A UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

by

Roger Stenson Clark

Foreword by

RICHARD N. GARDNER

MARTINUS NIJHOFF / THE HAGUE

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In addition to his vast help as Chairman of the doctoral committee Professor Gardner was kind enough to write the Foreword.

I have endeavoured to incorporate all relevant material available to me on 4 January 1972.

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FOREWORD BY RICHARD N. GARDNER

There are three main approaches to the international implementation of human rights standards.

The first approach is on the government-to-government level. This may be through bilateral diplomacy or resort by a government to multilateral machinery. The difficulty with this approach is that governments are often reluctant to complicate diplomatic relations by bringing human rights complaints against another government.

The second approach is to give individuals direct access to an international commission or tribunal. Such a right of individual petition exists in the European Commission and the European Court of Human Rights and in the Optional Protocol of the Convention on Racial Discrimination. This approach is feasible between countries which share a substantial degree of consensus on human rights standards. For the foreseeable future, however, it is not likely to be a practical possibility on the global level. Within the broad membership of the United Nations, the differences are simply too great. The majority of UN members are clearly not prepared to permit their citizens to appeal over their heads to international human rights bodies. Moreover, a worldwide system of private petition would almost certainly work unequally against free as compared with totalitarian societies. An international body would be besieged with petitions from citizens of open societies having no fear of the consequences, while citizens of totalitarian regimes would generally hesitate to bring their complaints for fear of government reprisal.

The third approach to the international implementation of human rights standards is through an international executive who can influence government action through fact-finding, publicity and persuasion. This is the approach of the proposed United Nations High Commissioner for Human Rights.

This book by Roger Stenson Clark explores the history and the future

prospects of the High Commissioner proposal with careful scholarship and shrewd judgment. Mr. Clark wrote the first draft of this book under my supervision for the degree of Doctor of the Science of Law at Columbia Law School before returning to take up his career as a law teacher in his native New Zealand. I am delighted that his work, in this improved and updated version, is now being published. It fills a real need, since it is the first book on this important subject.

On this occasion it might be appropriate to add a few comments on the history of the High Commissioner proposal. As Mr. Clark indicates, I had something to do with its "revival" in the United States Government during the closing months of the Kennedy Administration. A few details as to how this "revival" took place may perhaps be useful to students of international relations and international organization.

The decision to revive the High Commissioner idea was triggered by two events in the spring of 1963. In April of that year Marietta Tree, then serving as U.S. Delegate to the Human Rights Commission, sent me an article from the *Manchester Guardian* describing the work of New Zealand's new Ombudsman together with a note asking: "Can this *ever* be suggested for the UN? I recognize political problems here. But couldn't we talk to Senators informally to get their views?" This imaginative suggestion – one of many which the State Department received in those days from this charming and intelligent lady – started mental wheels turning.

The second event, which also occurred in April, was an invitation to participate in a seminar on the International Protection of Human Rights at the end of May in New York under the auspices of the American Jewish Committee. The agenda for that meeting, prepared by the Committee's gifted UN Representative, Mr. Sidney Liskofsky, contained a provocative item entitled "High Commissioner (Attorney-General, or 'Ombudsman') for Human Rights." The mental wheels were now spinning enthusiastically.

Until this moment such attention as I had been able to give to human rights questions had been devoted entirely to getting the Kennedy Administration to reverse the Eisenhower Administration's policy of total opposition to U.S. adherence to human rights conventions. This effort was well on the way toward fruition – the "Kennedy package" consisting of the three Conventions on Slavery, Forced Labor and the Political Rights of Women was sent by the President to the Senate for advice and consent to ratification in July. Now, with the stimulus from Mrs. Tree and the necessity to speak to the agenda prepared by the American Jewish Committee, I began to focus on the High Commissioner idea. Staff work began. We examined the original proposal for a High Commissioner (or Attorney-General)

launched a decade earlier in the UN by Uruguay and the Consultative Council of Jewish Organizations. We considered possible variations of the Uruguayan proposal. My speech to the Human Rights Seminar on May 27 touched the subject only lightly, but in July a number of meetings were held in the State Department on the High Commissioner idea with a view to including it in President Kennedy's speech to the General Assembly in September.

As I expected, the High Commissioner was opposed by almost every regional and functional bureau in the Department of State – for all the obvious reasons. It was argued that a High Commissioner might embarrass our government or some of the totalitarian regimes with which we were allied. It was also argued that the Soviet Union and other governments would oppose it bitterly and that our advocacy of it would get in the way of the *détente* that was beginning to emerge with the Russians after the conclusion of the Test Ban Treaty. Despite this opposition, those of us who favored the idea would probably have succeeded in getting it into the President's speech but for one development we had not foreseen – the opposition of Robert Kennedy and his associates in the Department of Justice. They argued – and from their point of view this was quite understandable – that we should not surface the High Commissioner proposal until the Civil Rights Act, then stalled in Congress, had been enacted. They feared that the creation of such an office at that juncture by the United Nations might add additional fuel to Southern opposition.

We were obliged, therefore, with great disappointment, to put the High Commissioner idea "on ice" for a while. But we did succeed in inserting into the President's speech to the Assembly on September 20 a strong condemnation of human rights violations in the United States, in Eastern Europe, and in South Vietnam. Most important, the President's speech contained the following two sentences:

"Our concern is the right of all men to equal protection under the law – and since human rights are indivisible, this body cannot stand aside when those rights are abused and neglected by any member state."

"New efforts are needed if this Assembly's Declaration of Human Rights, now 15 years old, is to have full meaning."

Just what these "new efforts" might be the President did not say, but on September 26 Mrs. Tree and I were authorized to discuss the High Commissioner with John Humphrey, the able Director of the UN's Human Rights Division. As a result, Humphrey began an examination of the idea within the UN Secretariat.

Then, suddenly, the proposal began to take on momentum of its own.

Non-governmental organizations began asking just what President Kennedy had in mind. In "off-the-record" briefings we told them the High Commissioner idea was "under consideration" but that no decision in the U.S. Government had yet been taken. Some NGOs then decided to move ahead on their own. A meeting to discuss the idea was held at New York University. Jacob Blaustein proposed it in his lecture at Columbia. The World Veterans Federation and other groups prepared a draft resolution. Ambassador Volio of Costa Rica became enthusiastic about the plan. He sought and received the authority of his government to sponsor it in the UN.

As late as the winter of 1964-65, the United States government, despite the passage of the Civil Rights Act, was still unwilling to take any initiative in the matter. But we did manage to get authority for Morris Abram to support a study of the High Commissioner proposal at the Human Rights Commission meeting in March 1965. Then, in September of that year, in his first speech to the General Assembly, ambassador Arthur Goldberg expressed "enthusiastic support" for the Commissioner. At long last, at the meeting of the Human Rights Commission in March 1966, the U.S. Government joined other governments as an active supporter. In 1967, both the Human Rights Commission and the Economic and Social Council voted in favor of the Commissioner. Alas, as of this writing, the General Assembly has yet to act.

This little bit of history suggests at least two interesting things. The first is that the revival of the High Commissioner was encouraged by the growing interest around the world in the Ombudsman. The successful experiment with this office on the national level naturally stimulated interest in its international potentialities.

The second element that emerges from this episode is the significant role played by non-governmental organizations. When the U.S. government, largely for reasons of domestic politics, was unable to translate the High Commissioner idea into political action, the non-governmental organizations took the initiative. After they had developed the proposal on their own and secured the endorsement of Costa Rica and other UN members, the position of those within the United States government who supported the proposal was entirely transformed. It was no longer a matter of asking the United States to take the initiative, but only to support an initiative which others had taken. To the unpersuaded in the bureaucratic establishment one could now say: "The proposal for a High Commissioner is now on the table. Do you really want us to oppose it?" Such are the strange ways of multilateral politics in our time.

Mr. Clark quite rightly sees the High Commissioner as a part of the international political process, as a catalyst for the creation of international customary law, as a promoter of human rights standards – not as a judge or enforcer. Like most proposals for practical next steps toward world order, the idea of the High Commissioner for Human Rights may be attacked as too modest by some and too ambitious by others. Strong opposition from a minority of members has so far prevented affirmative action by the General Assembly. These members may well succeed in blocking action for another few years. But I think they will lose in the end. The High Commissioner for Human Rights is an idea whose time has come. I commend this excellent book to all who would understand its history and, even more important, assess its future potential for international organization and human dignity.

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INTRODUCTION

At its meeting on 6 June 1967 the Economic and Social Council of the United Nations adopted a resolution [1] recommending that the General Assembly adopt a draft resolution establishing a United Nations High Commissioner's Office for Human Rights. The Office would be "so organized within the framework of the United Nations that the High Commissioner will possess the degree of independence and prestige required for the performance of his functions under the authority of the General Assembly." Those functions would be: [2]

> . . . to assist in promoting and encouraging universal and effective respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion, as set forth in the Charter of the United Nations and in declarations and instruments of the United Nations or of the specialized agencies, or of intergovernmental conferences convened under their auspices for this purpose without prejudice to the functions and powers of organs already in existence or which may be established within the framework of measures of implementation included in international conventions on the protection of human rights and fundamental freedoms; in particular:
>
> (a) He shall maintain close relations with the General Assembly, the Economic and Social Council, the Secretary-General, the Commission on Human Rights, the Commission on the Status of Women and other organs of the United Nations and the specialized agencies concerned with human rights, and may, upon their request, give advice and assistance;
>
> (b) He may render assistance and services to any State Member of the United Nations or member of any of its specialized agencies or of the International Atomic Energy Agency, or to any State Party to the Statute of the International Court of Justice, at the request of that State; he may submit a report on such assistance and services with the consent of the State concerned;
>
> (c) He shall have access to communications concerning human rights, addressed to the United Nations, of the kind referred to in Economic and Social

[1] ECOSOC res. 1237 (XLII), E.S.C.O.R., 42nd Sess., Supp. No. 1, 18-19, U.N. Doc. E/4393 (1967). The complete text of the resolution is reproduced in Appendix I.

[2] Id., operative para. 2.

Council resolution 728 F (XXVIII) of 30 July 1959 and may, whenever he deems it appropriate, bring them to the attention of the Government of any of the States mentioned in sub-paragraph (b) above to which any such communications explicitly refer;

(d) He shall report to the General Assembly through the Economic and Social Council on developments in the field of human rights, including his observations on the implementation of the relevant declarations and instruments adopted by the United Nations and the specialized agencies, and his evaluation of significant progress and problems; these reports shall be considered as separate items on the agenda of the General Assembly, the Economic and Social Council and the Commission on Human Rights, and before submitting such reports, the High Commissioner shall consult, when appropriate, any Government or specialized agency concerned, taking due account of these consultations in the preparation thereof.

In carrying out his functions the High Commissioner would be assisted by a panel of expert consultants "appointed by the Secretary-General in consultation with the High Commissioner, having regard to the equitable representation of the principal legal systems and of geographical regions." [3]

The ECOSOC resolution was another step in the continuing and complex process of United Nations efforts towards the furtherance of human rights on the international level.[4] It also marked a significant step in the attempt to establish an Office of High Commissioner, proposals for which have been before the United Nations in various forms since 1947. It did not, however, mean the final triumph of those proposals. When the General Assembly met later in the year it regretted that "consideration of this question had not been possible owing to the heavy programme of work . . ." and decided to give "high priority" to the issue at its 1968 session.[5] A similar resolution was adopted at the 1968 session,[6] dashing the hopes of a number of writers [7] that the creation of the Office might be something concrete to show for Human Rights Year.

[3] Id., operative para. 4.

[4] The best contributions to the discussion of the international law of human rights are: H. Lauterpacht, *International Law and Human Rights* (1950); E. Schwelb, *Human Rights and the International Community* (1964); Symposium on the International Law of Human Rights, 11 *How. L.J.* 257 (1965); Special International Year for Human Rights issues of the *J. Int'l Comm. Jurists*, vol. 8, no. 2 (1967) and vol. 9 no 1 (1968); E. Luard ed., *The International Protection of Human Rights* (1967). Most of the recent literature is noted in Rusis, "The International Protection of Human Rights," 25 *Q.J. Lib. Congress* 244 (1968).

[5] G. A. res. 2333 (XXII) of 18 December 1967, G.A.O.R., 22nd Sess., Supp. No. 16 at 40, U.N. Doc. A/6716 (1967).

[6] G.A. res. 2437 (XXIII) of 19 December 1968, G.A.O.R., 23rd Sess., Supp. No. 18 at 46-7, U.N. Doc. A/7218 (1968).

[7] R. Gardner, *In Pursuit of World Order* 262 (rev. ed. 1966); Etra, "International Protection of Human Rights: The Proposal for a United Nations High Com-

The item was again adjourned at the 1969 session of the Assembly, following a significant debate on the substance of the proposal. The Assembly decided to "give the highest priority to the consideration of this item with a view to the possibility of concluding such consideration at its twenty-fifth session." [8] The possibility failed to become reality and the proposal was again deferred after further debate in 1970 and 1971.

The object of this study is to examine the High Commissioner proposal in its context as a part of the international movement for human rights. Chapter 1 provides the background to the present proposal. It outlines past efforts, especially those of the United Nations, some of the forces that shaped them, and what are felt to be inadequacies in their results. For the suggestions for a High Commissioner result very much from an urge to fill the gaps in the present arrangements. Chapter 2 considers the history of the High Commissioner proposals and tries to show who gave them momentum. Chapter 3 considers the details of the High Commissioner's activities that seem to be encompassed in the loose language employed in the ECOSOC draft. For example, the ways in which he might assist U.N. organs and States; the extent to which he might deal with individual complaints of denial of human rights; the use that he might make of his reports to the General Assembly. The Chapter concludes with some general considerations, the most important of which is that of the extent to which the High Commissioner might be expected to use publicity in his operations and the extent to which he would rely on "quiet diplomacy." Chapter 4 deals with some administrative matters, the appointment and financing of the Office, the High Commissioner's relationship with the Secretary-General and with implementation organs constituted under various international agreements, and the role of the panel of experts mentioned in the draft. Consideration of the latter point opens up the issue of collegiality – why do the supporters of the proposal want a single Commissioner rather than a Commission? Chapter 5 examines the question of the "legality" of the Office and the General Assembly's power to establish it by resolution. The most substantial issues arise in regard to Article 2, paragraph 7, the domestic jurisdiction provisions of the Charter. However, the collegiate argument reappears here in constitutional garb and there is also the issue of individuals as subjects of international law.

missioner," 5 *Colum J. Transnat'l L.* 150, 155 (1966); Korey, "A Global Ombudsman," *Saturday Review,* 12 August 1967 at 20; Macdonald, "The United Nations High Commissioner for Human Rights," 5 *Can. Y.B. Int'l L.* 84, 117 (1967); MacBride, "The Meaning of Human Rights Year," 8 *J. Int'l Comm. Jurists* iii, x (1967).

[8] G.A. res. 2595 (XXIV) of 16 December 1969.

A distinction is commonly drawn between the "promotion" of human rights, the term used in the United Nations Charter,[9] and their "protection." "Promotion" carries with it the connotation of progressive development for the future. "Protection" implies some sort of enforcement procedure to ensure the application of shared standards. The two are not of course completely separable but Chapter 6 discusses the role of the High Commissioner as essentially a law promoter rather than a protector. It grapples with the fact that the High Commissioner would be trying to get states to abide by "non-legal" standards in the Universal Declaration of Human Rights, in other Declarations, and in conventions to which the states in question may not be parties. It suggests that the High Commissioner, in the course of encouraging the application of norms of "international morality" would act as a catalyst for the creation of an international customary law of human rights. Chapter 7 attempts to draw some conclusions. It examines how far the proposal would fill some of the gaps discussed in Chapter 1. It examines also the significance of the creation of the High Commissioner for international law and for international organization, considering in particular the role of the "activist" lone official, and suggests the areas which might be of principal concern to the High Commissioner. Finally the writer turns prophet and discusses the prospects for the adoption of the proposal.

[9] On the unsuccessful efforts to have the term "protection" used in the Charter see Sohn, "A Short History of United Nations Documents on Human Rights" in Commission to Study the Organization of Peace, *The United Nations and Human Rights* 39, 51-2 (1968).

CHAPTER I

INTERNATIONAL HUMAN RIGHTS ACTIVITY

A. PRIOR TO THE UNITED NATIONS

International concern with human rights did not begin with the United Nations. Early efforts were made not by organizations composed of representatives of states but by non-governmental organizations ("NGOs" in United Nations jargon). The earliest of such bodies was probably the Anti-Slavery Society, formed in Britain in 1787.[1] Henri Dunant who conceived the idea of what was to become the Red Cross obtained the support of the private "Geneva Society for the Protection of Public Interests" and used the International Statistical Congress of Berlin in 1863 as an international sounding board which helped to persuade Governments to take the initiatives which led to the first Geneva Conventions of 1864. Obviously enough such activities required for their ultimate success the cooperation of influential Governments. On a number of occasions other than slavery and war victims such cooperation had been forthcoming on an *ad hoc* basis before the first general international organization, the League of Nations, was formed in 1919.[2] No doubt some such state interventions were conceived primarily in a genuine spirit of concern for the rights of man and some (such as British and American support for independence in Latin America) involved less altruistic motives.

[1] The best short account of the efforts by NGOs is Archer, "Action by Unofficial Organizations on Human Rights" in E. Luard ed., *The International Protection of Human Rights* 160 (1967). There is much learning on the subject in J. Lador-Lederer, *International Nongovernmental Organizations and Economic Entities* (1963). The Anti-Slavery Society is still active: see the Report of the U.N.'s Special Rapporteur on Slavery who noted his "indebtedness to this great Society" despite a disappointing response from other NGOs, U.N. Doc. E/4168 Add. 2 at 8 (1966).

[2] E.g. successful pressures for an alleviation of King Leopold's personal rule in the Congo: Goldie, "The Transvaluation of Values in Contemporary International Law," 53 *Iowa L. Rev.* 358, 359-60 (1967).

The League of Nations

The first efforts to put intergovernmental cooperation in promotion or protection of human rights on other than an *ad hoc* basis were the Mandates and minorities protection arrangements of the League. Article 22 of the Covenant of the League provided that in the former German and Turkish colonies "there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization." The notion of a "sacred trust," largely as a ploy to make colonialism more respectable, went back at least to the "scramble for Africa" in the 1880s.[3] And, as one observer,[4] sympathetic to the work of the League has conceded, "There is no doubt that to some extent the mandates system was a rationalization of the pre-existing colonial system, designed to make it more acceptable to contemporary eyes, especially in the United States, but not in any major essential different from that system." Nevertheless he suggests that "The Council of the League and the Permanent Mandates Commission, in supervising the administration of these territories, certainly paid lip service to, and were perhaps genuinely concerned over, the welfare of the inhabitants of those territories." A feature of the Mandates system was that procedures, albeit rudimentary,[5] were instituted by the League to supervise the mandatory powers.

Also as part of the peace settlement, obligations to respect minority rights were undertaken (or imposed upon) most of the new states carved out of the Austro-Hungarian Empire, Turkey and the Balkan states. These were all treaty obligations. Albania, Lithuania, Latvia, Estonia and Iraq were required to undertake similar obligations upon admission to the League but the form was different – the state made a "Declaration" to the effect before the League. Although Finland was not so required, she entered into a special "Undertaking" in respect of the Aaland Islands. When Upper Silesia was divided between Germany and Poland they signed a Convention applicable to that area alone. Other special regimes were

[3] Louis, "African Origins of the Mandates Idea," 19 *Int'l Org.* 20 (1965). The classics on Mandates are Q. Wright, *Mandates Under the League of Nations* (1930) and D. Hall, *Mandates, Dependencies and Trusteeships* (1948).

[4] Luard, "The Origins of International Concern over Human Rights," in Luard, *op. cit. supra* note 1 at 19. See also Hudson, "Australia's Experience as a Mandatory Power," 19 *Aust. Outlook* 35 (1965).

[5] A big drawback was that complaints had to go through the Administering Authority and would- be complainants were deterred by fear of reprisals, Parson, "The Individual Right of Petition: A Study of Methods Used by International Organizations to Utilize the Individual as a Source of Information on the Violations of Human Rights," 13 *Wayne L. Rev.* 678, 682 (1967).

created for Memel and Danzig. The obligations were placed under the guarantee of the League. A member of the Council of the League could bring infringements of the obligations to the notice of the Council which could take such action as it thought fit and, in the last resort, refer the dispute for settlement to the Permanent Court of International Justice.[6] Committees of Three were formed from among the Members of the League Council to deal with petitions claiming breaches of the treaties.[7] The arrangements were hardly a great success, although they could well have achieved more if attempts to generalize them [8] had succeeded. In particular, with the limited exception of Upper Silesia, Germany where the need proved to be greatest was not bound by any treaty. And states subject to obligations could always claim that they were being discriminated against. Nevertheless, along with the mandates system, the minorities guarantees represented the major League contribution to the protection of human rights.

The League High Commissioners for Refugees

One further aspect of the work of the League deserves mention since it introduced the term "High Commissioner" [9] to the area of human rights – the effort to repatriate or re-settle refugees. This was carried out under the auspices of two High Commissioners whose Offices were combined shortly before the War in 1939. The first was the Director of the Nansen International Office for Refugees which dated from 1921 and was concerned with Russians, Armenians and some smaller groups of refugees. The second was a League official appointed in 1936 as High Commissioner for Refugees coming from Germany. Both succeeded in carrying out a large amount of valuable work in the field.[10]

[6] On the procedures see I. Claude, *National Minorities, An International Problem* 22-28 (1955); J. Stone, *International Guarantees of Minority Rights* esp. at 8-13 (1932).

[7] The Committees had, however, no power to take concrete action on specific complaints: see Stone, "Procedure Under the Minorities Treaties," 26 *Am. J. Int'l Law* 502, 504 (1932): "The petition ... is not a legal document but a piece of information. There is no difference, juridically speaking, between a petition submitted by a minority organization and one submitted by an individual or by an international sectarian or other organization; or between either of these and the newspaper cuttings which the Minorities Section [of the League Secretariat] constantly collects and classifies. All are information, pure and simple ..."

[8] See e.g. Calderwood, "The Proposed Generalization of the Minorities Regime," 28 *Am. Pol. Sci. Rev.* 1088 (1934).

[9] See further on the term High Commissioner, *infra* pp. 46, 57.

[10] See J. Simpson, *The Refugee Problem* esp. 191-226 (1939).

B. THE UNITED NATIONS AND HUMAN RIGHTS

The Charter

Although attempts by delegations such as that of Panama to have an international bill of rights included in the United Nations Charter were unsuccessful,[11] the Charter in fact contains seven references to human rights.[12] The success in obtaining the references was largely due to the activities of representatives of some 42 NGOs who attended the San Francisco Conference as consultants to the United States Delegation.[13] The first reference is in the Preamble which reads, inter alia, "We the Peoples of the United Nations determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations large and small... have resolved to combine our efforts to accomplish these aims." The second reference is in Article 1, paragraph 3 of the Charter which lays down as one of the "Purposes" of the Organization "To achieve international cooperation in solving problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." A third reference is contained in Article 13 which directs the General Assembly to initiate studies and make recommendations for the purpose, inter alia, of "promoting international cooperation in the economic, social, cultural, educational and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." The fourth reference is in Article 55 which pledges the United Nations to the promotion of various matters which include "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." With Article 55 must be read Article 56 which places an ill-defined obligation on Members to "take joint and separate action in cooperation with the Organization for the achievement of the

[11] See 6 U.N.C.I.O. Docs. 705 (1945).

[12] For a careful study of the drafting of the Charter provisions see Huston, "Human Rights Enforcement Issues of the United Nations Conference on International Organization," 53 *Iowa L. Rev.* 272 (1967).

[13] See J. De Groote, *American Private Organizations and Human Rights* (unpub. M.A. thesis, Stanford University, 1954) esp. Chapter 6; L. White, *International Non-governmental Organizations; Their Purposes, Methods and Accomplishments* 262 (1951); J. Blaustein, *Human Rights – A Challenge to the United Nations and to Our Generation* 6-7 (Dag Hammarskjold Memorial Lecture, Columbia University December 4, 1963), reprinted in A. Cordier and W. Foote, eds., *The Quest for Peace: The Dag Hammarskjold Memorial Lectures* 315, 318-19 (1965).

purposes set forth in Article 55." The fifth reference is in Article 62, paragraph 2 which provides that the Economic and Social Council "may [14] make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all." [15] Sixth is that in Article 68 which requires ECOSOC to "set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions." Finally there is the reference in the Chapter of the Charter dealing with the International Trusteeship System [16] which succeeded the League Mandates system. Under Article 76 one of the "basic objectives" of the system is "to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. . . ."

These are the principal provisions dealing with human rights in the Charter although a number of others which are also relevant will be mentioned in the course of this study. One in particular is Article 2, paragraph 7 which, on one interpretation,[17] takes away most of what the provisions just mentioned appear to give. It provides that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." Article 2, paragraph 7 will be considered in more detail later.[18] Suffice it to record at this point that the provision is one manifestation of the way in which the facts of international life ensured that the Charter was neither as clear nor as far-reaching as many would have liked. As one commentator [19] has remarked:

> The relevance to human rights of the political character of the U.N. appeared, of course, even in San Francisco and is reflected in the compromises of the Charter. Idealistic goals are enshrined as purposes of the U.N., and members undertake to cooperate in their promotion. Political realities and national reluctances are protected by lack of definiteness and definition, by hortatory phrases instead of commitment, by the ultimate availability of "domestic jurisdiction" to dilute obligation and bar scrutiny.

[14] Cf. the use of "shall" in the case of the General Assembly under Article 13.

[15] The Council has broadly interpreted the power in Article 62 to "make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters . . ." to include reports and studies on human rights.

[16] Article 73 of the Charter, the Declaration on Nonselfgoverning Territories (i.e. those not under the Trusteeship System) makes no specific reference to human rights.

[17] H. Kelsen, *The Law of the United Nations* 100 (1950).

[18] *Infra* Chapter 5.

[19] Henkin, "The United Nations and Human Rights," 19 *Int'l Org.* 504, 510 (1965).

Machinery

Article 7 of the Charter mentions six "principal organs" of the U.N. Each of them performs functions in the field of human rights. Mention has already been made of two of these bodies – the General Assembly and ECOSOC. A third is the Trusteeship Council which supervises the Trusteeship provisions of the Charter.[20] Most human rights matters that come before the General Assembly are referred to one of its Committees – the Third (Social, Humanitarian and Cultural), the Fourth (Trusteeship, including nonselfgoverning),[21] the Special Political Committee and occasionally the Second (Economic and Financial) and the Sixth (Legal). Another Charter body with a potential interest in human rights is the Security Council which may become involved under Chapter VII of the Charter if it concludes that a human rights situation constitutes "a threat to the peace, breach of the peace, or act of aggression . . ." [22] The only specific action taken by the Security Council in a case turning mainly on a question of human rights is that imposing sanctions against Rhodesia.[23] The Council has on occasion adopted resolutions of a human rights nature which fall short of enforcement action. A recent example was its resolution of 27 September 1968 [24] expressing concern for the safety, welfare and security of the inhabitants of Israeli-occupied Arab territories. A further Charter body which performs functions in relation to human rights is the Secretariat whose Division of Human Rights is closely identified with the paper work on most of the Organization's activities in this area and undoubtedly its views are influential on occasions in shaping the actions taken by political organs.[25]

[20] See generally, C. Toussaint, *The Trusteeship System of the United Nations* (1956); G. Thullen, *Problems of the Trusteeship System* (1964). "Human rights" in this context involves some concentration on the "right of self determination," but not exclusively so: see Castles, "The United Nations and Australia's Overseas Territories," in D. O'Connell ed., *International Law in Australia,* 368, 382-83 (1965).

[21] This Committee even hears petitioners on occasion; see Carey, "The United Nations' Double Standard on Human Rights Complaints," 60 *Am. J. Int'l Law* 792, 795-96 (1966).

[22] Charter Art. 39.

[23] S/RES./232 of 16 December 1966, S/RES./253 of 29 May 1968. See Cefkin, "The Rhodesian Question at the United Nations," 22 *Int'l Org.* 649 (1968); McDougal and Reisman, "Rhodesia and the U.N.: The Lawfulness of International Concern," 62 *Am. J. Int'l L.* 1 (1968); Rao, "The Rhodesian Imbroglio and the U.N.," 6 *Ind. J. Int'l L.* 233 (1966).

[24] S/RES/259. For the possible future application of Chapter VII in other parts of Southern Africa see W. Korey, *The Key to Human Rights – Implementation (Int'l Concil.* No. 570, 1968) 30-31.

[25] It is hard to document this general impression. Thullen, *op. cit. supra* note 20,

Although most of the human rights Conventions drafted under the auspices of the United Nations contain provisions according to which any dispute arising under such a convention relating to its interpretation or application may be referred to the International Court of Justice at the request of any of the parties to the dispute,[26] no such cases have gone before the Court. However, the Court has had before it, particularly by way of advisory opinion, a number of cases dealing with issues of human rights. Best known are the advisory opinions [27] and abortive contentious proceedings [28] relating to South Africa's League of Nations Mandate over South West Africa and that country's failure to bring the territory under the Trusteeship system and the advisory opinion on Interpretation of Peace Treaties with Bulgaria, Hungary and Roumania.[29]

However, much of the United Nations discussion and action has taken place not in the "principal organs" but in the Commission on Human Rights formed by the Economic and Social Council in 1946 pursuant to Article 68 of the Charter,[30] and in another Commission, a Sub-Commis-

who has some comments about the role of the Secretariat in drafting reports of Visiting Missions to Trust Territories, concludes at 125 that "Where lack of interest or knowledge of particular questions prevailed, the Secretariat played a correspondingly larger role in the report or resolution presented."

[26] Provisions to this effect appear in: Convention on the Prevention and Punishment of the Crime of Genocide, 1948; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949; Convention Relating to the Status of Refugees, 1951; Convention on the International Right of Correction, 1952; Convention on the Political Rights of Women, 1952; Slavery Convention Signed at Geneva on 25 September 1926 and Amended by the Protocol Opened for Signature or Acceptance at the Headquarters of the United Nations on 7 December 1953; Convention Relating to the Status of Stateless Persons, 1954; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956; Convention on the Nationality of Married Woman, 1957; Convention on the Reduction of Statelessness, 1961; International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (only after special procedures on Convention have been tried and failed); Protocol Relating to the Status of Refugees, 1966. The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962 requires the consent of all parties to the dispute for a reference to the Court.

[27] [1950] I.C.J. 128; [1955] I.C.J. 67; [1956] I.C.J. 23.

[28] The South West Africa Cases (Second Phase) [1966] I.C.J. 5; and see Falk, "The South West Africa Cases: An Appraisal," 21 *Int'l Org.* 1 (1967).

[29] [1950] I.C.J. 65. For a list of other human rights cases before the court see Fawcett, "The Protection of human rights on a universal basis: recent experience and proposals," in A. Robertson ed., *Human Rights in National and International Law* 289, 292-3 (1968).

[30] For discussions of the work of the Commission from somewhat different viewpoints see Hoare, "The UN Commission on Human Rights," in Luard, *op. cit. supra* note 1 at 59 and Resich, "The U.N. Commission on Human Rights," 15 *Rev. Contemp. L.* 27 (1968).

sion and a number of *ad hoc* Committees formed either by ECOSOC or the General Assembly. To the Commission on Human Rights ECOSOC quickly added the Commission on the Status of Women,[31] the Sub-Commission on the Prevention of Discrimination and Protection [32] of Minorities, and a Sub-Commission on Freedom of Information of the Press. The latter was however, abolished as from March 1952 "... partly because it had gained the animosity of professional journalists of the West by its insistence that freedom and responsibility go together.... One result of this is the highly unsatisfactory record of the United Nations in relation to the problem." [33] The main current *ad hoc* bodies with an interest in human rights are: the Special Committee on Colonialism (the "Committee of 24") [34] formed in 1961 to supervise the implementation of General Assembly Resolution 1514 (XV) of 1960 which called for "immediate steps ... to transfer all powers" to colonial peoples and asserted "the need for ... universal respect for, and observance of, human rights"; and the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa, formed in 1962.[35] The Special Committee was instrumental in having the Human Rights Commission establish in 1967 an Ad Hoc Group of Experts on South African Prison Conditions.[36] Subsequently the jurisdiction of the Group was extended to prison conditions in Southern Rhodesia and the Portuguese African Territories and later still it was empowered to investigate infringements of and restraints on trade union rights in all of these areas. An even more recent addition

[31] On the work of this Commission see Humphrey, "Human Rights, the United Nations and 1968," 9 *J. Int'l Comm. Jurists* 1, 4-6 (1968).

[32] Despite the promise implicit in the word "protection" in the title the Sub-Commission's activities in respect of minorities have been of the "promotional" kind and indeed it has devoted more of its energies to the "prevention of discrimination": see J. Lador-Lederer, *International Group Protection* 365-69 (1968).

[33] Humphrey, *op. cit. supra* note 31 at 4.

[34] The full name of the Committee is "the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples." The Committee's activities in 1970 are reported in U.N. Doc. A/8023 and Adds. See generally Carey, *op. cit. supra* note 21 at 796-98; Parson, *op. cit. supra* note 5 at 678, 698-701. The Committee took over activities formerly carried on by a Special Committee on South West Africa and a Committee on Information from Nonselfgoverning Territories. As to the latter see Sud, "The Committee on Information from Nonselfgoverning Territories: Its Role in the Promotion of Self-Determination of Colonial Peoples" 7 *Int'l Studies* (N. Delhi) 311 (1965).

[35] See Parson, *op. cit. supra* note 5 at 701, and the Committee's most recent Report U.N. Doc. A/8022 and Add. 1 (1970).

[36] Comm. on Human Rights res. 2 (XXIII) of 6 March 1967, E.S.C.O.R., 42nd Sess., Supp. No. 6 at 76-78, U.N. Doc. E/4322 (1967). See generally J. Carey, *U.N. Protection of Civil and Political Rights* 95-126 (1970).

to the list of *ad hoc* human right bodies is the Special Committee formed during the 1968 session of the General Assembly [37] to investigate the destruction of homes of the Arab civilian population inhabiting the areas occupied by Israeli forces. This Committee had a general mandate to consider possible breaches of the Universal Declaration of Human Rights and of the Geneva Conventions of 1949.

C. ACHIEVEMENTS OF THE UNITED NATIONS

1. The definition of international standards and the problem of enforcement

A great deal of the United Nations activity in the field of human rights has consisted of an attempt to spell out in some detail the substantive content of what the Charter vaguely terms "human rights and fundamental freedoms" and to urge governments to give effect to them. This effort has proved considerably more successful than the related effort of creating effective techniques to ensure that governments in fact do something practical.

Three formal techniques are used by the United Nations in the course of defining standards, treaties, declarations and recommendations. It is necessary to make some juridical distinction between the three at this point, in order to prepare for some of the discussion in later Chapters.

For present purposes we may accept that there is such a thing in international affairs as "law," described by one recent writer as "behaviour as to which there is – on the part of the actor, the victim, and others – a sense of obligation, and a sense of violation when it fails." [38] "Law" is what an international tribunal might apply in the unlikely event that disputants entrusted their dispute to it.[39] It is "defined" somewhat ambiguously in terms of its "sources" [40] in Article 38 of the Statute of the International Court of Justice:

[37] G.A. res. 2443 (XXIII) of 17 December 1968, G.A.O.R., 23rd Sess., Supp. No. 18 at 50, U.N. Doc. A/7218 (1968).

[38] L. Henkin, *How Nations Behave* 15n. (1968). For an excellent attempt at a somewhat more sophisticated description of the nature of international law see Schachter, "Towards a Theory of International Obligation," 8 *Va. J. Int'l L.* 300 (1968).

[39] Cf. the little use made of the I.C.J. in human rights matters, *supra* p. 11 and Henkin, *op. cit. supra* note 38 at 37.

[40] See Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law," *Symbolae Verzijl* 193 (1958).

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, [which provides that "The decision of the Court has no binding force except between the parties and in respect of that particular case"] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

While, in the absence of a clearly defined international legislature, executive or judiciary, it may be possible to argue in a particular instance whether a particular rule is one of law, disputes as to whether there is such a thing as international law are purely verbal.[41] Much ink has been wasted in quibbles about whether international law may be "properly" called "law" in the absence of sanctions to be attached to its breach [42] or in attempts to torture the facts of international life in order to show that it has sanctions such as war or reprisals.[43] The pigeon-holes provided by Article 38 of the Statute of the Court represent reasonably satisfactory criteria for identifying a particular "rule" as one of "law."

Against this somewhat dogmatically expressed background it is possible to make a fairly simple distinction between treaties (whether called covenants, agreements, conventions or protocols) declarations and recommendations. Treaties are meant, when ratified (with a few exceptions that are effective upon being entered into), to involve legally binding obligations. Declarations, although adopted in a more formal way than recommendations, and recommendations are simply resolutions of the General Assembly and as such do not give rise to legal obligations. But this simple distinction is complicated by a number of factors. In the first place it overlooks the role that unratified treaties and United Nations resolutions play in the development of international customary law. This will be discussed in Chapter 6.[44] Second, it to some extent simplifies the problem of understanding just what it means to say that a treaty is "binding" on states. In the domestic context, we may normally fall back on the position that that is law which may be enforced by state officials, although even that ex-

[41] Williams, "International Law and the Controversy Concerning the Word 'Law,'" 22 *Brit. Y. B. Int'l L.* 146 (1945).

[42] See e.g. J. Austin, 1 *Lectures on Jurisprudence* 231-32 (4th ed., ed. R. Campbell 1873).

[43] See H. Kelsen, *Pure Theory of Law* 320-23 (1967) and the strictures cast on such efforts in Fitzmaurice, "The Foundations of the Authority of International Law and the Problem of Enforcement," 19 *Mod. L. Rev.* 1, 2-6 (1956).

[44] *Infra* pp. 143-148.

planation does not fully explain why Governments comply with municipal law decisions against them.[45] But, as we have seen,[46] states are reluctant to refer their disputes as to law to international machinery. And, as Dr. Schwelb has pointed out:

[I]n the international community as it exists today, the practical difference between a legally enforceable treaty and a pronouncement which is supposed to operate in the moral and political rather than the legal field is not as great as would be the case in a more developed legal system.[47]

It will be suggested in Chapter 6 [48] that there are pressures on states to comply with "pronouncements" which are "supposed to operate in the moral and political field" similar to those pressures causing compliance with law. It may well be, in the light of what has just been said, that the real distinction between the three different types of instrument used by the United Nations is simply one of the degree of pressure for compliance and the degree to which states consider themselves as obligated – greatest in the case of treaties, least in the case of recommendations.

At this point it is necessary to say a little about some of the particular examples of each category.

Recommendations are the least important of the three for our present purposes but a fairly recent example will show the kind of thing involved. In the Annex to its resolution suggesting possible programmes for 1968, Human Rights Year,[49] the Assembly recommended that during the year members undertake, inter alia,

. . . to review their national legislation against the standards of the Universal Declaration of Human Rights and other declarations and instruments of the United Nations and to consider the enactment of new, or the amending of existing, laws to bring their legislation into conformity with the principles of the Declaration and other declarations and instruments of the United Nations relating to human rights.

[45] Fisher, "Bringing Law to Bear on Governments," 74 Harv. L. Rev. 1130, 1132-4 (1961).

[46] *Supra* pp. 9-11. See also *infra* pp. 19-20. While not perfect there is nevertheless a high degree of compliance with international law: Henkin, *op. cit. supra* note 38 *passim* (1968).

[47] E. Schwelb, *Human Rights and the International Community* 55 (1964). Schwelb discusses in this context the impossibility of "enforcing" the post-World War II Peace Treaties on human rights in the face of the refusal of the states "bound" by them to cooperate in the appoinment of the machinery contemplated in the treaties. For some observations on the difficulty of distinguishing "law" and "non-law" even in the domestic setting see M. Barkun, *Law Without Sanctions* 95-6 (1968).

[48] *Infra* pp. 138-142.

[49] G.A. res. 2081 (XX) of 20 December 1965, Annex II B. paras. 1 and 2, G.A.O.R. 20th Sess., Supp. No. 14 at 44-5, U.N. Doc. A/6014 (1965).

... to establish or refine ... their national machinery for giving effect to the fundamental rights and freedoms. For example, arrangements ... to enable groups of persons to bring before independent national tribunals any complaints they may have concerning the violation of their human rights and obtain effective remedies....

There have been eight formal human rights Declarations of which the most important are the Universal Declaration of Human Rights of 1948 and the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960.[50] The others are the 1959 Declaration on the Rights of the Child, the 1962 Declaration on Sovereignty over Natural Wealth and Resources, the Declaration on the Elimination of All Forms of Racial Discrimination (1963), the Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding Between Peoples (1965), The Declaration on Territorial Asylum (1967) and the Declaration on the Elimination of Discrimination Against Women of the same year.[51]

UNITAR, the United Nations Institute for Training and Research, in a paper prepared for the 1968 Teheran Conference on Human Rights,[52] listed, as of 26 March 1968, sixteen multilateral treaties of varying scope in the field of human rights adopted by the United Nations in the past two decades.[53] All these treaties were adopted either by the General Assembly or at international conferences convened by the Organization. The voting records show that most of them were approved by unanimous or near unanimous vote. Yet, as the UNITAR paper recorded,[54] when it comes to ratification or accession, only a minority of states are prepared to act. By 31 December 1967, the total number of acceptances of all human rights treaties was 459, about 21.3 per cent. of the maximum attainable number. Only seven states had accepted a majority of the sixteen treaties; 59 had accepted either two or less than two; of them, thirty accepted two, fifteen accepted one and fourteen accepted none. An obvious holdout from all

[50] See discussion in Emerson, "Colonialism, Political Development, and the U.N.," 19 *Int'l Org.* 484 (1965) and *supra* p. 12.

[51] The "Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages" (1965) amounts to a Declaration despite the difference in terminology. ILO and UNESCO commonly use the term "Recommendation" for their equivalents of the General Assembly's Declarations.

[52] U.N. Doc. A/CONF. 32/15 at 3 (1968).

[53] Those in note 26 *supra* plus the 1966 Covenants on Economic, Social and Cultural Rights on Civil and Political Rights and the Optional Protocol to the Covenant on Civil and Political Rights. To these must now be added the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968 (which, incidentally, has no "enforcement" procedures at all).

[54] U.N. Doc. A/CONF. 32/15 at 4 (1968).

but two of the conventions [55] was the United States,[56] but it was equally obviously not alone.[57] The figures for ratifications and accessions received a slight fillip during Human Rights Year [58] but encouraging states to become parties to human rights treaties is still a significant problem.

Lack of adherence to instruments is one problem. Another is the "fact that in contemplating the World at large, one does not, as yet, find a high positive correlation between national records of ratification of human rights treaties and parallel records of human rights observance and practice." [59] For this reason the search for effective enforcement procedures goes on.

2. *Enforcement procedures in the U.N. human rights treaties*

To date the most comprehensive efforts to spell out procedures have been in the 1965 Convention on the Elimination of Racial Discrimination which came into effect during 1969, and the International Covenants and Optional Protocol adopted by the General Assembly in 1966.[60] The 1965 Convention provides for the establishment of a Committee on the Elimination of Racial Discrimination and *ad hoc* Conciliation Commissions. The Committee, comprising eighteen members elected from the ratifying powers, will consider reports on the legislative, judicial, administrative or other measures States Parties have adopted which give effect to the provisions of the Convention; it will make general [61] recommendations and suggestions based on an examination of those reports.[62] Of potentially

[55] The 1926 (as amended) and the 1956 Slavery Conventions.

[56] R. Gardner, *In Pursuit of World Order* 250-4 (rev. ed., 1966); M. Konvitz, *Expanding Liberties* 353-67 (1966). The ratification of the Supplementary Slavery Convention in 1967 and of the 1951 Convention on the Status of Refugees and its 1966 Protocol in 1968 are perhaps signs of a new policy.

[57] The writer's country, New Zealand, had ratified five of the sixteen and signed two others. The best scorers were Yugoslavia, eleven, and Norway, ten.

[58] Twenty-nine states contributed a total of 37 ratifications or accessions: see U.N. Doc. E/CN.4/907/Rev. 3 (1969).

[59] Statement by the International League for the Rights of Man, U.N. Doc. E/CN. 4/NGO/140 (1966). See to the same effect Schwelb, *op. cit. supra* note 47 at 74.

[60] By September 1970 the Covenants had been ratified by only 8 States each and the Protocol by 4: U.N. Doc. A/8071 (1970).

[61] The term "general recommendations" in this and the 1966 treaties obviously places serious limits on the right to comment on developments in particular states.

[62] On the significance of the reporting procedures under this Convention and the 1966 Covenants see Gormley, "The Use of Public Opinion and Reporting Devices to Achieve World Law: Adoption of ILO Practices by the U.N.," 32 *Albany L. Rev.* 273, 292-93 (1968). On the 1965 Convention see Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," 15 *Int'l & Comp.*

greater significance is its power to consider communications from individuals or groups of individuals within the jurisdiction of States Parties which have recognized the jurisdiction of the Committee to do so [63] and to forward to the General Assembly suggestions and general recommendations concerning such communications. The Committee will also co-operate with various United Nations bodies in dealing with petitions from nonselfgoverning territories. Finally it will have the function of conciliating complaints by one contracting state or states against another. Upon receipt of a complaint the Committee will transmit it to the party concerned which must reply within three months. If the dispute is not adjusted to the satisfaction of one or more of the parties to it, either or any of them may refer it back to the Committee. An *ad hoc* Commission would then be appointed. It would make available its good offices and present a report embodying its findings of fact relevant to the issue between the parties. The report would contain such recommendations as the Commission may think fit for the amicable solution of the dispute. This report would be transmitted to the parties to the dispute and, eventually, to the other parties to the Convention, but there will be no further enforcement procedures if no settlement based on respect for the Covenant is reached at this point.

The two International Covenants of 1966 are an outgrowth of the Universal Declaration of Human Rights. As soon as it had finished work on the Declaration the Commission on Human Rights set to work on developing enforceable provisions similar to those in the Declaration. It was decided to embody them in two different instruments since it was felt that the enforcement procedures appropriate to economic, social and cultural rights could well be different from those appropriate to civil and political rights.[64] Thus the Covenant on Economic, Social and Cultural Rights relies entirely on reporting procedures and utilizes existing United Nations machinery. The parties undertake to submit reports to the Secretary-General on measures adopted and progress made. The Specialized Agencies will also provide certain material and the Secretary-General will transmit all the material to ECOSOC for consideration. ECOSOC in turn may submit to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties

L.Q. 996 (1966). See also Newman, "Ombudsmen and Human Rights: the New U.N. Treaty Proposals," 34 *U. Chi. L. Rev.* 951 (1967) and Luini del Russo, "International Law of Human Rights: A Pragmatic Appraisal," 9 *Wm & Mary L.Rev.* 749 (1968).

[63] At the time of writing no states have accepted this right of individual petition.

