

Neither Fish nor Fowl: The Quest to Define the Role of the UN High Commissioner for Human Rights

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I. Introduction

In March 1997 the first United Nations High Commissioner for Human Rights (HCHR) resigned, after almost three years in office. Assessments of the importance of the post vary greatly. Some have seen it as merely ‘a small step forward for human rights’,¹ while others have portrayed it as ‘symboliz[ing] humanity’s aspiration to achieve greater dignity for all human beings’.² In announcing the appointment of a new HCHR, in June 1997, UN Secretary-General Kofi Annan said that it was ‘one of the most important appointments that I will probably have the opportunity of making ...’³ Amnesty International had earlier suggested, somewhat hyperbolically, that the appointee ‘will shape the next century’s human rights agenda...’⁴

The analysis that follows seeks to take stock of the achievements and shortcomings of the HCHR at a time when the baton is passing from José Ayala-Lasso, a cautious, low-profile, but very senior Ecuadorean diplomat, to Mary Robinson, an experienced human rights lawyer and former President of Ireland. The principal focus of the article is on the extent to which the nature of the office and the appropriate role to be played by its incumbent have been clarified by the experience to date.

II. Background to the Establishment of the Office

Between 1945, when a path-breaking commitment to promote and protect human rights was enshrined in the United Nations Charter, and 1993 when the second World Conference on Human Rights was convened in Vienna, the international community achieved immense progress in relation to human rights. This was particularly true in terms of acceptance of the principles themselves, the development of detailed and in many instances legally binding standards, the fashioning of a number of – albeit relatively crude – procedures for responding to violations, and the establishment of a rudimentary bureaucratic apparatus to assist these efforts. But, however important these achievements, there were also a number of major deficiencies which needed to be remedied.⁵

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¹ Cerna, ‘A Small Step Forward for Human Rights: The Creation of the Post of United Nations High Commissioner for Human Rights’, 10 *The American University Journal of International Law and Policy* (1995) 1265.

² Clapham, ‘Creating the High Commissioner for Human Rights: The Outside Story’, 5 *EJIL* (1994) 556 at 567. See also Lord, ‘The United Nations High Commissioner for Human Rights: Challenges and Opportunities’, 17 *Loyola of Los Angeles International and Comparative Law Journal* (1995) 329; and Tikhonov, ‘The UN High Commissioner for Human Rights’, 1 *Moscow Journal of International Law* (1995) 21.

³ *Transcript of Press Conference by Secretary-General Kofi Annan*, UN Press Release SG/SM/6255, 12 June 1997, at 9.

⁴ ‘New High Commissioner for Human Rights Must Confront Human Rights Abusers’, *Amnesty International News Release*, Amnesty Doc. AI index: IOR 40/05/97, 21 Feb 1997.

⁵ See generally P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (1992, 2nd ed., forthcoming 1998).

Principal among them was the fact that the machinery that had been established for dealing with serious violations of human rights was singularly ill-equipped to respond effectively or consistently to most such situations. Until the end of 1993 the main means at the disposal of the human rights organs (principally the General Assembly and the Commission on Human Rights) consisted of appointing special rapporteurs or thematic mechanisms (focusing on 'themes' such as torture, arbitrary executions, disappearances, arbitrary detention, etc.) and the exercise of the Secretary-General's 'good offices' role. The results achieved through these techniques varied considerably from one situation to another. They succeeded in giving substance to the principle of accountability and, in some instances, in improving the human rights situation. But, by the same token, the human rights community was acutely aware of the severe shortcomings of the machinery as a whole. Many situations escaped the attention they clearly demanded, critical reports elicited a very uneven response and sometimes none at all, and the different mechanisms were uncoordinated and far from comprehensive in range.

There were other obvious shortcomings as well. Economic, social and cultural rights were largely ignored and efforts to have the right to development taken seriously had not succeeded. Human rights were isolated within the United Nations system as a whole and dealt with only by a very small number of specialist units. The funds available were inadequate and the principal unit within the United Nations secretariat – the Centre for Human Rights – was under-resourced, inefficient and poorly-equipped for carrying out the tasks it was being called upon to perform. The head of the Centre carried little weight with his counterparts elsewhere in the system when it came to efforts to coordinate.

