Chapter - III

HUMAN RIGHTS AND DOMESTIC JURISDICTION:
QUESTION OF INTERPRETATION

The Charter of the United Nations is a politico-legal document. It was largely a product of hard diplomatic bargaining and represented a series of compromises that was arrived at by the founding members of the Organization. It was, therefore, inevitable that some ambiguities in the text of the Charter have crept in. Quite a number of terms and phrases are there which could be subject to varied interpretation. This holds true in regard to the phrase "matters which are essentially within the domestic jurisdiction of any state" in Art. 2(7).

Indeed, this specific provision has been one of those which has given rise to intense controversy over its meaning, scope and applicability. Though the provision of Art. 2(7) seeks to prohibit the UN intervention in matters which are within the domestic jurisdiction of a member state, the limitation imposed is not absolute.

THE QUESTION OF DEFINING "DOMESTIC JURISDICTION"

One important area of UN activity where innumerable claims to and denials of the applicability of domestic jurisdiction clause made has been the question of promotion and protection of human rights. Whenever a state is accused of
violating fundamental human rights and freedoms of its citizens, that state generally resort to Art. 2(7) claiming that the matter was not subject to UN concern/intervention. As a result, many scholars of international law and organization and the government representatives in UN debates have raised the most fundamental question: whether Art. 2(7) imply any limitation on the Charter provisions of human rights and those of other human rights instruments? Over the years many other questions also have confronted the United Nations: Do human rights questions fall essentially under the domestic jurisdiction of a state? Has the domestic jurisdiction clause influenced the implementation of human rights norms of the United Nations, if so, in what way, and how far? Are there any interactions or conflicts between the domestic jurisdiction clause and the Charter provisions of human rights, especially Article 55 and 56? When does the implementation of human rights standards constitute "intervention" in the essentially domestic affairs of a state? It is difficult to find the categorical answers to these questions. However, it will be meaningful to analyse the response of the United Nations and its various organs when they were faced with these and other related questions.

1. See Chapter V of this study for the detailed analysis of cases involving gross violation of human rights where the domestic jurisdiction plea was often raised.
Before one could analyse the different aspects of the problem of interpretation involved in the question of promotion and observance of the basic human rights, it is essential to study the problems of interpretation/definition associated with the concept of "domestic jurisdiction" itself.

As stated earlier, the concept of "domestic jurisdiction" is one of those terms and phrases, included in the Charter, which have been left undefined. It is not clear in the Charter whether the Organization has power to discuss and investigate a dispute or matter to determine whether or not it falls within the reserved domain of a state. Since the Charter is silent about the interpreting authority and the "criteria" to be applied for interpretation of its provisions, Art.2(7) has been subject to diverse, and sometimes inconsistent, interpretations both in the scholarly writings and in the practice of UN organs.

Attempting a definition on domestic jurisdiction gives rise to many problems such as: Does it serve any purpose to define domestic jurisdiction? Is it desirable and feasible? Is it possible to list matters which fall under the exclusive competence of the states? Is it possible to demarcate where the line between domestic and international jurisdiction lies, if so, by what criteria.2

2. For a scholarly analysis which explores answers to some of these questions, see M.S.Rajan, "Defining 'Domestic Jurisdiction', Is it necessary? Is it Feasible, Is it Useful? Indian Journal of International Law (New Delhi), vol.1, 1961, pp.73-03. Also idem "The Question of Defining 'Domestic' Jurisdiction", International Studies (New Delhi), vol.1, no.3, 1959-1960, pp.248-
One way of defining "domestic jurisdiction" is to catalogue matters which fall under the exclusive jurisdiction of a state. In theory, scholars and jurists can and do try to define matters of domestic jurisdiction, as no more than an intellectual exercise. But in actual practice of states or of international organization, it is doubtful whether they can delimit and compartmentalize the jurisdictions of a state and international organization. One view prevails in the law of nations which is of Hans Kelsen. According to him, it is not possible to delimit (precisely) the jurisdiction of both the fields, as any matter or subject while at some given time it might have been one of falling essentially within the reserved domain of states, could also become for various reasons, one of international concern.\(^3\) It was pointed out by others that there are, and have been, cases in the history of international law where some matters may subject to concurrent jurisdiction, during the transitory period of a domestic matter becoming a matter of international concern. It has also been pointed out that what are and are not matters of domestic jurisdiction of one state may not be of other.\(^4\)

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Quite a number of other scholars have also attempted to define the matters of domestic jurisdiction. Hersch Lauterpacht writes: "a matter is essentially within the domestic jurisdiction of the state only if it is not regulated by international law or if it is not capable of such regulation by international law. There are few such matters, if any .... In the modern age of economic and political interdependence most questions which, on the face of it, appear to be essentially domestic are, in fact, essentially international."\(^5\) Lawrence Preuss too held the similar view. He stated that questions which fall under domestic jurisdiction are not those which are regulated by international law but are those which are left by international law for regulation by states. There are, therefore, no matters which are domestic by their "nature".\(^6\) J.L. Brierly too stated that a state has only that jurisdiction which is granted to it under international law. Within this sphere it may be free to act according to its own will and this sphere represents its domestic jurisdiction.\(^7\) Others, in an effort to define the concept, have just enumerated the matters of domestic jurisdiction. They were tariff regulation, immigration policy, the form of government, nationality, the size of

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its national armaments and armed forces, internal conflicts within its territory and so on.

Quincy Wright held that while determining the domestic jurisdiction of states it is essential to take into account all of the treaties the states have entered into and the international obligations and commitments that are agreed upon. Therefore, it is not possible to define a particular state's domestic jurisdiction. Thus, it can be said that any subject was within the framework of domestic jurisdiction until such time as it has been made subject to international regulation on the basis of a norm of international law or the conclusion of a treaty. As soon as a question becomes the object of an international treaty, ipso facto it leaves the area of domestic jurisdiction.

It is rightly pointed out by Djura Nincic that the different theoretical problems of domestic jurisdiction in international law arise from opposing standpoints concerning the essential question of the primacy of international versus national law. It seems that there is a continuing conflict between the concepts of the primacy of internal (domestic) and international law and between the domestic and international jurisdiction. The champions of the primacy of international law consider that domestic jurisdiction is in fact a "delegated jurisdiction". The supporter

of the primacy of national law also defend the thesis of "delegated legislation", but it is a jurisdiction which states delegate to international law. These differing (and often conflicting) attitudes concerning the question of domestic competence resembles the different views on the broader problem of sovereignty, which was also implicated in this general question of the primacy of international versus national law.  

There is yet another problem (similar to the above one): whether any part or Article of the Charter has a primacy over the other parts or Articles. Some writers like Fincham, Max Sorensen and Stephen Goodspeed believed that the domestic jurisdiction clause of Art.2(7) has a primacy over rest of the Articles of the Charter. Their literal reading (that "nothing contained in the present Charter" of Art.2(7) made it an overriding provision and gave this clause the status of primacy over the rest of the Articles), would virtually affect the operation of human rights provisions of the Charter. Can we interpret any part of a treaty or the UN Charter in isolation, as these scholars did? Prof. Rajan's view that "no part of a treaty [and the Charter] should be interpreted in isolation and independently of the rest of its provisions", is more convincing. He viewed that, Art.2(7)


cannot therefore, have an absolute meaning and effect in itself; its meaning is relative to the other provisions of the Charter. The technical committee of the UNICO also held that all provisions of the Charter are indivisible. Each provision, therefore, is to be construed and applied in "function of the others". This means that a single Article cannot be interpreted individually.12

A careful study of the travaux preparatoires of the San Francisco Conference might throw some light on the issue of domestic jurisdiction, i.e. why the term was left undefined: was it a deliberate attempt of the drafters of the Charter? Did they make Art.2(7) deliberately ambiguous?

