliaments could benefit from advisory support in dealing with political issues ranging from advisory services to the various parliamentary commissions and updating of the rules of procedure, to the regularization of relations with the press and the enhancement of women's participation. The need for assistance from the expert's standpoint should be assessed on a case-by-case basis. The Inter-Parliamentary Union (IPU) provided very useful support in that respect.

24. Mr. Martin Chungong from IPU noted that parliaments often did not have material resources to perform their duties properly. As guardians of human rights, parliaments were required to be effective and representative, meaning that they had to reflect the will of citizens. They should also be accessible to the general public by adequate means of communication, as well as being accountable, transparent, representative and effective. Parliaments should have

internal processes to allow them to take effective decisions and a system to evaluate the performance of their members. National-level decisions had to remain in tune with local needs. He stressed the importance of assistance to parliaments in many aspects of their daily activities, including institutional development and awareness-building. Finally, he suggested that assistance could take the form of advisory services, seminars and study visits to other countries.

#### **D. Post-conflict situations**

25. Ms. Sofia Macher spoke on the interdependence between democracy and human rights, with a focus on the rule of law, in post-conflict situations. She described the function of the truth and reconciliation commissions in post-conflict situations and the merit of establishing national processes that involve the whole of society, including victims, perpetrators and other concerned actors. Ms. Macher considered the conditions for meeting the needs of victims for justice where judicial systems had been destroyed and suggested that all possible efforts be made to set up national tribunals rather than courts at the international level. Such an approach could in some situations enhance the effectiveness of such mechanisms by increasing their inclusiveness and accessibility to citizen and victim. Addressing the question of reparations, Ms. Macher strongly supported the adoption of an integrated programme which is not limited to financial compensation, but which aims to restore respect for human dignity, physical integrity and social and economic rehabilitation. As a contribution to national efforts towards post-conflict reconciliation, the international community could consider the option of debt relief. Participants raised issues related to democratic transition in post-conflict situations, regular sharing of experiences and lessons learnt as well as the provision of technical assistance where needed.

#### **V. CONCLUSIONS AND RECOMMENDATIONS**

26. **The experts agreed on the following conclusions:**

27. **Democracy and the rule of law are interdependent and both are necessary to create an environment in which human rights can be realized.**

28. **The holistic concept of democracy articulated during the first expert seminar on democracy by the late High Commissioner for Human Rights, Sergio Vieira de Mello, which encompassed the procedural and the substantive, formal institutions and informal processes, majorities and minorities, males and females, Governments and civil society, the political and the economic, the national and the international, remains valid and attainable.**

29. **Significant gains have been made on every continent in advancing democracy. Each society has its own appropriate democratic institutional traditions, which should function under universally accepted principles and norms.**

30. **The experts affirmed that the Commission on Human Rights should continue to play a crucial role in developing a common understanding of principles, norms, standards and values that are the basis of democracy and the essential elements of the concept of the rule of law, and in promoting the normative content of the human rights enumerated in various international instruments.**

31. **The subordination of women in society frequently makes it difficult for women to claim and access their human rights, including those provided in constitutions and legislation. Women are not only disadvantaged within society generally, but are also in the lowest rank within each disadvantaged group - the poorest of the poor. Special measures are necessary to enable women to be aware of their rights as well as mechanisms that will help women to claim and enjoy all human rights.**

#### **THE INTERACTION BETWEEN HUMAN RIGHTS, DEMOCRACY, AND THE RULE OF LAW AND POWER DYNAMICS**

32. **States bear ultimate responsibility as the guarantors of democracy, human rights, and rule of law. They are encouraged to avail themselves of all means of international and regional assistance and cooperation, with a view to strengthening capacity-building at the national level. The international community should provide support through capacity-building, field services and monitoring.**

