

AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW
CENTER FOR HUMAN RIGHTS
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
STANDING COMMITTEE ON LAW AND NATIONAL SECURITY
REPORT

The American Bar Association Section of International Law’s Task Force on Reform of the United Nations Commission on Human Rights was established in January of 2004. During the course of that year, the Task Force held monthly meetings at which it heard from a wide variety of individuals, including officials of the U.S. Government, think tanks, nongovernmental organizations, and former Ambassadors of the U.S. to the Commission, all of whom contributed to our understanding of the issues and needed reforms.¹ The Section of International Law, along with the Center for Human Rights, Section of Individual Rights and Responsibilities, and Standing Committee on Law and National Security, have approved these principles as outlined by the Task Force summary below.

Our review had as its focus the role of the Commission in contributing to the promotion and protection of human rights. As the recent report of the Secretary-General’s High-level Panel on Threats, Challenges and Change stated, the “Commission on Human Rights is entrusted with promoting respect for human rights globally, fostering international cooperation in human rights, responding to violations in specific countries and assisting countries in building their human rights capacity.”²

At bottom, these are concerns of lawyers charged by our professional calling with promoting and protecting human rights. As we reviewed the performance of the Commission, particularly in recent years, and considered needed reforms, we focused on issues of particular relevance to lawyers, such as replacing the Commission with a Human Rights Council; the need to reemphasize fundamental human rights; promotion of the rule of law; development of the Democracy Caucus; strengthening the investigative processes of the Commission; and adopting a Code of Conduct committing the members to honor their human rights undertakings and cooperate with the Commission.

This report is particularly timely in that the U.S. Institute of Peace has underway, at the behest of the Congress, a six-month study of the UN, including the Human Rights Commission, and the recommendations for reform of the Commission proposed by the High-level Panel, as supplemented by the Secretary-General’s report, “In larger freedom: towards development, security and human rights for all,”³ are under active review by the Member States and the UN. It is the hope of the Task Force that this report will contribute to these

efforts and to the position that the U.S. Government and other interested Member States will take in respect to reform of the Commission in the coming months.

The Task Force includes members and non-members of the ABA, all of whom were appointed by the Chair of the Section of International Law. The membership encompasses experts from the human rights field, such as former U.S. government officials, congressional representatives, leaders from the relevant committees of the Section as well as other ABA sections and committees. David E. Birenbaum, former U.S. Ambassador to the UN for UN Management and Reform, chairs the Task Force.

On the whole, the Task Force found that the Commission on Human Rights, particularly in recent years, has failed to fulfill its mission to promote and protect human rights. While there are a number of reasons why this is the case, a primary cause is the increasingly politicized nature of the Commission, which has severely compromised the capacity of the Commission to take action in response to serious human rights violations.

The Commission, it should be understood, is an intergovernmental body (as opposed to a body of independent experts), whose membership reflects the overall composition of the UN. In the early years of its existence, this intergovernmental status contributed importantly to the legitimacy of human rights norms as set out in the Universal Declaration of Human Rights and other key instruments. In recent years, however, a number of states with severely compromised human rights records have sought to exploit the political nature of the Commission, resulting from its intergovernmental status, to prevent exposure and criticism of their transgressions, as well as the violations of other states. As the Secretary-General noted in his Larger Freedom report, “the Commission’s capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership on the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others.”⁴ The standing of the Commission was severely compromised by the selection of Libya as Chair and the re-election of Sudan as a member in the midst of the genocide in Darfur. Perhaps, the most shameful failure of the Commission in recent years was the refusal last year to adopt a resolution clearly condemning that genocide.

Notwithstanding its criticism of the Commission, the Task Force recognizes that the Commission has done important work in exposing, through its rapporteurs, cases of serious human rights violations. This work is especially important in countries with poor human rights records, which have ratified few human rights treaties and are therefore not subject to oversight by treaty monitoring bodies. Such exposure, on occasion, has resulted in prisoners being freed.

The Task Force recognizes that the inherently political nature of an intergovernmental body such as the Commission inevitably limits its ability to function as the beacon of human rights envisioned when it was created in 1946. These limitations are reinforced by its size (53 Member States), status as a subsidiary of the Economic and Social Council (ECOSOC), and restricted meeting schedule (once a year, apart from special sessions).

The Task Force endorses the Secretary-General's proposal of a smaller, standing Human Rights Council, whose members would be elected by the General Assembly subject to a two-thirds majority. As compared with the Commission, the Council would have the status, the time, and smaller and more committed membership to fulfill its responsibilities as the leading human rights intergovernmental body in the UN structure. And, the Council will provide a much-needed opportunity for a fresh start.

The Task Force recommends guidelines for the new Council designed to focus its mission on fundamental human rights and the rule of law, promote responsible behavior by Member States, strengthen the role of the Democracy Caucus of Member States, and enhance the professionalism of the investigative processes. The Task Force further, and in line with the recommendations of the Secretary-General,⁵ proposes reforms to enrich the contribution of the High Commissioner for Human Rights.

This report assumes the creation of a Human Rights Council on the basis proposed by the Secretary-General and, as indicated above, offers guidance drawn from the experience of the Commission to be drawn upon in establishing necessary rules, operations and processes. The Task Force notes that its recommendations would be equally applicable in the event the General Assembly determines to retain the existing Commission. In the end, no proposed set of legal and institutional reforms will succeed unless the U.S. and the other democratic Member States undertake to treat the Council with a seriousness of purpose and commitment at least equal to that of the Member States whose agenda has been to prevent the Commission from doing its job of protecting human rights. The Task Force offers specific recommendations in that regard.

The ABA recommendation also calls for enhanced coordination with human rights treaty bodies. These are some of the most legally oriented and least politically charged parts of the UN human rights system. Attention could also be given to the extent to which there should be greater resources for individual complaint mechanisms. These mechanisms have been used effectively in contexts where national legal systems are not willing or able to provide relief for serious human rights abuses.

