

Human Rights and the United Nations Charter: Transcendence of the International Standards of Human Rights

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ABSTRACT

It can be said that the source of the modern concept of human rights came from the United Nations. Looking at its charter one can see that the main purpose of the institution is to prevent wars on a global scale but at the same time the charter lays down various explicit and implicit inferences with regards to accepted standards of human rights. This charter came into being before the Universal Declaration of Human Rights and it has the effect of international law rather than the mere declaratory effect. This article will trace the creation of the charter, its references to human rights standards, the jurisprudential argument with regards to the obligatory nature of the charter, the impediments both causal and argumentative and the transcendence of a 'uniform' standard of human rights and erosion of local perspectives of human rights.

Keywords: Domestic human rights, human rights, universal human rights, UN Charter

INTRODUCTION

Explicit and Implicit References to Human Rights in The United Nations Charter

The United Nations is an international organization that was formed as a collective effort to regulate and conduct inter-national affairs, to prevent occurrence of war between

nations and at the same time respecting the notion of fundamental human rights. It was only after Second World War that nations began to ponder positively on the issue of human rights. The ratification of the Charter by member states and the formation of the United Nations should be seen as the desire of nations that the organization becomes the international protector of human rights due to the tragic experience of the world wars (Buergenthal, 2000).

Throughout the Charter there are eleven provisions in the Charter that refers to human rights, explicitly and implicitly.

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Explicit/Express Reference to Human Rights in the United Nations Charter

There are nine direct or explicit references on human rights in the United Nations Charter. They are as follows:

- (1) Second Paragraph of the Preamble;
- (2) Article 1(3);
- (3) Article 13(1)(b);
- (4) Article 55(c);
- (5) Article 56;
- (6) Article 62(2);
- (7) Article 68; and
- (8) Article 76(c).

The second paragraph of the preamble of the Charter provides that the peoples of the United Nations have determined to reaffirm their "... faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women..." It is accepted that a preamble is an introductory and explanatory statement in a document that explains the document's purpose and underlying philosophy. Thus, the said preamble of the Charter gave purpose and philosophy on human rights by first recognizing it.

Article 1(3) of the Charter deals with one of the purposes of the United Nations, in the context of human rights it provides that the purpose of the United Nations is "to achieve international co-operation... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion..." From this article two important points can be made. First that the article establishes the concept of

universality of human rights by stating that human rights and fundamental freedoms are for all and secondly, that the rights and freedoms should be enjoyed by all without any form of discrimination.

Article 13(1)(b) deals with functions and powers of the United Nations General Assembly (UNGA). It provides that the UNGA "...shall initiate studies and make recommendations for the purpose of... assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." This article gives obligation and imposes duty on the UNGA to initiate studies and make recommendations on matters of promotion of human rights. In the same time this article resonates with the wordings and spirit of Article 1(3) by expressly stating the concept of universality of human rights and non-discrimination.

Article 55(c) then provides "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Then Article 56 states that "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." These two articles need to read together in order to understand that they

provide member states with an undertaking to promote and observe human rights either by working together with the United Nations or separately.

Another explicit reference to human rights can also be seen under the prescribed functions and powers of the Economic and Social Council (ECOSOC). In Article 62(2) of the Charter, ECOSOC has been given the power to “make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.” For the purpose of realization of this power the Charter further provides ECOSOC with the authority to set up commissions for the promotion of human rights. This can be seen in Article 68 which states that ECOSOC shall “...set up commissions....for the promotion of human rights”.

The last explicit reference on human rights in the United Nations Charter can be seen in Article 76(c). The article provides that “the basic objectives of the trusteeship system....shall be....to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world....”

From these explicit references to human rights in the Charter, three United Nations Organs have been given the specific obligation of promoting and encouraging respect for human rights and for fundamental freedoms.

Implicit/Implied Reference to Human Rights in the United Nations Charter

There are two indirect or implicit references with regard to human rights in the Charter. They are as follows:

- (1) Article 8;
- (2) Article 10; and
- (3) Article 14.

Article 8 provides that the United Nations “... shall place no restriction on the eligibility of men and women to participate in any capacity and under conditions of equality...” This principle of non-discrimination as to sex is specific for the purpose of participation in the United Nations in its “principal and subsidiary organs”.

Article 10 states that the UNGA “...may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters”. This allows the UNGA to discuss any questions or any matters that include human rights and fundamental freedoms, which theme recurs again and again explicitly in the Charter, thus making it obvious that they are within the scope of the present Charter. This power of the UNGA is however curtailed by Article 12 which restricts UNGA to discuss any matters if the situation is under the exercise of the United Nations Security Council.