The representatives of 50 states at San Francisco seem to be quite aware of the importance of the problem of defining domestic jurisdiction, but none of the participants raised the issue, perhaps because they feared it to be a divisive issue on which no consensus could be evolved. However, some of the participating states suggested that the spheres of jurisdiction of the Organization with reference to member states be clearly defined and demarcated. Others suggested that the decision on which are and are not matters of domestic jurisdiction be vested

11. Rajan, n.4, p.73.

with the proposed International Court. Some had feared that if left undefined or unspecified about who could define it, each country may finally become the judge. It was also pointed out, in the previous chapter, how John Foster Dulles (speaking on behalf of the Sponsoring Powers) had defended the text of the Article. He had said that the omission of the "international law" criterion (which was, in fact, the criterion prescribed to determine matters of domestic jurisdiction under Art.15(8) of the Covenant of the League of Nations) from Art. 2(7) was essential as "international law", he submitted, "was subject to constant change, and it would therefore "be difficult to define [in advance] whether or not a given situation came within the domestic jurisdiction of a state." 14

Dulles' arguments were generally criticized, particularly by small powers; they pointed out that the proposal of the great powers would mean a step backward from the wording of the League Covenant. "No small and weak state", said the delegate of Uruguay, "can renounce the rules of international law... its firmest guarantee." 15

To defend the Sponsoring Powers' amendment to the domestic jurisdiction clause of the Dumbarton Oaks Proposals (DOP)16(which

13. These suggestions were proposed by the delegations of Belgium, Greece and Uruguay. These are discussed in greater detail in Chapter I of this thesis above. (pp. 28-29).

14. UNCIO, Docs., vol.6, p.508.

15. Ibid., pp.110-11.
subsequently became Art.2(7)/ from such criticisms, Dulles gave simplistic interpretations and contended that the amended version incorporated broad and simple principles, leaving them for development in the future. It is introducing a very simple principle - "a principle which men of common sense all understand". It says to the world organization: "conduct business in effect with governments, but do not yourselves directly intervene in the domestic life of a state." He added, "this is a simple principle, forthright statement .... It is a simple thing which is subject to evolution". He then illustrated the point by referring to the beneficial results of the simple principles of the US constitution, which did not contain undue elaboration and specification.16 He said that if the proposed text was adopted, future generations will thank the drafters for adopting simple phrases and allowing them to evolve as the state of the world. Responding the Greek delegate (who had complained that those complex and difficult questions, instead of being resolved at the conference were being left to be decided in the future) Dulles said that the problem of disputed jurisdiction was common to all other provisions of the Charter; it was not peculiar to Art.2(7) alone. Those states which accepted the compulsory jurisdiction

16. He stated: "Today, the Federal Government of the United States exercised an authority undreamt of when the constitution was formed, and the people of the United States were grateful for the simple conceptions contained in their constitution." Ibid., p.508. President Harry Truman also compared the Charter to that of US Constitution and stated that it will grow and expand with the changing times. Ibid., vol.1, pp.715-16.
of the proposed International Court might seek the opinion of
that Court in cases of disputed jurisdiction, while the Security
Council, the General Assembly and the ECOSOC could obtain an
Advisory Opinion of the Court in disputed cases. 17

Thus, it is evident from the rejection of the Greek
amendment and the first Belgian amendment that the representative
at San Francisco wanted that no specific procedure should be
included for determining matters of domestic jurisdiction.

Some representatives thought that this might empower the
state concerned to unilaterally interpret the provisions, thus
providing for a kind of veto power to all Powers, specially the
small ones. However, a resolution adopted in Committee IV/2
(dealing with legal problems) at San Francisco, was instrumental
in preventing the emergence of veto power arising out of the
assumed right of a member state to decide what were matters
within its domestic jurisdiction. According to this resolution,
the task of interpretation and application of the Charter was
left on UN organs concerned. After a lengthy discussion, Com-
mittee IV/2 concluded the following opinion in its final report:
"In the course of the operations from day today of the various
organs of the Organization, it is inevitable that each organ
will interpret such parts of the Charter as are applicable to
its particular functions. This process is inherent in the

17. See Report of the Rapporteur of Committee IV/1, Doc.
913, UNCSO, Docs. vol.13, pp.390-91.
functioning of any body which operates under any instrument defining its functions and powers". The report said, it was not necessary to include in the Charter a provision either authorizing or opposing the normal operation of these principles. When two or more members disagreed on the interpretation of any provision of the Charter, the two parties were free to submit the dispute to the proposed Court. It also suggested a joint conference of the two organs if and when occasion demanded. However, it is ironical to note (from the report) that the framers of the Charter could not agree upon any particular procedure or method of interpretation of the Charter provisions.

Thus, it can be said in reply to the questions — who decides the question of domestic jurisdiction, and how it is defined — that the concerned UN organs can interpret the Charter provisions while exercising their powers and asserting competence over a matter, as it is provided in the legal opinion of the Legal Committee of San Francisco Conference. A British academician points out that this legal opinion gave UN organs "the loop-hole" to assert their competence to decide whether or not a question precluded their consideration under Art. 2(7).

It should be noted that the right of interpretation

is not implicitly or explicitly given to member states. In fact, both in the academic and UN circles, the attempts of a state to assume exclusive right of interpretation is condemned. Alf Ross said: The idea of every state's having the right to establish what matters are domestic "would ... be catastrophic". It is in conformity with the basic principle of international law that no state can be judged in its own case, for it is certain that no party can give a definitive interpretation to the provisions of the Charter or a treaty. This flows from the principle sometimes referred to as "neutral law" that no one should be judge in his own case. Hobbes, Leithan, Chapter 15, Locke, Second Treatise of Civil Government, Ch. 27.

Prof. Lauterpacht's view is also relevant to this problem. He points out that the lack of an organ (or procedure) of interpretation is not peculiar to this article, that it is a common condition of the entire Charter, and that "the authority to decide upon disputed questions of interpretation of the Charter belongs, in principle, to the organ charged with its application.


23. Cited in Wright, n.8, pp.36-37.

MEANING OF SUCH TERMS AS "TO INTERVENE" AND "ESSENTIALLY DOMESTIC" IN ART. 2(7)

The extent to which the implementation of human rights norms, contained in the Charter, the Universal Declaration and the Covenants on Human Rights, is achieved depends on how the term "intervention" is defined. In other words, the extent to which the "domestic jurisdiction" clause of Art. 2(7) affects the protection of human rights by the Organization depends upon the interpretation of the two principal phrases contained in this para. — "to intervene", and "matters which are essentially within the domestic jurisdiction of any state".