During the course of deliberations of the Task Force, the Secretary-General's High-level Panel on Threats, Challenges and Change issued its final report, which addressed many issues facing the UN, including the performance of the Human Rights Commission. The report confirmed a number of the findings of the Task Force, including its findings that the Commission's capacity to meet its mandate has been "undermined by eroding credibility and professionalism," and that "standard-setting to reinforce human rights cannot be performed by states that lack a demonstrated commitment to their promotion and protection."⁶ Moreover, the High-level Panel expressed a similar concern to that of the Task Force that "in recent years states have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others."⁷

As noted above, subsequent to the issuance of the report of the High-level Panel, the Secretary-General issued his report providing recommendations for reform of the human rights machinery of the UN, drawn in large part from the recommendations of the High-level Panel. His report

similarly confirmed the key findings of the Task Force relating to the Commission and the High Commissioner.

The High-level Panel also made a number of recommendations. The Task Force endorses the recommendations concerning the designation of experienced human rights figures as heads of their delegations, creating an advisory council, having the High Commissioner for Human Rights prepare an annual report on the situation of human rights worldwide, regular reporting to the Security Council, and increased funding.⁸ The Task Force, however, does not agree with the recommendation of universal membership in the Commission. As discussed in Appendix A, Section II of this report, the Task Force concluded that opening the membership to all members of the UN would make it even more difficult than at present for the Commission to take action in response to human rights violations. The example set by UN bodies that have universal membership, such as the General Assembly and its third committee, does not inspire confidence that expanding the membership of the Commission so that it includes all members of the UN will lead to more responsible behavior.

As noted above, the Secretary-General also rejected the High-level Panel's recommendation of universal membership and proposed instead that the Commission be replaced by a smaller, standing Human Rights Council, whose members would be elected by a two-thirds majority of the General Assembly and would "undertake to abide by the highest human rights standards."⁹ The Secretary-General's report makes recommendations also for strengthening the role and capacity of the High Commissioner. The Task Force supports these proposals of the Secretary-General.

A number of governmental and nongovernmental organizations (NGOs) have issued reports calling for improved effectiveness and making appropriate recommendations.¹⁰ To add value, the Task Force, in fashioning its recommendations for guidelines for the Council, focused its efforts on recommendations designed to depoliticize the work of the Commission, improve its performance, and refocus its resources on the protection of fundamental human rights.

The analysis and recommendations of the Task Force are divided into the following sections in Appendix A:

A Human Rights Council

The first section of Appendix A presents the rationale for creating a Human Rights Council to replace the Commission and recommends:

- The General Assembly should create a Human Rights Council, whose members would be elected by a two-thirds majority of the General Assembly. The Council should be substantially smaller than the 53 member Commission.
- The Council should be a standing body of the UN.
- The resolution establishing the Council should commit all Member States of the UN to cooperate with the Council, particularly with its investigative processes.

Mission

The second section of Appendix A reviews the evolution of the Commission's mandate and its failure in recent years to adequately focus on its core mandate. Taking account of the failings of the Commission, the Task Force recommends that the Council:

- Assign special priority to protecting and promoting fundamental human rights.
- Establish a highly professional investigative processes, and in particular a strong rapporteur process, and improve coordination with other UN human rights treaty bodies.
- Reject any discriminatory, exclusive agenda items aimed at specific countries, such as the standing agenda item created by the Commission with respect to Israel, the only country so treated.
- Focus world attention on conflicts that may result in ethnic cleansing, genocide, or other mass violations of human rights.

The Task Force welcomes and applauds the efforts of the High Commissioner¹¹ and the Secretary-General to develop initiatives to promote the rule of law in post conflict and transitional states and to establish a democracy fund as a source of support.¹² The Task Force further encourages the High Commissioner to establish a task force of experts to provide advice in formulating plans for, and providing rule of law assistance to states wishing to improve their compliance with international human rights norms, as well as other related issues. Such an advisory body could also assist in identifying and disseminating “best practices” and in generating support for actions of the High Commissioner.

Process for Selecting Members of the Council

The third section of Appendix A addresses the selection of members of the Council. The Task Force preferred limiting membership to states that met minimal human rights standards but concluded that such an approach would not likely find acceptance in the UN. While a majority of states might be prepared to exclude other states that are subject to sanctions imposed by the Security Council or the censure of the new Human Rights Council, the current Member States would be hard pressed to reach a consensus on the appropriate standards to determine membership on the Commission.

Therefore, the Task Force agreed with the Secretary-General's recommendation that the members be elected by the General Assembly on the basis of a two-thirds majority vote, a requirement intended to limit membership to those countries which, by virtue of their qualifications, are able to garner the support of a super-majority of the General Assembly. If the members determine, as seems likely, that seats on the Council should be allocated among

the regional groups, that should be allowed only on the basis that all regional groups reserve the right to reject any candidates on the basis of their human rights records. The Task Force is examining the procedures for best assuring that the super-majority voting requirement functions as intended by the Secretary-General.

In addition, the Secretary-General and High Commissioner should exercise moral suasion with respect to the selection of Commission members by regional groups, the U.S., and other members of the Democracy Caucus should more effectively exert their influence over the selection process. The Council should adopt a Code of Conduct (Recommendation, Appendix I) under which members would, *inter alia*, pledge to honor their human rights obligations and to cooperate fully with the Commission's investigations. Certain breaches of the Code could result in the imposition of sanctions.

Specifically the Task Force makes the following recommendations:

- Regional groups should reserve the right to oppose the candidacy of a state that has a poor human rights record, even if such a candidacy has the support of the sponsoring regional group.
- Any Member State subject to action taken by the Security Council under Chapter VII of the UN Charter or the censure of the Human Rights Council should be prohibited from serving on the Council until the sanctions or censure are lifted.
- The Secretary-General and High Commissioner for Human Rights should use their good offices to persuade the Member States of the Regional Groups to select for membership in the Human Rights Council only states with good human rights records.
- The U.S. and democratic states should seek to strengthen and activate the emerging "Democracy Caucus" so as to promote the effective operation of the Council by, among other actions, supporting for membership on the Council only states with good human rights records.¹³
- The Council should adopt a Code of Conduct pledging members to comply with their obligations to protect human rights imposed by treaty, to use their membership on the Council to promote international efforts to protect human rights, to designate prominent persons with substantial human rights expertise to head their delegations to the Council, and to cooperate with the investigative mechanisms of the Council, including the work of rapporteurs charged with investigating allegations of human rights abuses. Serious violations of a member's obligations of good citizenship of the Council as defined in Article IV of the Code could give rise to the imposition of sanctions, including removal from membership and disqualification from re-election for at least one term.