33. **The triangle formed by the concepts of rule of law, human rights and democracy is not an equilateral one; circumstances may often require that greater emphasis be placed on one element, without detaching it from the others. Thus, a State whose institutions have broken down may need to re-establish democratic institutions and the rule of law to ensure respect for human rights and fundamental freedoms. States in which authoritarian rule or a populist majority has denied the rights of many persons may give priority to restoring human rights and fundamental freedoms and their system of protection, including the administration of justice.**

34. **Free, fair, and periodic multiparty elections are a key component of democracy, the rule of law and the protection of human rights. They also have an autonomous value as a means of self-realization and recognition of human dignity. Periodic elections are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them. The conduct of elections should be entrusted to an independent mechanism, as appropriate, one that is free from executive or other interference that could undermine the fairness of elections.**

35. **General comment No. 25 concerning article 25 of ICCPR should guide the implementation of the right to participate in public affairs, voting rights, and the right of equal access to public service. According to this general comment, the conduct of public affairs is a broad concept, which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at the international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs should be established by the constitution and other laws.**

36. **Freedom of expression, assembly and association are essential conditions for democracy and for a democratic election process. Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty or impediments**

**to freedom of movement that prevent persons entitled to vote from exercising their right effectively. Information and materials about voting should be available in minority languages.**

**37. The right to stand for election and the right to vote are substantively linked. The effective implementation of the first ensures a free choice of candidates. Any restrictions on the right to stand for election, such as a minimum age, must be based on objective and reasonable criteria established by law and not exclude any person on the basis of gender, religion, ethnicity or any other discriminatory ground. Unreasonable or discriminatory requirements such as education, residence, descent or political affiliation should not be permitted.**

**38. International cooperation and the participation of civil society are essential in building a wide range of pluralistic institutions and supporting periodic elections and other democratic processes.**

**39. All organs and institutions of the State should operate in a transparent manner and be held accountable. Transparency is essential to ensure that there is respect for the rule of law. Thus, access to information about public affairs and the operation of government bodies must be guaranteed. States are encouraged to adopt and implement legislation ensuring broad access to information by the public.**

**40. Sovereignty, national security and public order, interest and morals are terms that need to be interpreted in a manner consistent with international law because they confer discretionary power on State organs. It is important that no power remains unchecked and that there is a separation of powers between the different functions of the State.**

#### **CHALLENGES TO DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW THROUGH ENSURING EQUALITY, PARTICIPATION AND ACCOUNTABILITY**

**41 The fundamental principles of equality, participation and accountability derive from, underpin and protect human rights, democracy and the rule of law. Therefore:**

##### **Conflict, disorder, terrorism and security regimes**

**42. States must uphold their human rights obligations during periods of conflict and national emergency, in accordance with international law, the rule of law, and the principles of democracy. All measures taken to suspend temporarily those human rights that may be subject to derogation must be proportional, non-discriminatory, respectful of international obligations, and strictly required by the exigencies of the situation. In no circumstances may a State suspend or deny non-derogable rights such as the right to be free from torture and slavery, the right to equality under the law, and the basic guarantees of a fair and impartial hearing before a competent tribunal. Constant civilian oversight over the military and security forces is essential.**

43. **The undermining of the rule of law is a fundamental constraint to the enjoyment of human rights and humanitarian law. International human rights law and international humanitarian law together reinforce the body of rules that regulate a societal order that is predictable, orderly and that respects human rights. The two bodies of law overlap as they seek to protect human dignity and reduce human suffering.**

44. **Some recent responses to terrorism have resulted in an erosion of human rights and violations of the rule of law domestically and internationally. There have been serious violations of international human rights and international humanitarian law, e.g. the illegal seizure and deportation of persons, torture, and violations of provisions of the Geneva Conventions of 12 August 1949. This poses a challenge to the advancement of human rights.**

45. **The rationale for and practice of pitting security and rights against each other is both dangerous and counterproductive. There is need for vigilance, particularly as rule of law and democratic institutions are more - not less - important under states of exception.**

46. **In times of crisis and social disorder, threats to the effective enjoyment of rights can originate in derogating from rights, in the process of the administration of justice, and in the course of enforcing security laws. Recent developments, including conflict and terrorism, have tended to erode the rule of law.**