[64] Hoare, *op. cit. supra* note 30 at 59, 66-7; Schwelb, "Some Aspects of the Measures of Implementation of the International Covenant on Economic, Social and Cultural Rights," 1 *Rev. des Droits de l'Homme* 363, 363-4 (1968).

and the Specialized Agencies. ECOSOC may also transmit the reports to the Commission on Human Rights "for study and general recommendation, or, as appropriate, for information."

The Covenant on Civil and Political Rights, on the other hand, establishes special machinery similar to that in the Racial Discrimination Convention. An eighteen member Human Rights Committee is to be formed to consider reports from states. It is to transmit its reports and such general comments as it may consider appropriate to the States Parties. Under Article 41 of the Covenant a State Party may declare that it recognizes the competence of the Committee to receive and consider "communications" (the U.N. euphemism for complaints or petitions) to the effect that another state party feels that it is not fulfilling its obligations under the Covenant. The Committee will make its good offices available and, if this fails, it may, with the consent of the parties concerned appoint an *ad hoc* Conciliation Commission. If an amicable settlement is reached the Commission is to confine its report to a brief statement of the facts and of the solution reached. If a solution is not reached, the report is to contain its findings on all questions of fact relevant to the issues between the parties concerned, and its views on the possibility of an amicable settlement of the matter. The report is also to contain the written submissions and a record of the oral submissions made by the parties concerned. When such a report is made the parties must within three months notify the Committee whether they accept the contents of the report. No further procedures are contemplated if there is still no settlement.

Much disappointment has been expressed with the complaint procedures.[65] For one thing "conciliation applied to human rights is somewhat self-contradictory in that it suggests that, despite their sacred and inviolable nature, human rights can be 'negotiated'." [66] Further, state against state procedures have not often been utilized in the past. One reason is that states are reluctant to complain against others for fear of directing attention to the skeletons in their own cupboards, but the reluctance goes even deeper than that. Even when they have been used, it has often been for

[65] See e.g. Capotorti, "The International Measures of Implementation Included in the Covenants on Human Rights," in A. Eide and A. Schou eds., *International Protection of Human Rights* 131 (1968).

[66] Vasak, "National, Regional and Universal Institutions for the Promotion and Protection of Human Rights," 1 *Rev. des Droits de l'Homme* 165, 175 (1968). And note the comment by Bilder, "Rethinking Human Rights: Some Basic Questions" [1969] *Wisc. L.Rev.* 171, 209: "Wide resistance to strong implementation may be only an outward manifestation of an even broader nervousness and low sense of obligation to human rights convention commitments." Carey, *op. cit. supra* note 36 at 70-83 is hopeful for the prospects of negotiation in combination with other efforts.

political motives not necessarily directly related to the particular allegations involved.[67] These problems may be avoided if a state becomes party to the Optional Protocol. A State Party to the Covenant on Civil and Political Rights that adheres to the Protocol recognizes the competence of the Committee instituted under the Covenant to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that party of any of the rights in the Covenant. The Committee is to consider inadmissible any communication which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant. Any admissible cases are to be submitted to the state concerned. Within six months it must submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it. If the problem is not resolved the Committee is to consider the communication in the light of all written information (there is no provision for oral presentation or the examination of witnesses) made available by the complainant or the state. It is then to forward its views to the state and to the individual. If the state takes no action at this stage the matter rests.

Although the Convention on Racial Discrimination has now entered into force and its machinery been set up, progress in ratification so far suggests that it will be many years before the Covenants and the Optional Protocol come into force. The progress made by the United Nations in developing enforceable treaty provisions is thus disappointing, especially when compared with that made by two regional systems (the European Convention on Human Rights [68] and the Inter-American Commission on Human Rights) [69] and one of the Organization's Specialized Agencies, the

[67] E.g. the I.L.O. proceedings Ghana v. Portugal and the retaliatory action Portugal v. Liberia discussed in E. Landy, *The Effectiveness of International Supervision. Thirty Years of I.L.O. Experience* 175-76 (1966). See further on the dangers of state versus state complaints Hoffmann, "Implementation of International Instruments on Human Rights," 53 *Proc. Am. Soc. Int'l L.* 235, 236 (1959) and *infra* pp. 41-42.

[68] See e.g. "The European Convention on Human Rights," (*Int'l & Comp. L.Q.* Supplementary Publication No. 11, 1965); J. Fawcett, *The Application of the European Convention on Human Rights* (1969); Buergenthal, "Proceedings Against Greece Under the European Convention on Human Rights," 62 *Am. J. Int'l L.* 441 (1968).

[69] See e.g. Sandifer, "Human Rights in the Inter-American System," 11 *Howard L.J.* 508 (1965); Anna Schreiber, *Inter-American Commission on Human Rights* (1969); Scheman, "The Inter-American Commission on Human Rights," 59 *Am. J. Int'l L.* 335 (1965); *American Convention on Human Rights* (text in 9 *Int'l Leg. Mat.* 673 (1970)).

ILO.[70] It is not proposed to discuss these at this point, but reference will be made to their procedures where relevant in following Chapters.

3. *Other techniques to promote or protect human rights*

The gradual efforts leading to the Covenants have not been the only efforts by the United Nations in the past 20 years and some of the Organization's other activities will be discussed in the following sections.

(a) Communications, complaints or petitions

An important question in any assessment of the achievement of the United Nations is what happens to the thousands [71] of complaints or petitions which annually reach that body. The short answer is that in the majority of cases practically nothing happens to them. In February 1947 the Commission on Human Rights laid down a general rule that it "recognizes that it has no power to take any action in regard to any complaints concerning human rights." The Commission's decision was immediately characterized by a leading authority on human rights as amounting to "a denial of the effective right of petition and to an abdication of the crucial function of the United Nations in this respect." [72] Nevertheless ECOSOC confirmed the decision in August 1947 and reaffirmed its decision in 1959 when it adopted the resolution which currently governs the procedure to be followed with such communications, resolution 728 F (XXVIII) of 30 July 1959.[73] In that resolution ECOSOC requested the Secretary-General:

2. (a) To compile and distribute to members of the Commission on Human Rights before each session a nonconfidential list containing a brief indication

[70] See e.g., C. Jenks, *Human Rights and International Labour Standards* (1960); Landy, *op. cit. supra* note 67.

[71] An experienced representative, Mr Ganji of Iran, claimed in 1967 that 250,000 communications had been received since 1945: U.N. Doc. E/CN.4/SR.967 (1967). There are no official figures available.

[72] H. Lauterpacht, *Preliminary Report for the International Law Association on Human Rights, the Charter of the U.N. and the International Bill of the Rights of Man* (U.N. Doc. E/CN.4/89 at 16 (1948)). See also id., at 18: "There is no legal justification for the view, formally recorded in the Report of the Commission and confirmed by the Economic and Social Council, that it has no power to take action in the matter of violations of human rights brought before it. These bodies, and in particular the Commission on Human Rights, are not only entitled to take such action. By the express and implicit terms of the Charter they are bound to do so." (His specific references were to Articles 55 and 68.) For a recent suggestion that the question is still open to reconsideration see comments by Martin in Robertson ed., *op. cit. supra* note 29 at 319.

[73] E.S.C.O.R., 28th Sess., Supp. No. 1 at 19 (1959), U.N. Doc. E/3290 (1959).

of the substance of each communication, however addressed, which deals with the principles involved in the promotion of universal respect for, and observance of, human rights and to divulge the identity of the authors of such communications unless they indicate that they wish their names to remain confidential;

(b) To compile before each session of the Commission a confidential list containing a brief indication of the substance of other communications concerning human rights, however addressed, and to furnish this list to members of the Commission in private meeting without divulging the identity of the authors of communications except in cases where the authors state that they have already divulged or intend to divulge their names or that they have no objection to their names being divulged;

(c) To enable the members of the Commission, upon request, to consult the originals of communications dealing with the principles involved in the promotion of universal respect for, and observance of, human rights;

(d) To inform the writers of all communications concerning human rights, however addressed, that their communications will be handled in accordance with this resolution, indicating that the Commission has no power to take any action in regard to any complaint concerning human rights;

(e) To furnish each Member State concerned with a copy of any communication concerning human rights which refers explicitly to that State or to territories under its jurisdiction, without divulging the identity of the author, except as provided for in sub-paragraph (b) above;

(f) To ask Governments sending replies to communications brought to their attention in accordance with sub-paragraph (e) whether they wish their replies to be presented to the Commission in summary form or in full.

The Council also resolved to give members of the Sub-Commission on Prevention of Discrimination and Protection of Minorities the same facilities with respect to communications dealing with discrimination and minorities as the resolution gave members of the Commission. It also suggested to the Commission that it should at each session appoint an *ad hoc* Committee to meet shortly before its next session for the purpose of reviewing the list of communications prepared by the Secretary-General and of recommending which of these communications in original should be made available to the members of the Commission on request in accordance with sub-paragraph (c).

Thus, at most, complaints amount to "information" [74] in a very general

[74] Cf. League minorities petitions, *supra* note 7. While the Commission makes little or no practical use of the information the possibility that such complaints may in fact be of some value is suggested by a comment of a member of the Inter-American Commission on Human Rights; Sandifer, *op. cit. supra* note 69 at 508, 522-23: ". . . the Commission [sc. the Inter-American Commission] decided to take cognizance of these communications for information purposes, while making it clear to correspondents that it had no authority to take action of any kind in individual cases other than to transmit to the Governments concerned correspondence concerning them. These com-

sense which may be utilized by the Commission, and in some cases the Sub-Commission, in the course of their other activities.

A limited number of complaints receive much less cavalier treatment, a fact which has led many observers to speak of a "double standard." [75] The background to the "double standard" has been put thus:

> The gradual elimination of dependent areas and their admission to the United Nations meant an ever increasing Assembly majority with some agreed attitudes, particularly a determination to extirpate the remnants of white colonialism and white discrimination. . . . But it was a championship of anti-colonialism designed to accelerate "self-determination." It was not an assertion of general standards which other nations, including the champions, were prepared to accept in their own countries.[76]

Briefly, the complaints treated in accordance with the superior standard are those relating to the few remaining trust territories, those relating to other non-selfgoverning territories, complaints concerning *apartheid* in southern Africa and, more recently, those about prison conditions and infringements of trade union rights in South Africa, Southern Rhodesia and the Portuguese territories in southern Africa. These complaints are primarily processed not by the Commission on Human Rights but by special bodies created for the purpose.[77] Article 87(b) of the Charter makes specific reference to the power of the Trusteeship Council to "accept petitions and examine them in consultation with the administering authority," but procedures have been developed in each of the other areas both for the publication and investigation of petitions. One body, the Ad Hoc Working Group on South African Prisons has gone some way to develop careful judicial-type procedures for the *evaluation* of evidence as well as for oral hearings.[78]

The effectiveness of these procedures in achieving their object of pro-

munications and complaints together with the replies of Governments have proved invaluable supplements to other available information, which at best is incomplete and inadequate."

[75] Carey, *op. cit. supra* note 21 at 792; Carey, *op. cit. supra* note 36 at 143-153.

[76] Henkin, *op. cit. supra* note 19 at 504, 512. See also Kay, "The Politics of Decolonization: The New Nations and the U.N. Political Process," 21 *Int'l Org.* 786 (1967).

[77] See *supra* p. 12. A further nominal example of the double standard is the Fact Finding and Conciliation Commission on Freedom of Association established in 1950 by agreement between the I.L.O. and the U.N. to consider complaints of interference with freedom of association. It has seldom functioned and complaints of this nature are usually channelled through an informal I.L.O. body. See Jenks, "The International Protection of Trade Union Rights" in Luard, *op. cit. supra* note 1 at 210, 221-35.

[78] See Carey, "Procedures for International Protection of Human Rights," 53 *Iowa L. Rev.* 291, 307-8 (1967) and Carey, *op. cit. supra* note 36 at 95-126.

tecting human rights may well be doubted [79] but the fact remains that a much greater effort has been made to do something with these complaints than that in regard to the complaints relating to the remainder of the World.

A cautious attempt to circumvent the double standard was made in the Commission on Human Rights and its Sub-Commission during 1967. In the context of the issue put before the Commission by the General Assembly and ECOSOC, bearing the title "Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination, and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories" the Commission undertook a review of its procedures.[80] The main practical result was that the Commission requested ECOSOC to authorize the Commission and the Sub-Commission to examine information relevant to "gross violations" of human rights contained in the communications listed pursuant to ECOSOC resolution 728 F (XXVIII). It further requested the authority, after a careful examination of the information thus made available, to make a thorough study and investigation of situations revealing a consistent pattern of violations of human rights.[81] In a separate resolution [82] the Commission recommended that the Council should include in the Commision's terms of reference "the power to recommend and adopt general *and specific* measures to deal with violations of human rights." (Emphasis added). ECOSOC did not comply with this latter request but it did authorize the examination by both Commission and Sub-Commission of "information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid as practised in the Republic of South Africa and the Territory of South West Africa under the direct responsibility of the United Nations and now illegally occupied by the Government of South Africa, and to racial discrimination as practised notably in Southern Rhodesia, contained in the communications. . . ." [83]

The Sub-Commission, meeting later in 1967, had before it various printed documents relating to South Africa, South West Africa, Southern

[79] Thus: Mudge, "Domestic Policies and U.N. Activities: The Cases of Rhodesia and the Republic of South Africa," 21 *Int'l Org.* 55 (1967).

[80] For a description of these efforts see U.N. Doc. A/CONF. 32/6 at 6-9 (1968) and Carey, *op. cit. supra* note 78 at 310.

[81] Comm. on Human Rights res. 8 (XXIII) of 16 March 1967, E.S.C.O.R., 42nd Sess., Supp. No. 6 at 131-32, U.N. Doc. E/4322 (1967).

[82] Comm. on Human Rights res. 9 (XXIII) of the same date, id., at 133-34.

[83] ECOSOC res. 1235 (XLII) of 6 June 1967, E.S.C.O.R. 42nd Sess., Supp. No. 1 at 17, U.N. Doc. E/4393 (1967).

Rhodesia and the African territories administered by Portugal. It also had before it communications about Greece and Haiti which are described thus in its report: [84]

Greece. Two communications received by the Sub-Commission pursuant to Economic and Social Council res. 1235 (XLII) and identified at the Sub-Commission's meeting of 5 October 1967, held in private. . . .
Haiti. A communication received by the Sub-Commission pursuant to Economic and Social Council res. 1235 (XLII) and identified at the Sub-Commission's meeting of 5 October 1967, held in private. . . .

The result of the discussion was that part of the Sub-Commission's resolution on the item drew "the attention of the Commission . . . to some particularly glaring examples of situations which reveal consistent patterns of violations of human rights and regarding which the Sub-Commission has expressed its unanimous views in the course of its discussions." These were:

(a) the situation in Greece, resulting from the arbitrary arrest, detention and ill-treatment of political prisoners, and the denials of human rights involved, for example, in censorship and prohibition on the rights of association and free speech, since the *coup d'état* of 21 April 1967; and
(b) the situation in Haiti, resulting from the arbitrary arrest and detention of political prisoners.[85]

The Sub-Commission accordingly recommended that the Commission establish a Special Committee of Experts similar to that on South African prisons with power to examine these situations and report to the Commission.

The Commission's discussion of this recommendation at its 1968 meeting [86] (under the sub-item "study of situations which reveal a consistent pattern of violation of human rights") was instant disillusionment for those who thought that a way around the double standard in respect of communications had been found.[87]

[84] U.N. Doc. E/CN. 4. Sub. 2/286 at 42 (1967). One of the communications on Greece was from Amnesty International, the other from the International Confederation of Free Trade Unions. That on Haiti was apparently from the International League for the Rights of Man; see comments by representative of Haiti in U.N. Doc. E/CN. 4/SR. 966 at 262 (1967). NGOs also supplied background information to members of the Sub-Commission and Commission.

[85] U.N. Doc. E/CN. 4/Sub. 2/286 at 40 (1967).

[86] See Report of the Session in E.S.C.O.R., 44th Sess., Supp. No. 4 at 58-79, U.N. Doc. E/4775 (1968).

[87] Cf. the comments of the New Zealand representative on the Commission: "It was the intention of the majority in the Economic and Social Council to keep the spotlight on Southern Africa, but they had admitted the possibility that situations in other parts of the world might merit attention. The Sub-Commission . . . knowing that

The Sub-Commission's report received lengthy discussion. Representatives of Greece and Haiti were heard by the Commission and, at the fifth meeting held on the issue, the representative of Tanzania introduced a strong resolution which, inter alia:

regretted "that the Sub-Commission failed to prepare a report on information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid as practised in the Republic of South Africa, and racial discrimination as practised in Southern Rhodesia." and, rejected "the findings of the Sub-Commission that the situations in Greece and Haiti, *of all possible states,* represent glaring examples of situations which reveal consistent patterns of violations of human rights and fundamental freedoms as exemplified by the policy of apartheid and racial discrimination as practised in South Africa, Southern Rhodesia and South West Africa, on the basis of the evidence provided by the Sub-Commission." (Emphasis added.) [88]

During the course of the debate allegations were made about U.S. genocide in Vietnam, Arab persecution of Jews, suppression of intellectual freedom in the U.S.S.R., the Ukrainian S.S.R. and Poland and it was hinted that the Sub-Commission was trying to divert attention from "the most urgent and important task of taking all necessary steps to combat the inhuman policies of apartheid and racial discrimination in southern Africa." [89] In the result, neither the original Tanzanian draft, nor more moderate versions of it, nor a mild U.S. draft resolution (which nevertheless cut the ground out from under the Sub-Commission) [90] was adopted. An NGO representative at the Commission session [91] has observed that "while the matter of violations in Greece and Haiti was left suspended in mid-air, it was clear that the Sub-Commission would be hesitant in the future to interpret the mandate given it the previous year beyond the mere studying of 'consistent patterns' of violations in Southern Africa." This gloomy prediction was amply borne out by the desultory discussion of the item at the Sub-Commission's 1968

several United Nations bodies were at that time examining the problems of Southern Africa, decided to report... on Greece and Haiti." Quentin-Baxter, "International Protection of Human Rights," in K. Keith ed., *Essays on Human Rights* 132, 140 (1968).

[88] *Op. cit. supra* note 86 at 60.

[89] Id., at 71.

[90] Id., at 62-4. One preambular paragraph read: "*Recognizing* that, wherever situations exist that may involve a consistent pattern of violations of human rights, the Commission should be prepared to study and make recommendations as requested by resolution 1235 (XLII) of the Economic and Social Council, but that information sufficient for such recommendations has not been brought to the attention of the Commission. . . ."

[91] Korey, *op. cit. supra* note 24. Dr Korey was an observer for the Coordinating Board of Jewish Organizations at the meeting.

session.[92] But the Sub-Commission has far from given up its efforts to have its activities made more meaningful. At its 1970 meeting ECOSOC approved a procedure suggested by the Sub-Commission for the consideration of communications.[93] When the new procedure becomes operative the Sub-Commission will appoint a working group of not more than five of its members selected "with due regard to geographical distribution" which will meet once a year in private session to examine the communications for those suggesting a pattern of violations. These will be brought to the attention of the whole Sub-Commission. After considering the communications referred to it by the working group, the Sub-Commission will have power to refer them to the Commission. The Commission will either study the situation and report to the Economic and Social Council or, with the consent of the state concerned, appoint an *ad hoc* committee to investigate. In an oblique reference to the High Commissioner proposal ECOSOC decided that this new procedure should again be reviewed if any new organ entitled to deal with human rights communications should be established within the United Nations or by international agreement.[94]

(b) Periodic reports

As has been mentioned, an important part of the Convention on the Elimination of Racial Discrimination and of the International Covenants of 1966 is the procedure for periodic reports. There has been in existence since 1956 [95] a voluntary procedure of a similar nature, the notable lack of success of which does not augur well for the Convention and the Covenants. These voluntary procedures are at present governed by ECOSOC resolution 1074 C (XXXIX) [96] of 28 July 1965 which revised the system and invited States Members of the United Nations or of the Specialized Agencies to supply information regularly within a continuing three year cycle as follows:

[92] See U.N. Doc. E/CN.4/Sub.2/294 at 21-22 (1968). For another attempt to expand the activities of the Sub-Commission that also failed see *infra* pp. 36-38.

[93] ECOSOC res. 1503 (XLVIII) of 27 May 1970. See discussion in Rachlin, "Report of the 26th Session of the United Nations Commission on Human Rights," 3 *Rev. des Droits de l'Homme* 487, 487-489 (1970) and Carey, *op. cit. supra* note 36 at 91-92.

[94] Res. 1503 (XLVIII), operative para. 10.

[95] ECOSOC res. 624 B I (XXII) of 1 August 1956, E.S.C.O.R., 22nd Sess., Supp. No. 1 at 12, U.N. Doc. E/2929 (1956). On the more effective ILO reporting procedures see *infra* p. 107 and on those of UNESCO and the Council of Europe see Golsong, "Implementation of International Protection of Human Rights," 110 *Recueil des Cours* 7, 25-39 (1963).

[96] E.S.C.O.R., 38th Sess., Supp. No. 1 at 24-25, U.N. Doc. E/4117 (1965).

(i) In the first year, on civil and political rights, the first such reports to cover the period ending 30 June 1965.

(ii) In the second year, on economic, social and cultural rights, the first such reports to cover the period ending 30 June 1966.

(iii) In the third year on freedom of information, the first such reports to cover the period ending 30 Juni 1967.

Specialized Agencies and NGOs [97] were invited to contribute to the reports in accordance with this schedule and an attempt was made to give more punch to the examination of governmental reports by having the Sub-Commission on Prevention of Discrimination and Protection of Minorities undertake an initial study of the material received, report on it and submit comments and recommendations by the Commission. As we shall see, this procedure showed signs of being too successful and was discontinued.[98] The Commission on the Status of Women was also empowered to receive and consider the reports. ECOSOC also requested the Commission on Human Rights to establish an *ad hoc* committee chosen from its members, "having as its mandate the study and evaluation of the periodic reports and other information received under the terms of this resolution, and, in the light of the comments, observations and recommendations of the Commission on the Status of Women and of the Sub-Commission . . . to submit to the Commission comments, conclusions and recommendations of an objective character."

No one can claim that the success of the system has been great. One reason is that from the outset only a few states responded [99] and the position is deteriorating rather than improving. The reports on the freedom of information to 30 June 1967 came in from only 30 states [100] and the more recent request for reports on civil political rights to 30 June 1968 drew only 24 replies.[101] Nor is the information which has been provided of much use. As Moses Moskowitz, who has been an NGO observer at the Commission on Human Rights for over twenty years, has remarked: [102]

[97] See *infra* pp. 35-38 for the role of NGOs in the reporting process.

[98] *Infra* pp. 36-38.

[99] Korey, *op. cit. supra* note 24 at 25-6.

[100] U.N. Doc. E/CN.4/948 and Add. 1-9 (1968).

[101] See U.N. Doc. E/CN.4/980 (1969). No procedure is laid down in the resolution for comments by states on other states' reports. The Israeli Report, U.N. Doc. E/CN.4 /973 (1968), which noted legislation dealing with occupied territories drew some comments from Jordan, circulated as U.N. Doc. E/CN.4/1001. See also letter from Spain, U.N. Doc. E/CN.4/1002 (1969) commenting on references to Gibraltar in the British Report. In the course of the discussion of the item at the 1969 Session of the Commission the representative of Israel withdrew the whole of the Report. See Report of the Session, E.S.C.O.R., 46th Sess., Supp. No. 4 at 160, U.N. Doc. E/4621 (1969). 36 Reports on economic, social and cultural rights were received in 1969.

[102] M. Moskowitz, *The Politics and Dynamics of Human Rights* 94 (1968).

Not only have governments been unwilling and unable to escape the bias of their own perspectives, but the information they have been furnishing can hardly be said to provide an expanding vision of reality. In the first place, there are fixed national habits of thought that assign different values to the same fact or set of facts. Secondly, the separate facts do not add up to make a whole, if for no other reason than that they are rarely representative samples of the total situation they attempt to describe. The irrelevancies contained in the reports are only exceeded by their omissions. . . . Ten years of periodic reports have not given us a settled vision of the world scene of human rights.

The same writer went on [103] to comment that one of the main reasons for this unsatisfactory state of affairs is that "the UN organs immediately concerned have neither the authority nor the organizational and technical capacity to look behind the deceiving facade . . . ."

(c) Advisory services

A programme of UN advisory services in human rights was instituted in 1953. The programme is threefold: advisory services of experts, fellowships and scholarships, and seminars. The use made of the first of these has not been great. A memorandum by the Secretary-General [104] records that "two Governments . . . received advice concerning elections, electoral laws, procedures and techniques, while others have utilized assistance relating to the status of women." As the former Head of the Secretariat Division on Human Rights [105] has explained:

We found at the beginning that governments weren't interested in this kind of technical assistance. I suppose there was a psychological barrier; they may have thought that to ask for assistance from the United Nations in a matter like human rights might be interpreted as an admission that things were not as they should be. . . .

One interesting side effect of this reluctance to appeal for assistance to the United Nations is that a number of Governments have sought the advice of NGOs like the International League for the Rights of Man and the International Commission of Jurists. For example, in 1965, the Government of British Guiana asked the International Commission to set up a Commission of Inquiry into racial problems.[106] In a recent letter to the

[103] *Ibid.*

[104] U.N. Doc. A/CONF. 32/6 at 176 (1967). One country receiving advice on electoral law and practice was Costa Rica, the original sponsor of the current High Commissioner proposal: U.N. Doc. E/3075 at 9 (1958).

[105] Humphrey, "The United Nations and Human Rights," 11 *How. L.J.* 373, 377 (1965). On the programme generally see Higgins, "Technical Assistance for Human Rights," 19 *The World Today* 174 and 219 (1963).

[106] MacBride, "The Meaning of Human Rights Year," 8 *J. Int'l. Comm. Jurists*

writer the Secretary-General of the Commission listed the following examples of the types of request received by his organization:

we have been asked to advise on the institution of the Ombudsman in countries not acquainted with this system. We have supplied documentary material on the role of the Ombudsman, and advised on the manner in which the system could be operated in the particular country interested:
we have been asked to advise on the systems of preventive detention operative in different countries with a view to legislative reform on this point in a particular country:
we have been asked for ideas on the kind of measures which individual governments should support for the national and international protection of human rights:

This experience suggests that there exists a large potential pool of clients if the right organization to inspire confidence can be found.

Applications for fellowships and scholarships to study conditions in other countries got off to a slow start but they are now much sought after.[107] The net result of such visits is of course impossible to assess. The same is true of the seminar programme which, at least in terms of the number held (over 30), the wide range of topics covered, the number of participants and the amount of paper accumulated, appears to have been a huge success.

(d) Global studies of specific rights or groups of rights

In 1956 [108] the Commission on Human Rights decided that studies of specific rights or groups of rights "are necessary for the purpose of ascertaining the existing conditions, the results obtained and the difficulties encountered in the work of States members of the United Nations and Specialized Agencies for the wider observance of and respect for, human rights and fundamental freedoms" and agreed to undertake such studies. The studies were to stress "general developments, progress achieved and measures taken to safeguard human rights, with such recommendations of an objective and general character as may be necessary." The first of the studies undertaken was that on the Right of Everyone to be Free From

iii, viii. See generally Debevoise, "Lessons from Organisations like the International Commission of Jurists in Focusing Public Opinion," 58 *Proc. Am. Soc. Int'l L.* 143, 145 (1964).

[107] U.N. Doc. A/CONF.32/6 at 180-82 (1967).

[108] See U.N. Doc. E/CN 4/727 (1956). In addition to the Commission and Sub-Commission studies there have been various studies by ad hoc Committees or Special Rapporteurs, especially on slavery and freedom of information. See U.N. Doc. A/CONF. 32/6 at 169-70 (1967).

Arbitrary Arrest, Detention and Exile.[109] Much the same defects appear in this and other studies as in the periodic reports submitted by members. The procedure followed was this: the Commission set up a special committee of four of its members; it in turn elected a Chairman-Rapporteur and subsequently split up the two jobs. Under the Commission's authorizing resolution the Committee was to prepare the study with such assistance as it might require from the Secretariat, utilizing published material and written statements necessary for the study. Such material was to be drawn from the following sources: (i) Governments, (ii) the Secretary-General, (iii) specialized agencies, (iv) NGOs in consultative relationship,[110] and (v) writings of recognized scholars and scientists. Governmental material was obtained from contributions to the U.N. YEARBOOK ON HUMAN RIGHTS [111] and periodic reports, and eleven NGOs [112] submitted material, generally of a rather more searching nature than that of Governments. Country monographs were prepared by the Secretariat under the direction of the Rapporteur for as many countries as possible. These were sent to the Governments concerned for checking, verification and comment and were revised in the light of observations received.[113] The Committee held a number of formal and informal meetings and a substantive report was submitted to the Commission at its seventeenth session. This was referred to Governments and a revised report was then prepared and published.

A related Report, a Study on the Rights of Arrested Persons to Consult With Those Whom it is Necessary for Them to Consult in Order to Protect Their Essential Interests was completed but not published in 1968. The Sub-Commission on Prevention of Discrimination and Protection of Mi-

[109] A revised version of the study was published in 1964 (U.N. Pub. Sales no: 65 xiv. 2).

[110] As to the nature of consultative status, see *infra* pp. 32-34.

[111] ECOSOC in 1946 instituted a Yearbook which contains the texts of or extracts from constitutions, constitutional amendments, legislation, governmental decrees or administrative orders and reports on important court decisions during the year relating to human rights. International instruments adopted during the year are also included. Occasionally material has been requested from states on the law in a particular area. Thus the 1946 volume contains "all declarations and bills of human rights now in force" and in 1959 a Supplementary Volume on Freedom From Arbitrary Arrest, Detention and Exile was published. The material is obtained either from governments or correspondents appointed by governments. A recent letter to the author from a minor civil servant preparing such a report describes how "all the critical bits were excised."

[112] See list in published version, *supra* note 109 at 3.

[113] This step in the process may be more than an opportunity to water down anything critical. See Humphrey, *op. cit. supra* note 105 at 373, 376: "it gives governments an opportunity to rectify anything that may not be right in their legislation or practice without too much publicity being given to the matter."

norities has produced a number of studies by much the same, although somewhat speedier, route.[114]

The Reports are interesting enough documents for a comparative lawyer and they may on occasion provide the basis for further action by U.N. bodies. For example, the first of the Sub-Commission studies, on discrimination in education, provided the basis for the preparation of a UNESCO Convention on that subject. The second, on discrimination in religious rights and practices has been used in the drafting of the Declaration and Convention Against All Forms of Religious Intolerance which are at an advanced stage in the General Assembly. Nevertheless the references in such studies to particular countries, other than those in southern Africa, are studiously bland and as Professor Humphrey has rightly remarked,[115] the studies "have suffered by their excessively official character and the fact that the information in them reflects the *de jure* rather than the *de facto* situation in the various countries." The same writer's suggestion [116] that some of this suffering might be alleviated by greater reliance on NGOs in the preparation process provides a convenient backdrop to our next section on NGOs and human rights at the U.N.

D. NGOS AND HUMAN RIGHTS AT THE UNITED NATIONS

1. Consultative Status

We have already noted the importance of NGOs to human rights in pre-U.N. days and at the San Francisco Conference.[117] As well as influencing the human rights provisions of the Charter a number of human rights NGOs, along with a multitude of others whose interests lie in different fields [118] have achieved a sort of institutionalized pressure-group status under Article 71 of the Charter. Article 71 empowers ECOSOC to "make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence." Such ar-

[114] Discrimination in Education, (1957); in the Matter of Religious Rights and Practices (1960); in the Matter of Political Rights (1963); in Respect of the Right of Everyone to Leave Any Country, Including his Own, and to Return to His Country (1964); Against Persons Born Out of Wedlock (1967); Study of Equality in the Administration of Justice (1970); Special Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres (1970).

[115] *Op. cit. supra* note 31 at 13.

[116] *Ibid.*

[117] *Supra* pp. 5, 8.

[118] For an analysis of the different types of NGOs see Lador-Lederer, *op. cit. supra* note 1.

rangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Members of the United Nations concerned.

As the role of NGOs at the U.N. is relevant both in our consideration of the history of the High Commissioner proposal in Chapter 2 and of his possible functions, particularly in Chapter 3, it is necessary to explain in some detail the use that ECOSOC and the NGOs have made of this power.

The concept of "consultation" was left undefined at San Francisco and when ECOSOC held its first meeting early in 1946 it established a twelve-member Committee on Arrangements for Consultation with NGOs to make recommendations regarding consultation. As one careful study notes "the Committee was faced with such basic questions as the relationship between governmental and non-governmental bodies in terms of potential collaboration, methods of establishing the bona fides of an organization, methods of determining what constitutes an international organization, the types of organization with which collaboration might be desirable, and the techniques to be employed in making consultation possible." [119] The Report of the ECOSOC Committee [120] expounded a two-fold object of consultation:

> . . . on the one hand for the purpose of enabling the Council or one of its bodies to secure expert information or advice from organizations having special competence on the subjects for which consultative arrangements are made, and, on the other hand, to enable organizations which represent important elements of public opinion to express their views.

Arrangements were accordingly entered into to give effect to this dual object. Three categories of consultative relationship were established by the Council. Following a recent revision [121] of the arrangements, the three categories are (a) category I for organizations having an interest in most of the activities of the Council; (b) category II for those interested in some aspects of the work of the Council; (c) inclusion in a list known as "the

[119] *Consultations Between the United Nations and Non-Governmental Organizations, A Working Paper Transmitted by the Interim Committee to Consultative Non-Governmental Organizations* 19 (1949). That the same basic issues are still current was evidenced by the 1969 hearings held by the Council Committee on NGOs pursuant to ECOSOC res. 1225 (XLII) of 6 June 1967, E.S.C.O.R., 42nd Sess. Supp. No. 1 at 24, U.N. Doc. E/4393 (1967), which directed a thorough review of the whole matter. See generally S. Liskofsky, *The U.N. Reviews its N.G.O. System* (American Jewish Committee, Jan. 1970).

[120] U.N. Doc. E/42/Rev. 2 at 4 (1946).

[121] ECOSOC res. 1296 (XLIV) of 23 May 1968, E.S.C.O.R., 44th Sess., Supp. No. 1 at 21-26, U.N. Doc. E/4548 (1968), as amended by res. 1391 (XLVI) of 3 June 1969. On the superseded arrangements (generally a little more generous to the organizations) see Lador-Lederer, *op. cit. supra* note 32 at 402-408.

Roster" for organizations which may make occasional and useful contributions to the Council or other U.N. bodies. Rights of consultation vary in their detail according to the group in which an organization is placed but broadly speaking NGOs on any of the lists may send representatives to the Council and its Commissions and may make written, and sometimes oral, submissions on matters with which they are concerned. In addition, organizations in category I have the little-used power to propose to the Council Committee on NGOs that the Committee request the Secretary-General to place an item on the provisional agenda of the Council and also to propose items for the provisional agendas of the Commissions.

Obviously the formal provisions do not explain fully the role of NGOs in, for example, the Commission on Human Rights and any assessment of their role must take into account the hundreds of conversations engaged in annually between the "NGO lobby" and governmental and secretariat officials as well as the importance of national branches of NGOs in influencing governmental positions.[122] An experienced New Zealand representative [123] has suggested that:

> There is . . . surely no other area of international affairs in which nongovernmental organizations have participated so actively and constructively. . . . This, rather than the record of ratified international agreements, is the real measure of the contribution to the cause of human rights by such a country as the United States.

Pierre Juvigny [124] has placed NGOs as one influence among many in a complex process of the development of human rights and the breaking down of notions of absolute state sovereignty, in these words:

> The State's monopoly is challenged and its sovereignty in regard to human rights, yesterday absolute, is being toned down in various ways which some States are themselves progressively accepting either spontaneously or else under the effect of indirect pressures from national or international opinion, changes in ideas, the pervasive influence of large non-governmental organizations, or parliamentary decisions.

This is probably about as close an assessment as it is possible to make.

[122] See White, *op. cit. supra* note 13 at 263.
[123] Quentin-Baxter, *op. cit. supra* note 87 at 132, 138.
[124] Juvigny, "The Legal Protection of Human Rights at the International Level," 18 *Int. Soc. Sci. J.* 55, 67 (1966).

2. Communications

A second aspect of the relationship of the U.N. and NGOs is the question of any complaints that NGOs might wish to make about concrete human rights situations in particular states. In the early years of the organization such complaints were printed and circulated as United Nations documents. This meant that they had some sort of a chance of being publicized, if not in the press at least in U.N. circles and in the numerous libraries receiving the documents. Following protests by a number of Governments, this practice was stopped in 1952.[125] The Secretary-General is now under instructions to handle all communications containing complaints about human rights under ECOSOC resolution 728 F (XXVIII).[126] As the International League for the Rights of Man has lamented [127] this leaves NGOs in the less advantageous position of having "to file their complaints with the Secretary-General (who only transmits them to the governments involved), to circularize to member states the information and to seek publicity in the press."

Some concession was made to NGOs by paragraph 10 of ECOSOC resolution 888B (XXXIV) of 24 July 1962 dealing with periodic reports.[128] The resolution invited NGOs "to submit comments and observations of an objective character on the situation in the field of human rights to assist the Commission in its consideration of the summaries of periodic reports." The concept of "observations of an objective character" is one fraught with difficulty. It had been suggested in the discussions on the proposal in the Commission on Human Rights that "allegations of violations of human rights in individual countries would be inadmissible under ECOSOC Res. 454 (XIV)." [129] The 1962 resolution did not include any such restriction and the International League for the Rights of Man must surely have been correct when it expressed its view [130] that "if this invitation is to have any meaning at all, it must be interpreted to permit the inclusion of comments and observations . . . about specific countries, since it is all but impossible

[125] ECOSOC res. 454 (XIV) of 28 July 1952, E.S.C.O.R., 14th Sess., Supp. No. 1 at 60-61, U.N. Doc. E/2332 (1952).

[126] *Supra* p. 21.

[127] Communications Concerning Human Rights, U.N. Doc. E/CN. 4/NGO/68 at 3 (1956). See also joint submission by a number of human rights NGOs in U.N. Doc. E/CN.4/NGO/86 (1959).

[128] E.S.C.O.R., 34th Sess., Supp. No. 1 at 21, U.N. Doc. E/3671 (1962). On periodic reports in general see *supra* p. 27.

[129] See UN. Doc. E/3616/Rev. 1 at 12 (1962). As to res. 454 (XIV) see *supra* note 125.

[130] Statements of NGOs, U.N. Doc. E/CN.4/NGO/120 (1964).

to comment usefully on the general human rights situation in the world at large." At all events ECOSOC must have accepted the point when it revised the periodic reporting procedure in 1965. Paragraph 12 of its resolution [131] repeated the invitation for "objective" material and under paragraph 13 the Council requested the Secretary-General "in accordance with the usual practice in regard to human rights communications to forward any material received from non-governmental organizations in accordance with paragraph 12 and mentioning any particular States . . . to those Member States for any comments they may wish to make." A number of NGOs took the initiative and made comments on specific States. The issue was raised at the first meeting of the *Ad Hoc* Committee on Periodic Reports in February 1966. The only strong view expressed was that of the representative of the United Kingdom who had this to say: [132]

> And while the definition of the "objective information" those organizations were invited to submit . . . remained open to subjective interpretation, his delegation would regard as objective any information, whether submitted by governmental organizations, which was reasonably factual, not obviously untrue and consistent with the general aim of promoting the observance of human rights. Criticism of individual states was perfectly acceptable – and he anticipated that his own Government would receive its share of it – provided its purpose was to further human rights.

It will be recalled that the 1965 resolution had also requested the Sub-Commission on Prevention of Discrimination and Protection of Minorities to undertake the initial study of the periodic reports.[133] In 1966 the Sub-Commission appointed its Rapporteur, Mr Zeltner of Israel, as Special Rapporteur to examine the material then before the Sub-Commission which included reports from 44 Governments on civil and political rights to 30 June 1965, reports on economic and social rights to 30 June 1966 from 17 States, various reports from the ILO and other Specialized Agencies, and, most significantly, information from 29 NGOs along with comments on it from various governments. In his study presented to the Sub-Commission [134] Mr Zeltner emphasized the unsatisfactory nature of the governmental reports and suggested ways in which the contributions might be better organized. He stressed the significance of NGO comments which "may shed light on problems and difficulties not reflected in governmental reports which sometimes tend to be excessively optimistic or overly com-

[131] ECOSOC res. 1074 C (XXXIX) of 28 July 1965, E.S.C.O.R., 39th Sess., Supp. No. 1 at 24-25, U.N. Doc. E/4117 (1965).

[132] U.N. Doc. E/CN.4/AC.30/SR. 1 (1966).

[133] *Supra*, p. 28.

[134] U.N. Doc. E/CN.4/Sub.2/L.458 and Rev. 1 (1967).

placent." [135] In view of the nature of the documentation available the Special Rapporteur did not find it possible to point out any trends or developments. He appended to the draft report four annexes. The first three contained a tentative list of rights enumerated in the Declaration of Human Rights and the Covenants (suitable as subject-headings for future reports), a summary of information received from governments, covering selected rights, and a short summary of information from Specialized Agencies on rights and freedoms within their purview. The final Annex, issued as a restricted document, consisted of a summary of the information contained in observations by NGOs and of the comments of the Governments concerned.[136]

The remarkable reaction of some members of the Sub-Commission to the draft report is best told in the words of the Sub-Commission report: [137]

262. [Some members] felt that, as the study did not point out salient developments and trends, it did not fulfil its mandate. One member rejected the study as such, considering that not only did it not fulfil the mandate given but that the suggestions to Governments included therein were impracticable and were calculated to discourage Governments from submitting reports; moreover that no one had the right to tell Governments how to prepare their reports.

263. On the question of annex IV, some members felt that since the information submitted by non-governmental organizations was not verified, it should not be summarized in a document bearing the imprint of the United Nations. The opinion was expressed that the contents of this annex were slanderous; that it should never have been circulated as a U.N. document; that the Special Rapporteur had exeeded his mandate in summarizing the information submitted by non-governmental organizations; and that the document should be destroyed. It was also felt that while summarizing the allegations made by certain organizations annex IV was extremely reserved in reflecting the substance of comments made by certain Governments concerned.

The immediate result of the discussion was that the Sub-Commission decided by a narrow margin (8-6-4) to withdraw the offending annex. Subsequently the Commission on Human Rights decided [138] to request the

[135] Id., at 4. This passage is deleted from the revised text.

[136] NGO comments are not circulated as U.N. Docs. or even automatically referred to members of the Commission and Sub-Commission. Res. 1074 C (XXXIX) requested the Secretary-General to *forward* governmental material but only to make NGO material "available." See discussion in U.N. Doc. E/CN.4/903, E/CN.4/Sub.2/263 at 30-32 (1966). The public record does not show which countries were criticized but one was the Soviet Union; see the remarks of the U.S. delegate: Abram, "The U.N. and Human Rights," 47 *For. Aff.* 363, 371 (1969).

[137] U.N. Doc. E/CN.4/930 at 82-83 (1967).

[138] Commission res. 16 (XXIII) of 22 March 1967, E.S.C.O.R., 42nd Sess., Supp. No. 6 at 181-84, U.N. Doc. E/4322 (1967).

Secretary-General when presenting future reports for the consideration of the Commission to prepare an analytical summary with regard to each of the rights under consideration. The summary would include a description of the important trends revealed in the reports, difficulties encountered, methods adopted to overcome them, suggestions for possible further action and would draw, as appropriate, on such pertinent material as may be available from other United Nations sources. Later the same year ECOSOC reaffirmed that the Sub-Commission should have access to the reports received but decided that the Commission's request to the Secretary-General "render[s] unnecessary the initial study of periodic reports by the Sub-Commission . . ." and requested the Commission "to perform this task with the assistance of its *ad hoc* Committee on Periodic Reports on Human Rights." [139] Underlying the procedural juggling was the clear understanding that the summaries prepared by the Secretariat and anything that might emerge from the Ad Hoc Committee would be less critical than some members of the Sub-Commission would have been likely to produce.[140]

E. THE NATURE OF THE PROBLEM

We are now in a position to draw some general conclusions about the nature of the problems against the background of which the High Commissioner proposal arises. In our final Chapter we shall endeavour to assess the extent to which the proposal would solve some of those problems. In the meantime, it is suggested that the material which has just been discussed indicates the following eight areas in which the present situation is unsatisfactory:

1. Principles are formulated in treaty form but this is not followed by ratification by all, or even by a majority of states.
2. Ratified treaties are not given practical application.
3. Enforcement procedures contained in the treaties are limited.
4. "Communications" receive cavalier treatment.
5. Limited sources of information are available to United Nations human rights bodies.
6. Only limited use is made of NGO assistance and representations (this overlaps 4 and 5).
7. There is a meagre response to requests for periodic reports and ineffective techniques for dealing with those received.
8. Apart from attending seminars, States are reluctant to use the U.N.'s human rights advisory services.

[139] ECOSOC res. 1230 (XLII) of 26 June 1967, E.S.C.O.R., 42nd Sess., Supp. No. 1 at 12-13, U.N. Doc. E/4393 (1967).

[140] Note the mild report of the Ad Hoc Committee dealing with freedom of information: U.N. Doc. E/CN.4/968 (1968).

CHAPTER 2

THE DEVELOPMENT OF THE HIGH COMMISSIONER PROPOSAL

This Chapter discusses the origins and development of the present proposal. Not a great deal will be said at this stage about the attitudes of member states since this will be dealt with in some detail in Chapters 5 and 7. But it should be apparent from what follows that a number of important NGOs have been very active in urging the acceptance of the proposal, even if it is not as far-reaching as they would like. Indeed, one distinguished NGO member,[1] speaking in the context of the failure of the High Commissioner proposal, or of any other proposal for an effective enforcement procedure, to make any progress during Human Rights Year, 1968, has noted the "marked difference" between the approaches of governments and of NGOs. He sees a "growing conflict . . . between the conservatism of most governments in regard to human rights and the importance and urgency which the non-governmental sector attaches to the more effective protection of human rights. It is a clear indication that public opinion is far in advance of the official governmental attitude."

The Cassin Proposals

However, the initial germ of the idea of the Office did not come from an NGO. It in fact began with a French suggestion made to the Commission on Human Rights in December 1947, during the drafting of the Universal Declaration of Human Rights. The proposal was not for a "High Commissioner" but for an "Attorney-General." Its author and advocate was Professor Cassin, notable for his part in the drafting of the Universal De-

[1] Sean MacBride, "The Promise of Human Rights Year," 9 *J. Int'l Comm. Jurists* i, ii (1968). Mr MacBride is Secretary-General of the International Commission of Jurists and Chairman of the International Executive of Amnesty International. He has pressed consistently on their behalf since 1964 in favour of the High Commissioner proposal.

claration [2] and in fostering the cause of human rights in various forums throughout the life of the United Nations.