Article 14 provides that subject to the provisions under Article 12, the UNGA "...may recommend measures for.... situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations". Purposes and Principles of the United Nation can be found in Article 1 of the Charter. For the purpose of discussion under the human rights theme, the specific relevant article under the said article would be Article 1(3). When Article 14 is read together with Article 1(3) of the Charter, it is clear and evident that the UNGA is given the power to recommend measure to solve situations that occur caused by violations of universal human rights and discrimination.

Thus, it can be said that there are eleven instances in the United Nations Charter that make reference to human rights and fundamental liberties. Though the proposal, by interested countries and non-governmental organizations, to include the International Bill of Rights was rejected, their continued effort however was not in vain. It was in a way a success in the sense that even in the era where the major powers were quite resistant to the idea of universal human rights and fundamental freedoms, all members of the United Nations including the major powers had put their strong promise and commitment on promoting human rights and fundamental freedoms. This allowed the Universal Declaration of Human Rights to be formed in 1948 and later the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural

Rights in 1966, including its optional protocols which are referred to collectively in the International Bill of Rights.

The Significance of the United Nations Charter on the State Of Human Rights

It can be concluded that the Charter contains provisions that refer to human rights. These provisions alone show that human rights were considered by the members of the United Nations, during the adoption of the Charter, as an important theme that needs international recognition and affirmation. Below the significance of the Charter on the state of human rights will be discussed.

There are six areas of the United Nations Charter on human rights are as follows:

- (1) Human rights constitute a theme that recurs again and again throughout the Charter and is singular in its predominance.
- (2) The United Nations Charter internationalized the concept of human rights.
- (3) The United Nations Charter is the first international instrument in which nations agreed to work closely on the international level for the promotion of human rights.
- (4) The provisions of the Charter contain broad non-discrimination clauses with regard universality of human rights including the equality of men and women.
- (5) The United Nations Charter has the status of multi-lateral treaty and it imposes obligations on the member

states which are binding under international law.

- (6) The United Nations Charter allows the propagation and education on the concept of universal human rights.

It can be concluded that there are eleven provisions, both explicit and implicit, that refers to human rights in the United Nations Charter. The various recurrences of provisions that touch on human rights show that the theme was deemed important at the point when the Charter was adopted. Both explicit and implicit reference on the matter recurs again and again throughout the Charter. Oppenheim and Lauterpacht (1955) stated that “The idea of the recognition and protection of human rights is woven like a golden thread throughout the entire Charter as one of the principal objectives of the United Nations Organization”.

The provisions discussed above shows that human rights and fundamental freedoms are dominant themes in the United Nations Charter. Reading the Charter, one cannot escape from making a conclusion that human rights dominate the instrument. It was stated that “the core concept of the United Nations when the Charter was drafted was.... for the maintenance of international peace and security.... alongside this, the Organization would promote development and the universal realization of human rights” (Ramcharan, 2004).

Secondly, the United Nations Charter has internationalized the concept of human rights. Prior to adoption of the Charter in

1945 human rights were considered as a domestic and municipal issue. Based on the concept of law and sovereignty, each state has its own version of human rights depending on the state’s political ideology, religion and culture. Under this domestic version of human rights, no foreign state or any international organization may interfere. The adoption of the Charter marked the agreement of members of the United Nations to accept the internationalised view of human rights as stated by Buergenthal (2000) that with the signing of the Charter member states “...could no longer claim human rights as such were essentially domestic in character”. Though the question of what are human rights was not defined in the Charter but later in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Though the internationalized universal idea of human rights was positively accepted, there are however criticisms on the concept. Some critics advocated that universal human rights now adhered to were based on the western notion which can be traced back to the United States Bill of Rights and the French Declaration of the Rights of Man. Steiner, Alston and Goodman (2008) stated the relativist point of view is that it is not prudent to impose an exogenous concept of human rights on states which have their own endogenous concept of human rights. They also commented that “to a relativist, these instruments (human rights instruments) and their pretensions to universality may

suggest primarily the arrogance or cultural imperialism of the West...” (Steiner et al., 2008).

The third significance of the Charter on the state of human rights is that the Charter is the first international instrument where nations agreed to work closely on international level for human rights promotion. This is evident in Article 1(3) of the Charter that encourages international co-operation in the promotion of human rights. It is also evident in other provisions which are Articles 55(c) and 56. These three provisions can be seen as the ‘obligations’ of member states on the promotion of human rights. These provisions are among the most frequently invoked provisions of the Charter when dealing with inter-state ‘obligations’ on human rights.

