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Ved P. Nanda

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The Global Challenge of Protecting Human Rights: Promising New Developments

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THE GLOBAL CHALLENGE OF PROTECTING HUMAN RIGHTS: PROMISING NEW DEVELOPMENTS

VED P. NANDA*

I. INTRODUCTION

The ongoing tragedy in Darfur¹ reminds us every day how enormous the challenge is at the international level to protect human rights of individuals and groups suffering from the excesses of tyrannical regimes. A similar grim situation faces those who live in failed states. The existing international machinery is ill-equipped, inadequate, and ineffective for providing the needed protection. As the U.N. Secretary-General noted in his March 2005 follow-up report to the outcome of the Millennium Summit, “[c]hange is needed if the United Nations is to sustain long-term, high-level engagement on human rights issues, across the range of the Organization’s work.”² He emphasized the need to strengthen the U.N. human rights machinery by providing more resources and staff within the Office of the U.N. High Commissioner for Human Rights (OHCHR).³ He called for the human rights treaty bodies to be more effective and more responsive to violations of the rights under their mandate, which in turn necessitates the finalization and implementation of uniform guidelines on reporting to all treaty bodies.⁴

Noting that the Security Council is fully authorized under the U.N. Charter to use military force, including preventively, to preserve international peace and security when there exist latent threats, the Secretary-General asked rhetorically, “[a]s to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity

* Vice Provost and John Evans University Professor, University of Denver; Thompson G. Marsh Professor of Law and Director, International Legal Studies Program, University of Denver Sturm College of Law.

1. See, e.g., Joel Brinkley, *Plan to End Darfur Violence is Failing, Officials Say*, N.Y. TIMES, Jan. 28, 2006, at A3 (violence and chaos seem to grow as the broad strategy of ending the conflict is collapsing, according to U.N. and Bush administration officials. At the urging of Secretary-General Kofi Annan, the U.N. is considering deploying a larger peacekeeping force to replace that of the African Union); Evelyn Leopold, *Annan Wants US, Europe to Consider Force in Darfur*, REUTERS, Jan. 13, 2006 (U.N. wants the U.S. and European countries to send forces to stop the bloodshed in Darfur). See also, U.N. COMM’N OF INQUIRY ON DARFUR, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, (25 January 2005) [hereinafter *Darfur Report*].

2. The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for all*, *Report of the Secretary-General*, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 141, delivered to the General Assembly, U.N. Doc. A/59/2005 (March 21, 2005) [hereinafter *In Larger Freedom*].

3. *Id.* paras. 142-146.

4. *Id.* para. 147.

should be able to look to the Security Council for protection?"⁵ He also took special note of the need to replace the discredited U.N. Commission on Human Rights by a smaller and more effective standing Human Rights Council.⁶

Subsequently, Heads of State and Government who met at a World Summit at U.N. Headquarters in New York from September 14-16, 2005, agreed in principle to strengthen the U.N. machinery on human rights.⁷ However, the recommendations were in general terms, leaving the specifics for the General Assembly to decide at a later date. A promising development, however, was the agreement on the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.⁸

I will discuss here a few promising new developments that should result in enhancing the protection of human rights. The first such development is the recognition by U.N. member states of a "responsibility to protect their populations; the second is their promise to strengthen the Office of the High Commissioner for Human Rights; and last is the decision by member states to replace the U.N. Commission on Human Rights by an effective Human Rights Council.

II. THE RESPONSIBILITY TO PROTECT POPULATIONS FROM GENOCIDE, WAR CRIMES, ETHNIC CLEANSING, AND CRIMES AGAINST HUMANITY

The need to protect victims of civil wars, collapsed states, and repressive state practices resulting in massive violation of human rights is undeniable. However, controversy surrounds the claim that there exists a valid right to intervene by military action against a state on humanitarian grounds to protect peoples at risk in that state.⁹ Although the United Nations took coercive action, invoking a Chapter VII determination that the humanitarian crisis was 'a threat to international peace and security, to protect the Kurds from Saddam Hussein's brutality after the first Gulf War,¹⁰ the shameful inaction of the world community in the face of the Rwandan genocide as the screams of hundreds of thousands of innocent men, women, and children being massacred fell on deaf ears in the Security Council; there was soul-searching the world over on how to protect such victims. Questions

5. *Id.* para. 125.