The functions of the proposed Attorney-General [3] were a far cry from those of the present High Commissioner proposal. The projected Attorney-General was associated with a two-tier system of protection of human rights. At the lower level the aggrieved person would have the right of petition to a Commission on Human Rights. What amounted to an appeal might be taken to a Court of Human Rights by either the complainant or by the respondent state. At this stage the Attorney-General would enter the picture as advocate for the individual. The French suggestion failed to gain a great degree of support either in the drafting of the Declaration – which of course has no enforcement procedures – or when it was re-introduced during the debate on the Covenants.[4] The main stumbling block was the issue of individual petition.[5]

The U.N. High Commissioner for Refugees

A few months after the adoption of the Universal Declaration a Report was presented to ECOSOC by the ailing International Refugee Organization a specialized agency, which, with all too little governmental support, had been grappling with the massive refugee problems left over from the Second World War. The Report,[6] entitled *Future International Action Concerning Refugees* suggested that two possible kinds of machinery could be created to continue the task – a Division of the U.N. Secretariat or an independent High Commissioner's Office along the lines of the League arrangements. Following the discussion in ECOSOC and the preparation of a Secretariat paper the General Assembly decided in 1949 [7] to establish a High Commissioner's Office for Refugees with the degree of independence

[2] For Professor Cassin's account of the drafting of the Declaration see "Looking Back on the Universal Declaration of 1948," 15 *Rev. Contemp. L.* 13 (1968). He is now a Judge of the European Court of Human Rights.

[3] See U.N. Doc. E/CN.4/AC.4/1 (1947).

[4] Note also the failure of the Australian proposal for an International Court of Human Rights, U.N. Doc. E/CN.4/AC. 1/27 (1948).

[5] A modified form of the Cassin proposal was adopted in the European Convention on Human Rights. In the case of states so declaring, there is an individual right of petition to the European Commission on Human Rights. If the case goes on to the Court of Human Rights there is no right of individual application or appearance. The Commission's representative presents the complainant's case although he is not treated as an advocate for the party. See Golsong, "Implementation of International Protection of Human Rights," 110 *Receuil des Cours* 7, 125-28 (1963).

[6] U.N. Doc. E/1392 (1949).

[7] G.A. res. 319 A(IV) of 3 December 1949, G.A.O.R., 4th Sess., Resolutions at 36-37, U.N. Doc. A/1251 (1949).

necessary for it to carry out its functions as from 1 January 1951. The Statute of the Office was adopted in a slightly amended fashion at the 1950 session [8] and the High Commissioner commenced his duties as planned.[9]

The proposals of the Consultative Council of Jewish Organizations and of Uruguay

Soon after the 1949 General Assembly decision on the High Commissioner for Refugees an NGO, the Consultative Council of Jewish Organizations, adopted the term "High Commissioner" for its modification of the Cassin proposal which it floated with the title "A United Nations Attorney-General or High Commissioner for Human Rights." A memorandum bearing this name was written for the Council by Robert Langer and published early in 1950 and the proposal was put to the Commission on Human Rights in April of that year.[10]

Dr Langer and the Consultative Council of Jewish Organizations saw their High Commissioner as a workable compromise between those who wanted a right of individual petition in the proposed Covenant (at the time the decision had not been taken to have two Covenants) and those who would countenance nothing more than state against state complaints. Some of the disadvantages of "states-only" complaints have been mentioned in Chapter 1.[11] Dr Langer agreed that there was a genuine danger of abuse from such complaints, the danger of politically motivated action – or failure to act. Further, they were bound to endanger the security of the complainant by exposing him to the charge that he was trying to enlist the support of a foreign state and was thus committing an act of disloyalty and even of treason.[12] These dangers could be avoided without recourse to a right of individual petition by adapting two analogies, one domestic, one international. In the first place, he argued, human rights are a matter of

[8] G.A. res. 428(V) of 14 December 1950, G.A.O.R., 5th Sess., Supp, No. 20 at 46-48, U.N. Doc. A/1775 (1950).

[9] Further references will be made to the High Commissioner for Refugees in the discussion of the substantive provisions of the High Commissioner for Human Rights proposals. For the setting up of the Office and its early work see J. Stoessinger, *The Refugee and the World Community* esp. 164-168 (1956); and J. Lador-Lederer, *International Group Protection* 369-373 (1968); J. Read, *The United Nations And Refugees – Changing Concepts* (*Int'l Concil.* No. 537, 1962); E. Rees, *Century of the Homeless Man* (*Int'l Concil.* No. 515, 1957); for a detailed account of current activities see U.N. Doc. A/AC. 96/395 (1968) (Report on the Resettlement of Refugees) and U.N. Doc. A/AC.96/396 (1968) (UNHCR Programme for 1969).

[10] U.N. Doc. E/CN.4/NGO/6 (1950).

[11] *Supra* p. 19.

[12] R. Langer, *A United Nations Attorney-General or High Commissioner for Human Rights* 4 (1950).

concern for the whole international community, just as in a state the criminal law concerns the whole community. The public prosecutor, Attorney-General, or similar official is the representative of the community's interests when he institutes proceedings. Why not appoint "a special agency in which would be vested the right to initiate proceedings before international bodies charged with implementing the Covenant and through which the aggrieved individual or group of individuals would find access to those international bodies."? [13] The international bodies envisaged in the pamphlet would be Regional Commissions on Human Rights, with a right of appeal to a Central Commission. Correspondingly there would be Regional "Commissioners" as well as the Central High Commissioner. Secondly Dr Langer drew an analogy with Article 99 of the Charter which empowers the Secretary-General to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. This important provision is designed to make it possible for the Organization to act even if no member state is prepared to take the initiative. Dr Langer suggested [14] that a similar power might be vested in the proposed Commissioner to "draw attention to violations of human rights without the opprobrium ordinarily attached to denunciations by an individual or a state."

So far the proposal saw the High Commissioner or Attorney General largely in the role of prosecutor or advocate. But it also saw him performing functions short of "litigation" that are much closer to those in the current proposals – the supervision of domestic implementation of human rights. This would consist, in the main, "in constant perusal of official publications, press reports, articles in periodicals, etc., regarding the country concerned, in on-the-spot studies of the respective condition; and, finally, in the analysis and processing of periodic reports by the Governments of the Covenanting States, either upon special request or *ex officio*." [15]

Later in the same year the High Commissioner suggestion was taken up by a Government, that of Uruguay,[16] which at the 1950 session of the

[13] Id., at 3.

[14] Id., at 3-4.

[15] Id., at 10. See also discussion in M. Moskowitz, *Human Rights and World Order* 142-151 (1958). Mr Moskowitz was the representative of the Consultative Council of Jewish Organizations when the proposal was presented to the Commission on Human Rights.

[16] Moskowitz, *op. cit. supra* note 15 at 192 n. 3 points out that the Government of Uruguay "has been in the forefront of the fight for effective international protection of human rights, both in the United Nations and at the Inter-American Conferences." Despite the prevalence of dictatorships in Latin America there is a strong cultural

General Assembly proposed that the Commission on Human Rights consider the Attorney-General or High Commissioner as a possible solution to the dispute about the right of individual petition under the draft Covenant on Civil and Political Rights. The Uruguay delegation presented an elaborate set of draft articles [17] and, the following year, a lengthy explanatory memorandum.[18]

The Uruguay draft was presented on the basis of a single High Commissioner but could easily have been adapted for a Central and Regional scheme. The High Commissioner was to be appointed by the General Assembly from among persons of high moral character and recognized competence and independence who possess, in the countries of which they are nationals, the qualifications required for appointment to the highest judicial offices. The term of office would be five years with eligibility for reappointment. His powers would have been sweeping. In the first place he was to collect and examine information on the observance and enforcement in the States Parties of the provisions of the Convention. The sources of his information would have been similarly broad as those in the Jewish Organizations' proposal. In addition he would also have had the power in furtherance of his supervisory role to conduct on-the-spot studies and inquiries at times agreed with the States concerned.

In addition to his general supervisory role the High Commissioner would have had the power to receive and examine specific complaints of alleged violations of the Covenant, submitted to him by individuals, national and international non-governmental organizations and inter-governmental organizations. In order to put some limits on a possible flood of complaints the High Commissioner was to be given a wide discretion on whether or not to take action. In particular the draft provided that: [19]

No action shall be taken by the High Commissioner (Attorney-General) on any complaint which

(a) Is anonymous;
(b) Contains abusive or improper language; however, specific charges of improper conduct, levelled at individuals or bodies of persons, shall not be considered to constitute abusive or improper language;
(c) Does not refer to a specific violation of this Covenant by a State Party to the detriment of an individual or group of individuals who, at the time of the alleged violation, were within the jurisdiction of the same state;

tradition in favour of human rights: Schreiber, "The Inter-American Commission on Human Rights in the Dominican Crisis," 22 *Int'l Org*. 508, 527-28 (1968).

[17] U.N. Doc. A/C.3/L.93 (1950).

[18] U.N. Doc. A/C 3/564 (1951).

[19] The provision was very similar to those in a number of national statutes dealing with the Ombudsman: see W. Gellhorn, *Ombudsmen and Others* 427-28 (1966).

(d) Is manifestly inconsequential;
(e) Emanates from a national organization but does not relate to a violation allegedly committed within the jurisdiction of the State to which that organization belongs.

In deciding whether or not to take action he was also to give "due consideration" to the availability and the use made by the complainant of any domestic and other international remedies.

Also contained in the draft were detailed provisions on the procedures to be followed by the High Commissioner who could call for the assistance of competent agencies of the state concerned. He could also seek the assistance of such NGOs as might be familiar with local conditions and the general issues involved. He would have been entitled to conduct an enquiry within the territory concerned and would have had the right to see documents and hear witnesses. He would "make every effort to settle the object of a complaint . . . through negotiation and conciliation." If he were of the opinion that negotiations were not likely to lead to, or had not resulted in a satisfactory solution he might refer the complaint to the Human Rights Committee, to be set up under the Convention. The draft did not make it clear what the Committee was to do with the complaint, but the only real teeth in the powers of the High Commissioner would have been his authority to refer the matter to the Committee and of course his general authority to submit annual and, where necessary, special reports to the General Assembly for its consideration.[20]

Like the Cassin submission, the Uruguay draft did not gain a great deal of support. The arguments against it (which seem remarkably similar to those raised against the current proposals)[21] were summarized by the Secretary-General in a note to the tenth session of The General Assembly.[22] It was objected that anything beyond state complaints was unacceptable and premature in view of the existing political situation; that the draft was over-ambitious and ambiguous; that, even if a suitable person to fill the Office could be found, he would be swamped by complaints; finally, it was suggested that it was preferable to rely on a committee on which "all the areas and different judicial and cultural systems of the world would be represented." In the event, the Covenants as finally adopted had the much less "ambitious" enforcement procedures that have already been noted.[23]

[20] See further on "publicity as a sanction," *infra* Chapter 3.
[21] *Infra* Chapter 3.
[22] 10th Sess., Agenda Item 28 (Part II) at 84, U.N. Doc. E/2929 (1955).
[23] *Supra* Chapter 1.

Revival

The current revival of the High Commissioner concept seems to have begun in the U.S. State Department in the summer of 1963.[24] Richard N. Gardner, then Deputy Assistant Secretary of State for International Organization Affairs was concerned both with the general issue of U.S. participation in the human rights activities of the United Nations and with putting some vigour into the operations of that body. His suggestions in the former area resulted in the President's forwarding to the Senate for confirmation the Supplementary Slavery Convention of 1956, the 1952 Convention on the Political Rights of Women and a 1957 ILO Convention Concerning the Abolition of Forced Labour.[25] In the latter area it seemed clear that there was little chance of a strong U.S. initiative but President Kennedy's speech to the General Assembly on 20 September 1963 did contain a hint that the U.S. might at least go along with efforts at more efficient enforcement procedures. After expressing U.S. opposition to "*apartheid* and all forms of human oppression" the President went on to suggest that "New efforts are needed if this Assembly's Declaration of Human Rights, now fifteen years old, is to have full meaning." [26] At about the same time, Dr Gardner reminded a number of representatives of NGOs of the earlier High Commissioner proposals and the idea was taken up by Mr Jacob Blaustein a former Chairman of the American Jewish Committee and Alternate U.S. delegate to the General Assembly in his Dag Hammarskjold Memorial Lecture at Columbia University on 4 December 1963. In the course of an address stressing the need for "transition from *promotion* to *implementa-*

[24] The chronology in the following paragraphs has been pieced together from the printed material aided by discussions with Dr Gardner, who is now Henry L. Moses Professor of Law and International Organization at Columbia University; Mr Sidney Liskofsky of the International League for the Rights of Man; representatives of various governments; secretariat officials; and correspondence with Amnesty International, Mr Sean MacBride of the International Commission of Jurists and the late Mr Jacob Blaustein. Undoubtedly it does not do full justice to the part played by many representatives of governments and NGOs and academics in maturing an idea that had become very much in the public domain.

[25] See R. Gardner, *Human Rights Some Next Steps; Address, Texts of Conventions on Slavery, Forced Labor, and Political Rights of Women and President Kennedy's Letter Transmitting the Conventions to the Senate* (1963). The initiative did not bear fruit until the accession of the U.S. to the Supplementary Slavery Convention on 6 December 1967. No action has yet been taken by the Senate on the other two treaties.

[26] See text in *American Foreign Policy, Current Documents* for 1963, 106, 111. President Kennedy's remarks were referred to and the hint made a little stronger in R. Gardner, *Address to the World Jewish Congress* on 6 December 1963, 50 *Dep't State Bull.* 23 (1964) although no specific ideas were mentioned in the prepared text.

tion of human rights," Mr Blaustein suggested the appointment of a High Commissioner with much more modest functions than had been contemplated in the Uruguay draft:

> Such a High Commissioner would, amongst other things, lend his good offices to governments and be available at their request to investigate situations where there have been alleged violations of human rights; he could assist underdeveloped countries in the organization of various institutions for the promotion of human rights; he could advise the Economic and Social Council on the human rights aspects of the Development Decade; and he could assist the Commission on Human Rights in its review of the periodic reports from governments on human rights. . . .[27]

The Blaustein proposals were discussed at a seminar on 14 December of the same year arranged jointly by the American Jewish Committee and New York University. The seminar was attended by a number of American scholars in the human rights field and by some NGO representatives. In the course of the seminar Dr Gardner expressed personal support for the Blaustein suggestions and he included the gist of his remarks on that occasion in the first edition of his IN PURSUIT OF WORLD ORDER the next year. In addition to a general discussion of possible functions for a High Commissioner, a question of tactics, relevant to having the proposals adopted by Governments,[28] was discussed – that of the title of the proposed offical. It was suggested that a low-key title such as "Rapporteur" or even "Special Rapporteur" would be less likely to scare governments off.[29] This appears to have been one of the few occasions in the course of the development of the proposal when the appropriateness of the title was given serious consideration.[30] Apparently the supporters of the proposal

[27] J. Blaustein, *Human Rights – A Challenge to the United Nations and to our Generation* 23 (Dag Hammarskjold Memorial Lecture, Columbia University, 4 December 1963), reprinted in A. Cordier and W. Foote eds., *The Quest for Peace: The Dag Hammarskjold Memorial Lectures* 315, 328-29 (1965).

[28] On further issues of tactics see *infra* p. 60.

[29] One of the NGOs represented at the seminar, the International League for the Rights of Man, in fact presented to the Commission on Human Rights suggestions for a "Special Rapporteur or Consultant" with some of the powers of the Blaustein High Commissioner: U.N. Doc. E/CN.4/NGO/124 (1964). This was not proceeded with and the League supports the present High Commissioner draft. The term "Attorney-General" has not appeared in connexion with the current revival. Cf. the proposal for a U.N. Attorney-General with analogous functions to the U.S. official: Siegel, "Role of a proposed United Nations Attorney-General – advocate of peace," 7 *How. L.J.* 145 (1961).

[30] Note, however, the comments by France and Argentina, two lukewarm supporters of the concept noted in the Secretary-General's Analytical and Technical Study of the High Commissioner proposal U.N. Doc. E/CN.4/AC.21/L.1 at 22 (1966) and the clash between the Soviet and U.K. delegates *infra* p. 57.

have generally taken the view that the gain in prestige which comes with the fine-sounding title outweighs any unpleasant connotations that it may have.

It was at this point that NGO interest in the proposal became a determining factor in its survival. The question was discussed at informal meetings of NGOs held in Paris in January 1964 under the auspices of the World Veterans Federation, in London the following June under the auspices of Amnesty International and in Geneva in July of the same year under the auspices of the International Commission of Jurists. Present at some or all of these meetings, in addition to the hosts, were representatives of the International Committee of the Red Cross, the International Committee of Military Medicine, the Ligue Belge pour le Défense des Droits de l'Homme, the International League for the Rights of Man and the World Jewish Congress. The upshot of these meetings was a joint statement in favour of a High Commissioner for Human Rights and a draft General Assembly resolution.[31]

Lobbying of Governments began at this stage and the draft resolution was circulated widely. One Government which received a copy of the draft was that of Costa Rica which has taken an active interest in human rights matters at the United Nations over a number of years.[32] Early in 1965 Costa Rica introduced a proposal for a High Commissioner in the Commission on Human Rights.

The Costa Rica draft in the works

Some space needs to be devoted to the rather tedious process of steering the proposal through the United Nations, both for the light that is thrown on some of the matters discussed in later Chapters and to give some indication of the painstaking efforts involved in such an exercise.

The journey began in the Commission on Human Rights at its meeting in March 1965. The decision to sponsor the proposal had apparently been taken rather hurriedly since the Costa Rican request for the inclusion of a suitable item on the Commission's agenda was circulated only a few days before the session began.[33] The memorandum requesting inclusion made general references to the Uruguay draft and the Blaustein lecture but did

[31] The salient aspects of the NGO draft are reproduced in Fawcett, "The protection of human rights on a universal basis: recent experience and proposals," in A. Robertson ed., *Human Rights in National and International Law* 289, 298 (1968). NGO representatives discussed the draft with Professor John Humphrey, then Director of the United Nations Division on Human Rights, who has been strongly in favour of the idea.

[32] See e.g. its activities *supra* p. 29 and *infra* p. 67 note 26.

[33] U.N. Doc. E/CN.4/887 (1965) and provisional agenda E/CN.4/879/Add.2 (1965).

not mention the NGO statement of July 1964. The main objection to including the item on the agenda came from the Soviet representative who argued[34] that the "question of the establishment of such a post and its supporting bodies to supervise the application of the conventions on human rights and the draft convention on the elimination of racial discrimination was already on the agenda of the General Assembly." However, it was eventually agreed to include the item on the agenda in the form "Question concerning the implementation of human rights through a United Nations High Commissioner for Human Rights or some other appropriate international machinery." Speaking in favour of inclusion, while doubting that there would be time to reach the item, was Professor Cassin who expressed France's "great interest" in the proposal.[35] In fact the Professor has subsequently shown little enthusiasm for it.[36] The item was not reached and Costa Rica decided to attempt some action in another forum – at the ECOSOC meeting later in 1965. It proposed[37] that ECOSOC recommend to the General Assembly that it consider the matter. The Costa Rican suggestion was referred to by a number of delegations in the course of the ECOSOC Social Committee's discussion of the Report of the Commission on Human Rights.[38] Some interest was expressed by representatives of the United Kingdom, the United States, Canada and Algeria, while the Soviet representative repeated the objection to "prejudging" the General Assembly's decisions on the Covenants and added the argument that the jurisdiction contemplated "could not be conferred on one person, since questions of national sovereignty and prerogative were involved, and any interference in the internal affairs of sovereign States must be avoided."[39] We shall have occasion to examine this additional Soviet argument in a later chapter.[40] No specific resolution was, however, put before the Committee and no action was taken. Costa Rica then moved, itself, to have the General Assembly take up the matter. On 20 August 1965 it requested the inclusion

[34] U.N. Doc. E/CN.4/SR.815 at 6 (1965).

[35] U.N. Doc. E/CN.4/SR.816 at 3 (1965); and see Commission on Human Rights, Report on the Twenty-First Session, E.S.C.O.R., 39th Sess., Supp. No. 8 at 7-10 U.N. Doc. E/4024 (1965).

[36] See e.g. U.N. Doc. E/CN.4/SR.940 at 13, 20 and 22 (1967) where he supported a U.A.R. draft resolution in the Commission on Human Rights which would have sent the proposal back for further study and later abstained on the Commission's decision to support the draft resolution establishing the office; and his recent comments noted *infra* Chapter 7.

[37] U.N. Doc. E/L.1080 (1965).

[38] U.N. Docs. E/AC.7/SR.517 through 519 (1965).

[39] U.N. Doc. E/AC.7/SR.518 at 14 (1965).

[40] *Infra* pp. 112-133.

on the Agenda of the Twentieth Session and included in its request a draft resolution which followed closely the NGO draft of the year before.[41] The functions of the proposed official were described thus:

(a) he shall assist in the furthering of the realization of human rights and shall seek to secure the observance of the Universal Declaration of Human Rights;
(b) he shall advise and assist the Commission on Human Rights and other organs of the United Nations on the periodic and other reports, and submissions made by Governments, relating to human rights and such other matters as these bodies may request;
(c) he shall report annually to the General Assembly through the Economic and Social Council and his report shall be considered as a separate item on the agenda of both bodies; at the request of the General Assembly, the Secretary-General, or any other organ of the United Nations, the High Commissioner shall make special reports to the General Assembly; he may also make special reports in cases of urgency;
(d) he may, at the request of any Government, render assistance and services, and shall report on such assistance and services if so agreed with the Government or Governments concerned.

Costa Rica asked that the item be considered by a Working Group of the Assembly but in fact it was discussed briefly by the Third Committee which decided to refer it to ECOSOC for transmittal to the Commission on Human Rights for "study and report".[42] The main discussion turned on whether or not to direct the Commission to treat it "as a matter of high priority." These words were deleted before the draft resolution was adopted. The Hungarian representative's comment that "on the whole delegations had been satisfied with the activities of the existing bodies" [43] was probably not intended as an ironical reference to the inability of the

[41] U.N. Doc. A/5963 at 6 (1965). Shortly after the publication of this draft, public discussion of the High Commissioner idea was carried a step further at the Second International Conference on the European Convention on Human Rights held in Vienna under the auspices of the Council of Europe and the University of Vienna from 18 to 20 October 1965. A paper written by J. E. S. Fawcett, a member of the European Commission of Human Rights, prior to the appearance of the Costa Rican draft, discussed the NGO draft and a number of scholars and NGO representatives commented on the later material. The proceedings appear in Robertson, *op. cit. supra* note 31 esp. at 298, 306, 312, 318, 326-328. A summary of the discussion also appears in U.N. Doc. E/CN.4/AC.21/L.1 (1966). Professor Fawcett made the suggestion, which has not reappeared in subsequent governmental discussions, that there be a number of regional Commissioners each with the same role and relationship with the U.N.; Robertson ed., at 299. Note the similarity with the Consultative Council of Jewish Organizations proposals. For some trenchant criticism of regionalism in human rights matters see Schwelb, id., at 355-56.

[42] See U.N. Docs. A/C.3/SR.1372 (1965) and A/6167 (Report of the Third Committee) (1965).

[43] U.N. Doc. A/C.3/SR/1372 (1965).

United Nations to deal with the violations of human rights that took place in his country in 1956. But his reference to the organization's financial crisis perhaps helps to explain why the Committee did not want to rush matters.

The next United Nations forum at which the High Commissioner was discussed was a Seminar on Human Rights in Developing Countries held in Dakar, Senegal, in February 1966. According to the Report on the Seminar: [44]

> Some speakers expressed their deep conviction of the effectiveness of the proposed institution, and urged the countries whose nationals were participating in the Seminar to recommend their respective Governments to examine the plan attentively. However, some speakers thought that the institution of a United Nations High Commissioner for Human Rights might lead to interference in the domestic affairs of states.

More significant than any contribution that the Seminar made to the substance of the debates on the proposal was its composition – 23 African countries and observers from France, the U.S.S.R., the U.S. and a group of NGOs, many of them supporters of the Costa Rican draft. The large African representation underscores a point later made by the Representative of Jamaica when she stated that she wished to avoid the impression "that the States favouring the appointment of a High Commissioner were all developed Western-oriented countries and not members of the 'third world' ".[45]

Shortly before the March meeting of the Commission on Human Rights a statement supporting the Costa Rican draft [46] was made by fifteen NGOs.[47] The statement acknowledged that the functions proposed fell short of what the organizations would have liked but that they appeared "to represent the maximum likely to be acceptable to a number of governments in the present circumstances." Another NGO, the International Confederation of Free Trade Unions, issued a statement attacking the Costa Rican draft for being too mild and supporting something more like the Uruguay

[44] U.N. Doc. ST/TAO/HR/25 at 53 (1966).

[45] U.N. Doc. E/AC.7/SR.574 at 9 (ECOSOC Social Committee, 1967).

[46] U.N. Doc. E/CN.4/NGO/136 (1966).

[47] World Veterans Federation; Amnesty International; Coordinating Board of Jewish Organizations; Friends World Committee for Consultation; International Association of Penal Law; International Commission of Jurists; International Council of Jewish Women; International Federation for the Rights of Man; International Federation of Women Lawyers; International League for the Rights of Man; International Movement for Fraternal Union Among Races and Peoples; the Pan-Pacific and South East Asian Women's Association; World Jewish Congress; World Union for Progressive Judaism; International Humanist and Ethical Union.

draft.[48] In the course of the Commission's discussions on the item, statements generally supporting the Costa Rican draft were made by a representative of the International Commission of Jurists, one of the fifteen, and by representatives of the International Confederation of Free Trade Unions, the International Federation of Christian Trade Unions and the Consultative Council of Jewish Organizations. The latter's spokesman was Mr Moses Moskowitz who had presented the Council's proposals to the Commission on Human Rights back in 1950.[49] Following a general discussion [50] of the item during which a number of representatives expressed interest in principle but felt that the draft was too vague, the Commission decided [51] to establish a Working Group of nine states members of the Commission to study it and also asked the Secretary-General to prepare an analytical and technical study to assist the Group. It was agreed that the composition of the Working Group should be left to the discretion of the Chairman of the Commission, Mr Fernando Volio Jimenez of Costa Rica. According to the Costa Rican observer in the ECOSOC Social Committee the following May [52] Mr Volio Jimenez tried to persuade members of the Soviet block who were opposing the study to serve on the Group, but was met by a boycott. The Soviet representative later [53] denied "that the Chairman had begged the Soviet Union delegation to reconsider its decision" from which it seems a fair inference that he was asked at least once. At all events, the Working Group comprised representatives of Austria, Costa Rica, Dahomey, France, Jamaica, the Phillipines, Senegal, the United Kingdom and the United States. All except Dahomey, which had not yet expressed any opinion, had made statements in the Commission supporting the idea of a High Commissioner.

[48] U.N. Doc. E/CN.4/NGO/139 (1966). For a more recent statement of continuing NGO support see "Montreal Statement of the Assembly for Human Rights, March 22-27 1968, Proposals for Action," in 9 *J. Int'l Comm. Jurists* 110, 112 (1968).

[49] Mr Moskowitz had earlier expressed vehement opposition to the Costa Rican draft on the ground that it was so mild a proposal that its effects would be harmful to the cause of protection of human rights: American Examiner, 14 October 1965. However, at the Commission his words were generally favourable.

[50] The Soviet delegate took the opportunity to suggest that American support for the proposal was a diversion to give world opinion the impression of active participation in the cause of human rights when it did not even ratify U.N. Conventions on the subject: U.N. Doc. E/CN.4/SR.879 at 9 (1966).

[51] Commission on Human Rights, Report on the Twenty-Second Session, E.S.C.O.R., 41st Sess., Supp. No. 8 at 81-2, U.N. Doc. E/4184 (1966).

[52] U.N. Doc E/AC.7/SR.574 at 13 (1967). See also the representative of the Phillipines, U.N. Doc. E/AC.7/SR.573 at 10 (1967).

[53] U.N. Doc. E/AC.7/SR.574 at 18 (1967).

The Working Group held its first meeting in June 1966. Dahomey's representative broke his country's silence by remarking that the United Nations should do its utmost to remedy the flagrant violations of human rights that occur daily and that budgetary and other administrative aspects of the proposal should not be unduly stressed. "The Working Group should seek, rather, to justify the establishment of an office of High Commissioner." [54] After a brief and inconclusive discussion about what was meant by the words "or some other appropriate international machinery" in the Group's terms of reference: "Question concerning the implementation of human rights through a United Nations High Commissioner for Human Rights or some other appropriate international machinery," the Group agreed to adjourn until the following year when the Secretary-General's study would be available.

The Working Group's draft

The Secretary-General's analytical and technical study,[55] a thorough document to which the present study owes much, appeared on 30 December 1966. It summarized comments made by delegations, discussed possible interpretations of the draft resolution, surveyed established or contemplated machinery other than the High Commissioner and estimated the financial implications of the draft. An important point made in the Study,[56] to which effect was given at a later stage, was that because of the general language of resolution 728 F (XXVIII) [57] an express authorization would be necessary if the High Commissioner were to be given access to communications dealt with under that resolution.

With the Study available, the Working Group met again on fourteen occasions early in 1967 and produced its report and draft statute establishing an office of High Commissioner [58] in time for the meeting of the Commission on Human Rights in March. The Working Group's draft is substantially that finally recommended to the General Assembly by ECOSOC. Little needs to be said about the Working Group's meetings at this stage since extensive references will be made to them in the course of the next two Chapters which discuss the details of the draft. However, three points need to be mentioned. The first is that the Group settled the question of the

[54] U.N. Doc. E/CN.4/AC.21/SR.1 at 6 (1966).

[55] U.N. Doc. E/CN.4/AC.21/L.1 (1966). It was prepared by Dr Egon Schwelb, former Deputy Director of the Division on Human Rights and Professor at Yale Law School.

[56] Id., at 34.

[57] *Supra* p. 21.

[58] U.N. Doc. E/CN.4/934 (1967).

meaning of "or some other appropriate international machinery" [59] in its terms of reference by agreeing [60] that it "would not hold a general discussion or re-open discussion on the question of the appropriateness or not of establishing an Office of High Commissioner for Human Rights. It was agreed that the Working Group would take as the basis of its discussion the proposal of Costa Rica . . . and the analytical and technical study submitted by the Secretary-General . . . ." Second, the suggestion concerning communications in the Secretariat study was adopted and the draft provided that the High Commissioner would "have access to communications." [61] The third significant point was the addition to the proposal of a panel of expert consultants to assist the High Commissioner. The addition was primarily [62] the result of a compromise between a minority of members of the Group who were in favour of a collegiate structure rather than the single official and the majority which wanted a single official. Members of the majority contended that only a single official could exert the necessary moral influence and yet act with sufficient diplomatic skill to achieve the purposes of the proposed Office.[63] One thought that a collegiate body would involve duplication of work and complicate the efficient dispatch of business.[64] Members of the minority argued that a collegiate body would run less risk of error than a single person and, by being truly representative of different cultures and legal systems, would be less open to any charge of subjective judgment.[65] Reference was made to various collegiate bodies created under the auspices of the ILO and regional organizations. The compromise was a recommendation that the High Commissioner should have an advisory panel of not more than seven,[66] apparently full-time,[67]

[59] *Supra* p. 52.

[60] U.N. Doc. E/CN.4/934 at 8 (1967).

[61] For the Group's views on the importance of this, see *infra* p. 54.

[62] The first public suggestion for a panel seems to have come from the International Federation of Christian Trade Unions in the Commission on Human Rights: ". . . the High Commissioner should be assisted by a council which could be readily convened and which would make recommendations to him; the council should also be composed of representatives of states and non-governmental organizations, as also of outstanding experts who would be independent of Governments." U.N. Doc. E/CN.4/SR.876 at 10-11 (1966). See also suggestions by France, the U.K. and Argentina during the same debate, U.N. Doc. E/CN.4/SR.880 at 7, 10, 11 (1966). The proposal for NGO representation was never seriously considered.

[63] U.N. Doc. E/CN.4/934 at 8 (1967).

[64] Id., at 9.

[65] *Ibid.*

[66] The figure 7 was chosen rather than 5 to ensure that all legal systems and all geographical regions might be represented. See the Representative of Jamaica's reply to Soviet allegations that a big number was chosen so that it could be packed with Westerners: U.N. Doc. E/AC.7/SR.574 at 10 (1967).

[67] U.N. Doc. E/CN.4/934 at 18 (1967). But see the Secretary-General's statements

expert consultants but no real clues were given as to exactly what they were supposed to do. We shall examine the possible functions of this panel in Chapter 4.[68]

The Commission on Human Rights Approves

The Commission on Human Rights considered the Working Group's Report towards the end of its 1967 session after a skirmish [69] to prevent the item from being held over until the following year. Three Commission meetings were devoted to it. A draft resolution to adopt the Group's proposals was introduced by the Representative of Dahomey supported by four other members of the Group, Austria, Costa Rica, the Philippines and Senegal. The sponsors stressed that the High Commissioner could not "impose his will" upon Governments. They also said that in order to perform his functions adequately he "must have ample information at his disposal and he must in particular have access to the communications received under Council resolution 728F (XXVIII)." [70]

Prior to the meeting the Soviet representative had circulated a letter [71] alleging "a number of regrettable omissions and mis-representations contained in the analytical study." It was suggested that the study was biassed and had not complied with its aim which was to "consider all relevant questions concerning such on institution." Instead it had concentrated on arguments "which *a priori* justified its desirability and not otherwise." During the debate [72] the Soviet representative turned his attention to the Working Group Report and made much the same criticism about it. He added that it was surprising that the Working Group had ignored the adoption of the Covenants on Human Rights by the General Assembly:

> When . . . the Commission had adopted its resolution establishing the Working Group it had not known when the Covenants would enter into force, and a number of delegations had supported the idea of the appointment of a High Commissioner as a provisional solution. Now that the Covenants had been adopted, what mattered was to implement them by the methods of international co-operation they specified.

of administrative and financial implications of the draft U.N. Docs. A/C.3/L.1620 at 2-3 (1968) and A/C.3/L.1728 at 2-3 (1969) which proceed on the basis of a part time panel.

[68] *Infra* pp. 102-110.

[69] U.N. Doc. E/CN.4/SR.938 at 10-14 (1967).

[70] Report on the Twenty-Third Session of the Commission on Human Rights, E.S.C.O.R., 42nd Sess., Supp. No. 6 at 168, U.N. Doc. E/4322 (1967).

[71] U.N. Doc. E/CN.4/AC.21/L.1/Add.1 and Corr.1 (1967).

[72] U.N. Doc. E/CN.4/SR.939 at 10-11. See also representative of Iran, id., at 6-7.

Not only was the High Commissioner unnecessary in view of the completion of the Covenants but the effect of the Working Group's draft would be to usurp the functions of a number of U.N. organs and, indeed, to create a body with powers going beyond those contemplated in the Charter. Hardest hit was the General Assembly: the High Commissioner, not the Assembly, was to be charged with maintaining vigilance over the entire human rights situation. Although the General Assembly did not consider itself entitled to examine individual complaints of breaches of human rights,[73] the report would entitle the High Commissioner so to do. Further, powers were to be conferred that even went beyond those granted the International Court of Justice under Article 65 (1) of its statute which provides that the Court could give an advisory opinion only at the request of a body authorized by or in accordance with the provisions of the Charter, "whereas the Working Group proposed that the High Commissioner should give his advice and assistance, unasked and on his own initiative, not only to any organ of the United Nations, including the General Assembly, but even to Member States." [74] Moreover, a High Commissioner could not be representative of all the legal systems of the world. He could be thoroughly conversant only with the legal system and ideology of his own Government. The compromise of the panel of expert consultants was unsatisfactory since the panel would "be neither representative nor objective; the proposed method of appointment would leave the High Commissioner free to block the appointment of persons whose views did not coincide with his own." [75] Thus, insisted the Representative of the Soviet Union, the task of the Commission was not to create new organs but to improve the existing organs and ensure the rapid ratification and implementation of the International Covenants on Human Rights.[76]

The representatives of the United Arab Republic and Yugoslavia, mentioning similar arguments, put forward a draft resolution calling for a new study by an enlarged Working Group "in order to ensure a fuller represen-

[73] This is not entirely accurate. At least in regard to Non-Selfgoverning Territories and *apartheid,* the Assembly, through its Committees, considers individual petitions: see e.g. Carey, "The United Nations' Double Standard on Human Rights Complaints," 60 *Am. J. Int'l L.* 792, 795-6 (1966), and U.N. Doc. A/5565/Add.1 (1963). For an Assembly resolution making recommendations in relation to a named individual see G.A. res. 938 (X) of 3 December 1955, G.A.O.R., 10th Sess., Supp. No. 19 at 22, U.N. Doc. A/3116 (1955).

[74] *Op. cit. supra* note 72 at 13. He was referring to a passage in the Working Group Report which suggests that the High Commissioner might make *informal* offers of advice. See *infra* Chapter 3.

[75] Id., at 14.

[76] Id., at 15. At the time of writing the U.S.S.R. has not ratified the Covenants.

tation of the various points of view expressed on the matter," hinting that if this were not done the proposal was certain to be killed in the General Assembly.[77] A number of speakers felt that more than enough study had already been given to the proposal and that the U.A.R./Yugoslavia draft resolution was merely a stalling tactic. The representative of Dahomey, for example, stressed that the composition of the Working Group "could not have been otherwise . . . because the States opposed . . . had refused to participate . . . ." [78] He also argued that the adoption of the Covenants "represented only limited progress, for the provisions of the Covenants applied only to such States as agreed to ratify them, and . . . it would be some time before the Covenants came into force." [79]

Following the defeat of the U.A.R. draft resolution the Five-Power draft, modified by minor amendments suggested by Italy and the Ukrainian SSR was adopted by a vote of 20 [80] to 7 [81] with 2 [82] abstentions. The purpose of the Italian amendment was to make it clear that the High Commissioner was not to replace existing or contemplated machinery for dealing with human rights.[83] The Ukrainian amendment added a reference to the International Covenants to the draft preamble.

ECOSOC Approves

The ECOSOC Social Committee considered the Commission on Human Rights draft in May 1967. Little new was contributed to the positions already taken by States and the highlights of the debates were probably the clash between the representatives of Costa Rica and the U.S.S.R. over the membership of the Working Group and that between the U.S.S.R. and the U.K. over the term "High Commissioner." The first of these has already been noted.[84] The second occurred when Mr Nasinovsky of the Soviet

[77] U.N. Doc. E/CN.4/SR.940 at 7-8 (1967).

[78] Id., at 15.

[79] *Ibid.*

[80] Argentina, Austria, Chile, Congo (Democratic Republic of), Costa Rica, Dahomey, Greece, Guatemala, Iran, Israel, Italy, Jamaica, New Zealand, Pakistan, Peru, Philippines, Senegal, Sweden, U.K., U.S.A.

[81] India, Iraq, Poland, Ukrainian S.S.R., U.S.S.R., United Arab Republic, Yugoslavia.

[82] France, Nigeria.

[83] It added to operative paragraph 2 the words "without prejudice to the functions and powers of organs already in existence or which may be established within the framework of measures of implementation included in international conventions on the protection of human rights and fundamental freedoms. . . ." See *infra* p. ....

[84] *Supra* notes 52 and 53 and accompanying text. Allegations against the Working Group were also made by India, U.N. Doc. E/AC.7/SR.574 at 14 (1967); Tanzania, id., SR.572 at 8; by the Nigerian observer, id., SR.573 at 15. The Head of the Human

Union referred to the colonial connotations of the term High Commissioner and to the fact that High Commissioners were sometimes appointed for defeated territories. He went on to claim:

The Russian people had never been under the thumb of a High Commissioner. They had ousted the tsars.... It was true that there was a United Nations High Commissioner for Refugees, but the U.S.S.R. had never recognized him or financed his activities, which were really aimed at assisting those who had been the accomplices of Hitler.... The period of history recalled by the title of High Commissioner was so shameful as to make that title unacceptable.[85]

The British delegate responded that what he called the "obsession" with the term High Commissioner "was curious and precluded intelligent discussion." [86] He added that in his view further study was pointless: "No amount of technical analysis would affect the position taken by delegations." [87]

A resolution submitted by India which would have resulted in no action being taken that session was defeated 9-15-3 and the draft resolution proposed by the Commission on Human Rights was then adopted 15- [88] 4- [89] 8.[90] (The representative of Gabon later requested that his abstention be considered as an affirmative vote.) A further resolution was adopted requesting the Secretary-General to bring the resolution favouring the High Commissioner to the attention of Member States, along with a number of amendments submitted by the United Republic of Tanzania which had not been acted upon, in order to obtain their views. He was then to submit a report embodying the replies of Governments to the General Assembly. The resolution also asked the ILO and UNESCO to submit for the General Assembly's assistance a report on their experience in the implementation of human rights.[91]

Rights Division responded sharply to the Soviet claim that the analytical and technical study was biassed, id., SR.573 at 16-17.

[85] U.N. Doc. E/AC.7/SR.572 at 4 (1967). The statement about the High Commissioner for Refugees is somewhat misleading. While it is true that the Soviet Union has never financed the operational activities of the High Commissioner it in fact pays its share of his administrative expenses which are charged to the regular budget of the Organization.

[86] U.N. Doc. E/AC.7/SR.574 at 7 (1967).

[87] Id., at 9.

[88] Belgium, Canada, Dahomey, France, Guatemala, Iran, Mexico, Pakistan, Panama, Peru, Philippines, Sweden, U.K., U.S., Venezuela.

[89] India, Roumania, U.S.S.R., Czechoslovakia.

[90] Cameroon, Gabon, Kuwait, Libya, Morocco, Sierra Leone, Turkey, Tanzania.

[91] The Secretariat paper in response to the resolution, U.N. Doc. A/7170 (1968), contains the ILO and UNESCO replies as well as 11 favourable government responses and two unfavourable (Sudan and Japan). The paucity of replies is obviously disappointing and none were received during 1969.

The main resolution was then passed in plenary session 17-4-5 with Sierra Leone joining Gabon in moving from abstention to support.[92]

Some of the amendments put forward by Tanzania do not amount to a substantial revision of the draft and they could probably be accepted by its proponents. These will be mentioned in the next two Chapters.[93] However, the most important of the amendments would mean that the office would be constituted by multilateral convention rather than by General Assembly resolution. The motive behind this is cloudy but there is much truth in the comment by Costa Rica that this amendment, if pressed, "would result in the indefinite postponement or complete abandonment of the proposal . . . ." [94]

In the Assembly

The postponing General Assembly resolutions of 1967 and 1968, which were mentioned in the Introduction, involved no serious discussion of the substance of the proposal. The subsequent debates consisted largely of delegations re-stating positions that have already been mentioned.[95] However, it is worth recording that Japan, which had expressed its opposition to the proposal in a reply to the Secretary-General,[96] announced in 1969 that it had "given extensive consideration to the subject and that it was now ready to adopt a more positive attitude." [97] The main reason for the change in attitude was that the Japanese authorities realised that it would be a long time before the International Covenants on Human Rights entered into force. "In the circumstances, there was obviously an urgent necessity for a post of High Commissioner for Human Rights to help the international community in its efforts to obtain respect for those rights." [98] The representative of France which had been a somewhat wavering supporter indicated his Government's firm support.[99] The representative of India, which had been an early opponent of the proposal, made what appeared to be a preliminary manoeuvre towards support in 1969 when he said that his delegation would not make any comments on the substance of the proposal at the current Session but firmly supported the wording of the draft reso-

[92] E.S.C.O.R., 42nd Sess., 1479th meeting (1967). See Appendix I for the text of the resolution.

[93] *Infra* pp. 60, 97. See Appendix II for the Tanzanian proposals.

[94] U.N. Doc. A/7170, Annex III at 5 (1968). See also *infra* p. 107 (experts).

[95] U.N. Doc. A/8035, a Report prepared by the Secretariat for the 1970 debate, contains a useful summary of all the previous debates.

[96] U.N. Doc. A/7170, Annex III, at 7-9 (1968).

[97] U.N. Doc. A/C.3/SR.1726 at 7 (1969).

[98] *Ibid.*

[99] U.N. Doc. A/C.3/1730 at 7 (1969).

lution calling for the highest priority to be given to the item at the next session.[100] At the 1970 Session the Indian delegate followed up this statement by tabling a number of suggestions for amendments to the ECOSOC draft which, while weakening it somewhat, indicated support for the proposal in general.[101]

On the other hand, the representative of the U.S.S.R. indicated emphatically that "if such a legally unjustified officer was created the U.S.S.R. would not recognize it and would not enter into any kind of commitment with regard to it." [102] The debates so far in the Assembly make it plain that the proposal is strongly opposed by the Soviet and Arab blocs and that a number of Asians and Africans have reservations about it.

In the light of these strong feelings the 1971 resolution postponing the item until 1973 is not altogether surprising.

[100] U.N. Doc. A/C.3/SR.1731 at 7 (1969).

[101] U.N. Doc. A/C.3/L.1827, reproduced in U.N. Doc. A/8231 (Report of Third Committee) at 9 (1970).

[102] *Op. cit. supra* note 100 at 11-12. See also Saudi Arabia in U.N. Doc. A/C.3/SR. 1732 at 3-4 (1969): "His country intended, if the post was created, to reduce its contribution to the budget of the United Nations by an amount equivalent to its share of the normal cost of operation of the office...." During the 1970 debate none other than the Observer of the Holy See found it necessary to intervene to prevent the representatives of Saudi Arabia and France from coming to blows.

CHAPTER 3

THE FUNCTIONS OF THE HIGH COMMISSIONER

During the debates, a common comment, both by friend and foe of the proposal, has been that the functions proposed are not stated precisely. To some extent this lack of precision has been a tactical ploy by the strong supporters of the proposal on the theory that too much detail would frighten off less enthusiastic supporters. A related, and equally common, comment has therefore been that the vagueness leaves room for expansion. As the United States delegate explained to the ECOSOC Social Committee in 1967: "The provisions of the resolution were flexible enough to permit development, but also set realistic limits." [1] On the same occasion the Czechoslovak delegate complained that what he termed the "innocence" of the draft was "only apparent." In particular, he suggested, "by clever manipulation" the High Commissioner, once appointed, might "exercise powers which were not vested by the Charter in any organ." [2] This Chapter seeks to uncover what the draft resolution would permit – either on its face or with a little "manipulation."