As mentioned above, though human rights was internationalised by the Charter, it was not defined. The obligation imposed on member states to work with the United Nations allowed the organisation to embark on the mission to define human rights. According to Buergenthal (2000), the above provisions provided the United Nations “...with the requisite legal authority to undertake a massive effort to define and codify these rights”. It was through this collective effort by member states that human rights was given the definition and accepted understanding by the Universal Declaration of Human Rights 1948.

The fourth significance of the Charter with regards to human rights is its broad provisions on gender non-discrimination. The issue of gender discrimination has

existed prior to the Charter and continues even after its international recognition in the Charter. The Charter has allowed efforts to eradicate gender discrimination.

One of the most important efforts in eliminating gender discrimination is the mechanism known as the ‘gender mainstreaming’. The term ‘gender mainstreaming’ was made popular on the world centre stage on the Fourth World Conference on Women in Beijing in 1995 (Charlesworth, 2005). Gender mainstreaming mechanism was taken up by the ECOSOC in 1997. The principles are:

- (1) Issues across all areas of activity should be denied in such a manner that gender differences can be diagnosed—that is, an assumption of gender-neutrality should not be made.
- (2) Responsibility for translating gender mainstreaming into practice is system-wide and rests at the highest levels. Accountability for outcomes needs to be monitored constantly.
- (3) Gender mainstreaming also requires that every effort be made to broaden women’s participation at all levels of decision-making.
- (4) Gender mainstreaming must be institutionalized through concrete steps, mechanisms and processes in all parts of the United Nations system.
- (5) Gender mainstreaming does not replace the need for targeted, women-specific policies and

programs or positive legislation, nor does it substitute for gender units or focal points.

- (6) Clear political will and the allocation of adequate and, if need be, additional human and financial resources for gender mainstreaming from all available funding sources are important for the successful translation of the concept into practice.

On paper, the principles on gender mainstreaming set forth by ECOSOC may appear promising but for the time being they fall short in term of implementation and success. It was argued that despite the gender mainstreaming mechanism, women's participation in decision making in the United Nations it-self is somewhat glacial and not in line with Article 8 of the Charter (Lombardo, 2005). Not only in the United Nations can gender disparity also be seen all over the world either in the public or private sector. Feminists may say that this is against human rights but in reality, the question that needs to be asked is does gender equality as mentioned in the Charter means total equality between men and women without taking into consideration points of merit and circumstance? On this issue Islam provides an alternative view. In Islam, women are given equal rights with men, tough equal they are however not identical as the Quran prescribed that both man and woman are equal but man have advantage over them. The "advantage" has nothing to do with man's superiority over

woman, but rather, speaks of the different social roles that males and females fulfil based upon their individual natures. Though Islam seems to provide the answer, it is most unlikely that the so-called universal human rights proponents are going to adhere or at least take them into consideration. Here, as argued by Lombardo (2005), the universality of human rights as described in Charter can be argued on the basis that it is universal in the eyes of the West but not taking into consideration other non-western religion and cultural views.

The fifth significance of the Charter on human rights is that the Charter gives the effect of multi-lateral treaty that imposes obligation on member states. As a multi-lateral treaty that signed by the member states, it imposes obligations on them that are binding under international law. This is evident with reference to The Vienna Convention on the Law of Treaties, article 2(1)(a), defines a treaty as "an international agreement concluded between States in written form and governed by international law...". Furthermore in *Madellin v. Texas* the United States Supreme Court mentioned in the positive on the binding effect of the Charter on member states. However, The Charter though binding on member states under general international law is however limited by domestic law. Kirgis (1997) mentioned that treaties, including the United Nations Charter, are binding instruments under international law, subject to limited grounds much like those in domestic contract law for invalidating or terminating those.

In the context of human rights, the obligation imposed upon member states by the United Nations Charter is in Article 56 and read together with Article 55(c). As discussed above, the articles require member states to promote “universal respect for, and observance of...” human rights. The aforementioned article only obliges member states to promote respect and observance of human rights but not domestic application of universal human rights. To rely on the Charter for state’s obligation on human rights is not enough. The Charter only binds member states so that future work and effort on human rights is possible. This was remedied by subsequent international treaties that addressed the matter. The sixth significance is that the Charter provides an opportunity for propagation and education on universal human rights. This opportunity is provided in Articles 55(c) and 56 of the Charter. The organization and member states have positively taken this opportunity by signing and ratifying various international instruments on human rights. Taking into consideration the Charter and the instruments on human rights together they, as mentioned by Bilder (1969), “...define the content of human rights concepts and establish clearer standards of governmental conduct. They educate both officials and the general public in these norms....”. Thus, the Charter clearly sets forth the foundation on which the universal human rights and fundamental freedoms can be promoted through education and this is shown by the establishment of the United Nations Education, Cultural and Scientific

Organization (UNESCO) on 16th November 1945. UNESCO as a specialized agency under the United Nations was established with promotion of human rights as one of its core purposes.