Art. 2(7) prohibits the United Nations from intervening in matters which are essentially "within the domestic jurisdiction of a state". The scope of the prohibition will, therefore, determine to a large extent the scope of domestic jurisdiction itself. And the scope of this limitation will, in turn, depend upon the meaning — the broader or restricted — attached to the term "intervention". Therefore, it is natural to expect that the proponents of the expansion of UN jurisdiction would incline towards a broader construction of the term "intervention", and vice versa. And these two conflicting points of view over defining the term did, in fact, appear both in the UN activities and debates of the organs concerned and in the debates on the scope of international law.

There has been two opposing views in UN discussions and scholarly writings, as to what constitutes "intervention". One view holds that intervention means what it traditionally implies
international law. This view calls for a narrow or technical interpretation of the term. According to one leading exponent of this view, intervention is a technical term of, on the whole, unequivocal connotation. It signifies dictatorial interference in the sense of action amounting to denial of the independence of a state. It implies a peremptory demand for positive conduct or abstention — a demand which, if not complied with, involves a threat of, or recourse to, compulsion, though not necessarily physical compulsion, in some form". 25 Another proponent of this view, Oppenheim, defines the term as "dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual conditions of things". 26 Further he said, "it must be emphasized that intervention is always dictatorial interference, not interference pure and simple. Therefore, intervention must neither be confused with good offices, nor with mediation, nor with intercession, nor with co-operation, because none of these imply a dictatorial interference". 27

Prof. Charles Rousseau of France defines the term as follows:


27. Ibid., p.305. Emphasis added.
Intervention is the action of a state which is carrying out an act of interference in the internal or external affairs of another state to require the performance or non-performance of a specific thing. The intervening state acts in an authoritative way, seeking to impose its will, to exercise pressure in order to make its views prevail. (28)

Many representatives in the Assembly debates supported the above views. Thus, it can be said, in the light of many references to these views in the General Assembly, that neither the discussion of a matter nor the adoption of recommendations by UN organs, thereon constitutes "intervention" within the meaning of Art.2(7). Some held that a request for negotiations or an attempt to get a settlement would not be intervention. If sanctions imposed were of a nature that interfered with the internal position of a country, that would be intervention; but to talk about a situation, to discuss it, to debate, to persuade, to negotiate — these would not be intervention. (29) This interpretation of the term "intervention" — which is dynamic in nature — calls for strong international organization with broad functions.

The second view interprets the term in a broad and non-technical sense. Leland Goodrich and Edward Hambro, who are


proponents of this view, contended that intervention should not be interpreted in a narrow or technical sense but rather in the sense understood by the layman to mean interference in any form. While discussion does not amount to intervention, the creation of a commission of inquiry, the making of a recommendation of a procedural or substantive nature, or the taking of a binding decision constitutes intervention under the terms of this paragraph. This view interprets the term in the ordinary dictionary meaning.

It was held in UN debates, that this view prevailed during San Francisco Conference. It was recalled that Dulles, while speaking on behalf of Sponsoring Powers, considered the term as a mere technical and legalistic formula. Citing this statement, many representatives contended, therefore, that even discussion or recommendation or similar non-coercive action by the Organization could constitute intervention.

30. Leland Goodrich, et al. The Charter of the United Nations Commentary and Documents, 3rd rev. edn. (New York, 1969), pp.67-68. But Hambro, under the pseudonym "Pollux" in another place (Domestic Jurisdiction), Acta Scandinavia Jus Gentium, vol.17, 1946, has conceded that Lauterpacht's definition of the term "to intervene" is permissible. Cited in Rajan, n.4, p.67. M.S. Rajan has described this interpretation as a "static" or negative one, which, if followed, would not enable UN organs to advance the broad Purposes of the Charter. According to him, it does not attach any significance to the needs of the changing conditions of international society and is content to make a literal and restrictive interpretation of the Charter provisions. On the other hand, he regards the "Lauterpacht theory of interpretation" as dynamic and in conformity with the principles of international law. Rajan, n.4, pp.74-75.
"intervention" within the meaning of Art.2(7). Thus, by inference, it can be said that this interpretation limits the effectiveness of all operative provisions of the Charter, including those concerning human rights and fundamental freedoms.

Such a broad interpretation of Art.2(7) raises two other important questions: (1) whether the inclusion of an item on the observance of human rights in a member state in the agenda constitute intervention? (ii) whether a recommendation — in general or to a particular state — constitutes intervention?

Dr. Evatt (Australia), and Benegal Rau (India) contended that inclusion of the item in the agenda and making recommendation on it did not constitute intervention. Evatt noted: The right of discussion provided for in Art.10 of the Charter was one of its most important provisions. There was no question or problem which came within the scope of the Charter and which concerned its aims and principles or any one of its provisions which could not be discussed by the Assembly.31 Benegal Rau claimed that the term "to intervene" had a well-known technical meaning in international law and meant dictatorial interference. "If the General Assembly were to discuss the subject and were to make certain suggestions, which might help the parties concerned to arrive at a settlement of the problems, such action could not

be called intervention, and certainly not dictatorial inter-
ference". Similar view was expressed by the American
delegate.

Thus, this view (i.e. placing of an item on the agenda did not constitute intervention) prevailed in the United Nations from the beginning of its functioning. The jurisprudence of the General Assembly has been generally consistent in this regard and the Assembly has shown little inclination to question its own competence by subjugating it to a preliminary vote. Nor has the Security Council for that matter.

It should also be, however, pointed out that those who opposed in certain cases the consideration of a matter, claiming that it came within the domestic jurisdiction of the member state concerned, tried to show that discussion itself should be viewed as "intervention", that it might indeed, in the words of the delegate of South Africa, be regarded as "one of the most effective forms of intervention of which the Assembly is capable". This view was also supported by others. For instance,

33. The US representative, at 3rd Sess., Part II, observed that "the purpose of Art.2(7) regarding non-intervention in matters which are essentially within the domestic jurisdiction of states was not to prevent the discussion in the Assembly on the safeguarding of human rights and fundamental freedoms when the need arises". (A/AC.24/20).
34. Although it was apparently envisaged at San Francisco that, in case of dispute, the question of competence should be settled by a preliminary vote. **UNCIQ, Docs. vol.2, pp.711-14.**
French delegation generally chose to be absent from the Assembly discussion on the question of Algeria (which was its colony). However, on each of such occasions, where objection was raised to prevent discussion of an item, the Assembly invariably discarded such objections and pursued the consideration of the matter with no seeming apprehension that it was going beyond the prescriptions of Art. 2(7).