Subject matter

An initial question is that of the general subject-matter with which he would concern himself. Operative paragraph 2 of the draft refers him to human rights and fundamental freedoms "as set forth in the Charter of the United Nations and in declarations and instruments of the United Nations or of the specialised agencies, or of intergovernmental conferences convened under their auspices for this purpose. . . ." One of the amendments proposed by the United Republic of Tanzania, which were sent forward to the General Assembly along with the ECOSOC draft, would add a specific reference to the Universal Declaration of Human Rights among "declarations and instruments" but would not, of course, affect the very

[1] U.N. Doc. E/AC.7/SR. 573 at 14 (1967).
[2] Id., at 5.

broad scope of the phraseology. The scope of the High Commissioner's subject-matter was deliberately made broad in the Working Group. It will be necessary in Chapter 6 to examine the jurisprudential issues presented by what might be viewed as an attempt to create an office to "enforce" instruments that may fall short of constituting international law. At this stage, however, it is sufficient to record the Working Group's feeling that, since the High Commissioner's authority would be mainly "of a moral nature," compliance with Declarations might be as important to him as the observance of legally more binding instruments. Attention was also drawn to the frequent adoption of "recommendations" by the ILO and UNESCO and of "regulations" by WHO. None of these required ratification but all fell within the accepted scope of the term "instruments." The Report records [3] that it was "agreed that resolutions should not be included in the context, since they sometimes commanded less general support than declarations and conventions." This seems to leave General Assembly "recommendations," which are mere "resolutions" for present purposes,[4] outside the scope of the High Commissioner's field of activity, but human rights "recommendations" of the specialized agencies, when adopted with some formality, in. Exactly what is in or out would probably not be a significant issue in practice since the words of the Universal Declaration, which is obviously in, are so sweeping as to give the High Commissioner a great deal of room for manoeuvre. But it is clear that the High Commissioner would not be confined to dealing with only one group of rights (civil and political) as had been earlier suggested.[5] It is clear from the breadth of the wording that the High Commissioner would have some functions in relation to economic and social rights, even if from the very nature of those rights, actions in specific cases would be less likely than in the case of civil and political rights. The point was underscored in the Working Group by Pierre Juvigny of France who noted [6] the wide range of United Nations organs which might request the High Commissioner's assistance as further evidence that his duties would not be confined to civil and political rights.

[3] U.N. Doc. E/CN.4/934 at 13 (1967).

[4] See *supra* p. 14.

[5] See representative of Austria in U.N. Doc.E/CN.4/SR. 879 at 13 (1966): "... it would be necessary to differentiate between the different rights and recognize from the outset that the High Commissioner would be unable to exercise any control over the implementation of certain social rights, for example, which come under the domestic jurisdiction of states." Cf. Wold, "The Right to Social Services," 9 *J. Int'l Comm. Jurists* 41, 46 (1968) where a role is seen for the High Commissioner in promoting social rights.

[6] U.N. Doc. E/CN.4/AC.21/SR.4 at 5 (1967).

Analogy with an Ombudsman

While, as we shall see later in this Chapter, the High Commissioner may be able to take some steps in respect of specific complaints, the functions and powers accorded to him by the draft fall short of those typically conferred on an Ombudsman. This is perhaps made clear enough by the general form of words defining the High Commissioner's functions which direct him "to assist in promoting and encouraging universal and effective respect for human rights. . . ." [7] There is nothing here about *protection* or *implementation.* But the point is underscored by the omission from the draft of a number of specific powers normally granted to an Ombudsman. Ombudsmen, like the proposed High Commissioner,[8] do not usually have the power to enforce their recommendations against recalcitrant public servants, but they do have a number of powers – to subpoena and hear witnesses, call for documents, evaluate evidence, ask for further information and enter government departments – which are not accorded the High Commissioner in the draft. The unsuccessful Uruguay proposals made specific mention of such powers.[9]

That any analogy with the Ombudsman should not be taken too far was, indeed, stressed in debates by a number of supporters of the High Commissioner proposal. The representative of New Zealand, whose Government had recently transplanted the Scandinavian institution, told the Commission on Human Rights that "it was one thing to set up an institution such as that within relatively small and homogeneous societies; it was quite another to establish it on a world scale." [10] The representative of the United Kingdom whose Government was at the time steering through Parliament legislation to create an Office, that of the Parliamentary Commissioner for Investigation, somewhat like that of Ombudsman, noted that "it has never been the Commission's intention that the High Commissioner should be a general inquisitor or ombudsman charged with ferreting out every violation of human rights and reporting on them. The idea was that

[7] The Tanzanian amendment which would add a paragraph directing the High Commissioner to "initiate action where necessary to promote, encourage and strengthen universal and effective respect for human rights and fundamental freedoms" would, if adopted, still leave the functions short of those of an Ombudsman.

[8] W. Gellhorn, *Ombudsmen and Others* 431-32 (1966), J. Robson ed., *New Zealand, The Development of its Laws and Constitution* 144 (1967).

[9] *Supra* Chapter 2. See further on the Ombudsman analogy *infra* p. 142 note 16, 156 note 12.

[10] U.N. Doc. E/CN.4/SR.881 at 5 (1966). See also Sweden, SR.876 at 6 (1966); France, SR.880 at 9 (1966); Ukrainian S.S.R., SR.881 at 8 (1966).

the High Commissioner should be an individual, outside the political arena of the U.N., with powers to report on the status of human rights." [11]

The Ombudsman concept thus marks the outer limit of the possible powers of the High Commissioner although it will be suggested in the pages which follow that the draft creates something more than merely "an individual . . . with powers to report on the status of human rights" as envisaged by the representative of the United Kingdom.

General duty to assist in promoting and encouraging

Paragraph 2 of the ECOSOC draft lays down a general duty for the High Commissioner "to assist in promoting and encouraging universal and effective respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. . . ." The opening words of the paragraph conclude with the phrase "in particular" which is followed by four specific ways in which the High Commissioner is to perform his duties. These will be discussed shortly. The effect of the words "in particular" must at least be that what follows is to be given a broad interpretation, and it is difficult to suggest concrete examples of activities in which the High Commissioner might engage which are encompassed by the general power but not included in the specific subparagraphs. However, one activity probably implicit in the general power is that of urging states to ratify multilateral human rights conventions. The Secretary-General's reports showing the status of multilateral conventions and General Assembly resolutions such as that dealing with Human Rights Year which was mentioned in Chapter 1 [12] provide some encouragement of this nature but obviously something more is both possible and necessary. There are, indeed, precedents for the performance of such a function by international officials. The Statute of the High Commissioner for Refugees [13] lists as

[11] U.N. Doc. E/AC.7/SR.574 at 8 (1967). See also the U.S. representative in U.N. Doc. E/CN.4/SR.876 at 9 (1966) ("essentially advisory.") Cf. the robust remarks of the Representative of Panama that: "The most serious defect of the draft resolution was that it did not empower the High Commissioner to make investigations which were viewed by many delegations as an infringement of national sovereignty. In his view, some infringements of that kind would have to be tolerated if individual rights were to be effectively protected." U.N. Doc. E/AC.7/SR.573 at 3-4 (1967).

[12] *Supra* p. 15. For some suggestions of increased U.N. activity in this area see Roberto Ago's memorandum to the International Law Commission on "The Final Stage of the Codification of International Law," U.N. Doc. A/CN. 4/205/Rev. 1 (1968) and the Netherlands proposal to the Teheran Conference on Human Rights, A/CONF. 32/41 at 48 (1968).

[13] Para. 8(b). The statute appears as the Annex to General Assembly resolution

one of that official's functions "promoting the conclusion *and ratification* of international conventions" (emphasis added) and Prince Sadruddin Aga Khan, the present High Commissioner, has recently stressed the importance he attaches to this aspect of his work.[14] A study by UNITAR prepared for the Teheran Conference on Human Rights which has been referred to in another context [15] expresses the opinion that "one of the factors contributing to the comparatively large number of acceptances of the Convention on the Status of Refugees by African States is the role played by representatives of various offices of the United Nations High Commissioner for Refugees in Africa." [16] The same paper [17] records that

> Mr. Albert Thomas, the late Director-General of the ILO, considered this one of his most important responsibilities during his visits to the Capitals of the Member States of the ILO. Recent studies of the progress of ratification of the ILO Conventions and the part played by the Director and other ILO officials have indicated the importance of officials in the promotion of acceptance.

In the Commission on Human Rights two representatives suggested that the High Commissioner might perform similar functions [18] and, should a Member State show interest in a Convention, but need assistance in drafting suitable domestic legislation, the High Commissioner would probably be able to render assistance under paragraph 2 (b). More will be said about that when the subparagraph is discussed. His typical promotion activities would consist, like those of the High Commissioner for Refugees and the Director-General of the I.L.O., in discreet suggestions made during a visit for another purpose.

Sub-paragraph (a): advice and assistance to U.N. organs

We may now pass to the first of the High Commissioner's "particular" functions, bearing in mind that there is inevitably some overlap in the functions included in the different sub-paragraphs.

428(V) of 14 December 1950, G.A.O.R., 5th Sess., Supp. No. 20 at 46-48, U.N. Doc. A/1775 (1950).

[14] "Asylum – Article 14 of the Universal Declaration of Human Rights," 8 *J. Int'l Comm. Jurists* 27, 33 (1967). See also the comments by his predecessor: Schnyder, "Les Aspects Juridiques Actuels du Problème des Réfugiés," 114 *Recueil des Cours* 339, 408 (1964).

[15] *Supra* p. 16.

[16] A/CONF. 32/15 at 16 (1967).

[17] *Ibid.* On the occasional danger that states will be carried away by such promotion and make "empty ratifications" see E. Landy, *The Effectiveness of International Supervision: Thirty Years of I.L.O. Experience* 84-85 (1966).

[18] U.S., in U.N. Doc. E/CN.4/SR.876 at 9 (1966); Jamaica, in U.N. Doc. E/CN.4/

Sub-paragraph (a) of the ECOSOC draft instructs the High Commissioner to "maintain close relations with the General Assembly, the Economic and Social Council, the Secretary-General, the Commission on Human Rights, the Commission on the Status of Women and other organs of the United Nations and specialized agencies concerned with human rights, and [he] may, upon their request, give advice and assistance."

Professor Macdonald [19] has drawn attention to the important words "upon their request" in this formulation which might appear to put significant limits upon the High Commissioner's powers of initiative. He has, however, suggested that: "The reference here is to formal advice and assistance on a more or less specific human rights problem on which he has been consulted. It is obvious that if the High Commissioner is denied the capacity to take the initiative behind the scenes and to make informal contact with certain organs, his role will be unduly restricted and he will be something less than the Secretary-General's shadow. It is a fair inference that he was intended by the wording to enjoy an informal right of initiative which, of course, he will be expected to exercise with caution, tact and insight." This view is borne out by the interpretation accorded in practice to Article 98 of the United Nations Charter which directs the Secretary-General to "perform such other functions" as are "entrusted to him" by the General Assembly, the Economic and Social Council, the Security Council and the Trusteeship Council. Article 98 has been interpreted to permit preliminary soundings of attitudes by the Secretary-General.[20]

SR.882 at 506 (1966). The International Commission of Jurists has suggested that "The High Commissioner, *through his report to the General Assembly*, could play an important part in encouraging and securing the ratification of conventions relating to human rights." (Emphasis added) "A U.N. High Commissioner for Human Rights," 30 *Bull. Int'l Comm. Jurists* 4 (1967). In the writer's opinion the High Commissioner's powers under the draft are wider than this. Note also the recommendation by the International NGO Conference on Human Rights in Paris, 16-20 September 1968, that, pending the creation of the office of High Commissioner, the Secretary-General should appoint a "Special Representative whose task would be to approach governments in regard to ratification and implementation of international conventions." (Quoted in 36 *Bull. Int'l Comm. Jurists* 38-9 (1968)).

[19] Macdonald, "The United Nations High Commissioner for Human Rights," 5 *Can. Y. B. Int'l L.* 84, 88 (1967). Professor Macdonald, as the Canadian representative, was the Rapporteur of the ECOSOC Social Committee when it first considered the Costa Rican draft in 1965 and his article reflects his close association with the proposal. Canada was an early supporter.

[20] See *infra* p. 87. Note also this sentence in the report of the Working Group: "It was agreed that the institution should maintain close relations with the organ concerned and that this would provide an adequate basis for the exercise of initiative . . ."; U.N. Doc. E/CN.4/934 at 10 (1967). Subparagraph (d), discussed *infra* pp. 82-90 also provides some "basis for the exercise of initiative."

It is not clear from the text or from the *travaux préparatoires* whether there is intended to be any distinction between giving "advice" and giving "assistance." "Advice" in ordinary speech perhaps amounts to something less than "assistance." It could in the present context include, for example, help in processing periodic reports on human rights or even suggestions on how the Commission on Human Rights could improve its procedures in dealing with such reports. It could equally include the supplying of information from the High Commissioner's files in connexion with a debate or a global study, or perhaps comments on a draft convention or other instrument then before a particular organ, or even on whether new instruments are needed in particular areas. A recent example of the entrusting of such a role to the Secretary-General set an interesting precedent. General Assembly Resolution 2444 (XXIII) of 19 December 1968 [21] invited the Secretary-General in consultation with the International Committee of the Red Cross "and other appropriate international organizations" to study:

(a) Steps which could be taken to secure the better application of existing humanitarian conventions and rules in all armed conflicts;
(b) The need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare.

"Assistance" seems to imply some concrete dealing with a specific human rights situation. The use of the High Commissioner in the role of an "independent authority who could investigate impartially the facts of a given situation or whose good offices could be made available to ease tension in a certain area" was suggested to the Commission on Human Rights by the representative of the International Commission of Jurists.[22] The representative of the Netherlands [23] gave two specific examples of activities of such a nature when he suggested that if a High Commissioner had been available he might have been asked by the General Assembly to assume a role similar to that of the United Nations fact-finding mission to Vietnam in 1963 [24] and the Inter-American Commission's function in the Dominican crisis in 1965-66. These two examples are worth some attention since they

[21] G.A.O.R. 23rd Sess., Supp. No. 18 at 50-1, U.N. Doc. A/7218 (1968). A discussion of early fruits of the Study appears in 20 *N.Z. For Aff. Rev.* 17 (1970).
[22] Text supplied by the Commission of Jurists. For summary record see U.N. Doc. E/CN.4/SR.882 at 10-12 (1966).
[23] U.N. Doc. E/CN.4/SR.880 at 5-6 (1966).
[24] The Vietnam example had been previously suggested by Humphrey, "The United Nations and Human Rights," 11 *How. L. J.* 373, 378 (1965).

are reasonably typical of cases involving a question of human rights where some sort of international role is possible but the exact nature of the machinery which would be acceptable and of its functions is doubtful. It is also questionable whether the second of the examples is one in which it would be feasible for the High Commissioner for Human Rights to operate.

The Vietnam Fact Finding Mission was a response to allegations made concerning the Diem regime's treatment of the Buddhists. In September 1963 sixteen members of the General Assembly requested the inclusion of an item on the question on the Agenda of the eighteenth session of that body. Soon after the item had been taken up, the President of the Assembly announced that he had received two letters from the Special Mission of the Republic of Vietnam to the United Nations.[25] One of these extended an invitation to "the representatives of several Member States to visit Vietnam in the near future so that they may see for themselves what the real situation is as regards the relations between Government and the Buddhist community of Vietnam." The invitation was accepted and a mission was formed comprising representatives of Afghanistan, Brazil, Ceylon, Costa Rica,[26] Dahomey, Morocco and Nepal. It arrived in Saigon late in October and heard a number of witnesses. Unfortunately for the scholar, the affair ended inconclusively as a result of the successful coup against President Diem that took place while the Mission was in Saigon. However, the appointment of the Mission constituted a valuable precedent and its voluminous report contains much on the Mission's procedures that is of value to any future international fact-finder.[27] If the High Commissioner were requested by the General Assembly to carry out such a mission he would of course require the invitation, or at least the consent, of the State involved

[25] Report of the United Nations Fact-Finding Mission to South Vietnam, U.N. Doc. A/5630 at 4 (1963). South Vietnam is not a member of the U.N. although it is a member of various specialized agencies. The Vietnam mission is discussed in Franck and Cherkis, "The Problem of Fact-Finding in International Disputes," 18 *West. Res. L. Rev.* 1483, 1503-5 (1967).

[26] The Costa Rican representative was Ambassador Fernando Volio Jimenez, later closely associated with the High Commissioner proposal. See his account of the mission in "International Protection of Human Rights: Balance Sheet of a Promising Action," 1 (7) *U.N. Mon. Chron.* 75 (1964).

[27] For a recent acknowledgement of the importance of fact-finding as a means towards the settlement of disputes see G. A. res. 2329 (XXII) of 18 December 1967, G.A.O.R., 22nd Sess., Supp. No. 16 at 84, U.N. Doc. A/6716 (1967). See also Leurdijk, "Fact-Finding: Its Place in International Law and International Politics," 14 *Nederlands Tijdschrift voor Internationaal Recht* 141 (1967) and Ermacora, "International Enquiry Commissions in the Field of Human Rights," 1 *Rev. des Droits de L'Homme* 180 (1968).

– unless, like many bodies dealing with South Africa, he should seek his information outside the borders of that State.[28] A State may well find it more acceptable to consent to the presence of an independent official than to a group of Government representatives.

It is hard to share the Netherlands' Representative's confidence that the High Commissioner could play an effective role in a crisis like that in the Dominican Republic in 1965-66. The example raises difficult questions as to the size and nature of the operations with which the High Commissioner would be equipped to deal and as to his relationship with regional human rights organizations. Briefly what happened in the Dominican Republic [29] was that in the course of the civil war that broke out late in April 1965, requests were made by each of the rival factions for the presence of the Inter-American Commission of Human Rights. As soon as the fighting subsided early in June the Chairman of the Commission went on its behalf to the Republic. From then until 7 July 1966 at least one member of the Commission was in the country. The Commission concentrated on trying to safeguard basic rights to life, liberty and personal security, particularly freedom from arbitrary arrest by both sides. In the course of their duties Commission members heard individual complaints, visited towns and prisons in many parts of the country and kept in constant touch with top officials from both factions. Regular press releases were made and members of the press normally accompanied members of the Commission on their trips. There is no doubt that the Commission was directly responsible for improvements in prison conditions and the release of many political prisoners.

Obviously enough the Commission's role in the Republic went beyond fact-finding although it involved some of that. Fact-finding is seldom an end in itself and there is no reason why a U.N. organ that has entrusted the High Commissioner with fact-finding should not also ask him to use his "good offices" to attempt a settlement. We shall have more to say about this rather vague concept in the discussion of subparagraphs (c) and (d).[30] The Dominican operation probably went beyond "good offices" but, whatever the operation may be called, it was undoubtedly a large one. And

[28] The Ad Hoc Working Group on South African Prisons heard witnesses in London, New York and Dar Es Salaam: U.N. Doc. E/CN.4/950 (1967).

[29] The account that follows is based largely on the excellent discussion in Schreiber and Schreiber, "The Inter-American Commission on Human Rights in the Dominican Crisis," 22 *Int'l Org.* 508 (1968).

[30] *Infra* pp. 75-90.

it is dubious whether the High Commissioner would be equipped to handle such a task or, indeed, whether he should be so equipped.

The Inter-American Commission was able to do it largely because its members shared the work. Clearly the High Commissioner could not shelve his other duties for an indefinite period and set up office in the Dominican Republic, or anywhere else. In order to give such assistance, the High Commissioner would need to appoint a representative on the spot, perhaps chosen from the pool of talent that could be created by his panel of experts. Administratively such a role for the High Commissioner might therefore be feasible. But there are other reasons why it might not be politic. One reason is that an enterprise of such magnitude is almost certain not to go entirely as planned and the High Commissioner is likely to share in the opprobrium generated by his representative. Conor Cruise O'Brien has [31] made a good case in his THE UNITED NATIONS, SACRED DRAMA for the proposition that the entrusting of peace-keeping operations to the Secretary-General, far from resulting in a desirable increase in his power, results in a diminution of his effectiveness in other respects. He suggests that instead of the Secretary-General performing large-scale operations a *Co-ordinator* should be appointed who would be directly responsible to the General Assembly or the Security Council – and, if things went wrong, expendable without the opprobrium rubbing off onto the Secretary-General. The same argument is attractive in the present context. A second reason why the Dominican example may not be a good one so far as the High Commissioner is concerned touches on a problem that will require further examination in Chapter 4, that of his relations with regional human rights bodies where those bodies are geared to play an active role in a particular dispute.[32] The Secretary-General, at the request of the Security Council, did in fact have an observer with a very limited mandate in the Dominican Republic at the same time as the O.A.S. presence.[33] But both the competing factions within the country and the O.A.S. neighbors were more enthusiastic about keeping the problem "in the family" than in a worthwhile role for the U.N.. Some conflicts did in fact arise between the parallel oper-

[31] *The United Nations, Sacred Drama* 222-27 and 274 (1968). See to the same effect on conciliation and mediation operations Neblett, "International Mediation and Conciliation a Permanent Function," 3 *Int'l Lawyer* 332, 334-5 (1969). See also Goodrich, "The Political Role of the Secretary-General," in D. Kay ed., *The United Nations Political System* 127, 137 (1967).

[32] *Infra* pp. 100-101.

[33] L. Gordenker, *The UN Secretary-General and the Maintenance of Peace* 230-231 (1967).

ations.[34] It seems probable that the existence of a comparatively strong regional body would make it unlikely that there would be scope for the High Commissioner's services.

Scepticism concerning the appropriateness of the Dominican example must not be taken to suggest that fact-finding is all that the High Commissioner could be asked to do by U.N. organs. Undoubtedly there would be cases where he could be asked to use what were described to the Commission on Human Rights [35] as his "good offices" or by another advocate [36] as "quiet diplomatic mediation." However, it will be suggested that it is when the High Commissioner is acting under sub-paragraphs (c) and (d) rather than as an agent of, say, the General Assembly that such interventions are most likely to succeed.

Another possible type of assistance that the United Nations organs might request from the High Commissioner is suggested by the experience of the General Assembly's Trust Fund for South Africa.[37] In 1963 [38] the Assembly decided that the international community should, for humanitarian reasons, provide "relief and other assistance" to the families of "persons persecuted by the Government of the Republic of South Africa for their opposition to the policies of apartheid." Member states and organizations were asked to contribute funds for this purpose. In 1965 [39] a Trust Fund was established with the contributions received and the scope of the effort was extended to include the victims themselves as well as their families. As revised in 1968 [40] the function of the Trust (administered by a committee of five, nominated by Chile, Morocco, Nigeria, Pakistan and Sweden) is to provide grants to

[34] Schreibers, *op. cit. supra* note 29 at 520-22.

[35] *Op. cit. supra* p. 66.

[36] Korey, "A Global Ombudsman," *Saturday Review*, 12 August 1967, at 20. One writer has suggested that the situation following the coup in Burundi in 1965 was one in which the proposed High Commissioner could have acted effectively. The ILO Committee on Freedom of Association was in fact successful by "informal, quiet negotiation without publicity" in helping to obtain amnesty for a number of trade union members and other political prisoners in Burundi: Bissell, "Negotiation by International Bodies and the Protection of Human Rights," 7 *Colum. J. Trans Nat'l L.* 90, 107-8 (1968).

[37] See Astrom, "The United Nations Trust Fund for South Africa," 6 (2) *U.N. Mon. Chron.* 43 (February 1969).

[38] G.A. res. 1978B (XVIII) of 16 December 1963, G.A.O.R., 18th Sess., Supp. No. 15 at 20-21, U.N. Doc. A/5515 (1963).

[39] G.A. res. 2054B (XX) of 15 December 1965; G.A.O.R., 20th Sess., Supp. No. 14 at 17-18, U.N. Doc. A/6014 (1965).

[40] G.A. res. 2397 (XXIII) of 2 December 1968, G.A.O.R., 23rd Sess., Supp. No. 18 at 21, U.N. Doc. A/7218 (1968).

voluntary organizations, Governments of host countries of refugees and other appropriate bodies towards: legal assistance to those charged with offences against apartheid laws; relief to such persons and their dependants; education of such persons and their dependants; and relief for refugees from South Africa. One of the prime tasks of the Committee administering the fund is that of "promoting coordination in the provision of humanitarian assistance, by maintaining close contact with the voluntary organizations engaged in this task, the United Nations High Commissioner for Refugees and the donor Governments." [41] Promoting coordination by maintaining close links with voluntary organizations is an important part of the High Commissioner for Refugee's work – perhaps the most significant, in view of his own puny budget.[42] And it is not hard to envisage cases where the General Assembly would enlist the assistance of the High Commissioner for Human Rights in a fund raising or coordinating exercise in relation to South Africa or some other country. Obviously he would not want to take over the functions of the High Commissioner for Refugees but his influence could perhaps be particularly effective in channeling funds into the legal defence of persons charged with political offences as is done with some of the money in the trust fund and as many NGOs do in a large number of countries.[43]

Sub-paragraph (b): assistance and services to states

Pursuant to sub-paragraph (b) of the draft the High Commissioner "may render assistance and services to any State Member of the United Nations or member of any of its specialized agencies or of the International Atomic Energy Agency, or to any State Party to the Statute of the International Court of Justice, at the request of that State; he may submit a report on such assistance and services with the consent of the State concerned."

Mention has already been made of the little use made of the Secretary-General's programme of assistance,[44] and of the requests made instead to such NGOs as the International Commission of Jurists for help. The Secretary-General of that NGO has expressed his belief in a number of

[41] Astrom, *supra* note 37 at 45.

[42] J. Lador-Lederer, *International Non-Governmental Organizations and Economic Entities* 226 (1963).

[43] On coordination in relation to legal assistance undertaken by the High Commissioner for Refugees see J. Lador-Lederer, *International Group Protection* 386 (1968) and the 1968 Report of the United Nations High Commissioner for Refugees, G.A.O.R., 23rd Sess., Supp. No. 11 at 16 and 20, U.N. Doc. A/7211 (1968).

[44] *Supra* pp. 29-30.

forums [45] that the High Commissioner would have the necessary prestige and discretion to relieve the International Commission's work-load. The element of discretion is of course emphasized by the requirement of the sub-paragraph that a report may be made on services rendered only with the consent of the state involved. It remains to be seen whether his faith would be justified or whether states would feel the same inhibitions about using the High Commissioner's services as those of the Secretary-General.

Some of the possible subject-areas in which he might expect requests for assistance appear from the earlier discussion of the Secretary-General's programme. The United States representative on the Commission on Human Rights suggested that the High Commissioner might "assist Member States in establishing certain institutions such as that of *Ombudsman,* which had produced good results in other countries." [46] Pierre Juvigny, a member of the Working Group on the High Commissioner proposal, suggested that a state might seek his assistance on the eradication of slavery within its territory.[47] In an earlier section [48] we suggested that the High Commissioner might combine his function in promoting ratifications with that of giving advice. Thus he might express an opinion on the meaning of a Convention based on a study of the *travaux preparatoires* or the practice of other states or international organizations or make suggestions as to possible techniques for obtaining compliance in domestic law, drawing on his knowledge of what other states have done. Expressing a legal opinion on the meaning of a Convention is a matter of some delicacy, especially if the Convention itself provides for a judicial or some other form of interpretation in the event of a dispute, but it has in fact been done, cautiously, on occasions by the Secretariat. For example, one state before ratifying the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages obtained an informal opinion on whether its domestic legislation complied with the Convention requirement of "due publicity" to precede a marriage.[49] Assistance of such a nature could be

[45] E.g. before the Commission on Human Rights in 1966; "The Meaning of Human Rights Year," 8 *J. Int'l Comm. Jurists* iii, viii (1967); "The New Frontiers of International Law," *Unesco Courier,* January 1968, 27, 30.

[46] U.N. Doc. E/CN.4/SR.876 at 9 (1966).

[47] U.N. Doc. E/AC.7/SR.573 at 9 (1967). For other suggestions of a role for the High Commissioner in the eradication of slavery see the comments of the U.S. representative in U.N. Docs. E/AC.7/SR.534 at 15 and SR.536 at 7 (1966).

[48] *Supra* p. 64.

[49] Article 1, paragraph 1 of the Convention provides that "No marriage shall be legally entered into without the full and free consent of both parties; such consent to be expressed by them in person *after due publicity* and in the presence of the authority

the responsibility of the panel of expert consultants and would be of value to smaller states with correspondingly smaller foreign offices and staffs of legal advisers. The lack of such expertise appears to be an important factor preventing ratification of human rights treaties by a number of smaller countries.[50]

So far we have been adopting a rather narrow meaning of "assistance and services" in the light of the Secretary-General's past programme. But, taken literally, those words are open to a broader interpretation which would permit the High Commissioner to become involved in state against state complaints. To take the first specific human rights complaint that came before the General Assembly: [51] the Government of India is concerned about the treatment of persons of Indian origin in South Africa; it alleges that they are being discriminated against in matters of employment, housing, electoral rights and the like. May not the Government of India request the "advice and assistance" of the High Commissioner? [52] Some members of the Working Group envisaged the possibility of such requests and expressed the opinion that the draft should make it clear that "where assistance or good offices might be requested in a situation involving any State other than the requesting State, the consent of that other State would be required before any action was initiated." [53] No alteration was made to the draft to accommodate this suggestion but the extent to which the High Commissioner might intervene is certainly limited if the state complained

competent to solemnize the marriage and of witnesses as prescribed by law." (Emphasis added).

[50] UNITAR paper, *Acceptance of Human Rights Treaties,* U.N. Doc. A/CONF. 32/15 at 15 (1968). Note also the suggestion at the same page for a U.N. "Committee of Experts on Ratification and Acceptance" similar to the ILO Committee (infra Chapter 4) which would have, inter alia, functions similar to those outlined in the text. On ILO assistance of this kind see *The ILO and Human Rights* (Report of the Director-General (Part 1) to the International Labour Conference, 52nd Session, 1968) at 20-21.

[51] See discussion in J. Carey ed., *Race, Peace, Law and Southern Africa* 27 (1968).

[52] Of course many observers would doubt the chances of any official's success in the case of the specific example of South Africa. But alongside such pessimistic analyses note the interest shown early in 1968 in a U.S. proposal, not proceeded with, for the appointment of a "Special Representative for South Africa" who would be "an official operating without formal legal procedures, without the glare of publicity, depending primarily on quiet discussion with government representatives, having always in the background the possibility of exposure to public scrutiny of human rights violations as an implied threat resorted to only when absolutely necessary." Press Release USUN-19 of 12 February 1968 and see U.N. Doc. E/CN.4/SR.953 at 3-6 (1968). The Representative's kinship with the High Commissioner needs no emphasis and it was obviously thought that he might be effective.

[53] U.N. Doc. E/CN.4/934 at 11 (1967).

about is unresponsive. But, at the least, if State A complains about State B the High Commissioner is doing something merely by bringing the request to the attention of the Government of State B and asking whether it agrees to receiving assistance or good offices. An inquiry of such a nature may of itself lead in such cases to a favourable shift of position on the merits of the dispute, without further action.

Something needs to be said about the complicated formula for determining which states may make use of the services of the High Commissioner. The original Costa Rican draft would have empowered the High Commissioner to render services "at the request of any Government" and the Working Group discussions raised echoes of the arguments that regularly occur when multilateral treaties are being drafted over how to deal with attempts at ratification by states not recognized by the original parties.[54] Some members of the Working Group favoured the retention of the Costa Rican form of words in order to stress the a-political nature of the Office. One suggested that, on the contrary, as the High Commissioner would be working within the legal structure of the United Nations, it would be inappropriate for him to have the responsibility of determining whether a particular political entity met the requirements of statehood.[55] Eventually the formula in the draft, based on what is commonly called "the Vienna formula" because of its use in the important Vienna Convention on Diplomatic Relations in 1961, was adopted. However the Vienna formula also has the words "any other state invited by the General Assembly of the United Nations." These words do not appear in the present formulation which the Working Group expected would have to be reconsidered in the Assembly.[56] Professor Macdonald [57] has expressed the view that "It can be anticipated that this sub-paragraph will run into stormy seas when the question comes to the Assembly.... Universality in the field of human rights has an emotional and psychological appeal that tends to override technical difficulties...." It will be noted that both the broad "any state" formula and that actually adopted, permits assistance to non-member states of the U.N.. The General Assembly has in the past acted on the view that

[54] See Schwelb, "The Nuclear Test Ban Treaty and International Law," 58 *Am. J. Int'l L.* 642, 653-54 (1964) and references cited.

[55] U.N. Doc. E/CN.4/934 at 10-11 (1967).

[56] U.N. Doc. E/CN.4/934 at 11. So far as the Vienna formula itself is concerned, a Declaration adopted at the 1969 Vienna Conference on the Law of Treaties amounts to an attempt to have the General Assembly re-examine the whole question of invitation to participate. See the Final Act of the United Nations Conference on the Law of Treaties, U.N. Doc. A/CONF.39/26 (1969).

[57] *Op. cit. supra* note 19 at 90.

it has power to provide technical assistance for non-member states.[58] One's immediate reaction to the amount of discussion devoted to whether the wider formula should be used is to dismiss the issue as an example of Parkinson's Law in so far as it relates to time spent on trivialities in comparison with that spent on large matters. It is hard to imagine any of the states excluded by the formula – East Germany, North Korea, North Vietnam and Rhodesia are the only substantial ones – requesting assistance and services from a United Nations official in relation to their internal problems. But it is perhaps plausible that one of the Communist bloc sections of a divided country might seek to gain some propaganda advantage by announcing with due publicity that it is asking for the assistance of the High Commissioner to solve human rights problems caused by its neighbour. The present formula is felt to be justifiable in some quarters as a prevention of such efforts.

Sub-paragraph (c): communications

Sub-paragraph (c) is probably the provision most open to "manipulation" in the direction of an expanding role for the High Commissioner. It provides that: "He shall have access to communications concerning human rights, addressed to the United Nations, of the kind referred to in Economic and Social Council resolution 728 F (XXVIII) of 30 July 1959, and may, whenever he deems it appropriate, bring them to the attention of the Government of any of the states mentioned in sub-paragraph (b) above to which such communications explicitly refer."

The States with whom he would be entitled to deal are the same as those to whom assistance might be given. A serious question arises whether the Assembly has power to appoint a body which might be regarded as "overseeing" non-members as opposed to assisting them. United Nations efforts to supervise the human rights activities of non-member states (not overly successful) have generally [59] relied on Article 2.6 of the Charter, which provides that:

[58] See e.g. 3 *Repertory of Practice of United Nations Organs* 451-53 (1955) and Opinion of Office of Legal Affairs on Eligibility of Western Samoa for Technical Assistance in Public Administration, [1963] *U.N. Jurid. Y.B.* 174.

[59] See 1 *Repertory of Practice of United Nations Organs* 40-2 (Spain), 51-3 (Bulgaria and Hungry) (1955). The countries supporting consideration of the South Vietnam item in 1963 did not need to make any clear indication of the Charter provisions on which they were relying in view of the Vietnamese invitation to send a mission. See U.N. Doc. A/PV.1232 (1963).

The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

In the case of some at least of the communications which the High Commissioner might wish to bring to the attention of non-member states it would be difficult to find that any clear question of "the maintenance of international peace and security" was involved. It may well be, therefore, that the formula for determining the States that may be the subject of the High Commissioner's attention-drawing function should be reconsidered by the Assembly.

The most significant words in the sub-paragraph are "have access to" and "bring them to the attention." Both phrases are open to wide and narrow interpretations and which of these interpretations is adopted is of crucial importance to the role of the High Commissioner.

A narrow meaning of "have access to," corresponding to a circumscribed role for the High Commissioner would have him receiving copies of the communications, or perhaps a summary of them, at lengthy intervals as is done with the Commission on Human Rights.[60] On the other hand it would be administratively practicable for the High Commissioner's office to see originals or photo-copies of all communications received in New York within at least a day of their receipt. Manifestly, the latter arrangement would leave the door open to the High Commissioner's dealing with individual urgent cases.

The possibilities of these words "have access to" were clearly perceived by the Soviet representative when the draft was being discussed in the ECOSOC Social Committee in 1967. In his opinion the sub-paragraph "showed a clear intention of nullifying Economic and Social Council resolution 728 F (XXVIII) by giving the High Commissioner access to communications concerning human rights and to reports – mostly submitted by non-governmental organizations which were known to be in the pay of the CIA – which formed part of the archives of the United Nations with a view to publishing some parts of them." [61] A few days later he apparently decided that his acknowledgement of the drafters' intentions might return to haunt him and he proceeded to manufacture some legislative history by asserting [62] that under the draft "The High Commissioner would not actually deal with the substance of the communications concerning human rights;

[60] *Supra* pp. 21-22.

[61] U.N. Doc. E/AC.7/SR.572 at 7 (1967). See also the Soviet representative in the Commission on Human Rights, U.N. Doc. E/CN.4/SR.939 at 12 (1967).

[62] U.N. Doc. E/AC.7/SR.574 at 16 (1967).

he would simply compile statistics for the information of the General Assembly, stating how many communications had been received and how many answers had been provided by Governments." A narrow meaning of "have access to" would suffice for *that* function!

The later Soviet statement is relevant also to the meaning of "bring to the attention." His interpretation suggests that the words mean nothing more than the Secretary-General's duty under resolution 728 F (XXVIII) to "furnish each Member State with a copy of any communication concerning human rights which refers explicitly to that state. . . ." [63] In the course of the Working Group discussions some members referred to the possibility that the High Commissioner would be merely duplicating the Secretary-General's task. But the Group's report records that "The view prevailed . . . that a High Commissioner of the stature envisaged would soon assert his influence sufficiently to be able to depart from the mechanical procedure currently prescribed and permit him to follow up matters of importance contained in these communications." [64] Obviously some sifting is required in selecting "matters of importance." This was stressed by the representative of Dahomey when he was presenting the Working Group's report to the Commission on Human Rights: "The High Commissioner would also be able to draw the special attention of certain States to certain communications emanating from those States. In that respect, therefore, the High Commissioner's functions would be of a selective nature." [65]

What the High Commissioner could do with communications thus lies somewhere in the area between a "mechanical procedure" and what he might do if he were an Ombudsman.[66]

Some suggestions may now be made as to what activities lie in this area. One is that the communications may indicate a "consistent pattern" of violations of human rights. This was of course the area in which it was hoped that the Sub-Commission on Prevention of Discrimination and Protection of Minorities would act as a result of the 1967 additions to its powers,[67] and the hopes are not entirely dead.[68] If he discerns a "consistent pattern" of violations it must certainly be within the High Commissioner's powers to comment on it to the state concerned under sub-

[63] *Supra* p. 22.
[64] U.N. Doc. E/CN.4/934 at 17-18 (1967).
[65] U.N. Doc. E/CN.4/SR.938 at 15 (1967).
[66] *Supra* pp. 62-63.
[67] *Supra* p. 24.
[68] *Supra* p. 27.

paragraph (c).[69] This is probably what the Representative of Israel had in mind in the ECOSOC Social Committee when he referred to the plight of the Jews in the U.S.S.R. as an "appropriate field of action for the High Commissioner." [70] Other possibilities of consistent violations would be widespread incarceration of political opponents or their torture. Nice questions of evaluation are presented by the issue of determining when the communications show a "consistent pattern." Sheer numbers relating to a particular issue may not be conclusive in the light of the practice of some NGOs of organizing writing campaigns on a particular issue. Thus, in the Commission on Human Rights debate on conditions in his country,[71] the Representative of Greece noted that the Secretary-General had forwarded to him in August 1967 "two identical samples of 13,275 similar communications between 27 July and 3 August 1967 which referred to Greece." Clearly enough the High Commissioner would not be bound to act merely upon receipt of such large numbers. On the other hand he might well decide that a single, well-documented, communication from a responsible source was sufficient to show a pattern of violations.

A variation on the general "consistent pattern" possibility received some discussion in the Working Group when it was suggested that the High Commissioner would have some power to comment on the efficacy of internal legislation in complying with international human rights instruments to which a state is a party. As in the case of the High Commissioner's power to give advice on such matters at the request of states [72] reference was made to the similarity between the proposed panel of experts and the I.L.O. Committee of Experts on Application of Conventions which has such a power. After one speaker in the Working Group [73] had noted that the I.L.O. Committee, when commenting on divergences between national laws and an international convention, never dictated to a state what procedure should be followed to remedy the situation, the Group agreed, ambiguously, that: "The High Commissioner should confine himself to drawing attention to obstacles and difficulties encountered in the implementation of conventions and suggesting measures designed to overcome

[69] He may also be able to report to the General Assembly under subparagraph (d); see *infra* pp. 84-85.

[70] U.N. Doc. E/AC.7/SR.572 at 17 (1967). The representative of the U.S.S.R. defended the charges on the merits, denying discrimination rather than claiming that such a situation would be none of the High Commissioner's business: U.N. Doc. E/AC.7/SR.574 at 16 (1967).

[71] U.N. Doc. E/CN.4/SR.965 at 250 (1967). On the debate generally see *supra* pp. 24-27.

[72] *Supra* note 50.

[73] U.N. Doc. E/CN.4/934 at 13 (1967).

them." [74] In the context of the Working Group's discussion it is not clear whether the Group had in mind that the High Commissioner might do this as a part of bringing a communication or communications to the attention of a Government, or whether he would merely make a reference in general terms to the issue in his periodic report to the General Assembly. Certainly the phraseology is open to the interpretation that the High Commissioner might be able to offer some "advice" on such matters without the need for a request under sub-paragraph (b), no doubt tactfully suggesting alternative techniques.

Another interesting attention-drawing possibility relates to the situation of human rights in armed conflict. A few years ago the International Commission of Jurists put the question:

> Has the time not come, when it would be desirable, that whenever an internal conflict or disturbance arises in any part of the world the Secretary-General of the United Nations, or some other United Nations authority, should unequivocally bring to the notice of the belligerents the provisions of the "law of nations" as elaborated by the Geneva Conventions as well as by the Universal Declaration of Human Rights. In cases where the belligerents are receiving active support from outside States, these States should also be requested to use their best endeavours to ensure the proper application of these minimal humanitarian rules.[75]

The Geneva Conventions are customarily brought to the attention of belligerents by the International Committee of the Red Cross [76] but the High Commissioner would surely have the sort of prestige necessary for a reasonably successful appeal to be made. The type of situation envisaged by the International Commission of Jurists is likely to lead to the receipt of a number of communications on which the High Commissioner might act, both from the populations involved and from concerned NGOs, as the recent conflicts in Vietnam, Nigeria and the Middle East have done. Attention-drawing is no guarantee of compliance but some Governments at least find it politic to pay lip-service to such appeals. The I.C.R.C. endeavours to follow up its appeals with an attempt to get the parties to the

[74] *Ibid.* The I.L.O.'s Conventions and Recommendations are in the general area of economic and social rights and the High Commissioner's power to comment on national legislation could constitute his most significant activity in relation to such rights.

[75] "Human Rights in Armed Conflict," 21 *Bull. Int'l Comm. Jurists* 1, 5 (1964).

[76] See text of appeal by I.C.R.C. to North and South Vietnam, the National Liberation Front of South Vietnam and the United States in 47 *Rev. Internationale de la Croix-Rouge* 395-6 and replies by the U.S. and South Vietnam at 441-2 and North Vietnam at 485-6 (1965). For a subsequent appeal and response by New Zealand see *Int'l Rev. of the Red Cross* (6th year) 400 (1966).

conflict to accept inspections or at least the Committee's general humanitarian efforts.[77] In the case of an appeal by the High Commissioner there is the possibility, subject to what has been said in the discussion of the Dominican Republic case about the size of such an operation,[78] that the General Assembly or one or more of the parties might respond with a request for his assistance.

The Geneva Conventions example is slightly complicated by the reference in paragraph 2 of the draft resolution to human rights and fundamental freedoms "as set forth in the Charter of the United Nations and in declarations and instruments of the United Nations or of the Specialized agencies, or of intergovernmental conferences convened under their auspices. . . ." [79] The Geneva Conventions of 1949 do not come within any of these categories but references have been made to them often enough in U.N. proceedings (usually coupled with the Universal Declaration) and, in view of their near universal acceptance, there is unlikely to be any technical objection to the High Commissioner's initiative.

So far we have been speaking of situations where the High Commissioner might draw attention to a pattern of violations. There is perhaps one class of individual case where it would be possible for the High Commissioner to act. That is in the case where NGOs often take action – of addressing an appeal to the Government concerned on behalf of persons imprisoned or sentenced to death for a political offence. There is no United Nations instrument banning capital punishment although a 1968 General Assembly resolution [80] comes fairly close to that position and endeavours to ensure that executions are not carried out before there is time for humanitarian appeals to be made.[81] The Secretary-General of the International Com-

[77] Bissell, "The International Committee of the Red Cross and the Protection of Human Rights," 1 *Rev. des Droits de l'Homme* 255 (1968).

[78] *Supra* p. 69.

[79] See discussion of these words *supra* pp. 60-61. A similar problem could arise if the High Commissioner were to address an appeal based on a Convention to which the state concerned is not a party. Cf. the Secretary-General's warnings in the Congo of possible genocide, apparently on the view that the Genocide Convention represented customary law: Annual Report of the Secretary-General 1960-61, G.A.O.R., 16th Sess., Supp. No. 1 at 11, U.N. Doc. A/5201 (1962). The High Commissioner would surely have authority in such a case.

[80] G.A. res. 2393 (XXIII) of 26 November 1968, G.A.O.R., 23rd Sess., Supp. No. 18 at 41-42, U.N. Doc. A/7218 (1968).

[81] Operative paragraph 1 of the resolution invites member states to provide (i) That a person condemned to death shall not be deprived of the right to appeal to a higher judicial authority, or, as the case may be, to petition for pardon or reprieve; (ii) That the death sentence shall not be carried out before these opportunities have been given; and also to consider the fixing of a certain time limit before the expiry of which no death sentence shall be carried out.

mission of Jurists suggested to the Commission on Human Rights that the High Commissioner would be an appropriate person to direct such appeals and also noted the importance of swift action:

Time after time the organization which I have the honour to represent has to act in a matter of hours – not weeks or months but hours sometimes. We have to send somebody to interview a Government to try to ease a given situation, to try to save the lives perhaps of people who are awaiting execution somewhere, to try to ease the situation. We do many such things, unceasingly and without publicity, and I think that we can claim that in many instances throughout the world we have succeeded in easing difficult situations. These are functions which would really be much better performed by a High Commissioner appointed by the General Assembly, with all the moral authority that he would have as representative of the General Assembly.[82]

No doubt some of the NGOs who do this type of thing [83] could be relied upon to address the communication to the U.N. necessary to give the High Commissioner "jurisdiction" under sub-paragraph (c) and it will be noted that for him to be effective in such cases it would be necessary for him to "have access to" such communications immediately upon their receipt. That is to say, the broader meaning of "have access to" which was discussed earlier,[84] would need to be applied. It will be suggested later in this Chapter [85] that, relying on precedents created by the Secretary-General, the High Commissioner could also develop a role in this area without the need for a communication.

A related NGO activity is that of sending observers to trials suspected of having political overtones in an effort to encourage fair play.[86] A hint from the High Commissioner when bringing complaints about forthcoming political trials to the attention of a Government could lead to a request for the High Commissioner or his representative to attend the trials and this might well affect the tone of the proceedings if not the outcome. The U.N. has had some experience of attending the elections in countries wishing to show

[82] 30 March 1966. Text supplied by Mr MacBride.

[83] Amnesty International, the International Association of Democratic Lawyers, the International Commission of Jurists and the International League for the Rights of Man are the best known.

