



INTERNATIONAL
COMMISSION
OF JURISTS

**REFORMING THE HUMAN RIGHTS SYSTEM:
A CHANCE FOR THE UNITED NATIONS
TO FULFIL ITS PROMISE**

June 2005

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REFORMING THE HUMAN RIGHTS SYSTEM: A CHANCE FOR THE UNITED NATIONS TO FULFIL ITS PROMISE

Introduction

The United Nations is in the process of a long overdue drive to redefine its aims and reform its institutions. Consultations among state delegations underway in the corridors of New York headquarters and capitals around the world are gearing toward hard decisions in advance of the Millennium + 5 Summit to be held in September 2005.¹ Discussions on the human rights component of the reform process are coalescing around proposals to replace the existing Commission on Human Rights (Commission) with a human rights council (council) occupying a higher standing within the UN system. First advanced by UN Secretary-General Kofi Annan in his report “*In Larger Freedom*,”² the proposal has been reflected in a draft outcome paper by the President of the UN General Assembly, Jean Ping.³

The International Commission of Jurists (ICJ) considers that now is the time for the United Nations to fulfil its essential human rights mandate under the UN Charter in a dramatically new way. UN member states must resolutely safeguard the many achievements of the UN in human rights protection and promotion. In the face of unprecedented human rights challenges, they must also create the conditions to allow it to do a great deal more.

With the necessary political will the existing Commission could be made more effective. However, a window of opportunity has opened for more significant and far-reaching reform. The ICJ therefore endorses replacing the Commission with a council that occupies a higher position in the UN and is able to respond more swiftly and effectively to serious human rights situations around the world. However, a human rights council should not, and indeed cannot, constitute the sum total of the UN human rights system.

¹ A number of consultations and discussions have taken place this year, focusing on decisions to be made at the September Summit. In New York, the General Assembly has held a series of informal discussions on four cluster areas: freedom from want, freedom from fear, freedom to live in dignity and strengthening the United Nations, including through the creation of a human rights council. The Commission on Human Rights held an informal session on reform on 20 June 2005. For its part, the ICJ participated in a workshop of governmental and non-governmental representatives, (“Informal Lausanne Group”) on 2 May and 7 June, convened by the Government of Switzerland.

² Report of the Secretary-General, *In larger freedom: towards development, security and human rights for all*, A/59/2005 (21 March 2005).

³ Issued 3 June 2005, see www.un.org/ga/president/59/draft_outcome.htm

Treaty bodies⁴, special procedures⁵, the Office of the High Commissioner for Human Rights (OHCHR), and human rights programs of other UN agencies must continue to form primary and complementary pillars of that system.

Although proposals have been advanced to make the council a body of independent experts,⁶ the Secretary-General's High Level Panel, the Secretary-General himself and the vast majority of States and other stakeholders all agree that the council will have to be composed of UN member states. The council will therefore necessarily play first and foremost political and policy roles.

The existing Commission has been much derided as being overly "politicized." This criticism is ill-conceived. The Commission (and any future human rights council) is by its nature and composition a political institution, meaning that it is an intergovernmental process where representatives of states decide policy and action. This characterization is not pejorative: intergovernmental institutions are required to achieve political results, including formulating strong human rights policy. Specifically, the development and implementation of international human rights norms and the tackling of serious human rights situations and crises must be the result of collective decisions of states. These are political projects, requiring strong political will.

The Secretary-General⁷ and the High Level Panel on security threats⁸ have recognized that the Commission suffers from a credibility deficit. This deficit does not arise from the political or inter-governmental nature of the Commission. It results from the disinclination of members of the Commission to exercise their collective political mandate and authority coherently and with primary reference to principled human rights concerns. This deficiency is compounded by the failure of states to provide adequate material and political support for the "non-political" components of the human rights system to function effectively. The treaty bodies, special procedures, and the OHCHR do or should perform essential tasks of the human rights system, including human rights monitoring and protection, conceptual analysis, and national capacity building. For the political body (ie, the Commission/ council) to make wise and coherent decisions, it must act on the basis of information, analysis and experience provided by these players.

A human rights council should therefore not be seen as the principal organ of the UN human rights system, but as its political organ and policy body, complementing and

⁴ Treaty bodies are the supervisory expert bodies tasked with reviewing the implementation of state obligations under the seven principal human rights treaties.

⁵ Special procedures are independent expert mechanisms set up by the Commission to examine particular themes or country situations. The mandates are typically configured as special rapporteur, working group (usually of five members), special representative of the Secretary-General, or independent expert.

⁶ See in this regard proposal of Peru, oral statement delivered on 12 April 2005 at the informal session on the reform of the Commission of the 61st session of the Commission on Human Rights.

⁷ *In Larger Freedom*, para. 182. See also Statement to the 61st Commission on Human Rights on 7 April 2005, para. 14.

⁸ *A More Secure World; Our Shared Responsibility, Report of the Secretary-General's High Level Panel on Threats, Challenges and Change, United Nations, A/59/565 (2 December 2004), para. 283.*

giving necessary support to the independent and expert parts of the system. All those components need to be strengthened. In this respect, it is essential that states provide the political and financial support necessary for the High Commissioner to implement key elements of the *Plan of Action* she has proposed for her office.⁹

I. FUNCTIONS OF A HUMAN RIGHTS COUNCIL

Recent discussion has centred on the form of a new council. It is critical that states and other stakeholders give far more attention to the functions of the council, to ensure that they are appropriate to meet the great human rights challenges of the coming decades, if not the millennium. In developing those functions, it is necessary to remedy the ills of the present Commission. It is equally essential to preserve and strengthen the best features of the existing system to serve as the foundational blocks for a new council.

THEMATIC WORK OF A COUNCIL: STRENGTHENING SPECIAL PROCEDURES

Thematic Work: Special procedures must be preserved and strengthened

- Existing special procedures mandates should be retained
- To ensure independence and high quality of expertise, a new and more transparent procedure for appointing mandate holders should be adopted, selecting individuals from a roster of experts
- Every year one session of the council should explore in depth a significant theme with a high-level segment and drawing on the High Commissioner's proposed annual thematic report

Over the years, the Commission has adopted many valuable resolutions on a wide range of thematic issues. These resolutions have helped to explain the meaning of well-established human rights and have guided states on implementing human rights obligations. Some have paved the way for human rights instruments containing hard or soft law standards. Others have set up special procedures mandates or adopted the findings and recommendations of procedure mandate holders. Any new council should continue to consider human rights on a thematic basis.

⁹ Office of the High Commissioner for Human Rights, *Plan of Action: Protection and Empowerment*, www.ohchr.org/english/planaction.pdf

Special procedures and the work of the council

The General Assembly President's consolidated draft outcome document concludes that "the Council shall preserve the strengths of the Commission on Human Rights, including the system of special procedures."¹⁰ The ICJ urges that this provision be retained in the final document.

Some have suggested that in establishing a new human rights council, the existing special procedures¹¹ should expire because they derive their mandates from the Commission, which presumably would be dissolved. The special procedures have come under increasing criticism from all regional blocs as having unnecessary or duplicative mandates. Some critics argue that to overcome what they see as an excessive proliferation of mandates the new council should re-establish only a few mandates afresh, or, in a more radical scheme, should dispense with the special procedures system entirely and transfer their functions to a peer review process, or even to the OHCHR.

The ICJ considers such proposals to be profoundly ill-conceived. For the most part, the special procedures have been a major success of the Commission. The special rapporteurs, special representatives, independent experts and working groups, have provided valuable conceptual analysis on key human rights themes; have served as a mechanism of last resort for victims; have sometimes prevented serious abuses, and even saved lives, through urgent appeals; have served as an early-warning mechanism to draw attention to human rights crises; and have frequently provided high-quality diagnoses of individual country situations, including by carrying out country missions.

A critical weakness of the special procedures is not their inefficacy, but that they are simply not able to do enough. The experts serve in a part-time capacity and they perform

¹⁰ *Outcome Document* of 3 June 2005, para. 88.

¹¹ Currently, 28 special rapporteurs, special representatives, independent experts and working groups cover the following themes: People of African descent; arbitrary detention; enforced or involuntary disappearances; the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination; the right to development; adequate housing as a component of the right to an adequate standard of living; the adverse effect of the illicit movement and dumping of toxic waste and dangerous products on the enjoyment of human rights; contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights; extrajudicial, summary or arbitrary executions; freedom of religion or belief; the question of human rights and extreme poverty; human rights defenders; human rights and international solidarity; human rights, transnational corporations and other business enterprises; the human rights of migrants; the independence of judges and lawyers; minority issues; the promotion and protection of human rights and fundamental freedoms while countering terrorism; the promotion and protection of the right to freedom of opinion and expression; the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the right to education; the right to food; the sale of children, child prostitution and child pornography; the situation of human rights and fundamental freedoms of indigenous people; torture and other cruel, inhuman or degrading treatment or punishment; trafficking in persons, especially in women and children; and violence against women, its causes and consequences.

their work without remuneration. A mandate holder typically will rely on the assistance of perhaps a single staff member of the OHCHR to cover an entire human rights theme, such as torture or the right to food, covering all countries in the world. There is clearly a problem of under-resourcing, which can partly be addressed by earmarking some of the expected extra resources towards bolstering the special procedures system.