As regards the second question, it would appear from the UNCIO records that recommendations were deemed to fall under the term of "intervention", as understood in Art. 2(7). This is evidenced by the trend of the discussions in Committee II/3 which dealt with the matter. It is also found in UN practice that recommendations addressed to a particular state were considered to constitute intervention and the recommendations worded in general terms or addressed to all the states were not considered as intervention. It was felt that the latter group of recommendations could not be taken to constitute "intervention" even if they did relate to "domestic" questions, because they dealt with them on general plane of international cooperation, and not within the domestic sphere of a certain state. This point of view had many adepts, especially in the early days of the Organization, and led UN bodies to seek to word their recommendations, even when they were addressed to a certain state or to a certain group of states, in as general a manner as possible. Subsequently, these niceties tended to be discarded and recommendations, even sharply-worded recommendations, were laid on the door step of certain states (e.g. the Republic of South Africa).
One of the controversies regarding the meaning and scope of the concept of domestic jurisdiction arose from the vague phraseology of Art. 2(7) approved at San Francisco. The phraseology of the text was more ambiguous and far from clear compared to the texts of its counterpart provision in the League Covenant and the Dumbarton Oaks Proposals. Two main changes were brought (by the amendment of Sponsoring Power's proposal) to the Dumbarton provision, namely, the omission of the words "international law" (and also the specification of the determining authority) as a criteria for determining jurisdictional matters, and the word "essentially" was substituted for the term "solely". During the debate on Great Powers' proposal it was argued, forcefully indeed, that this change was proposed to cover a wider areas of matters with a view to extending the "domestic jurisdiction" of member states. The desire of the drafters of the Charter was to embrace also matters which, through their international repercussions or the involvement of an international treaty or customary legal obligations, were not "solely" but "essentially", domestic. Dr. Evatt, the leader of the Australian delegation, stated that the field of domestic jurisdiction was really wider than those matters "solely" within domestic jurisdiction. He preferred to oppose the Belgian amendments (which were finally defeated), which sought to retain the Dumbarton Oaks phraseology of the text, by noting that the word "essentially" constituted a more modern concept in keeping
with international relations today than "solely" or "exclusively. John Foster Dulles too rhetorically quipped, "What is there in the present world that is solely domestic?" He also queried, as regards the omission of the term "international law" from the text, "I wonder what international law is"? He termed its contents undefinable and opposed its insertion on the (contrary) ground that it was superfluous, since there was no other possible criteria for determining the jurisdiction. 38

Thus, the reference to international law was finally omitted and the word "solely" was replaced by an equally vague word "essentially", ostensibly with a view to broadening the scope of matters covered by domestic jurisdiction. But, whether the frame of the Charter achieved this goal? Certainly not. With the expanding concern of UN organs in the fields unperceived of by the founders of the Organization, it can be said that it had an entirely opposite effect. The undefined terms and phrases included in the text, which were left to evolve themselves by the interpretation of members, helped the United Nations to widen its scope of activities and jurisdiction, rather than to widen domestic jurisdiction.

37. UNCIO Docs., vol.6, p.512.
38. Ibid., p.512. See also Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the US Delegation, The Secretary of State (Deptt. of State Publication 2349, Conference Series 71, 26 June 1945), p.45.
Though it is not clear as to what precisely was the intention of the drafters in introducing these changes, one could agree with the inference of M.S.Rajan: that they might have probably wanted that the principle of domestic jurisdiction should not only (or entirely) have legal character (or meaning), rather it should have political and other dimensions. It implied that the matter of jurisdiction should be decided in the light of the circumstances of each case.

39. Rajan, n.4, p.79. Many others also hold similar views. Minasse Hailey, a doctoral student of Columbia University and till recently Foreign Affairs Minister of Ethiopia, too held the same view. He said, the assertion by the Permanent Court that the question of domestic jurisdiction is a "relative question" dependent "upon the development of international relations" has led to the view that since the determination of whether a given matter is or is not within the domestic jurisdiction of a state involves the consideration of the development of relations of states at a given time, and since this relation of states is shifting and uncertain, the proper criteria that must be adopted should be a political one rather than legal. See Minasse Hailey "United Nations consideration of Domestic Questions and their International Effects". (Ph.D. Dissertation, Columbia University, New York, 1961), p.100. Earnest Gross in emphasizing the changing nature of domestic jurisdiction, said: "It is, of course, an utterly hopeless task to endeavour to state which is an 'essentially domestic matter' at any given time or to lay down any slide-rule test for determining what is or is not an essentially domestic matter'. It varies with particular facts at hand; it varies with time ... It is in truth, a relative concept dependent upon the development of international relations". Earnest A. Gross, "Impact of the United Nations upon Domestic Jurisdiction", Department of State Bulletin (Washington, D.C.), vol.18, 1948, p.267. Professor Lawrence Preuss too stated that since the interpretation of the "terms" appearing in Art.2(7) would "involve a weighing of political and moral factors", the task of determining the applicability of Art.2(7) 'can more appropriately be performed by a political organ". Preuss, n.6, p.647.
Furthermore, it can also be said that these changes have introduced an element of great flexibility in determining the boundaries of domestic vis-a-vis UN jurisdiction, contrary to the impression created prima facie by the text of Art. 2(7). The vagueness of the phraseology of Art. 2(7) has turned out to be its highest virtue.\(^{40}\)

**ART. 2(7) AND OTHER PROVISIONS OF THE CHARTER: SCOPE AND EXCEPTION**

Many representatives, in the Assembly debates, considered that Art. 2(7) had an overriding effect on all other provisions of the Charter. Some said it should be read literally: that is to say, the phrase "nothing" contained in the present Charter shall authorize the United Nations..." must be taken to mean "nothing". Therefore, supporters of this contention (mainly the delegation of South Africa) maintained that the Article had an overriding effect and applied to all other provisions of the Charter, including those of human rights. South Africa was advancing the argument of supremacy of Art. 2(7) over all the rest, right from the inception of the Organization.\(^{41}\) Such a technical or literal reading of Art. 2(7) would affect the operation of other Articles, such as Art. 1, containing the Purposes of the Organization, Arts. 13, 55, 56 and 73.

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\(^{40}\) Ibid., p. 64.

On the other hand, many delegates held that Art.2(7) could not have an absolute meaning and effect in itself, it must be related to other provisions of the Charter. It was argued that if an overriding effect was conferred on Art.2(7), many provisions of the Charter would become meaningless. Art.10, which is envisaged by many delegates as the corner-stone of the United Nations, can effectively counter the arguments based on Art.2(7). Moreover, the Charter was an indivisible whole, being a valid and legitimate multilateral treaty, all its provisions were binding upon its signatories. Thus, it cannot be construed to have absolute primacy or meaning over rest of the Charter provisions.42

This controversy can be solved by citing the principles of treaty interpretations under international law. One such accepted principle, as noted earlier, is that "no part of a treaty [or the Charter for that matter] should be interpreted in isolation and independently of the rest of its provisions".43 The interpretation of any part of the treaty should be seen in relation to its principles and international law. Similarly, another important principle of treaty interpretation is that the

42. See for further analysis of this contention, ibid, vol.1, p.143; Suppl. No.3, pp.116-17.

43. Rajan, n.4, p.73.
parties must not be presumed to have intended to nullify or defeat a treaty by defeating its very purposes. One cannot find any reasons to believe why this rule of treaty interpretation should not be applicable to the Charter. Therefore, it can be said, in the light of these principles, that Art. 2(7) cannot have an absolute meaning over other Articles.