Obligation of the Member States under the United Nations Charter

In the discussion above, it can be concluded that the Charter gave significance on the state of human rights. One of it is the concept of internationalization of human rights that allows departure from the old understanding of domestic or municipal human rights to universal human rights. Though the understanding of member states on this matter have changed significantly in the past five decades, the issue that needs to be addressed is whether this understanding is practiced by states by their own volition or by the obligation imposed upon them by the Charter.

To determine whether such positive obligation exists we need to see the expressions used in the Charter. There is no doubt that there are provisions that refer to this matter but they are about purposes and principles of the United Nations and the functions and powers of bodies or organs under the United Nations. The exception can be found in Article 56, the undertaking clause. The provision provides that the undertaking itself only requires member states to promote and observe human rights without any discrimination and does not have a strong obligatory impact. Thus, rather than obligatory, the provisions sound advisory and supervisory.

Kelsen's View

According to Kelsen (1950), the Charter does not impose obligation on member states on matter of human rights. He stated that "the language used by the Charter in this respect does not allow the interpretation that the Members are under legal obligations regarding the rights and freedoms of their subjects" (p. 29). He further stated that "the fact that the Charter, as a treaty, refers to matter is in itself not a sufficient reason for the assumption that the Charter imposes obligations with respect to this matter upon the contracting parties" (p. 29). Kelsen's tone on this matter shows that he was of the opinion that the Charter does not impose obligations. He further argued that human rights are well within a state domestic jurisdiction because Article 2(7) of the Charter forbids intervention of United Nations on such matters with the exception that the situation fits "...threats to the peace, breach of the peace...." as provided in Article 39 of the Charter.

There are several reasons why this occurred. First, the Charter does not provide a standard definition of human rights making imposition of obligation impossible. Second, a provision that clearly imposes obligation would never be accepted by the signatories during the adoption of the Charter. And third, it was perhaps the drafter's intention that the provision was worded in that manner so that it can be the foundation of international cooperation on human rights. Thus, it can be said that true to the Kelsonian jurisprudential argument of the *pure theory of law*, the Charter though inspiring does not

impose obligations upon the member states since it lacks the *binding norm*.

Looking at the Charter from Kelson's perspective, the Charter is viewed not as an authoritative document of human rights but merely as a collective agreement between the contracting states to work together seeking a common ground of understanding on human rights. Nevertheless, this however should not be seen as a failure of the Charter, and should be seen in a way that the Charter was actually a success story with regards to the fight for human rights because it provided the foundation upon which human rights are defined, codified and strengthened.

Obligatory/Binding Nature of the Charter

It can be argued that the Charter does impose legal obligations on human rights on the ground that provisions on such matter recur throughout the Charter thus signifying its predominance. The Article that mentioned "... the United Nations shall promote.... observance of, human rights...." when read together with Article 56, obliges member states to actively participate on human rights. This participation can either be jointly together with the United Nations or separately.

The obligatory nature of the Charter can be seen in two of the earliest UN General Assembly resolutions. In the Resolution of 44(1) of 1946, the general assembly was of the opinion that the "...treatment of Indians in South Africa should be in conformity with the international obligations under

the agreements concluded between the two governments and the relevant provisions of the Charter". In Resolution of 103(1) of 1946, the General Assembly declares that "...it is in the higher interests of humanity to put an immediate end to religious and so-called racial persecution and discrimination, and calls on the Governments and responsible authorities to conform both to the letter and to the spirit of the Charter of the United Nations...".

There are also many other court decisions that seem to support this view such as the case of *Oyama et al., v. California*, which revolves around the issue of racial discrimination caused by a law coupled together with negative sentiment of the Americans towards peoples of Japanese origin. This case did not have a huge impact on the abolishment of discriminatory laws in the United States although the concept of human rights under the United Nations Charter was quoted and recognized. This is evident in the words of Justice Murphy that "...this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion". The same positive tone of the courts with regard to racial discrimination as against human rights can also be seen in the Canadian case of *Re Drummond Wren*. In this case, the Ontario Court mentioned that Canada "... is pledged to promote universal respect for and observance of, human rights and fundamental freedoms for all without

distinction as to race, sex, language or religion". This was followed by the case of *Re Noble and Wolf*.