Operation

The fourth section of Appendix A sets forth detailed recommendations for the Council to strengthen the investigatory processes as employed by the Commission. Specifically, it recommends that the capacity and credibility of rapporteurs should be strengthened through the expansion and updating of professional rosters, training manuals, and use of common investigative protocols.

The Council should allow ample time for rapporteurs to present their reports, given that it will be a standing body. Assuming that the Council retains the 1503 complaint procedure, the Task Force recommends that the rules be revised to promote greater transparency in the process.

Role of the High Commissioner for Human Rights

The fifth section in Appendix A considers the relationship of the Council to the High Commissioner for Human Rights and suggests ways in which the effectiveness of the High Commissioner can be enhanced. In particular, the Task Force recommends that the Special Rapporteurs be required to present their reports to the High Commissioner immediately after completion rather than on an annual basis, that the High Commissioner produce and circulate a comprehensive and up to date compilation of the rapporteurs' findings and recommendations well in advance of each session of the Council, and that the High Commissioner be empowered on an emergency basis to present a rapporteur's report to the UN Security Council in cases of an imminent human rights crisis.¹⁴ Finally, the Task Force calls for increased funding to enable the High Commissioner to carry out these activities.

Relationship with NGOs

The final section in Appendix A addresses the relationship between the Council and NGOs and makes proposals for enhancing the role and contribution of NGOs to the work of the Council, as compared with the Commission. Specifically, the Task Force recommends that the Council should appoint a coordinator to facilitate NGO communication and interaction with the Council, and do away with the strict requirement that NGOs may only have half the speaking time allotted to Member States. The replacement of the Commission by a standing Council will also provide a greater opportunity for constructive NGO involvement in the work of the Council.

The Section of International Law and our Task Force partners, the Center for Human Rights, Section of Individual Rights and Responsibilities, and Standing Committee for Law and National Security, encourage you to support the Code of Conduct and underlying principles of the recommendation.

Respectfully Submitted,

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Chair, Section of International Law

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APPENDIX A

SECTION I

REPLACING THE COMMISSION ON HUMAN RIGHTS WITH A HUMAN RIGHTS COUNCIL

With respect to the need to replace the Commission on Human Rights with a Human Rights Council, the Task Force found:

The inherently political nature of an intergovernmental body such as the Commission inevitably limits its ability to function as the beacon of human rights envisioned when it was created in 1946. This situation is exacerbated by its relatively large size (53 Member States), status as a subsidiary of ECOSOC and limited meeting schedule (once a year apart from special sessions).

As the Secretary-General noted in his Larger Freedom report, “the Commission’s capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership of the Commission not to strengthen human rights, but to protect themselves against criticism or to criticize others.”¹⁵

The standing of the Commission was severely compromised by the selection of Libya as Chair, the re-election of Sudan as a member in the midst of the genocide in Darfur, and the shameful failure of the Commission last year to adopt a resolution clearly condemning that genocide.

The credibility deficit of the Commission has, according to the Secretary-General, cast a shadow on the reputation of the UN system as a whole.¹⁶

The Secretary-General has appropriately identified the reform of UN human rights mechanisms as a central component of the entire UN reform effort. As such, the protection of human rights is on par with the UN interests in promoting security and fostering political and economic development.

As will be discussed in greater detail below, the primary focus for protecting human rights has shifted from standards formulation to implementation. The focus on implementation requires a smaller body than one charged with standards development, and requires a standing committee.

The creation of a Council will enable the UN to begin anew with a clean slate and avoid many of the limitations seemingly irrevocably imbedded in the operating system of the Commission.

The Task Force recommends that in order to more effectively promote the protection of human rights, the Human Rights Commission should be replaced by a new Human Rights Council established on the following basis:

The Task Force endorses the Secretary-General's proposal of a standing and smaller Human Rights Council, whose members would be elected by the General Assembly subject to a two-thirds majority. As compared with the Commission, the Council would have the status, the time, and smaller and more credible membership to fulfill its responsibilities as the leading human rights intergovernmental body in the UN structure.

1. The General Assembly should create a Human Rights Council.

The number of members should be substantially smaller than the 53-member Commission

2. The Council members should be elected by a two-thirds majority of the General Assembly. The Chair of the Council should be elected by a two-thirds majority of the Council.

The super-majority voting requirement is intended to assure that members are broadly approved by the overwhelming majority of the members of the General Assembly.

3. The Council should be a standing body of the UN.

The creation of a standing body will enable the Council to devote the necessary time and resources to protecting human rights, and will prohibit states from running out the clock in order to escape censure for human rights violations.

4. The Council should have co-equal status with the other major organs of the UN—ECOSOC and the General Assembly.

This will likely require that the Charter be amended, a lengthy and difficult process. In the interim, it may be necessary to establish the Council as a subsidiary body of the General Assembly, with the objective of converting it to a free standing body when charter amendments are next presented to the members.

5. The resolution or amendment establishing the Council should commit all Member States of the UN to cooperate with the Council, particularly with its investigative processes.

SECTION II

SETTING THE MISSION OF THE HUMAN RIGHTS COUNCIL

With respect to the mission of the Human Rights Council, the Task Force found:¹⁷

The Commission's original priority was to submit proposals to the General Assembly relating to an international bill of rights, the protection of minorities, the status of women and other human rights norms. The Commission was also charged with making studies and providing information at the request of ECOSOC. Over the years, the Commission has interpreted its broad mandate to encompass the establishment of standards for the protection of human rights, the investigation of systematic abuses, and the recommendation of affirmative measures to protect human rights.¹⁸ During its first twenty years, the Commission emphasized its responsibility for standard setting and successfully produced a number of important draft conventions.¹⁹ While the Commission continues to undertake standard setting work (e.g., the draft text on disappearances), its focus in recent years has shifted to the implementation of existing standards.