The only explicit exception provided for in the rule of domestic jurisdiction clause is applicable to the enforcement measures contained in Chapter VII of the Charter. The determination of the scope of this exception is most important, because upon the nature and extent of the exception depends the scope of the general rule—i.e., prohibition of interference in domestic jurisdiction. Since the domestic jurisdiction provision in Dumbarton Proposals (contained in para 7 of section A of the Chapter VIII) was concerned only with that section dealing with pacific settlement of disputes, it did not contain any exception to the provisions of Section B, contained in that chapter. But, as noted in earlier chapter, the Sponsoring Powers' amendment shifted the provision from Chapter VIII of the DOP to Chapter I containing provisions of general applicability to all the Charter provisions. The amendment, however, provided an exception to the application of Chapter VIII, Sec. B. This was stated to have been done in order not to limit the powers of the Security Council

44. Higgins, n.22, p.65.
in dealing with threats to peace or breaches of peace etc.

At San Francisco, the Australian delegate, Dr. Evatt, considered this exception too broad and thought it might have dangerous consequences to the sovereignty of member states. Accordingly, he tabled an amendment (which was finally approved and became part of the present 'Art. 2(7)', which sought to confine the exception to "enforcement measures" of the Security Council.

The main aim of the drafters of the Charter in making this exception might have been to give the Organization, despite domestic jurisdiction limitations, powers to take remedial steps with respect to situations or disputes which involved threat to peace, breach of peace, or acts of aggression. These powers were granted on it to maintain international peace, which was one of the Purposes of the Organization. But this intention has not been explicitly reflected in the Charter, as it has failed to define the degree of threat or breach of peace required to make the exception operative.45 It is not clear as when the situation becomes "ripe" for resorting to enforcement measures under Chapter VII.

It is evident from the Charter that the Security Council, under Chapter VII, not only has powers to take enforcement measures but also to make recommendations. Therefore, a question arises—whether the exception provided for in Art. 2(7) applies

45. Rajan, n.4, p.94.
to the whole of Chapter VII? If it is not, it can be argued that in case of less degree of gravity of the situation or dispute prevailing, for which the Security Council could not justify the determination of a situation under Art. 39, it might be argued that the Council is not competent to act under any other chapters of the Charter, even though the situation represents a potential threat to international peace and security. This view leads to an apparent contradiction to the powers and authority of the Council.\(^{46}\) There can be another view, divergent from the one mentioned above. It is that there could be varying degrees of threats to, or breaches of peace. Naturally, in such cases the measures taken could be less drastic and less far-reaching than those falling within the terms of enforcement measures under Chapter VII, and which could also be permissible (in spite of domestic jurisdiction limitation) under other chapters, especially Chapter VI of the Charter. These measures could be taken without any formal determination of the degree of threat to peace, breach of peace, or act of aggression, but merely on the judgement that the situation or dispute constitutes a potential threat to international peace and security. To act in such situation is one of the Purposes of the Organization. Whatever might have been the intention of the drafters of this exception, it can be said undoubtedly that the Security Council cannot sit quietly when there occurs threat

\(^{46}\) See for detailed analysis, ibid., pp. 94–95.
to peace, or breach of peace, despite by the restriction put by Art. 2(7). 47

In view of the prevailing contradictory views, only the UN practice can provide the satisfactory answer to this situation. 48

IS THE QUESTION OF HUMAN RIGHTS "ESSENTIALLY" A DOMESTIC MATTER?

Despite many references to human rights and fundamental freedoms in the UN Charter (specially in the Preamble, Articles 1(3); 13,1(b); 55,56; 62(2) and 76(c) ) certain efforts to protect them by the Organization or its members have been resisted on the grounds that such efforts would constitute "intervention" in the domestic affairs of the state under Art. 2(7).

Millions of people are denied even the basic human rights throughout the world, such as equality before law, freedom against arbitrary imprisonment, inhuman treatment or punishment. The policy of racial discrimination not only continues unabated in some parts of the world but also enjoys official protection from at least one member of the United Nations — the Union of South Africa. The single biggest hurdle that has been greatly hampering, if not completely blocking UN efforts in the field of

47. Ibid., pp.96-97.
49. Ibid., p.97.
human rights, is probably the domestic jurisdiction clause of Art. 2(7).

Hans Kelsen, has rightly pointed out that Art. 2(7) takes away most of what the human rights provisions provide for. It is said that this provision has reduced to a minimum, if not nullify, human rights provisions of the Charter. Thus, it can be said that the "reserved domain" clause has become a convenient handle for member states to escape their international obligations under the Charter in relation to human rights (among other subjects) and most of them took shelter under this clause. This has raised a basic question in respect of the Law of United Nations: whether questions of human rights fall essentially within the domestic jurisdiction of a state?

(i) Human Rights and 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, and international lawyers who contend that matters of human rights do


not fall under the "exclusive jurisdiction" of states. They base 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. They argue that the prominent position accorded to human rights in various Articles "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". On the other hand, it was argued that the repeated mention of human rights in the Charter provisions have made them obligatory in nature. Hersch Lauterpacht belongs to this group. 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 essentially within the domestic jurisdiction of UN members. At another place, he has said: "A matter is essentially within the domestic jurisdiction of the State only if it is not regulated by international law or if it is not capable of such regulation..." and he continued, "in the modern age

51. Lauterpacht, n.5, pp.147, 151.

52. Ibid., pp.147-48; 178. Also see n.25, pp.15-16. For similar views see Fincham, n.10, pp.176-77.
of economic and political independence, most questions, which on the face of it appear to be essentially domestic were, in fact, essentially international.\textsuperscript{53}

During the last four decades, the United Nations has not only sought to regulate matters concerning human rights, but also secured legal backing to them by way of drafting International Covenants on Human Rights which have now entered into force. Thus, it can be said that as a result of the formulation of fundamental human rights (in the form of the adoption of the UN Charter, the Universal Declaration, and the International Covenants, and a number of declarations and resolutions concerning human rights), the question of how a particular state treats its citizens seem no longer a matter "essentially within the domestic jurisdiction of a state".

The overwhelming majority of scholars and experts on the UN system have accepted the opinions expressed by Hersch Lauterpacht. For instance, Manouchehr Ganji considered that respect for human rights and fundamental freedoms as provided by the Charter should be acknowledged as legal obligation for the states, and that its breach would represent the infringement of the Charter itself.\textsuperscript{54} Some scholars considered that any attempt to

\textsuperscript{53} Ibid., p.175.

disregard or violate them is destructive, both of legal and moral authority. After making an extensive survey of UN action in this field, Rosalyn Higgins has concluded: "The claim... that human rights question cannot be essentially within the domestic jurisdiction seems justified, for Articles 55 and 56 imposes specific legal obligations by which all states are bound, Art. 2(7) notwithstanding."55 Peter N. Drost also views that questions of human rights by virtue of the terms of the Charter and other international instruments have become international matters and as such are outside the reserved domain of Art. 2(7).56

Similarly, recent studies on this problem have also followed more or less the Lauterpacht's line of thinking. Virginia Leary has concluded her essay57 saying that it is clear from the UN practice that certain actions relating to specific human rights problems do not constitute intervention. The United Nations has sought information, appointed fact-finding commissions, studied situations and made recommendations for the adoption of certain policies. Clearly, these actions have been considered as permissible by the Charter and not as constituting a violation of

Art.2(7). However, UN practice also seems to be clear about the limitations of UN actions, when concerned with specific violations of human rights: e.g. the sending of a fact-finding committee/commission into a country without its permission would appear to be unwarranted intervention. Ganji also has concluded that Art.2(7) cannot be invoked to prevent the United Nations from undertaking studies, investigations, and discussions or making recommendations concerning the international promotion of, and respect for, fundamental rights of the individual. 58

It was also said that where states ratifying human rights instruments have undertaken to observe specific obligations, the measures of implementation provided for in those treaties cannot be considered as intervention. In fact, by ratifying the Charter, in addition to ratifying human rights Covenants, members have opened up their reserved domain in this respect to UN organs.

