

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.

ROGER S. CLARK
Senior Lecturer in Law
Victoria University of Wellington
New Zealand

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.

RICHARD N. GARDNER
Henry L. Moses Professor of Law
and International Organization
Columbia University

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 writers⁷ 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 Rusic, "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 them⁸ 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).