To promote the ability of the Commission to investigate systematic human rights abuses, the ECOSOC authorized the Commission to carry out special investigative procedures.²⁰ Of these procedures, certain ones were subject to strict rules of confidentiality, which have undermined their effectiveness. The Commission has developed a monitoring system but has never adequately fulfilled its potential to protect fundamental civil and political rights.

In particular, the increasingly politicized nature of the Commission has severely compromised its capacity to take action in response to serious human rights violations. Some states have used the Commission's recognition of social and economic rights to deflect attention from the violation of civil and political rights.²¹

The Commission has often remained silent in the face of gross violations of human rights,²² or has adopted ineffectual resolutions without urging further, meaningful steps. A recent instance of this failure was the Commission's weak response to the genocide in Darfur, Sudan during the 60th Session.

The Commission's efforts to investigate or censure human rights violators are frequently stifled through bloc voting,²³ no-action motions, and other procedural maneuvers by regional groups and by alliances of non-democratic states.²⁴ For instance, certain notorious violators of human rights successfully banded together in the 60th Session of the Commission to defeat important resolutions. Only the most politically isolated states are subject to censure by the Commission, which means that Middle Eastern and African States, as well as Russia and China, enjoy a near-immunity. On the other hand, the Commission spends a disproportionate amount of its time on Israel, which is the only state with its own agenda item and is the subject of repeated resolutions.

The Commission's emphasis on consensus decision-making ultimately protects human rights violators by enabling them and their allies to drastically water down country-specific resolutions or chairperson's statements.

As the Secretary-General has noted, the human rights priority in the coming years is on effective implementation of the by now well-established international norms.

The Task Force recommends that to fulfill its mission and avoid the failings of the Commission, the Human Rights Council should follow the following guidelines:

1. The Council should assign special priority to protecting and promoting fundamental human rights that form the foundation of human dignity by protecting all human beings against abusive state action. Member states should not be allowed to use protection of economic and social rights as a pretext to detract from protection of civil and political rights.

The Council should establish procedures and implement a program of strong initiatives to ensure the protection of these fundamental human rights, including aggressive investigations, public hearings, and reports to the Security Council when there is evidence that an egregious violation has occurred. These efforts should not detract from the attention given to other human rights abuses within the jurisdiction of the Council.

2. Efforts should be undertaken to establish a highly professional investigative process, and in particular a strong rapporteur system.

Discriminatory, exclusive agenda items, such as the agenda item for Israel, the only country so treated, should not be continued.²⁵ While no country should avoid scrutiny when it is warranted, the exclusive focus of an entire agenda item on a single country is discriminatory.

3. The Council should bring attention quickly to conflicts that could result in ethnic cleansing and genocide, and should mobilize international action to resolve these conflicts and prevent atrocities.

SECTION III

SELECTION PROCESS FOR THE MEMBERS OF THE COUNCIL AND CODE OF CONDUCT

This section addresses the selection of members of the Council and the adoption of a Code of Conduct. The Task Force found that efforts to establish binding criteria for the selection of members of the Council, while highly desirable, would not be feasible, except in the instance

of countries that are under Chapter VII actions imposed by the Security Council or the censure by new Human Rights Council. However, there are a variety of other, less contentious means to improve the selection process and promote more responsible behavior by members. The Task Force recommends that the Secretary-General and the High Commissioner informally bring their influence to bear in protecting the credibility of the Council from being compromised by the selection of known human rights violators. Further, the U.S. and other democratic states should more effectively organize the participation of democratic states across the regional groups so as to promote the selection of states with commendable human rights records. In addition, the Task Force recommends the adoption by the Council of a Code of Conduct whereby all Member States would pledge to comply with obligations imposed under human rights agreements to which they are party, to cooperate with the investigative mechanisms of the Council, and to designate prominent persons with substantial human rights expertise to head their delegations.²⁶ Serious violations of a member's obligations of good citizenship of the Council imposed under Article IV of the Code could result in removal and disqualification from future membership.

With respect to the selection process for the members of the Council and the Chairperson, the Task Force found:

Membership in the Council brings with it the responsibility to conform to a standard of good citizenship as members of the body, including a commitment to honor human rights obligations assumed under treaties and a pledge to cooperate with the Council, particularly with respect to investigations. Membership in the Council should provide an avenue for states to engage in setting and elaborating standards, reinforcing the protection of human rights, responding to serious violations, promoting human rights, and contributing to the clarification of their conceptual underpinnings. These tasks cannot be meaningfully performed by states that lack credibility in human rights matters.

Member States would have great difficulty reaching a consensus in support of objective membership criteria, although they might be prepared to exclude countries currently sanctioned by the Security Council or censured by the Human Rights Council.

Adopting universal membership, as recommended by the High-level Panel, would likewise not make the Commission more effective. Opening the membership to all members of the UN could make it even more difficult for the Commission to respond to human rights violations. Those UN bodies that do have universal membership, such as the General Assembly and its third committee, are not particularly effective.

Similarly, the effectiveness of the Commission has been greatly influenced by the independence and professionalism of the Chairperson.²⁷

Particular concerns raised by the Task Force include:

- Many Member States fail to uphold the standards embodied in the major human rights instruments and either commit or fail to respond to serious human rights violations;

- Some states become members of the Commission with the purpose of protecting themselves against international criticism for serious human rights violations committed by their own authorities. This finding in particular was highlighted in the observations of the High-level Panel;
- Recently the credibility of the Commission has been substantially degraded as key officers have been selected from some Member States (e.g., Libya) that have a track record of severe human rights violations. Other countries (e.g., Sudan) have been accepted as members notwithstanding egregious and on-going human rights violations;

If the above concerns remain unaddressed in the selection process for the Council, its credibility and relevance will be undercut profoundly.²⁸

The Task Force recommends that in order to promote a representative and effective Council, and ensure the selection of a responsible and independent chairperson, the following reforms should be adopted:

- Members of the Council should be elected by the General Assembly on the basis of a two-thirds majority.
- While the members can be expected to insist that traditional standards of geographic representation be applied, the requirement for a super-majority vote should lead to the rejection of the candidacies of human rights abusers, particularly given the limited number of available memberships.
- Regional groups should refuse to enter into voting protocols or other procedures, which call for the automatic acceptance of candidates endorsed by the appropriate regional group.