[84] *Supra* p. 76.

[85] *Infra* p. 86.

[86] See Debevoise, "Lessons From Organizations Like The International Commission of Jurists in Focusing Public Opinion," 58 *Proc. Am. Soc. Int'l L.* 143, 144, 171 (1964). Thus Amnesty International and the International Association of Democratic Lawyers were represented at the Iraqi spy trials referred to *infra* p. 89: see communique issued by I.A.D.L. in Brussels, January 1969 entitled "Le Procès de 14 Intellectuels Iraniens Devant Le Tribunal Militaire Teheran" at 2.

their good faith [87] and it is not too far-fetched to interpret "assistance and services" in sub-paragraph (b) to permit such observations.

Sub-paragraph (d): reporting

We come to the function that, at least in the early days of the Office, would be the most important. Sub-paragraph (d) directs the High Commissioner to "report to the General Assembly through the Economic and Social Council on developments in the field of human rights, including his observations on the implementation of the relevant declarations and instruments adopted by the United Nations and the specialized agencies, and his evaluation of significant progress and problems; these reports shall be considered as separate items on the agenda of the General Assembly, the Economic and Social Council and the Commission on Human Rights. . . ." Before submitting such reports the High Commissioner "shall consult, when appropriate, any Government or specialized agency concerned, taking due account of these consultations in the preparation thereof."

To deal first with some of the mechanics of the sub-paragraph: No indication is given as to the frequency of the reports which he would make. In this respect the present draft is less precise than the Costa Rican proposal which directed the High Commissioner to report annually, to make special reports "at the request of the General Assembly, the Secretary-General, or any other organ of the United Nations" and also empowered him to make special reports "in cases of urgency." There is nothing in the Working Group materials to indicate why the change was made. Professor Macdonald [88] has analysed the position thus:

There are no provisions on special or annual reports as such, and though the power to do so may be implied, the High Commissioner is not expressly authorized to submit on his own initiative such special reports as he may deem necessary. The question arises therefore as to what the High Commissioner is to do in those "action situations" in which he may not wish to wait for a regular session of the Assembly or ECOSOC or on which he wishes to submit a special report apart from his annual report. Has he the discretion to do so? It is arguable that he has, although, as in all these cases, he may not think it desirable to do

[87] For example, prominent individuals from Canada, Sweden and Uruguay, chosen from a list submitted by the Secretary-General to the Government of Costa Rica at its request, observed the final stages of the election campaign and the election in that country in 1958. See U.N. Doc. E/3075 at 8 (1958). In 1965 the General Assembly, in spite of objections from the U.S.S.R., the U.S., the U.K. and Australia, accepted the New Zealand Government's suggestion that it send an observer to elections in a N.Z. dependency, the Cook Islands, leading to internal self-government. See U.N. Doc. A/5762 (1965).

[88] *Op. cit. supra* note 19 at 94 (1967).

so very frequently and certainly not without consultations, because special reports will almost always contain accusations against a state or a group of states, and, since the reports will eventually come before the Assembly, they may complicate rather than clarify the issues at hand by attracting premature and harmful publicity.

A second aspect of the mechanics of the sub-paragraph is the requirement of consultation with any Government "concerned," "when appropriate." The Working Group's Report [89] makes it plain that "concerned" is a euphemism for "subject of unfavourable allegations." The duty to consult is not absolute since some leeway is left open by the words "when appropriate" although no criteria of appropriateness are given. In response to a Tanzanian suggestion to delete all reference to consultation, the Costa Rican delegation has recently linked the requirement with its feeling that "the initial activities of the High Commissioner should be conducted with great prudence so that his office achieves the prestige, respect and esteem of all Governments." [90] No doubt the provision is in part a deference to fears of loss of state sovereignty and in part a recognition of the *audi alteram partem* rule. It appears also to be true that, as one member of the Working Group pointed out,[91] "an obligation to consult would in fact safeguard the High Commissioner from appearing to act on a politically inspired impulse" and perhaps even permit him to correct an error of fact. But, should a state ignore the opportunity to reply, this would be likely to be interpreted as a tacit admission of the High Commissioner's strictures and would thus strengthen the impact of his report which would of course be able to refer to the lack of response. On the other hand, consultations might result in the state's rectifying the situation referred to without the need for further formal action.

The regular reports might serve a number of purposes. For example, the High Commissioner's information might lead him to the conclusion that a new Convention was needed in a particular area and he could make appropriate suggestions. Again, he might wish to make comments on the effectiveness of Commission on Human Rights or ECOSOC procedures in dealing with their business. The importance of such activities should not be underestimated. But his most important contribution is contained in the command of operative paragraph 2(d) of the draft that he should make "observations on the implementation of the relevant declarations and in-

[89] U.N. Doc. E/CN.4/934 at 14 (1967).

[90] U.N. Doc. A/7170, Annex III, at 5 (1968). See also the note on the Tanzanian amendment in the Secretary-General's Report, U.N. Doc. A/8035 at 38-39 (1970).

[91] *Op. cit. supra* note 89 at 14.

struments adopted by the United Nations and the specialized agencies and his evaluation of significant progress and problems." It is likely that in obeying this injunction the High Commissioner would attempt to do what the Commission on Human Rights has been quite ineffective in doing through its examination of periodic reports on human rights [92] – preparing a thorough global survey of success and failure in relation to each specific right, say as listed in the Universal Declaration. Included in Appendix III [93] is an outline sent to states by the Secretary-General in 1968 with his request for reports on civil and political rights for the period 1 July 1965 to 30 June 1968. (The High Commissioner might, incidentally, find it more convenient, at least until he is well established, to operate on a three-yearly cycle similar to that used for periodic reports rather than trying to cover the whole field each year). The Secretary-General's outline sets out in detail, much the way that the High Commissioner might be expected to do, the particulars of each right on which information was sought. Of course the bulk of the replies received [94] bore little relationship to the outline and the end product of the Commission's examination of the item was quite innocuous.[95] But the High Commissioner's reports need not be.[96] In the first place, he would have power to refer to particular states – otherwise there would be no point in the reference to consultation contained in the draft. Equally important, he would not be confined to governmental reports to the United Nations for his sources of information.

While he might glean some information from periodic reports and contributions to the YEARBOOK ON HUMAN RIGHTS, this bland material could be supplemented and corrected in a number of ways. Incomplete reports could be filled out by an examination of pertinent legislation or court decisions ignored or glossed over in such reports, and of course by the "follow up" power implicit in the High Commissioner's duty to consult.

An obvious source of the High Commissioner's information would be the communications to which he would be given access under sub-paragraph (c).[97] This raises the interesting possibility that the High Commissioner, in the course of drawing a complaint or series of complaints to

[92] *Supra* pp. 27-29.

[93] *Infra* pp. 171-172.

[94] U.N. Docs. E/CN.4/973 and Adds 1-4 (1968).

[95] See the Report on the Commission's Twenty-Fifth Session, E.S.C.O.R., 46th Sess., Supp. No. 4 at 158-60 and 197-200, U.N. Doc. E/4621 (1969). Note also the Secretariat's valiant attempt to make an "Analytical Summary" from the reports received, supplemented by material from the *Yearbook on Human Rights*, using the outline: U.N. Doc. E/CN.4/980/Rev. 1 (1969).

[96] See also R. Gardner, *In Pursuit of World Order* 261 (rev. ed., 1966).

[97] *Supra* p. 75.

the attention of a Government, might hint that unless he received a satisfactory reply it would be necessary to raise the matter in a report. There is of course nothing to prevent the author of a complaint from himself making public his complaint (the information on Greece which formed the basis of the Sub-Commission resolution discussed in Chapter 1 [98] was widely distributed by Amnesty International) but it is probably true that wider coverage in the news media would be achieved by material emanating from a High Commissioner than from a complainant, even where that complainant was a large NGO.

NGOs often obtain their information by filing magazine and newspaper clippings and the Minorities Section of the League had persons employed in such work.[99] It has been argued before the Commission on Human Rights that "reports by first-class foreign correspondents, published in papers with an international reputation, are as good a source as is available to a Commission which cannot itself conduct a judicial investigation." [100] This argument has the same cogency in the case of the High Commissioner. Newspaper reports may, in fact, be more reliable than many communications. The Consultative Council of Jewish Organizations and the Uruguay proposals had specific references to the use of such sources [101] and one large NGO which commented on the Costa Rican draft argued for the inclusion of similar provisions in it.[102] Without such sources, the NGO argued, the High Commissioner would be "powerless and ineffective." There is only one inconclusive reference in the subsequent history of the draft to suggest that the matter ever received close attention. In the Report

[98] *Supra* pp. 24-27.

[99] *Supra* p. 7 note 7.

[100] Quentin-Baxter, "International Protection of Human Rights," in K. Keith ed., *Essays on Human Rights* 132, 144 (1968). And note the following telegram sent by the Commission to the Government of Israel in 1968: "The United Nations Commission on Human Rights is distressed to learn from newspapers of Israeli acts of destroying homes of Arab civilian population inhabiting the areas occupied by the Israeli authorities subsequent to the hostilities of June 1967. The Commission . . . calls upon the Government of Israel to desist forthwith from indulging in such practices and to respect human rights and fundamental freedoms." The representative of Italy "having received confirmation of the accuracy of the Press reports," later associated himself with the decision. See E.S.C.O.R., 44th Sess., Supp. No. 4 at 138, U.N. Doc. E/4775 (1968).

[101] *Supra* pp. 41-44. On sources of information available to U.N. bodies generally see J. Carey, *UN Protection of Civil and Political Rights* 127-142 (1970).

[102] International Confederation of Free Trade Unions in U.N. Doc. E/CN.4/NGO/139 (1966). The Confederation probably had in mind I.L.O. supervisory bodies which use a wide range of detailed official and unofficial sources. See Landy *op. cit. supra* note 17 at 25, 156-9, 180-93; E. Phelan, *Yes, and Albert Thomas* 43 (1936).

of the Working Group [103] one member is recorded as having "emphasized the need to stipulate, in some part of the Working Group's recommendations . . . that the High Commissioner must have access to all information available to the Secretary-General. The need for such a provision could not be met in the context of communications alone." Effect was given to this suggestion in paragraph 6 of the draft statute under which the Assembly would request the Secretary-General to "supply the High Commissioner with all the facilities and information required for carrying out his functions." [104] The Secretariat does not keep any systematic collection of newspaper accounts but some material is filed and this may be one of the sources referred to by the member of the Working Group. Despite the absence of any express mention in the draft there seems to be nothing to prevent the High Commissioner from obtaining such material from the Secretary-General or even arranging for his staff to make a collection of their own.

Finally, Government representatives and NGOs would surely maintain informal contact with the High Commissioner and pass information on to him as well as pressing their pet ideas on him. For example many NGOs develop ideas for new international conventions.[105] In addition to painstakingly lobbying Governments, such NGOs could find it helpful to brief the High Commissioner and enlist his support for the idea.

A wider view of sub-paragraph (d) – a "good offices" function

So far we have been discussing sub-paragraph (d) in terms of what goes into the High Commissioner's report to the General Assembly. But the multiplication of sources which has just been outlined, combined with a striking resemblance between the sub-paragraph and Article 99 of the Charter suggest that it has possibilities that go far beyond reporting. Article 99 of the Charter [106] empowers the Secretary-General to bring to the attention of the Security Council any matter which in his opinion may threaten international peace and security. Seldom has the Secretary-

[103] U.N. Doc. E/CN.4/934 at 17 (1967).

[104] On this provision see further *infra* pp. 99-100.

[105] See e.g. 24 and 25 *Amnesty International Review* (1968) (treatment of political prisoners).

[106] The analogy of Article 99 was relied upon in a general way by the Consultative Council of Jewish Organizations in its early proposals, *supra* p. 42 but the potentialities of the "penumbra" analogy in connexion with the present draft have not been appreciated by previous commentators.

General used this power explicitly.[107] However, the Article has been interpreted, particularly by Dag Hammarskjold and U Thant, to give the Secretary-General wide powers of inquiry and initiative. The principle underlying this interpretation has been explained thus:

> If the Secretary-General is to use his power with maximum effectiveness, he must take a convincing case or present prima facie evidence that the matter to which he is calling attention has sufficient serious content to engage so solemn an organ as the Security Council. He must be highly informed in order to do so.[108]

This must lead to the taking of initiatives in some cases which in fact turn out not to be appropriate ones for future Security Council action [109] but of course the initiative may itself lead to an easing of tension. Some scope for initiative has also been read into Article 98 of the Charter which directs the Secretary-General to "perform such other functions as are entrusted to him by [the General Assembly, the Security Council, the Economic and Social Council, and the Trusteeship Council]." Someone has to do the preliminary sounding out to see whether such a role would be acceptable and this is likely to be the Secretary-General himself.[110] An offshoot of such initiatives has been the development of the Secretary-General's actions of a "good offices" nature.[111] The terms good offices, mediation and conciliation "have been used with considerable looseness and flexibility" [112] and few commentators have tried to explain exactly what good offices involves. However, Arthur Lall in his excellent study of international negotiation [113] distinguishes good offices from mediation in this fashion:

[107] A recent careful study asserts that the Article has been invoked "explicitly and deliberately only once." That was at the beginning of the Congo case in July 1960: Gordenker, *op. cit. supra* note 33 at 139.

[108] Id., at 138.

[109] Alexandrowicz, "The Secretary-General of the United Nations," 11 *Int'l & Comp. L.Q.* 1109, 1115-17 (1962); R. Falk and S. Mendlovitz eds., 3 *The Strategy of World Order* 302 (1966).

[110] Gordenker, *op. cit. supra* note 33 at 160-61.

[111] Introduction to the Annual Report of the Secretary-General on the Work of the Organization 1958-9, G.A.O.R., 14th Sess., Supp. No. 1A at 3, U.N. Doc. A/4132 (1959). See discussion in Simmonds, " 'Good Offices' and the Secretary-General," 29 *Nordisk Tidsskrift for International Ret* 330 (1959); Note, "Good Offices of the U.N. Secretary-General with Regard to Bahrain," 9 *Int'l Leg. Mat.* 787 (1970).

[112] L. Goodrich and A. Simons, *The U.N. and the Maintenance of International Peace and Security* 292 (1955).

[113] A. Lall, *Modern International Negotiation, Principles and Practice* 18 (1966). See to the same effect Sohn, "The Role of International Institutions as Conflict-Adjusting Agencies," 28 *U.Chi.L.Rev.* 205 at 207-8 (1961). Note also the use of the term "good offices" in respect of what is essentially a conciliation function in the 1965 Convention on the Elimination of Racial Discrimination and the 1966 Covenant on

> Essentially, mediation is a more formal process which entails the prior agreement of the parties to a dispute or situation, both to the use of the method and to a particular mediator. Such bilateral or multilateral agreement . . . is not an essential prerequisite in the function of good offices. When the permanent representatives . . . of certain Asian and African states went as a delegation to call on Dag Hammarskjold to express their concern over the conflict in Algeria between the French and the National Liberation Front, and made suggestions as to what might be done in the situation, they were calling into operation the good offices, but not any mediatory functions of the Secretary-General. Hammarskjold, of course, understood perfectly. He made this clear at a press conference on August 25, 1955, at which he said: "I have transmitted to the French Delegation . . . the views expressed to me by a number of Delegations. . . . [M]y information to the French Delegation on what had been said on the appeal from the Asian-African group was information and not a *démarche* on my side. . . ."

Such a delegation is surely something more than the sending of "mere information" with the help of a postman. Information can be conveyed by writing a letter or holding a press conference. Obviously anyone requesting the Secretary-General's offices is hoping that the "information" will have more impact when filtered through an "international conscience."

Such must have been the intentions of the delegation which is referred to in the following remarkable press release: [114]

> On behalf of the group of socialist countries, the Permanent Representatives of Poland and Czechoslovakia met with the Secretary-General at 11.15 p.m. on Friday, 28 April 1967 at his residence. They requested him to use his good offices with a view to stopping the persecution and averting the possible execution of political leaders now under detention in Greece. They particularly requested the Secretary-General to intercede to save the life of Manolis Glezos.
>
> The Permanent Representative of Poland saw the Secretary-General again on Saturday, 29 April at 12.00 noon and conveyed a personal message from the Foreign Minister of Poland to the same effect.
>
> The Secretary-General then met with the Permanent Representative of Greece and requested him to convey his personal appeal on humanitarian

Civil and Political Rights (*supra* pp. 17-20) and its use in resolutions expanding the jurisdiction of the High Commissioner for Refugees, e.g., G.A. res. 1388 (XIV) of 20 November 1959, G.A.O.R., 14th Sess., Supp. No. 16 at 20-1, U.N. Doc. A/4354 (1959), empowering him to lend his good offices for the welfare of "refugees who do not come within the competence of the United Nations." On these latter developments see Schnyder, *op. cit. supra* note 14 at 339, 429-43 (1964).

[114] U.N. Press release SG/SM/699 of 29 April 1967. For earlier efforts by the socialist team (acting through the First Committee and the President of the General Assembly) to obtain clemency for Greek prisoners, see Loeber, "The Soviet concept of 'domestic jurisdiction.' A case study of Soviet policy in the United Nations 1945-1952" [1961] *Int. Recht und Diplomatie* 165, 178-181, J. Green, *The United Nations and Human Rights* 162-65 (1956).

grounds, on behalf of the political detainees. He expressed his confidence that, in keeping with the noble traditions of Greece, the usual judicial processes of democratic countries would be followed in dealing with the political leaders in detention.

Glezos was a prominent Greek Communist leader who was believed to be due for execution. A few days later a spokesman for the Secretary-General announced [115] that an assurance had been received from the Greek Government that none of the prisoners arrested in the recent coup d'etat were in danger of execution and that they would be dealt with under "due legal judicial processes of democratic countries."

The identity of the originators of this appeal – not generally noted as fans either of an expanded role for the Secretary-General or of the High Commissioner – will not go unnoticed. Nor will the elements added in the press release to the notion of "good offices"; the Secretary-General asked the representative of Greece to *"convey his personal appeal on humanitarian grounds."* Here was an appeal both to the Secretary-General's personal authority by virtue of his position and to his role as spokesman for humanity.[116] These elements appeared again in an appeal made the following year to the same country. In November 1968 one Alekos Panagoulis was sentenced to death by a military tribunal in Athens for desertion and sedition. A number of Governments and NGOs addressed appeals for clemency to the Greek Government and they were joined by U Thant, acting on a "personal and humanitarian basis." [117] Panagoulis was not executed. Another similar example occurred on 28 January 1969 when the Secretary-General issued a statement "deploring" the execution in Baghdad of fourteen persons as Israeli spies. In explaining his action the next day, Mr Thant said that he was "motivated by humanitarian feelings and by the fear that the executions would impede the peace mission of Ambassador Jarring. He recognized as the Iraqui mission contended, that 'this is purely an internal affair.' It is of course far from my intention to bring the matter before any deliberative organ of the United Nations." [118] This last sentence suggests that the Secretary-General has gone beyond anything that can be

[115] New York Times, 4 May 1967, p. 4 cols. 3, 4.

[116] The term "humanitarian" in this context probably comes from Article 1, paragraph 3 of the Charter which lists as one of the purposes of the U.N. the achievement of international cooperation in solving international problems, inter alia, of a "humanitarian character." The writer understands that there are other examples of the kind of activity by the Secretary-General discussed in the text which did not become public.

[117] U.N. Press Release WS/373 of 22 November 1968 at 11, New York Times, 21 November 1968, p. 3, col. 6 and 22 November 1968, p. 1, col 7.

[118] New York Times, 29 January 1969, p. 1, col. 6 and p. 13, col. 1.

squeezed out of Articles 98 and 99. It also has interesting overtones of the arguments about how far a United Nations organ or official may go short of "intervention" within the meaning of Article 2.7 of the Charter.[119] And the whole series of actions raises the strong possibility that the High Commissioner's role might develop in a similar direction. Sub-paragraph (d) with its reference to reports and consultations with states "concerned" is open to the same expansion as Article 99 of the Charter. And the sub-paragraph is reinforced by sub-paragraph (a) which is open to the same treatment as Article 98. Add to this the reference in operative paragraph 1 of the draft to the High Commissioner's "independence and prestige" and the High Commissioner could probably go at least as far as the Secretary-General. One member of the Working Group apparently thought so when he made the comment: "Then there was the question of particular violations of human rights which attracted world attention.... A High Commissioner could discreetly draw the attention of the state concerned to the matter." [120] It is reasonably clear from the context of the representative's remarks that he did not have in mind the drawing of attention to *communications* but something involving wider sources – something that "attracted world attention."

There are, then, good grounds for believing that sub-paragraph (d) could be interpreted to grant much more power than at first meets the eye.

Some General Considerations

Now that the specific functions contemplated in the draft have been examined in some detail three general points remain to be discussed. The first is the extent to which the High Commissioner would need to have regard to the rules of international law relating to the exhaustion of domestic remedies. The second is the issue of discretion versus publicity in his operations. And finally, there is the question of the likelihood of the "evolution" of the Office that was referred to at the beginning of the Chapter.

The exhaustion of domestic remedies

A common problem with respect to the jurisdiction of international tribunals is that of the right of a complainant to institute proceedings before the tribunal when he has not made use of all the domestic judicial, and

[119] *Infra* Chapter 5.

[120] Pierre Juvigny of France in U.N. Doc. E/AC.7/SR.573 at 9 (1967). Note also the suspicions of the Representative of Turkey that sub-paragraph (d) "seemed designed not only to promote but also to supervise respect for human rights." U.N. Doc. E/AC.7/SR.575 at 4 (1967).

perhaps administrative, procedures of the state concerned which may lead to the granting of redress for the matter in question.[121] No reference is made to this issue in the draft statute of the High Commissioner and, in view of his concern with general issues rather than with ferreting out a solution to each specific complaint that comes to his attention, the domestic remedies rule is unlikely to loom large in his deliberations. As Sir Humphrey Waldock has explained:

> There is . . . a difference between bringing a complaint before an international organ, whether legal or political, for the purpose of impeaching generally a law or policy, such as the apartheid laws, considered to violate human rights, and doing so for the purpose of obtaining redress for particular victims of particular violations of human rights. In the former case, where the object is to determine the general compatibility of legislative or administrative measures with international undertakings regarding human rights, there is no place for the operation of the local remedies rule, as the European Commission of Human Rights expressly held in its decision on the admissibility of the first Greek application with respect to human rights in Cyprus.[122]

The reason behind this exception to the general rule that domestic remedies must be pursued is that, if international consideration were held up while a mass of people executed probably futile domestic complaints, the international proceedings might be needlessly and indefinitely held up.

This exception to the domestic proceedings rule would appear to apply generally to the High Commissioner's functions including in particular, those in relation to communications and reports although one can imagine cases in which he would be likely to defer comment, or further comment, until after a final appellate court with constitutional jurisdiction had rendered a definitive decision on the constitutionality of legislation which was also claimed to contravene the state's international obligations.[123]

Discretion versus publicity in the High Commissioner's operations

An important aspect of the way in which the High Commissioner would function is the extent to which he would operate quietly and discreetly and

[121] See generally, T. Haesler, *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals* (1968); Panel, "Using a Country's Own Legal System to Cause it to Respect International Rights," 58 *Proc. Am. Soc. Int'l L.* 100-22 (1964); Mummery, "The Content of the Duty to Exhaust Local Judicial Remedies," 58 *Am. J. Int'l L.* 389 (1964); Amerasinghe, "The Rule of Exhaustion of Domestic Remedies in the Framework of International Systems for the Protection of Human Rights," 28 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht* 257 (1968).

[122] Waldock, "General Course on Public International Law," 106 *Recueil des Cours* 5, 209 (1962). The case referred to is Greece v. United Kingdom, App. No. 176/56. See also Amerasinghe, *op. cit. supra* note 121 at 268-69 and 279.

[123] Cf. Amerasinghe, *op. cit. supra* note 121 at 279 n. 50.

the extent to which he would try to mobilize to the full the forces of world public opinion. So far as his reports and recommendations of a general nature are concerned, every possible opportunity for dissemination should be taken. There is absolutely no reason why the High Commissioner should be like the Commission on Human Rights "which remains almost totally unknown to more than 99 per cent of the world's population." [124] But the issue would take on a different hue when the High Commissioner was contemplating referring to a particular state in a report made under sub-paragraph (d), or when he was considering the publication of reports on technical assistance rendered, or of the precise details of any negotiations carried out on behalf of other organs under sub-paragraph (a). The general tenor of the issues dealt with in the course of assisting other organs would of course be made public by the time that the High Commissioner became involved but the question would still arise whether further publicity would help or harm negotiations.

Many commentators have remarked on the power of the "sanction of publicity." [125] For example, Dr Abram, the former United States representative on the Commission on Human Rights, has recently stated his belief that "Despite the harsh realities of power politics world opinion *is* a force to be reckoned with. Governments *do* devote much time and energy, both in and out of the U.N., to defending and embellishing their own human rights image and demeaning that of others." [126] He referred, among other examples to "the vehemence with which the Government of Greece defended itself, at last year's Commission session, against charges of human rights violations." [127] The I.L.O. Conference Committee on the Application of Conventions and Recommendations [128] and human rights NGOs such as the International Commission of Jurists, the International

[124] Luard in E. Luard ed., *The International Protection of Human Rights* 323 (1967).

[125] See e.g. Henkin, "The United Nations and Human Rights," 19 *Int'l Org.* 504, 514 (1965); Gardner, *op. cit. supra* note 96 at 259; Golsong, "Implementation of International Protection of Human Rights," 110 *Recueil des Cours* 7, 36 (1966); Carey, "Procedures for International Protection of Human Rights," 53 *Iowa L. Rev.* 291, 300 and 317-20 (1967); Carey, *op. cit. supra* note 101 at 154-158. The power of publicity appears to be great despite the fact that the "Attentive Public" is a small, if increasing, minority: see J. Rosenau, *The Attentive Public and Foreign Policy. A Theory of Growth and Some New Evidence* (Princeton Center of International Studies, Research Monograph No. 31, 1968).

[126] Abram, "The U.N. and Human Rights," 47 *For. Aff.* 363, 371 (1969). For discussion of such demeaning and embellishing by the Soviet Union see Jacobson, "The USSR and ILO," 14 *Int'l Org.* 402, 424-25 (1960).

[127] On the charges against Greece see *supra* pp. 24-26.

[128] See Landy, *op. cit. supra* note 17 at 42-6 and *infra* pp. 107-109.

League for the Rights of Man and Amnesty International make extensive use of publicity in the course of their work.[129]

There is, however, the danger that the use of the weapon of publicity will drive the state publicized into a corner from which it will try to justify its position rather than to change its policies in response to the criticisms. It has been suggested that this is precisely what has happened in the case of South Africa and Rhodesia.[130] Some of the factors operating to determine whether publicity helps or hinders have been suggested by Dr C. Wilfred Jenks, drawing on his extensive experience with I.L.O. procedures:

> It depends upon the value attached to the pledged word and the keenness of the sense of international responsibility and interdependence of the country concerned, upon the prestige enjoyed there by the international body which has formulated the criticism, and upon the extent to which, under the conditions that prevail there, international criticism tends to reinforce or to silence national criticism of official policy.[131]

Empirical evidence of what exactly happens in such cases is of course almost impossible to obtain in view of the unreliability of the public record as an accurate account of the motivation of the actors concerned. But the point does emerge that the High Commissioner should generally keep publicity as a last resort.[132] Speaking of the notion of the High Commissioner as a discreet operator Lady Gaitskell told the Third Committee in 1965 that:

> ... such an idea would commend itself more readily to Member States than more elaborate implementing machinery. It would take account of their susceptibility and their legitimate desire to preserve their sovereignty, which were immediately aroused when there was too much publicity. The High Commissioner could operate discreetly and with tact, could identify human rights problems at a very early stage, before they had come to international attention,

[129] See Debevoise, *op. cit. supra* note 86 at 143.

[130] Mudge, "Domestic Policies and U.N. Activities: The Cases of Rhodesia and the Republic of South Africa," 21 *Int'l Org.* 55 (1967). For a contrary view of the power of publicity to change repressive policies in southern Africa see two of the witnesses before the Ad Hoc Working Group on South African Prisons in U.N. Doc. E/CN.4/AC.22/SR.6 at 26-7 and SR.24 at 20 (1967).

[131] C. Jenks, *The International Protection of Trade Union Freedom* 493 (1957).

[132] The International Committee of the Red Cross regards publicity as so dangerous a medicine that it never itself publishes reports or recommendations made as a result of its investigations inside particular countries and relies entirely on persuasion: Bissell, *op. cit. supra* note 77 at 255, 262-3. The High Commissioner for Refugees is chary in the use of publicity. There is an analogy here with the dangers of another sanction – expulsion; see Sohn, "Expulsion or Forced Withdrawal from an International Organization," 77 *Harv. L. Rev.* 1381 (1964) and Carey, *op. cit. supra* note 101 at 26-33.

and, at that juncture, could offer his good offices to the State or States concerned.[133]

The likelihood of the success of quiet overtures in at least some cases has been stressed by Dr Abram:

Not all human rights violations are so deeply ingrained that virtual overthrow of a regime or dominant class, or radical change in the legal or social order, is the only solution. Neglect, oversight or inaction, or passions roused by temporary conflicts of interest, are often at the base of many abuses, and in such instances governments and peoples may prove gratifyingly responsive to the High Commissioner's overtures.[134]

It seems possible to conclude that a visit to the news media would not be the first stop on the High Commissioner's agenda. Rather: "He would function as an observer and factgatherer, as an intermediary away from the public spotlight and in extreme cases, as the U.N. agent who would expose abuses to the glare of world opinion." [135]

The prospects for evolution

Throughout this Chapter we have alluded to the vagueness of the language in the draft and to the possibilities this allows for the development of the role of the High Commissioner by creative interpretation. But the question arises whether faith in such an expansion by supporters of the proposal is illusory. Consider the following NGO statements on the High Commissioner. The first is from the International League for the Rights of Man. The second is obviously an answer to it; it came from the Consultative Council of Jewish Organizations, which, it will be recalled [136] floated the early, detailed proposals for a High Commissioner.

1. . . . it is desirable to leave some of the functions in general terms, to allow for the pragmatic evolution of his role.[137]
2. The experience of the past twenty years militates against any and all assumptions that the High Commissioner's functions will evolve pragmatically to meet the needs as they arise.[138]

The second confident pronouncement of despair is a substantially accurate account of the lack of development of both the Commission on Human

[133] U.N. Doc. A/C.3/SR.1372 at 490 (1965).
[134] *Op. cit. supra* note 126 at 372.
[135] Id., at 371. For an indication of the faith placed by Dag Hammerskjold in such "quiet diplomacy" see his remarks in W. Foote ed., *Servant of Peace* 94-96 (1962).
[136] *Supra* p. 41.
[137] U.N. Doc. E/CN.4/AC.21/NGO 1 (12 January 1967).
[138] U.N. Doc. E/CN.4/AC.21/NGO 2 (23 January 1967).

Rights and its Sub-Commission.[139] It is, however, possible to marshal at least four items of experience during the past twenty years to cast doubt on its general accuracy. The first is that the role of the Secretary-General has in fact expanded since 1945.[140] The second is the gradual widening of the range of activities of the United Nations High Commissioner for Refugees, either by a generous interpretation of his statute or by the General Assembly's entrusting of further responsibilities to him.[141] Third, the role of the Inter-American Commission on Human Rights has expanded both by a progressive interpretation of its own powers and by subsequent acceptance of the expansion by its parent body.[142] Finally there is the experience of the European Convention on Human Rights. Parties to that Convention have an option whether they will accept (a) the right of individual petition to the Commission and (b) the right of the Commission or another Party to refer a complaint to the Court of Human Rights. The experience has been that the number of states accepting individual petitions and the jurisdiction of the Court has gradually increased. The most significant of these developments in the present context are those of the Secretary-General and the High Commissioner for Refugees. Like them, the High Commissioner for Human Rights would be an executive figure. Their experience in expanding their functions despite much the same forces as those opposing the appointment of the High Commissioner for Human Rights suggests that, while it may be possible to hamstring political bodies like the Commission on Human Rights,[143] U.N. executive capacity can grow free of restriction of any one member or group of members.

It may be inferred that the prospects for a "progressive expansion" of the High Commissioner's role would not be altogether bleak.

[139] *Supra* pp. 21-27 and 36-38.

[140] See e.g. his recent cautious efforts in relation to political prisoners, *supra* pp. 88-90 and more generally: Alexandrowicz, *op. cit. supra* note 109 at 1109; S. Bailey, *The Secretariat of the United Nations* (rev. ed. 1964); Gordenker, *op. cit. supra* note 33.

[141] See *op. cit. supra* note 113 and Krenz, "The Refugee as a Subject of International Law," 15 *Int'l & Comp. L.Q.* 90 (1966). It has been suggested that a continuation of this process could take the High Commissioner for Refugees well into some of the areas suggested for the High Commissioner for Human Rights: Carey, *op. cit. supra* note 125 at 291, 302-3 n. 58.

[142] See Schreiber and Schreiber, *op. cit. supra* note 29 at 508, 528; Fox, "Doctrinal Development in the Americas: From Non-Intervention to Collective Support for Human Rights," 1 *N.Y.U. J. Int'l L. & Pol.* 44 esp. 55-60 (1968).

[143] See also *infra* p. 104.

CHAPTER 4

SOME ADMINISTRATIVE MATTERS AND THE ISSUE OF COLLEGIALITY

This Chapter is devoted mainly to the major administrative problems associated with the proposal – appointment and financing; relations with the Secretary-General and with the various implementation organs that have been, or will be set up on a regional or global basis; and the role of the panel of experts. This last question has implications which go beyond the merely "administrative" since the role of the panel could well affect the substantive matters with which the High Commissioner could concern himself.

Appointment and financing

Paragraph 3 of the draft provides that the High Commissioner "shall be appointed by the General Assembly, on the recommendation of the Secretary-General, for a term of five years. . . ." This is similar to the provision relating to the High Commissioner for Refugees although the latter's term is only three years.[1] An authority on the High Commissioner for Refugees has suggested that the mode of appointment has "strengthened significantly" the position of the High Commissioner: "Thus, the Secretary-General is not burdened with responsibility for his actions, and, by the same token, he is protected from any political antagonism aroused by actions of the Secretary-General." [2] Nevertheless, the appointment procedure would put some burden on the Secretary-General since he would be responsible for preliminary soundings for an acceptable candidate. It is

[1] Both are in turn based on Article 97 of the Charter which provides that the Secretary-General is to be appointed by the General Assembly upon the recommendation of the Security Council. No specific term is mentioned but five years is customary. A three-year term was discussed at San Francisco and the argument was made that this would be insufficient for the Secretary-General to assert his independence: see 7 U.N.C.I.O. Docs. 345-7, 387-9 (1945).

[2] J. Read, *The United Nations and Refugees – Changing Concepts* (*Int'l Concil.* No. 537, 1962) 8-9.

no doubt hoped that the selection process would largely take place behind the scenes and that the actual "appointment" would be as nearly unanimous as possible in order to ensure that the incumbent wields as much authority as can be attained.[3] One of the Tanzanian amendments sent forward to the General Assembly would replace the word "appointed" by the General Assembly with "elected" [4] but does not appear to be intended to involve any difference in the procedure. It is unlikely that the selection of one candidate from a slate of nominees is intended, whatever the terminology.

The authority of the High Commissioner would no doubt be enhanced by the length of his term which is probably the maximum that can reasonably be expected for such a functionary in a political organization like the United Nations.[5] Of course the possibility of re-appointment is not precluded. His "independence and prestige" would be further underscored by the provision that "his emoluments shall not be less favourable than those of an Under-Secretary." [6] The High Commissioner for Refugees' salary was raised to this level in 1968.[7]

So far as staff is concerned, the draft provides that "within the limits of the budgetary appropriation provided and on the recommendation of the High Commissioner, the staff of the High Commissioner shall be appointed by the Secretary-General and such staff shall be subject to the conditions of employment provided under the Staff Regulations of the United Nations adopted by the General Assembly and the Staff Rules promulgated thereunder by the Secretary-General." [8] These provisions should keep to a minimum any political pressures for the appointment of particular persons to the High Commissioner's staff although it is worth noting that the High

[3] See representative of Dahomey in U.N. Doc. E/CN.4/SR. 938 at 16 (1967). Unanimity in appointment is not necessarily a *sine qua non* of success; Albert Thomas, the highly successful first Director-General of the I.L.O. was only narrowly elected: see E. Phelan, *Yes and Albert Thomas* 17 (1936).

[4] Cf. the successful efforts at San Francisco to "emphasize the administrative nature of the office [of Secretary-General] by substituting 'appointment' for 'election' by the General Assembly." L. Gordenker, *The U.N. Secretary-General and the Maintenance of Peace* 23 (1967). The U.S. delegate has indicated support for the Tanzanian amendment on the ground that it would "be a further guarantee that [he] would enjoy the trust of Member States." U.N. Doc. A/C.3/SR.1726 at 12 (1969).

[5] See also note 1 *supra*.

[6] ECOSOC draft, operative para. 3. The Costa Rican draft referred to the level of a judge of the I.C.J. which is approximately the same.

[7] See U.N. Docs. A/C.5/1214 and Corr. 1 and A/7454 (1968). The present equivalent of "Under-Secretary" is the Assistant Secretary-General level. In 1969 the salary for an Assistant Secretary-General was $44,200: U.N. Doc. A/C.3/L.1728 at 2-3 (1969).

[8] Draft operative para. 7(b).

Commissioner for Refugees is also kept independent from the Secretary-General in that he appoints his own staff.

In his statement of the administrative and financial implications of the proposal prepared for the twenty-third session of the General Assembly, the Secretary-General suggested that, in addition to the panel of experts and the services that would be shared with the Secretariat, "it is initially proposed that a small staff comprising a special assistant (P-5), two other professional officers (P-5 and P-3), and four general service staff (three secretaries and one clerk) be provided. . . ." [9] This is a modest establishment indeed (about the size of the establishment of the New Zealand Ombudsman) [10] and perhaps reflects an anticipation of a rather limited work load. But, as we shall see, the panel of experts would probably handle a lot of the detailed work.

The expenses of the Office would be "financed under the regular budget of the United Nations" [11] as is the case with the administrative expenses of the High Commissioner for Refugees.[12] Thus the annual budget for the High Commissioner for Human Rights would be voted upon by the General Assembly under Article 17 of the Charter. Professor Macdonald [13] has observed pessimistically that

> . . . any Member State opposing creation of the institution will be free to introduce amendments reducing or even eliminating the appropriation for the Office. Under Article 18 of the Charter, decisions on budgetary questions require a two-thirds majority. It appears, therefore, that the elimination of the appropriation offers a favourable opportunity for those states that would like to abolish the Office itself. The elimination of the appropriation could be effected by mustering a blocking one-third, in a vote to oppose the appropriation *in toto,* whereas a resolution to abolish the Office itself would require support of two-thirds of the membership.

Another pessimistic possibility, mentioned by an opponent of the proposal which has since become one of its supporters,[14] is that the budgetary arrangements "may lead to non-payment of the portion of the contributions

[9] U.N. Doc. A/C.3/L. 1620 at 2 (1968) and U.N. Doc. A/C.3/L.1728 at 2 (1969).

[10] Aikman and Clark, "Some Developments in Administrative Law" (1966), 29(2) *N.Z.J. Pub. Admin.* 48, 58 (1967).

[11] Draft operative para. 7(a).

[12] See discussion in Schnyder, "Les Aspects Juridiques actuels du Problème des Réfugiés," 114 *Recueil des Cours* 339, 396-7 (1965).

[13] Macdonald, "The United Nations High Commissioner for Human Rights," 5 *Can. Y. B. Int'l L.* 84, 107 (1967).

[14] Japan in U.N. Doc. A/7170, Annex III at 9 (1968). And see the threats of non-payment by the U.S.S.R. and Saudi Arabia in U.N. Doc. A/C.3/SR.1731 at 11-12 and SR.1732 at 3-4 (1969).

related to the cost of maintaining this office on the part of those Member States which oppose its establishment." On the scale of operations initially contemplated for the High Commissioner it would take a long time before such a course of action resulted in another financial crisis of the kind caused by the United Nations' peace-keeping activities.[15] The main opponent of the proposal, the Soviet Union, has in fact flatly asserted that it would not pay its assessed share of the High Commissioner's budget.[16] However, despite some fulminations against the High Commissioner for Refugees [17] and some abstentions when his budget was being considered they have never refused to pay their share of his administrative expenses which far exceed those proposed for the High Commissioner for Human Rights [18] and the present threat may well be an idle one.

The High Commissioner for Refugees has survived such dire possibilities as these – in addition to the uncertainty of holding an office created and extended for a series of "temporary" periods. It is unlikely, therefore, that once appointed, the High Commissioner would be subjected to more financial harassment than is the lot of all United Nations organs.

Relations with the Secretary-General

Some aspects of the relationship between the Secretary-General and the High Commissioner have just been discussed but there are some others requiring mention. First, under paragraph 7(d): "The administration of the Office of the High Commissioner shall be subject to the Financial Regulations of the United Nations and to the Financial Rules promulgated thereunder by the Secretary-General, and the accounts relating to the Office of the High Commissioner shall be subject to audit by the United Nations Board of Auditors." Further, paragraph 5 invites the High Commissioner "to conduct the Office in close consultation with the Secretary-General and with due regard for the latter's responsibilities under the Charter." And paragraph 6 requests the Secretary-General "to supply the High Commissioner with all the facilities and information required for carrying out his functions." Some of the implications of this provision were mentioned in Chapter 3.[19]

[15] See e.g. Russell, "United Nations Financing and 'The Law of the Charter'," 5 *Colum. J. Transnat'l* 68 (1966).

[16] *Supra* note 14.

[17] See e.g. the remarks quoted in Chapter 2, *supra* p. 57.

[18] The Secretary-General's estimate of the annual budget of the High Commissioner for Human Rights amounts to $283,300: U.N. Doc. A/C.3/L.172 at 3 (1969). The High Commissioner for Refugees had an administrative budget of $4,722,000 in 1971.

[19] *Supra* p. 86.

Obviously there is to be a close working relationship, and it could not be otherwise since an important problem would be the avoidance of duplication of effort. At many points in the preceding discussion we have suggested areas in which the High Commissioner might work by analogy with what is already done by the Secretary-General. Thus, consultation between the two must surely take place before a U.N. organ decides to ask for the "advice and assistance" of one in preference to the other. If the High Commissioner's services were to be used extensively in the preparation of reports and studies and in the drafting of Conventions, this would mean a reduction of the work-load of the Division on Human Rights and possibly some staff transfers. Furthermore, the "advice and assistance to states" functions must contemplate the virtual replacement of the Secretary-General's programme (other than seminars) by the High Commissioner's.[20] None of these problems would be too difficult to work out in practice.

Relationship with implementation organs

Operative paragraph 2 of the draft, it will be recalled,[21] provides that the High Commissioner's activities are to be "without prejudice to the functions and powers of organs already in existence or which may be established within the framework of measures of implementation included in international conventions on the protection of human rights and fundamental freedoms."

In view of the rudimentary measures of implementation in most treaties this is unlikely to present him with substantial problems. He would need to take account of the reporting procedures under the International Covenant on Economic, Social and Cultural Rights in preparing his own reports, in order to avoid conflicts between his own suggestions and suggestions contained in reports prepared by the Commission on Human Rights and ECOSOC pursuant to their functions under the Covenant.[22] Beyond that, he would need to take account of the fact that some of the communications or other complaints that come before him may belong within the purview of the I.L.O., UNESCO, or other specialized agencies,[23] a regional organization,[24] the Committees or Conciliation Commissions established under

[20] No account seems to have been made of any saving on the costs of the Division of Human Rights in the Secretary-General's estimates noted *supra* note 18.

[21] See *supra* Chapter 2, p. 56.

[22] See *supra* pp. 18-19.

[23] See *supra* p. 27 note 95.

[24] See *supra* pp. 68-70. The writer understands that one of the "unstated" reasons for the reluctance of the Commission on Human Rights to take up the questions of Greece and Haiti (*supra* p. 25) was that the issues were then pending before the Euro-

the 1965 Convention on the Elimination of Racial Discrimination [25] and the 1966 International Covenant on Civil and Political Rights.[26] The wording of the draft does not seem to amount to an absolute prohibition of dealing with matters within the jurisdiction of such bodies but its effect must be that he should suspend his own activities as soon as a particular issue with which he is dealing is referred to such a body. It would also be possible for him to suggest to parties involved in a matter which comes to his attention that they would be likely to obtain better results by taking action pursuant to one or other of such procedures. For example, if a state were to request his assistance under paragraph 2(b) in dealing with another state's alleged human rights violations which affect it, he might suggest an application under an appropriate Convention. But, at least in the case of existing Conventions, he would have no formal power to refer matters to their implementation organs.

There is a serious question as to the power of implementation organs under various treaties to obtain the assistance of the High Commissioner in relation to their own functions. So far as the International Covenant on Economic, Social and Cultural Rights is concerned there is no problem since ECOSOC and the Commission on Human Rights, in the course of their functions under the Covenant, could presumably obtain the advice and assistance of the High Commissioner as they might in relation to any other human rights matters. But the position is far from clear in the case of the bodies set up under the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. Sub-paragraph 2(a) of the ECOSOC draft speaks of giving assistance "upon their request" to the General Assembly, the Economic and Social Council, the Secretary-General, the Commission on Human Rights, the Commission on the Status of Women "and other organs of the United Nations and the specialized agencies concerned with human rights." Do the bodies formed under the Covenant and the Convention amount to "other organs" within this formulation? That they may not is suggested by a well-known report of the Secretary-General on the "Means by which the Proposed Human Rights Committee may be able to obtain

pean and Inter-American Commissions. On the question of primacy between U.N. and regional organs where both have jurisdiction see Sohn, "A Short History of United Nations Documents on Human Rights" in Commission to Study the Organization of Peace, *The United Nations and Human Rights* 39, 174-77 (1968) and D. Bowett, *The Law of International Institutions* 256-257 (2nd ed. 1970).

[25] *Supra* p. 18.

[26] *Supra* p. 19.

advisory opinions from the International Court of Justice."[27] Article 96 of the Charter provides that advisory opinions may be requested by the General Assembly or the Security Council and, in cases within the scope of their activities, "other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly." In the Secretary-General's view[28] it was clear enough that the proposed Committee could not be considered a principal organ of the United Nations "since such principal organs are expressly designated in Article 7(1) of the Charter." Further:

It is most doubtful whether this Committee could be considered a subsidiary organ under the present text of the draft Covenant. It seems quite clear under Art. 7(2) that a subsidiary organ would have to be a body established by a principal organ. This would not be the case in regard to the Human Rights Committee. That proposed body would be established by an international instrument separate and distinct from the Charter. Its members would be elected by the States which are parties to the Covenant, and the terms of reference of the Committee would be laid down by the Covenant. In the performance of its functions it would not be subject to the authority of any principal organ of the United Nations.