The end of the Cold War brought opportunities for enhanced cooperation that resulted from the termination of pervasive super-power rivalry. But the early optimism was rapidly offset by the number, intensity and complexity of the conflicts that were unleashed by dramatically changed circumstances in many countries. The World Conference on Human Rights, held in Vienna in June 1993, took place against this background and was generally seen to present a crucial opportunity to remedy at least some of the deficiencies. The central element in the reforms proposed by the major NGOs and key governments was the creation of the post of UN High Commissioner for Human Rights.⁶

Similar proposals had been on and off the international agenda since the late 1940s when the French had proposed an 'Attorney-General for Human Rights', a post similar in conception to that of the Advocate-General in the European Court of Justice. In 1950 and again in 1965, NGOs supported by the governments of Uruguay and Costa Rica respectively, had pushed for the appointment of a High Commissioner whose principal role would be the promotion of respect for the two International Human Rights Covenants.⁷ A third attempt

⁶ M. Nowak (ed.), *World Conference on Human Rights, Vienna, June 1993* (1994); and Center for the Study of the Global South, *Evaluating the Vienna Declaration: Advancing the Human Rights Agenda* (1994).

⁷ See Consultative Council of Jewish Organizations, *A United Nations Attorney-General or High Commissioner for Human Rights: A Memorandum Submitted to the Commission on Human Rights* (1950); Macdonald, 'United Nations High Commissioner for Human Rights', 5 *Canadian Year Book of International Law* (1967); Note, 'UN High Commissioner for Human Rights: A Call for Support', 30 *International Commission of Jurists Bulletin* (1967) 1, 84-117; R. S. Clarke, *A United Nations High Commissioner for Human Rights* (1972); Macdonald, 'United Nations High Commissioner for Human Rights: The Decline and Fall of an Initiative', 10 *Canadian Year Book of International Law* (1972) 40; Humphrey, 'United Nations High Commissioner for Human Rights: The Birth of an Initiative', 11 *Canadian Year Book of International Law* (1973) 220; and Rycroft, 'United Nations High Commissioner for Human

occurred between 1977 and 1983.⁸ For the most part, it seemed that these efforts had succeeded only in galvanizing the opposition of a great many governments who feared interference in their domestic affairs, a more intrusive and effective UN human rights programme, and a thinly concealed Western political agenda.

Despite prolonged negotiations, the Vienna Conference could not agree on any specific proposal and the matter was referred to the General Assembly. Since such compromises are often merely a prelude to killing off proposals, it came as a surprise to many observers that the Assembly was able to reach a consensus agreement on 20 December 1993.⁹ José Ayala-Lasso, then Permanent Representative of Ecuador to the UN and a former Foreign Minister, was appointed High Commissioner in February 1994 and took office on 5 April of that year.¹⁰ Several factors help to explain this breakthrough: the concerted campaign by NGOs, led primarily by Amnesty International;¹¹ strong support provided by a new US administration anxious to pursue a policy which distinguished it from its predecessor; uniform support from the countries of Central and Eastern Europe which had previously opposed any appointment; and skilful diplomatic brokering in which Ayala-Lasso played a major role.

Inevitably, the formula which brought success had all the advantages and disadvantages of a typical multilateral diplomatic compromise.¹² It sought to respond to each of the major shortcomings identified by key groups: the right to development was prominent, great hopes were invested in the coordination role, the office would be responsive to violations and it would strengthen the secretariat as a whole. But the many elements which were combined into a single resolution did not add up to a coherent whole and certainly did not flow from any clear vision as to the role of the office. These were matters to be worked out in practice, subject to the balancing of competing pressures, to the course of political events, to the personality of the High Commissioner, and to his relationships with his peers in the secretariat and in governments and with his boss, the UN Secretary-General.

The first HCHR's three years in office provide a basis upon which to identify with reasonable clarity the principal issues which are highest on the agenda. They include the relationship between the High Commissioner and the rest of the UN system, the availability of funding and staff, and the manner in which a broad but vague mandate is to be implemented.

Rights: A Proposed International Government Control Agency', 4 *Rutgers Camden Law Journal* (1973) 237.

⁸ Graefrath, 'On The Sixth Version of the Proposal for A High Commissioner for Human Rights', 4 *GDR Committee Human Rights Bulletin* (1978) 26; *Summary of information regarding consideration by United Nations organs of the question of the establishment of a post of United Nations High Commissioner for Human Rights*, UN Doc. E/CN.4/Sub.2/1982/26 (1982); and *Report of the informal working group on the question of the establishment of a United Nations High Commissioner for Human Rights*, UN Doc. E/CN.4/Sub.2/1982/36 (1982).

⁹ General Assembly Res. 48/141 (1993).

¹⁰ He was Foreign Minister from 1977 to 1979 and had been Permanent Representative to the UN since 1989. He was 62 when he took office as HCHR.

¹¹ Amnesty International, *Facing Up to the Failures: Proposals for Improving the Protection of Human Rights by the United Nations*, Amnesty Doc. IOR 41/16/92, Dec. 1992.