#### **Impunity**

47. **All States must act within the law and encourage accountability for abuses and wrongdoing. National action plans to combat impunity may be a suitable vehicle for implementing this principle. They should be based on a comprehensive approach, including mutually reinforcing measures, such as judicial accountability, mechanisms of truth and reconciliation, and programmes of reparation. Such plans should be developed in a participatory manner and the views of civil society should be taken into account.**

48. **Countering impunity requires effective measures at the international and national levels. The experts affirmed that States must be encouraged to ratify the Rome Statute of the International Criminal Court. They must also enhance their capacity to investigate and prosecute those responsible for war crimes, crimes against humanity and genocide. Furthermore, and to enhance accountability, States must be encouraged to go beyond the ratification of international instruments and to make every effort to implement them at the domestic level. The international community should develop its capacities to provide technical assistance in this regard.**

49. **Victims of international crimes need special care and their needs should be considered as priorities. Their rights and needs must be at the centre of policy considerations regarding accountability and justice. They need to participate in decisions that have an impact on their rights.**

50. **It is necessary not only to react to violations of human rights, but to establish effective mechanisms that can prevent them. There is a need to place emphasis on building an early warning capacity to address problems of impunity. In this context,**

**the experts recommended that the High Commissioner for Human Rights, together with the Secretary-General, should be able to call upon the Security Council in cases where impunity is systematic. Also, mutual cooperation in criminal matters should be enhanced. Regional measures may be useful models in this matter.**

**51. In considering the need to combat impunity for violations of human rights and the detrimental impact of impunity on democracy and the rule of law, it is recommended that a study be carried out analysing the interrelationship between human rights obligations and the law of State responsibility, taking into account issues of universal jurisdiction and the practice of State and diplomatic immunities.**

### **Corruption**

**52. All forms of corruption, including political, economic and corporate corruption, undermine democratic values and institutions, degrade the enjoyment of rights, and impair the ability of the State to implement human rights, in particular, economic and social rights. Resources to combat corruption should be made available readily and widely at the national and international levels.**

**53. The international community's fight against corruption should be broad and holistic in nature, taking full account of political corruption in a more serious way, with a view to consolidating new and restored democracies.**

**54. The enactment of appropriate legislation should be prioritized to address the various structural weaknesses that allow corruption to thrive. Also, international cooperation is essential to counter corruption. States must, for instance, provide for their banking system to ensure that the profits of corruption cannot be retained, but are returned to the State of origin. The ratification and implementation of relevant international, regional and subregional instruments, particularly the United Nations Convention against Corruption, and those related to money laundering, should be promoted. Bilateral agreements aimed at countering corruption should also be encouraged.**

**55. Anti-corruption strategies should be nationally led and based on the principles of transparency and accountability. The right of access to information, including government information, and freedom of expression and the press should be respected and enhanced. Measures aimed at reducing poverty should take into account the linkages between high poverty levels, illiteracy and the potential for corruption. Working towards the realization of the Millennium Development Goals provides an important opportunity to confront underdevelopment and corruption.**

**56. Countering corrupt practices in electoral processes requires cooperation among the key institutions that supervise elections, such as the electoral agencies, the police and anti-corruption institutions.**

57. Codes of conduct for public officials and representatives and the public services, and the periodic declaration of assets should be introduced. Electoral legislation should address matters of funding of political parties, including electoral campaign financing and the role of corporations. Anti-corruption legislation should address the national and international giving and receiving of bribes.

#### **Denial of access to justice by disadvantaged groups**

58. Access to justice is an essential condition for the effective implementation of human rights, as well as for democracy and the rule of law. It does not mean exclusively access to the judicial sector. It also means access to less formal types of institutions and mechanisms such as national human rights institutions, ombudspersons, mediators and skilled personnel who can assist people in claiming their rights and navigating through State agencies.

