

The United Nations High Commissioner for Human Rights: The History of a Contested Project

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Abstract

This essay recounts the protracted history of the proposal to create a UN High Commissioner for Human Rights, from the days of Cold War controversies and divisions until the post ultimately came into being after the World Conference on Human Rights (Vienna, 1993). While early proposals perceived the High Commissioner as an independent authority receiving complaints and lending good offices, the envisaged role of the High Commissioner progressively evolved over the years – with the setting up of a great variety of treaty-based and charter-based implementation procedures – to encompass comprehensive policy-planning and global human rights advocacy. Thus, as the UN official with principal responsibility for human rights activities, the High Commissioner became firmly embedded in the structure of the UN organization. This paper further underscores the catalytic role of non-governmental organizations in consistently pushing forward the high commissioner project, as it finally emerged in an atmosphere of high expectations.

Key words

non-governmental organizations; UN Commission on Human Rights; UN High Commissioner for Human Rights; UN Secretary-General; World Conference on Human Rights

I. INTRODUCTION

It was forty years ago, in 1967, when the UN Commission on Human Rights (in 2006 replaced by the Human Rights Council) embarked on a new stage of its existence. While in earlier years the Commission was mainly occupied with human rights standard-setting, it was in 1967 that the Commission was mandated to deal annually with consistent patterns of gross violations of human rights, notably policies of racial discrimination, segregation, and apartheid. Thus the Commission started to monitor the treatment of prisoners in South Africa and over the years progressively extended its activities to cover the whole human rights situation in South Africa. In the same year, the human rights situation in the Palestinian territories, occupied since 1967, also became a matter of serious concern to the Commission on Human Rights and has been the subject of close monitoring ever since.

It is appropriate to recall in this special issue in honour of John Dugard the taking up of these two serious human rights situations by the Commission on Human

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Rights because of their direct impact on John's life and work. As a highly respected South African legal scholar committed to the cause of human rights, John Dugard has consistently taken a firm stand against the apartheid policy which constituted a denial of all basic human rights. And as a Special Rapporteur on the situation of human rights in the Occupied Palestinian Territory John Dugard has proven to be a conscientious monitor in upholding human rights and international humanitarian law.

The year 1967 was significant for another reason in the history of the Commission on Human Rights. In that year, the Commission as a UN policy organ for the first time endorsed the establishment of a UN High Commissioner's Office for Human Rights. However, as this paper will show, this ambitious project remained deadlocked for a long time. It was only in 1993, after the World Conference on Human Rights held in June in Vienna, that the UN membership reached agreement on the creation of the post of the High Commissioner for Human Rights as the UN official with principal responsibility for UN human rights activities.

The present contribution to the issue in honour of John Dugard will trace the protracted history of the proposal to create a UN High Commissioner for Human Rights up to its adoption by the United Nations in 1993.¹ It is written with the knowledge that efforts deployed to this cause by many human rights supporters were not in vain.

2. A CONTESTED PROJECT

The proposal of establishing a High Commissioner for Human Rights within the United Nations remained divisive over a long period of time. It met with strong opposition from the socialist countries of Eastern Europe, most Western and Latin American countries favoured the proposal, and countries from Africa and Asia were divided. It was only in 1993, when the days of the Cold War were over and a new political situation had emerged, thus transforming the international human rights agenda, that the UN General Assembly finally decided to create the post of the High Commissioner for Human Rights as a follow-up to the World Conference on Human Rights, which had made a recommendation to that effect.

Human rights activists and scholars played a stimulating role in the initiation and development of the proposal and in lobbying governments. They also kept the issue alive and from time to time gave it new impetus so as to maintain it on the agenda of UN human rights policy organs. While this process, with its ups and downs and with higher and lower degrees of intensity, stretched over a period of some thirty years, there are three momenta which conveniently lend themselves for analysis, explanation, and comparison. These three momenta were concretely shaped in draft resolutions presented to the UN General Assembly in 1967, 1977, and 1993 respectively. The first draft resolution was elaborated and voted upon by the Commission on Human Rights and subsequently adopted by the Economic and

1. An early and detailed analysis of the proposal was made by R. S. Clark, *A United Nations High Commissioner for Human Rights* (1972).

Social Council on 6 June 1967² for recommendation to the General Assembly. However, this most representative body of the United Nations left the matter pending. The second draft resolution, based on further work of the Commission on Human Rights and the General Assembly under the heading of an item entitled 'Alternative approaches and ways and means within the UN system for improving the effective enjoyment of human rights and fundamental freedoms', was presented in November 1977 by a number of Western and Latin American countries and some African states to the Third Committee of the General Assembly.³ After a hectic debate the Third Committee decided by a narrow margin not to vote on the draft resolution on the understanding that the proposal and the relevant documentation would be transmitted to the Commission on Human Rights.⁴ This defeat made the chances of the establishment of a High Commissioner extremely slim. It was only due to a change in the political climate that the UN General Assembly finally came on 20 December 1993 to adopt, without a vote, Resolution 48/141, by which it decided to create the post of the High Commissioner for Human Rights.

In the light of the three texts referred to above, this paper will first describe contextual elements which influenced the drafting of these texts in 1967, 1977, and 1993. Thereafter some of the basic arguments which were advanced both in favour of and against the proposal of a High Commissioner will be reviewed. And, finally, we shall look into a number of features and aspects relating to the creation of the Office of the High Commissioner: appointment and qualifications, relationship to the Secretary-General, relationship to other UN organs and to human rights mechanisms, staff and resources, and legal framework. This review may help in the comprehension of the evolution of the concept of the High Commissioner as the result of changing perceptions about the content and nature of the international human rights agenda and the need to take into account the political concerns of major sectors of the UN membership.