Assuming that the seats on the Council are allocated among the regional groups, the non-sponsoring regional groups, and in particular the Western European and Other States Group (WEOG), must reserve the right to reject candidates with poor human rights records.

- Any Member State under Security Council action taken under Chapter VII of the UN Charter or censure of the Human Rights Council should be prohibited from serving on the Council.
- The Secretary-General and the High Commissioner should seek to persuade Member States of the regional groups to reject the candidacies of known human rights violators for membership and leadership in the Council.
- The U.S. and other democratic states should work together to support candidates for membership and leadership that support human rights and oppose others and develop an agenda for meaningful action by the Council.

- The U.S. and other democratic states should seek to strengthen and energize the emerging “Democracy Caucus,” which is currently chaired by Chile.

To this end, the U.S. should work with other democracies to build upon the work of the Council for a Community of Democracies to promote a coalition of democratic states that will act in concert to pass key resolutions in response to crises and to develop effective operating mechanisms within the Human Rights Council. The Democracy Caucus should also undertake efforts to ensure that democratic states are selected for membership in the Council and should work to prevent the selection of non-democratic states.

- To promote the effective development and implementation of a Democracy Caucus agenda and participate effectively in the work of the Council as a standing body, the U.S. should appoint a full time Ambassador to the Council and do so as early as possible. This Ambassador should be instructed to initiate consultations with Democracy Caucus Member State ambassadors in Washington to formulate an agenda and plan of action for the Council meetings. This activity should be coordinated with similar efforts by U.S. Embassies. Particular emphasis should be placed on encouraging the Democracy Caucus member countries of Africa, Eastern Europe, and Latin America to take leadership roles.
- The Council should adopt a Code of Conduct committing the Member States to promote international protection of human rights; to honor international human rights efforts; to cooperate with the investigative mechanisms of the Council (specifically including cooperation with the rapporteurs charged with investigating allegations of human rights abuses); and to appoint as heads of their delegations persons with substantial human rights expertise. The obligation to appoint as head of delegation persons with human rights experience would go far to enhance the overall professionalism of the Council.

The Code would not impose new human rights obligations on the Member States; rather it would pledge the members to honor existing human rights responsibilities in their capacity as members of the Council. (See Recommendation, Appendix I for Proposed Code.) Since all of these responsibilities are logically related to membership in the Council, a strong case can be made for their acceptability.

A Member State’s serious breach of its obligations of good citizenship of the Council imposed under Article IV of the Code could lead to its censure, suspension of membership, or ineligibility for future membership. These obligations arise out of the relationship between every member and the Council and, for that reason, the Code provides for sanctions in the event of serious violations. As a necessary complement to the Code, the Council should create a “Membership Committee” to make determinations of serious breaches of the good citizenship obligations and recommend appropriate sanctions. The Council should adopt rules governing the work of the Membership Committee.

SECTION IV

ESTABLISHING PROFESSIONAL INVESTIGATIVE PROCESSES OF THE HUMAN RIGHTS COUNCIL

With respect to the effective operation of the Human Rights Council, the Task Force found:

The current selection process used by the Commission for Special Rapporteurs needs to be improved. The current roster of potential rapporteurs is too limited and is not kept up to date. As a result, the Commission often goes through a lengthy, cumbersome, and politicized process for selecting new Special Rapporteurs.

The High Commissioner for Human Rights recently created a basic training process for the Special Rapporteurs, in which they receive briefings on the history of their mandate and the methodology of the Special Procedures. The efficiency and effectiveness of the rapporteurs could be further enhanced if the High Commissioner provided them with more extensive training manuals that drew on the collective experience of past rapporteurs and internationally accepted investigative practices. The High Commissioner may wish to call upon the American Bar Association and other national and international professional organizations to assist in developing and carrying out a more comprehensive training program.

As the Report of the High-level Panel noted, although regular budget funding has increased in recent years, the budget allocation for the High Commissioner rapporteurs is still not commensurate with their activities and the importance of their responsibilities. Voluntary funding can be donated for a particular mandate, but the High Commissioner for Human Rights discourages the practice.

With respect to the Commission's so-called "1503 confidential complaint procedure,"²⁹ while the guarantee of confidentiality may have been necessary to attract state participation in the early days of the UN, secrecy is now anachronistic and, on balance, detrimental. Moreover, a primary reason for the current rule—a concern that countries would not otherwise cooperate—would diminish with the adoption of the recommended Code of Conduct. The Code would commit all Member States of the Human Rights Council to cooperate with the investigative mechanisms and recommendations of the Council, including those taken with respect to 1503 complaints. And, as recommended above, the resolution establishing the Council would extend this obligation to all Member States of the General Assembly.