6. *Id.* paras. 181-183.

7. G.A. Res. 60/1, ¶¶ 123-126, 138-140, 157-160, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter World Summit Outcome].

8. *Id.* paras. 138-140.

9. See, e.g., V.S. Mani, *Humanitarian Intervention Today*, 313 RECUEIL DES COURS 13-323 (2005); F. TESON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (2d ed. 1996); *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* (R. Lillich ed. 1973); Ved Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti -- Revisiting the Validity of Humanitarian Intervention Under International Law -- Part I*, 20 DENV. J. INT'L L. & POL'Y 305 (1992) (hereinafter *Nanda, Humanitarian Intervention -- Pt I*); Ved Nanda, *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia -- Revisiting the Validity of Humanitarian Intervention Under International Law -- Part II*, 26 DENV. J. INT'L L. & POL'Y 827 (1998); Thomas G. Weiss, *The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era*, 35 SECURITY DIALOGUE 135 (2004).

10. See Nanda, *Humanitarian Intervention -- Pt I*, *supra* note 9, at 330-334.

were being raised as to whether along with the rights associated with sovereignty there was not also an obligation on a sovereign to protect those under its jurisdiction.

Along with academic writing on the subject, several governments took policy initiatives to consider the question. Among the major initiatives were those by the Danish government,¹¹ the Dutch government,¹² the Swedish government, and the Clinton administration.¹³ The Canadian initiative, that of the International Commission on Intervention and State Sovereignty (ICISS), is the most influential of all these initiatives and was undertaken in response to the challenges posed by Secretary-General Annan in his General Assembly addresses, first in 1999 and then again in 2000. This initiative issued a report, entitled "The Responsibility to Protect."¹⁴ In Kofi Annan's words, "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?"¹⁵ The government of Canada had established the ICISS in cooperation with a group of major foundations. It may be recalled that the 1999 NATO intervention in Kosovo had taken place in the face of a seeming paralysis and inaction at the United Nations.¹⁶

After deliberations on legal, moral, operational, and political aspects of the issue, and after wide consultations around the world, the Commission concluded that as an exceptional and extraordinary measure, military intervention for human protection purposes is warranted only when there is:

[S]erious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind: A. large-scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or B. large-scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.¹⁷

According to the Commission this was the "just cause" threshold. It outlined four precautionary principles to guide the use of force—right intention, last resort, proportional means, and reasonable prospects of success—in halting or averting

11. Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (1999).

12. Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law, *Humanitarian Intervention* (2000).

13. Independent International Commission on Kosovo, KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2000).

14. Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Dec. 2001) [hereinafter ICISS Report].

15. Quoted in *id.* at vii.

16. See, e.g., Ved Nanda, *NATO's Armed Intervention in Kosovo and International Law*, 10 USAFA J. LEG. STUD. 1 (1999-2000).

17. ICISS Report, *supra* note 14, at xii.

the suffering “with the consequences of action not likely to be worse than the consequences of inaction.”¹⁸

Earlier, in the mid-1990s, the Special Representative of the Secretary-General on Internally Displaced Persons, Francis Deng, had already advocated the responsibility concept pertaining to sovereignty in his studies—in 1995, *Frontiers of Sovereignty*,¹⁹ and in 1996 (co-authored with others), *Sovereignty as Responsibility: Conflict Management in Africa*.²⁰

It was, however, the Canadian study on the topic that received most attention of Member States and the United Nations, and the document adopted by the September 2005 Summit of Heads of State and Government reflects the study's recommendations.

Kofi Annan again broached the subject in his September 2003 address to the General Assembly as he urged the Security Council members:

[T]o engage in serious discussions of the best way to respond to threats of genocide or other comparable massive violations of human rights—an issue which I raised myself from this podium in 1999. Once again this year, our collective response to events of this type—in the Democratic Republic of the Congo, and in Liberia—has been hesitant and tardy.²¹

Subsequently, he established a High-Level Panel on Threats, Challenges and Change of eminent persons to examine the current challenges to peace and security and the contribution that collective action can make in addressing these challenges.