There is, however, a limitation inherent in the part-time nature of the mandate that will not be addressed by additional money. Even if resources allowed, most mandate holders could not undertake more than three country visits in a single year. Because of these constraints, the experts have been unable to do necessary follow-up work on country situations, especially after missions. This limitation should be addressed by enhancing the capacity of the OHCHR, not only to better service the mandate holder, but also to perform certain substantive functions of the mandate. Once a special procedure mandate holder produces an independent, expert assessment of a country, the High Commissioner could follow through on implementation of the expert recommendations, including through country visits by the OHCHR and, where possible, by ensuring that country field operations and other UN agencies incorporate the reports into their work.

The second weakness of the special procedures system derives from the failure of states to cooperate with the mandate holders, either procedurally, or by taking serious steps to implement recommendations. Many states fail to respond positively to requests for invitations for missions, fail to respond to requests for information regarding allegations or individual complaints, or do respond, but in a perfunctory manner. The ICJ, in conjunction with a number of other major NGOs, has called for all states to issue standing invitations to special procedures mandate holders, which would signal their support for the special procedures system and willingness to cooperate with mandates.¹² To date, at least 52 states have issued such standing invitations.¹³ It will be a compelling task for a human rights council to address this lack of cooperation by many states (see below).

Any new human rights council should retain the existing special procedures mandates. While not all mandates may ultimately be necessary, the present slate reflects political negotiations and compromises struck over years and the balances should not be disturbed without a very careful and methodical consideration of all that is at stake. In addition, each mandate has over time acquired an accumulated wisdom, much of which could be lost or obscured were mandates to be abruptly terminated and their functions displaced. A human rights council should also retain the capacity now held by the Commission to establish new special procedures mandates where a need is identified. Indeed, it may be

¹² E/CN.4/2005/NGO/1, joint written statement submitted to the 61st Commission on Human Rights under agenda item 18 (c).

¹³ Argentina, Austria, Belgium, Brazil, Bulgaria, Canada, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Germany, Georgia, Greece, Guatemala, Hungary, Iceland, Ireland, Islamic Republic of Iran, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Mongolia, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Republic of Macedonia, Romania, San Marino, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, and Uruguay.

necessary to have more, not fewer, mandates to properly advise and support any future council.

There should be a change in methods of appointment of special procedures and other independent experts in the human rights system. At present, the Chairperson of the Commission makes the appointments in consultation with the Commission Bureau¹⁴ and, if the Chairperson sees fit, certain states and NGOs. This process is irregular and non-transparent and the result is that the level of expertise and independence of appointed experts varies greatly.

The ICJ believes that a better method would be to select experts from a roster maintained and regularly updated by the OHCHR.¹⁵ Such a roster could be used more widely than for special procedure mandates, such as for appointments by the OHCHR, council, or Secretary-General of commissions of inquiry, personal representatives or other *ad hoc* experts. Governmental and non-governmental sources, as well as the OHCHR itself, could submit names and *curriculum vitae* of experts to be considered for the roster. It would be the responsibility of the High Commissioner to vet all nominees so as to filter out manifestly unqualified candidates. In this vetting process, the High Commissioner would use clear criteria, such as whether the person has a substantial level of expertise in the field of human rights and whether she or he is serving actively in any executive or legislative government position that would impair or give the appearance of impairing independence. The human rights council would still make the appointments, but would select appointees from the official roster of candidates subjected to this vetting.

The Office of the High Commissioner and thematic work of the council

In her Action Plan submitted to the Secretary-General, the High Commissioner has proposed to produce an annual thematic Global Human Rights Report.¹⁶ If carefully conceived and adequately resourced, this initiative could contribute meaningfully to human rights. The report should not simply explore the conceptual and abstract dimensions of thematic questions, but should also evaluate actual conditions and practices in a substantial number of countries in all regions of the world.

The global report would be most effective if considered by the council at an annual session, possibly containing a high-level ministerial segment, and dedicated to a

¹⁴ The Bureau is composed of five persons, one member from each regional group, elected by the Commission. One of these persons serves as Commission Chairperson and one serves as Rapporteur. The Expanded Bureau, also often involved in consultations, includes the Bureau and the five regional coordinators of each region.

¹⁵ A roster of experts was initiated by OHCHR, but apparently has not been kept updated and is seldom used to appoint special procedure experts.

¹⁶ OHCHR, *Plan of Action: Protection and Empowerment*, para. 86.

particular theme. The annual session could serve as a miniature conference, replacing the costly and large-scale human rights conferences that have been convened periodically.

The High Commissioner should also retain the capacity to initiate conceptual work and to fill gaps where a council is unwilling or unable to act to address a thematic concern.

ADDRESSING HUMAN RIGHTS SITUATIONS IN STATES

Human rights in UN member states must be effectively addressed

- All states should be subject to scrutiny
- Treaty bodies, supplemented by special procedures and the OHCHR, have the primary responsibility systematically to assess member states
- The treaty body system should be transformed into a unified full time standing body
- A peer review mechanism could review implementation of measures undertaken to improve human rights performance
- A council must maintain the capacity to respond robustly to chronic human rights problems and crisis situations in member states with a wider range of trigger mechanisms to bring a country before the council
- The confidential “1503 procedure” should be eliminated

Political impediments and incoherence in the existing system

The Commission has been unable for political reasons to deal coherently and robustly with country-specific human rights situations. This failing more than any other has given rise to the credibility deficit so many have identified. The Commission clearly has a prime responsibility to address patterns of serious violations wherever they occur. Yet only a small number states -- usually those that are weak or politically isolated -- ever come squarely before the Commission.¹⁷ Political antagonisms between states, rather than human rights concerns, frequently drive the Commission’s orientation in this area. The Commission therefore examines and reacts to difficult human rights situations around the world in a diffuse, highly selective and often ineffective manner.

¹⁷ The Sub-Commission on the Promotion and Protection of human rights at one time was active in considering country human rights situations. It is now allowed to hold only fleeting debate on country situations, without the capacity to adopt country-specific resolutions or to mention countries in thematic resolutions. Beginning with its decision 2000/109, the Commission has recalled each year “that the Sub-Commission should continue to be able to debate country situations not being dealt with in the Commission. It should also be allowed to discuss urgent matters involving serious violations of human rights in any country. However, the Sub-Commission should not adopt country-specific resolutions.” See also resolution 2004/60, para. 9, and resolution 2005/53, para. 8.

There are a variety of ways by which a state comes before the Commission. An analysis of the way these different methods have been used shows that the number of states the Commission subjects to scrutiny has been sharply declining. First, the Commission may set a fixed item on its agenda. At present, one such item exists (item 8), concerning Israel, *vis-à-vis* violations of human rights in the occupied Arab territories, including Palestine.¹⁸ Second, one agenda item (item 9) is dedicated to “human rights violations in any part of the world.” Throughout the 1990s, the volume of resolutions adopted and mandates established under this item expanded, followed by a precipitous decline in recent years. In 1998 there existed 13 resolutions/mandates,¹⁹ whereas in 2005, following the 61st session in March/April 2005, only four emerged.²⁰ Third, some of the slack in country consideration had been assumed through the agenda item 19, meant to concern advisory services and technical cooperation, but some states are now beginning to grow suspicious of even this approach.²¹ Fourth, countries can be addressed through Chairperson’s Statements or Decisions of the Commission, falling under the advisory services agenda item or the miscellaneous item 3, purportedly concerning “organization of the work of the Commission.”²²

Human rights advocates consider that states lack the political will to address human rights crises or chronic human rights problems in most member states. Many states from developing world blocs assert that developed countries impose “double standards” by addressing only states of the developing world and insist that technical assistance and human rights promotion should be the main basis of the Commission’s work. African and Asian regional groups now often actively seek to block “item 9” country-specific initiatives, which invariably have as primary sponsors members of the Western and Others Group, including through the improper use of procedural devices such as “no action” motions.²³ These states may act singly or, more typically, collectively, such as in regional blocks: the Organisation of the Islamic conference (OIC), the Like-Minded Group,²⁴ or the Non-Aligned Movement (NAM). They level charges of “selectivity”,

¹⁸ During the *apartheid* era, a separate agenda item also existed on the violation on human rights in Southern Africa.

¹⁹ The countries were Afghanistan, Federal Republic of Yugoslavia, Burundi, Equatorial Guinea, Rwanda, Myanmar, East Timor, Cuba, Iraq, Sudan, Zaire, Iran, Sudan, Zaire, Iran, and Nigeria. All except East Timor had special procedures mandates established.

²⁰ Mandates exist for Belarus, Cuba, Democratic Republic of Korea (North Korea), and Myanmar.

²¹ In 1998 there were just three technical assistance/advisory services mandates, Cambodia, Haiti and Somalia. After a period of growth, the number was again down to four by 2005 (Burundi, Cambodia, Democratic Republic of Congo and Sudan).

