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QUESTIONING THE SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW AND THE UNIVERSALITY OF HUMAN RIGHTS STANDARDS

AMOLOYE-ADEBAYO AZIZAT OMOTOYOSI*

ABSTRACT

This article critically examines two important but controversial areas in the international debate on meaningful protection of human rights- the question of the sources of international human rights law and the universality of human rights standards. It argues that there is a need to carefully and correctly locate within general international law the source(s) of law that makes human rights standards universally applicable to all individuals everywhere. With the notion that what is to be taken as the source(s) of international human rights law to a large extent determine the contours of the universality of the recognised human rights standards, the article concludes that there is a need for an all-inclusive and robust analysis of the two areas in such a way that the term 'human rights' does not merely constitute a rhetorical phrase to those individuals who may be left at the margin of a narrow construction.

I. HOW CAN THE TERM 'HUMAN RIGHTS' BE RIGHTLY DESCRIBED?

Twining cautions, and rightly in the current author view, about making unreserved generalizations regarding law or legal systems generally. The reason being that such generalization, in contemporary times, are often superficial, misleading, exaggerated, ethnocentric, or in some cases plain false.¹ He offers himself as global-sceptic and decries the tendency to overuse and abuse global words such as 'global law' and 'global jurisdiction' because they tend to ignore 'the crucial point that interdependence is a relative matter.' To him

Most so-called "global" processes and phenomena are linked to sub-global patterns of relative proximity: geographical contiguity, historical connections, military, economic, political, and trade relations, empires,

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¹ Twining, W. 2004, 'Diffusion of Law: A Global Perspective,' 49 *Journal of Legal Pluralism and Unofficial Law*, Pp. 1-15. See also a further illumination of the theme in a sequel to this titled 'Social Science and Diffusion of Law,' 32(2) *Journal of Law and Society*, 203-240. Pp. 204-7.

alliances, diasporas, and networks. The English Language, the Common law, the Islamic world, World Wars I and II are, in this view, sub-global phenomena.²

1 Taking the above words of caution on board, perhaps what aspires to true globalism in present times is the International Human Rights System, even if based entirely on the singular fact that as Shelley puts it: "[t]he issue of human rights is now part of an intellectual dialogue that assumes headlines in many leading newspapers throughout the world."³ Human rights is arguably the most popular terminology in International Law that permeates almost all discourses and debates whether political, social, economic or even religious. Political decisions, economic/trade policies and agreements, social stratifications, religious principles and /or practices often times become human rights' issues and are evaluated on that basis at national and international levels.⁴

Yet, for all *conceptual* and *practical* purposes, the term 'human rights' has from inception been and still remain not only 'a political issue of extraordinary concern' but 'as well an intellectual and legal problem.'⁵ For the *conceptual*, the precise nature and definition of what we all mean by 'human rights' has continued to remain elusive. Efforts by leading commentators to pin the term to some particular levels of understanding have ranged between cynicism and utopianism. To some political scientists, (human) "rights are the privileged vocabularies in negotiating issues and constructing institutions, at least in the West"⁶ which if not constrained has the potential, as some legal writers have stated, of easily slipping (or has slipped already) into a 'political football'.⁷

On a lighter and perhaps comical note is the following commentary by Falk⁸

The concept of human rights is the mother's milk of the international community. Problem is, these days human rights come in more flavors than coffee or soft drinks.

²Twining, W., 2009, 'Implications of "Globalisation" For Law As A Discipline' Presented at the Commonwealth Scholarship Commission Legal Network Launch Conference, 13-14 June, 2009, Pp. 1-3, On file with the author.

³Shelley, L.I., 1989, 'Human Rights as an International Issue,' *Annals of the American Academy of Political and Social Science*, vol. 506, p. 43.

⁴*Ibid*, P.43.

⁵Frohock, P.M., 2008, 'Human Rights and Research on Inchoate Life: An Emerging Set of Limits for Rights Vocabularies?' 30 *Human Rights Quarterly*, P. 960.

⁶Heinze, E., 2008, 'Even-handedness and the Politics of Human Rights,' 21 *Harvard Human Rights Journal*, 7-46, P.7.

