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NO DISTANT MILLENNIUM : THE UN HUMAN RIGHTS INSTRUMENTS AND THE PROBLEM OF DOMESTIC JURISDICTION*

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Prior to the establishment of the United Nations, the questions of promotion and protection of human rights was generally considered as a matter within "domestic jurisdiction" beyond the reach of international law/organization. While the Covenant of the League of Nations was being drafted, a Japanese proposal for insertion of "the principle of the equality of nations and the just treatment of their nationals" was quietly shelved, the reasons, for non-acceptance of such a proposal — reflecting only a rudimentary adherence to the principle of universality of human rights — were of course political, and the main opposition came from the United States. However, its rejection did not have any major significance which indicates that the concept of international concern for human rights had not by then achieved world-wide and serious concern.

It is true that the League Covenant did contain certain provisions which had bearing on promotion of general welfare of the people; particularly in regard to the "minorities" in Europe and the inhabitants of Mandate territories. However, it fell short of spelling out international recognition of the concept of human rights. It is in this sense that, compared to the League Covenant, the UN Charter represents a revolutionary change, since it reaffirms, in unequivocal terms to quote its Preamble, "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women . . . without distinction as to race, sex language or religion". Thus, the questions of human rights are no longer matters which are the concern of individual member states.

While emphasizing the concept of human rights and its universal application, the UN Charter has also given recognition to the concept of domestic jurisdiction. Article 2(7) of the Charter specifically lays down that: "Nothing contained in the . . . 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 . . . Charter. . . ." Do the provisions

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in the Charter relating to human rights and the one relating to domestic jurisdiction come into conflict? Did the domestic jurisdiction provision impede or influence the drafting of various human rights instruments? To what extent are the states allowed to retain their sovereignty in recognizing, promoting and ensuring the protection of human rights of their citizens? Does there exist any tension between the doctrine of state sovereignty and international protection of human rights by the United Nations? What progress has the United Nations made in promoting human rights and effecting change in the state behaviour in this regard? Has it succeeded in inducing states to observe international standards/norms of human rights? To what extent is it successful in inducing domestic changes? The purpose of this paper is to explore answers to these and other related questions. The discussion/analysis that follows, however, is synoptic in nature.

I. WHETHER HUMAN RIGHTS ARE MATTERS OF DOMESTIC JURISDICTION

The opinion among international jurists and UN experts is divided on the question: "Is the question of human rights essentially a domestic matter?" There is a group of scholars who contend that matters of human rights do not fall under the "domestic jurisdiction" of states. They based their contention on the fact that if a particular question was covered by some provision of the Charter, it became a matter of international concern. For instance, Hersch Lauterpacht argues that the prominent position accorded to human rights in various Articles of the Charter "are no mere embellishment of a historical document", nor was it "the result of an after-thought or an accident of drafting", or "the vague expression of a trend or a pious hope". He has said that the significance and the character of human rights as provided in the Charter are not at all of a declaratory nature, but they impose legal obligations on member states. Human rights having become the subject of a solemn international obligation and one of the fundamental purposes of the Charter, are no longer a matter falling within the domestic jurisdiction of UN members.[1]

The opponents of these views point out that mere mention of human rights in the UN Charter does not testify to its binding effect, that they contain only a programme of principles, not legal norms; that the human rights are not defined in the Charter, and that under the Charter the members have only agreed to "promote" international co-operation in these matters. Manley O. Hudson doubted the binding effect of these provisions. He interpreted the words, "promote", "promoting", and "promotion", which are invariably used in the Charter provisions concerning human rights, in such a manner as to contradict the point that these provisions have created an obligation for member states with regard to the protection of such rights. "Member states had not, by signing the Charter, assumed a legal obligation to treat persons under their jurisdiction with respect for human rights . . . They merely had agreed to "promote international cooperation to that end".[2] Likewise, Felix Ermacora, while distinguishing between the "promotion" of human rights and the "protection" of those rights, argues that the "promotion" of human rights is no longer essentially within domestic jurisdiction, while their

protection falls within the reserved domain of states.[3]

Manouchehr Ganji has refuted the contention of Manley Hudson. If in the opinion of Hudson, the states are free to treat their nationals in any manner they please, then, he questions, what would be the sense of the obligations created under the terms of Art. 55 and 56 of the Charter? The answer to this question depends on the definition which may be attached to the word "promote". He cites the meaning of the word "promote" from the *Oxford English Dictionary* as follows: "To advance, to raise to a higher grade or . . . to further the growth, development progress". From these definitions of the term, Ganji draws a legitimate conclusion that a legal obligation to promote comprises the legal obligation to protect. It might be stated that to advance, to raise to a higher grade, to further growth—all these terms imply: (1) concern for the preservation and protection of something, that already is in existence; (2) concern for the development and advancement of the thing that already exists. Promotion by its very nature pertains to conservation.[4]