The Task Force recommends that in order to ensure the performance and professionalism of the Council's vital investigative operations, the following measures should be adopted:

1. The roster of persons eligible for appointment as rapporteurs, which is maintained by the High Commissioner for Human Rights, should be expanded to include a number of highly qualified individuals designated by international organizations such as the International Bar Association, Union Internationale des Avocats, and appropriate national professional associations, such as the ABA. The roster should be updated annually to ensure that it includes only individuals who continue to be available and willing to serve if selected to be a Special Rapporteur. In expanding and updating the roster, every effort should be made to ensure that it is representative of different geographical areas and different legal systems, as well as having a gender balance.³⁰ The improved list will provide the Chair of the Council with a sufficient number of eligible and readily available rapporteurs. The Chair will thus not have to go through a prolonged and politicized selection process for each situation.
2. The High Commissioner should provide the rapporteurs with a comprehensive, universal training program, including use of expanded training manuals. With multiple investigations throughout the world, the High Commissioner should establish common investigative protocols to be included in the training manuals.
3. The Council should consider the following fundamental questions when creating, merging or terminating mandates:
 - Does the proposed action increase the level of human rights protection and promotion?
 - Does the proposed action reflect the accepted equal importance of civil and political rights and economic, social and cultural rights?
 - Does the proposed action avoid unnecessary duplication?
 - Does the proposed action identify which mechanism (expert, rapporteur, or working group) is the most effective in terms of increasing human rights protection?³¹
4. Ample time should be provided for the rapporteurs to present their findings and recommendations to the Council. As a standing body, the Council will have much more time than did the Commission to give full consideration to the reports of rapporteurs.
5. The financial situation of the High Commissioner needs to be significantly improved through increased contributions from the UN regular budget, so as to ensure collective responsibility and an adequate allocation of resources to all mandates. In addition, arrangements should be made to encourage private donations, subject to appropriate conflict of interest rules.

6. The 1503 complaint procedure of the Commission, if carried over into the Council, should be revised to allow for greater transparency through access to non-protected information.
7. The High Commissioner should consider these recommendations for improving and making more professional the functioning of the investigative processes to be employed by the Council, including better coordination between the Council's investigations and the monitoring responsibilities of the human rights treaty bodies.

SECTION V

EXPANDING THE ROLE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

With respect to the relationship of the Commission with the High Commissioner for Human Rights, the Task Force found:

The High Commissioner is the principal UN official with responsibility for human rights and is accountable to the Secretary-General. Among its responsibilities, the High Commissioner serves as the Secretariat of the Commission. The High Commissioner, consistent with her mission, possesses a considerable measure of independence. It is essential that this independence be safeguarded in establishing the Council. As the leading human rights advocate within the UN system, the High Commissioner has the credibility and responsibility to speak out if the Council fails to do its job of protecting human rights.

A large number of urgent appeals are issued each year by thematic and country-specific rapporteurs, whose purpose is to strengthen human rights protection in situations giving rise to immediate concern. Until the recent establishment of the Office of the High Commissioner's "Quick Response Desk" and "Urgent Action Database," there had been little coordination between the rapporteurs. Rapporteurs often unknowingly issued parallel appeals to the same government. The High Commissioner is well placed to facilitate increased coordination between the rapporteurs.

Since 2001, the reports of special procedures mandate-holders have been available on the High Commissioner's website prior to the session of the Commission. The High Commissioner could promote a better debate at the Council and help create technical cooperation programs within the UN system, by compiling recommendations made by the Special Rapporteurs into an official document. This compilation could then be distributed at the Council's sessions.³²

Currently, the rapporteurs are expected to present their reports to the Commission on an annual basis. This approach limits the ability of the rapporteurs to facilitate swift action,

especially in emergency situations such as imminent genocide. They should, rather, submit their reports to the High Commissioner immediately after completion.

In recent years, the High Commissioner has on a few occasions been invited to appear before the UN Security Council to report on country-specific situations, a trend that should be encouraged.

The Report of the Secretary-General called upon the High Commissioner to play a more active role in the deliberations of the Security Council and the proposed Peacebuilding Commission. The presence of the office of the High Commissioner at UN Headquarters in New York should be substantially enhanced, reflecting the greater priority that should be given to human rights in all work of the UN. The Secretary-General also called for the increased allocation of resources to the Commissioner in order to train country teams within her office.³³

The Task Force recommends that in order to strengthen the role of the High Commissioner for Human Rights in relation to the Council, as compared with the Commission, the Human Rights Council should adopt the following measures:

1. Special Rapporteurs should be required to coordinate more closely with the Office of the High Commissioner for Human Rights to ensure that (1) facts supporting the urgent appeal are clearly set out, and (2) rapporteurs do not issue parallel appeals because they are unaware of concurrent appeals.³⁴
2. At least four weeks prior to the relevant session of the Council, the High Commissioner should produce and circulate (1) a comprehensive and up to date compilation of recommendations made by *thematic mechanisms*, and (2) a compilation by country of concerns and recommendations made by Special Rapporteurs. This compilation should include:
 - A summary of cases raised by special procedures;
 - A summary of recommendations arising from missions and government replies;
 - The extent to which recommendations made by special procedures have already been implemented, including information from UN agencies;
 - Requirements for visits, including whether a government has issued a standing invitation;
 - The status of a given country's ratification of international human rights treaties;
 - The number of overdue reports owed the treaty monitoring bodies, and information regarding technical cooperation programs run by the High Commissioner.³⁵

To that end, any documentation control rules adopted by the Council should allow the issuance of an official compilation of excerpts from other official documents.

3. Reports of the Special Rapporteurs should be presented in a timely fashion to the High Commissioner, not just on an annual basis to the Council, as is presently the case with the Commission.
4. The High-level Panel proposed that the Security Council request the High Commissioner to prepare an annual report on the situation of human rights worldwide, which should drive the agenda of the Council, and to report to it regularly about the implementation of all human rights-related provisions of Security Council Resolutions. The Task Force endorses those proposals, provided that adequate funding is provided. The Task Force further proposes that the High Commissioner bring to the attention of the Security Council reports of Special Rapporteurs on imminent human rights crises.
5. The High Commissioner for Human Rights' rule of law initiative should be supported with appropriate levels of funding and the cooperation of Member States of the Council. Adherence to the rule of law and the development of a legal and institutional infrastructure (e.g., constitutional protection of human rights, laws meeting due process standards, a professional police force, and an independent judiciary) are indispensable to the protection of human rights. The Task Force welcomes and applauds the recent efforts of the High Commissioner and the Secretary-General in assisting countries in building the rule of law.

The Council should assume responsibility for the 2003 request of the High Commissioner to the Commission to develop ways to strengthen national systems for protecting human rights.³⁶ The focus of this initiative should be to provide technical assistance to interested states. The initiative would encompass norm setting and developing democratic institutions.³⁷ The Secretary-General should be encouraged to fully fund such an initiative, as broadly recommended by High-level Panel.