⁷Falk, R., 2004, 'Human Rights', *Foreign Policy*, No. 141, P. 18.

Would you like the Asian, Islamic, indigenous, economic, European or the U.S. version? And how would you like your human rights to be served: "with sanctions, regime change, corporate window dressing, or good old-fashioned moral suasion? [Human rights are] the most effective- and most misguided- recipes for promoting human dignity around the world. (Parenthesis added).

Likewise, the argument by Evans⁸ presents human rights as not only 'a concept that empowers those threatened by state violence but also 'offers an instrument for domination' which are necessary in market discipline and relations to 'maintain and legitimate particular forms of production and exchange.' Accordingly, he further argues, given that lots of attention is accorded issues such as 'trade, property, and finance' than to 'poverty, the environment, and socioeconomic rights' within the legal discourse of human rights (as international human rights law, hereinafter IHRL), it may be suggested that 'human life is valued as a means to an end rather than an end in itself.'

Another description of human rights as "internationally guaranteed legal entitlements of individuals vis-a-vis the state, which serve to protect fundamental characteristics of the human person and his or her dignity in peacetime and in times of armed conflict"⁹ while being useful for pedagogical purposes can also become victim of its own construction. Surely, one may argue, that a description of human rights as 'legal entitlements of individuals vis-a-vis the state' merely underscores one of the traditional views on the origins of human rights as articulations 'in the post Holocaust world solely for the purpose of protecting individuals from abusive modern states'¹⁰ thus making states the sole duty-bearers of human rights obligations. This definition, in the current author's view, ignores the conventional perspective that States, while being the primary duty bearers of human rights obligations, non-State actors such as transnational corporations and private individuals must be recognized as having certain duties too if human rights are to be protected more meaningfully. As Sterner observes-

[T]he notion that the human rights movement regulates only state conduct is at best an historical observation. As it develops, human rights law continues to erode the long

Evans, T., 2005. 'International Human Rights Law as Power/Knowledge.' 27 *Human Rights Quarterly*. Pp. 1046-1068 @ 1056-8.

Kalin, W. and Kinzli, J. 2009. *The Law of International Human Rights Protection*. Oxford: University Press. P.32.

Afshari, R., 2007. 'On Historiography of Human Rights Reflections on Paul Gordon Laren's *The Evolution of International Human Rights: Visions Seen*.' 29 *Human Rights Quarterly*. P.8.

standing notion of a public-private divide, in the sense of state and non-state actors, where only the former is subject to regulation under international law.¹¹

Further, describing human rights simply as 'legal entitlements' appear to incline strongly towards the theory of legal positivism which locates the origin of human rights only in *international guarantees* such as treaties and conventions. This notion is contrary to the postulates of the natural law theorists who consider the 'dictates of natural law as being an appeal much saner and safer than to the uncertain and unenlightened opinions of a bemused electorate'¹² on the origin of human rights. To the naturalists, the 'basic principles of law (like human rights) are not determined by shifting legislation or even by treaties.'¹³

Taking account of the discussion so far, it is arguable that the richness of the multitude of lenses through which the human rights terminology may be refracted makes a universally/globally acceptable description a difficult if not impossible task. Perhaps a universally accepted definition is an antithesis to the human rights program itself that lauds, *inter alia*, the principle of freedom of thought and individual expression to all persons. Moving from the *conceptual* problem of the terminology to the *practical*, whether or not in application the contents of the specific human rights guarantees have universal interpretation or must as of necessity be contextually relative to the socio-cultural exigencies of each domestic jurisdiction is still providing much fertile ground for serious debates. A prior theoretical problem is the question of the source(s) of IHRL. All in all, the case seem to be that that we all generally agree on the term 'human right' in so far as it is not a requirement of the agreement to define in specific terms what it entails.¹⁴ What follows in the sections below is an examination of the question of the sources of IHRL and that of the universality of human rights standards guaranteed by this law.