¹² See Clapham, *supra* note 2; Clapham, 'The High Commissioner for Human Rights and the UN Secretariat', forthcoming in Alston, *supra* note 5; and Cook, 'The Role of the High Commissioner for Human Rights: One Step Forward or Two Steps Back?', in Panel on 'Human Rights: Implementation through the United Nations', *Proceedings of the Annual Meeting of the American Society of International Law*, 89th Meeting.

III. The Role of the High Commissioner within the System as a Whole

The resolution establishing the office stated that ‘the High Commissioner ... will be the United Nations official with principal responsibility for United Nations human rights activities under the direction and authority of the Secretary-General’.¹³ This raises important questions as to both vertical and horizontal authority. The latter is considered below in the context of coordination.

In terms of vertical authority, the Secretary-General at the time the post was created, Boutros Boutros-Ghali, made it clear that he did not want such a post.¹⁴ When it was created anyway, he took two precautions. He appointed a cautious diplomat with no human rights credentials and a record of actively opposing any consideration of human rights matters by the Security Council. More importantly, he steadfastly refused to clarify the nature of the relationship between the head of the Centre for Human Rights, Assistant Secretary-General Ibrahima Fall (a disappointed aspirant for the senior post), and the High Commissioner. This allowed, and indeed encouraged, a political tug of war between two senior officials which paralyzed or disrupted many aspects of the work of the Centre, facilitated a divisive polarization among the staff, and ensured that both men were preoccupied with bureaucratic in-fighting at the expense of developing any clear substantive policy directions. This result can only have been intended by a Secretary-General who was well aware of the stalemate and acted only to ensure that no resolution was achieved. Whatever other achievements can be credited to Mr. Boutros-Ghali (and there are many), a contribution to strengthening the UN’s human rights machinery is certainly not among them.

As a result of this manoeuvring, the first High Commissioner, despite his formal seniority, was unable to establish a satisfactory line of authority over the staff of the Centre for Human Rights and remained unable to commit definitively even the very inadequate resources that were available within the Centre. The High Commissioner initiated a comprehensive management review of the Centre, which was undertaken by Price Waterhouse and is still in the process of being implemented. The resulting restructuring was very long overdue but it is far from clear that the correct formula has been identified or that it will be able to change the ethos of the Centre to the degree necessary. In his farewell speech, Ayala-Lasso proudly proclaimed that he was leaving his successor ‘a new, modern and efficient institution free of the defects and difficulties that had caused so many problems in the past ...’¹⁵ But Human Rights Watch’s description of the Centre for Human Rights as ‘much-criticized and ailing’ seems a lot closer to the mark.¹⁶

IV. Funding and Staff

An unstated assumption that appears to have been shared by proponents of the office and those fearful of vesting it with too much power was that very limited funds and staff would be

¹³ General Assembly Res. 48/141 (1993), para. 4.

¹⁴ The day before the Vienna Conference opened Boutros-Ghali contributed an article to the *Washington Post* of 9 June 1993 in which he wrote: ‘This is a time for ... quiet diplomacy Solutions cannot be imposed from the top down. Proposals for new bureaucracies [etc.] ... may only arouse discontent and resistance ...’

¹⁵ Statement of 10 March 1997. See UN HCHR website at: <http://www.unhchr.ch/HTML/menu2/3/e/chr53E.htm>, at 4.

¹⁶ Letter to UN Secretary-General, dated 7 March 1997. See HRW website at: gopher://gopher.igc.apc....0/00/int/hrw/general/40, at 2.

provided to the office. Allocations made so far, which perhaps also reflect Secretary-General Boutros-Ghali's own reluctance to see such a post created, have confirmed a political and financial determination to run the office on a shoe-string. For the first two years the High Commissioner was given a budget of \$1,471,400, resulting in a staff of three professionals and a very limited travel and operating budget. Requests to add another staff member to his office in 1996 were unsuccessful, as were requests to convert a large number of temporary posts in the Centre for Human Rights into established posts which were deferred pending the outcome of the restructuring. A further 6 per cent cut in the UN's overall budget was also applied to the High Commissioner and the Centre in February 1996 (A/51/641). The result has been a vicious circle in which the importance of fundamental restructuring has been widely recognized but the granting of the additional human resources with which to accomplish the task has been postponed until it is clear that the restructuring has been a success.

At the same time, the number of tasks being given to the High Commissioner has continued to expand, rather dramatically in the case of the various field activities. The High Commissioner has thus been compelled to supplement the entirely inadequate resources at his disposal by seeking voluntary, extra-budgetary, special purpose contributions. The Rwandan operation, for example, which is the only major field operation to be funded almost entirely on a voluntary basis, cost close to US\$10,000,000 in 1996. This led to the creation of a Voluntary Fund for the Support of the Activities of the High Commissioner/Centre for Human Rights.¹⁷ Within that fund, US\$25,000,000 has been sought for a Fund for Human Rights Field Activities. While contributions have been forthcoming, they have not been especially predictable or assured. Moreover, a situation in which so much of the High Commissioner's overall budget is dependent upon the whims of individual governments and the vagaries of their own budgetary situations is highly unsatisfactory.