However, it should be borne in mind, before making such pessimistic comments such as those of Hudson, that the adoption of the Charter announced the new international law of human rights. The new law buried the old dogma that the individual is not "subject" of international politics and law and that a government's behaviour towards its own nationals is a matter of domestic, and not of international, concern. It penetrated national frontiers and the veil of sovereignty. It removed the exclusive identification of an individual with his government. It gave the individual a part in international politics and rights in international law, independently of his government.[5] Louis B. Sohn, participating in a human rights forum, described 1945 as "a very important year in the area of human rights . . The Charter ... was really the first international instrument in which the countries of the world agreed to promote human rights on a universal level and to try to see to it that something is done to ensure that human rights are being observed.[6] Another international lawyer has pointed out that the Charter is, *inter alia*, a human rights instrument. It is the foundation upon which a large body of international human rights law has been built.[7] The language of the Charter reflected an impressive show of confidence on the part of the Charter's framers in the wisdom of an attempt to frame an International Bill of Rights. The Preamble of the Charter spoke in the name of "the Peoples of the United Nations". The purpose of these opening words was to emphasize that the Charter was an expression of the will of the peoples of the world. Human rights was a new approach of the Charter which distinguished it from the League Covenant and made it superior.

UN PRACTICE

This controversy—whether or not human rights are essentially matters of domestic jurisdiction—was not limited to academic circles, but became for many years a general topic for heated debate in UN practice. It was argued (especially by those states where human rights were alleged to have been violated) that the protection of human rights is a matter "essentially within the domestic jurisdiction" of the state concerned, and the United Nations, while it might adopt general measures promoting human rights, need not concern itself with the violations of

human rights in particular states: because human rights are incorporated in the Charter, in order to serve as goals to be inspired (not enforced legally), as they contain only a programme of principles, not legal norms, and they are to be *promoted,* not protected.

This line of argument was reflected in the Assembly's debates on various questions of human rights which came to its forum. It was contended that the Charter did not impose international obligations in respect of human rights, and did not remove them from the realm of domestic jurisdiction where they traditionally belonged. The human rights provisions of the Charter were mere declarations of Purpose and Principles (it was argued), rather than statements of legal obligation. The representatives belonging to this group held that the Universal Declaration was merely a recommendation by the General Assembly and had no binding character. The fact that human rights had not been defined in the Charter, nor any machinery for their implementation prescribed therein, it was said, was a significant indication that they did not impose obligations, notwithstanding their repeated mention in the Charter. The South African delegate (Smuts) said, due to the lack of definition or the absence of "an internationally recognized formulation" of such rights, the Charter had made them as vague concepts in respect of which member states could not be said to have undertaken any obligations.[8] More than once, a statement of Committee II/3 from the records of San Francisco Conference was cited[9] in support of these contentions. One delegate remarked that even if the human rights were present, no standards were laid down to verify in the Charter.[10]

It was also said that Art. 2(7) had an overriding effect and applied to all the provisions of the Charter, including those on human rights and fundamental freedoms. It was suggested during discussion on specific cases, that there were certain apparent contradictions between Art. 2(7) and Art. 55 and 56 of the Charter, it would be desirable to determine which provisions took precedence over others and that it would therefore, be useful to refer the issue to the International Court of Justice for an Advisory Opinion.[11]

The opponents of these views argued that the repeated mention of human rights in the Charter have made them obligatory in nature. In support the following arguments were submitted. *Firstly,* it was held that human rights did not fall essentially within the domestic jurisdiction of states. The Charter provisions on human rights have imposed obligations on member States, and that in question whether a state had fulfilled its obligations under the Charter was not a matter of domestic jurisdiction. It was argued that Art. 2(7) applied to the whole Charter and made no distinction between provisions which imposed international obligations and those which did not. It could not be evaded, therefore, by invoking the existence of international obligations created by other provisions of the Charter, even those on human rights.

Secondly, it was maintained that under customary international law, every State had the duty to respect the human rights and fundamental freedoms of all persons and that international duties were beyond the scope of domestic jurisdiction.

Thirdly, it was held that by adopting the Universal Declaration, in 1948, the

Covenants on human rights in 1966, besides the scores of other Covenants on specific rights, the Assembly had removed them from the reserved domain of States.