Although the report went on to suggest that the Committee might request one of the principal organs to consider applying for an advisory opinion on the matters on which the Committee wanted advice, no provision to this effect was eventually included in the Covenant or in the Race Convention.

The reasoning on whether the Committees are "organs" for the purpose of obtaining advisory opinions appears to apply with equal force to the question whether they would be organs for the purpose of obtaining the advice of the High Commissioner. It follows that neither the Elimination of Racial Discrimination Committee nor the Human Rights Committee would be entitled to seek his assistance.

The panel of expert consultants

Paragraph 4 of the ECOSOC draft provides for the appointment of a panel of expert consultants to advise and assist the High Commissioner in carrying out his functions. The panel would not exceed seven in number and its members would be appointed by the Secretary-General in consultation with the High Commissioner, having regard to the equitable representation of the principal legal systems and geographical regions. Its members' terms would be determined by the Secretary-General in consultation with the

[27] U.N. Doc. E/1732 (1950).
[28] Id., at 3.

High Commissioner and would be subject to the approval of the General Assembly.

In our discussion of the history of the High Commissioner proposal, we noted [29] how the addition of the panel of experts to the Costa Rican draft was seen primarily as a compromise between those members of the Working Group who were in favour of a single High Commissioner and those (France and Senegal) who, while sympathetic to the general concept and to at least some of the proposed functions, would have preferred a collegiate body – a Commisson rather than a Commissioner. A number of states which opposed the whole idea in the Commission on Human Rights and in ECOSOC rationalized their opposition by suggesting that they would consider seriously attempts to achieve the further promotion of human rights through a collegiate body. The members of the Soviet bloc, indeed, went as far as to put the argument for collegiality in terms of a constitutional argument based on the Charter.[30] Other delegates spoke just as forcefully against the attempt to have a lone High Commissioner. Thus the representative of Iraq [31] told the Commission on Human Rights:

> One advocate of the appointment of a High Commissioner had said that he wished to institutionalize moral authority and conscience. That was precisely what his delegation did not want; it believed in the collective effort and responsibility of all members of the United Nations and in their participation in the development of a collective moral conscience.

The argument also relied on the fear, expressed in Khrushchev's famous words when he was advocating the "troika" proposal for replacement of the Secretary-General,[32] that "there are no neutral men." To quote again from the words of the representative of Iraq (words albeit that would concede the High Commissioner a much wider role than his supporters would):

> it was open to question whether there existed an absolutely independent and impartial person worthy of being elevated to the rank of judge and protector of the rights of all individuals.[33]

It was also urged that the regional bodies for the protection of human rights operate on the collegiate system despite the shared common tradition of

[29] *Supra* p. 53.

[30] See *infra* p. 133.

[31] U.N. Doc. E/CN.4/SR.939 at 7 (1967). See also India E/AC.7/SR.574 at 14 (1967); France E/CN.4/SR.940 at 20 (1967).

[32] See S. Bailey, *The Secretariat of the United Nations* 48-54 (rev. ed. 1964); J. Stoessinger, *The United Nations and the Super Powers* 48-58 (1965).

[33] U.N. Doc. E/CN.4/879 at 8 (1966).

the countries concerned. But: "The States Members of the United Nations had no such uniformity of tradition or legislation as these regional bodies and should not, *a fortiori,* be subjected to the decisions of a single individual, however objective and impartial he might be." [34]

Many NGO and Government representatives with whom the writer has discussed the High Commissioner proposal have expressed the opinion that the best way to kill it is to insist on collegiality. Their arguments run along three main lines. First, U.N. collegiate bodies such as the Commission on Human Rights, have tended to be "hapless" (to steal Professor de Smith's apt term) [35] and hamstrung. A new tack is therefore needed. Second, it is suggested that the argument in part misses its mark because, although it might apply to a judicial body, it is not so appropriate to an official who would essentially be a negotiator rather than a judge. In this context it is worth noting the comparison made by Leon Gordenker in his important study of the Secretary-General between the efficiency of that official as a negotiator and the lack of efficiency shown by international commissions:

> No matter how carefully instructions to a multilateral commission are framed, they are inevitably filtered through as many foreign offices as there are members of the commission. If the commission is made up of persons chosen for their qualifications, each of them is likely to see his instructions in a particular light. Commissions must either reach unanimous decisions or be suspected of partiality or weakness.[36]

It seems fairly clear that the High Commissioner's proposed functions of encouraging ratification and bringing communications to the attention of states would be rendered largely nugatory in the hands of a collegiate body. Finally, it is suggested that "the Secretary-General has proved that one man

[34] U.N. Doc. E/CN.4/SR. 939 at 10 (1967). On the socialist countries' genuine fears of being "swamped" in international organizations see Morawiecki, "Institutional and Political Conditions of Participation of Socialist States in International Organizations: A Polish View," 22 *Int'l Org.* 494 (1968); E. McWhinney, *"Peaceful Coexistence" and Soviet-Western International Law* 53-4 (1964).

[35] Review of E. Luard ed., *The International Protection of Human Rights,* 1 *N.Y.U. J. Int'l L. & Pol.* 135, 137 (1968). It follows from the argument in the text that efforts to increase the powers of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (*supra* pp. 24-27) are doomed to failure. In comparison with the High Commissioner the Sub-Commission suffers not only from collegiality but also from its lack of prestige in lying at the bottom of the ladder – Sub-Commission, Commission, ECOSOC, Assembly.

[36] L. Gordenker, *op. cit. supra* note 4 at 201. See also, on the dangers of a committee in simply prolonging differences in political organs, Zacher, "The Secretary-General and the United Nations' Function of Peaceful Settlement," 20 *Int'l Org.* 724, 728-9 (1966).

can be above all systems in terms of his ability to grasp broad concepts for the general good." [37]

If this very persuasive analysis of supporters of the draft be correct it becomes extremely important to elucidate the extent to which the compromise of the panel of experts is likely to convert the High Commissioner into a collegiate body by another name. It may be helpful to view the role of the panel of experts as lying somewhere on a continuum between being merely members of the High Commissioner's staff (like the employees of the Secretariat or the High Commissioner for Refugees) at the one end, and a body with a power of direction, or at least of veto, at the other. In the absence of any clear reference in the draft or in the *travaux préparatoires* to the position on the continuum that the drafters had in mind it is necessary to examine three possible clues as to what is envisaged: the title; the appointment procedure; and an analogy drawn during the debates with the I.L.O. Committee of Experts on the Application of Conventions and Recommendations.

As to the first, the term "panel of expert consultants to advise and assist the High Commissioner" (rather than "Executive Committee," "Governing Body" or "Cabinet") suggests a minor role. This is to some extent confirmed by the experience of the High Commissioner for Refugees – an experience which, surprisingly, was not referred to in any of the discussions on the proposed panel. The resolution under which the first United Nations High Commissioner took office [38] empowered ECOSOC to establish an "advisory committee" on refugees to consist of representatives of States Members and states non-members of the United Nations "to be selected by the Council on the basis of their demonstrated interest in and devotion to the solution of the refugee problem." The advisory committee set up by ECOSOC did little of significance and when the General Assembly decided in 1954 [39] to increase its powers ECOSOC was empowered to change the title to "Executive Committee of the High Commissioner's Programme." Under the presently operative resolution [40] the Committee (currently composed of 31 states and the Holy See) is entrusted

[37] U.S. representative to the Commission on Human Rights quoted in 54 *Dep't State Bull.* 1032 (1966).

[38] G.A. res. 428 (V) of 14 December 1950, G.A.O.R., 5th Sess., Supp. No. 20 at 46-48, U.N. Doc. A/1775 (1950).

[39] G.A. res. 832 (IX) of 21 October 1954, G.A.O.R., 9th Sess., Supp. No. 21 at 19-20, U.N. Doc. A/2890 (1954).

[40] G.A. res. 1166 (XII) of 26 November 1957, G.A.O.R., 12th Sess., Supp. No. 18 at 19-20, U.N. Doc. A/3805 (1957); and see explanation of the sponsors' intention in G.A.O.R., 12th Sess., Plenary (723rd meeting) 532.

with the following terms of reference, the detail of which bears comparison with the lack of definition in the present draft:

(a) To give directives to the High Commissioner for the liquidation of the United Nations Refugee Fund;
(b) To advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office;
(c) To advise the High Commissioner as to whether it is appropriate for international assistance to be provided through his Office in order to help solve specific refugee problems remaining unsolved after 31 December 1968 or arising after that date;
(d) To authorize the High Commissioner to make appeals for funds to enable him to solve the refugee problems referred to in sub-paragraph (c) above;
(e) To approve projects for assistance to refugees coming within the scope of sub-paragraph (c) above;
(f) To give directives to the High Commissioner for the use of the emergency fund to be established under the terms of paragraph 7 below.

Potentially these are very wide powers of initiative – or frustration – although still partly advisory and partly executive. But while the change in title carried with it a greater potential the Committee has tended in practice to act as a rubber stamp for the High Commissioner's suggestions [41] and it is perhaps most useful as a convenient means for keeping in touch with the countries (including non-members of the U.N.) that contribute most generously to the programme. It seems to follow from the High Commissioner for Refugees' experience that an "advisory" body would not interfere too much [42] in the day to day work of the Office, since even his "Executive" Committee has not done so.

This view is underscored in the ECOSOC draft by the provision that the experts are to be appointed by the Secretary-General in a manner similar to that for the High Commissioner's regular staff. This contrasts with the political selection of the Commission on Human Rights, the Executive Committee of the High Commissioner's Programme and even the Sub-Commission on Protection of Minorities and Prevention of Discrimination whose members are experts but are nominated for election by governments. The draft will undoubtedly come in for some discussion on this score in the General Assembly since one of the amendments proposed by Tanzania would replace the present wording with a provision that the experts would

[41] It recently decided only to meet annually in the interests of economy: Report of the UNHCR, G.A.O.R., 23rd Sess., Supp. No. 11 at 41, U.N. Doc. A/7211 (1968).

[42] Or, depending on one's point of view, "would hardly have the necessary powers to prevent the High Commissioner from taking arbitrary decisions." (Representative of Czechoslovakia, U.N. Doc. E/AC.7/SR.573 at 5 (1967)).

be "elected by the General Assembly on the basis of equitable geographical distribution." The far-reaching significance that this could have for the role of the panel appears to have been missed by the delegation of Costa Rica which has said,[43] without further elaboration, that it "finds acceptable" this amendment. But it has not been missed by the United States delegation which has commented [44] that:

> We regard this expert panel as an essential resource, but we believe its members should be appointed by the Secretary-General in consultation with the High Commissioner, as recommended by the Working Group.... The need is for an efficient operating mechanism that can respond quickly when needed, and not for another committee or commission. The essential will be team work. To achieve this, decisions and direction are best centred in a single hand, who can be held responsible by the General Assembly.

While the point may not be crucial in the context of the High Commissioner for Refugees' Executive Committee whose members share a common approach to the general principles of the Office it could well be decisive in causing paralysis if the High Commissioner for Human Rights' panel were to be filled with governmental representatives.

The final clue to what is intended by the present draft is provided by the analogy drawn by a number of delegations [45] with the I.L.O. Committee of Experts on the Application of Conventions and Recommendations and a little needs to be said about that body.[46] The basis of its jurisdiction lies in the reporting provisions of the I.L.O. Constitution. Regular reports are required on measures taken by members to give effect to conventions ratified by them and in addition they must provide information on their law and practice relating to such unratified conventions and recommendations on which information is requested from time to time. The reporting procedures for unratified conventions and for recommendations are not aimed specifically at enforcing such instruments [47] but at encouraging governments to review their laws and practices and to enable global surveys

[43] U.N. Doc. A/7170, Annex III, at 5 (1968).

[44] Id., at 15. Note also the Working Group's comments to the same effect; U.N. Doc. E/CN.4/934 at 19 (1967).

[45] See e.g. the discussion in the Working Group's Report, U.N. Doc. E/CN.4/934 at 12-13 (1967).

[46] The best discussions are in E. Landy, *The Effectiveness of International Supervision. Thirty Years of I.L.O. Experience* (1966); C. Jenks, *The International Protection of Trade Union Freedom* 142-153 (1957); C. Alexandrowicz, *World Economic Agencies, Law and Practice* 103-108 (1962); Bissell, "Negotiations by International Bodies and the Protection of Human Rights," 7 *Colum. J. Transnat'l L.* 90, 97-109 (1968).

[47] But note that one I.L.O. activity comes close to doing that, *infra* p. 109 and *supra* p. 70 note 36.

of progress and problems to be made. One or two conventions or Recommendations are chosen for examination each year.[48] However, the bulk of the Committee's time is devoted to an examination of the reports on ratified conventions in the light of other material available to the Committee or such supplementary data as it may request.[49] "Observations" (another delightful euphemism in the same tradition as the General Assembly's "communications") are then made to governments thought to be in breach of their obligations. A summary of such observations is prepared for the I.L.O. Annual Conference where it is examined by a Conference Committee comprising government, worker and employer representatives. Governments are invited to comment on the observations made about their actions and most do so. Many of the observations are acted upon by governments at the first, non-political, stage of this process [50] and more following discussion in the Conference Committee. The Director-General of the Organization recently recorded that "during the previous four years governments introduced changes in their law and practice in some 300 cases in respect of which observations and requests had been made by the Committee." [51] The two stages of the process are of course closely related:

> ... the Conference Committee relies more and more on the preliminary fact-finding carried out by the Committee of Experts and the latter benefits in turn from the deliberations and prestige of the Conference, as the supreme body of the Organization.[52]

But the techniques of the two differ sharply, in a manner which recalls our earlier discussion of discretion versus publicity.[53] The Committee of Experts relies on quiet persuasion while the Conference Committee uses the weapon of publicity. In fact, in extreme cases where little progress has been made over a number of years states are placed on a special "black-list." [54] The Committee of Experts has attained a high degree of independence and impartiality and a record of solid work. Its independence is enhanced by its appointment procedure – members are appointed by the I.L.O. Governing Body on the recommendation of the Director-General who acts on his

[48] See e.g. the study of the 1930 and 1957 Forced Labour Convention in the 1968 *Report of the Committee of Experts on the Application of Conventions and Recommendations* 175-252, and, generally, Jenks, *op. cit. supra* note 46 at 150-153.

[49] See *supra* p. 85 note 102.

[50] Exact figures are hard to come by but see Landy, *op. cit. supra* note 46 at 165 who stresses this point.

[51] *The ILO and Human Rights* (*Report of the Director-General, Part I, to the International Labour Conference,* 52nd Session, 1968) 19.

[52] Landy, *op. cit. supra* note 46 at 199.

[53] *Supra* pp. 91-94.

[54] Landy, *op. cit. supra* note 46 at 170-71.

own initiative – there is not even any formal requirement of geographical or legal "balance." [55] It has seldom been necessary for a vote to be taken in the Committee and there are few dissents from its recommendations.[56] This is in part due to the independence of its membership but must in part also be attributed to the technical nature of many of the I.L.O. Conventions which do not permit of great ideological disputes over their interpretation. The more political of the I.L.O. conventions have in practice been supervised primarily by another body, the Governing Body Committee on Freedom of Association, which has not enjoyed the same degree of unanimity.

The I.L.O. analogy underlines the role of the Committee of Experts, as of the High Commissioner's Office in general,[57] as a part of a possibly continuing process leading to political organs if no progress is made. It also suggests that the prime field of activity of the panel would be the examination of reports and other material available, in order to assess compliance with human rights instruments – ratified or unratified conventions and declarations. It would not have the same leverage as the I.L.O. Committee in obtaining reports as the latter has by virtue of the treaty provisions in the I.L.O. Constitution and, given the low level of reporting by governments to the U.N.[58] compared with that to the I.L.O.,[59] it would obviously need to rely on many of the additional sources of information that were discussed in Chapter 3.[60]

We noted in an earlier chapter [61] that it is not clear whether the High Commissioner's panel would be full- or part-time. The I.L.O. model may be relevant in this context. It meets for about two weeks a year, although its members are sent material for preliminary examination in advance of the meeting. A similar arrangement could well be considered for the panel of experts.

It seems possible to conclude from what has just been said that the way the provision for the panel of experts is at present the panel would be purely advisory. It would not dictate policy or specific actions to the High Commissioner. Its main strength would probably be as an independent

[55] Bissell, *op. cit. supra* note 46 at 100-101 n. 38.

[56] Note also in this respect the "consensus" procedures followed by two advisory committees formed to assist the Secretary-General, the Advisory Committee on Atomic Energy and the UNEF Advisory Committee: see Hammarskjold in W. Foote ed., *Servant of Peace* 170-72 (1962).

[57] *Supra* pp. 82-86.

[58] *Supra* p. 28.

[59] 84.5% in 1968 (Director-General's Report, *op. cit. supra* note 51 at 9).

[60] *Supra* pp. 84-86.

[61] *Supra* p. 53.

body to examine domestic legislation [62] on the basis of international standards in order that appropriate recommendations might be formulated. A shift by the General Assembly in the direction of placing greater responsibility on the panel could result in a serious truncation of the whole concept of the High Commissioner.

[62] The I.L.O. Committee has acknowledged its difficulties in going beyond the legislation to compliance in practice: *Report of the Committee of Experts on the Application of Conventions and Recommendations* 13-14 (1968). But getting the legislation into shape is at least part of the battle won. For some doubts on how large that part is see Bilder, "Rethinking International Human Rights: Some Basic Questions," [1969] *Wisc. L. Rev.* 171, 206-7.

CHAPTER 5

THE CONSTITUTIONALITY OF THE OFFICE, PARTICULARLY IN THE LIGHT OF ARTICLE 2, PARAGRAPH 7 OF THE CHARTER

A matter which has received some attention – especially from opponents of the proposal – is the question whether the General Assembly has power to create the office by resolution or whether it could only be done by means of a Convention.[1] There has also been some suggestion that, even by Convention, international law would not permit the establishment of an office such as that contemplated. This Chapter will analyse these arguments.

The argument in favour of the General Assembly's power to create the office turns primarily on Articles 22, 1.3, 13.1 (b), 55, 56 and 60 of the Charter. Article 22 [2] empowers the Assembly to "establish such subsidiary organs as it deems necessary for the performance of its functions." Article 13.1(b) empowers it to "initiate studies and make recommendations for the purpose of," inter alia, "assisting in the realization of human rights and fundamental freedoms." [3] This is bolstered by the reference in Article 1.3 to the achievement of international co-operation in matters of human rights as one of the Purposes of the Organization, by Article 55's injunction to the "United Nations" to promote "universal respect for and observance of, human rights and fundamental freedoms for all . . ." and by the pledge of members contained in Article 56 to "take joint and separate action in

[1] Aside from the "constitutional" arguments note the interesting discussion of the pros and cons of a non-conventional basis in the Inter-American context by Scheman, "The Inter-American Commission on Human Rights," 59 *Am. J. Int'l L.* 335, 340 (1965): "[I]t covers a broad area that might not have been within its mandate if it had been hammered out in the process of negotiation and subject to ratification. Second, no state can escape the provisions of the Declaration, for there is no convention to which reservations can be made or which can be denounced . . . [T]he other side of the coin is the complete lack of enforcement provisions."

[2] For an analysis of the numerous applications of Article 22 see 1 *Repertory of Practice of United Nations Organs* 661-742 (1955) and Supplement No. 2, Vol. II, 222-274 (1964); Skubiszewski, "The General Assembly of the United Nations and its Power to Influence National Action," 58 *Proc. Am. Soc. Int'l L.* 153, 154 (1964).

[3] Note also the similar powers conferred on ECOSOC by Article 62.

co-operation with the Organization for the achievement of the purposes set forth in Article 55." Article 60 provides that responsibility for the discharge of the functions of the Organization contained in Chapter IX of the Charter relating to international economic and social co-operation (including in particular Articles 55 and 56) shall be vested in the General Assembly and, under its authority, the Economic and Social Council. Supporters of the High Commissioner proposal [4] argue that the General Assembly's discharge of its functions under Articles 1.3, 13.1(b), 55, 56 and 60 would be enhanced by the appointment of a lone official to operate in the ways indicated in Chapter 3. There are, of course, ample precedents for the creation by the Assembly of "subsidiary organs" to assist it in the human rights field – the High Commissioner for Refugees, the Fact-Finding Mission to South Vietnam, the Committee on Information from Non-Self-Governing Territories, the Committee of 24, the Special Committee on the Policies of Apartheid of the Government of South Africa and numerous other bodies dealing with southern Africa.[5] In response, the opponents of the proposal simply brush aside these precedents [6] and make three main constitutional arguments: (a) that the creation of the Office would run counter to Article 2, paragraph 7 of the Charter; (b) that the Charter requires a collegiate body, not an individual; and (c) that individuals cannot be subjects of international law. The last two are essentially makeweight arguments and the bulk of this Chapter will thus be devoted to the issue of Article 2, paragraph 7.

A. ARTICLE 2, PARAGRAPH 7 OF THE CHARTER

The context of the argument

Article 2, paragraph 7 was mentioned in Chapter 1.[7] It provides that "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters

[4] See e.g. Mr Tully of the U.S. in U.N. Doc. E/CN.4/SR.940 at 14 (1967).

[5] See *supra* pp. 12-13.

[6] See e.g. the comments of the U.S.S.R. about the High Commissioner for Refugees, *supra* p. 57.

[7] *Supra* p. 9. The classic studies are H. Lauterpacht, *International Law and Human Rights* 166-220 (1950); Preuss, "Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction," 74 *Recueil des Cours* 553 (1949); M. Rajan, *United Nations and Domestic Jurisdiction* (2nd ed. 1961). A neat summary of the main points appears in the Report of the Commission on the Racial situation in the Union of South Africa, G.A.O.R., 8th Sess., Supp. No. 16, U.N.

to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." At the outset it must be stressed that the context in which the paragraph falls to be considered in relation to the High Commissioner is that of procedures which may be followed by the General Assembly. The High Commissioner would of course be the servant of the Assembly and the Articles relied upon by the proponents of the proposal confer functions on the Assembly and power to appoint organs to assist it in relation to those functions. The important issue for present purposes is the extent to which these Articles are to be read subject to any limitations imposed by the notion of "domestic jurisdiction." The Soviet objection to the High Commissioner based on Article 2, paragraph 7, like similar objections made against the inclusion of enforcement procedures in the International Covenants,[8] is not expressed as opposition to the acceptance of international concern with human rights. The objection, in the words of the Soviet representative in ECOSOC,[9] is that:

> The High Commissioner would be a judge of both the substance and the application of the agreements that were signed. He wondered how any sovereign state could allow a third party to interfere in its affairs in that way. The USSR, which abided strictly by the Conventions to which it was a party, would not allow the High Commissioner to interfere and sit in judgment on how it applied their provisions.

It may be possible to divide objections such as these into two parts, one of substance and one of procedure [10] but the gist of the objection is to the

Docs. A/2505 and Add. 1 (1953) reproduced in R. Falk and S. Mendlovitz, 3 *The Strategy of World Order* 370-378 (1966). The U.N. practice is reviewed exhaustively in R. Higgins, *The Development of International Law Through The Political Organs of the United Nations* 58-130 (1963). Excellent recent studies are Gross, "Domestic Jurisdiction, Enforcement Measures and the Congo" [1965] *Aust. Y.B. Int'l L.* 137; Ermacora, "Human Rights and International Jurisdiction," 124 *Recueil des Cours* 375 (1968), and Verdross, "The Plea of Domestic Jurisdiction before an international Tribunal and a Political Organ of the United Nations," 28 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 33* (1968).

[8] See Carey, "Implementing Human Rights Conventions – The Soviet View," 53 *Kentucky L. J.* 115 (1964); Gardner, "The Soviet Union and the United Nations," 29 *L. & C. P.* 845, 851 (1964).

[9] U.N. Doc. E/AC. 7/SR. 572 at 5 (1967). See also Ukrainian S.S.R. in U.N. Doc. E/CN. 4/SR. 881 at 7 (1965): "The High Commissioner... would be a kind of investigator enjoying extraterritorial privileges; that was contrary to the principles of the sovereignty of states and of non-intervention in their internal affairs..."; India, U.N. Doc. E/AC. 7/SR. 574 at 15 (1969); Tanzania, U.N. Doc. E/AC. 7/SR.572 at 10 (1967).

[10] See Carey, *op. cit. supra* note 8 at 117-118 and *Academy of Sciences of the U.S.S.R., Institute of State and Law,* F. Kozhevnikov ed., *International Law, a Textbook for Use in Law Schools* 137-138 (1961).

techniques to be applied for ensuring compliance. Essentially the Soviet position is that Article 2.7 of the Charter leaves it to the states concerned and not the United Nations to determine the substance of the human rights obligations involved and whether or not there has been a breach of those obligations.

Soviet reliance on the provision as the basis for a "constitutional" argument is not new. As Goodrich and Simons point out in their discussion of Soviet objections to the appointment of United Nations fact-finding commissions, "the objections have not been related to the general question of the power of investigation of the General Assembly but have been concerned with the more specific issue of the relation of the power of investigation to Article 2 (7) of the Charter." [11] Like other groups,[12] the Soviet bloc has not been entirely consistent in its reliance on Article 2.7.[13] And lest it be thought that constitutional objections of the kind made to the High Commissioner are purely a Soviet aberration, it is worth recalling the opposition of the colonial powers in the early sessions of the Assembly to the creation of a Committee on Information from Non-selfgoverning Territories on the ground that the institution of the committee would run counter to Article 2, paragraph 7. In the words of the French delegate:

> Chapter XI of the Charter was a Declaration involving an obligation but not providing for a medium of implementation. The only definite obligation was the transmission of specified information and it was silent on what was to be done with the information.[14]

Rosalyn Higgin's comment with respect to that episode is of direct relevance to the present issue of giving effect to the human rights provision of the Charter: "This viewpoint hardly seems to be in conformity with the principle of effectiveness in the interpretation of a treaty – a principle of no little importance when that treaty also happens to be an international constitutional instrument." [15]

Some of the proposed functions of the High Commissioner appear to be constitutional regardless of the position taken on the question of domestic

[11] L. Goodrich and A. Simons, *The United Nations and the Maintenance of International Peace and Security* 175 (1955). See also Higgins, *op. cit. supra* note 7 at 70.

[12] See the Commonwealth ditherings discussed in Howell, "The Commonwealth and the Concept of Domestic Jurisdiction," 5 *Can. Y. B. Int'l L.* 14 (1967).

[13] On Soviet practice see Loeber, "The Soviet Concept of 'Domestic Jurisdiction.' A Case Study of Soviet Policy in the United Nations 1945-52" [1961] *Int. Recht und Diplomatie* 165.

[14] Quoted in Higgins, *op. cit. supra* note 7 at 114. See also similar British and U.S. arguments quoted in U. Sud, *United Nations and the Non-Self-Governing Territories* 32 (1965).

[15] Higgins, *op. cit. supra* note 7 at 114.

jurisdiction. Many of the types of assistance that the High Commissioner could render other U.N. organs, such as helping in the drafting of Conventions or Declarations, or in improving their procedures (except perhaps those dealing say with periodic reports that hit too hard at individual states) do not seem to run foul of its provisions on any view. These are the everyday activities of the Organization in which all members participate without demur. Even the appointment of the High Commissioner as a permanently available fact-finder or mediator does not create any real difficulty since on each particular occasion on which the General Assembly or other organ used his services a decision would have to be made that the particular situation was not one of domestic jurisdiction, or at least the consent of the parties concerned would have to be obtained.[16] Again, the appointment of an official to render assistance and services to states *at their request* cannot possibly run foul of the paragraph. The difficulties with domestic jurisdiction arise once the High Commissioner is conceded some right of initiative in offering advice and more squarely in relation to his attention-drawing, reporting and good offices functions where individual states are concerned; that is his functions under paragraph 2, sub-paragraphs (c) and (d) of the ECOSOC draft.[17] Difficulties perhaps arise also in relation to his function in encouraging the ratification of human rights treaties since it is arguably a matter of domestic concern whether or not a state accepts further international obligations in that area.

Against this background we may pass to an examination of the effect of Article 2, paragraph 7 in relation to the provisions of the Charter conferring functions and powers on the General Assembly to deal with matters of human rights. This is not the place for an extensive re-examination of the whole subject of domestic jurisdiction but in order to appreciate its relevance in the present context it is necessary to devote a few pages to a consideration of the origins of the paragraph and to its subsequent interpretation by the political organs of the United Nations.

The League domestic jurisdiction provision

Some indications of the effect of Article 2, paragraph 7 of the Charter appear from an examination of the effect accorded to its predecessor Article 15, paragraph 8 of the Covenant of the League of Nations.

[16] Soviet acquiescence in the establishment of a Permanent Peace Observation Commission under the "Uniting for Peace" Resolution, G. A. res. 377A (V) of 3 November 1950, G.A.O.R. 5th Sess., Supp. No. 20 at 10-12, U.N. Doc. A/1775 (1950), is consistent with the suggestion in the text. See discussion in Goodrich and Simons, *op. cit. supra* note 11 at 175.

[17] See *supra* pp. 75-90.

Under Article 15 of the Covenant members agreed to submit to the League Council any dispute which was likely to lead to rupture or which was not submitted to arbitration or judicial settlement. Paragraph 8, adapting provisions found in many bi-lateral arbitration agreements, provided that:

> If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report and shall make no recommendation as to its settlement.

The implications of this provision were considered by the Council on only a few occasions. For our purposes the most significant of the disputes in which it was invoked was that between Britain and France over the imposition of French nationality (carrying with it a liability for military service) on certain persons born in the French Protectorates of Tunis and Morocco. When the dispute was taken by Britain to the League Council, the Council with the concurrence of Britain and France referred to the Permanent Court of International Justice the question whether the dispute "is or is not by international law solely a matter of domestic jurisdiction under Article 15 (8) of the Covenant." In the course of its opinion holding that "the dispute ... is not solely within the domestic jurisdiction of France" the Court made its oft-quoted pronouncement on the relativity of the term "domestic jurisdiction":

> The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the court, in principle within this reserved domain. ... However it may well happen that, in a matter which, like that of nationality, is not in principle regulated by international law, the right of a state to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other states.[18]

In such a case the dispute would have become one "of an international character."

The drafting of the Charter

Subject of course to the difficulty of deciding in a concrete case whether the "development of international relations" was such that a particular item, such as nationality, "in principle within the reserved domain" had become "of an international character," the effect of Article 15, paragraph

[18] Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion of 7 February 1923, 1 *World Court Reports* 143, 156.

8 of the Covenant was plain enough: it limited the competence of the Council of the League so far as the pacific settlement of disputes was concerned. The position of Article 2.7 in Chapter I of the Charter dealing with Purposes and Principles suggests that it might have ramifications across the whole range of the Organization's activities and not just those relating to the settlement of disputes. Indeed, the legislative history of the provisions bears this out. A paragraph similar to Article 15.8 first appeared in Chapter VIII of the Dumbarton Oaks proposals which dealt with the Security Council's settlement procedures and the resolving of situations which might lead to international friction.[19] At San Francisco various textual alterations were made and, at the insistence of the Sponsoring Powers, the provision was made of general application to the work of the Organization. John Foster Dulles in his capacity as adviser to the United States delegation explained cogently that the delegates were dealing with a "new and basic principle governing the entire organization" and not "with some technical rule of law dealing with international disputes" as in the League Covenant. This change was necessary because of differences in the nature of the United Nation's activities from those of the League:

> And the difference is primarily the fact that the organization we are now working to build is an organization which is going to have functions which, we believe, will enable it to eradicate the causes of war and not merely, or even primarily, to deal with international disputes after they arise . . .[20]

In these circumstances, the question of the relationship between the Organization and its Members needed a definite answer: "Is it going to be an organization which deals essentially with the governments of member-states and through international relations? Or is it going to be an organization which is going to penetrate directly into the domestic life and the social economy of each of the member-states?"[21] Article 2.7 made it clear that the organization was to be essentially of the former kind, not the latter. But the barrier was not to be a rigid one. After all, the Charter was a constitutional document and the domestic jurisdiction provision was to be a sort of international equivalent of the inter-state commerce clause in the United States Constitution. "Today the Federal Government of the United States exercised an authority undreamt of when the Constitution was

[19] See Rajan, *op. cit. supra* note 7 at 32-33.
[20] Unpublished Verbatim Minutes of U.N.C.I.O. Committee I/1 quoted in Rajan, *op. cit. supra* note 7 at 42-43.
[21] Id., at 43.

formed, and the people of the United States were grateful for the simple conceptions contained in their Constitution." [22]

Thus Article 2.7 was to extend to a greater range of activities than Article 15.8, but like that provision its meaning was to be "relative" and depend upon "the development of international relations."

Apart from its scope, Article 2.7 contains a number of textual differences from its predecessor. The first is its use of the word "intervene" in reference to the Organization's activities. This will be discussed in the next section. Second, the reference to international law as the determinant of jurisdiction found in the Covenant was not repeated. The legislative history on the reasons for this change is not illuminating [23] but in practice what references have been made to legal standards in interpretation have been to the international law standard.[24] Third, there was the substitution of the word "essentially" for "solely," apparently with the intention of restricting the jurisdiction of the United Nations as compared with the League. However, the obvious conclusion from United Nations practice on the matter is "that the category of matters *essentially* within the domestic jurisdiction is . . . very narrow and that the verbal change from 'solely' to 'essentially' has not had in practice the significance it was intended to have." [25] A final, and highly important difference is that, whereas the Covenant gave the Council power to determine disputed issues of jurisdiction, Article 2.7 makes no reference to which authority is to decide whether a claim of domestic jurisdiction is well-founded in the event of disagreement. An attempt to have provision made for the reference of such issues to the International Court failed at San Francisco.[26] The effect of the lack of reference to who makes the decisions has caused a great deal of difficulty to commentators. It was, however, well understood at San Francisco that each organ of the United Nations would interpret the Articles of the Charter relating to its own functions.[27] But as Leo Gross has recently noted: "This is not the same as conferring upon an organ the power to make an authoritative interpretation to which the Charter or general inter-

[22] John Foster Dulles in 6 U.N.C.I.O. Docs. 508 (1945); and see Huston, "Human Rights Enforcement Issues of the United Nations Conference on International Organization," 53 *Iowa L. Rev.* 272, 289 (1967).

[23] Rajan, *op. cit. supra* note 7 at 38 and 43.

[24] Id., at 369.

[25] Id., at 361.

[26] See Engel, "Procedures for the de Facto Revision of the Charter," 59 *Proc. Am. Soc. Int'l L.* 108, 109-110 (1965).

[27] 13 U.N.C.I.O. Docs. 709 (1945).

national law attaches finality." [28] In other words, a state in a dissenting minority on a point of interpretation may with perfect legal propriety maintain the correctness of its own interpretation although it may well incur political pressures from the majority. In the words of Committee IV/2 at San Francisco: "... if an interpretation ... is not generally accepted it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation ... it may be necessary to embody the interpretation in an amendment to the Charter." [29]

There is nothing particularly startling in having a "political" body such as the General Assembly or the Security Council deciding "legal" questions [30] or in the notion that decisions on interpretation are not necessarily binding on bodies other than the one actually making the decision.[31] But of course this type of arrangement, which was the best that could be obtained when the Charter was drafted, pays a heavy price in lack of certainty or finality. The result is that, apart from the assistance gained from two decisions of the International Court [32] reiterating the relativity of "domestic jurisdiction" in the light of the development of international relations, the efforts at giving substance to Article 2.7 have taken place mainly in the General Assembly and the Security Council.

The practice of those bodies [33] indicates that there have been three main areas of disagreement over the wording of the paragraph which are relevant in the present "constitutional" context:

(i) As to the meaning of the term "intervention."
(ii) As to the meaning of "matters essentially within the domestic jurisdiction of any state." (One variation of this dispute involves the question whether Articles 55 and 56 of the Charter impose legal obligations on states.)
(iii) As to the extent to which the fact that human rights matters may affect

[28] Gross, *op. cit. supra* note 7 at 137, 141. See also his earlier discussion in "States as Organs of International Law and the Problem of Autointerpretation," in G. Lipsky ed., *Law and Politics in the World Community* 59 at 76-77 and 84-85 (1953).

[29] 13 U.N.C.I.O. Docs 832 (1945).

[30] Note the U.S. constitutional doctrine of "political questions" discussed in e.g. Baker v. Carr 369 U.S. 186 (1962) and the non-justiciable Directive Principles of State Policy found in the constitutions of some former British colonies: see S. de Smith, *The new Commonwealth and its Constitutions* 165-166 (1964).

[31] See e.g. under the United States Constitution N. Dowling and G. Gunther, *Cases and Materials on Constitutional Law* 47-51 (1965).

[32] Interpretation of Peace Treaties [1950] I.C.J. 65 and Interhandel case [1959] I.C.J. 6.

[33] See 1 *Repertory of Practice of United Nations Organs* 55-159 (1955) and *Supplement* no. 2., Vol. I, 121-198 (1964).

the maintenance of international peace and security can be said to surmount any barrier created by the paragraph.

Claims of domestic jurisdiction have in effect been denied by a majority of the General Assembly in nearly all cases in which they have been made.[34] Since the custom has been to vote on both the merits and the application of Article 2.7 at the same time it is often impossible to state the precise basis upon which United Nations competence was established [35] and different members will in fact have resolved the jurisdictional problem to their own satisfaction by a line of reasoning not necessarily the same as that of other members who arrived at the same result.

Intervention

Leo Gross [36] has suggested that the meaning of "intervention" "depends upon the position one takes on the question whether the reservation is in the nature of a limitation on the competence, or on the powers of the United Nations." If we leave aside for the moment the question which matters are essentially within domestic jurisdiction, it is possible to set out a list of ways – in approximate ascending order of seriousness – in which a United Nations body might wish to "deal with" such matters (to use a neutral term); inclusion on the agenda; establishing a commission to study the situation prevailing in a particular member state or its domestic policy; making a recommendation in general or to a particular state; tendering good offices; the making of decisions which, in terms of the constitutional document of the Organization, members are legally bound to put into effect through the executive and judicial branches of the state; economic and political sanctions; and, finally, the use of armed force. Some writers [37] suggest that "intervene" is to be understood in its ordinary dictionary meaning of "to come between in action; to interfere, interpose; also to act as intermediary." [38] And it is common for states making objections on the basis of Article 2.7 to slip in the word "interfere" instead of "intervene." [39] The dictionary meaning of "intervene" appears to be appropriate to any of the possible modes of dealing just suggested except perhaps inclusion on the agenda and mere discussion not leading to any decision other than a

[34] See *ibid.*
[35] See e.g. Verdross, *op. cit. supra* note 7 at 35.
[36] *Op. cit. supra* note 7 at 138.
[37] See e.g. L. Goodrich and E. Hambro, *Charter of the United Nations* 120 (2nd ed. 1949); L. Goodrich, *The United Nations* 78-79 (1960); H. Kelsen, *The Law of the United Nations* 100 and 787 (1950).
[38] 5 *Oxford English Dictionary* 424 (1933).
[39] See e.g. the U.S.S.R. in relation to the High Commissioner *supra* p. 113.

denial of jurisdiction. On this basis the limitation is, of course, one of competence. Professors Lauterpacht [40] and Cassin [41] have, however, argued strongly that the exception goes only to the powers of the Organization and not to its competence. Their suggestion is that the term "intervene" has a technical meaning in international law which must have been known to the drafters of the Charter:

> Paragraph 7 of Article 2 refers only to such action on the part of the United Nations as amounts to intervention; it does not rule out measures falling short of intervention. Intervention is a term of, on the whole, unequivocal connotation. It signifies dictatorial interference in the sense of action amounting to a denial of the independence of the State. It implies a peremptory demand for positive conduct or abstention – a demand which, if not complied with, involves a threat of or recourse to compulsion, though not necessarily physical compulsion, in some form.[42]

On this basis, it follows that any competent organ of the United Nations, and the Assembly in particular, may discuss any situation arising from any alleged non-observance by a state or number of states of their obligation to respect human rights and fundamental freedoms:

> The object of such discussion may be the initiation of a study of the problem under the aegis of the United Nations; it may be a recommendation of a general nature addressed to the Members at large and covering in broad terms the subject of the complaint; or it may even be a recommendation of a specific nature addressed to the State directly concerned and drawing its attention to the propriety of bringing about a situation in conformity with the obligations of the Charter. None of these steps can be considered as amounting to intervention. ... None of them subjects to coercive action, or to a threat thereof, the unwilling determination of a State. They may mould its attitude, but this is a matter different from compulsion. There is no legal obligation to accept a recommendation or to take into account the general sense of a discussion or to act upon the findings of an enquiry. Admittedly, pressure of the public opinion of the world as expressed through these channels may be made to bear upon the

[40] Lauterpacht, *op. cit. supra* note 7 at 167.

[41] Cassin, "La Déclaration Universelle et La Mise en Oeuvre des Droits de l'Homme," 79 *Recueil des Cours* 241, 253 (1951).

[42] Lauterpacht, *op. cit. supra* note 7. Professor Cassin, *op. cit. supra* note 41, defines "intervention" thus: "... l'immixtion au sens technique et impératif du mot se manifestant par des injonctions ou des ordres. Mais il n'interdit ni les conseils, ni les études, enquêtes ou rapports, ni les recommandations ou projets de conventions." See also Wright, "Is Discussion Intervention?" 50 *Am. J. Int'l. L.* 102, 106 (1956): "Diplomatic representations requesting information or suggesting negotiation, diplomatic protests alleging violations of international law and demanding reparation, and tenders of good offices or mediation not in a peremptory tone have not been considered intervention."

recalcitrant state. That kind of persuasion no provision of the Charter would have been able to prevent.[43]

Most commentators see this as an interpretation which is left open by the *travaux préparatoires,*[44] particularly by references such as those of John Foster Dulles already quoted [45] to the question whether the organization might "penetrate directly into the domestic life and the social economy" of Members. Article 2, paragraph 7, means by the word "intervention" to prevent such penetration. In other words, on the continuum suggested at the beginning of this section of possible ways in which the organization might "deal with" human rights matters, intervention includes the making of decisions to which members are legally bound to give a type of "self-executing" effect (to use the American constitutional term) [46] and the various sanctions for failure to give such effect.

The Lauterpacht/Cassin view is a highly persuasive one which has found support in many United Nations debates.[47] Supporters of the dictionary meaning of intervene have, however, in Leo Gross's words, noted "obvious flaws" [48] in it. The problem is that the maximum power granted under the Charter to the Assembly is a power to "recommend" and it appears at first sight to follow from this that, whether a matter be one involving domestic or any other matters, the Assembly has no power anyway to interfere dictatorially. Further, the Security Council, which has power to make binding decisions (Articles 26 and 40), to order economic and political sanctions (Article 41) and the use of armed force (Article 42), is specifically empowered to over-ride domestic jurisdiction by the closing words of Article 2.7: "this principle shall not prejudice the application of enforcement measures under Chapter VII." Thus, it is argued, if intervention were to be confined to dictatorial interference, Article 2.7 would become meaningless and redundant. One answer to the redundancy argument has been suggested by Professor Lauterpacht himself who considered that there are degrees of enforcement and intervention permitted under the Charter which fall short of "enforcement action" under Chapter VII:

[43] Lauterpacht, *op. cit. supra* note 7 at 169-170. See further on the legal nature of Assembly resolutions *infra* pp. 143-145.

[44] See e.g. Higgins, *op. cit. supra* note 7 at 68-69, Rajan, id., 66-67. Cf. Gilmour, "The meaning of "Intervene" within Article 2 (7) of the Charter – An Historical Perspective," 16 *Int'l & Comp. L. Q.* 330, 349 (1967).

[45] *Supra* p. 117.

[46] See e.g. D. O'Connell, *International Law* 55-57 (1965).

[47] See e.g. 1 *Repertory, op. cit. supra* note 33 at 130 n. 313.

[48] Gross, *op. cit. supra* note 7 at 139.

> [F]or instance a peremptory recommendation by the Security Council, [presumably under Article 39] accompanied by a distinct intimation of action against the non-complying State, would be covered by the limitation imposed by Article 2, paragraph 7 – assuming always that the question is one "essentially within the domestic jurisdiction" of the State concerned.[49]

This would leave only a fairly small area for the operation of the paragraph and if Leo Gross is correct in saying that "enforcement action" includes any action taken under Chapter VII [50] not even this small area is open. However, the Assembly's practice has opened up some areas in which it seems possible to stretch the power to "recommend" to include a power to interfere dictatorially. For example, action taken under the 1950 "Uniting for Peace" resolution,[51] while it may not be "binding" on Member States in the sense that a Security Council decision to take action is, could not but be viewed by the state at whom it is directed as other than "dictatorial." Again the Assembly's decision in 1946 to recommend that members withdraw their diplomatic representatives from Spain must be dictatorial interference in the Lauterpacht sense.[52] And there is of course the precedent of resolutions recommending that members end diplomatic relations with South Africa and place an embargo on imports and exports to that country, especially of arms.[53] These all involved situations in which it was possible to put aside arguments based on Article 2.7 on the ground that the maintenance of international peace and security was involved [54] but the key point for present purposes is that they permit the Assembly some powers of "dictatorial interference." In other words, even on Professor Lauterpacht's definition of intervene, the paragraph is not devoid of effect.

In view of the Organization's custom of not taking a clear decision on jurisdiction as distinct from merits and of often basing jurisdiction on alternative grounds it is not possible to give a precise analysis of the meaning given to intervention in practice. But it seems a fair summary to say that dictatorial interference is clearly intervention; [55] that inclusion on

[49] Lauterpacht, *op. cit. supra* note 7 at 173.

[50] Gross, *op. cit. supra* note 7 at 145-154.

[51] G.A. res. 377A (V) of 3 November 1950, G.A.O.R., 5th Sess., Supp. No. 20 at 10-12, U.N. Doc. A/1775 (1950). See R. Falk and S. Mendlovitz, *op. cit. supra* note 7 at 249-269.

[52] G.A. res. 39 (I) of 12 Dec. 1946, G.A., 1st Sess., Part II, Resolutions 63-64.

[53] See especially G.A. res. 1761 (XVII) of 6 Nov. 1962, G.A.O.R., 17th Sess., Supp. No. 17 at 9-10, U.N. Doc. A/5217 (1962).

[54] See *infra* pp. 127-128. The resolution on Spain perhaps depended on Article 2.6 of the Charter but it does not say so.