3. HISTORICAL NOTIONS AND CONTEXTUAL ELEMENTS

An early proposal for what was called an 'Attorney General' was launched in 1947 by René Cassin, the eminent French human rights expert and scholar. It was envisaged that such an official would be available to assist petitioners in their legal actions against respondent states before a Court of Human Rights in the context of the International Bill of Human Rights. The idea of a UN Attorney General for Human Rights was further pursued by Uruguay in 1950 and 1951. His or her authority would have included receiving and examining complaints from individuals and national and international non-governmental and intergovernmental organizations. The Attorney General would have been authorized to negotiate with states parties concerned, to refer complaints to the Human Rights Committee under the Covenant on Civil

2. ECOSOC resolution 1237 (XLII).

3. UN Doc. A/C.3/32/L.25/Rev.1.

4. See B. G. Ramcharan, *Humanitarian Good Offices in International Law* (1983), ch. XI (Good Offices of the proposed UN High Commissioner for Human Rights), 151–8.

and Political Rights, and to conduct on-the-spot inquiries.⁵ As correctly observed by Roger Clark, the early proposals saw the role of the contemplated high official in terms of a prosecutor or advocate.⁶ However, these proposals did not receive a great deal of support.

3.1. The 1967 process

After the Universal Declaration of Human Rights was adopted on 10 December 1948, work on the other projected parts of the International Bill of Human Rights, notably legally binding instruments together with a system of international supervision and enforcement, slowed down considerably, to a large extent as the result of the political and ideological tensions between East and West but also due to a political shift in human rights priorities, with emphasis on the right of peoples to self-determination and the elimination of racial discrimination and apartheid. When, in the years of the Kennedy administration in the early 1960s, the idea of a high UN official for human rights was revived in the United States, now under the name of a High Commissioner, by influential personalities as Richard N. Gardner and Jacob Blaustein, the express link with the International Bill of Human Rights no longer appeared and the functions of a High Commissioner were no longer contemplated as instrumental in legal procedures but rather in such areas as lending good offices, investigations on request, and offering advice and assistance to countries. A number of non-governmental organizations (NGOs) took up the matter, notably the World Veterans Federation, Amnesty International, the International Commission of Jurists, and the World Jewish Congress. They prepared a joint statement as well as a draft General Assembly resolution.⁷ It was on this basis that Costa Rica introduced in 1965 a proposal for a High Commissioner in the Commission on Human Rights.

In the years 1965–7 the Costa Rica draft was the subject of intense discussions and negotiations. Much groundwork was done in an analytical and technical study by the UN Secretariat, and the draft was thoroughly reviewed and revised by a Working Group of nine states members of the Commission on Human Rights, set up in 1966. The draft elaborated by the Working Group was finally adopted, by a divided vote of 20 to 7 with 2 abstentions in the Commission on Human Rights, and was subsequently approved (also by a divided vote) by the Economic and Social Council.⁸

The arguments put forward both in favour of and against the proposal – a consistent and persistent objector was the USSR – will be reviewed later. These arguments applied equally to the 1967 draft text and to the 1977 proposal, which will be discussed hereafter. For present purposes, in order to place the 1967 draft in a broader context, it is useful to recall certain developments that had a considerable impact on the position of human rights within the UN system of those years. These developments related to the areas of standard-setting and implementation. In 1965 the UN

5. See further Clark, *supra* note 1, at 39 ff.

6. *Ibid.*, at 42.

7. *Ibid.*, at 47.

8. ECOSOC Resolution 1237 (XLII), 6 June 1967.

General Assembly adopted the first major human rights instrument which included a system of international supervision, namely the International Convention on the Elimination of All Forms of Racial Discrimination. The countries of Africa and Asia considered this treaty as an important tool in the struggle against apartheid and, more generally, against systems of white colonial and racial domination. The adoption of the 1965 anti-racism convention paved the way for the General Assembly in 1966 to adopt the two International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, together with an Optional Protocol to the latter relating to the individual right of petition, thus completing its work on the International Bill of Human Rights. It should be noted that this work had started at a time when the decolonization process was still at an early stage, and its completion was brought about with the political support of the decolonized countries of Asia and Africa.

Another striking development in these years occurred in the Commission on Human Rights. As a result of the expanded composition of the Commission (its membership was raised from 21 to 32 countries), making the Commission more representative of UN membership and thus increasing the influence of African and Asian countries, the Commission embarked in the years 1966 and 1967 on a series of activities in the area of implementation to meet the concerns of the new majority in the Commission. Thus, under the heading of 'The question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories', the Commission was authorized by the Economic and Social Council to deal annually with 'gross violations' and 'consistent patterns of violations of human rights'.⁹ The Commission also established in 1967 a Working Group of Experts on the Treatment of Prisoners in South Africa, whose mandate was progressively extended to cover the whole of the human rights situation in southern Africa.¹⁰

These developments in the areas of standard-setting and implementation created an atmosphere and the potential for a more activist and operational human rights policy in the United Nations. These developments would militate in favour of the establishment of an appropriate authority to guide and give direction to such more vigorous human rights policies, but they also strengthened the hands of those who argued that with the future entry into force of the International Covenants and with the extended powers of the Commission on Human Rights, adequate machinery would already be in place to cope with human rights needs and requirements. The authors of the 1967 draft resolution were mindful of these developments inasmuch as in the umbrella clause of the paragraph describing the functions of the UN High Commissioner for Human Rights the wording was included 'without prejudice to the functions and powers of organs *already in existence or which may be established*