59. Deprivation of access to justice usually means denial of human rights, political exclusion and legal uncertainty. Moreover, it often leads to a lack of knowledge about rights or cynicism relating to their importance. Disadvantaged or vulnerable groups, including minorities, are most frequently among those who suffer denial of justice. States should adopt policies and make resources available so that the population, and in particular disadvantaged groups, can become aware of their rights.

60. Obstacles to access to justice are manifold, but include poverty, lack of education and illiteracy - afflicting 780 million inhabitants of the world - and discrimination. Commonly, the face of a person who does not have access to justice is that of a rural woman, and in many cases a member of a minority group. States must make a real effort to meet the Millennium Development Goals so that those who are disadvantaged may benefit.

61. Many members of disadvantaged groups are deprived of access to justice because the costs of engaging with judicial institutions outweigh their resources. Other problems, ranging from the slowness of the judicial process and judicial corruption to lack of information about relevant procedures, lead to disputes being resolved through informal means or through extralegal or even illegal action.

62. Legal aid for the poor is a useful and even indispensable method of levelling the playing field for the poor vis-à-vis other sections of society. There is no single model for such assistance, and States should consider a variety of approaches to find what is most effective for them. A focus on affordability and quality of the services rendered is essential. Legal assistance services should not be incorporated in the formal judicial apparatus but be independent from judicial control. Legal aid should be understood to be a broad concept not limited to formal legal proceedings, but should also include advisory services to assist persons to obtain the benefits and services.

63. Education, in particular the eradication of illiteracy and human rights education in general, is essential in raising the awareness of disadvantaged groups of their rights. In some cases, States have ratified human rights instruments and have adopted implementing

legislation, but need to go further by adopting policies and making resources available so that the population, and in particular disadvantaged groups, can have assistance with how to exercise these rights.

64. **Progressive rapprochement between customary dispute resolution mechanisms and the formal legal system could improve the administration of justice. Care should be taken to monitor customary dispute resolution mechanisms to ensure respect for human rights that have been universally agreed upon at the international level. A process of consultation, dialogue and coordination between the formal and non-formal legal systems can improve access to justice.**

65. **States should consider the creation of effective procedures to deal with crimes committed on a large scale and mass torts. Ending impunity for State and non-State actors, including corporations, is essential.**

66. **An overarching body of principles that highlight the minimum core elements of the right of access to justice for the disadvantaged should be developed. They should form the accepted basis for legal and institutional reform across a diversity of legal systems.**

67. **The experts recommended that States should review the activities of the poor that have been characterized as offences to be dealt with in the context of the criminal justice system, with a view to considering decriminalizing behaviour that essentially is non-harmful and tends to penalize disadvantaged groups as opposed to individuals who have acted wrongfully.**

68. **There should be further focus on studying the particular needs of minorities and other disadvantaged groups in societies, such as women, children, and non-citizens. It should also be recognized that there are difficulties in access to justice because of denial of economic, social and cultural rights to disadvantaged groups.**

#### **MEASURES TO ENHANCE DEMOCRACY AND THE RULE OF LAW - LESSONS LEARNT: NATIONAL AND REGIONAL PERSPECTIVES**

69. **A number of measures have been identified to strengthen and enhance democracy and the rule of law, particularly with regard to judicial authorities as well as parliaments. The special needs of countries in transition were also recognized along with the indispensable role of the United Nations in this regard. In this context:**

##### **Strengthening judicial infrastructure**

70. **The independence of the judiciary is a core component of democratic governance and mandated by international norms. States should respect the United Nations Basic Principles on the Independence of the Judiciary. Nevertheless, concern was expressed regarding the modalities for ensuring the accountability of judges. While recognizing the importance of the principle of separation of powers and non-interference with the judicial function, particularly with respect to political pressures or influence exercised by the other branches of Government, judges need to be accountable.**