To provide rule of law assistance more effectively, the High Commissioner should establish a task force of human rights experts to formulate plans for rule of law assistance for those states that wish to improve their compliance with international human rights norms. This task force can also give feedback to the High Commissioner and assist in the dissemination of "best practices."³⁸ This task force would be available year round to provide support with rule of law assistance and other initiatives of the High Commissioner.

The ABA Task Force recognizes that other UN agencies, in particular, the UNDP, run important programs to promote the rule of law. The High Commissioner, in her role as the officer with principal responsibility for promoting human rights in the UN, should take a leading role in coordinating these activities.

6. The Task Force recognizes more generally that its recommendations will require additional funding for the High Commissioner and supports the provision of the necessary funding.

SECTION VI

ENHANCING THE ROLE OF THE NGOS

With respect to the future relationship of the Council with NGOs, the Task Force found:

NGOs play an important role in the work of the Commission, serving as a reality check on the rhetoric and political maneuverings of Member States. Yet their access to the Commission has been limited, thereby minimizing their ability to provide the Commission with useful information. According to a long-standing decision of the Commission, representatives of Member States are allotted twice the speaking time permitted to NGOs. Due to this time constraint, in many instances NGOs have been forced to give joint statements before the Commission, which some groups have found to be unacceptable. Moreover, limits on speaking time and on the length of written submissions have required NGOs to make short, hasty arguments. In addition, NGOs have sometimes been arbitrarily barred from the proceedings of the Commission and working groups. The transformation of the Commission into a standing Council will provide greater opportunity for constructive NGO involvement in the work of the Council.

The Task Force recommends that in order to enhance the participation of NGOs, the Human Rights Council should adopt the following policies:

1. NGOs should maintain, at a minimum, the same degree of access to the Council as now exists with the Commission.
2. The High Commissioner recently appointed an NGO liaison official, whose responsibilities should be continued and expanded to include coordination between NGOs and the Council.³⁹
3. Consistent with its status as a standing body, the Council should enlarge the opportunity of NGOs to provide information to it. Requirements, such as the Commission imposes, restricting NGOs to half the speaking time allotted to Member States, should not be adopted.
4. The Council should recognize and support the valuable contributions NGOs make with respect to the follow-up of field visits and implementation of recommendations.⁴⁰

¹ The Rapporteurs, Paul R. Williams and Michael P. Scharf, are grateful for the assistance of Karna Ekland, Lucy Gillers, Mekbib Solomon, Gail Karish, Sarah Blake, Niki Dorsky, and Lesly Murray.

² UN Secretary-General's High-level Panel on Threats, Challenges and Change, UNDOC A/59/565, Section XVIII, at 70 (Nov. 29, 2004).

³ In Larger Freedom: Towards Development, Security and Human Rights For All, Report of the Secretary-General, A/59/2005, (March 21, 2005) [hereafter Report of the Secretary-General]

⁴ Report of the Secretary-General, *supra*, at 45.

⁵ Report of the Secretary-General, *supra*, at 37-8.

⁶ UN Secretary-General's High-level Panel on Threats, Challenges and Change, at 70.

⁷ *Id.*

⁸ *Id.*, at 70-71.

⁹ Report of the Secretary-General, *supra*, at 45.

¹⁰ In making the findings and formulating the recommendations contained in this report, the Task Force relied on an extensive body of work regarding the reform of the UN Commission on Human Rights, including but not limited to: Report of the Bureau of the 54th Session of the UN Commission on Human Rights submitted to the 55th Session pursuant to Commission decision 1998/112, UN Doc. E/CN.4/1999/104 (1999); Report of the Intersessional open-ended working group on enhancing the effectiveness of the mechanisms of the Commission on Human Rights to the 56th Session, UN Doc. E/CN.4/2000/112 (2000); Millennium Report of the Secretary-General of the United Nations, "We the Peoples" Role of the United Nations in the 21st Century, <http://www.un.org/millennium/sg/report/full.htm> (last visited February 3, 2004); Secretary-General's 2nd reform report, UN Doc. A/57/387 (2002); Compilation of submissions, UN Doc. E/CN.4/2003/11 (2003); Manual for Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the special procedures of the Commission on Human Rights and of the advisory services programme, (last revised at the 10th meeting of SRs, 23-27 June 2003); Report of the meeting of Special Rapporteurs/representatives, experts and chairpersons of working groups of the special procedures of the Commission on Human Rights and of the advisory services programme UN Doc. E/CN.4/2000/5 (2000); Enhancing the effectiveness of the Sub Commission on the Promotion and Protection of Human Rights UN Doc. E/CN.4/Sub.2/1998/38 (1998); Common position of the Sub Commission on future tasks, length of session, working methods, composition and election of members UN Doc. E/CN.4/Sub.2/1999/47 (1999); Amnesty International, UN Commission on Human Rights must reform itself or risk irrelevance, http://news.amnesty.org/mav/pages/UNCHR_2004 (last visited February 3, 2004); Global Policy Forum, Compilation of materials regarding various UN reform initiatives, <http://www.globalpolicy.org/reform/initiaindex.htm> (last visited February 3, 2004); Alston, Philip, *The United Nations and Human Rights: A Critical Appraisal* (Oxford, Clarendon Press, 1995); as well as relevant United States Congressional Action, 108th Congress 1st Session, H.R. 2799; Calendar No. 274- 108th Congress 1st Session Senate Report 108-144; and S13756 Congressional Record Senate November 23, 2003.

¹¹ In 1994, the American Bar Association adopted a resolution strongly supporting the newly created post of the High Commissioner for Human Rights.

¹² Report of the Secretary-General, *supra*, at 35, 38.

¹³ The ABA adopted a resolution in 2004 supporting the creation of a UN Democracy Caucus within the UN framework to work towards the strengthening of democracy, human rights, and the rule of law throughout the UN system.