V. Defining the Mandate

The High Commissioner's mandate has always been the most contentious issue. At the end of the negotiations, the recipe that attracted consensus was a combination of vagueness and comprehensiveness. The former ensured that no specific independent fact-finding mandate was conferred, the coordination role remained limited and imprecise, responding to violations was only one part of a broad mandate, and questions of staff and funding were left largely unaddressed. The latter resulted in equal attention being given to both sets of rights – economic, social and cultural, and civil and political – as well as to the right to development, and an emphasis being placed upon 'non-threatening' activities such as human rights education, public information programmes and the provision of technical assistance ('advisory services'). While the generality of the mandate leaves the High Commissioner with a great deal of discretion, its key provision requires him or her to play 'an active role ... in preventing the continuation of human rights violations throughout the world ...'

The first High Commissioner sought to package his activities in a more succinct fashion.¹⁸ Thus he told the Commission on Human Rights in February 1995 that his principal tasks were: urgent measures, prevention, technical assistance, coordination and cooperation. But the open-endedness of his mandate, combined with the great expectations held by NGOs on the one hand and the preference of many governments for a limited, low-key and consensual

¹⁷ UN Doc. A/51/36 (1996), para. 121.

¹⁸ See generally *Reports of the United Nations High Commissioner for Human Rights*, UN Docs. A/49/36 (1994); A/50/36 (1995); and A/51/36 (1996); *The High Commissioner for Human Rights: An Introduction, Making Human Rights a Reality*, United Nations publication, Sales No: HR/PUB/HCHR/96/1.

role on the other, compel the High Commissioner to walk a rather unstable tight rope. While he took steps in various directions during his three years in office, he failed to develop any clear vision of the role the office might play. The challenges faced by the office can best be illustrated by reference to the divergent responses to the High Commissioner's principal activities so far.

A. Urgent measures

On 6 April 1994, just one day after Ayala-Lasso took office, the situation in Rwanda erupted after the shooting down of the President's plane. The genocidal activities that followed demanded a UN response and, to his credit, Ayala-Lasso took up the challenge. He visited the country and then gathered support for an emergency session of the Commission (only its third ever). The Commission appointed a Special Rapporteur but also, at Ayala-Lasso's suggestion, agreed to send six human rights monitors. While the target number was eventually increased to 147, Ayala-Lasso had no funds and his efforts were at the mercy of special appeals to donor governments. Even when some funds were forthcoming, the Centre for Human Rights proved incapable of mounting such an operation effectively. As Ayala-Lasso told the General Assembly in November 1994, the operation was a 'political success but a logistical failure'. Nevertheless an important precedent had been set and the management of the mission was substantially improved by the appointment, in 1995, of former Amnesty International Secretary-General, Ian Martin, as director. In February 1997 there were a total of 174 staff in Rwanda under the auspices of the HCHR. At the same time, Ayala-Lasso was advocating an increase to 300 staff. By this time, however, he was portraying them not as 'monitors' but as observers whose tasks were to 'provide the Government with technical advice, assistance, training, education and information on human rights ... so as to facilitate the task of rebuilding Rwanda...'¹⁹

Critics have also noted the disparity between the time and resources devoted to Rwanda by the High Commissioner and his relatively low profile on certain other major threats to human rights. While he sent a mission to Chechnya, it was comparatively late in the day and had few visible results.

B. Prevention

A long-standing criticism of UN human rights action concerns its essentially reactive nature. Thus, when events in Burundi looked likely to take the same path as those in neighbouring Rwanda, the High Commissioner established a ten-person office in Bujumbura to oversee a technical cooperation programme to provide human rights training to government officials, the military, the judiciary, the police and others. Monitors were not included in the programme until the General Assembly and Commission called for them. While various other situations which would also have been appropriate candidates for such preventive measures have yet to be addressed, a useful precedent had thus been set. In his Human Rights Day Message in December 1996 the High Commissioner noted with pride that when he had taken office 'there were hardly any human rights staff in the field: today [there are] more staff in the field than at headquarters'.²⁰

¹⁹ *HCHR News*, vol. 1, no. 9, Dec. 1996–Jan. 1997, at 3.