²² In 2005, Chairperson’s statements were agreed on Afghanistan, Colombia and Haiti. Decisions were taken on Chad and Liberia, none of which were connected with any mandate.

²³ This procedural motion, which is intended to preclude from consideration matters not within the competency of the Commission to decide, has been abusively invoked, with mixed success, to avoid consideration of countries (such as China, Zimbabwe), thematic issues (human rights and sexual orientation in 2003) and the adoption of standards (Optional Protocol to the Convention against Torture in 2002).

²⁴ The Like-Minded group comprises Algeria, Bangladesh, Belarus, Bhutan, China, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Sudan, Viet Nam, and Zimbabwe.

“finger-pointing”, and “confrontation” at states seeking to bring attention to human rights violations of other states. They increasingly disfavour the Commission taking up country-specific human rights concerns at all.

Expressing this sentiment, the NAM Declaration adopted at the Ministerial Conference in Durban on 17-19 August 2004, states that “[e]xploitation of human rights for political purposes, including selective targeting of individual countries for extraneous considerations, which is contrary to the principles and purposes of the United Nations Charter, should be excluded.” Pakistan, speaking on behalf of the OIC at the 61st session of the Commission on Human Rights put it more bluntly:

“The OIC ... is deeply concerned that resolutions are sponsored under item 9 to target Islamic countries and those from the developing world putting to question the credibility of such actions.... It is our firm belief that country-specific resolutions are politically motivated and do not contribute to the protection or promotion of human rights. Such resolutions have in many cases only led to confrontation and the consequent politicization of the Commission on Human Rights.”²⁵

While there is certainly merit in the charges of selectivity and double standards, the solution is not to do away with country scrutiny. States that have been the subject of a Commission resolution and/or mandate usually do warrant such scrutiny. The point, rather, is that so many states are omitted from consideration. The political conditions underlying such glaring omissions are not mysterious. The serious human rights situations in China, or Russia/Chechnya, and the US in relation to the “war on terror” all should appear on the Commission’s radar, but as these situations concern Permanent Members of the Security Council, they are inevitably absent from the Commission’s agenda.²⁶ Other states that warrant consideration are protected by the Permanent Members and regional or other blocs.

²⁵ Statement by H.E. Mr. Masood Khan, Ambassador and Permanent Representative of the Islamic Republic of Pakistan on behalf of the Member States of the Organization of the Islamic Conference, 23 March 2005.

The Cuban Ambassador in his statement to the Commission characterized the resolution on human rights in Cuba as having been “imposed on the Commission...as a result of the brutal pressure, conditions and blackmail exerted against several of its members by the United States and...based on the slanders and lies of the anti-Cuban campaign.” Statement of H.E Mr. Jorge Ivan Mora Godoy, Ambassador, Permanent Representative of the Republic of Cuba to the 61st session of the CHR, 23 March 2005.

²⁶ The Commission did briefly take up Chechnya in 2000 and 2001 (see Commission Resolutions 2000/58 and 2001/24).

A council needs the capacity to scrutinize universally and respond selectively

The criticisms of selectivity, on the one hand, and lack of coherent or robust action towards states, on the other hand, could be addressed in three obvious ways: First, a council could simply stop considering individual countries, focus on promotion and capacity building and return to the early days of the Commission when human rights questions were debated in abstract terms. Although some states would no doubt be comfortable with this approach, it would only serve to widen the credibility deficit identified by the Secretary-General. The second method could involve a system of universal scrutiny, by which all states are considered by the council. This approach would have to clear a number of hurdles to be feasible. By levelling the field, there is the risk of losing focus and blurring the distinction between states needing only to strengthen their human rights performance and those with grave problems. The third approach would be to devise a system of selective scrutiny that is more coherent and covers a larger and more diverse number of states than does the present Commission.

The ICJ considers that a council should combine the second and third approaches. The UN human rights system as a whole must develop further the capacity to examine all human rights in all countries. No state has a spotless human rights record and none has fully and effectively implemented all of its human rights obligations. By examining all states, the UN council would restore the confidence of all member states and demonstrate that it is not engaging in inappropriate selectivity. The system must also recognize that not all states are alike and that states with serious, chronic human rights problems or experiencing a human rights crisis will require a heightened level of engagement by a council.

Reforming the treaty body system

Among the principal means of achieving effective universal scrutiny is for all states to have ratified the seven core human rights treaties and therefore to be scrutinized by the treaty bodies. These human rights treaty bodies evaluate the compliance of states parties with their human rights legal obligations under the respective treaties. The ICJ believes that treaty bodies should have the primary responsibility within the UN to conduct a systematic human rights legal assessment of member states.

The legitimacy gap in the Commission exists partly due to the failure of the Commission to make adequate use of and to strengthen the work of the treaty bodies and the special procedures. Much of the treaty body output, composed of analysis of state reports, General Comments, and quasi-jurisprudence on individual complaints, constitutes some of the most substantial work in the UN system, anchored as it is in the hard legal obligations under international standards accepted by states. In performing its political and protection functions, a future human rights council should rely more consistently and meaningfully on the analysis, observations and recommendations of the treaty bodies.

In his report, the Secretary-General observes that human rights treaty bodies “need to be much more effective and more responsive to violations of the rights that they are mandated to uphold.”²⁷ The ICJ considers reform of the human rights treaty body system to be of paramount importance, every much as compelling as reform of the Charter-based system. A number of efforts and exercises have sought to diagnose the deficiencies in the treaty body system²⁸ and some modest steps have been taken, such as the development of “core documents.”²⁹ However, the political impetus has not yet been generated to overhaul the system to allow the human rights treaties to fulfil their promise as universal standards to be implemented by all states for all people.

The treaty body system suffers from a number of deficiencies. Some stem from a lack of resources, others from the irresponsible or non-cooperative conduct of states, and still others from the uneven performance of the treaty bodies themselves and the OHCHR in its capacity as secretariat. Clearly there is an overload on the system, which is bound to increase as more states ratify more treaties. Many treaty bodies, saddled with a backlog of states reports, are unable to review state obligations in a timely manner. Many states do not report to the treaty bodies on time; or do not report at all; or submit reports of poor quality, which do not adequately or faithfully reflect the state’s performance measured against its obligations. States often lack the political will to implement the recommendations of treaty bodies or even to publicize the findings or to make them available to relevant national authorities. Many states fail to accept individual complaint mechanisms and those states that have accepted them do not make them known nationally, as a result of which they are under-utilized. The treaty bodies themselves have not followed up adequately their own recommendations or sensibly prioritized areas of concern to states. They do not sufficiently coordinate and harmonize their reports with the analysis of other treaty bodies and special procedures. The quality of expertise on the treaty bodies is also widely variable, as is the quality of their conclusions and

²⁷ Secretary-General’s report, *In larger freedom: towards development, security and human rights for all*, 21 March 2005, para. 147.

²⁸ See, e.g., the Report of the Brainstorming Meeting held in Malbun, Liechtenstein, submitted to the General Assembly as A/58/123; A. F. BAYEFKY, *The UN Human Rights Treaty System in the 21st century*, Kluwer Law International, The Hague, London, New York, 2000; *UN Human Rights Treaty System – Universality at the Crossroads*, Kluwer Law International, The Hague, London, New York, 2001; the reports of the expert Philip Alston, *Long term approaches to enhancing the effectiveness of United Nations human rights treaty bodies: expert study prepared by Mr Philip Alston (A/44/668)*, *Interim report on updated study by Mr Philip Alston (A/CONF. 157/PC/62/Add.11/Rev.1)*; *Final report on enhancing the effectiveness of United Nations human rights treaty system (E/CN.4/1997/74)*.

²⁹ In his report *Strengthening of the United Nations; an Agenda for further change (A/57/387)*, the Secretary-General proposed that “each state should be allowed to produce a single report summarizing its adherence to the full range of international human rights treaties to which it is a party” (para. 52). However, consensus favoured expansion of the “core document” to include information on substantive treaty provisions congruent to all or several treaties, as well as other information of general relevance to all committees. This “expanded core document” would be submitted in tandem with a targeted treaty-specific report to the relevant treaty body. See also the last report of the Secretariat on guidelines on an expanded core document and treaty-specific targeted reports and harmonized guidelines on reporting under the international human rights treaties, HRI/MC/2005/3.

recommendations on countries. The OHCHR, for its part, is not able adequately to disseminate the output of treaty bodies, especially at the national level.

To remedy these and other shortcomings, the High Commissioner has proposed in her Action Plan “to consolidate the work of the seven treaty bodies and to create a unified standing treaty body.”³⁰ The ICJ agrees that the optimal way to address these shortcomings would be to establish such a full time, standing treaty institution, which would carry out all of the functions of the present treaty bodies. It could review all treaty obligations of a state and serve as a general human rights “court” of last resort to adjudicate individual complaints, similar to the institutions of the African, European or Inter-American systems.³¹ It is therefore high time for states to make a political commitment in this year of reform, to begin a *process* for treaty body reform, as no comprehensive human rights reform will ultimately succeed without addressing treaty bodies.