[55] Hence the findings of threats to the peace in resolutions recommending sanctions against South Africa and Rhodesia.

the agenda and discussion are not; and that the practice is equivocal on matters between these two extremes. The general tone of debates appears to favour the Lauterpacht/Cassin position. There was some suggestion by Western members during the discussion of a number of early draft resolutions relating to South Africa that a general resolution addressed to all states was not intervention while a specific one was. This position finds echoes in the persistent efforts to keep resolutions following the examination of periodic reports "general" to the point of banality.[56] Rosalyn Higgins quite rightly regards any such distinction as "ill-conceived." [57] It is impossible to see what difference generality should make when, in a case like a resolution on *apartheid,* all those voting on the resolution would know precisely which state or states it was aimed at. The objectionable recommendations must surely be only those recommending measures of coercion. In a number of instances, bodies have been set up to study the situation in South Africa [58] but these creations were justified by many of their supporters on grounds other than the intervention point, in particular that a breach of international obligations or a threat to the peace was involved. There is no unequivocal decision on whether a tender of good offices following a complaint brought before the Organization by one Member against another amounts to intervention since the only Good Offices Commission appointed by the Assembly, that between India and South Africa in 1952 [59] was also justifiable on the ground that international obligations in the form of a treaty were involved. Finally, in his action in January 1969 in "deploring" the execution in Baghdad of fourteen persons as Israeli spies the Secretary-General suggested impliedly that he regarded such action as falling short of intervention, in what he accepted as "purely an internal affair," because it was "far from my intention to bring the matter before any deliberative organ of the United Nations.[60]

It should be added by way of conclusion to this section that acceptance of the "dictatorial interference" view of the meaning of "intervene" does

[56] *Supra* pp. 36-38.

[57] Higgins, *op. cit. supra* note 7 at 82.

[58] E.g. the Commission established to study the Racial Situation in the Union of South Africa under G.A. res. 616 A (VII) of 5 December 1952, G.A.O.R., 7th Sess., Supp. No. 20 at 8, U.N. Doc. A/2361 (1952).

[59] G.A. res. 615 (VII) of 5 December 1952, G.A.O.R., 7th Sess., Supp. No. 20 at 8, U.N. Doc. A/2361 (1952). For an example of a Security Council body not regarding an offer of good offices as intervention in matters apparently accepted as domestic see the Report of the Commission of Investigation to ascertain the facts relating to alleged border violation along the frontier between Greece... and Albania, Bulgaria and Yugoslavia... S.C., 2nd Year, Special Supp. No. 2, Vol. 1 at 153 (1947).

[60] *Supra* p. 89.

not necessarily involve the taking of any position on whether Articles 55 and 56 of the Charter impose any legal obligations on Member States. So long as the Organization itself is acting under a duty or power conferred by the Charter (for example, the General Assembly acting under Articles 13, 55 and 60 in relation to human rights) it may take any action short of intervention (as defined) even though Members may be under no legal obligation to comply with its recommendations, offers of good offices and the like.

Matters essentially within the domestic jurisdiction of any state

If we accept, as do most speakers in United Nations debates, that human rights were at least until 1945 "in principle" within a state's "reserved domain" [61] it is well enough established that it is possible for them to become of an "international character" as a result of the "development of international relations." [62] Many scholars and representatives take the view that the Charter provisions on human rights have achieved just such a progression. The argument has been put in two different ways. Some representatives [63] have taken the broad position that the mere inclusion of a matter, such as human rights, within the Charter, an international agreement, places it outside the domestic jurisdiction of Member States. This line of reasoning is bolstered by the assertion that Article 2.7 cannot possibly have been intended to limit the power of the Assembly under Article 10 of the Charter to discuss and make recommendations "on any matters within the scope of the present Charter. . . ." If it had been intended that Article 2.7 should nullify express provisions of the Charter such as Article 10 it would have read "Notwithstanding the provisions of the Charter . . ." instead of "Nothing contained in the present Charter. . . ." The contrary argument is that "Nothing" has over-riding effect and that a matter within domestic jurisdiction remains so, even if it is referred to in the Charter. It is thus removed from "the scope of the Charter" as those words are used in Article 10.

Like those who accept Lauterpacht's definition of intervention, the adherents of the "inclusion in the Charter" view need not necessarily take any position on whether the Charter imposes any legal obligations on

[61] The point is disputable. A number of writers accept that there was a longstanding right of "humanitarian intervention" consistent with at least some matters of human rights being of international stature. See e.g. Lillich, "Intervention to Protect Human Rights," 15 *McGill L.J.* 205 (1969) and authorities there cited.

[62] See Nationality Decrees Case, *op. cit. supra* note 18.

[63] See 1 *Repertory, op. cit. supra* note 33 at 142-143.

Members as distinct from a power on the Organization. However, many of this group, which appears to be a minority of the membership, also accept the narrower view of the effect of the Charter references to human rights as removing those matters from the domestic to the international sphere. This view rests primarily on Articles 55 and 56 and in particular the words "pledge themselves to take joint and separate action." Opposing the views of a number of scholars [64] who claim that because of the vagueness of the language used (especially "promote" in Article 55 and the lack of a definition of "human rights and fundamental freedoms") the human rights provisions are only declarations of purposes and principles so far as Member States are concerned, Professor Lauterpacht [65] has argued strongly that "The cumulative legal result of all these pronouncements cannot be ignored." In his opinion:

> The legal character of these obligations of the Charter would remain even if the Charter were to contain no provisions of any kind for their implementation. For the Charter fails to provide for the enforcement of its other numerous legal obligations the legal character of which is undoubted.[66]

In fact, in the discussion of this issue, two analytically distinct questions are often confused: (a) do the provisions create a legal obligation, and (b) what is the extent of that obligation and what degree of accountability to the Organization is involved. As one writer has explained, while the vague language may affect the "degree of effectiveness" of the obligation, it does not affect its "legal character." [67] More will be said about the extent of the obligation in the discussion of the relevance of the United Nations practice to the High Commissioner proposal. Suffice it to note at this point that the overwhelming weight of practice favours the view that at least some legal obligation is placed on member states.[68]

[64] E.g. Kelsen, *op. cit. supra* note 37 at 29, Goodrich, *op. cit. supra* note 37 at 254, Chernichenko, "Human Rights and the principle of non-intervention in the United Nations Charter," [1964-5] *Sov. Y. B. Int'l L.* 176.

[65] Lauterpacht, *op. cit. supra,* note 7 at 148.

[66] *Ibid.* See also the discussion in Chapter 1, *supra* p. 14 of the lack of enforcement procedures in relation to many matters of international law.

[67] G. Ezejiofor, *Protection of Human Rights Under the Law* 60 (1964).

[68] Higgins, *op. cit. supra* note 7 at 128. The most striking example is the resolution resulting from the failure of the Soviet Union to allow the departure of Russian wives of foreign nationals. See 1 *Repertory, op. cit. supra* note 33 at 81-83. The lack of a definition of human rights in the Charter may be overcome by treating the Universal Declaration of Human Rights as an authoritative definition. See *infra,* Chapter 6, p. 139.

The maintenance of international peace and security

The point has been made often enough that questions of human rights are "inextricably entwined with issues of peace" [69] and another possible way to avoid Article 2, paragraph 7 is to say, as has often been done in the case of South Africa, that the "maintenance of international peace and security" is at stake.[70] Where a particular human rights problem creates a situation amounting to a "threat to the peace, breach of the peace or act of aggression," the Security Council may take enforcement measures under Chapter VII and Article 2.7 itself expressly excludes the domestic jurisdiction issue. The Ukrainian representative in the Commission on Human Rights has suggested that this was in fact the *only* case in which the United Nations could act to safeguard human rights.[71] But the practice of United Nations organs has opened up a much larger exception. Chapter VI of the Charter gives the Security Council power to make recommendations on matters falling short of an actual threat to the peace, breach of the peace or act of agression. Under Article 34 the Security Council "may investigate any dispute, or any situation which may lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." Article 35 empowers Member States, and in certain cases non-members, to "bring any dispute, or any situation of the nature referred to in Article 34 to the attention of the Security Council or the General Assembly." In addition to the various powers granted to the Security Council in such cases [72] the Charter (Article 11) empowers the General Assembly to "make recommendations with regard to any such question to the state or states concerned or to the Security Council or to both." The General Assembly's powers under Article 11 are reinforced by Article 14 which empowers it to "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including

[69] Abram, "The Quest for Human Dignity," 2 (2) *Vista* 35, 36 (1966). But see Bilder, "Re-thinking International Human Rights: Some Basic Questions," [1969] *Wisc. L. Rev.* 171, 187-189.

[70] See e.g. the statements by India, Liberia and the U.S.S.R. quoted in Falk and Mendlovitz, *op. cit. supra* note 7 at 384-385. See also the lucid remarks by Ambassador Plimpton in J. Carey ed., *International Protection of Human Rights* 49-50 (1968).

[71] "It was only when human rights were trampled underfoot and that peace was thus threatened that United Nations intervention was justified." U.N. Doc. E/CN. 4/SR. 881 at 7 (1965). See to the same effect Chernichenko, *op. cit. supra* note 64 at 176.

[72] See Articles 33, 36 and 37.

situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations."

Much fuzzy language has been used in both the Security Council and the General Assembly in relation to the extent to which Article 2, paragraph 7 applies to matters brought before those bodies under Chapter VI. But there has been clearly developed in resolutions dealing with Spain, South Africa and Angola [73] an exception to the paragraph where a matter is one of "international concern":

Briefly stated, the doctrine holds that whenever a matter constitutes a potential threat to the peace, it ceases to be a matter of domestic jurisdiction and becomes a matter of concern to the international community. The "concern" justifies action in regard to the matter, or establishes international jurisdiction.[74]

Put in terms of the Charter, this means that a dispute or situation "likely to endanger the maintenance of international peace and security," "likely to impair the general welfare or friendly relations among nations" or which has led to "international friction" is both an exception to Article 2.7 for the purposes of the jurisdiction of the Security Council or the General Assembly, and a case where recommendations are appropriate.

Application to the High Commissioner proposal

It should now be possible to consider how the scholarly opinion and the General Assembly's practice with respect to Article 2, paragraph 7 applies to the High Commissioner proposal. The point has already been stressed that different states adopt different approaches to arrive at the same jurisdictional conclusion. It follows that an argument for constitutionality notwithstanding Article 2.7 will be strongest if it provides a number of alternative reasons.

The least promising of the three lines of argument just discussed, so far as supporters of the High Commissioner are concerned, is that based on the maintenance of international peace and security. It would undoubtedly have some scope in particular instances where a United Nations body was contemplating using the services of the High Commissioner as a fact-finder or a conveyor of good offices.[75] But as a justification for the officer's more

[73] The relevant practice is discussed in Higgins, *op. cit. supra* note 7 at 77-81.
[74] Howell, *op. cit. supra* note 12 at 16 (1967).
Chapter VI of the Charter is of course headed: "Pacific Settlement of Disputes." Note how little the concept of international concern leaves of the original Dumbarton Oaks conception of Article 2.7 as affecting precisely that topic!
[75] Note the suggestion, *supra* p. 115 that the appointment of an official who would be permanently available for such services raises no difficulty with Article 2.7.

general functions it runs into at least two serious difficulties. The first difficulty is this: the concept of a potential threat to the peace has no doubt been "stretched quite far"; [76] it seems, for example, to be satisfied by something less than the American constitutional standard of "clear and present danger" or the tort standard of "reasonable foreseeability." But it must have some limits. In relation to many of the High Commissioner's possible activities, such as the encouraging of ratifications of human rights treaties,[77] the drawing of attention to communications or discriminatory domestic legislation,[78] and appeals on behalf of persons condemned to death,[79] any threat to the peace is almost certainly of very distant potential. There is no warrant in the Organization's practice for an assumption that *any* matter of human rights is per se sufficient to invoke the doctrine of international concern. It follows that it is only in relation to a limited area of the High Commissioner's activities that the international peace and security argument would be useful.

A second difficulty with justifying the creation of the office of High Commisioner with the aid of the notion of international concern is that, so far as the General Assembly is concerned, Chapter VI of the Charter comes into play only when a state brings a particular dispute or situation to its attention (as India brought the situation in South Africa to the Assembly's attention). Again this is no problem so far as the High Commissioner's function of giving advice and assistance to other United Nations organs is concerned, but it would need a very broad interpretation of the Assembly's powers to enable it to appoint an official who would act to head off such situations before they got to the stage where a state would wish to present them to the Assembly, or who would himself put matters before the Assembly. A similarly broad interpretation of Article 22 and the "maintenance of peace" Articles was debated and rejected during the second Session of the Assembly when it was proposed to appoint an Interim Committee of the Assembly to consider, inter alia, matters relating to the maintenance of international peace and security, during the period when the Assembly was not in session.[80] Following an extensive constitutional debate, the terms of reference of the Committee were limited in this area to the consideration and reporting to the General Assembly "on any dispute or any situation which, in virtue of Articles 11 (paragraph 2),

[76] Goodrich, "Peace Enforcement in Perspective," 24 *Int'l J. (Canada)* 657, 669 (1969).

[77] *Supra* pp. 63-64.

[78] *Supra* pp. 75-81.

[79] *Supra* pp. 88-90.

[80] See discussion in 1 *Repertory, op. cit. supra* note 33 at 675.

14 or 35 of the Charter, *has been proposed for inclusion in the Agenda of the General Assembly by any Member of the United Nations or brought before the General Assembly by the Security Council,* provided that the Committee previously determines the matter to be both important and requiring preliminary study . . ." [81] (emphasis added). No difficulty of the kind just discussed appears to arise concerning the functions of the General Assembly under the human rights provisions themselves. The provisions of Chapter VI and the related Articles 11 and 14 giving power to make recommendations on matters of international peace and security and friendly relations among nations are couched in permissive terms (a state *may* bring a dispute to the Assembly and the Assembly *may* make recommendations). But the human rights provisions are cast in mandatory terms requiring the Assembly to take action: It "shall initiate studies and make recommendations." (Article 13.1). Often the "initiative" for such studies and recommendations will come directly to the Assembly from Member States, but in other cases the ideas will come up to the Assembly from its subordinate bodies such as ECOSOC and the Commission on Human Rights. Of course the intervention of members is necessary at some stage of the proceedings but, for example, in relation to matters starting in the Sub-Commission on Prevention of Discrimination and Protection of Minorities, state sponsorship of an issue need not be so strong as that under Chapter VI and related Articles. And the notion of the Assembly appointing another subordinate, the High Commissioner, to help it in its everyday duties, fits much more neatly into the scheme of the Charter than the appointment of a body to aid it, in the way suggested for the Interim Committee, with one of its exceptional tasks.[82]

It seems, therefore, that the arguments based on the meaning of intervention and on the extent to which Articles 55 and 56 create obligations "enforceable" by the political organs, particularly the General Assembly, provide a more acceptable juridical basis than an argument based on the maintenance of peace and security for the creation of the Office in the light of Article 2, paragraph 7 of the Charter.

If we accept the meaning of "intervention" as implying a peremptory demand, the paragraph does not prevent United Nations efforts to foster human rights by means short of this. "These means include study, enquiry, investigation, and recommendation either of a general character or ad-

[81] G.A. res 111(II) of 13 November 1947, G.A.O.R., 2nd Sess., Resolutions 15-16, U.N. Doc. A/519 (1947).

[82] "Exceptional," in that the Charter places primary responsibility for the maintenance of peace and security on the Security Council.

dressed to individual members of the United Nations." [83] If it is not "intervention" for the Assembly itself to undertake such activities, the Assembly may establish a subsidiary organ under Article 22 to assist it in the performance of its functions whose activities would consist "mainly of analysis, study, discreet representation, good offices and persuasion." [84] In the words of a United States representative: "We do not believe that article 2, paragraph 7 of the Charter in any way inhibits the United Nations from the establishment of a moral force." [85]

We are left then, with the final, and more frontal attack on the Soviet position, an argument that the High Commissioner would not be dealing with matters essentially within the domestic jurisdiction. As has been suggested the argument may be put in a wide and narrow form. In the broad form of the argument, matters of human rights are not within domestic jurisdiction because they are within the scope of the Charter. Articles 10 and 13.1(b) empower the Assembly to initiate studies and make recommendations on these matters. Hence, so long as the High Commissioner's activities can fairly be said to be related to the making of studies or recommendations, (an inference that might reasonably be made from our discussion of those activities in Chapter 3), the appointment creates no difficulties with the domestic jurisdiction provision. And, although this argument, like that based on the meaning of intervention, need not involve members in any legal obligation to comply with recommendations that might be made, this creates no problem since the High Commissioner would have no power to dictate; although, as we have stressed, there would be some pressures for compliance.

The narrow way of putting the argument is based on the imposition of an obligation on states by Articles 55 and 56 of the Charter, perhaps when read in conjunction with the other human rights provisions. The point has already been made that there is a distinction between whether or not those Articles impose a legal obligation and the extent of that obligation. A wide view of the extent of the obligation, in terms which appear to entail accountability to the United Nations for all breaches of human rights, was recently expressed by the United Kingdom Foreign Minister in the General Assembly:

[83] Lauterpacht, "Human Rights, The Charter of the United Nations and the International Bill of Rights," U.N. Doc. E/CN.4/89 at 13 (1948).

[84] Costa Rica in relation to the High Commissioner, U.N. Doc. A/7170, Appendix III at 4 (1968).

[85] 54 *Dep't State Bull.* 1031 (1966). Cf. the U.S.S.R. in U.N. Doc. E/AC.7/SR.574 at 17 (1967): "even the functions so far envisaged for the High Commissioner would constitute interference in the internal affairs of states."

Article 56 of the Charter makes it clear that no country can say that the human rights of its citizens are an exclusively domestic matter. A country that denies its citizens the basic human rights is by virtue of Article 56 in breach of an international obligation.[86]

Bearing in mind that the "jurisdiction" of the High Commissioner would be confined mainly to "gross violations" or "patterns of violations" it is not necessary to espouse an extreme view of the nature of the obligation in the present context. It is sufficient to adopt Ian Brownlie's position that "while it may be doubtful whether states can be called to account for every alleged infringement of the rather general Charter provisions, there can be little doubt that responsibility exists under the Charter for every substantial infringement of the provisions, especially when a class of persons, or a pattern of activity, are involved." [87] But the obligation under Articles 55 and 56 is obviously not spent by a commitment to account for certain breaches. The requirement of joint and separate action to promote universal respect for and observance of human rights and fundamental freedoms must include also an obligation to take part in good faith in the Organization's on-going human rights activities such as reporting on human rights developments and the drafting and ratification of human rights treaties.

A legal duty to account for a pattern of violations is sufficient to provide a legal basis for the High Commissioner's attention-drawing and good offices functions and for many of the comments he might make on the contents of individual countries' periodic reports. Article 60 of the Charter places responsibility for the Organization's role in relation to Articles 55 and 56 on the General Assembly and its subordinate bodies. Thus any supervision of Members' duties must lie primarily with it. And the High Commissioner would be, in respect of such functions, just the kind of assistance contemplated by Article 22. Further, since he would be subject to the control of the Assembly, Members would be protected against his

[86] U.N. Doc. A/PV.1693 (1968). See to the same effect Higgins, *op. cit. supra* note 7 at 128.

[87] Brownlie, "The Place of the Individual in International Law," 50 *VA. L. Rev.* 435, 456 (1964). Accord, Waldock, "General Course on Public International Law," 106 *Recueil des Cours* 5, 199-200 (1962); Ermacora, *op. cit. supra* note 7 at 375, 436-438 (who lists what remains within domestic jurisdiction if the view in the text is adopted). But see the narrower view taken of the Articles in Buergenthal, "The United Nations and the Development of Rules Relating to Human Rights," 59 *Proc. Am. Soc. Int'l L.* 132 (1965). See also Loeber, *op. cit. supra* note 13 at 170: "It can be submitted that the Soviet Union considers a violation of Human Rights generally to be a matter of domestic jurisdiction; but it claims certain exceptions, mainly on the issue of discrimination against races and in labor questions."

acting beyond the scope of the Assembly's authority. Again, the duty to take part in the reporting and drafting functions of the Assembly and its supporting bodies is consistent with the proposition that the High Commissioner would not be intervening in matters of domestic jurisdiction should he chide a state for not sending in its periodic reports or urge it to ratify human rights treaties to which it was not a party.

It is unlikely that all, or even most, of the states voting one way or the other in the final debate on the High Commissioner proposal will do so because they have deliberately reached an unequivocal decision on the constitutionality of the Office in the light of Article 2.7 of the Charter. And if, as seems probable, a High Commissioner is in fact appointed and he expands his functions by "creative interpretation" [88] of the Resolution instituting his Office, many observers will no doubt see both the appointment itself and the expansion as another example of the relativity of the concept of domestic jurisdiction. The important decision will not be a purely legal one – although it will be made in a legal context which includes Article 2, paragraph 7. The important decision will be a determination by a substantial majority of the General Assembly that "the development of international relations" (to use the words of the Permanent Court in the Nationality Decrees case [89]) has reached the stage where the international body politic can tolerate the transplanation of an additional organ.

B. THE ARGUMENT THAT THE CHARTER REQUIRES A COLLEGIATE BODY AND NOT AN INDIVIDUAL

We considered earlier the question of the desirability of having a single official rather than a collegiate body.[90] The clearest statement of the Soviet position that a collegiate body is constitutionally required is in the following words of the U.S.S.R. representative in the Commission on Human Rights:

> The draft resolution gave a false impression that the institution of a High Commissioner's office was provided for in the Charter or in other international agreements. On the contrary, the provisions of the Preamble to, and Article 1 of, the Charter made it clear that the only effective means of protecting human rights and fundamental freedoms was international cooperation and concerted action by all Members of the United Nations. It was surprising that the Working Group had seen fit to ignore those basic provisions of the Charter.[91]

[88] *Supra* p. 94.
[89] *Supra* p. 116.
[90] *Supra* pp. 102-110.
[91] U.N. Doc. E/CN.4/SR.939 at 11 (1967). See also in ECOSOC: "the creation of

It is difficult to see which specific provisions of the Preamble and Article 1 are relied upon but presumably it is references such as the Preamble's "have resolved to combine our efforts" or Article 1's "to achieve international cooperation in solving international problems." It is equally difficult to see how such provisions prevent the appointment of a High Commissioner rather than a Commission. Even if we accept that "the only effective means of protecting human rights and fundamental freedoms is international cooperation and concerted action by all members of the United Nations" it does not follow that the members may not appoint a lone official to assist them in this process. No derogation would thereby be made from the need to develop a consensus or a collective will; the important political decisions would still be made by members, individually or collectively. To foreshadow a point to be developed in the next Chapter,[92] the High Commissioner would be merely a catalyst for the development of concerted action by all members of the United Nations and not a substitute for it.

C. THE ARGUMENT THAT INDIVIDUALS CAN NOT BE SUBJECTS OF INTERNATIONAL LAW

The last of the Soviet Union's constitutional arguments is that the proposed activities of the High Commissioner would run counter to the doctrine that "individuals could not be recognized as subjects of international law, since only States and under the Charter, international organizations could have that status." [93] In one sense this argument bolsters that which has just been discussed by suggesting that, even apart from the Charter, as a matter of general international law, an individual like the High Commissioner could not be erected into a subject of international law. But the argument is directed mainly at a different individual – the individual who sends communications to the U.N. which the High Commissioner would then deal with. It thus echoes earlier objections made on a similar basis to the in-

such a post would be incompatible with the Charter of the United Nations, which called for international cooperation and prescribed collective measures to ensure respect for human rights. It provided for the establishment of representative bodies." U.N. Doc. E/AC.7/SR.572 at 4 (1967). The Czech argument for collegiality in U.N. Doc. E/AC.7/SR.573 at 6 (1967) does not appear to be cast in constitutional terms. (At the International Conference on Human Rights in Teheran prior to the 1968 occupation of Czechoslovakia the Czech delegate made a statement favourable to the High Commissioner. A "correct interpretation" of his words was later given in the Assembly: U.N Doc. A/C.3/SR./1730 at 8 (1969).)

[92] *Infra* pp. 143-150.

[93] U.N. Doc. E/CN.4/SR.881 at 15 (1966).

clusion of the right of individual petition in the Covenant on Civil and Political Rights.[94] In fact, bearing in mind the socialist states' actions on behalf of Greek political prisoners [95] and Soviet acquiescence in the Nuremberg principles,[96] the rule that individuals can not be subjects of international law appears to be invoked by them only for denying any right of *individual* complaint to an international organization or official. It has no scope in regard to complaints by a state on behalf of individuals – even individuals who are nationals of a state other than that doing the complaining – or in regard to the right of international tribunals to try individuals for international crimes. Be that as it may, while the argument is supported by the "unanimously expressed" [97] view of Soviet international lawyers it is no longer taken seriously by most Western writers. One is reminded of Professor H. L. A. Hart's comment in respect of the theory that states can only be bound by self-imposed obligations. He suggests that such theories

> fail completely to explain how it is known that states "*can*" only be bound by self-imposed obligations, or why this view of their sovereignty should be accepted, in advance of any examination of the actual character of international law. Is there anything to support it besides the fact that it has often been repeated? [98]

An "examination of the actual character of international law" reveals an impressive list of international instruments according rights or duties to individuals. Thus one commentator [99] discusses the International Prize Court created by the second Hague Conference in 1907, the Central

[94] E.g. the statement to the Third Committee that "The right of individual petition was wrong in principle because it would subvert the rule of contemporary law that the only subjects of international law were States." U.N. Doc. A/C.3/SR.1439 (1966). Query whether the reference in the text above note 93 to international organizations was a slip. Most Soviet statements, like that in the present note, deny that international organizations may be subjects. See e.g. Kozhevnikov ed., *op. cit. supra* note 10 at 89.

[95] *Supra* pp. 88-89.

[96] Carey, *op. cit. supra* note 8 at 115, 128 n. 60.

[97] O. Lissitzyn, *International Law Today and Tomorrow* 67 (1965). For an attribution, in part, of the continuation of the Soviet position to "international law textbooks that have not been adequately revised since the early part of the century" see MacBride in Carey, *op. cit. supra* note 70 at 53.

[98] H. L. A. Hart, *The Concept of Law* 219 (1961).

[99] Poulantzas, "The Individual Before International Jurisdictions," 15 *Rev. Hellénique de Droit International* 375 (1962). See also W. Gormley, *The Procedural Status of the Individual Before International and Supranational Tribunals* (1966); C. Norgaard, *The Position of the Individual in International Law* (1962); Trumpy, "The Individual as a Subject of Transnational Law," 34 *Y.B.A.A.A.* 120 (1964); Tucker, "Has the Individual Become the Subject of International Law," 34 *U. Cincinn. L. Rev.* 341 (1965) and the Secretary-General's Report on the Right of Petition, U.N. Doc. E/CN.4/419 (1950).

American Court of Justice created in the same year, the Arbitral Tribunals formed after the First World War, Administrative Tribunals of International Organizations, the European Convention on Human Rights and the International Military Tribunals set up after the Second World War. To this we could add the United Nations practice of according hearings to petitioners from Trust and other non-selfgoverning territories and from southern Africa.[100] In short, there is a substantial body of practice denying any flat assertion that individuals cannot be subjects of international law. And the point is still valid even if the practice is regarded as exceptional.[101] Few commentators accept a static conception of international law and there is no legal reason why the limited functions of the High Commissioner in relation to communications – which certainly do not go as far as some of the existing provisions – should not be added to the corpus of practice.

The Creation of the Office would be Constitutional

This Chapter began by noting that the main discussion of the constitutionality of the High Commissioner proposal has been by its opponents. It is perhaps a fair inference from the dearth of consideration of the matter by the majority in the Commission on Human Rights, the Economic and Social Council and so far in the General Assembly, that most members do not take the matter seriously. However, it is submitted that, even after giving the arguments the proper consideration they deserve, the case for constitutionality is considerably stronger than that against. There can be no real doubt as to the Assembly's power to create the Office envisaged in the ECOSOC draft.

Once the arguments discussed in this Chapter have been put aside the institution of the Office appears as a clear application of the Assembly's express powers under Article 22 to "establish such subsidiary organs as it deems necessary for the performance of its functions." There is no need to rely on any inherent powers such as those invoked to uphold the awards of compensation made by the United Nations Administrative Tribunal.[102] A slight difficulty perhaps arises in respect of the High Commissioner's function in giving advice and assistance to ECOSOC and the other organs

[100] *Supra* pp. 23-24.

[101] Note the interesting discussion in the Report of the Working Group on the High Commissioner on whether the U.N.'s receipt of petitions in certain cases was an exception to a general rule against a right of petition or whether the exceptional cases were those in which petitions were not received: U.N. Doc. E/CN.4/934 at 17 (1967).

[102] See: Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion of 13 July 1954 [1954] I.C.J. 41.

named particularly or generally in the draft resolution. By a narrow literal interpretation it might be said that this would enable the High Commissioner to assist *them* while Article 22 empowers the Assembly to create bodies to assist *it*. The answer to such an argument so far as bodies like ECOSOC and the Commission on Human Rights are concerned is that it is merely a case of one of the Assembly's assisting another of its assistants. There must surely be nothing unconstitutional in that! As far as other bodies like the Security Council and the Secretariat are concerned, the answer is that the General Assembly, in the course of performing its own functions, is perfectly entitled to cooperate with these other bodies on matters of common concern – as indeed it does. And assisting them on such matters is part of *its* function in which the High Commissioner would participate.

CHAPTER 6

THE HIGH COMMISSIONER AS A LAW PROMOTER RATHER THAN A LAW ENFORCER

Treating the High Commissioner as essentially an agency for the enforcement of international legal rules on human rights, the Soviet representative in the Commission on Human Rights raised the important question of the juridical nature of the standards which the Office would be applying in the course of its work:

> Unlike the United States and a number of Western countries, the Soviet Union considered that implementation measures, which were essential in any multilateral international instrument, should be adopted after and not before the acceptance by States of specific legal obligations. It seemed illogical that implementation measures should be considered, on the same footing, by States that would assume the obligations and by those that would refuse to do so. It was equally illogical to imagine that any institution could exercise the same jurisdiction over the State Parties to some international instrument and over States which were not parties to it, i.e., over States which had not assumed the same obligations. For those reasons, his country considered that all efforts to promote human rights and fundamental freedoms should be undertaken within the framework of multilateral international conventions.[1]

He was referring of course to the delimination of the High Commissioner's area of concern in paragraph 2 of the ECOSOC draft [2] to be human rights "as set forth in the Charter of the United Nations and in declarations and instruments of the United Nations or of the specialized agencies, or of intergovernmental conferences convened under their auspices. . . ." This Chapter examines the jurisprudential significance of this broad area of concern and suggests that the Soviet objections are irrelevant in the case of an official whose function is law promotion rather than law enforcement. The argument is in two parts. In the first it is suggested that the Soviet argument is more appropriate to a discussion of the role of a *judicial* enforcement body where the question involved is that of compliance with settled

[1] U.N. Doc. E/CN. 4/SR. 879 at 11-12 (1966).
[2] Discussed *supra* pp. 60-61.

legal rules. The High Commissioner would be a "political" figure, or at least the first stage in a process leading to possible action by U.N. political bodies. Considerations of strict legality may be less appropriate in such a setting. Second, it is suggested that in concentrating on the High Commissioner as an "enforcer" of conventional law, the Soviet statement both distorts his contemplated function and overlooks the significance of custom as a source of international law. The High Commissioner would in fact play an important part as a catalyst in the creation of an international customary law of human rights.

The High Commissioner as part of a political process

A number of states have adopted the position that at least some of the Declarations with which the High Commissioner might deal, the Universal Declaration [3] and the Declaration on the Granting of Independence to Colonial Countries and Peoples [4] in particular, amount to "law" in the sense of an authoritative interpretation of the Charter. But this is by no means a unanimous view.[5] It may also be possible to regard some Declarations and multilateral treaties as evidence of "general principles of law recognized by civilized nations" within the meaning of Article 38 of the Statute of the International Court of Justice and thus "law." [6] Later in this Chapter it will be argued that Declarations and unratified treaties may become law by a process of customary law creation. In respect of the enforcement of Charter provisions or customary law there are no conceptual problems such as those raised by the Soviet statement quoted at the beginning of this Chapter (although there may be "constitutional" difficulties

[3] See discussion in Sohn, "The Universal Declaration of Human Rights," 8 *J. Int'l Comm. Jurists* 17, 17-23 (1967). And note the comment of the representative of New Zealand at the International Conference on Human Rights in Teheran on 29 April 1968 that the International Covenants on Human Rights are "best regarded – and most easily accepted – as a codification of an important area of international law already reflected in the human rights provisions of the United Nations Charter and the Universal Declaration." (Text supplied by N.Z. Mission to the U.N.). This general proposition was adopted unanimously in the Proclamation of Teheran, U.N. Doc. A/Conf. 32/41 at 4 (1968).

[4] E.g., Ceylon, U.N. Doc. A/C. 6/SR. 763 at para. 5 (1962); Iran, U.N. Doc. A/C. 6/SR. 762 at para. 28 (1962); Poland, U.N. Doc. A/C. 6/SR. 811 at para. 9 (1963).

[5] See e.g. Sir Kenneth Bailey of Australia, referring to both Declarations, in U.N. Doc. A/C. 6/SR. 817 at para. 13 (1963). See also Sohn, op. cit. supra note 3 and J. Castañeda, *Legal Effects of United Nations Resolutions* 174-175, 193-196 (1969).

[6] See *supra* p. 14 for the adoption of Article 38 as our "working definition" of "law". On the proposition suggested in the text see O. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations,* 61-62 (1966) and Baxter, "Multilateral Treaties as Evidence of Customary International Law," 41 *Brit. Y.B. Int'l L.* 275, 297-298 (1965-6).

of the kind discussed in Chapter 5). But let us assume for the moment that the Declarations and other unratified instruments of the General Assembly and specialized agencies, with which the High Commissioner would deal, do not fit within one of the pigeon-holes of "law" as defined in the Statute of the International Court of Justice. It is nevertheless apparent that they are not intended by those who draft and vote in favour of them to be mere additions to a paper junk-heap. And some of the functions they have are similar to the functions of those principles that we call law. Professor Falk has explained some of those functions in these words:

> A main function of law is to establish an agreed system for the communication of claims and counterclaims between international actors and thereby to structure argument in diplomatic settings. In the search for the bases of *justification or objection* it is clear that the resolutions of the Assembly play a crucial role – one independent of whether their status is to generate binding legal rules or to embody mere recommendations.[7]

This explanation refers to resolutions of the General Assembly and must apply *a fortiori* to those rather formal resolutions called Declarations. And the same principles must apply to unratified multilateral conventions of the kind referred to in the draft Statute of the High Commissioner. They will have been adopted either by a resolution of the General Assembly or by a large-scale international conference at which most of the nations of the world were represented and, from the moment of adoption they amount at least to a statement of agreed international standards which may be used as a basis of justification or objection.

If these standards perform some of the same functions as law in the international arena it seems likely that states might be persuaded that it is in their interest to abide by them for much the same reasons that they abide by international law. Some of the considerations causing compliance with international law were listed a few years ago by Professor Louis Henkin [8] under three, not mutually exclusive, headings: Domestic Influences in Law Observance, Law in Foreign Policy and The "Accounting" of Cost and Advantage of Law Observance. Even the most totalitarian governments are

[7] Falk, "On the Quasi-Legislative Competence of the General Assembly," 60 *Am. J. Int'l L.* 782, 786 (1966). To the same general effect see Lande, "The Changing Effectiveness of General Assembly Resolutions," 58 *Proc. Am. Soc. Int'l L.* 162, 163-5 (1964); Sloan, "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations," 25 *Brit. Y.B. Int'l L.* 1, (1948).

[8] Henkin, "International Law and the Behaviour of Nations," 114 *Recueil des Cours* 171, 180-200 (1965). See also the same writer's *How Nations Behave* 45-83 (1968) and Fisher, "Bringing Law to Bear on Governments," 74 *Harv. L. Rev.* 1130 (1961).

subject to some domestic pressures, however muted; in free societies the press and "public opinion" are forces to be reckoned with, especially if the government wants a smooth path to re-election. Most governments like also to put on a good front in international organizations [9] and in the world press. All these considerations must be weighed when a government is considering disobedience to a rule of international law.

There is nothing mysterious in the suggestion that international standards short of "law" might be complied with for much the same factors as these even if the motivation is not quite as strong as in the case of law. In our domestic society we have our morality which is enforced by its own sanctions [10] and with which people comply for much the same reasons that they comply with law. The formal distinction between law and morality may be clearer in the domestic setting, with its system of judicial officials to enforce law, than it is in the international setting.[11] But domestic morality has its "officials" (or "busy-bodies," depending upon your point of view) who often function as symbols for it – parsons, priests, rabbis and even editorial writers and television pundits. In a sense these people are moulders or makers of morality or opinion, but in another sense they, themselves, reflect "the moral consensus," the views of organized religion, or of "right-thinking" people.

This is where the High Commissioner comes in. He would, as Mrs. Lande has said of the General Assembly,[12] "both '*mobilize*' and '*express*' world opinion." And he would, on behalf of the General Assembly, act as a symbol of the world morality created by it, with his assistance. In the words of one of the supporters of the proposal:

> [T]he adequacy of moral force is proportionate to the means at hand to sharpen its focus, to increase its visibility, to institutionalize it, and to elevate the platform from which it is exercised.
>
> We have computerized many aspects of society, but we have not invented, and I believe we never shall invent, a mechanical or electronic substitute for conscience. Therefore, the institution we should develop must be centered in human beings, hopefully in an exceptional man who would occupy a very unusual and exceptional office. There is, I believe, great potential in embodying the cause of human rights in a single person who has earned respect and trust, in whom all have confidence of the sort that is not generally enjoyed by faceless

[9] See also *supra* pp. 91-94.

[10] H. Kelsen, *Pure Theory of Law* 27-8 (1967); H. L. A. Hart, *The Concept of Law* 175-6 (1961).

[11] Note the suggestion made *supra* p. 15 that the distinction between Conventions, Declarations and recommendations is substantially one of degree.

[12] Lande, *op. cit supra* note 7 at 164.

committees or other groups where people are usually expected to represent their national or ideological interests.[13]

The High Commissioner would not be the first institution to encourage respect for international morality. This is precisely the aim of many NGOs – the International Committee of the Red Cross, in particular, has important humanitarian functions over and above its role under the Red Cross Conventions.[14] The International Labour Organization's Freedom of Association Committee has, for a number of years, used conciliation and persuasion techniques to encourage governments to comply with the "morality" contained in unratified conventions relating to freedom of association.[15] The Inter-American Commission on Human Rights operates with respect to the "American Declaration of the Rights and Duties of Man." And the High Commissioner for Refugees uses his good offices to encourage states to abide by conventions dealing with refugees although they may not be parties to them. But none of these are judicial enforcement bodies:

> [T]here can never be any question in such situations of compulsion or adjudication to force a state to implement declarations of principle which it is not bound by treaty to recognize. The prestige and impartiality of the negotiating officials and the threat of publicity are normally sufficient, however, to induce a state to meet with the organization and to make some gesture of compliance with its requests.[16]

These words would apply with equal force to the role of the High Commissioner.

[13] Dr. Morris Abram, U.S. representative in the Commission on Human Rights 54 *Dep't State Bull.* 1030-1 (1966).

[14] Bissell, "The International Committee of the Red Cross and the Protection of Human Rights," 1 *Rev. des Droits de l'Homme* 255, 257-9 (1968). Note also the efforts of the International Commission of Jurists to formulate and have states abide by its concept of "The Rule of Law."

[15] C. Jenks, *The International Protection of Trade Union Freedom* 235 (1957). The Soviet Union has co-operated to some extent with this body: Jacobson, "The U.S.S.R. and ILO," 14 *Int'l Org.* 402, 419-20 (1960). C. Norgaard, *The Position of the Individual in International Law* 152 (1962) sloughs off the conceptual problem by treating the conventions as authoritative interpretations of Members' responsibilities under the I.L.O. Constitution. Cf. text above notes 3 and 4 *supra.*

[16] Bissell, *op. cit. supra* note 14 at 259. We mentioned in Chapter 3 (*supra* pp. 62-63) the analogy between the High Commissioner and an Ombudsman and it is worth noting here the similarity between the Ombudsman's role in the encouragement of good administrative *practice,* rather than administrative *law,* and the High Commissioner's encouragement of international morality rather than international law.

The High Commissioner as a catalyst for the creation of international customary law

Occasionally treaties contain provisions which attempt to confer duties on states which are not parties to them. An example is Article 2, paragraph 6 of the Charter of the United Nations which was mentioned earlier.[17] And Article 15 of the International Convention of the Elimination of All Forms of Racial Discrimination confers on the Committee established under the Convention certain functions relating to petitions and reports from non-selfgoverning territories regardless of whether the metropolitan power concerned is a party to the Convention. Generally speaking, however, states do not regard themselves as subject to any legal obligations under conventions unless they are ratified, and Declarations and other resolutions [18] are as such, not regarded as legally binding.

But this does not take account of the role that unratified conventions and resolutions may play in relation to the second of the sources of international law listed in the Statute of the International Court of Justice – "international custom, as evidence of a general practice accepted as law."

To take first resolutions. It is becoming increasingly recognized that a resolution, and a Declaration in particular, "is in fact a nascent legal force which may enjoy, in the rounded words of Judge Cardozo, a twilight existence hardly distinguishable from morality and justice until the time when the *imprimatur* of the world community will attest its jural quality." [19] The likelihood of this process occurring is greatest in the case of Declarations since they are adopted with some solemnity and usually near unanimity [20] but it may occur also in the case of other resolutions.[21] Such a

[17] *Supra* pp. 75-76.

[18] But note Judge Lauterpacht's opinion that resolutions, at least those adressed to Administering powers, create "*some* legal obligation ... however rudimentary, elastic and imperfect ...." Separate opinion in the South West Africa Voting Procedure Advisory Opinion [1955] I.C.J. 67 at 118-9. And see Dugard, "The Legal Effect of United Nations Resolutions on Apartheid," 83 *S.A.L.J.* 44 (1966).

[19] Sloan, *op. cit. supra* note 7 at 1, 32-3. And see generally, Asamoah, *op. cit. supra* note 6; R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* 5-7 (1963); Falk, *op. cit. supra* note 7 at 782.

[20] See e.g., the discussion in the well-known Memorandum by the U.N. Office of Legal Affairs on the use of the terms "declaration" and "recommendation," U.N. Doc. E/CN. 4/L. 610 (1962). For some official statements that the Universal Declaration is now customary law see discussion at U.N. Seminar on Human Rights in Developing Countries, Dakar, Senegal, 8-22 February 1966, U.N. Doc. ST/TAO/HR/25 at 52 (1966) and *op. cit. supra* note 3.

[21] This is the general drift of the material in Asamoah, *op. cit. supra* note 6 at 46-61.

development is intelligible enough where a Declaration is followed by lengthy state practice (in the sense of overt acts applying its principles) based on it. But some authorities are of the opinion that something less than "practice" in this sense may complete the creative process. "Practice," as one writer has said, "should be understood in a wider sense to include verbal forms." [22] This was one of the substantive points argued during the second phase of the abortive proceedings brought by Ethiopia and Liberia against South Africa, relating to the South West African Mandate.[23] It was argued for the Applicants [24] that the effect of a series of resolutions on *apartheid* in South and South West Africa, combined with provisions such as those of the Universal Declaration of Human Rights and the International Covenants, then at the draft stage, had been to create either: (a) a standard for the interpretation of the mandate obligation to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory," or: (b) a legal norm of non-discrimination or non-separation on the basis of race. While the majority of the Court did not reach this point, a number of the dissenting judges were prepared to accept one or both of these propositions and to acknowledge the technique of law-creation implicit in that acceptance. Judge Tanaka, who expressed the position most emphatically, considered that a new rule was needed, and in fact existed, to take account of advances in world communications systems and of multilateral diplomacy:

A State, instead of pronouncing its view to a few States directly concerned, has the opportunity, through the medium of an organization to declare its position to all members of the organization and to know immediately their reaction on the same matter. In former days, practice, repetition and *opinio juris sive necessitatis,* which are the ingredients of customary law might be combined together in a very long and slow process existing over centuries. In the contemporary age of highly developed techniques of communication and information, the formulation of a custom through the medium of international organizations is greatly accelerated and facilitated; the establishment of such a custom would require no more than a generation or even less than that. This is one of the examples of the transformation of law inevitably produced by change in the social substratum.[25]

[22] Id., at 57.

[23] South West Africa Cases (Second Phase) [1966] I.C.J. 6.

[24] See e.g. South West Africa Cases, Reply of the Governments of Ethiopia and Liberia 52 (June 1964) and E. A. Gross, Agent for the Applicants, Speech to the Court, 19 May 1965 in R. Falk and S. Mendlovitz, 3 *The Strategy of World Order* 79 (1966).

[25] [1966] I.C.J. at 291; see also Judges Padilla Nervo at 469 and Mbanefo at 490 as well as Judge Jessup's agreement that at least a standard for the interpretation of the Mandate had been created (id., at 433). C. Jenks, *The Common Law of Mankind*

This is not to say that, except in very special situations [26] which appear to have no application to the development of human rights standards, one resolution makes a legal rule – it is clear that the founders did not grant a simple legislative power to the Assembly.[27] "What is required for customary international law is the repetition of the same practice; accordingly, in this case, resolutions, declarations etc., on the same matter in the same, or in diverse organizations must take place repeatedly." [28]

Put simply, there is, in Richard Falk's words, "a discernible trend from consent to consensus as the basis of international legal obligations." [29] Or, as Judge Tanaka said: "the method of the generation of customary law is in the stage of transformation from being an individualistic to being a collective process." [30]

A similar customary process is also at work in the case of treaties. Sir Humphrey Waldock has explained his view of the position thus:

> Fortunately a general multilateral treaty, provided that it obtains enough ratifications, acceptances, etc. to bring it into force at all, tends to prove a stronger tool for establishing general norms than the mere number of ratifications, acceptances, etc. might suggest. Its text, which will usually have been adopted by something like two-thirds of the international community, is both a well-considered and an "official" expression of general opinion in regard either to the existing or the desired law on the subject. A text having, apparently, such a large measure of general support is inevitably invested with a certain *persuasive* authority, although it may lack the authority of a legally binding instrument. Much depends on the subsequent reaction of States. If a certain number definitely manifest their rejection of the treaty, it may come into force for those States which accept it but never achieve the status of general law. More fre-

30 (1958) contains an earlier statement very similar to Judge Tanaka's position. Asamoah, *op. cit. supra* note 6 at 230-32 has examples of references by municipal courts to resolutions as evidence of international standards.

[26] Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?" 5 *Ind. J. Int'l L.* 23 (1965).

[27] Sloan, *op. cit. supra* note 7 at 6-7.

[28] Judge Tanaka in [1966] I.C.J. at 292. Cf. the separate opinion of Judge Van Wyk, id., at 169, denying that resolutions in the absence of practice of an overt nature are enough. It was estimated in 1969 that the Universal Declaration of Human Rights had been referred to 75 times in later resolutions: Bleicher, "The Legal Significance of Re-Citation of General Assembly Resolutions," 63 *Am. J. Int'l L.* 444, 444 (1969).

[29] Falk, *op. cit. supra* note 7 at 784.