In its December 2004 report, the High-Level Panel observed that currently state sovereignty “clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.”²² However, when a state is unable or unwilling to meet this responsibility, “the principles of collective security mean that some portion of those responsibilities should be taken up by the international community”²³

After noting that “[c]ollective security institutions have proved particularly poor at meeting the challenge posed by large-scale, gross human rights abuses and genocide”²⁴ and acknowledging Rwanda as the biggest failure,²⁵ and further noting that the humanitarian disasters in Somalia, Bosnia, Rwanda, Kosovo, and Darfur

18. *Id.*

19. Francis M. Deng, *Frontiers of Sovereignty*, 8 LEIDEN J. INT'L L. 249 (1995).

20. FRANCIS M. DENG, ET AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (1996).

21. *Secretary-General's Address to the General Assembly*, U.N. NEWS CENTRE, Sept. 23, 2003, available at www.un.org/apps/sg/printsgstats.asp?nid=517.

22. U.N. General Assembly, Note by the Secretary-General: A More Secure World, Our Shared Responsibility -- Report of the High-Level Panel on Threats, Challenges and Change, U.N. Doc. A/59/565, para. 29, Dec. 2, 2004 [hereinafter High-Level Panel Report].

23. *Id.*

24. *Id.* para. 36.

25. *Id.* para. 87.

“have concentrated attention not on the immunities of sovereign Governments but their responsibilities, both to their own people and to the wider international community,” the Panel stated:

[T]here is a growing recognition that the issue is not the “right to intervene” of any State, but the “responsibility to protect” of *every* State when it comes to people suffering from avoidable catastrophe—mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease.²⁶

Having examined the prior failures of collective security, the Panel concluded:

We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.²⁷

The Panel enumerated five basic criteria of legitimacy regarding the Security Council’s authorizing or endorsing the use of military force: seriousness of threat; proper purpose; last resort; proportional means; and balance of consequences (reasonable chance of success, and consequences of action not likely to be worse than the consequences of inaction).²⁸ It called upon the Security Council and General Assembly to embody these guidelines in declaratory resolutions.²⁹

Another major study undertaken pursuant to the U.S. Congress’s action establishing a bipartisan taskforce on the United Nations (co-chaired by George Mitchell and Newt Gingrich) urged the United States in its June 2005 report³⁰ to “endorse and call on the UN Security Council and General Assembly to affirm a responsibility of every sovereign government to protect its own citizenry and those within its borders from genocide, mass killing, and massive and sustained human rights violations.”³¹ It recommended that the United States lead the Security Council “in finding the most effective action across the full range of legal, economic, political, and military tools,” and that the U.S. “should strongly support the creation of an enhanced and effective capability within the U.N. system to identify these threats before they fully develop.”³² Among other recommendations, the report calls for regional organizations and member states to

26. *Id.* para. 201, emphasis in original.

27. *Id.* para. 203.

28. *Id.* para. 207.

29. *Id.* para. 208.

30. U.S. Institute of Peace, *American Interests and UN Reform (Report of the Task Force on the United Nations)*, June 2005 [hereinafter U.S. Institute of Peace].

31. *Id.* at 28.

32. *Id.* at 30.

act for humanitarian purposes in case the Security Council is unable to take effective action in such situations.³³

In response to the ongoing debate on the responsibility to protect, the World Summit endorsed the emerging norm that each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, and it called upon the international community to support the U.N. in establishing an early warning capability.³⁴ It also placed responsibility on the international community, through the United Nations, to help to protect populations from these crimes in accordance with the U.N. Charter. This responsibility includes taking collective action, decisively and in a timely fashion, through the Security Council, under Chapter VII of the U.N. Charter "on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations" from these crimes.³⁵

The Summit asked the General Assembly to continue consideration of this responsibility in light of principles of the U.N. Charter and international law. The Summit added, "[w]e also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from [these crimes] and to assisting those which are under stress before crises and conflicts break out."³⁶ It also supported the mission of the Special Advisor of the Secretary General on the Prevention of Genocide.³⁷

This statement demonstrates an unambiguous acceptance of the principle that the Security Council must assume collective responsibility to act under Chapter VII as a last resort. It thereby puts to rest the question of validity regarding the use of force in the face of the Article 2(7) prohibition of intervention in internal affairs. However, notwithstanding the Security Council authority under the U.N. Charter to use force if it determines that there is a threat to international peace and security, the Summit's endorsement must be followed by the adoption of resolutions by both the Security Council and the General Assembly enumerating guidelines for the use of force by the Security Council, as recommended by the High-Level Panel in its report. These guidelines will lend credibility to the decision-making process in the Security Council and legitimacy to any eventual decision by it to use force.