Supplementing treaty body output from the OHCHR and special procedures

At present, relying on the treaty bodies alone to conduct country reviews is not sufficient. First, not all countries are presently parties to all treaties. Universal ratification of the seven principal human rights treaties must be a priority objective for the UN system. However, this goal is not immediately achievable.³² Secondly, many states do not meet their treaty reporting requirements in a timely manner, if at all, meaning that not even all states parties come under effective review. Indeed, with respect to some treaties, the reporting cycles themselves are drawn out over too great a time span. Thirdly, the treaty bodies are not always able to perform either preventative or timely reactive functions; their agenda, in its sequence and ordering of priorities, is at least partly driven by bureaucratic considerations.

The work of the treaty bodies must therefore be supplemented by other actors and procedures. In this regard, the expansion of human rights field presences by the OHCHR can help to fill gaps. The OHCHR is able to carry out some country activities through field presences in the areas of protection and/or capacity building. Some of these activities are taken in connection with Commission mandates, but most are carried out

³⁰ OHCHR, *Plan of Action: Protection and Empowerment*, paras. 99 and 100.

³¹ Both the European and the Inter-American systems provide individuals with a complaint procedure, in accordance with article 34 of ECHR and articles 61-62 of ACHR. The individual complaint mechanism is optional before the Inter-American Court, as complaints can only be referred to the Court if they concern a State Party to the Convention that has accepted the jurisdiction of the Court. However, complaints for all states can be received before the American Commission. The individual complaint mechanism is compulsory in the European system.

³² At present, the International Covenant on Civil and Political Rights has been ratified by 154 states, the International Covenant on Economic, Social and Cultural Rights by 151, the Convention on the Elimination of Racial Discrimination by 170, the Convention on the Elimination of Discrimination against Women by 180, the Convention against Torture by 138, the Convention on the Rights of the Child by 192, and the Convention on Migrant Workers by 30.

pursuant to bilateral arrangements between the OHCHR and the concerned state.³³ The OHCHR also maintains several regional offices.³⁴ The High Commissioner proposes in her Plan of Action to enhance field presences and to maintain within them a public reporting component.

Further country analysis is performed by the special procedures mechanisms, most importantly when they carry out country missions. Overall, the special procedures deal with states in a diffuse and fractured manner. Piecing together the combined wisdom of all special rapporteurs on any country is bound to reveal an incomplete and possibly distorted picture.

Regardless of the collective output from the treaty bodies, OHCHR and special procedures, the question still to be resolved is how a political body can take the analyses, and act to improve the human rights implementation and performance of member states.

A Peer Review Mechanism?

In his statement before the Commission on 7 April 2005, the Secretary-General proposed that a human rights council have “an explicitly defined function as a chamber of peer review...to evaluate the fulfilment by all states of all their human rights obligations.”³⁵ The ICJ considers that universal scrutiny should be one of the guiding principles of the council and that a form of peer review, if wisely constructed, could help to build political confidence among states in the new institution. However, three cautionary notes must be entered: Peer review must bolster, not replace, the work of the treaty bodies and special procedures; it must not unduly drain resources from other parts of the human rights system; and it must support, not replace, the capacity of the council to take specific action in respect of states with especially serious human rights problems.

Two general variants of a peer system have been mooted,³⁶ a “comprehensive approach”, following on peer functions in other organizations, such as the International Labor Organization (ILO) and the World Trade Organization (WTO), and a “light” model, consisting primarily of a process of interactive dialogue among states. Under the first model, a panel composed of experts or member states would conduct research, including by drawing on treaty body and special procedures sources, and engaging in consultations with stakeholders, including through field visits. A questionnaire would be answered by

³³ Field presences of varying types presently exist in Afghanistan, Angola, Bosnia and Herzegovina, Burundi, Cambodia, Central African Republic, Colombia, Cote d’Ivoire, Democratic Republic of Congo, Eritrea, Ethiopia, Georgia (+Abkhazia), Guinea-Bissau, Guyana, Haiti, Iraq, Liberia, Mexico, Mongolia, Nepal, Occupied Palestinian Territories (Gaza and West Bank), Serbia and Montenegro, Sierra Leone, Sri Lanka, Sudan, Tajikistan, Former Yugoslav Republic of Macedonia, Timor-Leste, and Uganda.

³⁴ Latin America, Asia-Pacific, Western Asia, Central Asia, Central Africa, Eastern Africa, West Africa, Southern Africa.

³⁵ Proposals for a peer review mechanism have been supported by several states, including Argentina, Canada, Japan, Mexico, Republic of Korea, Poland, and Switzerland.

³⁶ In May 2005, Canada circulated an options paper outlining these peer review concepts.

the state concerned, and a substantive report would be published with findings and recommendations. A formal and open hearing would also be included.

The alternative lighter model would consist of a three-hour interactive dialogue, including a statement by the state under review, and comments and questions from other states. The OHCHR would make information available from existing treaty bodies and special procedures, with states and NGOs also contributing submissions. A rapporteur would publish a summary of the dialogue, and a possible follow-up statement by state would be issued.

Peer review systems presently exist in a number of intergovernmental bodies, including the ILO,³⁷ the WTO,³⁸ the Organization for Economic Cooperation and Development (OECD) and the New Partnership for Africa's Development (NEPAD). Although useful experiences could be drawn from these processes, none is readily transferable to the human rights system. With the exception of NEPAD, they deal with a narrower subject area than would a human rights council, which is intended to consider all human rights. They also review performance set against more tightly fixed rules or standards.

Under any peer review model, it is likely that states would be inclined reflexively to give themselves and their colleagues mutual protection on sensitive human rights concerns, which would serve to undermine the effectiveness of the procedure. In other instances, states are likely to use peer review as a political cudgel to attack political adversaries. These are the worst characteristics of the present Commission that have attracted such great criticism, and there is no easy way to ensure that a council avoids reproducing these tendencies.

A comprehensive peer review of the human rights situations in all states could also either be too superficial to make a valuable contribution, or could sap an inordinate proportion of the resources and energy of the UN system. To make a credible assessment of any state's human rights performance, the council would need to have before it a substantial dossier on the state under review, from independent and expert sources, and evaluating the states performance regarding the full range of human rights. Otherwise, peer review

³⁷ For the ILO, the concerned government submits a report which is examined by a Committee of Experts on the Application of Conventions and Recommendations, which submits a report examined by a tripartite Conference on the Applications of Conventions and Recommendations meeting at each annual session of the ILO. The concerned state usually makes a statement to the Conference Committee. In rare instances, the governing body adopts a strong decision, as with Myanmar and forced labour in 2000.

³⁸ For the WTO, the Trade Policy Review Mechanism (TPRM) reviews "trade policies and practices and their impact on the functioning of the multilateral trading system." Under this scheme, the WTO Secretariat is responsible for preparing a country report to be presented, together with a policy statement from the country under review, for consideration by the Trade Policy Review Board (TPRB), the membership of which is open to all WTO Members. Each member is reviewed once every two, four or six years, depending on their share of world trade. There is a provision which allows for least developed countries to be reviewed at longer intervals. Some 15 reviews are conducted in a year. Part of the information amassed may derive from country missions and responses by governments to questionnaires. The Secretariat report and the member's policy statement are published after a review meeting.

could amount to no more than a pale reproduction of the review already being performed on most states by the treaty bodies.

The problems are no less acute in the “light” version of peer review. It is suggested that three hours could be set aside for each state. But is it really sensible to subject China, with one fourth of the world’s population, to the same three-hour process of review as, say, the tiny Pacific Island state of Palau? Does a unitary state require the same breadth of review as a complex federal state, with implementation of human rights occurring in multiple jurisdictions? Does a state with few human rights difficulties command as rigorous a process as a state facing chronic human rights problems or a human rights catastrophe? A universal peer review process, even if it could be conducted practically, could well serve to obscure more than it reveals.

A more fundamental question concerns what the Council is to do with the information that it receives and the conclusions it reaches. Will the review consist in mere reporting without consequence? How does mere review lead to effective action? These questions, never satisfactorily addressed under the present system, are perhaps the most difficult challenge for a new council.

Peer review as review of implementation

To be effective, peer review should not be a fresh assessment of the human rights situation in a country. Rather, peer review would only add value to the existing work of the United Nations human rights system if it were an intergovernmental review of the *implementation* of evaluations, observations and recommendations made by the treaty bodies, special procedures, OHCHR and previous Commission/council resolutions. This review could then bolster, rather than undermine, these parts of the system. Peer review would then help to address one of the major weaknesses of the Commission and the treaty body system: lack of follow-up and implementation of existing recommendations.

For a peer review scheme to be practicable, an intermediary expert body, or individual country rapporteurs, would have to be tasked with compiling concise, readily digestible dossiers of the often voluminous analytic material and recommendations of treaty bodies, special procedures and OHCHR.³⁹ This output would necessarily contain gaps, some sizeable, especially in respect of certain states warranting the greatest scrutiny and those that have ratified few treaties or have not been visited by the special procedures or OHCHR. To fill these gaps, the council would have to commission additional analyses, either by the OHCHR or an outside expert, which could require a field mission to the concerned country.⁴⁰ Whoever prepares the report would have to draw on reliable

³⁹ The OHCHR presently maintains on its website a compilation of existing output by country. See www.ohchr.org/english/countries.