²⁰ As at 14 February 1997 the following staff presence in the field had been established:
 Burundi: 31 (8 international UN staff; 21 locally recruited UN staff; and 2 UN volunteers)
 Cambodia: 50 (11 international UN staff; 33 locally recruited UN staff; and 6 UN volunteers)

An important, if somewhat delayed, initiative was the opening of a six-person office in Bogotá, Colombia in April 1997. Its stated objectives are to:

provide technical assistance; monitor the human rights situation in the country; receive complaints and allegations of human rights violations and other abuses, including breaches of humanitarian norms ...; follow up the complaints and allegations received with the national authorities and appropriate international human rights bodies and mechanisms in Geneva; and report periodically to the High Commissioner, who will report to the Commission on Human Rights.²¹

This list of functions clearly illustrates the reason why many observers remain somewhat ambivalent about the development of a sizeable field presence in certain situations. They question whether the Centre for Human Rights is appropriately placed to undertake such operations and fear that it might be transformed by default into an operational agency, a role for which it has not been equipped, and that this might come at the expense of its core monitoring and accountability functions.²² On the other hand, the Colombia office clearly has the potential to be far more effective as a monitor than does a Special Rapporteur operating on the basis of an annual two-week visit, and it has the additional attraction of being able to respond directly to complaints.

Efforts to establish an Indonesian 'field presence' were, however, far less successful. After the High Commissioner had reported to the Commission in 1996 on his visit to Indonesia and East Timor, the Chairman of the Commission announced provisional agreement to 'look into the possibility of the High Commissioner assigning a programme officer within the office of the UNDP in Jakarta in order to follow up the implementation of the technical cooperation agreement. This officer would also have regular access to East Timor.'²³ Had such an initiative been formalized, there would have been a strong risk that nothing more than technical cooperation activities would be undertaken and that the Government could then claim to have

Former Yugoslav Republic of Macedonia: 1 (locally recruited UN staff)

Bosnia and Herzegovina: 9 (4 international UN staff; 3 locally recruited UN staff; and 2 UN volunteers)

Croatia: 6 (2 international UN staff; 3 locally recruited UN staff; and 1 UN volunteer)

Federal Republic of Yugoslavia: 4 (2 international UN staff; 2 locally recruited UN staff)

Abkhazia, Georgia: 1 (international UN staff)

Mongolia: 3 (locally recruited UN staff)

Rwanda: 174 (36 international UN staff; 44 locally recruited UN staff; and 65 UN volunteers; 21 provided by the European Commission; 4 each provided by Denmark and Norway)

Zaire: 3 (1 international UN staff; 2 locally recruited UN staff)

Gaza: 1 (international UN staff)

In addition, consultants employed under the Technical Cooperation Programme were working in Latvia, Papua New Guinea, Togo, Malawi, Haiti and Albania. The total is 289. Source: United Nations Office at Geneva, *Press Release NOTE/97/4*, 14 February 1997.

²¹ *HCHR News*, vol. 1, no. 9, Dec. 1996–Jan. 1997, at 2. The initiative was based on a statement of 23 April 1996 by the Chairman of the Commission on Human Rights. UN Doc. E/1996/23 (1996), at 297.

²² E.g. Stapleton, 'Amateurs Posing as Professionals: The United Nations Human Rights Field Operation in Rwanda', *Human Rights Tribune*, June/July 1995, at 13.

²³ UN Doc. E/1996/23 (1996), at 361.

cooperated fully with the High Commissioner in response to alleged violations. But, in any event, the Indonesian Government subsequently announced that it was not prepared to go forward, even on that basis.

C. Technical Assistance

Over the past decade the Centre for Human Rights has greatly expanded its role in providing assistance in the form of drafting legislation, assisting in the development of new national institutions to protect human rights, the provision of human rights training and education and other such activities. While the programme was set up long before the post of High Commissioner was created, Ayala-Lasso was especially active in offering assistance to the countries he visited, including the establishment of the various field offices noted above. In his farewell address to the Commission on Human Rights he said that he had sought to expand the programme ‘to the maximum degree’, resulting in there being ‘more than 400 technical cooperation activities’ in 1996 alone.²⁴ Critics have questioned whether this should be a priority concern, whether such assistance should be provided by the Centre as opposed, for example, to the United Nations Development Programme, whether clear enough guidelines exist to prevent the blurring of the line between assistance and political reinforcement, and whether the enthusiasm of governments for such activities derives mainly from a concern to divert UN attention away from their continuing violations. In restructuring the Centre for Human Rights, Ayala-Lasso combined field operations and technical cooperation activities within a single Activities and Programs Branch, thus reinforcing these concerns.

D. Coordination

In terms of horizontal authority, the first High Commissioner attached great importance to his coordinating role but his achievements appear more cosmetic than real. In debates leading to the creation of the post, competing views were expressed as to whether the Office should be located in New York or Geneva. The former is central to the political action, while the latter is the location of the Centre and of several key humanitarian agencies. Geneva was preferred by most governments, but on the assumption that a senior official would represent the High Commissioner on a permanent basis in New York. While Geneva was chosen, it took well over a year for the New York post to be established and it remained a mid-level liaison post rather than becoming a force for coordination within the UN secretariat.