71. **Judicial integrity is a key element of impartial justice. States that do not already have a code of conduct for judges are encouraged to consider adopting the Bangalore Principles on Judicial Conduct. In this context, judicial discipline and the removal of judges who have engaged in corruption are essential.**
72. **The judiciary should be representative of, sensitive and responsive to the most disadvantaged groups in society. States should consider training judges to become sensitive to special issues pertaining to women and other disadvantaged groups.**
73. **States should give serious consideration to compulsory, periodic and continuous legal education, including in the area of international human rights law and jurisprudence. Judges should receive more training on international human rights standards and jurisprudence, and the modalities for the domestic application of international human rights law.**
74. **OHCHR should be invited to further develop its technical assistance programmes in the area of judicial training. Issues relating to how international human rights law could be applied by national courts, even in cases where the State has not ratified international treaties or not enacted implementing legislation, should be addressed in the context of technical assistance for the domestic application of international standards.**
75. **Efforts should be made to explore how a database of the opinions of high-level national courts that have applied international human rights law and jurisprudence in the domestic context could be developed.**

#### **Providing meaningful assistance to parliaments**

76. **Democracy is the only system of governance that is self-correcting and that offers hope for the realization of human rights and fundamental freedoms. The oversight role of parliaments as guardians of human rights should be supported and enhanced. Parliament plays a fundamental role in reforming national legislation in line with international standards. Effective parliaments that represent the will of the people are essential to democratic rule.**
77. **Support for initiatives to assist parliaments in the area of capacity-building are welcome and should be increased in order to help parliaments to be more accessible to their constituents, in particular civil society and disadvantaged groups.**
78. **Efforts should be made to protect and promote the rights of members of parliaments to enable them to effectively play their role as guardians of human rights. Efforts by the Inter-Parliamentary Union (IPU) in this regard through the Committee on the Human Rights of Parliamentarians should be supported and encouraged.**
79. **The Inter-Parliamentary Union plays a crucial role in the effective functioning of parliaments. IPU and the United Nations should deepen their cooperation in seeking common approaches to enhance democratic practices. The development of the Manual on Good Practices by Parliamentarians by the Inter-Parliamentary Union is welcome, and the Manual should be widely disseminated once completed.**

80. **Parliaments should welcome media coverage and criticism of their proceedings, with a view to ensuring transparent and accountable processes for the adoption of legislation and government oversight, and also to facilitate a better understanding of their activities among the public. The existence of free and independent media is a prerequisite in this regard.**

#### **Assisting post-conflict States**

81. **Societies emerging from conflict have special needs in addressing the legacy of human rights violations and moving towards democratic governance under the rule of law. The international community, particularly democracies, should assist post-conflict States in making the transition to stable democracy by, inter alia, providing technical assistance and international cooperation in multilateral forums.**

82. **Truth and reconciliation mechanisms constitute an important step in establishing accountability and achieving justice. They should be established through a participatory process whose legitimacy should be confirmed by the victims. It is imperative that the truth and reconciliation mechanisms be fully equipped to carry out their tasks in a transparent and efficient manner. Their status should provide for follow-up as appropriate, including in the form of prosecutions. The demand for justice by victims should be recognized as an obligation within a democratic transition. Every effort should be made to find viable means and methods of achieving that end.**

83. **Reparation programmes should be a tool for fully integrating victims in society and restoring respect for their dignity. They should not be limited to financial compensation only, but should be designed in a comprehensive manner in accordance with international standards. The experts suggested that the special procedures of the Commission on Human Rights should document cases of violence against women, in particular to ensure reparations for women who suffered harm in cases of sexual violence. Assistance by the international community might be required in providing adequate reparation, including the possible creation of international reparation mechanisms.**

84. **A number of United Nations departments, agencies and programmes, as well as regional organizations, are actively assisting Member States to build more inclusive and participatory democratic political processes under the rule of law. Their role must be enhanced. The framework for United Nations action, as articulated by the Secretary-General in his important report to the Security Council on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616 of 3 August 2004), is welcome.**

85. **The findings of this seminar should be seen as a guide to the realization of the holistic concept of democracy.**