Two further concerns must be addressed. First, the threshold for taking collective action should include massive and sustained violations of human rights, which the current recommendations do not explicitly include as a basis for taking collective action. Second, a crucial issue for the implementation of the Summit's mandate relates to the composition of the Security Council itself. It may be recalled that the High-Level Panel had presented alternatives for reforming the Security Council, for it had found the challenge "to increase both the effectiveness

33. *Id.* at 31.

34. World Summit Outcome, *supra* note 7, para. 138.

35. *Id.* para. 139.

36. *Id.*

37. *Id.* para. 140.

and the credibility of the Security Council and, most importantly, to enhance its capacity and willingness to act in the face of threats.”³⁸ A perennial criticism has been that the present membership of the Security Council is not representative of the broader U.N. membership, especially of the developing world, and that the Council should be perceived as democratic and accountable. However, negotiations at the U.N. for Security Council reform have not yet been fruitful.

III. STRENGTHENING THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

In his March 2005 report, the Secretary General referred to the reaffirmation by the Millennium Declaration in 2000 of the U.N. mission and commitment “to striving for a world of peace and justice grounded in universal respect for human rights,”³⁹ and asked the U.N. High Commissioner for Human Rights to submit a plan of action to strengthen her office within 60 days.⁴⁰

On May 26, 2005, the High Commissioner submitted a strategic plan for the future of OHCHR, aimed at strengthening the Office so that it could “play its central role” in meeting the challenge of addressing today’s threats to human rights posed by “poverty, discrimination, conflict, impunity, democratic deficits and institutional weaknesses [, which] will necessitate a heightened focus on implementation.”⁴¹ The plan envisages OHCHR action in five areas: 1) greater country engagement to address the challenge of implementation at the country level so that the human rights rhetoric can be translated into reality; 2) an enhanced human rights leadership role for the High Commissioner within the U.N. system to allow the Office to be more proactive and engaged in identifying problems and proposing solutions so that it can meet human rights challenges and prevent violations; 3) a closer relationship with U.N. agencies and civil society; 4) partnership with various U.N. human rights treaty bodies and increased support to special procedures of the U.N. Commission on Human Rights, aimed at ensuring better coordination within the U.N. system and a more coherent functioning of the U.N. machinery; and 5) building OHCHR’s administrative and management capacity to ensure that it can effectively implement its strategic plan.⁴²

The High Commissioner outlined the plan⁴³ after identifying situations that give rise to human rights challenges—such as poverty, armed conflict, democracy deficits, and weak institutions⁴⁴—and the challenge of implementation at the

38. High-Level Panel Report, *supra* note 22, para. 248.

39. *In Larger Freedom*, *supra* note 2, para. 141.

40. *Id.* para. 145.

41. The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc. A/59/2005/Add. 3, Annex, at 2, May 26, 2005.

42. *Id.* paras. 127-158, which contain action points identified by the High Commissioner.

43. *Id.* paras. 45-126.

44. *Id.* paras. 10-20.

national level—including the knowledge gap, the capacity gap, the commitment gap, and the security gap⁴⁵—in light of the goals she has set out of protection and empowerment.⁴⁶

The High Commissioner's proposed plan is ambitious and forward-looking. It will, however, require a considerable infusion of new human and financial resources for its implementation, as the following highlights demonstrate. She calls for greater dialogue and engagement with countries,⁴⁷ which will require an increase in country-focused staff and expertise, as well as expanded OHCHR presence at the country, regional, and sub-regional levels. She seeks development of a rapid response capacity to deploy human rights officers at short notice, a more effective involvement of the Office in U.N. peace operations, and increased support and legal expertise in crisis situations and in post-conflict settings to help commissions of inquiry or fact-finding missions engaged in investigating severe and widespread abuses. Also, she would strengthen the Office's technical cooperation assistance for human rights reform and strengthen expertise and capacity in such areas as human rights law, policy and institutions; human rights education, investigation, monitoring, training, and programming; and research and policy analysis. The High Commissioner envisages creating a new Policy and Planning unit and a Legal unit.