The inter-agency dimension of coordination is especially important. In his 1996 Annual Report the High Commissioner characterized enhanced cooperation among UN bodies in relation to human rights as ‘vital’ and indicated that his ‘aim is to facilitate this process through enhancing channels of information ..., enhancing exchange of relevant expertise and undertaking joint projects’. Until the late 1980s genuine collaboration between the Centre for Human Rights and most of the other agencies was practically non-existent. It has developed gradually since that time and the High Commissioner’s rather ambitious stated goal is to act ‘as a clearing house and focal point for initiatives in the area of technical cooperation for human rights’ in relation to the entire UN system, including the development and financial institutions.²⁵ But these agencies have consistently shown a great reluctance to coordinate with anyone else, especially when the latter can offer no resources, few staff and limited political clout.

²⁴ *Supra* note 15, at 3.

²⁵ UN Doc. A/51/36 (1996), para. 13.

The High Commissioner's 1996 Annual Report lists important developments in relation to UNICEF, UNESCO, UNHCR, UNDP and WHO. However, only two of these appear to have real substance. The arrangements with UNICEF have yielded considerable benefits, while those with UNDP have affected a limited area of the two agencies' mutual activities and have the potential to be more productive in the future. The first High Commissioner also initiated contacts with the World Bank but his principal concern seemed to be to raise project funds from the Bank rather than to promote a more sophisticated interaction. Efforts to ensure the integration of a human rights component within the UN's peace-keeping activities met considerable passive resistance, although some training programmes have been initiated. Within the context of the Advisory Committee on Coordination (the ACC), the most important system-wide forum of its kind, the High Commissioner was perceived to have been so ineffectual that, in November 1996, the Committee's executive body actually urged him to contribute more actively.²⁶ Ayala-Lasso's own verdict on the degree of success he achieved *vis-à-vis* other institutions is probably implicit in his parting prescription for the future when he told the Commission that 'agencies and departments of the United Nations should strive to identify effective ways to work jointly instead of guarding jealously their respective mandates'.²⁷

One area in which the first High Commissioner came to make a valuable contribution was in relation to the large-scale international conferences organized by the UN. Ayala-Lasso made no significant contribution to the Copenhagen or Cairo conferences but did grasp the nettle in relation to Beijing, where he submitted a useful commentary upon some of the shortcomings of the draft conference declaration. Similarly, he took a positive stance in relation to the Habitat II Conference and the issue of the weight, if any, to be accorded to the right to adequate housing.

A different dimension of coordination concerns the UN's human rights machinery and what the High Commissioner has termed his responsibility for its 'rationalization, adaptation and strengthening'. While there is a good deal to be done in this area, it remains to be seen whether the High Commissioner can play much more than a limited catalytic role. He has not proposed any major reforms, perhaps for fear of alienating one or more of his constituencies. He encouraged a more cooperative approach to be taken by Special Rapporteurs, such as the three dealing with the Great Lakes region (specifically, Burundi, Rwanda and Zaire). He could perform a valuable follow-up function in promoting the recommendations of the Special Rapporteurs, working groups and treaty bodies. In some cases he seems to have done so; in others he appears to prefer a much more low-key profile.

Given the High Commissioner's lack of staff and inadequate resources, it is not clear that the office will be able, even with a more effective effort in the future, to achieve a great deal in terms of authentic coordination within a system that has shown itself remarkably resistant to such endeavours.

E. Cooperation

Ayala-Lasso stated that the main principle governing his work was 'international cooperation at all levels' and indicated that he would act 'in a spirit of dialogue, consensus and solidarity'. In his farewell address, he said his aim had been to generate 'consensus and confidence' and to avoid 'the easy approval that any denunciation or condemnation obtains'.²⁸ In this spirit he visited some 27 countries in his first 18 months in office at the invitation of governments. His

²⁶ UN Doc. ACC/1996/2/Add.1 (1996), para. 7.

²⁷ *Supra* note 15, at 3.

²⁸ *Ibid*, at 2.

pace slowed considerably in the subsequent 18 months. Although he has raised difficult issues on such occasions, he has not published a detailed account of any visit. His preparedness to visit countries which have refused access to Special Rapporteurs has drawn particular criticism from NGOs. It has been suggested that there needs to be a carefully coordinated approach between the High Commissioner and Special Rapporteurs and that conditions should be stipulated to ensure that his visits will not be manipulated by governments to enhance their legitimacy at the expense of human rights. Striking an appropriate balance between being open to ‘a dialogue with all Governments ..., without conditions or prejudice’, and not undermining efforts to monitor and apply pressure to recalcitrant governments will continue to be a major challenge.