## **Annex I**

### **LIST OF PARTICIPANTS**

#### **Experts**

Mr. François BOREL (Switzerland), former member of the Swiss Parliament

Mr. Dato Param CUMARASWAMY (Malaysia), advocate and solicitor in Kuala Lumpur and former United Nations Special Rapporteur on the independence of judges and lawyers

Dr. Frene GINWALA (South Africa), former Speaker of the Parliament of South Africa

Ms. Sofia MACHER (Peru), Centre for Civil and Human Rights of the University of Notre Dame Law School, formerly Commissioner of the Peruvian Truth and Reconciliation Commission

Dr. Mohammad-Mahmoud Ould MOHAMEDOU (Mauritania), Associate Director of the Harvard University Programme on Humanitarian Policy and Conflict Research

Mr. Palan MULONDA (Zambia), Director of the Institute for Human Rights, Intellectual Property and Development Trust

Dr. Srivansan MURALIDHAR (India), advocate before the Supreme Court of India

Senator Dulce Maria SAURI-RIANCHO (Mexico), Mexican Senate

Professor Dinah SHELTON (United States of America), George Washington University School of Law

Dr. Lyal SUNGA (Canada), University of Hong Kong Faculty of Law and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law

Professor Daniel THÜRER (Switzerland), University of Zurich

Judge Mirosław WYRZYKOWSKI (Poland), Constitutional Tribunal of Poland

#### **Member States**

Afghanistan, Albania, Algeria, Armenia, Australia, Austria, Bahrain, Bangladesh, Belgium, Bhutan, Brunei Darussalam, Canada, Chile, Congo, Costa Rica, Croatia, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, France, Germany, Greece, Haiti, Hungary, India, Indonesia, Iran (Islamic Republic of), Ireland, Israel, Jordan, Kenya, Luxembourg, Madagascar, Mexico, Morocco, Norway, Oman, Paraguay, Peru, Poland, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, South Africa, Sweden, Switzerland, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, Ukraine, United States of America, Uzbekistan, Zambia, Zimbabwe.

**United Nations**

Department of Peacekeeping Operations, Department of Political Affairs

**United Nations bodies and specialized agencies**

United Nations Development Programme, Office of the United Nations High Commissioner for Human Rights

**Intergovernmental organizations**

African Union, Inter-Parliamentary Union

**Non-governmental organizations**

Europe-Third World Centre, People's Decade of Human Rights Education

**Other organizations and bodies**

Kharkiv Centre for Women's Studies, Legal Council "Legi-Team", Peoples' Movement for Human Rights Learning, Raoul Wallenberg Institute of Human Rights and Humanitarian Law

## **Annex II**

### **AGENDA**

28 February 2005

#### Morning session

- |               |   |
|---------------|---|
| 10.00 - 10.15 | Opening statement by the High Commissioner for Human Rights<br>Introductory remarks: presentation of seminar objectives |
| 10.15 - 10.20 | Adoption of the provisional agenda  |
| 10.20 - 10.35 | Keynote address: Ms. Freny Ginwala<br>Highlights of the first expert seminar and its conclusions                        |
| 10.35 - 10.50 | Keynote address: Ms. Dinah Shelton  |

#### **I. THE INTERACTION BETWEEN DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW AND POWER DYNAMICS**

Chairperson: Ms. Freny Ginwala

#### Panel discussion

- |               |   |
|---------------|---|
| 10.50 - 11.10 | Introduction of expert paper: Periodic, fair and free elections:<br>important elements for the promotion and protection of human rights<br>Speaker: Mr. Daniel Thürer |
| 11.10 - 11.30 | Coffee break  |
| 11.30 - 11.50 | Expert paper: The separation of powers and limitations on<br>discretionary powers<br>Speaker: Mr. Mirosław Wyrzykowski  |
| 11.50 - 13.00 | General discussion<br>Moderator: Chairperson  |
| 13.00 - 15.00 | Lunch break   |