¹⁴ The Report of Secretary-General, *supra*, at 37, called upon the High Commission to play a more active role in the deliberations of the Security Council and the proposed Peacebuilding Commission. The Secretary-General also called for the increased allocation of resources to the Commissioner in order to train country teams within her office.

¹⁵ Report of the Secretary-General, *supra*, at 45.

¹⁶ Report of the Secretary-General, *supra*, at 45.

¹⁷ The findings of the Task Force are based upon a comprehensive review of materials prepared by governments, NGOs, and academics relating the Commission, and the experiences of the Task Force members, and the views of experts who met with Task Force over the past year.

¹⁸ Excerpts of ECOSOC Resolutions 5(I) February 16, 1946 and 9(II) June 21, 1946. The Commission's basic mandate was further clarified in Resolution 1235 (XLII) which authorized the Commission to examine information relevant to gross violations of human rights and fundamental freedoms, and in Resolution 1979/36 which asked the

Commission to assist ECOSOC in the co-ordination of activities concerning human rights in the UN system. The subject matter of the Commission's work is internationally recognized human rights.

¹⁹ Including the draft Universal Declaration of Human Rights (adopted by the UN General Assembly in 1948), and drafts of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1954 (adopted in 1966).

²⁰ Resolution 1235 authorized the Commission to establish ad hoc working groups of its own members to make a public study of situations that reveal a consistent pattern of violations of human rights, followed by public reports and recommendations to ECOSOC. Both country-specific and thematic investigations have been initiated under this procedure. Resolution 1503 established a confidential procedure to receive complaints.

²¹ For example, in its 60th Session, the Commission passed resolutions on a wide range of topics that are better addressed in other, more specialized international bodies. "Summary: The UN Human Rights Commission: Can It Be Rescued?" American Enterprise Institute, March 2004. Available at:

<http://www.aei.org/events/filter.all.eventID.785/summary.asp> (last visited April 7, 2004).

²² See Amnesty International, "2003 UN Commission on Human Rights: A Time for Deep Reflection" AI Index: IOR 41/025/2002, pp. 2.

²³ For example, in its 60th Annual Session, consideration of draft resolutions on the human rights situations in Zimbabwe and in China was blocked, and a draft resolution on the human rights situation in the Chechen Republic of the Russian Federation was defeated on a roll-call vote.

²⁴ A near majority of the Member States of the Commission are rated by Freedom House as either "partly free" or "not free."

²⁵ Cyprus is also subject to a specific reference in a sub-item of item 9 of the Commission's agenda. This practice too should be eliminated.

²⁶ The prospect of sanctions for breach of a state's obligations of good citizenship of the Council should serve as a strong incentive to comply.

²⁷ In addition to the powers conferred upon him or her elsewhere by the Rule of Procedure, the chairperson has the "complete control of the proceedings of the Commission and over the maintenance of order at its meetings." See Rule 41(1) of the Rules of Procedure of the Functional Commissions of the Economic and Social Council (E/5975/Rev. 1)

²⁸ The Task Force found in particular there was a recent surge in concern expressed by some Member States of the Commission, the United States Congress, the High-Level Panel, and the Secretary-General concerning the credibility and relevance of the Commission.

²⁹ Procedure for Dealing with Communications Concerning Human Rights, E.S.C. Res. 3, UN ESCOR, Supp. No. 1, at 24, UN Doc. E/RES/2000/3 (2000); Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms, UN ESCOR, 49th Sess., Supp. No. IA, at 8, UN Doc. E/4832/Add.1 (1970).

³⁰ Report of the Inter-sessional open-ended working group on enhancing the effectiveness of the mechanisms of the Commission on Human Rights, 56th Sess. (2000) at ¶ 6.

³¹ *Id.* at ¶ 14.

³² "2003 UN Commission on Human Rights: A Time for Deep Reflection," Amnesty International, AI Index IOR 41/025/2002.

³³ The Report of the Secretary-General, *supra*, at 37.

³⁴ "2003 UN Commission on Human Rights: A Time for Deep Reflection," Amnesty International, AI Index IOR 41/025/2002 at ¶ 27.

³⁵ *Id.*

³⁶ This request was based in the Secretary-General's Reform Report of September 2002 (A/57/387).

³⁷ The provision of technical assistance should not be used by states to deflect human rights investigations or the appointment of a rapporteur, where such action is called for.

³⁸ In August 1994, the ABA recommended that the U.S. government "help to increase UN resources for the promotion of democracy and the strengthening of the rule of law." "Recommendation of the Working Group on Improving the Effectiveness of the United Nations" as reprinted in Noyes, John E., ed. *The United Nations at 50: Proposals for Improving Its Effectiveness* (American Bar Association, 1997).

Since that time, there has been much UN activity directed toward promotion of the rule of law. The 2003 annual report of the UN High Commissioner for Human Rights emphasized that "the key to the future protection of human rights must surely lie in prevention of gross human rights violations at home – through the operation of national protection systems anchored in the rule of law and protection by the judiciary and partner institutions." UNHCHR,

Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights, E/CN.4/2003/14, February 26, 2003, p. 6.

Rule of law and the promotion of democracy have become central themes of the activities of the UN High Commissioner for Human Rights, a fact that the Commission itself has recognized. For example in, Commission Resolution 1999/74, para. 7 the Commission “affirms that the UN High Commissioner for Human Rights remains the focal point for coordinating system-wide attention for human rights, democracy and the rule of law.” See also Commission Resolution 2003/36.

The Commission is also involved in rule of law issues, having established thematic mandates on topics such as extra judicial, summary or arbitrary executions, arbitrary detention, and the independence of judges and lawyers. National human rights institutions from many countries also participate in the Commission’s annual sessions, and the Commission has passed resolutions affirming their importance in promoting and protecting human rights. For example, Resolution 2003/76.

³⁹ Manual for Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the special procedures of the Commission on Human Rights and of the advisory services programme in 1999. Last revised at the 10th meeting of SRs, 23-27 June 2003.

⁴⁰ UN ESCOR, 60th Session, UN Doc. E/CN.4/2004/4 (2003).