F. Economic, Social and Cultural Rights and the Right to Development

In the negotiations to establish the office, developing countries attached particular importance, in defining the HCHR’s mandate, to the balancing of other rights against the dominant emphasis traditionally accorded to civil and political rights. In his 1996 Annual Report, the High Commissioner states that he ‘has assertively sought to secure that economic, social and cultural rights, and particularly the right to development, acquire a higher profile within the framework of United Nations human rights efforts’.²⁹ There are, however, very few results to show for any such assertiveness. Indeed, reading through the entirety of the High Commissioner’s report one finds no reference, except in relation to the Habitat II Conference, to any tangible activity that the High Commissioner has carried out in relation to these rights. In the three years since he took office, the UN human rights programme has continued to devote almost no attention to them and to provide virtually no resources for their promotion. In May 1996 the Committee on Economic, Social and Cultural Rights reiterated its long-standing request for the appointment of a specialist in this field within the Centre for Human Rights. The Committee noted that a post had been established in 1993 specifically for the purpose of assisting it, but that the relevant post had immediately been diverted to provide temporary assistance to the office of the High Commissioner. This request resulted in nothing more than an acrimonious letter from the HCHR.³⁰

The first High Commissioner consistently characterized the right to development as a species of economic rights, thus doing an injustice to the much more comprehensive nature of that right and overlooking the very specific and very different nature of economic, social and cultural rights *per se*. This confusion was reflected in virtually every report or statement he made. In summary, it can be said that the rhetorical importance attached to these rights by the first High Commissioner failed to match the reality.

VI. Evaluating the Results of the First Three Years

The balance sheet at the end of three years is, inevitably, a mixed one. Amnesty International, in assessing the performance of Ayala-Lasso upon the announcement of his resignation, concluded that his record had ‘been disappointingly mixed’ and that he ‘consistently failed to confront governments that were responsible for gross violations of human rights’.³¹ Another commentator concluded that he had ‘relied exclusively on “quiet diplomacy”, [thereby] squandering his unique potential to stigmatize illegal conduct. He visited scores of countries

²⁹ UN Doc. A/51/36 (1996), para. 4.

³⁰ The correspondence is reproduced in UN Doc. E/1997/22 (1997), Annexes V and VI.

³¹ *Supra* note 4.

but almost never reported on what he saw or discussed.³² Human Rights Watch wrote, in a letter to the Secretary-General, that Ayala-Lasso's resignation and the transfer of his deputy created 'a situation of unprecedented opportunity ... to give [the UN's] human rights machinery a much-needed overhaul'.³³

Governments, on the other hand, are likely to be rather more positive in their assessments.³⁴ Ayala-Lasso rocked very few boats but, at the same time, he was an energetic diplomatist on behalf of human rights. There is always a risk that overt activism on the part of the first holder of an office that can be abolished by the very same governments that are being monitored will provide the excuse for its elimination. Just as the European Court of Human Rights moved with 'all due deliberation' in its first two decades, so too it is necessary to consolidate and entrench the status of a new office such as that of High Commissioner. Moreover, Ayala-Lasso had to work with a Secretary-General whose affection for human rights was at best intellectual and who created and maintained a bureaucratic stalemate or no-man's land in Geneva with which Ayala-Lasso had to contend. The staffing and funding arrangements provided for the High Commissioner were equally inadequate.

In essence, Ayala-Lasso behaved as one might expect a former Foreign Minister with continuing domestic political ambitions to behave. He was extremely reluctant to take a strong public stance in relation to violations, except when condemnation was the only response that the vast majority of governments could reasonably have expected of him. By the same token, he was certainly more engaged than a number of his predecessors at the head of the UN's human rights bureaucracy.

It is interesting to reflect upon the conclusions to be drawn from the uncritical acceptance which greeted the resignation of the first High Commissioner in order to again become Foreign Minister of Ecuador. It seemed to be widely assumed that such an order of priorities was appropriate and that the post of High Commissioner was self-evidently less important and less prestigious than that of Foreign Minister. More charitably, it seemed to be accepted that when the call arose to serve the people of one's own country, it was clearly more compelling than the call to serve humanity as High Commissioner. The contrast between this reaction and the simultaneous outcry in the United States media that compelled Kenneth Starr, the Special Prosecutor appointed by Congress to investigate the Whitewater Affair and the involvement of President Clinton and Hilary Rodham-Clinton therein, to remain in his post until his job was completed, is dramatic. By the same token, it has to be acknowledged that the High Commissioner was merely following a well worn path, taken, for example, in the early 1990s by Thorwald Stoltenberg who rather abruptly resigned the post of High Commissioner for Refugees in order to become Norwegian Foreign Minister. It may thus be unfair to criticize Ayala-Lasso. But if the post of High Commissioner is to command the respect it deserves, this order of priority will need to be reversed and candidates for the post will need to be reminded that they are expected to serve out their terms rather than resigning as soon as a more attractive offer comes along.