9. ECOSOC Resolution 1235 (XLII).

10. See in more detail T. van Boven, 'The United Nations Commission on Human Rights and Violations of Human Rights and Fundamental Freedoms', (1968) 14 *Netherlands International Law Review*, at 374–93, repr. in A. P. M. Coomans, C. Flinterman, F. Grünfeld, I. Westendorp, and J. Willems (eds.), *Human Rights from Exclusion to Inclusion, Principles and Practice, An Anthology of the Work of Theo van Boven* (2000), 117–34.

within the framework of measures of implementation included in international conventions on the protection of human rights and fundamental freedoms'.¹¹ However, the political forces in the General Assembly blocking the creation of the Office of the High Commissioner prevailed in the late 1960s and early 1970s; the core of the opposition was led by the Soviet and Arab blocs.¹²

3.2. The 1977 process

The proposal to establish the post of UN High Commissioner for Human Rights did not, however, disappear completely into the archives of history. It remained for some years a low-key aspiration and was kept under review in a somewhat hidden way under the heading of 'alternative approaches and ways and means within the UN system for improving the effective enjoyment of human rights and fundamental freedoms'. The 'alternative approaches' item bounced¹³ between the Commission and the General Assembly, and in 1977 a new draft resolution was submitted to the Third Committee of the General Assembly by 17 delegations from Western, Latin American and African countries, subsequently joined by seven more delegations from Western countries.¹⁴ The various functional aspects of this proposal will be discussed later in conjunction with the other texts that reached the General Assembly. At this stage we will highlight a few contextual aspects.

A major factor of that time was the active human rights policy of US President Jimmy Carter. The Carter administration had put human rights prominently on the international political agenda. It must be assumed that it was not by coincidence that already in the first year of the Carter presidency the proposal of the High Commissioner was relaunched. The United States was not a co-sponsor of the draft resolution, but gave its full support in the person of the US ambassador to the United Nations, Andrew Young.

Other factors should also be taken into account. The International Covenants had entered into force in 1976. Legally speaking this was an important development, but at the time the implementation procedures of the Covenants were in their infancy and had only marginal impact. Major political attention was given in those years by UN political organs to massive violations of human rights related to apartheid, racism and racial discrimination, colonial domination, foreign occupation, and alien subjugation. New concepts were also emerging as relevant to the human rights agenda and strongly advocated by the developing countries, such as the right to development and the establishment of a new international economic order, focusing on more equity in political and economic relations between states and in international decision-making. More emphasis was put on the concept of the interdependence and indivisibility of all human rights – civil and political rights as well as economic, social, and cultural rights.

11. ECOSOC Resolution 1237 (XLII), recommending the adoption of a draft resolution by the General Assembly, oper. para. 2 (emphasis added).

12. See Clark, *supra* note 1, at 58–9.

13. The expressive verb 'bounce' was used by A. Clapham, 'Creating the High Commissioner for Human Rights: The Outside Story', (1994) 5 *EJIL*, 556–68, at 556.

14. UN document A/C.3/32/L.25/Rev.1.

These concerns and developments were broadly reflected in the text of the 1977 draft resolution. In terms of the proposed mandate of the High Commissioner, repeated reference was made to work done in the struggle against colonialism, apartheid, racism and racial discrimination, colonial domination, foreign occupation, and alien subjugation. Mention was also made of the promotion of the understanding of basic human rights inherent in the establishment of a new international economic order and the need to link the traditional concept of human rights with basic economic, social, and cultural needs. Furthermore, to allay the misgivings of those who feared that the High Commissioner would act as a substitute for existing or future human rights organs and mechanisms, a clause was included that the functions of the High Commissioner shall not prejudice or authorize interference in the functions and powers already in existence or which may be established for the promotion and protection of human rights. A special matter of concern, raised by many delegations but also by the entourage of the UN Secretary-General, was the relationship of a High Commissioner to the Secretary-General, in particular with respect to the traditional role of the Secretary-General in providing good offices.¹⁵ The draft resolution reflected this concern but apparently did not allay the fears of rivalries and tensions that might arise between a High Commissioner and the Secretary-General.

An intensive debate came to an abrupt and unhappy end in early December 1977 with a procedural motion put forward by Cuba in the Third Committee of the UN General Assembly, proposing that the whole matter be referred back to the Commission on Human Rights. This motion was adopted by 62 in favour, 49 against and 22 abstentions.

3.3. The 1993 process

The late 1970s and the 1980s witnessed a considerable expansion in the potential of the United Nations to monitor respect for human rights and to deal with gross and consistent patterns of violations. Important new legal instruments were drawn up and adopted relating to areas of special concern, such as the elimination of discrimination against women, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and the rights of the child. In addition to already existing supervisory mechanisms relating to civil and political rights, economic, social and cultural rights, and racial discrimination, three new treaty bodies were set up under the respective new legal instruments.