Leary has concluded her essay by pointing out that the "gross, consistent or systematic violation of human rights" can no longer be considered a matter essentially within the domestic jurisdiction of the offending state under UN Charter, although there are limitations on the permissible actions of the United Nations in response to such violations in the absence of the finding of a threat to international peace. 59 The question then

58. Ganji, n.54, pp.35-36.

arises: What are "gross violations of human rights? One writer considers that governmental policies of genocide, mass killings, widespread acts of torture and other inhuman treatment, as well as mass arrests and imprisonments without trial fall into the category of "gross violation of human rights". In fact, the United Nations has consistently taken the position that a state engaging in gross violation of human rights is considered to be violating its Charter obligations and consequently is not protected by the domestic jurisdiction clause of the Charter. 60

The opponents of these views point out that mere mention of human rights in the Charter provisions 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 therefore no implementing machinery was provided for), and that under the Charter the members have only agreed to "promote" international co-operation in these matters. This question was discussed at great length at the 23rd meeting of the International Law Commission. Manley Hudson, who presided over the meeting, doubted the binding effect of the 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 Charter provisions on human rights 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 and fundamental freedoms without distinction as to race, sex, language or religion. They merely had agreed to promote international cooperation to that end." 61 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. 62

61. UN Int. 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 the human rights and fundamental freedoms of their own nationals. Ibid., pp.11-16. Also see, Drost, n.56, p.29; Joginder Singh Bains, "Domestic Jurisdiction and the Law of the United Nations", (unpublished Ph.D. dissertation, University of Michigan, 1953), p.181; Kelsen, n.3, pp.99-100,773 and Robinson, n.49, pp.74,78.

62. Felix Ermacora, "Human Rights and Domestic Jurisdiction (Article 2/7 of the Charter)", Recueil des Cours, vol.124, 1968, 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 impermissible 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 and the "protection" of human rights in matters of..."
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." [William Little, The Shorter Oxford English Dictionary, Revised and edited by C.T. Onions, 3rd ed. vol. II (Oxford, 1959), p. 1597]. 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. 63

(Previous f/n. cont...) discrimination 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 are generally based on pragmatic considerations – not on any legal or doctrinal principle. M.S. Rajan, The Expanding Jurisdiction of the United Nations (Bombay: Dobbs Ferry, N.Y., 1982), p. 210.

63. Ganji, n. 54, pp. 131-32.
However, it should also 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 toward 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. 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 it that something is done to ensure that human rights are being observed." 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.

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64. Louis Henkin, The Rights of Man Today (Boulder, Col., 1978), p.94.


66. Buergenthal, n.60, p.15.
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 wills 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.

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
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 purposes 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 machinery for their implementation prescribed, 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. More than once, a statement of Committee II/3 from the records of San Francisco Conference was cited, in support of


68. 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 Co-operation 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.
these contentions. One delegate remarked that even if the human rights were present, no standards were laid down to verify in the Charter.\textsuperscript{69}

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 Articles 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.\textsuperscript{70}

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.

\textsuperscript{69} 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 Cottee of 1st and 6th Cottee, p.15 (25 November 1946).

\textsuperscript{70} See for the details of each argument advanced in a specific case, 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.
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 the 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, therefore, not be evaded 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 scope 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 most 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 depends. 71

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. 72 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

71. 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.

72. GAOR, 10th Sess., Ad Hoc, Pol.Cottie, 5th mtg., (26 October 1955), para 2 and 3 (Sweden); Para 8 (Syria), pp.11-12.
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).

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. 74

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

73. GAOR, 15th Sess., Spl. Pol. Cottée., 242nd mtg., (5 April 1961), Para 13, pp. 77-76 (UK); 244th mtg., (7 April 1961), Paras 3 (Australia) and 16-19 (France), pp. 85-86.

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.\textsuperscript{75} But this was denied later and 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.\textsuperscript{76} 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 definitive standard was available was no argument at all. The mention of human rights in the Charter was not made with the

\textsuperscript{75} Bains, n.61, p.185.

\textsuperscript{76} 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 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.
intention of creating them, because they already did exist (the French delegate supported this view), 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. 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. This view is based on the doctrine of natural law.

77. Prof. René Cassin stated: "Human rights existed before the UN Charter and did not exist any less since". E/CN.4/SR.48 (4 June 1948), p.6.
78. GAOR, 3rd Sess., Part I, Sixth Cottee., (Chile).
80. See for the detailed study of this theory, Lauterpacht, n.5, pp.73-126, pp.13-55; and An International Bill of Rights (New York, 1945); and Richard Tuck, Natural Rights Theories - Their Origin and Development (Cambridge, 1979).
Thus, in conclusion, it can be said, in the prevailing opposing viewpoints on the question whether human rights question fall within domestic jurisdiction, that the answer to this question largely depends on whether 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 Legal Nature of Charter Provisions, the Declaration and Covenants/Conventions

The answer to the question (discussed above) i.e. whether or not human rights is a matter of domestic jurisdiction?, depends to a large extent on what place and what legal significance is being given to human rights provisions of the Charter. The questions on the legal nature of human rights (such as, how far are the Charter provisions on human rights a legal obligation? or are they a mere statement of ideals?) are generally raised by jurists and scholars and member states in the debates of human rights forums. These problems arise because the Charter provisions are too general and vague in defining those rights, and do not contain any machinery to implement them. Moreover, the Assembly and the ECOSOC lack powers to pass resolutions of a binding nature.

There are many scholars, jurists and UN members who consider that Charter provisions on human rights impose legal obligations. They accept the narrower view that the Charter references to human rights remove them from the domestic to
international sphere, opposing the views of some writers 81 (who claim that because the Charter provisions on human rights are worded in a vague language and those rights are undefined, they can be considered only as the declarations of Purposes and Principles and not binding on the member states), Lauterpacht has argued strongly that "the cumulative legal result of all these pronouncements cannot be ignored". In his opinion, "the legal character of these obligations of the Charter would remain even if the Charter were to contain no provisions of any kind for their implementation. For, the Charter also fails to provide for the enforcement of its other numerous legal obligations, the legal character of which is undoubted". 82 Rosalyn Higgins considers Lauterpacht's view as convincing. She has not found any reason why the United Nations should not concern itself with them, through discussions and resolutions. UN bodies should address resolutions to concerned states, rather than to pass them in a general terminology. There is no reason to consider these decisions as contravening the domestic jurisdiction of states. It was pointed out that the Charter is not in the habit of defining its terms, and was said if a definition were a pre-requisite to prescription of obligations, virtually all the

81. They are, e.g., Hans Kelsen, Leeland Goodrich and Joseph Kunz, etc. See, Kelsen, n.3, p.29; Goodrich, n.30, p.35 and Joseph L. Kunzu, "The UN Declaration of Human Rights", American Journal of International Law, vol.43, 1949, pp.316-23.