Afternoon session

II. CHALLENGES TO DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW:  
HOW TO ADDRESS ISSUES OF EQUALITY, PARTICIPATION, AND  
ACCOUNTABILITY

Chairperson: Ms. Sofia Macher

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|---------------|--|
| 15.00 - 15.30 | Presentation of expert papers on the two topics identified below   |
| 15.30 - 16.30 | Discussion group 1: management of internal disorder, emergencies and conflicts<br>Moderator: Mr. Mahmoud Mohamedou |
| 15.30 - 16.30 | Discussion group 2: Impunity<br>Moderator: Mr. Lyal Sunga  |
| 16.30 - 16.45 | Coffee break   |
| 16.45 - 18.00 | Plenary session: presentation of group reports and general discussion<br>Moderator: Chairperson                    |
| 18.15 - 19.45 | Reception hosted by the High Commissioner for Human Rights   |

1 March 2005

Morning session

Chairperson: Ms. Dinah Shelton

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|---------------|---|
| 10.00 - 10.30 | Presentation of expert papers on the two topics identified below                                |
| 10.30 - 11.30 | Discussion group 3: Corruption<br>Moderator: Mr. Palan Mulonda                                  |
| 10.30 - 11.30 | Discussion group 4: access to justice by disadvantaged groups<br>Moderator: Mr. S. Muralidhar   |
| 11.30 - 11.45 | Coffee break  |
| 11.45 - 13.00 | Plenary session: presentation of group reports and general discussion<br>Moderator: Chairperson |
| 13.00 - 15.00 | Lunch break   |

Afternoon session

III. MEASURES TO ENHANCE DEMOCRACY AND THE RULE OF LAW - LESSONS  
LEARNT: NATIONAL AND REGIONAL PERSPECTIVES

Chairperson: Mr. Dzidek Kedzia

- |               |  |
|---------------|--|
| 15.00 - 16.15 | Presentations on the five topics identified below  |
| 16.15 - 16.30 | Coffee break   |
| 16.30 - 17.15 | Discussion group 1: United Nations technical cooperation programmes<br>Moderator: Mr. Dzidek Kedzia - OHCHR<br><br>Democracy and rule of law reform projects - new or restored democracies<br>Speaker: Ms. Martha Doggett - DPA<br><br>UNDP Technical Cooperation Programme: cooperation with the judiciary, parliaments and law enforcement agencies<br>Speaker: Mr. Jean Fabre - UNDP<br><br>United Nations Peacekeeping Operations: conflicts and post-conflict situations<br>Speaker: Mr. Robert Pulver - DPKO<br><br>Human rights tools for countries in transition<br>Speaker: Ms. Mona Rishmawi - OHCHR |
| 16.30 - 17.15 | Discussion group 2: measures for strengthening judicial infrastructure and related training, teaching and education<br>Moderator: Mr. Param Cumaraswamy  |
| 17.15 - 18.30 | Plenary session: presentation of group reports and general discussion<br>Moderator: Chairperson  |

2 March 2005

Morning session

Chairperson: Mr. Param Cumaraswamy

- |               |   |
|---------------|---|
| 10.00 - 11.00 | Presentation of the expert papers on the two topics identified below  |
| 11.00 - 11.15 | Coffee break  |
| 11.15 - 12.15 | Discussion group 3: assistance to parliaments<br>Moderators: Mr. François Borel, Ms. Dulce Maria Sauri<br>Mr. Martin Chungong (IPU) |
| 11.15 - 12.15 | Discussion group 4: post-conflict situations<br>Moderator: Ms. Sofia Macher   |
| 12.15 - 13.00 | Plenary session: presentation of group reports and general discussion   |
| 13.00 - 15.00 | Lunch break   |

Afternoon session

Chairperson: Ms. Freny Ginwala

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|---------------|-------------------------------|
| 16.00 - 17.00 | Discussion of the conclusions |
| 17.00 - 18.00 | Closure of the seminar        |

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