Fourthly, it was argued that to admit the claim of domestic jurisdiction with respect to human rights would destroy the edifice which the Charter had constructed for the protection of these rights and would render meaningless some of its important provisions.

Fifthly, it was held that if the collective action of states for the protection of human rights had been permissible under international law of the 19th century (the reference was towards the practice of "humanitarian intervention"), it was surely no less permissible under the law of the United Nations.

Sixthly, it was maintained that the protection of human rights was an international matter since man was no longer, as in the past, indirectly subject to international law but had become an additional subject of international law and of primary concern of the international community.

Finally, it was said that violation of the Charter provisions on human rights and the question of race relations did not fall within domestic jurisdiction. Items which concerned such violations were not only items which the Assembly could properly discuss and make recommendations on, but they involved one of the most important issues confronting the United Nations, on the solution of which the future of the Organization itself would to a large extent depend.[12]

There were also arguments which were slightly different from the above contentions. Firstly, there were a few representatives who, while agreeing that violation of human rights fell in principle within domestic jurisdiction, considered that these violations became matters of international concern only when they assumed proportions capable of affecting relations between states.[13] Secondly, some of the delegates, who opposed UN jurisdiction on the ground of Art. 2(7), later modified their position so far as the policy of *apartheid* was concerned. They agreed that *apartheid* could be considered so exceptional as to be *sui generis* and that therefore their delegations were able to consider proposals regarding that question on their merits. *Apartheid* now entailed such international repercussions that its discussion had been freed from the limitation imposed by Art. 2(7)[14] Thirdly, a distinction was drawn between accidental violations of human rights and systematic violations which had international repercussions and created unrest beyond the borders of the state where they occurred. The former could fall within domestic jurisdiction, the latter could not.[15]

Regarding the position taken by the South African delegate (that the Charter provisions did not impose any legal obligations in respect of human rights and fundamental freedoms), *inter alia*, it can be said that it was an evasion of the issue, rather than its refutation. Because, this view rests on the assumption that the human rights provisions of the Charter are not binding as the particular rights are not defined and the subject matter is not clear. That is, it presupposes that whenever an international standard was made available, the Charter provisions would begin to apply retrospectively. In other words, if it be recognized that the Universal Declaration has filled the gap by defining the possible human rights, then a standard was made available, and the provisions of the Charter should be

accepted as applicable.[16] But this was denied later and it was argued that human rights will cease to be domestic only when a Convention to that effect had been signed by the respective states..

The US delegation also supported this view.[17] Thus, in view of the adoption of Covenants on human rights and their coming into force, it can now be said that the contracting parties to the Covenants cannot claim that human rights of their citizens are within their exclusive jurisdiction.

Replying to the above contentions, it was argued (by the proponents of the expanding UN role) that the mere fact that no definite standard was available was no argument at all. The mention of human rights in the Charter was not made with the intention of creating them, because they already did exist (the French delegate supported this view),[18] but with a view to proclaiming a solemn pledge to safeguard their observance and extend their exercise. The need for the Universal Declaration was felt, because it was considered necessary to define the scope of those rights.[19] The delegation of Philippines remarked that the definition of human rights was postponed to later stage due to the same reasons which applied to the U.S. Constitution (The US Bill of Rights was added to the Constitution after twelve years of its adoption). It was also said that, if a nation (specially South Africa) had signed the Charter on the understanding that no effort would be made to define human rights at a later stage, it has committed an error. The authors of the Charter had clearly anticipated the definition of human rights and the formulation of measures to implement them. The postponement of the definition of human rights to a later stage was justified as it required some time.[20] This view is based on the doctrine of natural law.[21]

Thus, in sum, it can be said, in the prevailing opposing viewpoints on the question whether human rights questions fall within domestic jurisdiction, that the answer to this question largely depends on whether or one considers Charter provisions imposed legal obligations. The jurisprudence of the United Nations can expand to the extent states consider UN resolutions (concerning human rights) as binding.

II. THE UN REGIME OF HUMAN RIGHTS — EXPANDING INTERNATIONAL JURISDICTION

Though opinion is divided both among scholars and member states, on the question whether human rights can still be considered as a matter within domestic jurisdiction, the UN experience during the last 50 years in drafting scores of human rights instruments for promoting/protecting human rights and the state practice of voluntarily ratifying these Conventions/Covenants and their moderately successful mechanisms, point towards an unusual conclusion: that *human rights are simultaneously matters of both international and domestic jurisdiction.* The discussion in this and the subsequent section illustrates this.