Highlights regarding the High Commissioner's proposed leadership role within the U.N. system⁴⁸ include establishing a unit to work on the U.N. Millennium Development Goals and to expand the Office's capacity to play a more active role in the deliberations of the Security Council, especially in the areas of peacekeeping and peacebuilding, as well as promotion of the rule of law. The High Commissioner envisages publishing an annual thematic Global Human Rights Report and launching a Global Campaign for Human Rights as part of the Office's expanded outreach and communications functions so as to effectively build public support for human rights principles.

The High Commissioner's plan for working with U.N. human rights bodies⁴⁹ includes providing more resources to human rights treaty bodies for analytical and organizational operations and seeking the establishment of a unified standing treaty body. Also, the Office is to increase its capacity to address issues related to coordination, overlapping mandates, and increase in the number of special procedures—rapporteurs, working groups, and experts appointed by the U.N. Commission on Human Rights. In the High Commissioner's proposed work with the U.N. agencies and civil society, including academia,⁵⁰ she intends to provide more effective support to country teams with advice, training, and increased support to civil society.

45. *Id.* paras. 22-32.

46. *Id.* paras. 33-39.

47. *Id.* paras. 45-74, 127-133.

48. *Id.* paras. 75-88, 145-150.

49. *Id.* paras. 89-105, 145-150.

50. *Id.* paras. 106-114, 142-144.

The High Commissioner proposes building OHCHR capacity,⁵¹ which includes creating a centrally placed planning, monitoring, and evaluation unit, increasing staff with geographical balance and establishing a more substantial presence in New York, where major U.N. bodies and functions are centralized.

Currently, the human rights program receives only 1.8 percent of the U.N. budget and the bulk of OHCHR's activities are financed by extra-budgetary contributions, as out of the total 2004 annual budget of \$86.4 million, \$33.8 million was from the regular budget while \$52.6 million came from voluntary contributions.⁵² The High Commissioner anticipates that the plan will require doubling the Office's resources over the next five to six years.

As usual, the September 2005 World Summit's rhetoric was impressive, resolving to strengthen the U.N. Human Rights machinery⁵³ and improve the effectiveness of the human rights treaty bodies by specifying the means to do so, "through more timely reporting, improved and streamlined reporting procedures and technical assistance to States to enhance their reporting capacities and further enhance the implementation of their recommendations."⁵⁴ The Summit further resolved to "integrate the promotion and protection of human rights into national policies and to support the further mainstreaming of human rights throughout the United Nations system, as well as closer cooperation between the Office of the United Nations High Commissioner for Human Rights and all relevant United Nations bodies."⁵⁵

The Summit supported the promotion of human rights.⁵⁶ It reaffirmed its commitment to advance the human rights of indigenous peoples⁵⁷ and recognized the special needs of women and children,⁵⁸ persons with disabilities,⁵⁹ and minorities.⁶⁰

As to strengthening the OHCHR, the Summit resolved to do so, taking note of the High Commissioner's plan of action, especially noting the need to respond to the challenges, "particularly in the areas of technical assistance and capacity-building, through the doubling of its regular budget resources over the next five years with a view to progressively setting a balance between regular budget and voluntary contributions to its resources...."⁶¹ It also lent its support to closer cooperation of the Office with all relevant U.N. bodies, including the Security Council, the General Assembly, and the Economic and Social Council.⁶²

51. *Id.* paras. 115-126, 151-158.

52. *Id.* para. 3.

53. World Summit Outcome, *supra* note 7, para. 123.

54. *Id.* para. 125.

55. *Id.* para. 126.

56. *Id.* para. 131.

57. *Id.* para. 127.

58. *Id.* para. 128.

59. *Id.* para. 129.

60. *Id.* para. 130.

61. *Id.* para. 124.