In the same period the Commission on Human Rights, using the powers conferred on it by the Economic and Social Council as far back as 1967, decided to set up a series of special mechanisms to deal with allegations of violations of human rights in areas of serious international concern, authorizing the sending of urgent appeals on behalf of persons who are in immediate danger and carrying out visits on the spot with the consent of governments concerned. Thus special rapporteurs and working groups of experts received specific mandates to deal with disappearances;

15. See, in detail, Ramcharan, *supra* note 4.

extrajudicial, summary, or arbitrary executions; torture; arbitrary arrest and detention; religious intolerance; racism and xenophobia; and freedom of expression. In addition, following precedents relating to southern Africa, the Occupied Palestinian Territory, Chile, and so on, the Commission appointed a good number of country rapporteurs and experts whose reports focused on the human rights situation in specific countries which were characterized, in the opinion of the Commission, by consistent patterns of gross violations of human rights.

It is relevant for several reasons to refer to these developments in the context of creating a post of High Commissioner for Human Rights. First, while the policy organs of the United Nations, such as the Commission on Human Rights and the General Assembly, are composed of representatives of governments and thus political (and selective) by nature, the treaty bodies and the special country and thematic mechanisms created by the Commission on Human Rights personalize the elements of expertise and independence. In this respect they introduced into the human rights programme some of the qualities and functions which were to be attributed to a High Commissioner in the earlier proposals. Second, the multiplicity or proliferation of treaty bodies and special mechanisms of the Commission on Human Rights made it more necessary than before that for the sake of an effective functioning of all these bodies and mechanisms a stronger and more effective system of co-ordination of human rights activities be pursued within the United Nations. For that purpose effective leadership and more resources would be required. Here, the role and the office of a High Commissioner came into the picture.

The end of the Cold War had created a sense of euphoria, particularly in Western countries. It was expected that new avenues would be opened towards more democracy, political and economic liberty, and social justice, and that commitment to human rights and fundamental freedoms would be strengthened, globally, regionally, and nationally. It was also expected that the United Nations, and notably the Security Council, would become more effective in the maintenance and restoration of international peace and security. Against this background the UN Secretary-General presented his report 'An Agenda for Peace' (1992), with emphasis on preventive diplomacy and recognition of the need for effective responses in situations where peace and justice were in jeopardy.

It was in those years of firm hopes for new chances and new opportunities that the idea of a second World Conference on Human Rights was born.¹⁶ The preparations of the Conference revealed more discord than expected and when it finally took place in Vienna in June 1993 the shadows of conflicts and human suffering in the former Yugoslavia were constantly in the minds of many. It was nevertheless remarkable that the Vienna Conference within a period of less than two weeks was able to adopt on 25 June 1993 a constructive and comprehensive Declaration and Programme of

16. The first World Conference on Human Rights took place in Teheran in 1968, at the occasion of the 20th anniversary of the Universal Declaration of Human Rights.

Action. The activities and the contributions of NGOs to the work of the Conference were another remarkable feature.¹⁷

The final document of the World Conference reaffirmed the universality, the indivisibility, and the interdependence of all human rights. It also restated basic concepts such as the right of peoples to self-determination and the right to development. Thanks to the effective work of constituencies and coalitions of women's rights and children's rights, the sections in the final document on the equal status and human rights of women and on the rights of the child are strong and well developed. For present purposes it is important to draw attention to section IIA of the final document, entitled 'Increased co-ordination on human rights within the United Nations system', with special subsections on 'Resources', 'Centre for Human Rights' and 'Adaptation and strengthening of the United Nations machinery for human rights, including the question of the establishment of a United Nations High Commissioner for Human Rights'. Under this last heading two important paragraphs were included:

The World Conference on Human Rights recognises the necessity for a continuing adaptation of the United Nations human rights machinery to the current and future needs in the promotion and protection of human rights, as reflected in the present Declaration and within the framework of a balanced and sustainable development for all people. In particular, the United Nations human rights organs should improve their coordination, efficiency and effectiveness. (para. 17)

The World Conference recommends to the General Assembly that when examining the report of the Conference at its forty-eighth session, it begin, as a matter of priority, consideration of the question of the establishment of a High Commissioner for Human Rights for the promotion and protection of all human rights. (para. 18)

As a close observer stated, the World Conference recommendation to the General Assembly concerning a High Commissioner for Human Rights was a late ('eleventh-hour') proposal that went into the Vienna final document.¹⁸ Intellectual and lobbying activities of prominent human rights NGOs deserve much credit in this regard. In a policy document prepared for the World Conference, Amnesty International made a strong plea for a UN 'Special' Commissioner for Human Rights, and stressed the need for 'a wholly fresh examination of the role and the functions of the post of a human rights Commissioner'.¹⁹ In this document 'essential attributes' of the Commissioner were outlined and matters relating to the appointment and the relationship to existing human rights mechanisms were discussed. The written report, dated 14 June 1993, by the general rapporteur, Manfred Nowak, of the Vienna NGO-Forum recommended that:

An office of a High Commissioner for Human Rights should be established as a new high-level independent authority within the United Nations system, with the capacity to act rapidly in emerging situations of human rights violations and to ensure the

17. Manfred Nowak (ed.), *World Conference on Human Rights, Vienna, June 1993: The Contribution of NGOs: Reports and Documents* (1994).