⁴⁰ During the 61st session of the CHR Brazil promoted a proposal for the OHCHR to develop “a global report” on human rights around the world. The draft resolution, which in the end was not tabled, provided that a “feasibility study [of such a report] shall indicate the sources to be used in the report, among which on data from the following sources: governments; special rapporteurs and representatives of the Secretary-General; treaty bodies; regional agencies on human rights; UN agencies and NGOs with consultative status

external sources, including the work of regional bodies, such as the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, the Council of Europe, the Organization for Security and Cooperation in Europe, national human rights institutions of the concerned country, international and local non-governmental organisations, and academic institutions.

States would have to commit substantial resources to make this system work effectively. For peer review to be useful, states would probably have to come under audit at least one time every three years, meaning that more than 60 states per year would be considered. In order to handle such volume, peer review would probably have to be undertaken by a subcommittee of the full council. It would be essential that the procedure involve the full and active participation of NGOs, including through written and oral submissions, in open and transparent processes. The council would have to report publicly on the substantive outcome of the peer review and would have to develop a follow-up mechanism.

Procedures for countries with a serious human rights situation

The human rights council must be able to treat especially grave human rights situations in a critical, albeit constructive, manner. It may be that all states should be reviewed by the UN system; but it is certainly not appropriate that all countries attract an identical response by the UN system.

Among states that should be considered under this heightened form of scrutiny are those that experience a sudden escalation in human rights abuses⁴¹ and those with chronic and unaddressed human rights deficiencies. The council should have the competency, as does the existing Commission, to act in such situations by setting out in clear terms, both normative and practical, the diagnoses and prescriptions.

It is inevitable that the perennial claims of selectivity and “double standards” will be made whenever sharp judgement is passed on the human rights performance of a state. This feature is always present in a political process. But it has been more pronounced in the present system because of the politically selective way in which resolutions are decided and drafted. When a lead state or small group of states simply presents to the

at ECOSOC.” Brazil failed to gain widespread support for this proposal, for a number of reasons, including that some consider a truly comprehensive global report to be far too ambitious within any conceivable capacity the human rights system would be likely to retain in the foreseeable future.

⁴¹ The High Commissioner, in her Plan of Action (para. 30), identifies such situations as constituting a “security gap”: “where Governments or armed group leaders deliberately pursue policies directly threatening personal security through repression, intimidation and violence, ordering, condoning or tolerating political killings, massacres, “disappearances”, wilful destruction of civilian property, denial of essential medical and foodstuffs, torture, forced displacement and famine, or systematically depriving targeted minority groups of their rights. In such situations, most often linked to armed conflict, violations of human rights reach the state of acute crisis and call for a commensurate protective response.”

Commission a self-formulated draft and then negotiates the text on the basis of extrinsic factors, the ground is laid for the charges of lack of professionalism.

What is needed for a new council is 1) a range of clear trigger mechanisms to bring a state before the council for heightened scrutiny and, 2) a range of responses that a council may adopt, depending on the nature and severity of the situation and not a one-size-fits-all approach.

Trigger mechanisms

As to a trigger mechanism, under the present system of the Commission, a state or group of states initiates a resolution, sometimes in a well-considered manner, and other times through a process bordering on the farcical. States should continue to be able to place a state on the agenda of the council and to do so through an urgent process, if necessary to respond to an emergency (see discussion below on the council as a standing body). But it should be possible for the High Commissioner, the treaty bodies, and special procedures and other independent players in the system to do so concurrently. The special procedures mandate holders and/or treaty bodies collectively might take a decision at their respective annual meetings to refer a country to the council. In a sense, the special procedures already play such a role through their reporting. However, one of the main weaknesses of the existing Commission is that it fails seriously to consider or debate most of these reports. It should therefore be possible for those in the UN system to ask that situations of special concern be taken up directly on the agenda on the Commission. If, for instance, the High Commissioner's field team reports a serious deterioration in a particular country, the High Commissioner should be in a position to request a discussion on the situation in the council.

A supplementary trigger mechanism could be the recommendation of a sub-committee on country situations, which would make an initial assessment for placing states on the agenda. The sub-committee could consist of independent experts, appointed pursuant to recommendations of the High Commissioner following appropriate consultations and drawing on the roster of experts (see above). The recommendation of the sub-committee would be accompanied by an explanatory note and supporting documentation intended to make the case for consideration and action. That documentation could contain the expert analysis of independent actors in the UN human rights system (treaty bodies, special procedures and the OHCHR) and independent commentary outside of the system (reports from regional intergovernmental organisation bodies, NGOs, academic sources). This documentation would help to focus the ensuing debate more on the substantive elements and less on the politics, as well as to provide legitimacy for any specific action the council might take on a particular state.

The expert sub-committee (or OHCHR) could also be used in another way. When a state or group of states place a country on the agenda of the council, the council could decide to ask the sub-committee (or OHCHR) urgently to compile such documentation and provide an assessment to the council.

A range of responses

In reviewing a country situation, it will be important that the council not merely engage in empty discussion or believe that it can only choose between silence and loud condemnation. The council should have a range of possible options for action, whether through decisions or resolutions, along a continuum of possibilities. Some possible responses include:

- A decision that the situation does not warrant any action by the council
- Censure of the concerned state
- Setting out benchmarks for change, implementation of which would be considered at subsequent council sessions and by the OHCHR and other UN actors
- Offers of technical assistance/capacity building by the OHCHR and other UN agencies
- Setting up of an OHCHR field operation
- Mandating of a monitoring mission, consisting of special procedure mandate holders, “eminent” persons, or other independent experts
- Appointment of country-specific experts or rapporteurs. In this regard, there is no useful purpose to be served by distinguishing between “monitoring” mandates (adopted under item 9 of the Commission’s present agenda) and “technical assistance” mandates (adopted under item 19). Both types of experts invariably need to perform both functions to carry out any serious work. It is also not important whether the title of the mandate holder is “special rapporteur” or “independent expert”, but the usage should remain uniform⁴²
- Seeking an advisory opinion of the International Court of Justice
- Referral of the situation to regional human rights organizations, or national human rights institution of the concerned state
- Referral to the Security Council in cases of human rights catastrophe where there appears to be a threat to international peace and security (*e.g.*, Darfur)
- Providing information to the Prosecutor of the International Criminal Court in respect of situations where it appears that genocide, crimes against humanity or serious war crimes may be taking place

Eliminating the 1503 confidential procedure

Regarding the confidential “1503 procedure,”⁴³ the ICJ considers this mechanism to be an antiquated relic of a bygone order. It is simply not acceptable that certain states can be

⁴² It may be necessary to retain the titles “Special Representative” or “Personal Representative” for those positions for which the mandate holder is to represent directly the Secretary-General or High Commissioner.

⁴³ The “1503 procedure” is the confidential complaint mechanism established through ECOSOC resolution 1503 (XLVIII) on 27 May 1970. The procedure was amended in 2000, in accordance with the Commission decision 2000/109, endorsed by ECOSOC resolution 2000/3. Under the 1503 procedure, the Commission has the mandate to examine “a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms” occurring in any country of the world.

examined under a shroud of secrecy. Transparency, a principle that should generally guide the United Nations in its conduct, is indispensable when dealing with a “consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.”⁴⁴ Of course, there are occasions when an expert or government may have reason to conduct a particular communication in confidence, such as when pursuing an individual case. It is quite another matter to have all facets of a mechanism or procedure -- its establishment, its operations, its communications and its reporting-- conducted in secret. In addition to being largely ineffective, these procedures serve to undermine the confidence of the general public, including victims, in the capacity of the UN to serve their needs.

PRESERVING HUMAN RIGHTS STANDARD-SETTING

Standard-Setting: a core function of the UN human rights system

- Standard-setting should be performed with greater speed
- A reformed Sub-Commission should be reconstituted as a sub-committee of a council to provide improved collective expertise
- The OHCHR should play a more active expert role
- A broader range of stakeholders, including victims of human rights violations, should participate in standard-setting procedures

Standard-Setting must remain a core function of the UN human rights system

As the Secretary-General acknowledged in his explanatory note on the proposed UN Human Rights Council of April 2005, “[...] the body of international human rights norms developed to date by the Commission is, perhaps, its greatest legacy.”⁴⁵ After first drafting the Universal Declaration of Human Rights, the Commission has gone on to elaborate much of the body of universal international human rights law, including the key international treaties, declarations and principles. The Commission has also left a rich corpus of substantive resolutions, which frequently restate, clarify or interpret the law. The special procedure mandates established by the Commission have amply supplemented and refined this output.

This legacy notwithstanding, a commonly voiced sentiment is that the standard-setting work is substantially complete. Energies and resources of the human rights system, it is

⁴⁴ ECOSOC resolution 1503 (XLVIII) of 27 May 1970.