62. *Id.*

The critical question is whether this rhetoric will be translated into reality. The need to provide more resources to allow the U.N. human rights machinery to function effectively has been evident for years. Thus, the budgetary decisions and the necessary actions at the U.N. in support of the promises of the Summit will largely determine the answer to this question.⁶³

IV. THE PROPOSED HUMAN RIGHTS COUNCIL

There is consensus on reforming the U.N. Commission on Human Rights. The 53-member Commission has been criticized on several grounds, primarily that it is politicized, selective, using double standards, and ineffective.⁶⁴ Several recent reports have suggested that the Commission be replaced by a nimble and effective Human Rights Council. One such recommendation came from the task force of the American Bar Association's Section on International Law,⁶⁵ which was established in January 2004 and issued its report in August 2005.⁶⁶

The task force, on which I served, began its report by providing a rationale for replacing the Commission with a Human Rights Council:

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

...

The standing of the Commission was severely compromised by the selection of Libya as Chair, the re-election of Sudan as a member in the

63. The Secretary-General, *Report of the Secretary-General on Implementation of decisions from the 2005 World Summit Outcome for action by the Secretary-General*, ¶ 23, delivered to the General Assembly, U.N. Doc. A/60/430, (Oct 25, 2005):

The stipulated doubling of the regular budget resources of OHCHR over the next five years . . . is essential to strengthening the Office to enable it to effectively carry out its mandate to respond to the broad range of human rights challenges facing the international community, particularly in the areas of technical assistance and capacity-building.

64. At the meeting of the Third Committee (Social, Humanitarian and Cultural) of the General Assembly in New York, October 26-28, 2005, the Norwegian representative used the terms, "politicized," "selective" and "ineffective," while Vietnam's representative said that selectivity and double standards had politicized the Commission. Press Release, General Assembly, Proposed Human Rights Council Must be Broadly Based, Avoiding Politicization of Past, Assembly's Social Committee Told: Creation of Body Seen as Opportunity to Rectify Current Weaknesses, Strengthen Role of United Nations in Key Area, U.N. Doc. GA/SHC/3833 (Oct. 31, 2005), available at www.un.org/News/Press/docs/2005/gashc3833.doc.

65. Chaired by David E. Birenbaum, former U.S. Ambassador to the U.N. for U.N. Management and Reform with Professors Paul R. Williams and Michael P. Scharf as Co-Rapporteurs. The task force included officials of the U.S. government, think tanks, NGOs, and former ambassadors of the U.S. to the Commission.

66. The chair of the Section of International Law, Kenneth B. Reisenfeld, submitted the report.

midst of the genocide in Darfur, and the shameful failure of the Commission last year to adopt a resolution clearly condemning that genocide.⁶⁷

While the task force was deliberating, the Secretary-General's High Level Panel on Threats, Challenges and Change published its report, in which it stated that in the recent past, the Commission's capacity to perform its tasks of:

[P]romoting respect for human rights globally, fostering international cooperation in human rights, responding to violations in specific countries and assisting countries in building their human rights capacity, . . . has been undermined by eroding credibility and professionalism We are concerned that in recent years States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. The Commission cannot be credible if it is seen to be maintaining double standards in addressing human rights concerns.⁶⁸

The High-Level Panel recommended universal membership on the Commission, which "would underscore that all members are committed by the Charter to the promotion of human rights, and might help to focus attention back on to substantive issues rather than who is debating and voting on them."⁶⁹ In his response to the Panel's recommendations, the Secretary-General in his December 2004 note to the General Assembly commended the Panel's report to the General Assembly, noting that, as the Commission was undermined by its declining credibility and professionalism, "a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole."⁷⁰ However, he did not accept the Panel's recommendation of universal membership on the Commission, but instead suggested that "Member States should agree to replace the Commission... with a smaller standing Human Rights Council."⁷¹ He added:

Member States would need to decide if they want the Human Rights Council to be a principal organ of the United Nations or a subsidiary body of the General Assembly, but in either case its members would be elected directly by the General Assembly by a two-thirds majority of members present and voting. The creation of the Council would accord human rights a more authoritative position, corresponding to the primacy of human rights in the Charter of the United Nations. Member States should determine the composition of the Council and the term of office of its members. Those selected to the Council should undertake to abide by the highest human rights standards.⁷²

67. *Replacing the Commission on Human Rights With a Human Rights Council* 2005 A.B.A. Sec. Int'l L. Rep 8, app. 1, § 1 [hereinafter ABA Report] (copy of the manuscript on file with the *Denver Journal of International Law & Policy*).

68. High-Level Panel Report, *supra* note 22, paras. 282-283.

69. *Id.* para. 285.