[30] [1966] I.C.J. at 294. For cautious Socialist acceptance of "custom by consensus" see Lachs (now the Polish Judge on the I.C.J.), "The Law of Outer Space," 113 *Recueil des Cours* 7, 96-97 (1964); Mc Whinney, "The Changing United Nations Constitutionalism. New Arenas and New Techniques for International Law Making," 5 *Can. Y.B. Int'l L.* 68, 83 (1967). For a warning that mere majority opinion may not be enough in the absence of Big-Power support see O. Lissitzyn, *International Law Today and Tomorrow* 108 (1965).

quently, however, States merely fail to commit themselves to the treaty and keep their position open as to its ultimate acceptance by them. It is then that the persuasive authority of a general treaty may gradually work its provisions into the fabric of customary law.[31]

An enthusiastic academic supporter of the Waldock view (who would extend it to the cumulative effect of bilateral treaties) has suggested that "a treaty arguably is a clear record of a binding international commitment that constitutes the 'practice of states' and hence is as much a record of customary behaviour as any other state act or restraint." [32] The validity of this approach has recently been recognized by the International Court of Justice in the North Sea Continental Shelf Cases [33] although the majority of the Court took a somewhat conservative view of the quantum of proof necessary to establish the development of custom and declined to find that it had been provided in the particular case.

In the North Sea Cases the Court was faced, inter alia, with the question whether the equidistance principle for the delimitation of the continental shelf embodied in Article 6 of the 1958 Continental Shelf Convention had become a norm of customary international law. The Court remarked that:

In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris,* so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.[34]

The majority of the Court took the view that "the number of ratifications

[31] Waldock, "General Course on Public International Law," 106 *Recueil des Cours* 5, 83 (1963). And see Lissitzyn, *op. cit. supra* note 30 at 107.

[32] A. D'Amato, *The Concept of Custom in International Law* 139 (unpublished Ph. D. dissertation, Columbia University 1968). For less enthusiastic support see Baxter, *op. cit. supra* note 6 at 275.

[33] 8 *Int'l Leg. Mat.* 340 (1969). Article 38 of the recently concluded Vienna Convention on the Law of Treaties recognizes that nothing in the Article of the Treaty dealing with "Treaties and Third States," "precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."

[34] Id., 373-374.

and accessions so far secured is, though respectable, hardly sufficient,"[35] that although time, in itself, was not conclusive, the Convention had been in force for only a short time and that there was only limited state practice relying on the norms of Article 6:

The essential point in this connection – and it seems necessary to stress it – is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*; – for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.[36]

The judgment of the majority of the Court fails to come to grips with the jurisprudential difficulties inherent in the notion of *opinio juris sive necessitatis*.

If this ingredient of customary law seriously implies that in respect of each item of practice there must be a "conception that the practice is required by, or consistent with, prevailing international law" (in Judge Hudson's well-known formulation for the International Law Commission)[37] it is difficult to see how custom could ever be proven. Not only does it run into the difficulty that it seems to require that the states which first began the practice did so in the mistaken belief that they were acting as the law required, but as Anthony D'Amato has recently said:

Such a theory seems to depend upon exact motivational analysis of state behaviour. Yet there is a fundamental difference between what we as observers think a state thinks, and what the state in fact thinks, or feels or has a conviction about. To add to the difficulty, a state is of course an artificial entity; there is considerable room for doubt whether what a state "thinks" is what a majority, or vocal minority, of its leading, or at least influential, decision makers – or their advisers – say they are thinking.[38]

[35] Id., 374.
[36] Id., 376.
[37] 2 *Y.B. Int'l L. Comm.* 26 (1950). But see M. McDougal, H. Lasswell and I. Vlasic, *Law and Public Order in Space* 117 (1963); "The subjectivities of oughtness required to attend such uniformities of behaviour, which subjectivities may on occasion be proved by mere reference to the uniformities in behaviour, may relate to many different systems of norms, such as prior authority, morality, natural law, reason or religion."
[38] D'Amato, *op. cit. supra* note 32 at 98.

The judgment of the majority of the Court is of little help in determining how such *opinio* may be proved.[39]

While there is much to be said for the more flexible approach taken by the dissenters in the North Sea case who found that a custom based on Article 6 had been established [40] the decision is unequivocal in its acceptance of the general point being made – a treaty can provide the basis for customary development.

What role would the High Commissioner have in the customary process? He might aptly be described as *a catalyst for the creation of international customary law by the collective process.*

He would function as a catalyst in a number of different ways: One facet of his duty to advise and assist United Nations organs would engage him in the drafting of international instruments that would then provide the startingpoint for customary development or perhaps be another item of "repetition" in Judge Tanaka's sense and thus part of a continuing development. It has been suggested that the High Commissioner might also assist organs such as the General Assembly as a fact-finder or the conveyer of good offices. As a result of the action taken by states or the Assembly in response to his efforts, norms could be created in a number of areas; for example, on the treatment of aliens, or racial or religious minorities, or the rights to travel or marry. Again, rules might be developed for the treatment of political prisoners in time of civil strife, detailing their physical treatment and rights of access to appellate tribunals in the event of conviction or to complaint authorities in the case of ill-treatment. We have suggested, adopting the argument used by Conor Cruise O'Brien in relation to the Secretary-General, that it would not be wise for the High Commissioner to become directly involved as the administrator of a large-scale enterprise in the nature of the United Nations operation in the Congo or the Inter-American Commission on Human Rights' activities in the Dominican Republic.[41] But no doubt he could be consulted on some of the more specific details of the proposed plan of action in such a situation and the executive action taken by the Secretariat or other officials acting on his advice would amount to another example of practice building up custom.

[39] See Higgins, "The United Nations and Lawmaking: The Political Organs," 33 *Proc. Am. Soc. Int'l L.* 37, 40-41 (1970).

[40] See esp. Judges Koretsky, 8 *Int'l Leg. Mat.* at 399-404, Tanaka, id., 406-411, Lachs, id., 416-421, Sørensen, id., 423-429.

[41] *Supra* pp. 69-70. The argument, it will be recalled, flows from the near inevitability that some aspects of a largescale operation will turn sour and the danger that the resulting opprobrium could diminish the Secretary-General's or High Commissioner's effectiveness over a large area.

Influence of this kind would follow automatically from the close working relationship the High Commissioner would maintain with the Secretary-General.

In his role as adviser to states he would also help to foster practice leading to the creation of international norms. To take one of the situations on which the assistance of the International Commission of Jurists has been asked on a number of occasions: [42] advice on the system of preventive detention operative in the state concerned. His advice, repeated and adopted in a number of instances,[43] could lead to a general standard for the types of emergency during which preventive detention may be used and the judicial and administrative safeguards that should be provided for persons subject to such restrictions on their liberty. Hopefully, the High Commissioner's advice and assistance to states would often lead to their being able to ratify human rights conventions but undoubtedly it would have an important part to play in this customary process also.

The point is even clearer in respect of the High Commissioner's role in bringing communications to the attention of states and the good offices functions we have suggested he might obtain by a generous interpretation of the reporting provisions in the draft resolution creating the Office. In carrying out those activities he would be making a deliberate attempt to persuade states to apply the principles contained in resolutions and perhaps unratified conventions. If his recommendations were accepted, another item of state practice would be added to those already existing to help make up the quantity necessary for law to emerge. In respect of at least some of his recommendations which were not accepted he would mention that fact in his Report to the General Assembly. The Assembly's discussion of the issues raised in his Report is another way in which the High Commissioner would be involved in the creative process since it could well result in the adoption of another resolution or declaration which would constitute "repetition" and contribute to the custom-creating process in that manner.

Finally, the High Commissioner's Report could also be a vehicle for suggesting the drafting of new instruments in zones where his studies have shown existing instruments to be deficient. These new instruments would, in turn, play their role in the process we have just been discussing.

[42] *Supra* p. 30.

[43] He might, for example, draft a sort of Uniform Code of Preventive Detention. The example has added international interest because of proceedings brought under the European Convention on Human Rights (Lawless v. Ireland, *Publications of the European Court of Human Rights, Series B,* 1960-61) and the effort to deal with preventive detention in various Commonwealth constitutions (see S. de Smith, *The New Commonwealth and its Constitutions* 188-190 (1964)).

So far as *opinio juris* is concerned, some feeling of being obligated, at least in the final stages of customary development, is required by the notion of international law that we adopted in Chapter 1.[44] On the view of the development of treaties and Declarations into custom that we have been discussing this feeling of being bound, by a large majority but not necessarily all states, may appear from the words of declarations or be evidenced by the fact of repetition (either in the sense of repetition of overt acts or the repetition of the same principles). After a state has repeated, or acquiesced in the repetition of a position a number of times it will reach a point where it cannot deny that that position has become law – even if its first or even subsequent acceptances of the position did not evidence the acceptance of any legal rule. And of course, so long as most states accept the position, the dissenters will find themselves bound also. To put it in the context of the High Commissioner: even if states were to act in a particular way on a number of occasions simply to "please" the High Commissioner – perhaps even claiming that they were not creating a precedent – the time would come when they would no longer be able to deny that a rule of law had been created.

A promoter, not an enforcer or protector

It is now possible to draw together the two arguments contained in this Chapter and to emphasize once again that the High Commissioner would be a promoter, not a protector. A distinguished official of the Directorate of Human Rights of the Council of Europe, Dr Vasak, has recently made the following highly illuminating distinction between promotion and protection of human rights:

> The promotion of human rights . . . implies action resolutely directed towards the future: the question of human rights is seen as containing a lacuna, because they are not all, or are only incompletely, guaranteed under national legislation or international law, or because they are not sufficiently understood by the persons entitled to them or by States and their subsidiary bodies which are bound to respect them. In these circumstances, a body for the promotion of human rights will attempt to determine inadequacies and even violations, not so much in order that they may be punished but that similar situations may be prevented from recurring in the future.
>
> The "protection" of human rights appears to have, in many respects, a diametrically opposed aim. Intended to ensure the observance of human rights as established under existing law, protection leads, by the sanctions to which it necessarily gives rise, towards a future that perpetuates the past. Moreover,

[44] *Supra* p. 13.

protection relies mainly on court processes whereas the promotion will make use of every available legislative technique, including studies, research, reports, and the drafting of texts.[45]

Promotion looks forward to the day when protection will be appropriate, when states will be subject to international legal obligations and when there will be adequate judicial and other enforcement procedures to "punish" breaches. But that, if not a Utopian dream, is at least a goal for the distant future. The philosophy behind the High Commissioner proposal is that, in the interim, we must accept that the road will be long, accept that an international law of human rights is not acknowledged by states in general. We must therefore devise means to encourage them to abide by the principles of international morality that are being developed by the United Nations and its specialized agencies, and, in the process, to create substantive law. Once the substance has been widely accepted it will be possible to strengthen the whole process further by the adoption of more formal techniques of enforcement.

[45] Vasak, "National Regional and Universal Institutions for the Promotion and Protection of Human Rights," 1 *Rev. des Droits de l'Homme* 165, 167 (1968). See also on the distinction Humphrey, "Human Rights, the United Nations and 1968," 9 *J. Int'l Comm. Jurists* iii, x (1967).

CHAPTER 7

CONCLUSIONS

The High Commissioner would not be a mere stop-gap

The High Commissioner has been seen by at least some of his supporters as a means of filling the "supervision gap" until the International Covenant on Civil and Political Rights comes into force. We suggested at the end of the last Chapter that in the short run the High Commissioner's "promotion" might be regarded as the best available in the absence of strong procedures for "protection." In the long run it is no doubt hoped that the appointment of a High Commissioner would so improve the climate that the international community would be prepared to accept not only the International Covenant, but even more stringent procedures. Nevertheless, it would be wrong to see the High Commissioner simply as a stop-gap whose services might be terminated not too far in the future. Undoubtedly, even with the existence of highly sophisticated enforcement machinery, there would exist a continuing need for an informal procedure co-existing with the formal ones.[1] This is suggested by experience both in relation to countries that have appointed institutions like the Ombudsman and in relation to the I.L.O.'s procedures. As Professor Gellhorn has written with reference to the institution of a number of co-existing, formal and informal, procedures for administrative review:

> Quality controls tend to be cumulative, not mutually exclusive. Procedural steps that administrators must take when contested matters arise can be carefully prescribed; as in Poland, this prescription can be coupled with provision for review at a higher level of administration. Hierarchic review within the administrative structure is entirely consistent with penetrating review by ordinary courts.[2]

[1] The High Commissioner would presumably drop out of the picture in a particular situation once a formal complaint was made. See *supra* pp. 100-101.

[2] W. Gellhorn, *Ombudsmen and Others* 421 (1966).

In the case of the International Labour Organization, the elaborate formal complaints system has seldom been used. The bulk of the supervision of I.L.O. Conventions has been done by the Committee of Experts on the Application of Conventions and Recommendations and the Governing Body Committee on Freedom of Association, two informal bodies not referred to in the I.L.O. Constitution. Nevertheless there are important points of inter-action between the two types of procedure:

> The evidence available seems to suggest, therefore, that a combination of two parallel supervision procedures can help materially in promoting governmental action. Experience has demonstrated, moreover, that the informal but systematic approach which received little attention when the I.L.O. was established now overshadows the constitutional procedures on which so much reliance had been placed in the early days. On the other hand, the very fact that these procedures have largely remained in the background enables them to exercise a latent influence in cases of exceptional gravity. Formal representations and complaints can be held in reserve, so to speak, for possible use when the periodic procedure seems to be losing momentum.[3]

In short, an informal Office like that of High Commissioner could have just as important a part to play in encouraging law observance as it would in encouraging the observance of international morality.

An unwelcome proliferation?

It is in the light of considerations such as this that we should examine suggestions that the supporters of further international promotion and protection of human rights would be better employed in making existing attempts work – for example, by encouraging the ratification of the International Covenants and the Race Convention – rather than wasting time with proposals for new machinery.

The view that the High Commissioner proposal is, at least at this time, an unwelcome diversion, has been expressed by Professor René Cassin who, it will be recalled, was the father of the idea back in 1947. Writing in the context of the current High Commissioner suggestions and of the work of the Commission on Human Rights in general, he mentioned his fear that "the almost simultaneous initiation of too many devices and procedures will cause duplication of work and encourage inertia on the part of governments reluctant to ratify the 1965 Convention and the 1966 Covenants, which take the grievances of individuals out of their exclusive juris-

[3] E. Landy, *The Effectiveness of International Supervision. Thirty Years of I.L.O. Experience* 177 (1966); see also C. Jenks, *The International Protection of Trade Union Freedom* 495-98 (1957).

diction." [4] This is a plausible fear, which undoubtedly has some basis of fact. But in the writer's view it is outweighed by the advantages of having something in the meantime and of creating an informal procedure which can be retained to go with the more formal ones. A further interesting counter to the proliferation argument has been made by Michael Barkun:

> [I]n the end, levels of expectation play a key role. If each new procedure is expected to reach its manifest aim, in the face of earlier failures, the result will be a continuing process of hope and disillusionment. On the other hand, there may well be a process at work not unlike that of evolution by selection, in which the solution of a problem depends upon the testing of alternatives. Seen in this light, the proliferation of legal procedures is experimentation, with the built-in expectation not only of eventual success but of a number of intermediate failures as well.[5]

Few writers and diplomats who operate in the human rights area are sufficiently lacking in scepticism to believe that any particular procedure is *the* one that will solve all the problems, but it is submitted that in spite of the dangers of proliferation the High Commissioner idea is so promising of eventual success that it is well worth trying.

Why not leave the job to the Secretary-General?

A variation on the proliferation argument is that the proposed functions of the High Commissioner should best be left to the Secretary-General. After indicating his opposition to the notion of a High Commissioner "empowered to take decisions and to act," the representative of India in the Commission on Human Rights suggested that "if he was to be little more than a negotiator . . . it was preferable that that function continued to be entrusted to the Secretary-General; the latter would perform it more effectively, since his personal prestige would cause him to be heeded more than a High Commissioner would be when political interests were involved as was usually the case." [6] The short answer to this contention is that the High Commissioner would have from the outset, or at least acquire in practice, the necessary "personal prestige." Further, since he would be dealing solely with matters of human rights, he would not, like the Secre-

[4] Cassin, "Twenty Years After the Universal Declaration," 8 *J. Int'l Comm. Jurists* 1, 17 (1967). See to the same effect the representative of the U.S.S.R. in U.N. Doc. E/CN. 4/SR. 939 at 4 (1967) and Markovic, "Implementation of human rights and the domestic jurisdiction of States," in A. Eide and A. Schou eds., *International Protection of Human Rights*, 47, 66 (1968).

[5] Barkun, "Legal Innovation and Behavioral Change," 53 *Iowa L. Rev.* 352, 352 (1967).

[6] U.N. Doc. E/CN. 4/SR. 881 at 13-14 (1966).

tary-General, be involved with an extremely wide variety of problems, any one of which might turn sour and affect his prestige over a broad area.

The implications of the proposal for international organization

The accumulated experience of a large number of multi-member international organizations since the formation of the I.L.O. and the League of Nations provides many variations on the role and status possible for the chief permanent official of such organizations.[7] It is common, however, to refer to two basic models for such an official, the "activist," typified by Albert Thomas, first Director-General of the I.L.O. and the "anonymous civil servant," typified by Sir Eric Drummond, first Secretary-General of the League.[8] U.N. Secretary-Generals have tended to line up closer to the activists than to the anonymous civil servants. And the role of the Secretary-General has also tended to exhibit, in a rather diffuse way, something that is brought into much sharper focus in the case of the High Commissioner for Refugees – the role of the chief official as a personification of a problem, as a symbol. Trygvie Lie apparently had such a concept in mind when he spoke of the Secretary-General as "spokesman for the world interest," although he conceded that the concept was "in many ways ahead of our time, when nationalism is stronger than ever and national sovereignty still the ruling force." [9] The "world interest" is of course a very broad thing; the notions of the plight of the refugee or the furtherance of human rights are much more precise and the High Commissioner for Human Rights would be both an activist and a symbol in the tradition of the High Commissioner for Refugees. The pattern would of course be susceptible of further use. Thus the report of a study financed by the Ford Foundation, and issued in May 1969 [10] as a policy paper of the United Nations Association of the U.S.A., suggested the appointment of a "Commissioner for Population" who would have "authority to organize coordinated action by the United Nations Specialized agencies to support national family planning progress, research on reproduction and contraception and the training of experts." The report went on to suggest a very practical advantage of the prestigious lone official which would have equal

[7] See D. Bowett, *The Law of International Institutions* 111 (1963) for some of the variations.

[8] See E. Phelan, *Yes and Albert Thomas* (1936), S. Schwebel, *The Secretary-General of the United Nations* 3-13 (1952), I. Claude, *Swords into Plowshares* 176-77 (3rd ed. 1964), L. Gordenker, *The U. N. Secretary-General and the Maintenance of Peace* 4-16 (1967).

[9] T. Lie, *In the Cause of Peace* 88 (1954).

[10] New York Times, 25 May 1969 at 1, col. 6-7 and 5, col. 1.

application to the High Commissioner for Human Rights:

> The question of mandates, of which agency should undertake what activity, has been used as a classic delaying tactic by a United Nations system which, taken as a whole is reluctant to make a more impressive commitment.[11]

In other words, the activist symbol like the High Commissioner for Human Rights would be able to cut through the jungle of overlapping authority and make sure that, even if he was not able to deal personally with a particular problem, the person with the authority to act most effectively could be seized of the issue.[12]

It is perhaps necessary to sound the cautionary note that one would not want to see the whole area of international organization populated by Commissioners or High Commissioners. The whole point is to have someone with the prestige to cut through the maze. Once the numbers became too large, the currency would become cheapened (just as the prestige of "Special Rapporteurs" fell between the League and the U.N.) and we would be back where we started with the need for new officials to break down the barriers between the High Commissioners' empires. But there is no danger of this at the present and there is certainly room for the High Commissioner for Refugees to be joined by the High Commissioner for Human Rights, the Commissioner for Population and perhaps a few others.

The advantages

It is worth recalling at this juncture the conclusions drawn in Chapter 1 as to the major areas of inadequacy of existing international efforts for human rights. They were:

1. Principles are formulated in treaty form but this is not followed by ratification by all, or even by a majority of states.
2. Ratified treaties are not given practical application.
3. Enforcement procedures contained in the treaties are limited.
4. "Communications" receive cavalier treatment.
5. Limited sources of information are available to United Nations human rights bodies.

[11] Id., at 5, col. 1.

[12] In addition to handling complaints within his jurisdiction, the New Zealand Ombudsman receives "a considerable number of miscellaneous enquiries" from persons who do not know where to go for administrative advice or redress. "Where possible these people are told how to get proper advice for their particular problems." See Report of the Ombudsman for the year ended 31 March 1968 at 6. The High Commissioner for Refugees is able to perform a comparable function and the High Commissioner for Human Rights would be able to do so as well.

6. Only limited use is made of NGO assistance and representations (this overlaps 4 and 5).
7. There is a meagre response to requests for periodic reports and ineffective techniques for dealing with those received.
8. Apart from attending seminars, States are reluctant to use the United Nations's human rights advisory services.

What inroads might the High Commissioner be expected to make with regard to each of these areas?

1. Non-ratification of treaties

The High Commissioner would attack the problem of non-ratification in two different ways. First, he would encourage ratification. Directors-General of the International Labour Office and High Commissioners for Refugees have found that constant prodding by a high-ranking and prestigious official scores some successes in increasing the number of ratifications and the same would surely be true of the High Commissioner for Human Rights. In some instances it would be necessary for him to combine his encouraging function with his advisory function in order to ensure that ratification was not merely a hollow gesture to which the necessary effect was not given by suitable domestic legislation or executive action.

Second, in the course of nearly all his other activities – advising and assisting the General Assembly and other United Nations organs, advising and assisting States, bringing communications to the attention of governments, using his good offices in matters of human rights and the presentation of his periodic reports to the Assembly – the High Commissioner would be a catalyst for the development by custom of a common law of human rights. Not "instant" custom, but at least accelerated custom. Indeed in its early stages the creation of the Office of High Commissioner would probably mark a shift of emphasis from treaty to custom as the main basis for human rights under international law. However, the two processes – encouragement of ratification and the creation of similar legal principles through the medium of custom – are closely related. A state which regards itself as bound by customary norms to act in a particular fashion may be more inclined to make the gesture of ratification and to accept both the details of the norms and any enforcement procedures that may be contained in the relevant treaties. Both processes which the High Commissioner would foster would, of course, lead to a situation which constitutes an improvement of the present low rate of ratification.

2. Lack of practical application of ratified treaties

The High Commissioner would not be an "enforcer" of treaties as such. As a "law promoter" he would be just as active in encouraging states *not* parties to human rights treaties to abide by their provisions as he would be in trying to ensure compliance by those who were. But, as has been suggested earlier in this Chapter, his informal methods would be applicable even to allegations against those states which were parties to Conventions which, like the International Covenant on Civil and Political Rights and its Protocol, have detailed complaint procedures. In fact, if he uses his powers of publicity with great caution, the quiet approaches of the High Commissioner might be more effective than action taken in the glare of publicity before an international committee. Quiet words to the appropriate state officials before a public position has had to be taken and justified are sometimes more effective than the same words spoken after the officials concerned have been driven into a corner by the news media and by internal and external political forces.

One of the most useful functions of the High Commissioner's panel of expert consultants would be similar to that of the enforcement functions of the I.L.O. Committee of Experts on the Application of Conventions and Recommendations, that is examining domestic legislation to test its compliance with international standards. It seems likely that, at least in the early stages of the Office, the High Commissioner would not be able to achieve a great deal in relation to complaints of breaches of international standards affecting specific individuals. His effectiveness would thus lie mostly in cases of "gross violations" or "patterns of violations" such as discrimination on religious, political or ethnic grounds, including those situations where the violations take place under the auspices of legislation like that just mentioned which is out of line with international instruments. Such limitations on the High Commissioner's possible actions on behalf of individual petitioners arise in part from the caution of the drafters of the resolution which would create the Office in not providing for any direct individual right of petition apart from his right to examine "communications" and bring some of them to the attention of the states concerned. The limitations arise in part also from the restrictions as to access to facts to which he would be subject. More will be said on these points in paragraphs 4 and 5 of this section. It is sufficient to note at this stage that it is in the area of the encouragement of the practical application of the principles contained in human rights treaties through the examination of communications that there is the greatest scope for the creative evolution of the Office. As con-

fidence gradually grows in the High Commissioner it seems likely that something more nearly resembling a right of petition in individual cases would develop and the High Commissioner would quite closely approximate an Ombudsman in this respect.

3. Limited enforcement procedures in treaties

The High Commissioner's promotional techniques could well be regarded as a substitute for the inclusion of stringent enforcement procedures in human rights treaties, at least in the short run. However, in the long run, his efforts could lead to increased confidence in the impartiality of international bodies in general and to a climate in which the international community was prepared for more effective procedures. No doubt he would do his best to encourage such a climate in his reports to the Assembly, in his informal contacts with state representatives, and when he was assisting the Assembly and other bodies in the drafting of further human rights conventions. The institution of more sophisticated procedures would in turn strengthen the hand of the High Commissioner when he was dealing with the parties to treaties containing such procedures, since it would be appreciated that those cases in which his informal techniques failed would be likely to come before more formal bodies. The possibility of such further action would be an important incentive in encouraging response to the High Commissioner's efforts.

In the case of at least one existing treaty the High Commissioner's activities might lead to the strengthening of what appear at present to be very weak measures of implementation. If the appointment of a High Commissioner leads, as we suggest it will,[13] to a more searching examination of the periodic reports presented under the voluntary programme, a precedent will be created for the examination of the reports presented under the International Covenant on Economic and Social Rights to constitute a serious attempt at international supervision and not just a perfunctory exercise in cannibalistic paper-shuffling.

4. "Communications"

No one would seriously suggest that all the hundreds of thousands of communications received by the United Nations since 1945 were worth following up in detail because they raised significant issues within the scope of the organization's human rights instruments. Many communications undoubtedly come from cranks, are frivolous, relate to matters on which there are

[13] See *supra* pp. 83-86 and *infra* para. 7.

perfectly adequate domestic remedies, are incapable of substantiation or concern action for which no international standards have been developed.[14] But not all are in this class. The appointment of a High Commissioner would mean that for the first time since the Commission on Human Rights decided in 1947 that it had no power to take action on individual complaints, communications which are at present effectively ignored [15] would be subjected to a genuine scrutiny in an effort to sort out those meriting further study and action. The sorting process would probably involve the High Commissioner in reading such communications shortly after their receipt, that is, while their subject-matter is still fresh. At least those showing an apparent pattern of human rights violations would be brought to the attention of the states concerned. In conjunction with his panel of experts the High Commissioner would check the facts in the ways suggested in paragraph 5 of this section, make enquiries as to the accuracy of the version of the facts suggested by the state in question and if necessary, make suggestions about how the situation might be improved. All this would normally take place with a minimum of fuss, formality and publicity. In some instances, after the High Commissioner had become fairly certain of the facts it would also have become apparent that his quiet representations were not going to bring results. He would then use his powers of publicity and raise the issue in a report to the General Assembly. Limited as his powers of coercion and investigation might be, the High Commissioner would certainly ensure that redress was obtained in some cases at an early stage and also that the ground was properly prepared before a situation was put before the Assembly. What is more, the way in which the High Commissioner would select matters from among the communications, either for drawing the attention of states to them or reporting to the Assembly would help shape the area of activity of United Nations organs in human rights matters – either by identifying spheres in which further international instruments are needed or by concentrating the influence of the organization in obtaining adherence to already formulated standards.[16]

[14] The great majority of applications to the European Commission of Human Rights are rejected at the first, "admissibility", stage of investigation on grounds such as those suggested in the text. See Robertson, "The European Convention on Human Rights," in E. Luard ed., *The International Protection of Human Rights* 99, 120-121 (1967).

[15] I.e., those not dealing with dependent territories or southern Africa.

[16] There is an analogy here between the sifting process of the High Commissioner and that of the Supreme Court of the United States when it is exercising its discretion on which applications for certiorari in constitutional cases it will hear. Both involve some creative activity as to the areas in which the officials in question are prepared to focus their law-developing powers.

5. *Limited sources of information*

The key to the success of the High Commissioner's work, whether in assisting the Assembly in relation to particular situations, bringing communications to the attention of states or preparing his regular reports to the Assembly, is the extent to which he would be able to sort out something approaching the truth from the material available. Neither he nor the panel of expert consultants would be given power by the draft resolution to hold hearings or subpoena witnesses or documents.[17] Nor would they have the great advantage accorded to a state Ombudsman of being able to enter government departments and inspect all the relevant files. In the present state of international relations it would probably be an unusual situation if a State voluntarily permitted him to enter its territory to make an on-site investigation of the facts and he would be unable to enter without such permission. This results mainly from the very nature of the United Nations which, in most instances, simply does not have the physical power to enforce its decisions either to investigate or to make specific recommendations (witness its failure to enforce its decisions on South West Africa against South Africa). One manifestation of this fact of international politics is the way in which states objecting to United Nations actions on the basis of Article 2.7 of the Charter continue to justify their refusal to countenance United Nations efforts even after a majority of the Organization has decided that the claim is unfounded.[18] It can be confidently asserted that most of the rebuffs that the High Commissioner would receive from states in the course of his efforts to find the facts would be justified by a reference to Article 2, paragraph 7.

Nevertheless, he would not be altogether powerless in his efforts to make himself fully informed. Governmental responses to his enquiries would not always be entirely unrewarding. He would be able to interview expatriates with relevant information, as is often done by United Nations bodies dealing with South Africa. Sometimes it would be possible to follow up communications by writing or talking to their writers. In other situations, this would not be feasible because the complainant was within the borders of the state concerned and the High Commissioner's attentions might cause repercussions on him. In such cases the High Commissioner would be forced either to use his ultimate weapon of publishing the allegations or to

[17] No doubt if he were used by the General Assembly to find the facts on a question before it powers of this nature would be given in the particular instance.

[18] *Supra* p. 119.

rely on his continuing collection of material. This would include governmental, nongovernmental and United Nations reports, legislation, newspapers and periodicals. The same sources of information – including the general trend of communications concerning a particular country – would be used to evaluate and supplement periodic reports received from states and of course it would be useful background information for any fact-finding or good offices operations that he might undertake on behalf of United Nations organs.

The important thing is that the fact-gathering process would be an ongoing one. All the little scraps of information, perhaps not of any great significance in themselves, would be pieced together and used as appropriate in the various facets of the High Commissioner's programme.

6. NGO representations and assistance

Human rights NGOs have been an important force behind the High Commissioner proposal. And the techniques which he would use owe much to those developed by NGOs in their efforts to encourage states to abide by standards not necessarily required by their legal obligations. It is not too far-fetched to regard the High Commissioner as a sort of institutionalized NGO. But it is too much to expect that he would be so successful in turning the world into a beautiful place that the NGOs could all go out of business. However, the institution of the High Commissioner would enhance their effectiveness by providing them with a valuable opportunity for an informal relationship with a United Nations official sympathetic to their general aims and with power to act. This would greatly increase the degree of attention given by the Organization to their communications and other representations such as ideas for new human rights treaties. On the other hand, it is unlikely that the High Commissioner would want his relationship with NGOs to be too obviously close. NGOs are largely a Western phenomenon and it is relatively easy to brand them as stooges of the C.I.A. or some other sinister organization. A High Commissioner appealing to a global constituency would want to do his best to avoid the appearance of pressures which might result from such an association and would certainly want to limit his contacts with NGOs to some extent.[19]

[19] In this context a supporter of the High Commissioner idea, Mr. Akram of Pakistan, has suggested that: "... in the establishment of the post ... account would be taken of the following considerations: firstly, the Office ... should not entertain any complaints from organizations which were based outside the territorial jurisdiction of the State in which the violations were alleged to have occurred ...." U.N. Doc. A/C. 3/SR. 1730 at 6 (1969).

7. Inadequate supply of government reports and inefficient procedures for dealing with those obtained

The response to requests for reports by the I.L.O. which are followed up by prodding both from the Committee of Experts and the Director-General's staff suggests that if enough prompting is given most governments will eventually comply with requests for periodic reports. Assisting their periodic reporting system by encouraging states to respond to requests for them is one of the ways in which ECOSOC and the General Assembly could be expected to seek the assistance of the High Commissioner. Thus, something closer to a genuine picture of world-wide developments might be obtained. Furthermore, the inefficient techniques currently used for dealing with such reports could be improved with the assistance of a High Commissioner. Reports would be carefully processed by experts substantially insulated from political pressures and analysed, criticized and supplemented in the light of other available sources of information. Suggestions for action either generally or in specific cases could be made in the High Commissioner's own report to the political organs.[20] Because of the improvement of the material available, the value of the debate in those organs would also be enhanced.

8. Use of advisory services

Advisory services would be a useful adjunct to the High Commissioner's efforts to encourage ratification and the practical application of human rights treaties. It is also one of the areas in which he would manifest his role as a catalyst in the creation of an international customary law of human rights since similar advice, given and adopted in a series of cases, could contribute to the development of the necessary degree of practice required to prove the existence of a custom. The panel of expert consultants would be a pool of talent from diverse legal systems well-equipped to help in the giving of advice. The fact that states could approach the High Commissioner for assistance knowing that any request they made for anonymity would be respected is an important aspect of the draft provision on assistance. One of the most difficult problems to overcome is the fear of states in asking for help that others might use the request to embarrass them by suggesting that all is not well. The extent to which the High Commissioner's

[20] His reports might well follow the pattern set by those of Albert Thomas to the I.L.O.: "He meant to make it what he called a 'living' Report, a Report which would survey all the problems which confronted the organization, not only those which were already before it in one form or another, but also those which were fermenting in the whole social cosmos." Phelan, *op. cit. supra* note 8 at 125.

advisory services might be used is thus highly speculative in view of the scarcity of requests made to the Secretary-General under his programme. But the experience of the International Commission of Jurists indicates that there are a large number of potential clients who would approach an official whom they felt to be of sufficient impartiality and discretion. Some of the most promising areas for assistance are those of electoral law and machinery, the institution of procedural safeguards of individual rights in the domestic sphere and the elimination of the last vestiges of slavery.

What the future holds

In the course of the research for this study I have become convinced that the type of advantages which have just been listed make the High Commissioner proposal one worthy of implementation by the General Assembly. What are the chances that it will do so in the near future? The academic who speculates about what the diplomats will do is doomed to embarrassment. Few observers, for example, thought that after twelve years of sporadic debate the Assembly would adopt the Human Rights Covenants in 1966.[21] But it is possible at least to list some of the variables affecting the fate of the proposal at the time of writing. In the first place, apart from a number of important NGOs, the most enthusiastic supporters of the proposal are a group of smaller countries, mainly of the "Third World" – Costa Rica, Dahomey, Jamaica, the Philippines and Senegal. Of the Big Powers, the United States, the United Kingdom and France have all expressed support but none seems prepared to take any initiative. Indeed, in view of Soviet opposition, overenergetic support by any one of them could be counterproductive. France has, until recently, been lukewarm. While the present U.S. Administration is just as forthcoming in support as its predecessor, the United Kingdom now appears to be a little wary of possible anti-colonial implications in the proposal. The Soviet bloc is of course firmly against the whole idea and it has been joined in many of its objections by the Arab nations, by some Africans, such as Tanzania, and by some Asians, such as India and Japan. The Arab nations perhaps share the fears held by some of the Socialist countries[22] and, for quite different reasons, at least one Western country,[23] that the Office would be used as a

[21] See e.g., Schwelb, "Some Aspects of the International Covenants on Human Rights of December 1966," in Eide and Schou, *op. cit. supra* note 4 at 103, 104.

[22] See comments by Professor Szabo of Hungary in Eide and Schou, *op. cit. supra* note 4 at 297.

[23] One U.S. ally is understood to be concerned that, as an open society, it is likely to receive a much greater number of harassing complaints to the High Commissioner than would occur in the case of closed societies. On this possibility see R. Gardner,

stick to beat them with. A factor in their opposition is undoubtedly their desire to keep the U.S.S.R.'s support in the Middle East. Israel's support of the proposal perhaps adds a little to Arab opposition. The Indian position is in part accounted for by a desire to stay friendly with the Russians, in part by the skeletons of Kashmir and the Nagas and in part by a lack of clear instructions to its delegates. There are now signs of an impending change of heart by the Indians. Initial Japanese opposition to the proposal was apparently based on a fear of derogating from the effectiveness of the International Covenants on Human Rights. But, given the tardiness in their ratification, Japan has moved to support of the proposal. Some diplomats feel that more African support could be obtained for the proposal by affording the High Commissioner a role in matters South African or racial matters in general,[24] but this is to some extent a renunciation of the spirit of the proposal which seeks to alleviate some of the excessive concentration on the issue of race. An understanding that, if the Office were created, the first High Commissioner would be an African might be a sufficient gesture to gather more African support. Continuing NGO support perhaps increases the suspicions of lukewarm supporters or fence-sitters from non-Western countries.

In the 1971 Session the item was deterred until 1973. The immediate prospects for the High Commissioner are thus not good. It is always difficult to know how much to infer support on the merits from positions taken in a procedural vote, but a reading of the 1969 to 1971 debates suggests that a substantial majority of the membership (between 80 and 100 members) is in favour of the proposal or is not strongly opposed to it. About 20 members appear to be adamantly opposed. It is fair to add that the supporters have not felt that the time was ripe to vote down the minority and appoint the High Commissioner by a majority vote. While it is plain that unanimity is not obtainable this need be no bar to the creation of the Office, even though it will somewhat reduce the High Commissioner's

In Pursuit of World Order 256 (rev. ed. 1966). The U.S. position is apparently that there are already so many opportunities for public complaint and criticism that one more is unlikely to make any significant difference.

[24] Note the exchange between the representatives of Tanzania and the U.K. in ECOSOC. The Tanzanian representative "felt not only that the High Commissioner ... should have as his first concern the protection of the African or the negro of African descent, wherever he might be – in the United States, in Africa, in the Carribbean or elsewhere, – but also that if the post of High Commissioner was established it should be occupied by a Negro." U.N. Doc. E/AC. 7/SR. 572 at 9 (1967). Sir Samuel Hoare, the U.K. delegate, "could not accept that a body set up within the United Nations system should concern itself solely with the wrongs suffered by one particular group of people." U.N. Doc. E/AC. 7/SR. 574 at 8 (1967).

effectiveness. The decision to have a High Commissioner for Refugees was made in 1949 by a vote of 35 to 7 with 13 abstentions [25] and most of the opposers and abstainers on that occasion are among the opponents of the present proposal. Nevertheless the High Commissioner for Refugees has done, and continues to do, valuable work.

[25] G.A., 4th Sess., SR. at 495 (1949). In the Third Committee, where the U.S. dissented on matters of detail, the vote was only 24-12-10: 4th Sess., Third Committee SR. at 150 (1949).

APPENDIX I

RESOLUTION ADOPTED BY THE ECONOMIC AND SOCIAL COUNCIL AT ITS 1479TH PLENARY MEETING ON 6 JUNE 1967

1237 (XLII). *Question concerning the implementation of human rights through a United Nations High Commissioner for Human Rights or some other appropriate international machinery*

The Economic and Social Council,

Recommends to the General Assembly the adoption of the following draft resolution:

"*The General Assembly,*

"*Having considered* the recommendation contained in Economic and Social Council resolution 1237 (XLII) of 6 June 1967,

"1. *Decides* to establish a United Nations High Commissioner's Office for Human Rights, the Office to be so organized within the framework of the United Nations that the High Commissioner will possess the degree of independence and prestige required for the performance of his functions under the authority of the General Assembly;

"2. *Instructs* the United Nations High Commissioner for Human Rights to assist in promoting and encouraging universal and effective respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion, as set forth in the Charter of the United Nations and in declarations and instruments of the United Nations or of the specialized agencies, or of intergovernmental conferences convened under their auspices for this purpose without prejudice to the functions and powers of organs already in existence or which may be established within the framework of measures of implementation included in international conventions on the protection of human rights and fundamental freedoms; in particular:

"(*a*) He shall maintain close relations with the General Assembly, the Economic and Social Council, the Secretary-General, the Commission on Human Rights, the Commission on the Status of Women and other organs

of the United Nations and the specialized agencies concerned with human rights, and may, upon their request, give advice and assistance;

"(*b*) He may render assistance and services to any State Member of the United Nations or member of any of its specialized agencies or of the International Atomic Energy Agency, or to any State Party to the Statute of the International Court of Justice, at the request of that State; he may submit a report on such assistance and services with the consent of the State concerned;

"(*c*) He shall have access to communications concerning human rights, addressed to the United Nations, of the kind referred to in Economic and Social Council resolution 728 F (XXVIII) of 30 July 1959 and may, whenever he deems it appropriate, bring them to the attention of the Government of any of the States mentioned in sub-paragraph (*b*) above to which any such communications explicitly refer;

"(*d*) He shall report to the General Assembly through the Economic and Social Council on developments in the field of human rights, including his observations on the implementation of the relevant declarations and instruments adopted by the United Nations and the specialized agencies, and his evaluation of significant progress and problems; these reports shall be considered as separate items on the agenda of the General Assembly, the Economic and Social Council and the Commission on Human Rights, and before submitting such reports, the High Commissioner shall consult, when appropriate, any Government or specialized agency concerned, taking due account of these consultations in the preparation thereof;

"3. *Decides* that the High Commissioner shall be appointed by the General Assembly, on the recommendation of the Secretary-General, for a term of five years, and that his emoluments shall not be less favourable than those of an Under-Secretary;

"4. *Decides* to establish a panel of expert consultants to advise and assist the High Commissioner in carrying out his functions; the panel shall not exceed seven in number, the members to be appointed by the Secretary-General in consultation with the High Commissioner, having regard to the equitable representation of the principal legal systems and of geographical regions; the terms of appointment of the members of the panel shall be determined by the Secretary-General, in consultation with the High Commissioner, and shall be subject to the approval of the General Assembly;

"5. *Invites* the High Commissioner to conduct his office in close consultation with the Secretary-General and with due regard for the latter's responsibilities under the Charter;

"6. *Requests* the Secretary-General to supply the High Commissioner

with all the facilities and information required for carrying out his functions;

"7. *Decides* that:

"(*a*) The Office of the High Commissioner shall be financed under the regular budget of the United Nations;

"(*b*) Within the limits of the budgetary appropriation provided and on the recommendation of the High Commissioner, the staff of the Office of the High Commissioner shall be appointed by the Secretary-General and such staff shall be subject to the conditions of employment provided under the Staff Regulations of the United Nations adopted by the General Assembly and the Staff Rules promulgated thereunder by the Secretary-General;

"(*c*) Provision may also be made to permit the employment of personnel without compensation or on a fee basis for special assignments;

"(*d*) The administration of the Office of the High Commissioner shall be subject to the Financial Regulations of the United Nations and to the Financial Rules promulgated thereunder by the Secretary-General, and the accounts relating to the Office of the High Commissioner shall be subject to audit by the United Nations Board of Auditors."

APPENDIX II

UNITED REPUBLIC OF TANZANIA: AMENDMENTS TO DRAFT RESOLUTION IV APPROVED BY THE COMMISSION ON HUMAN RIGHTS AT ITS TWENTY-THIRD SESSION* ON THE QUESTION CONCERNING THE IMPLEMENTATION OF HUMAN RIGHTS THROUGH A UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS OR SOME OTHER APPROPRIATE INTERNATIONAL MACHINERY

In paragraph 2, fifth line, after "United Nations," insert the words "especially the Universal Declaration on Human Rights."

Insert the following new sub-paragraph after paragraph 2 (a):

"He shall initiate action where necessary to promote, encourage and strengthen universal and effective respect for human rights and fundamental freedoms."

Delete the last lines of sub-paragraph 2 (d), beginning with the words "and before submitting such reports."

In paragraph 3, replace the word "appointed" in the first line by the word "elected."

In paragraph 4, in the third line, replace the words "appointed by the Secretary-General in consultation with the High Commissioner," by the words "elected by the General Assembly on the basis of equitable geographical representation."

Add a new paragraph 6:

"*Decides* to elaborate during its twenty-second session an appropriate convention which shall govern the powers of competence and procedures under which the High Commissioner and his Office shall operate."

Add a new paragraph 7:

"*Decides* to invite the Director-General of the International Labour Office to submit to the General Assembly, for its guidance and assistance at its forthcoming session, a report on the experience of the International Labour Organisation in the field of implementation of human rights in its sphere of competence."

* Later adopted as resolution 1237 (XLII) of the Economic and Social Council.

APPENDIX III

OUTLINE OF HEADINGS SENT TO STATES BY THE SECRETARY-GENERAL WHEN INVITING REPORTS ON CIVIL AND POLITICAL RIGHTS FOR THE PERIOD 1 JULY 1965 TO 30 JUNE 1968*

I. *Significant developments with regard to the recognition and enjoyment of civil and political rights during the period 1 July 1965 to 30 June 1968*

A. *Inviolability of the Person*

(1) Right to life, liberty and security of person.
(2) Freedom from torture or cruel, inhuman or degrading treatment or punishment.
(3) Freedom from slavery, the slave trade, servitude and forced or compulsory labour.
(4) Freedom from arbitrary interference with one's privacy, family, home, correspondence and from attacks upon one's honour and reputation.

B. *Protection of the Law*

(1) Right to recognition as a person before the law.
(2) Equality before the law and equal protection of the law without any discrimination.
(3) Right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted by the constitution or by law.
(4) Freedom from arbitrary arrest, detention or exile.
(5) Right to fair and public hearing by an independent and impartial tribunal.
(6) Presumption of innocence; guarantees for defence, non-retroactivity as regards penal offences and penalties.

* Reproduced in U.N. Doc. E/CN. 4/989 at 6-7 (1969).

C. *Freedom of movement*

(1) Right to freedom of movement and freedom to choose a residence; right to leave any country and to return to one's country.
(2) Right to seek and to enjoy asylum from persecution.

D. *Personal status*

(1) Right to a nationality.
(2) Right to marry and found a family; equal rights of spouses as to marriage, during marriage and its dissolution.
(3) Protection of the family by society and the State; protection of the child as a minor.
(4) Right to own property.

E. *Freedom of thought and expression; freedom of assembly and association*

(1) Right to freedom of thought, conscience and religion.
(2) Right to freedom of opinion and expression.
(3) Right to freedom of peaceful assembly.
(4) Right to freedom of association including the right to form and join trade-unions.

F. *Right to take part in the government of one's country, directly or through freely chosen representatives*

(1) Right to vote and be elected in periodic and genuine elections.
(2) Right of equal access to public service in one's own country.

G. *Equality in the recognition and enjoyment of the rights and freedoms set forth above without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*

II. *Limitations including those determined by law upon exercise of civil and political rights and freedoms*

(1) For the purpose of securing due recognition and respect for the rights and freedom of others.
(2) For the purpose of meeting the just requirements of morality, public order and general welfare in the democratic society.
(3) For the purpose of preventing the exercise of civil and political rights contrary to the purposes and principles of the United Nations.

(4) Derogations in time of public emergencies which threaten the life of the nation.

(5) Other limitations.

III. *Significant developments with regard to the recognition and enjoyment of the right of self-determination and the right to independence during the period of 1 July 1965 to 30 June 1968*

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