Despite objections based on Art. 2(7) of the Charter, the United Nations has been successful in evolving international norms and standards of human rights by adopting various declarations and conventions. Between 1948-1992, it has adopted around 88 instruments,[22] covering the entire gamut of human relationship. These,

inter alia, deal with the rights of women, children, refugees, migrant workers, stateless persons, minorities, prohibition of torture, racial or religious discrimination, right to development and peace etc. The most important among them are the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 UN Covenants — the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) along with its two Optional Protocols (the first dealing with the right of individual petition and the other with the abolition of death penalty). These three instruments are *basic* and constitute what is commonly known as the "International Bill of Rights"—the first such bill in human history. Thus, it can be said that building on the Principles of its Charter, the International Bill and numerous other conventions, the United Nations is striving to create a "culture of human rights" and introduce an "ideology of human rights" in international law, politics and relations.

The UN human rights instruments can be classified into three kinds:

1. **Declaratory Regime.**

The United Nations has produced numerous non-treaty instruments (in the form of Declarations or rules and principles) that are not, in themselves, legally binding, but are morally and politically very influential. Sometimes they provide the basis for subsequent treaty drafting.

The most important of all UN Declarations is the UDHR, which is the first document to list/define human rights/duties of individuals. It is not a treaty. Its purpose is to provide "a common understanding" of the human rights and fundamental freedoms referred to in the UN Charter and to serve "as a common Standard of achievement for all peoples and all nations [even those which are not UN members]". Though it is a non-binding document, over the years, it has acquired a moral and legal status. It has become part of customary international law. As a first "Magna Carta" of mankind, it has influenced the drafting of the constitutions of many Afro-Asian states and has inspired the European and American Conventions on Human Rights and the African Charter on Human and People's Rights. Moreover, its provisions have been cited in scores of UN resolutions (including those of the Security Council) and the decisions of the national and international courts.

2. **Promotional Regime**

So far the United Nations has adopted around 25 human rights treaties/ conventions most of which are now in force. Many of the Conventions (like the Genocide Convention or the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages) do not contain any implementation mechanisms. These treaties leave implementation responsibility to the states parties concerned. For instance, the Genocide Convention states that the national courts are competent to try and punish the perpetrators of the crime of genocide. Only six of the UN instruments have relatively better (if not very strong monitoring

mechanism like that of the European Convention) implementation provisions. Those six treaties will be discussed a little later.

Besides treaty procedures, the United Nations had instituted between 1950s and 1970s, three important procedures (which had an important bearing on promotion of human rights) the reporting procedure, the communications procedure and the public exposure procedure.[23]

a) **The Reporting Procedure**, which was instituted in 1956 by the Economic and Social Council, required all UN members to submit periodic reports focussing on the obstacles and impediments, if any, experienced by them in their efforts towards achieving the "common standards", as set out by the UDHR. The purpose of these reports, *inter alia*, was to ascertain the overall state of human rights prevailing in the member states. The reporting procedure, which was in operation till 1980 (the General Assembly decided to discontinue it in view of the coming into force of UN Covenants) was universally applicable (unlike the Covenant reporting procedures, which are confined to the states parties) to all UN members.

Though it is true that these reports did not provide an objective statement of facts on the situation of human rights prevailing in the reporting states, and they often contained information, couched in a tone of self-righteousness, and presented in a form that would help create a good image of the government concerned (and that there were no practical benefits of these reports), one fact becomes well-established that by regularly reporting to the UN bodies, the member States, advertently or inadvertently accepted the principle that there is an higher authority to which they were obliged to report regarding the observance of human rights in their respective countries. In fact, this is a significant development, as it unobtrusively eroded the concept of "domestic jurisdiction" in matters of human rights.

b) **The Communications Procedure** was established by the ECOSOC resolution in 1959, which was defined in 1967 and 1970. In 1970, the so-called 1503 procedure was adopted to deal with the communications that appear to reveal a consistent pattern of gross and reliably attested violations. These communications are confidently scrutinized and reviewed by the Commission of Human Rights and its Sub-Commission.[24]

It is apposite to recall here, that the United Nations receives between 30,000 and 40,000 communications every year from individuals, NGOs and other sources, under the 1503 procedure, alleging violations of human rights. It is heartening to note that in 1989, more than 3,00,000 communications were logged. These communications are outside the framework of the first Optional Protocol to the ICCPR. These may come from any country, even from states which are not members of the United Nations. So far, communications concerning around 100 countries have been reviewed. These countries, among others, included, Afghanistan, Albania, Argentina, Bangladesh, Benin, Brazil, Ethiopia, Haiti, Indonesia, Myanmar, Pakistan, Paraguay, Philippines, Somalia, South Africa, Sudan, Turkey, Uganda, Venezuela and Zaire.