18. Clapham, *supra* note 13.

19. Amnesty International, *World Conference on Human Rights, Facing Up to the Failures: Proposals for Improving the Protection of Human Rights by the United Nations*, AI Index: IOR 41/16/92, December 1992.

coordination of human rights activities within the United Nations system and the integration of human rights into all United Nations programmes and activities.²⁰

This NGO recommendation contained in succinct terms three major functions for the proposed High Commissioner: rapid action in emergencies, co-ordination, and the integration (or mainstreaming) of human rights into the whole of the UN system. Also after Vienna a number of prominent NGOs continued to press for the creation of the office of a High Commissioner. Thus, in October 1993, Amnesty International, Human Rights Watch, the International Federation for Human Rights, the International Human Rights Law Group, the International League for Human Rights, the Jacob Blaustein Institute for Human Rights, and the Lawyers Committee for Human Rights issued a strong joint statement urging that such office should deal with the following challenges:

the need for strategic direction and proper coordination of existing bodies and programmes concerned with human rights;

the need for a senior official to ensure that promotion and protection of human rights are integrated into the work of all relevant aspects of the United Nations system;

the need to ensure that human rights becomes a central, system-wide priority in all United Nations activities rather than continue as a marginalized subject assigned to Geneva alone;

the necessity of ensuring that the United Nations' response to human rights problems is early, efficient, effective and comprehensive.²¹

As it appeared, in Vienna the ground was prepared for the General Assembly to establish the post of a High Commissioner for Human Rights, but history had proven that the concept of a High Commissioner was fraught with many sensitivities and complexities. It was therefore a major accomplishment that the General Assembly decided on 20 December 1993 to create the post of the High Commissioner for Human Rights and thus fulfilled a wish cherished for a long time by many human rights activists and defenders.²² In this respect much credit should be given to the sessional working group of the General Assembly, skilfully chaired by the permanent representative of Ecuador, Jose Ayala Lasso, who later became the first UN High Commissioner for Human Rights. As noted by Andrew Clapham, 'for the first time, the United Nations has now a human rights official who can take up human rights concerns with governments without waiting for a mandate by a political body'.²³ But realistically he also drew attention to restrictions and pitfalls facing the office because of the totally inadequate financial and human resources assigned to the office. In fact, the financial services of the UN Secretariat estimated that the costs of implementing Resolution 48/141 would amount to less than US\$2 million over the years 1994–5!

20. Nowak, *supra* note 17, at 78.

21. Joint statement reproduced in foreword by R. Clark to B. G. Ramcharan, *The United Nations High Commissioner for Human Rights: The Challenges of International Protection* (2002), at xviii.

22. UN Doc. A/48/141 (20 December 1993).

23. Clapham, *supra* note 13.

The resolution establishing the mandate of the High Commissioner reflected a good number of issues and features which had received particular emphasis in the Vienna and post-Vienna process: first of all the renewed emphasis on the universality, indivisibility, and interdependence of all human rights – civil, cultural, economic, political, and social – as a guiding criterion and an overall responsibility of the High Commissioner, and further, the importance of promoting a balanced and sustainable development for all people and of ensuring realization of the right to development. Also the provision of advisory services and technical and financial assistance at the request of states is specifically mentioned, as well as education and public information programmes in the field of human rights. Further, a preventive role of the High Commissioner with regard to the continuation of human rights violations, reflected in the Vienna final document, is provided for in the 1993 resolution. The wishes expressed by NGOs that the High Commissioner should act as a co-ordinator and should help to integrate human rights in the whole of the UN system are also reflected in the text. No explicit reference is made, however, to a possible role of the High Commissioner to be instrumental in emergency situations. But it is apparent that in the overall purport of the mandate to promote and protect the effective enjoyment of all human rights and to engage in a dialogue with all governments in order to secure respect for all human rights, the High Commissioner has sufficient authority to initiate action when emergencies so require. It must be kept in mind, in this respect, that in the wording of the resolution, the High Commissioner as the UN official with principal responsibility for UN human rights activities shall act ‘under the direction and authority of the Secretary-General’.

4. OPPOSING AND SUPPORTING ARGUMENTS

The debates in the Commission on Human Rights and in the General Assembly on the proposed High Commissioner for Human Rights were, before the general climate changed in the late 1980s and early 1990s, highly divisive, emotional, in some respects legalistic, procedural, and repetitive. The issue was heavily embattled; some arguments against the proposal were not fully without merits but a good number of the arguments were put forward so as to create the impression that a High Commissioner would constitute the greatest possible threat to friendly relations among states and undermine international co-operation. In hindsight the debates now appear to have been a sterile exercise.

One of the first and principal arguments advanced against a High Commissioner was the contention that the establishment of such an authority would lead to undue intervention in the domestic jurisdiction of states and therefore constitute a violation of Article 2(7) of the UN Charter. This argument typically belongs to the early times of the United Nations. It was also advanced in early years in connection with UN action against the apartheid policy of South Africa. It was also relied on many times by the socialist countries of Eastern Europe. However, inasmuch as human rights became more and more regarded as a matter of international concern and mechanisms were developed by the United Nations to deal with massive and gross violations of human rights, this argument no more held and lacked persuasive

force. Many international lawyers and diplomats addressed in the early years of the United Nations the scope and meaning of Article 2(7) of the UN Charter. They discussed at length the meaning of such terms as ‘intervention’ and ‘matters essentially within the domestic jurisdiction of any state’.²⁴ The reference to Article 2(7) carried progressively less weight and became a discourse of the past.

It was further argued that, insofar as new and more human rights mechanisms came into existence or were envisaged for the future – either on the basis of treaties or as mechanisms of the Commission of Human Rights – and special procedures were developed to deal with ‘communications’ relating to violations of human rights,²⁵ the tasks of a High Commissioner, as contemplated, were to be carried out more appropriately by existing or future human rights mechanisms and procedures. This argument did indeed gain weight with the creation, in the 1970s and 1980s, of treaty-based and charter-based mechanisms to carry out tasks of implementation and monitoring. In the light of these developments the proponents of a High Commissioner were well advised to shift the emphasis of their proposal from implementation to co-ordination.