70. In Larger Freedom, *supra* note 2, para. 182.

71. *Id.* para. 183.

72. *Id.*

Subsequently, on May 23, 2005, the Secretary-General provided a detailed proposal regarding the establishment of the Human Rights Council.⁷³ He recommended that the Council be a standing body with smaller membership, to be elected by the entire membership of the General Assembly, and to be located in Geneva.⁷⁴ He had earlier stated a peer review function for the Human Rights Council:

It should have an explicitly defined function as a chamber of peer review. Its main task would be to evaluate the fulfillment by all States of all their human rights obligations And it should be equipped to give technical assistance to States and policy advice to States and United Nations bodies alike. Under such a system, every Member State could come up for review on a periodic basis. Any such rotation should not, however, impede the Council from dealing with any massive and gross violations that might occur. Indeed, the Council will have to be able to bring urgent crises to the attention of the world community.⁷⁵

He called upon the Summit to decide upon the details pertaining to the mandate, function, composition and status as a principal or subsidiary body.⁷⁶

The ABA task force agreed with the Secretary-General's proposal. It also suggested that the Council should have co-equal status with ECOSOC and the General Assembly but as this would require amendment of the Charter, it suggested that in the interim the Council may be established as a subsidiary body of the General Assembly and that it could be converted into a free-standing body when Charter amendments were next presented to the membership.⁷⁷ It further suggested that to fulfill its mission and avoid the Commission's failings, the Human Rights Council should:

[E]stablish procedures and implement a program of strong initiatives to ensure the protection of these fundamental rights, including aggressive investigations, public hearings, and reports to the Security Council when there is evidence that an egregious violation has occurred. These efforts should not detract from the attention given to other human rights abuses within the jurisdiction of the Council.⁷⁸

The task force made two further suggestions in this regard: one, the Council should strive to establish a highly professional investigative process, especially a strong rapporteur system, and strengthened human rights treaty bodies; and two, the Council should promptly bring attention to conflicts that could result in ethnic

73. The Secretary-General, *Report of the Secretary-General on In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc. A/59/2005 Add. 1 (May 23, 2005) [hereinafter *Explanatory Note*].

74. *Id.* paras. 4-5.

75. Speech to the Commission on Human Rights (April 7, 2005), *quoted in id.* para. 6.

76. *Explanatory Note*, *supra* note 73, paras. 9-14.

77. ABA Report, *supra* note 67, at 9.

78. *Id.* at 11.

cleansing and genocide, triggering international action to resolve such conflicts and prevent atrocities.⁷⁹

The task force recommended that for the Council to be representative and effective, the selection of a responsible and independent chairperson should be ensured, and the reforms should include, in addition to the election by two-thirds vote of the General Assembly, that any member state which is under censure of the Human Rights Council or under Chapter VII action of the Security Council should be prohibited from serving on the Council.⁸⁰ In addition, it recommended that the Council:

[A]dopt a Code of Conduct committing the Member States to promote international protection of human rights; to honor international human rights efforts; to cooperate with the investigative mechanisms of the Council (specifically including cooperation with the rapporteurs charged with investigating allegations of human rights abuses); and to appoint as heads of their delegations persons with substantial human rights expertise.⁸¹

The proposed Code of Conduct includes states' commitment by virtue of their membership on the Council to perform their obligations under international human rights instruments to which they are a party and to give serious consideration to ratification of those U.N. human rights treaties to which they are not yet a party. States also commit to "protect their internal populations from genocide, ethnic cleansing and serious violations of international humanitarian and human rights law."⁸² It enumerated certain obligations for member states on the Council, including "undertaking a voluntary commitment not to abuse 'no-action' procedures," cooperating with Council initiatives and the Council's investigative mechanisms, and ensuring that special rapporteurs and other experts on mission are provided appropriate privileges and immunities.⁸³ It added that a material breach of these obligations may lead to censure, suspension, or ineligibility for future membership.⁸⁴

The task force made further recommendations for certain measures to be undertaken by the Human Rights Council aimed at strengthening the role of the High Commissioner for Human Rights in relation to the Council, as compared with the Commission.⁸⁵ These include closer coordination by Special Rapporteurs with the Office of the High Commissioner, and production and circulation by the High Commissioner before the Council sessions of "(1) a comprehensive and up to date compilation of recommendations made by *thematic mechanisms*, and (2) a compilation by country of concerns and recommendations made by Special

79. *Id.* at 11-12.