It is gratifying to note that the confidential scrutiny of material under 1503

procedure led to the launching subsequently by the Commission on Human Rights to public "investigations" of one kind or another, into violations of human rights in Chile (1974), Equatorial Guinea (1979), El Salvador (1981), Bolivia (1981), Guatemala (1982), Poland (1982), Iran (1982), Afghanistan (1984), Cuba (1980), Romania (1989) and Iraq (1991).[25]

c) Public Exposure Procedure

In 1967 the Commission on Human Rights established public procedures which enabled it and its Sub-Commission to discuss annually any question of violation of human rights under the agenda item titled "Question of Violation of Human Rights in all Countries". Since then, a large number of questions, such as racial discrimination in South Africa or human rights in Greece during the military regime, have been publicly discussed under this item. In fact, the purpose of such a debate is to expose publicly the consistent pattern of gross violations occurring the any part of the world. Through such debates, the governments have been compelled to justify their actions to the outside world. There is hardly any government that is not concerned about its image in the international community. All wish to avoid condemnation of any kind by the Commission. Such discussion is likely to establish, in the long run, an entirely different international environment, which may expect a "standard" behaviour from all member states.

3. Implementation Regime

Under this regime fall six human rights instruments. These establish monitoring mechanisms to supervise implementation of their provisions. The treaties are two UN Covenants - ICESCR and the ICCPR (1966), the Race Convention (1965), the Women's Convention (1979), the Torture Convention (1984) and the Children's Convention (1989). These instruments have instituted monitoring bodies: the Committee on Economic, Social and Cultural Rights (CESCR), the Human Rights Committee (HRC), The Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee against Torture (CAT)[26] and the Committee on the Rights of the Child (CRC). These Committees are composed of experts serving in their individual capacity. The Committees examine state reports submitted under these instruments. While doing so, their members ask questions to state representatives introducing reports with the purpose to establish and maintain a constructive dialogue between the treaty bodies and reporting states. These Committees do not act in judicial or even quasi-judicial roles. They do not pass judgements on a state compliance with the treaty obligations. Rather, they seek to assist Parties in fulfilling their obligations, make available to them the experience gained from examining other state's reports, and discuss with them any issue related to the enjoyment of treaty rights in their countries. Of course, where it is clear that a government is not very keen in improving its human rights record, Committee's scrutiny and questioning may be more pointed.

During consideration of the state reports under human rights treaties, the

treaty—monitoring bodies have elaborated a dynamic, rather than merely procedural, process for considering state reports. This evolution occurred primarily for two reasons. First, the active role of the members of these bodies, whose varying viewpoints and experiences contributed for the evolution of the process. Second, this evolution also resulted from an innovative and dynamic approach to the system of monitoring adopted by these bodies, to question representatives of states regarding national legislation, practices and policies described in the periodic reports and to request that states provide more specific details when answers were incomplete. The contribution of both elements has made it possible to enrich the consideration of reports submitted by states parties to a degree that the drafters of these treaties had perhaps never imagined.

The monitoring bodies under the UN Covenants—the HRC and CESCR—through their "general comments" or major decisions provide important interpretations of the Covenants. In addition, and more significantly, both Committees have affirmed that states parties must consider general comments when preparing their periodic reports under the Covenants for submission to those Committees.

The monitoring process also may be useful in prompting domestic public debate and government action with respect to possible violations at least in those countries which take their treaty obligations seriously. Through formal "general comments" the Committees may also contribute towards developing jurisprudence concerning interpretation of various treaty obligations and rights.

It is neither possible nor desirable to detail here the functions or role of each of these Committees. However, a couple of observations need to be made here regarding the working of international conventions on human rights. First, by ratifying many human rights conventions, periodically submitting reports on the measures—legislative, administrative or any other undertaken to give effect to the rights recognized in them and sharing their experiences and difficulties encountered, if any, during their efforts in implementing the obligations arising from these conventions; and allowing their citizens to petition the treaty-monitoring bodies for the alleged violations of their rights, states are establishing a "practice" that how they treat their citizens is no longer a matter of exclusive *domestic jurisdiction*. In other words, matters of human rights have become matters of international jurisdiction and scrutiny. Now the effect of Art. 2(7) of the Charter, on matters relating to human rights has considerably reduced. Second, it is encouraging to note that despite their weak implementation mechanisms and limited experiences from their functionings, the international conventions have been quite successful in effecting changes in the attitude of states in respect of the traditional stand on the scope of domestic jurisdiction and besides often, in domestic law. The treaty monitoring bodies are painstakingly working hard, and in fact inducing states parties to bring their legislaions in conformity with international norms and standards. To buttress this, the following illustrations from the functioning of CERD and HRC are supplied.