⁴⁵ Explanatory note by the Secretary-General to the President of the General Assembly in date of 14 April 2005, UN Doc A/59/2005/Add.1, para. 11.

argued, should now be expended mainly on the implementation of these standards. There is certainly little point in elaborating standards that go unimplemented, and the global performance on implementation remains patchy at best. Yet law-making, whether at the domestic or international level, is necessarily a never-ending process. Human rights law must keep pace with the changing nature of human needs and aspirations, and with new forms of rights violations and understandings reached about their causes.

International human rights law, in historical terms, is in early development. There remain sizeable protection gaps, notably in the area of economic, social and cultural rights, and inadequate international legal recognition of the rights of members of certain groups, such as minorities, indigenous peoples and persons with disabilities. As High Commissioner Louise Arbour has observed: “No one should be so bold or presumptuous as to declare finished the process of articulating the contours of rights. The aspirational quality inherent in the concept of human rights would suggest that this process can never be complete. One can certainly point today to *lacunae* in our international normative framework.”⁴⁶

In addition to filling outstanding gaps in the development of primary norms, a great deal of work remains in order to give shape and interpretive guidance to existing norms. International human rights law-making is part of a continuous cycle: identifying where international law should better protect the rights and needs of victims; elaborating standards to meet this need; implementing the new standards; reviewing the quality of implementation; and further refining the standard to address any shortcomings. In this respect, the dichotomy between new law and implementation is artificial and misleading.

The ever-changing political landscape may make it politically acceptable to create or interpret international standards today in areas for which it was impossible to do so yesterday. As social and cultural values change, long-standing grievances or claims may need to be expressed in the language of rights. Advocates in the international disabilities movement, for example, have made clear that the disabled require not charity, but enforceable rights.

The ICJ therefore endorses the Secretary-General’s plea that the proposed human rights council provide “creative responses to deal with new and emerging issues” and that it contribute meaningfully to the development and interpretation of international human rights law.

⁴⁶ Remarks delivered at the opening of the 61st session of the Commission on Human Rights, 14 March 2005.

Standard-setting must be performed with greater speed

Human rights law-making at the United Nations nevertheless suffers from certain structural shortcomings, which should be substantially addressed. The machinery is extremely slow. A number of key instruments have taken ten or more years to be negotiated,⁴⁷ despite a decision by the Commission that “in most instances, the established time-frame should in principle not exceed five years.”⁴⁸ Even where a majority of states have summoned the political will to agree to a new instrument, progress is slow because intergovernmental working groups typically meet only once a year and too soon before the next session of the Commission to ensure necessary follow-up. By contrast, the International Labour Organization (ILO) has a fixed procedure and time frame within which it conducts its standard-setting. Every instrument is drafted some 43 months from the decision by the Governing Body to place it on the agenda to its adoption.⁴⁹ Procedures such as those adopted by the ILO are not necessarily transferable to the context of international human rights law. In order to achieve the highest possible standard of protection, it may at times be preferable to move with greater caution so as to allow for the gathering of sufficient political support to obtain a satisfactory standard, rather than to press for the quick adoption of a weak instrument. Nevertheless, considerable time is presently lost through administrative, procedural and financial constraints, or through politically motivated stalling tactics.

There is certainly a need for more concentrated and swift work in situations where an agreement is politically achievable. The Secretary-General’s explanatory note expresses the hope that “[a]s a standing body, the Council might find ways to overcome the delay currently faced by the Commission regarding some standard-setting activities.”⁵⁰ However, as there are no enforced time frames for standard-setting in the UN human rights system, success necessarily will depend on the willingness of states to agree to an increase in sessions of the working groups or committees drafting the instruments.

⁴⁷ See, for example, the Declaration on Human Rights Defenders (A/RES/53/144 of 8 March 1999), the Declaration on the Protection of all Persons from Forced Disappearance (A/RES/47/133 of 18 December 1992), the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (A/RES/47/135 of 18 December 1992), the Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (E/CN.4/RES/2005/35 of 19 April 2005), and the Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (E/CN.4/RES/2005/81 of 21 April 2005).

⁴⁸ UN Commission on Human Rights, Decision 2000/109, Annex, para. 60.

⁴⁹ In accordance with Article 14 of the ILO Constitution, it is usually the governing body that places items on the agenda of the Conference. The agenda of the conference, leading ultimately to the adoption of a Convention, is established with the input of representatives of employers and workers, as well as governments. A standard-setting item is often dealt with by the Conference through the “double-discussion” procedures, i.e. at two successive sessions. At the second session of the Conference, the proposed Convention is submitted to the full Conference for approval and adoption.

⁵⁰ Explanatory note by the Secretary-General to the President of the General Assembly of 14 April 2005, A/59/2005/Add.1, para. 11.

Standard-Setting through independent and collective decision-making and centrality of the Sub-Commission on the Promotion and Protection on Human Rights

UN standard-setting in a broad sense has not been confined to the work of the Commission. Within the UN, treaty bodies, especially through General Comments and recommendations, and special procedures, through recommendations, analyses and quasi-jurisprudence, also contribute to the interpretation, refinement and advancement of international law. All of these bodies complement the standard-setting efforts of the Commission. A similar role could be played by the OHCHR. Much in the manner of specialised bodies such as the World Health Organization or the UN High Commissioner for Refugees, the High Commissioner could provide authoritative interpretation and guidance on human rights and make recommendations to advance their realisation.

State involvement will always be integral to the standard-setting process. The need to develop conceptual understanding and political support of states is indispensable to any standard-setting initiative. Still, the quality of standard-setting would be improved through greater input of independent expertise in the process.

The Sub-Commission on the Promotion and Protection of Human Rights is a collegial body of 26 experts from varying regions and backgrounds, elected by the Commission to serve in an independent capacity. The Sub-Commission should be enlisted more systematically to produce independent expert drafts in advance of discussion in an intergovernmental negotiation. The Sub-Commission is often referred to as the Commission's "think tank". Key functions of the experts have typically been to prepare working papers and studies on conceptual human rights questions, which in principle enable the Sub-Commission as a whole to provide informed input to the deliberations of the Commission. Many initiatives for new instruments and first drafts have originated from the Sub-Commission.⁵¹

The Commission has clipped the powers of the Sub-Commission in recent years, allowing it to undertake standard-setting only upon its request or prior authorization.⁵² The impetus to curtail these activities of the Sub-Commission appear to flow from certain political sensitivities regarding the substantive results or the quality of the Sub-Commission work, rather than a well-considered conception of the proper role an independent expert body should play.

⁵¹ See, for example, the Declaration on Human Rights Defenders, the Declaration on the Protection of all Persons from Forced Disappearance, or the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; the Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity.

⁵² See Commission on Human Rights resolution 2005/83, para. 8(c).

The future role of the Sub-Commission has not been discussed extensively in the context of reform. The High Level Panel Report recommended the establishment of an Advisory Panel or Council of 15 experts, which presumably would be tasked to carry out some of the functions presently assumed by the Sub Commission.⁵³ The proposed reduction in the number of experts notwithstanding, it is unclear what advantages a new body would bring over a (reformed) Sub-Commission.

Some have voiced the suggestion that the Sub-Commission should be dissolved and that under a new council its function should be taken up through the appointment of independent experts on specific tasks as the need arises. This approach, it is argued, would help to rationalize the work of the council and ensure stricter quality control. The ICJ is unconvinced by this argument. There is great value that comes from a process of collegial and collective deliberation by independent experts that may be absent when a single expert or small working group takes up a subject. An independent body should be granted sufficient flexibility both to follow mandates entrusted to it by its parent body (Commission/council) and to initiate activity on its own, such as by identifying important areas for study and development based on its own expert assessment of *lacunae*. Collective decision-making is a check and balance on the deliberations of the body.

An independent, expert and collegial body should therefore be retained, although the present Sub-Commission might be reconceived as a “Sub-Committee” of a new human rights council. The council would of course retain the discretion as to whether it will make use of the work of the Sub-Commission. In addition, many of the Sub-Commission’s contributions will retain value in their own right, as expert work to be used and referred to by governments, intergovernmental organisations, the OHCHR, NGOs and academic institutions.

One of the main weaknesses of the Sub-Commission is the deficiency in the level of expertise and independence of a number of its members. In the most recently adopted resolution on the Sub-Commission, the Commission enjoined states “to be conscious of the strong concern to ensure that the body is independent and is seen to be so and, *inter alia*, to ensure that their nominees to the Sub-Commission are impartial and independent, free from conflict of interest, and, if elected, that the nominating States do not seek to unduly influence their work.”⁵⁴ Yet even casual observers of the Sub-Commission are aware that a number of members do not meet these standards. Indeed, some members actually sit on national delegations or hold other governmental posts during times other than the three weeks that they serve on the Sub-Commission. The ICJ therefore considers that a process similar to that outlined above for the selection of special procedures experts should apply to candidates for the Sub-Commission, whereby members are elected from a roster of candidates vetted for competence and independence. There are also a small number of Sub-Commission members who have served for decades, which is very unhealthy for a body that needs vibrant and fresh

⁵³ *Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change, United Nations*, 2004, para. 287.