82. Lauterpacht, n.5, p.148.
Articles of the Charter would be rendered meaningless. One writer has appropriately remarked: While the vague language (used in the Charter) may affect the "degrees of effectiveness" of the obligation, it does not affect its "legal character".

A majority of writers have clearly taken the position that Arts. 55 and 56 impose legal obligations. Quincy Wright has opined that the use of the word "pledge" in Art.56 does undoubtedly imply some obligation, but that obligation is only to "take joint and separate action in co-operation with the Organization". It is pointed out that Arts. 55 and 56 are unequivocal and clear in imposing legal obligations. Any attempt by UN members to disregard or violate human rights is destructive both of legal and moral authority. As a matter of fact, these Articles plainly imply that the United Nations is to concern itself with matters which might otherwise be regarded as essentially within the domestic jurisdiction of states. They lend support to the inference that something more is expected of the Organization than a mere affirmation of respect for the rights of man. The obligations imposed in Art.55 should be fulfilled


85. Wright, n.8, pp.70-71.
in good faith of the membership obligations provided in Art. 2 of the Charter.\(^86\) It is said that Art. 56 creates a firmer commitment of members as well as of the Organization to take necessary measures to achieve the declared purposes of Art. 55. Leland Goodrich has compared Art. 55 with Art. 1 of the Charter to point out the significance of the former. It is more specific than Art. 1 in defining the responsibilities of states — as it (Art. 55) stressed on UN action, while Art. 1 emphasizes on "international co-operation"; Art. 55 commits the United Nations, if not to specific solutions, at least to achieving specific objectives, while Art. 1 refers to the solution of problems of "an economic, social, cultural or humanitarian character". He further added: Art. 55 declares that the United Nations shall "promote ... universal respect for, and observance of "human rights, while Art. 1 envisages "international cooperation in promoting and encouraging respect for human rights and fundamental freedoms".\(^87\)

To conclude, it can be said that, since the Charter is a multilateral convention now accepted by 159 states, member states are under legal obligation to promote respect for human rights within their respective jurisdictions.


\(^87\) Goodrich, n. 30, pp. 373-74.
Regarding the legal value attached to the Universal Declaration of Human Rights, it can be said that two differing opinions prevailed. The great majority of members who participated in the drafting of the Declaration did not consider that it created binding obligations. With the exception of a few states, it was generally held from the legal point of view that the Declaration is not a legally binding document to which one may attribute the effect of creating obligations for the states. Only the representatives of France and Belgium, and, to a lesser degree, Lebanon, Panama, and Chile maintained (with some reservations) that the Declaration has a binding force. Two arguments were advanced in favour of the binding force of the Declaration. Firstly, it was held that Arts. 55 and 56 of the Charter state the obligation of the members to respect "the fundamental freedoms for all". But these Articles do not specify what those fundamental freedoms are. The Declaration should thus be an "authentic interpretation" of Arts. 55 and 56, a determination of the content and scope of the obligations stated in these Articles.


89. This argument was advanced by France (A/C.3/SR.92, pp. 60-63 (20 October 1948), Chile (A/C.3/SR.91, pp.49-51 (20 October 1948) and SR.156, p.671 (25 November 1948)), China (A/C.3/SR.91, pp.47-48) and Lebanon (A/C.3/SR.91, p.51). The representative of Egypt also held the similar view and considered that the Declaration represented "an authoritative interpretation of the Charter" and stated that by adoption of the Declaration the question of human rights became a matter of international concern. A/C.3/SR.92, p.12.
Prof. Cassin of France, went even further to state (before the ECOSOC) that the Declaration was "a complement of the United Nations Charter ... a clarification of the Charter, and an organic act of the United Nations, with all the legal validity of such acts." Secondly, it was contended that some provisions of the Declaration have long constituted "customary rules of nations and were consequently recognized as unwritten international law."

Neither of the two arguments are convincing to Jorge Castaneda, as the records of the UNCTO clearly prove (he says) that no UN organ is authorized to make, in a general way, i.e., through pronouncements, "authentic interpretation" of the Charter. It cannot be considered that the Universal Declaration, as an authentic interpretation of the Charter, would fill the content of Articles 55 and 56 with a legal character.

However, irrespective of the extent to which Art. 2(7) originally may have covered the protection of human rights in the opinion of the framers of the Charter, there is no doubt that the adoption of the Declaration has greatly contributed to strengthening the view that this matter is no longer outside the

90. E/SR.215, p.18. Along the same lines was the opinion of the Lebanese delegate, Dr. Malik; he has observed that the Declaration was not a simple resolution of the Assembly, but a continuation of the Charter and must have the dignity of the Charter (E/CN.4/3R.50, 4 June 1948, pp.3-5).


international sphere and thus exempt from international action. Since 1948, UN organs have almost invariably asserted their capacity to discuss and make recommendations on the protection of human rights, frequently invoking the Declaration as a basis, both for maintaining their competence and for addressing specific recommendations to states on these matters.\textsuperscript{93}

Over the years, the United Nations has adopted more than twentyfive instruments of human rights and most of which are in force today.\textsuperscript{94} These instruments clearly establish obligations

\begin{itemize}
  \item 93. Ibid., p.195.
  \item 94. There are twenty one human rights; instruments which are now in force. They are:
    \begin{itemize}
    \item (i) International Covenant on Economic, Social and Cultural Rights;
    \item (ii) International Covenant on Civil and Political Rights;
    \item (iii) Optional Protocol to the International Covenant on Civil and Political Rights;
    \item (iv) International Convention on the Elimination of All Forms of Racial Discrimination;
    \item (v) International Convention on the Suppression of and Punishment of the Crime of Apartheid;
    \item (vi) Convention on the Elimination of All forms of Discrimination Against Women;
    \item (vii) Convention on Prevention and Punishment of the Crime of Genocide;
    \item (viii) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity;
    \item (ix) Slavery Convention of 1926;
    \item (x) 1953 Protocol amending the 1926 Convention;
    \item (xi) Slavery Convention of 1926 as amended;
    \item (xii) Supplementary Convention on the Abolition of Slavery, the Slave Trade, and institutions and Practices similar to slavery;
    \item (xiii) Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others;
    \item (xiv) Convention relating to the Status of Refugees;
    \item (xv) Protocol relating to the Status of Refugees;
    \item (xvi) Convention on the Reduction of Statelessness;
    \item (xvii) Convention relating to the Status of Stateless Persons;
    \item (xviii) Convention on the International Right of Correction;
    \item (xix) Convention on the Nationality of Married Women;
    \item (xx) Convention on the Political Rights of Men; and
  \end{itemize}
\end{itemize}
for States Parties. But their legal nature depends to a large extent whether a state has only signed them pending the ratification or accession (e.g. the United States has signed the two Covenants in 1977, but till now it has not ratified) or has acceded with any reservations. It also matters, of course, whether these instruments are accepted by populous nations or by those with small populations. Though these instruments are primarily and directly applicable to nation states, rather than to private individuals, they create binding obligations on States Parties for which they are accountable to international community. Since many of the Covenants/Conventions have entered into force and are widely ratified (e.g. by 1 January 1985, the Genocide Convention was ratified by 89 states and the Convention/Racial Discrimination by 115 states), it can be argued that human rights are no longer considered as matters falling essentially within the domestic jurisdiction and that their adoption has given a specific content to the obligations of the UN Charter.