The functioning of the CERD during the last 25 years reveals that many states have brought numerous changes/amendments in their domestic legal systems, such as (a) some national constitutions have been amended in order to incorporate

provisions prohibiting racial discrimination; (b) states parties have undertaken systematic reviews of their legislation to amend any laws or regulations which have the effect of perpetuating racial discrimination, or to enact new legislation to satisfy the requirements of the Convention; (c) some states have amended their legislation at the suggestion of CERD, for example, one state repealed a law which stipulated that a person must understand the national language in order to be entered on the electoral roll; (d) some states have added new provisions to their penal legislation, making racial discrimination a punishable offence, or have amplified previous legislation; (e) some states have initiated educational programmes to eliminate racial discrimination; (f) some states have established new administrative agencies or new offices to deal with the problems of racial discrimination and to protect the interests of indigenous groups. It should be noted that a number of states parties to the Convention have formally informed CERD that such changes were introduced into their legal or administrative systems in response to the exhortations of the CERD.[27]

Similarly, the experiences and achievements of HRC are also worthy of mentioning here. The Mongolian representative noted that the comments of HRC on its initial report had effected revision of the country's penal code.[28] In his discussion on promulgation of the Covenant, the Mexican representative noted that the translation of the Constitution into minority languages in his country was the result of a suggestion by HRC.[29] In the *Mauritian Women Case* (under the Optional Protocol),[30] Mauritian legislation placing Mauritian women married to foreign husbands but not Mauritian men married to foreign women, at risk of deportation was found to be contrary to Articles 2(1), 3 and 26 in relation to Articles 17(1) and 23(1) of the Covenant by the HRC. Subsequently, the report of Mauritius states that its indictment by HRC resulted in a direct change in a law: "An amendment to the Immigration Act was passed by Parliament on Women's Day (8 March 1983) to remove the discriminatory provisions against women found by the Human Rights Committee in the *Aumeeruddy-Cziffra* Case (Case No. 35 of 1978).[31]

Moreover, the individual petition system under the Optional Protocol is a development of extraordinary significance, as it has put the "individuals" on par with governments/states before the international body, i.e. HRC. Though this procedure (like other procedures under various treaties) is admittedly weak and is not very effective, compared to the one established by the European Convention, it is still considered very successful at least in one respect, i.e., declaring individual communications admissible. For instance, between 1977 and 1994, the HRC registered 587 communications, of which it declared 201 admissible (i.e., 34 per cent of communications are declared admissible). Whereas, during 1955-90 (a period of 35 years) the European Commission received 15,911 petitions of which only 670 were declared admissible (i.e. less than 4.5 per cent of the petitions were accepted).

III. RECOGNITION OF STATE SOVEREIGNTY/DOMESTIC JURISDICTION IN HUMAN RIGHTS INSTRUMENTS

Despite adoption of many human rights treaties by the United Nations and their coming into force and the institution of monitoring mechanisms to oversee their implementation, the question of promotion/protection of human rights has not entirely/solely become a matter of UN/international jurisdiction. The incorporation of many principles/provisions in these treaties, which still protects sovereignty of states, illustrate this point. The following provisions and principles in UN instruments of human rights and international law may be noted.

1. Most of the human rights instruments contain limitation and restriction clauses. The ICCPR in particular defines the admissible limitations or restrictions on the rights which it sets forth. While the formulation of the limitation clauses differs from article to article, it may be said that in general the Covenant provides that the rights and freedoms with which it deals should not be subject to any restrictions except those which are provided by law (domestic), or are necessary to protect national security, public order, public health or morals or the rights and freedoms of others. Many other "exceptions" to rights are provided for in the individual articles of various instruments. The domestic law and national authorities enjoy wide powers to impose limitations and restrictions on the enjoyment of human rights.

2. Though most of the instruments do not contain "derogation" clauses, the ICCPR empowers the state to derogate from some rights during the time of wars and national emergencies. This provision implied two things: first, the rights are not absolute; and the second, it is sovereign states which determine the nature and extent of rights to be recognized specially during public emergencies.[32]

3. One of the state practices establishing the primacy of state sovereignty over international jurisdiction on matters of human rights comes from the regime of "Declarations and Reservations" which the states parties make upon ratification of human rights treaties.[32] Many states have made a "package of reservations". For instance, the US government while ratifying Genocide Convention in 1989, the two Covenants in 1992 and the Torture Convention in 1994, has made an elaborate set of reservations, understanding and declarations which have been described as spacious, meretricious, hypocritical and incompatible with the object and purpose of the instrument concerned. It has refused to accept a provision prohibiting capital punishment for crimes committed by persons under 18 years of age (Torture Convention) and reserved on "ICJ Clause) and federal clauses" of these instruments.[34]

There is more to it. A practice of making "objections" on reservations/ declarations made by some states also prevails. For example, the governments of France, Germany and the Netherlands filed objections on the reservations made by India to the two Covenants. These governments took objection to India's

declaration in respect of Art. 1 of both the Covenants saying that Indian reservation concerning the right to self-determination of peoples goes against the object and purpose of the Covenants, the 1970 Declaration on the principles of International Law and the provisions of the Charter.