⁵⁴ Commission on Human Rights resolution 2005/53.

thinking. Terms of membership should be limited to a maximum of two three-year terms, as they are with special procedures.

A role for the OHCHR in standard-setting

The High Commissioner for Human Rights has a broad mandate pursuant to General Assembly Resolution 48/141 of 1993, which created the post. A more highly professionalized OHCHR should be in a position to initiate many of the kind of functions presently carried out only pursuant to a mandate by the Commission. The OHCHR should not be seen primarily as a servicing arm of a human rights council. That servicing imperative will be a necessary, but secondary, function of the OHCHR.

With a few notable exceptions, the OHCHR, unlike other UN agencies, such as the ILO, has not contributed substantially to standard-setting processes. The OHCHR can and should play a far more active expert role in providing legal and technical advice and in identifying options for drafting. This task clearly falls within the competence of the High Commissioner, whose mandate includes the responsibility “to play an active role in removing current obstacles and in meeting the challenges to the full realization of all human rights.”⁵⁵

Including a broad range victims and other stakeholders in standard-setting procedures

The human rights law-making procedures have excluded many important actors. A very small number of contributors, mostly from the developed world, have assisted in developing human rights standards. This tendency holds true for both governmental and non-governmental participants. Victims and other impacted persons rarely take part in the process, if they are even aware it is occurring. The absence of participation of a broad range of actors inevitably creates a sense of a lack of ownership by those states and NGOs that were not involved. This deficit damages the goal of wide dissemination and implementation of the instrument.

The dynamics of exclusion are slowly changing, and some newer instruments have introduced remarkable innovations. The process for adoption of the Landmine Convention, for instance, was driven by a broad based NGO-movement, from the North and from the South, which is now reflected in a constructive partnership between NGOs and states in a relatively successful implementation process.⁵⁶ A similar dynamic was at

⁵⁵ General Assembly Resolution A/RES/48/141 of 20 December 1993, para 4 (f).

⁵⁶ *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, known as the Ottawa Convention, which opened for signature December 3, 1997. Over 800 groups in more than 50 countries participate in the International Campaign to Ban Landmines, working locally, nationally and internationally to ban antipersonnel landmines through the implementation of the Convention. More information is available at www.icbl.org.

play during the adoption and implementation of the Statute for the International Criminal Court (Rome Statute).⁵⁷

Regional meetings are an effective method for creating political momentum and eliciting broad input and forging ownership. Examples of such meetings were those held for the Vienna Declaration and Programme of Action, for the Durban Declaration and for the Disability Rights Convention.

Other innovative approaches have been adopted in the drafting of the Convention on Disability Rights. In its resolution on the Convention, the General Assembly urged that accessibility be improved for persons with disabilities to engage in the process, encouraged member states to involve persons with disabilities, representatives of disability organisations and experts in the preparatory process, and to include persons with disabilities in their delegations. It also decided to establish a voluntary fund to support the participation of NGOs and experts from developing countries.⁵⁸ For the drafting, an unprecedented mechanism was put into place. At its second session, the Ad Hoc Committee set up by the General Assembly decided to establish a Working Group to draft the first text of the Convention,⁵⁹ composed of 40 members, of which 12 were NGO members. Over half of the members of the Working Group were persons with disabilities.

Many of these new working methods could be adopted by the new human rights council. The resolution establishing a council, as well as its rules of procedure should be formulated in a manner that allows for the broadest participation at all stages and for the highest flexibility.

⁵⁷ *Rome Statute of the International Criminal Court*, A/CONF.183/9 of 17 July 1998. The Coalition of NGOs for the International Criminal Court is composed of over 200 NGOs, including the ICJ, which served on its Steering Committee. The Coalition actively participated at all levels of the Conference leading to the adoption of the Rome Statute. It did so in accordance with General Assembly resolution 52/160, which requested the Secretary-General to invite the NGOs accredited by the Preparatory Committee to the Conference on the establishment of the International Criminal Court, to fully participate in the Conference.

⁵⁸ General Assembly Resolution 57/229 of 18 December 2002, paras 10, 12, 13 and 14.

⁵⁹ Report of the second session (A/58/118 & Corr.1), para. 15. This decision was endorsed by General Assembly Resolution 58/246 of 23 December 2003 on an “Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities.”

II. FORM OF A NEW COUNCIL

THE COUNCIL: A SELECT BODY OF STATES FULLY COMMITTED TO ITS OBJECTIVES AND PROCEDURES

The Council: A Membership of Committed States

- Membership should be selective, not universal, based on 2/3 of UN members voting, with a size roughly comparable to the existing Commission
- Council members should commit to cooperate with the council and its mechanisms and to subject themselves to scrutiny
- NGOs must be afforded full participation in a new council
- Accreditation procedures for NGOs should be reformed to expand participation of legitimate organizations and filter out government-controlled organizations

The High Level Panel Report and the Report of the Secretary-General propose diametrically divergent strategies to confront what both identify as the declining “credibility and professionalism” of the Commission. The High Level Panel suggests that a move to universal membership could help to stem the excessive politicization of the Commission, which is blamed for contributing to the credibility gap.⁶⁰ The Secretary-General, on the other hand, proposes a human rights council that would be smaller in size than the present Commission.⁶¹ The draft outcome paper of 3 June 2005 presented by General Assembly President Ping concludes that “the membership of the Council shall be elected directly by the General Assembly, by a two-thirds majority on the basis of equitable geographic representation, and be comparable in size to the CHR.”⁶²

The measure of credibility of any UN human rights body flows not simply from the identity of its members, but also from whether it is willing and able to carry out the core work for which it has been established, as identified by the UN Charter and supplementary instruments, including the Vienna Declaration and Program of Action. The ICJ therefore considers that the arrangement adopted must be that which will best prompt states to muster the political will to ensure that a new council functions effectively as a protector and promoter of human rights for all people in all parts of the world.

⁶⁰ *Report of the Secretary-General's High Level Panel on Threats, Challenges and Change, United Nations*, 2004, para. 285.

⁶¹ *Report of the Secretary-General, In larger freedom: towards development, security and human rights for all*, 21 March 2005, para. 183.

⁶² General Assembly President, *Draft Outcome Paper*, para. 88.

It is entirely appropriate to question whether states with the poorest human rights performance and evincing little political resolve to address human rights problems at home can command the authority to decide how to advance human rights globally and to sit in judgment of their peers. Thus, some have argued that membership of council, entailing formal decision-making authority, should be restricted to states that have demonstrated the capacity and legitimacy to play such a role. Others argue that it is preferable to keep these offending states within the circle, engaging them in dialogue, to maintain the possibility of constructively changing their conduct.

In an ideal world, states with poor human rights records would not be in a position to act as a decision-making authority on the world's highest human rights body. Their role would be confined to observer status, which would allow them to participate actively, but not to exercise political authority. In the world as it exists, it would be extremely difficult to achieve agreement on solid benchmarks or indicators in relation to a state's human rights performance. It would be nearly impossible to agree on which states would meet such criteria and who is to make this assessment. Of course, in electing states to a new council, some states will apply serious human rights criteria in determining which states they vote on the council. If the procedure is adopted whereby two-thirds, rather than a simple majority, is required for election to a council, there is a better chance that these states will be able to prevent the worst abusers from gaining seats on the council.

Membership carries responsibility

While applying formal criteria to membership may be unlikely, there is value in conditioning membership on future commitment. States must be ready to demonstrate that they take the work of the council seriously and support its objectives. Membership should therefore be limited to states that are prepared to enter into commitments to cooperate fully with the council and its mechanisms and to subject themselves to critical evaluation. If states fail to live up substantially to the commitments undertaken, they should not be re-elected to the council.

Before becoming a member of the council, a state could be expected to pledge that it will cooperate with the council and its mechanisms, including by: issuing standing invitations to the special procedures, or at least agree to accept visits *de facto* and to accept the standard terms of reference for special procedures fact-finding missions; to respond expeditiously and meaningfully to communications of special procedures, including in relation to complaints and special procedures; and to undertake to incorporate into its legal and policy considerations the content of the resolutions and decisions. Although the council would be a charter-based institution and UN member states are under no formal obligation to ratify treaties, a commitment could also be made at a minimum to conduct a serious review on ratification of the seven key human rights treaties.

Some states would make such commitments merely *pro forma* and not follow them through, but even so the commitments would still be important in building a system that strives for integrity. The effectiveness of the existing Commission has clearly been

undermined by states that refuse to cooperate with it and with its mechanisms. An institution that takes on members that do not accept or support its procedures and mechanisms will always suffer from a credibility gap. States that consistently fail to cooperate with the special procedures and seek to undermine important decisions taken by the Commission/council cannot really be considered to be seeking membership in good faith.