Another argument carrying weight was the contention that functions contemplated for the High Commissioner, or parts thereof, could well be entrusted to the Secretary-General. It was recalled that respective Secretary-Generals had in many instances discreetly intervened and made their good offices available on behalf of people whose fate was in jeopardy. It was argued that, in fact, many of the activities of the envisaged High Commissioner could be carried out under existing competences of the Secretary-General. This was also, as was suggested, behind a Canadian proposal that a UN Under-Secretary-General for Human Rights be appointed.²⁶ Against this background it may be recalled that, in later years, the head of the UN Centre for Human Rights was made Under-Secretary-General for Human Rights. However, this officeholder had to combine his human rights functions with the post of Director-General of the European Office of the United Nations in Geneva. This combination of functions was in fact an artificial solution *pour besoin de la cause*.

It is no secret that during the many years that the High Commissioner proposal was under discussion in the United Nations, none of the Secretaries-General could be seen as supportive of the proposal. Basically they did not favour the upgrading of human rights within the organization because this might complicate the tasks and duties of their office, whose interest lies in entertaining good relations with member states. Moreover, in their view a High Commissioner might well be a potential troublemaker and competitor. Scepticism on the part of the Secretary-General was well illustrated as late as on the eve of the World Conference on Human Rights in June 1993 when the then Secretary-General, Boutros Boutros-Ghali, wrote in the *Washington Post*,

24. See also in detail Clark, *supra* note 1, at 112–33.

25. It is intimated that ECOSOC Resolution 1503 (XLVIII) of 27 May 1970, setting out a procedure for dealing with communications relating to violations of human rights, was accepted by countries as a trade-off against the High Commissioner proposal which would have, after the introduction of this procedure, less *raison d'être*.

26. Ramcharan, *supra* note 4, at 156.

Both the principles and the practices of human rights are under stress. This is a time for serious discussion, for quiet diplomacy and step-by-step problem solving. Solutions cannot be imposed from the top down. Proposals for new bureaucracies, high-level positions, more procedures and permanent forums, as admirable and well-intentioned as they are, may only arouse discontent and resistance at a time when liberality and leeway are called for. This is a year for dialogue.²⁷

Other moves in the game to stall the proposal of a High Commissioner related to the legal basis and the structure of the office to be created. It was argued that as a result of the proposal, states which had not ratified human rights conventions would be subject to the supervision of the High Commissioner in the same manner as those states which were bound by treaty obligations. Only through an international convention could a machinery such as that of the High Commissioner be established. This line of thought would make the High Commissioner an à la carte authority for those countries that accepted such authority. It would affect the collective, UN-wide, and global vision of the whole High Commissioner concept. It was also proposed to invest the powers of a High Commissioner not in one single person but in a triumvirate or other collegiate body, with due regard for equitable representation of the principal legal systems and geographical regions.²⁸ However, the proponents of the High Commissioner concept felt quite rightly that a collegiate body would make the office ineffective and might lead to paralysis. Yet, in an effort to satisfy those who favoured a collegial structure, the 1967 proposal included the idea of establishing a panel of expert consultants to advise and assist the High Commissioner in carrying out his functions. Such a panel should not exceed seven in number, the members to be appointed by the Secretary-General in consultation with the High Commissioner. The idea of an advisory panel did not reappear in later texts.

In support of the proposal of a High Commissioner the conviction was expressed that the post of High Commissioner would make a significant contribution to the promotion and protection of human rights throughout the world. While the proponents recognized the importance of existing machinery, such as was provided for in the International Covenants on Human Rights and other instruments, the High Commissioner, far from being superfluous, would usefully complement the promotion and protection system set up by these instruments. In this respect it was recognized that major human rights treaties were ratified only by part of the membership of the United Nations. And inasmuch as the human-rights machinery became more extensive in terms of number of instruments and procedures and as regards the increase in number of ratifications, the need for effective co-ordination became more pressing and the role of a High Commissioner as a co-ordinator commended itself more convincingly.

In the same vein it was considered that a High Commissioner would not be driven by political and selective motivations which prevailed in the UN Commission on Human Rights and the General Assembly. The hope was expressed that the High Commissioner's activities would not reveal a double standard approach which

27. Quoted by Clapham, *supra* note 13.

28. See, in great detail, Clark, *supra* note 1, at 102 ff.

typifies political organs. In order to cope more effectively and expeditiously with emergencies and urgent cases, the High Commissioner would not have to wait until he or she received a specific mandate, but his or her position within the UN system would enable him or her to launch and carry out the necessary action in a timely manner. In this regard emphasis was put on the role of the High Commissioner as a facilitator, as someone who would lend good offices and engage in a dialogue with governments and other parties. In order to allay the apprehensions of those who were said to fear undue interference in domestic affairs of states, the proponents of a High Commissioner argued that he or she would in no way impose his or her will on governments. Rather he or she would stand ready to enter into dialogue, collect information, carry on consultations, and report to the Commission on Human Rights and to the General Assembly, with a view to promoting and protecting human rights in the most effective manner.