4. The exhaustion of domestic remedies before invoking international jurisdiction on petitioning HRC or CERD for alleged violations of human rights also recognizes the principle that it is the states which are primarily responsible to implement human rights. International organization can only induce states to comply with their international obligations.

5. Moreover, many states have still not ratified human rights instruments and are reluctant to invoke inter-state communications procedure of ICCPR.

Notes and References

1. Hersch Lauterpacht, *International Law and Human Rights* (New York, 1950), pp. 147-48, 151 and 178. For similar views See C.B.H. Fincham, *Domestic Jurisdiction* (Leiden, 1948), pp. 175-7, Manouchehr Ganji, *International Protection of Human Rights* (Geneva, 1962), pp. 113-23; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (London, 1963), p. 128; Felix Ermacora, "Human Rights and Domestic Jurisdiction", *Recueil des Cours* (Leiden), vol. 124, No. 2, 1968, pp. 436-37.
2. UN International Law Commission, 1st Sess., SR. (23 May 1949), Doc. A/CN.4/SR.23, p. 10. However, it should be noted that the majority of the Members of the Commission were of the opinion that the Charter provisions have placed certain legal obligations on states, where it concerns respect for human rights/freedoms of their nationals. *Ibid.*, pp. 11-16. Like Hudson, Hans Kelsen, Robinson and J.S. Watson too consider that human rights fell within the "domestic jurisdiction" of a state. See J.S. Watson, "Auto-interpretation, competence and the continuing validity of Article 2(7) of the United Nations Charter", *American Journal of International Law*, vol. 71 (1977), pp. 60-83.
3. Ermacora, note 1, pp. 430-31. This argument, in the opinion of M.S. Rajan, is unacceptable, as it is based on the misunderstanding that "promotion" means only "formulation" and not implementation. Ermacora gives a very limited (sometimes wrong) meaning to the word "promotion". Rajan is even very critical of his distinction between the permissible and imperssible UN "intervention" in dealing with the non-observance of human rights by member states (Ermacora, while distinguishing between permissible and impermissible intervention, has said that the principle of non-intervention is not applicable to the "promotion" of human rights, the right of self-determination as far as "gross violations" or "consistent pattern of violations" are concerned, but that principle is applicable to "all other" human rights questions. *Ibid.*, p. 435 (ff), and characterized the distinction as thoroughly unacceptable, unjustified and pointless. Rajan's argument is convincing, because, in his view, the nature of actions taken by UN organs is generally based on pragmatic considerations—not on any legal or doctrinal principle. M.S. Rajan, *The Expanding Jurisdiction of the United Nations* (Bombay, 1982), p. 210.
4. Ganji, note 1, pp. 131-32.
5. Louis Henkin, *The Rights of Man Today* (Columbia, 1978), p. 94.
6. John Carey (ed.), *International Protection of Human Rights*, Background Paper and Proceedings of the 12th Hammarskjold Forum (N.Y., 1978), p. 35.
7. Thomas Buergenthal, "Codification and Implementation of International Human Rights", in Alice H. Henkin (ed.), *Human Dignity - The Internationalization of Human Rights* (Dobbs Ferry, N.Y., 1979), p. 15.