Size must be restrictive, but allow for broad representation

The ICJ supports keeping the membership of the human rights at a size comparable to the present Commission. Universal membership would make the operation of a council cumbersome and inefficient. It could obscure the visibility and impact of those governmental and non-governmental actors that seek to make genuine, substantive contributions to its work. The High Level Panel overstates the case in arguing that universal membership “might help focus attention back onto substantive issues rather than who is debating and voting on them.”⁶³ Universalizing membership is not likely to decrease appreciably the current hyper-politicization or “horse-trading” and subordination of human rights questions to extraneous diplomatic and political questions. The state blocs and groupthink that drag down the Commission would persist under a scheme of universal membership, only the size of each grouping would expand three or four-fold. It would be difficult to maintain focussed and serious work within a body of this size.

Some argue that as observer states already participate in the present Commission, there would be little functional change should a council adopt a universal arrangement. Although many more than the Commission members participate in its work, nowhere near all of the 191 UN-member states are significantly involved. A substantial number of states are not present at all at the Commission, and many others make only sporadic appearances or do not participate meaningfully. Universal membership would necessarily increase the number of active players, as well as give a vote without corresponding substantial engagement to those whose participation is more passive.

NON-GOVERNMENTAL ORGANIZATIONS MUST REMAIN KEY PLAYERS IN A NEW COUNCIL

Any new council must at a minimum preserve the central role that NGOs presently play in the Commission. Activities such as the delivery of oral and written statements, convening of parallel events, attending open-ended working groups and drafting consultations on resolutions should be maintained. A council should also develop the means to expand NGO engagement so as to allow participation in interactive dialogue with special procedures and with peer review bodies.

⁶³ *Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change*, para. 285.

It is essential that this NGO engagement be integral to the Commission itself. Proposals to create NGO segments or fora that would occur at separate times or places from the intergovernmental process would serve to marginalize civil society and should be flatly rejected.

Accreditation procedures must be reformed

Present rules require NGOs to be accredited to participate in the Commission. An NGO may be accredited with UN general consultative status, special consultative status with ECOSOC, or as a “roster” organization,⁶⁴ with participation limited to specific issues of expertise. Most NGOs that participate in the Commission are presently accredited by ECOSOC, pursuant to article 71 of the UN Charter.⁶⁵ The accreditation is determined by an intergovernmental standing committee composed of 19 members based on geographic balance, pursuant to ECOSOC resolution 1996/31, which sets principles to be applied in the establishment of consultative relations.

The difficulties with the present accreditation process result in large measure from the political status of the accreditation committee and its non-transparent proceedings. For politically motivated reasons, some NGOs that otherwise meet the criteria established under ECOSOC resolution 1996/31, have been denied accreditation. Other organizations, commonly referred to as “GONGOs” (government-organized NGOs), are so accredited, despite their close affiliation with governments.

If the existing or similar criteria for accreditation are to be maintained under a human rights council, the council should set up an accreditation unit composed of independent assessors and the secretariat, rather than states, to ensure that the criteria are applied in a neutral manner, free from political interference. Proposals in this regard have been laid out in some detail by the Secretary-General’s Panel of Eminent Persons on United Nations-Civil Society Relations, chaired by Fernande Henrique Cardoso.⁶⁶ The establishment of a new council would be an opportune time for these proposals to be implemented.

⁶⁴ Under ECOSOC resolution 1996/31, para. 24, “Other organisations that do not have general or special consultative status but that the Council, or the Secretary-General of the United Nations, considers can make occasional and useful contributions to the work of the Council or its subsidiary bodies or other United Nations bodies within their competence shall be included in a list (to be known as the Roster). This list may also include organisations in consultative status or a similar relationship with a specialised agency or a United Nations body. These organisations shall be available for consultation at the request of the Council or its subsidiary bodies. The fact that an organisation is on the Roster shall not in itself be regarded as a qualification for general or special consultative status should an organisation seek such status.”

⁶⁵ At the 61st session, 32 participating NGOs had general consultative status, 189 Special Consultative status with ECOSOC and 40 had roster status.

⁶⁶ *We the peoples: civil society, the United Nations and global governance, Report of the Panel of Eminent Persons on United Nations-Civil Society Relations*, UN doc A/58/817, paras. 120-146.

THE COUNCIL AS A STANDING BODY

A Standing Principal Organ of the UN system

- The council should be a principal body under the UN Charter
- The council should retain the capacity to be called into emergency session at any time, at the request of its Bureau, the Secretary-General or the High Commissioner
- The council should meet at regular periodic intervals amounting to at least double the total time of the existing Commission, and with one monthly session

The ICJ strongly supports the Secretary-General's proposal that the new council be a "standing body."⁶⁷ One of the deficiencies of the existing Commission is that all of its activity is concentrated in a single six-week session. This arrangement is unsatisfactory for three reasons: First, human rights developments, including major human rights crises, occur throughout the year, not simply from mid-March through April. Aside from the rare occasions when it has been called into special session, the Commission has not been able to respond to rapidly breaking human rights developments either preventatively or in an immediately reactive manner. Secondly, operating in a single session creates a political pressure cooker, whereby deals must be negotiated in a rapid-fire manner and many smaller states cannot hope to participate meaningfully in relation to many of the issues. Thirdly, a six-week time frame is simply not adequate for deliberating upon all human rights questions for all people in all parts of the world.

The new council should have status as a permanently standing body and hold multiple plenary meetings during each year. The aggregate total of weeks should be at least double that of the present Commission. In addition, committees and working groups of the council, including one devoted to standard-setting and conceptual work (the successor to the Sub-Commission) and one dedicated to country situations, should continue to meet as necessary throughout the calendar year. The council should also hold regular single meetings at least once per month, following upon a similar practice of the Security Council, which meets at least every 15 days. In addition to clearing away ordinary formal business, such meetings would allow the council to respond expeditiously to emergencies and breaking crises, without the need to invoke procedures for a special session.

The council should have the capacity to be called into special (emergency) session at any time, at the request of the Secretary-General, the High Commissioner, the bureau of the council, or no more than one-third of its members. It should not be required to get a

⁶⁷ *Report of the Secretary-General, In larger freedom: towards development, security and human rights for all*, para. 183.

majority of states to call such a session, as is the practice of the Commission pursuant to ECOSOC Decision 1993/286. The emergency character of such sessions will require the council to convene rapidly, meaning that time should not be expended rallying support from a sizeable number of states.

The council could meet periodically away from its home base, in Geneva, New York and the geographic regions, to allow for a far broader degree of participation by governmental delegations and, especially, NGOs, for which travel to Geneva poses an insurmountable expense.

A HUMAN RIGHTS COUNCIL AS A PRINCIPAL ORGAN

The ICJ strongly supports the elevation of a council to constitute a principal organ with within the UN, which would properly situate human rights as one of main pillars of the UN system.

In his report, the Secretary-General recommends placing a human rights council in a higher position than that now occupied by the Commission. The Secretary-General suggests that the Council could either be constituted as a principal organ of the UN or as a subsidiary body of the General Assembly. Under either scheme, the role of ECOSOC in overseeing the Commission would be eliminated.

Human rights questions should be resolved to the greatest extent possible on human rights considerations. Fundamental human rights are inviolable and should not be subject to negotiation or false “balancing tests”. When human rights bodies fall under the supervision of organs of the UN that do not have human rights as their primary consideration, interference may occur based on factors extrinsic to human rights.

In this respect, the ICJ advocates the creation of the council as a free-standing principal organ. Such an arrangement need not wholly vitiate the role of the UN General Assembly in considering certain human rights issues. Although the council would have the authority to take decisions and to adopt resolutions, it might, in certain instances, opt to seek an endorsement by the General Assembly, so as to gain explicit universal approval. This route might be chosen, for example, when adopting a new normative human rights instrument. But while the General Assembly might have concurrent competency in human rights areas, it would not have the authority to oversee directly the human rights council, or to reverse the decisions of that body.

Establishing a human rights council as a principal organ of the United Nations would require amendment of the UN Charter. There are two ways in which Charter amendment may be achieved: Under Article 108, an amendment is to be adopted by vote and ratification of two-thirds of the member states and ratification by the Permanent Members

of the Security Council.⁶⁸ Under Article 109, an amendment requires a similar voting proportion, but the amendment process is initiated by a review conference.⁶⁹ It is unlikely that the latter means would be necessary if the negotiations for amendment had already taken place.

If amending the Charter were not possible, the council could be established as a subsidiary body of the General Assembly. This process would require the vote of a simple majority by the General Assembly. The objective of this approach would be to place the human rights council directly under the General Assembly and, presumably, to remove the oversight competency of the Third Committee.

In practical terms, establishing the council as a subsidiary body of the General Assembly could be marginally easier, since the universal supervisory authority of the General Assembly would be retained. However, it seems likely that the support of at least two-thirds member states and the five Permanent Members of the Security Council would in either case be needed to ensure the political support and legitimacy to achieve a change of such magnitude. If states were to decide on universal membership for a new council, there would really be no argument for imposing a layer of control by the General Assembly over a body having the same membership.

⁶⁸ Article 108: “Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.”

⁶⁹ Article 109: “1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council (...) 2. Any alteration of the Present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations including all the permanent members of the Security Council.”