(iii) The Question of UN “Intervention” in the Field of Human Rights

There are two possibilities when the UN organs, especially the Security Council, can directly concern/intervene in questions

(previous f/n. cont...)

(xi) Convention on Consent to Marriage, Minimum Age for marriage and Registration of Marriages.

involving the violation of human rights. Firstly, under Art. 34 of the Charter, the Council is authorised to investigate any dispute or any situation (which may arise from the widespread denial of human rights) which might lead to international friction or give rise to a dispute. It is also authorized to determine whether the continuance of such situation or dispute is likely to endanger the maintenance of international peace and security. Such situations might even grow out of neglect or wilful refusal by a state to pay proper respect to fundamental rights of persons within its jurisdiction, and such a refusal might jeopardize the rights of a minority of its population. One writer has said, it might even happen that an arbitrary and dictatorial government would oppress all its subjects. In this case, the form of government itself might constitute a situation leading to international friction and giving rise to a dispute. He concluded, under such circumstances the Security Council might intervene, notwithstanding that the situation was originally a matter essentially within the domestic jurisdiction of a particular state concerned. 95

Article 39 of the Charter provides another possible way, in which the Security Council can avoid Art. 2(7) and concern itself with human rights situations. Under this Article, the Council is authorized "to determine" the existence of any threat to the peace, breach of peace, or act of aggression and make recommendations or take decisions to maintain or restore international peace and security. This Article has been invoked many

95 Holcombe, n.86, p.98.
times in respect of South Africa. It can be established under this Article that any particular problem of human rights may create a situation amounting to a "threat to the peace, breach of peace or act of aggression" and the Security Council might take enforcement measures under Chapter VII. It should be recalled that the Ukrainian SSR had once suggested in the Commission on Human Rights that this was the only case in which the United Nations could act to safeguard human rights. But the practice of the Organization has opened up a much larger exception. The Security Council has powers to deal with such situations under Articles 34 and 35.

Thus, it can be said that when a matter or situation (including those arising out of violation of human rights) becomes likely to (i) endanger the maintenance of international peace and security; and (ii) impair the friendly relations among states, that matter automatically ceases to be one of essentially domestic jurisdiction, but of international concern and interest.

SUMMARY OBSERVATIONS

The discussion of various problems of interpretation and application of the provisions of human rights and domestic jurisdiction under UN Charter and its Practice, which followed in this chapter, enable us to form a few observations. Firstly, it should be recognized, at the outset, that there exists no universally agreed definition on the meaning and content of the terms

"domestic jurisdiction" and "essentially domestic" and "intervention" appearing in Art. 2(7) of the Charter. The lack of definition and ambiguity of these "terms" had a major impact on the functioning of UN organs, with respect to promotion and protection of human rights. One of the most common situations giving rise to claims and denials of the applicability of domestic jurisdiction reservation was regarding the question of human rights. Numerous objections were raised to make human rights provisions of the Charter inapplicable and non-binding, specially by the states where human rights were alleged to have been denied to their citizens. However, the UN practice has proved that Art. 2(7) cannot assume primacy over rest of the Articles. Similarly, it has been widely held that giving literal meaning to those terms is juridically untenable and unacceptable to the vast majority of UN members and scholars. The UN organs, in their practice, have asserted their competence to concern the questions of human rights, not withstanding strong arguments in favour of Art. 2(7). They have discussed and investigated quite a number of human rights situations.

The second inference which emerges from UN practice is that such UN activities as "discussion", "concern", "study", "investigation", "inquiry" (with prior approval of the states Parties concerned) of the human rights questions, and even the adoption of "recommendations" to correct human rights behaviour of a state are considered as not constituting "intervention in the internal affairs of member states". It follows, therefore,
that a "narrow interpretation" of the term "intervention" is widely accepted and its "strict or broad" interpretation is ignored. Most of the UN organs, despite the objections raised on the ground of domestic jurisdiction clause, have succeeded to exert considerably their power of "concern" and "discussion" (and sometime, preparing the report) of the questions of human rights. They have made thousands of recommendations, which have been not considered as tantamounting to intervention in the sense of Art. 2(7), though the concerned states often claimed so. However, it should be recorded that so far no UN organ has directly intervened in a member state to uphold human rights (e.g. by imposing mandatory sanctions or resorting to UN action i.e. other than those of passing recommendations), nor has supported the principle of "humanitarian intervention". The South Africa is an exception. It was the only state against which the Security Council had taken strongest action by imposing mandatory arms embargo in 1977 (by Resol. 418).

Thirdly, it can be said that the adoption of over more than 25 human rights instruments/documents and the coming into force of many such instruments, during the last four decades, have constituted a pioneer effort in the history of international relations. During this period, there is no single year when human rights have not been on the agenda of most UN organs. As a matter of fact, it has become a staple of UN activity. Given the human rights provisions of the Charter, and the definition,
catalogue and unanimous proclamation of these rights in the Universal Declaration, and the provision of the system of implementing machinery in the two Covenants on human rights, among other instruments, it is clear that the subject of human rights as such is no longer a matter "essentially" within the domestic jurisdiction under Art. 2(7). As a result, a state today cannot make the blanket assertion, as it could do before the Second World War, that the manner in which it treats its own nationals is a matter within its domestic jurisdiction and not the business of any other state. Thus, it can be said, keeping in view the process of internationalization of human rights, that virtually all states are at present subject to some international legal obligations as regards some human rights of their inhabitants. To that extent, their actions in regard to such human rights are, of course, not within their own domestic jurisdiction.

Two authorities of the law of United Nations can be cited to support the above conclusion. First, Louis Henkin once appropriately stated that if human rights were always a matter of domestic jurisdiction and never a proper subject of UN or external attention in any form (like discussion, resolution and recommendations) the provisions of the UN Charter, the Universal Declaration, and of various Covenants/Conventions, and the various activities of UN and other bodies would be ultra vires. 97

Second, Alfred Alfaro, a delegate from Panama, and a well-known international lawyer, eloquently stated in the very first session of the General Assembly: "Now, is para 7 a real barrier? Are human rights essentially within the domestic jurisdiction of states? My answer is no, a hundred times no. I submit that, by the San Francisco Charter, human rights have been taken out of the province of domestic jurisdiction and have been placed within the realm of international law". He had further added, "I submit that the United Nations have undertaken collectively to proclaim, to promote and to protect human rights, and by so doing, the Members of the Community of states, by the greatest of all covenants in history, the San Francisco Charter, have given birth to a new principle of the law of the nations, the principle that the individual, as well as the state, is subject to international law." He continued: "That the principle has ceased to be the mere speculation of jurists and writers... human rights... is a matter essentially within the jurisdiction of international law, especially within the sphere of action of the United Nations." 98