The arguments pro and con were continuously repeated over the years with differing degrees of intensity but, as said before, with the Cold War coming to an end and the emergence of a new climate they lost much of their point as setting out the demarcation line between support and opposition. The new discourse would rather concentrate on how to shape the functions and modalities of a High Commissioner in the light of the needs of the UN human rights programme as it had developed over the years. In this regard, it is striking, as observed by Roger Clark, that the original proposals portrayed the High Commissioner as a separate and independent authority in relation to the structure of the United Nations but that ultimately the High Commissioner became more of a high-level policy maker rooted within and forming part of the bureaucratic hierarchy of the organization.²⁹

5. FEATURES OF THE PRESENT MANDATE AGAINST THE BACKGROUND OF EARLIER PROPOSALS

5.1. Qualifications and appointment

The present mandate prescribes that the High Commissioner shall be a person of 'high moral standing and personal integrity and shall possess expertise, including in the field of human rights, and the knowledge and understanding of diverse cultures necessary for impartial, objective, non-selective and effective performance of the duties of High Commissioner'.³⁰ The 1967 proposal referred to the need for the High Commissioner to possess 'the degree of independence and prestige required for the performance of his functions', and the 1977 proposal similarly referred to 'the degree of personal independence, prestige and integrity required for the discrete and impartial performance of his functions'. One of the differences between the terms of the present mandate and the previous ones is the absence in the 1993 text of the notion of independence. Another difference is the requirement in the 1993 text, not referred to in the earlier proposals, that the High Commissioner shall have 'general knowledge and understanding of diverse cultures'. Moreover, according to the 1967

29. Clark, *supra* note 21, at xvi.

30. UN General Assembly Resolution 48/141, para. 2(a).

and 1977 proposals, the High Commissioner would function under the authority of the General Assembly and the Secretary-General respectively. The present mandate refers in this respect to the 'direction and authority of the Secretary-General'.

The appointment of the High Commissioner is in the 1993 resolution a task of the Secretary-General and must be approved by the General Assembly 'with due regard to geographical rotation'. The appointment is for a fixed term of four years, with the possibility of one renewal for another fixed term of four years. Moreover, the High Commissioner shall have the rank of Under-Secretary-General. The 1967 proposal envisaged that the High Commissioner be appointed by the General Assembly, on the recommendation of the Secretary-General, for a term of five years. In the 1977 proposal the appointment of the High Commissioner was to be made by the Secretary-General for a term of five years and had to be confirmed by the General Assembly. All the texts clearly give a decisive role to the Secretary-General in the appointment procedure, but they require the political backing of the General Assembly so as to secure the support of the UN membership.

5.2. Relationship to the Secretary-General

This relationship has always been regarded as a delicate one and, as stated earlier, successive Secretaries-General were not, to say the least, keen supporters of the concept of a High Commissioner. As has already been pointed out, the present mandate provides that the High Commissioner as the 'United Nations official with principal authority for United Nations human rights activities' shall function 'under the direction and authority of the Secretary-General'. The earlier proposals for a High Commissioner would have established less of a close link with the Secretary-General. The 1967 proposal invited the High Commissioner to conduct his office in 'close consultation' with the Secretary-General and the 1977 text envisaged establishing the High Commissioner 'under the authority of the Secretary-General'. By using the wording 'under the direction and authority of the Secretary-General', the present mandate appears to confirm that the Secretary-General remains, also in his relationship to the High Commissioner, 'the chief administrative officer of the Organization' in terms of Article 97 of the UN Charter.

5.3. Relationship to other UN organs

The present mandate explicitly places the responsibility of the High Commissioner within the framework of the overall competence, authority, and decisions of the General Assembly, the Economic and Social Council, and the Commission on Human Rights, and requests the High Commissioner to report annually to these bodies.³¹ The High Commissioner also carries the responsibility of co-ordinating human rights promotion and protection activities 'throughout the United Nations system', which stretches the mandate of the High Commissioner into broad areas

31. It should be noted that since the Commission on Human Rights was replaced in 2006 by the Human Rights Council, the latter assumes the role and the responsibilities of the Commission on Human Rights relating to the Office of the UN High Commissioner for Human Rights, as decided by General Assembly Resolution 48/141 of 20 December 1993 (see UN Doc. A/60/251, para. 5(g), on the establishment of the Human Rights Council, 15 March 2006).

of peace and development and into fields covered by the Specialized Agencies. The 1967 and 1977 proposals spoke merely about maintaining 'close relations' with UN organs, Specialized Agencies, and other intergovernmental organizations concerned with human rights, and about giving advice and assistance. The 1977 draft referred in this context to ensuring 'co-ordination of their activities in the human rights field'. This confirms that the concept of a High Commissioner underlying the 1967 and 1977 proposals was that of a separate authority maintaining close relations with organs in the UN system, while the concept of a High Commissioner developed in the 1993 resolution was based on an integrated vision of the position and the role of the High Commissioner within the UN system.

5.4. Relationship to UN human-rights monitoring mechanisms

According to the present mandate the High Commissioner carries the responsibility, in line with the Vienna final document, 'to rationalize, adapt, strengthen and streamline the UN machinery in the field of human rights with a view to improving its efficiency and its effectiveness'. The 1967 and 1977 proposals, originally based on the idea that a High Commissioner would carry out functions of implementation which might compete with functions and powers of existing or future organs of implementation and supervision, tried to ensure that conflicts of competence be avoided. Therefore, these earlier proposals included the clause 'without prejudice to the functions and powers of organs already in existence or which may be established'. In the present mandate a somewhat different concept of High Commissioner emerges in the light of the situation that an abundance of human rights monitoring mechanisms has already come into existence. Rather than demarcating the functions and powers of the High Commissioner vis-à-vis human rights monitoring mechanisms, he or she is mandated to rationalize, adapt, strengthen, and streamline this UN machinery.