Perhaps the fairest verdict on the first High Commissioner is that he did nothing to jeopardize the continuity of governmental and public support for the Office and that he laid the

³² Brody, 'Give the World a Clear Voice for Human Rights', *International Herald Tribune*, 6 March 1997, at 6.

³³ *Supra* note 16.

³⁴ The Chinese Government thanked him 'for having chosen dialogue and cooperation rather than confrontation and selectiveness'. UN Doc. E/CN.4/1997/SR.8 (1997), para. 15. The Dutch representative commented that he had transformed the office 'into a well-established and active institution open to dialogue with States'. *Ibid*, para. 14.

groundwork for the appointment of a better known international personality with a more abiding commitment to uphold human rights.

VII. Looking Ahead

After the resignation of Ayala Lasso, one commentator called for the appointment of ‘a true champion of liberty ... who is not afraid to openly challenge governments’.³⁵ Another emphasized the need for ‘a fearless human rights czar’.³⁶ That may be something of an overstatement, however, partly because fearlessness is not a recipe for success in an international diplomatic context unless moderated by prudence and underpinned by a strong sense of strategy. And partly because the United Nations system, with its in-built checks and balances and its penchant for endless turf battles, brooks no czars, even one whose task is to defend humanity against inhumanity.

In the event, Mary Robinson’s appointment was announced by the Secretary-General on 12 June 1997, and approved by consensus by the General Assembly five days later.³⁷ Her credentials could hardly have been better. Before becoming President of Ireland in 1990, she had been a Professor of Constitutional and Criminal Law, a parliamentarian, an active participant in various human rights and social sector NGOs at both the domestic and international levels, and a barrister with experience before the European Court of Human Rights.³⁸

She faces four main challenges. The first is to identify an appropriate role for the office, one which does not seek to reach beyond certain limits and which ensures that what is done can be done effectively. She will need to play a central role in maintaining the importance accorded to human rights on the international agenda at a moment in history when it would suit a great number of governments to downgrade it. The task is to develop and communicate a clear vision for the office and to establish a workable balance between consensual diplomacy and a preparedness to speak out in defence of human rights. While it will not be easy to strike such a balance, her predecessor clearly erred on the side of the former. The second challenge will be to give the office a viable status or profile *vis-à-vis* the Secretary-General and other parts of the international system. Ultimately, a HCHR cannot work at odds with a Secretary-General since the latter can cut the lifeline in a hundred different ways. But a degree of independence from the day to day political pressures that swirl around the office of the Secretary-General is indispensable if the office of HCHR is to be meaningful. Robinson’s task will be to cajole governments gradually to accept that the office of HCHR cannot be just another UN exercise in high-level politicking and horse-trading. And indeed Kofi Annan has demonstrated by Robinson’s appointment that he may well prove to be far better disposed to human rights than any of his predecessors, none of whom distinguished themselves in that respect.

The third challenge lies in the policy domain. There is a pressing need to establish a clearer line between the function of responding to violations of human rights and that of providing friendly advice and assistance. Given the difficulty the first HCHR had in establishing genuinely cooperative relations with other parts of the UN system, the better strategy might be to work through those other agencies rather than in effective competition with them when it comes to technical cooperation and related activities. Similarly, it is essential that something be done to take economic, social and cultural rights seriously. Ayala-Lasso had no

³⁵ Brody, *supra* note 32.

³⁶ Deen, ‘Search for a Fearless Human Rights Czar’, *IPS [Inter Press Service] Daily Journal*, vol. 5, no. 25, 24 Feb. 1997, at 2.

³⁷ UN Doc. A/51/924 (1997) and UN *Press Release* GA/9254 of 17 June 1997.

³⁸ UN *Press Release* SG/A/638 of 12 June 1997.

feel, and apparently little sympathy, for those rights. A HCHR from Western Europe will have less leeway in such matters if she is to assuage the scepticism of many developing countries. Equally, there is still a long way to go in order to achieve an adequate gender balance in the human rights work of the UN, despite the achievements to date of the 1990s. The final challenge for the new HCHR will be to bring the reality, rather than just the restructured appearance, of managerial competence to the Centre for Human Rights. For that task she will need not only formidable skills of her own and the ability to motivate a demoralized secretariat, but also adequate management assistance and additional financial resources. The moment has come when Western governments in particular will have to give financial substance to their fine words.