The positive treatment on the obligatory nature of the Charter had allowed states to argue at the international level on the violation of human rights issues. For example, Articles 1, 55 and 56 were mentioned in the *Hostages Case*. In this case the United States urged the International Court of Justice to condemn Iran's seizure of United States' hostages during the 1979 Iranian Revolution as a violation of fundamental human rights recognized by the International community. The United States citing the above three articles, contended that, "the existence of such fundamental rights for all human beings....with the existence of a corresponding duty on the part of every State to respect and observe them, are now reflected in the Charter of the United Nations".

The latter discussion that argued that human rights impose obligations on member States does sound appealing. As appealing as it may sound, in reality, States maintain their own human rights affairs which is strengthened by the doctrine of Sovereignty of State. It can be said that the number of States that truly adhere to universal standards of human rights are small or perhaps negligible. Even strong and vocal proponents of human rights like the United States and her allies violate human rights at home and abroad since it is a widely known fact that in these countries there is discrimination based on colour, religion, and culture.

States also seem to rely on the two approaches discussed above when arguing on this matter depending upon their particular interests at the point in time. This can be seen in the case of the treatment of Indians in the South African Union. The Union argued that the Charter did not provide a definition of human rights thus making the Charter impossible to impose obligations on member states. Meanwhile Indian representatives argued that the mistreatment of Indians constitute a violation of human rights as provided in the Charter.

Objections to Implementation

In the discussion above, some have argued that the Charter does not establish obligatory nature of human rights provisions. It is believed that one of the reason such obligatory nature cannot be established is the impediment in Article 2(7) of the Charter.

Human rights though internationalized, remain still very much under domestic state jurisdiction. Each state has the right to apply its own set of human rights either by adopting in total the internationally prescribed standards of rights or by their own *sui generis* standards perhaps based on the relativist view, albeit respecting the universal notion of human rights. This will create a situation where the observance of human rights differs from State to State. These differences in the approach on how States perceive human rights gives rise to situations where one State may believe that the other is not practicing human rights.

For example, Malaysia practices affirmative action that gives privileges to *bumiputeras* (persons of a Malay race and natives of Malaysia) as per the Malaysian Federal Constitution. On this matter Shad Faruqi mentioned that many economic, social and educational programmes in Malaysia are structured along ethnic lines (Faruqi, 2008). Some defend it on the basis that it is a much-needed affirmative action to balance the imbalances in the country and some may say that Malaysia violates human rights by practising discrimination via discriminatory laws. On this matter the question that should be asked is that, is it possible for foreign States, via the international arena, to impose positive obligations on Malaysia to observe universal human rights?

As discussed previously, Articles 56 and 55(c) contain the provision where positive obligation in human rights can be derived. They require member states to promote and observe human rights based on the pledge given by the states. In the event that a state breaches that pledge by violating human rights within its own territory a state is said to have breached the Charter itself. The only remedy available in such matters is international law yet the United Nations by virtue of Article 2(7) has no authority or jurisdiction to intervene.

Article 2(7) states that, “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters

for settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”.

The article indicates that the United Nations cannot intervene in any matter under state jurisdiction. The question is what does it mean by ‘intervene’? Authors such as Lauterpacht and Oppenheim seem to define interventions as the dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things. Gilmour (1967) mentioned that ‘intervention’ means either “dictatorial interference” or “interference pure and simple”. By referring to the drafting history of the Charter he was of the opinion that intervene means “interference pure and simple” and the drafters have no intention to limit that word to “dictatorial interference”. This shows that at the time when the Charter was adopted member states agreed on the supremacy of state sovereignty thus making any interference in the domestic affairs of a state illegal.

Furthermore, in the *Nicaragua case*, the International Court of Justice established the fact that the term intervention in the Charter does not mean dictatorial-interference. Any dictatorial-interference by one State on another is deemed as a violation of international law. In this case it was held that the United States had violated international law by intervening in Nicaragua’s state of affairs by supporting guerrilla rebels and mining Nicaraguan harbours contrary to the provision of Art 2(4) of the Charter.

CONCLUSION

It can be said that since human rights theme recurs throughout the Charter it has attained transcendence from a matter of State domestic jurisdiction to a higher plane of international law. This transcendence will slowly erode domestic human rights which have been moulded by unique domestic factors such as culture and religion. Domestic courts are seen to slowly adopt and adept to the international norm of human rights one case at a time. Though the UN version of human rights is not expressly imposed upon member states, it will slowly creep into domestic laws and judgments of the courts, and eventually there is a probability that the same standard of human rights will be applied by all states to result in a uniform new world order.

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