5.5. Staff and resources

The 1993 resolution requests the Secretary-General to provide the High Commissioner with appropriate staff and resources, within the existing and future regular budgets of the United Nations, and decides that the Office of the High Commissioner be located in Geneva, with a liaison office in New York. Moreover, the High Commissioner had the responsibility of carrying out overall supervision of the Centre for Human Rights. According to this arrangement the High Commissioner would be backed up by a small Office with limited funding and would supervise the Centre for Human Rights without being the official head of the Centre. This arrangement soon created an unworkable situation and was later remedied. As far as staff and resources are concerned it appears that the 1993 resolution was still based on the earlier concepts of a High Commissioner, reflected in the 1967 and 1977 proposals, according to which the High Commissioner would constitute a separate (and small) outfit. Given the broad responsibilities entrusted to the High Commissioner in the 1993 mandate, the staff and resources arrangement in the same resolution was totally inadequate and carried the inherent risk that the High Commissioner would become a lame duck.

5.6. Legal framework

Obviously the UN Charter, the Universal Declaration of Human Rights, and other international human rights instruments provide the basic legal framework for the functioning of the High Commissioner, both in the present mandate and in the earlier proposals. At the same time, echoing concerns that were expressed in earlier stages, reference is made in the present mandate to obligations arising from international law 'to respect the sovereignty, territorial integrity and domestic jurisdiction of States'. Equally, reference is made to the promotion of universal respect for and observance of all human rights, in the recognition that 'in the framework of the purpose and principles of the Charter, the promotion and protection of all human rights is a legitimate concern of the international community'. This combination of language is a perfect illustration of skilful diplomatic drafting so as to satisfy all sides and to reach consensus. At the end of the day it was the decision to create the High Commissioner that counted. Once the mandate and the institution are operative, subtleties of the enabling language remain mainly of academic interest.

6. CONCLUDING REMARKS

This survey recounts some of the history of the proposal to create a UN High Commissioner for Human Rights. It stops with the adoption of General Assembly Resolution 48/141, which decided to create the post of High Commissioner. This resolution was a victory for all who had been keeping faith with human rights and worked for their promotion and protection at national and international levels. The resolution carries the vision that the United Nations, whose Charter was proclaimed in the name of 'We the Peoples', provides the structural and conceptional framework for the High Commissioner to make the realization of all human rights a principal and integrated objective in the promotion of international peace and development.

The efforts to create a High Commissioner for Human Rights were long deadlocked as a result of the strong divisions marking the Cold War period. Thanks to the end of the Cold War and the emergence of a new political climate, new possibilities opened up favouring the strengthening of the promotion and protection of human rights and international humanitarian law. These potentials were also reflected – in spite of adverse trends – in the Vienna Declaration and Programme of Action (adopted by the Vienna World Conference in June 1993) and gave new impetus to the High Commissioner proposal.

Although the resolution establishing the UN High Commissioner for Human Rights makes no mention of the role of non-governmental organizations and the relationship of the High Commissioner to NGOs as well as to civil society at large, the partnership of NGOs in the defence of human rights remains essential. It is also clear from this historical account that at crucial stages of the conceptualization, the development, and the launching of the High Commissioner proposal, NGOs played a vital role.

During the time that the proposal for a High Commissioner followed its course for some thirty years before it was adopted in 1993, the profile of a High Commissioner considerably changed, along with the development and evolution of the UN

Human Rights programme. Initially the main tasks of a High Commissioner were, in the absence of adequate mechanisms, projected in areas of handling complaints and lending good offices. But in the course of years with the progressive creation of independent bodies of experts, either on the basis of human rights treaties or as special procedures of the Commission on Human Rights, the need for a High Commissioner as a monitor shifted to the need to make the High Commissioner a co-ordinator. At the same time it was emphasized that the High Commissioner should be instrumental in dealing with human-rights emergencies and launching rapid action to this end.

The World Conference on Human Rights in Vienna affirmed and developed a broad concept of human rights and recognized the necessity for a continuing adaptation of the UN human rights machinery to current and future needs, and placed the establishment of a UN High Commissioner against this background. As a result the profile of the High Commissioner, developed and re-shaped in the present mandate, is much more comprehensive than in blueprints outlined in earlier texts. Of course, co-ordinating and strengthening UN human rights machinery remain important tasks, but Vienna took things further and envisaged the mainstreaming of human rights in the whole of UN activities. Here the High Commissioner emerges as a main policymaker or, to cite the terms of the present mandate, 'the United Nations official with principal responsibility for United Nations human rights activities under the direction and authority of the Secretary-General'.

The present mandate embeds the High Commissioner more strongly within the political and administrative structure of the United Nations than was foreseen in earlier texts. The requirement of 'independence', which was initially one of the conditions of the function of a High Commissioner, disappeared in later texts and does not reappear in the present mandate. But obviously, as a UN official and staff member, the High Commissioner has to meet the requirement of independence prescribed in Article 100 of the UN Charter. The hierarchical relationship to the Secretary-General is made more explicit than before through the words 'under the direction and authority of the Secretary-General'. On the side of both the Secretary-General and the High Commissioner this relationship is to be fostered in a constructive and diligent spirit.

It may by now safely be said that, as a competent participant and insider observed, the establishment of the Office of the High Commissioner for Human Rights has brought to the UN human rights programme an independent voice of high moral standing and an international official of stature within the UN secretariat.³²

32. See Ramcharan, *supra* note 21, at 204.