80. *Id.* at 13-14.

81. *Id.* at 15.

82. *Id.* at 22.

83. *Id.* at 23.

84. *Id.*

85. *Id.* at 18-20.

Rapporteurs and treaty bodies.”⁸⁶ Also, it suggested that the Special Rapporteurs’ reports should be presented to the High Commissioner in a timely fashion and that the High Commissioner’s rule of law initiative should be supported with appropriate levels of funding and cooperation of the Council’s member states.⁸⁷

Finally, the task force made policy recommendations for the Council to enhance the participation of NGO’s, which include their access to the Council, the continuation and expansion of the functions of an NGO liaison official appointed by the High Commissioner, and enlargement of the opportunity for NGO’s to provide information to the Council.⁸⁸

The Mitchell-Gingrich task force, discussed above, also recommended that the U.S. government “support the creation of a Human Rights Council, ideally composed of democracies, to monitor and enforce human rights.”⁸⁹

The September 2005 World Summit resolved to create a Human Rights Council, which it said should address violations of human rights, make recommendations, and promote effective coordination, as well as mainstream human rights within the U.N. system.⁹⁰ It asked the General Assembly president “to conduct open, transparent and inclusive negotiations... with the aim of establishing the mandate, modalities, functions, size, composition, membership, working methods and procedures of the Council.”⁹¹

The General Assembly has been discussing the details regarding the establishment of the Council. Various suggestions have been forwarded regarding the Council’s membership, election, and mandate. It is hoped that all these issues will be finalized at the ongoing negotiations of the current (60th) session of the General Assembly by March 2006.⁹² Several NGO’s have submitted their recommendations to member states engaged in consultations and negotiations.⁹³

V. CONCLUSION

The developments discussed here to strengthen the existing U.N. machinery to protect human rights are indeed promising. Notwithstanding the pivotal role of

86. *Id.* at 18-19 (*emphasis in original*).

87. *Id.* at 19.

88. *Id.* section VI, at 21.

89. U.S. Institute of Peace, *supra* note 30, at 34-35.

90. World Summit Outcome, *supra* note 7, para. 157, 159.

91. *Id.* para. 160.

92. “The President of the General Assembly mentioned that the most pressing negotiation was on the Human Rights Council; he hoped to finalize the work in the next month.” Press Release, General Assembly, Summary of Press Briefing in Vienna by General Assembly President on Follow-Up to World Summit, U.N. Doc. GA/SM/368 (Jan. 24, 2006).

93. *See, e.g.*, Letter from 33 NGO’s to Permanent Representatives and Member States of the Convening Group of the U.N. Democracy Caucus (Jan. 24, 2006), *available via Human Rights Watch at* <http://hrw.org/english/docs/2006/01/24/global12527.txt.htm>; Letter from 160 NGO’s to foreign ministers of U.N. member states and U.N. permanent representatives (Jan. 19, 2006), *available via Human Rights Watch at* www.globalpolicy.org/reform/topics/hrc/2006/0119elements.htm; Joint letter from the Global Policy Forum to Jan Eliasson, President of the General Assembly on the UN Human Rights Council (Nov. 1, 2005), *available at* www.globalpolicy.org/reform/hrc/1101joint.htm (signed by several NGOs).

human rights in the maintenance of international peace and security, neither the High Commissioner for Human Rights nor the U.N. Commission on Human Rights has received adequate resources to function effectively. Perhaps the cause is, in part, their location in Geneva while major U.N. bodies and activities are centered in New York, or perhaps it is the baggage of history, for the Commission has only gradually and incrementally started functioning to fulfill its mandate and that, too, primarily through special procedures—rapporteurs, working groups, and experts. Further, the Office of the High Commissioner for Human Rights was created at a much later date, and there has been little clarity regarding the relationship between the Commission and the High Commissioner's Office.

Strengthening the Office of the High Commissioner and replacing the Commission with an effective Council are necessary first steps. Recognition of the obligation to protect is a momentous new step. Its endorsement by member states should be a precursor to creating the necessary mechanisms that will allow effective responses to massive and sustained violations of human rights, an enormous challenge to the world community that has thus far gone unaddressed.