8. GAOR, 1st Sess., Part II, Joint Committee of the 1st and 6th Committee(21 Nov. 1946), p. 4.
9. The statement had stated that, members of Committee II/3 "are in full agreement that nothing contained in Chapter IX [of the Charter, dealing with International Economic and Social Cooperation] can be construed as giving authority to the Organization to intervene in the domestic affairs of Member States", UNCIO, Docs. vol. 10, pp. 271-72.
10. Sir Hartley Shawcross (UK) said: "The Charter recognized that the United Nations, should promote higher standards of social progress and development, but did not lay down such standards when a code of standards of social progress and development had been drawn up and adhered to, any infringement of its provisions would fall within the competence of the United Nations, while anything else, not covered by the code, would be a matter of domestic jurisdiction. The essential legal question was that, in the meantime, it was clearly a matter of domestic jurisdiction of every state to decide what rights it should grant its citizens GAOR 1st Sess., Part II, Joint Committee of 1st and 6th Committee, (25 Nov. 1946), p. 15.
11. See for the details of each argument advanced in a specific case, UN *Repertory of UN Practice*, vol. 1, pp. 144-45, vol. 1, Suppl. No. 1, p. 62, vol. 1, Suppl. No. 2, pp. 171-72; and Suppl. No. 3, pp. 118-19.
12. For the details of each argument advanced in a specific case, see *ibid.*, p. 144; Suppl. 1, pp. 61-62, Suppl. No. 2, pp. 170-71, and Suppl. No. 3, pp. 117-18.
13. GAOR, 10th Sess. *Ad Hoc*, Pol. Committee, 5th mtg., (26 Oct. 1955), para 2 and 3 (Sweden), Para 8 (Syria), pp. 11-12.
14. GAOR, 15th Sess. Spl. Pol. Committee., 24nd mtg., (5 April 1961), Para 13, pp. 77-78 (UK); 224th mtg., (7 April 1961), Paras 3 (Australia) and 16-19 (France), pp. 85-86.
15. E/CN.4/SR.211, p. 11 (7 May 1951).
16. J.S. Bains, "Domestic Jurisdiction and the Law of the United Nations", (unpublished Ph.D. thesis, University of Michigan, 1953), p. 185.
17. ESCOR, 3rd Year, 6th Sess., Suppl. No. 1 (E/600), (Report of the Commission on Human Rights), p. 36. The report of the Commission also points out that the question - whether the Convention should include an express statement to the effect that the matters dealt with in it are of international character or not was discussed in the Commission. It was quietly agreed that the proposed clause was unnecessary, as domestic jurisdiction of state, if properly interpreted, only covered questions which had not become international in one way or another. Once states agreed that such questions should form the subject of a Convention, they clearly place them outside their domestic jurisdiction and art. 2(7) became inapplicable. But the US delegation proposed that the removal of the subject matter from domestic jurisdiction should be limited only to states parties to the Convention, *ibid.*, p. 36.
18. Prof. Rene Cassin states: "Human rights existed before the UN Charter and did not exist any less since". E/CN.4/SR.43 (4 June 1948), p. 6.
19. GAOR, 3rd Sess. Part I, Sixth Committee., (Chile).
20. A/AC.38/SR.43 (15 Nov. 1950), p. 263.
21. See for the detailed study of this theory, Lauterpacht, note 1, pp. 73-126, pp. 13-55; See also *An International Bill of Rights* (New York, 1945); Richard Tuck, *Natural Rights Theories - Their Origin and Development* (Cambridge, 1979).
22. For the texts of these documents see *Human Rights - A Compilation of International Instruments* vol. 1, parts First and Second, Universal Instruments (New York: United Nations, 1993).
23. For a detailed analysis of there procedures see my article "The UN Mechanisms and Procedures for Promotion and Protection of Human Rights", *Indian Journal of International Law*, vol. 25, (1985), pp. 578-92. The revised and updated version of this article appears as chapter 5 of my book, *The United Nations at Fifty - Studies in Human Rights* (New Delhi, 1996), pp. 63-100.
24. For detailed analysis of this procedure see Chapter 5 of my book, *ibid.*, pp. 70-77.
25. Menno T, Kaminga, *Inter-State Accountability for Violations of Human Rights* (Philadelphia, Pa., 1992), p. 98.
26. For a perceptive and detailed discussion on the role of these Committees See Chapters 9 to 13 of Philip Alston (ed.), *The United Nations and Human Rights - A Critical Appraisal* (Oxford, 1992), pp. 339-546.
27. Centre for Human Rights, Geneva, *The First Twenty Years - Progress Report of the Committee on the Elimination of Racial Discrimination* (New York: United Nations, 1991), pp. 55-56.
28. UN. Doc. CCPR/C/SR. 658 (1986), para 25.

29. UN. Doc. CCPR/C/SR.849 (1988), para 53.
30. UN. Doc. A/37/40 (1981), para 134.
31. UN. Doc. CCPR/C/28 Add. 12, para 5(b) (1988).
32. See Jaime Oraa, *Human Rights in State of Emergency in International Law* (Oxford, 1992).
33. See Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin*? (Dordrecht, 1994).
34. For a detailed and critical analysis of U.S. reservations See Louis Henkin "US Ratifications of Human Rights Conventions: The Ghost of Senator Bricker", *American Journal of International Law*, vol. 89, (1995), pp. 341-50.