II. SOLVING THE QUESTION OF SOURCES OF IHRL.

It is observed that some measure of caution must be exercised in analyzing the sources of IHRL. A study of relevant literature indicates that this is an area fraught with seriously divergent views. Legal

¹¹Steiner, H.J., 2007. 'Human Rights: The Deepening Footprint.' 20 *Harvard Human Rights Journal* P.9

¹²Brown, P.M., 1940. 'Changing Concepts of International Law.' 34(3) *The American Journal of International Law* P.504.

¹³Ibid.

¹⁴See the statement by one of the members of the Committee responsible for the drafting of the Universal Declaration of Human Rights (UDHR) as cited in Glendon, M. A., 2001. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. Random House Inc P.I.

commentators have given the proposition that the concept of human rights owes its 'distinct international flavour' to international law generally.¹⁵ IHRL is therefore regarded simply as part and parcel of international law, the former supposedly sharing the same characteristics and sources as the latter.¹⁶ In order to test the validity or otherwise of this assertion, it is important to ascertain in the first instance what the sources of international law are and to thereafter examine the extent to which one may say that the same sources serve as the basis upon which norms of IHRL may be grounded. An authoritative indication of the sources of international law is Article 38 (1) of the Statute¹⁷ of the International Court of Justice (ICJ) which provides -

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

It is safe to argue that only the sources contained in (a) - (c) above are relevant for discussion in relation to IHRL for obvious reasons. Taking the listed sources in their order of formulation, it appears that it is only the position of international human rights treaties as the legal source of some human rights obligations, especially in relation to States party to them, that appears settled. On this issue, most international human rights experts would generally agree that a sure and straight-forward source of IHRL are human rights guarantees enshrined in the provisions of the existing human rights treaties. In one such sense, it has been contended that 'treaty law provides solid and

¹⁵Beyani, C., 1999, 'The Legal Premises for the International Protection of Human Rights', In Goodwin-Gill and Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie*, Oxford: Clarendon Press, P.22.

¹⁶Rehman, J., 2003, *International Human Rights Law: A Practical Approach*, Harlow, etc: Longman, P.13.

¹⁷Available at <http://www.icj-cij.org/documents/index>. Last accessed 11 January 2014.

not to simply validate compelling legal foundations¹⁸ upon which to base some human rights obligations largely because the legal character of treaties generally 'appears to be more or less uncontroversial'.¹⁹

In spite of this contention, it is acknowledged that the provisions of international human rights instruments in some situations are not adequate for human rights protection for the reason that it is possible for the violation of some human rights violations of some States to be left unaddressed.²⁰ This may be for the reason that an offending State is not party to a governing treaty or that the provisions of a particular treaty are such that are made subject to the domestic legal machinery which places municipal legislations at par or above provisions of international instruments. Considerations such as stated have fuelled the desire to locate human rights obligations in some other sources other than treaty law.²¹ The quest has given rise to questions and arguments as regards whether or not it may be said that some human rights norms are grounded or possess some strong foundations in customary law²² as stated above in Article 38 (1) (b) of the ICJ Statute. 'International customs' as provided in this paragraph appear to accord with the traditional view on the twin requirements of evidence of states practice and a sense of legal obligation (*opinio juris*) before a rule of international law may be said to have developed based on custom.²³

While some commentators of IHRL have argued for the existence of some human rights norms as customary IHRL,²⁴ this notion has been challenged as not satisfying the two basic requirements for the development of a norm as international custom.²⁵ For example, based on the traditional 'states practice and *opinio juris*' paradigm, it is not entirely clear whether the continuous and countless invocations of the provisions of the provisions of a non-treaty UDHR in most national jurisdictions²⁶ can safely be taken as evidence of state practice or

¹⁸Simma, B and Alston, P., 1988-89, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Yearbook of International Law* Pp 82-3.

¹⁹Ibid.

²⁰Ibid p. 107.

²¹Ibid.

²²Lillich, R.B., 1995-6, 'The Growing Importance of Customary International Human Rights Law', 25 *Georgia Journal of International and Comparative Law* P.2, compare with D'Amato, A., 1995-6, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms', 25 *Georgia Journal of International and Comparative Law* Pp 51-2.

²³Henkin, L., 1995-96, 'Human Rights and State "Sovereignty"', 25 *Georgia Journal of International and Comparative Law* P.35.

²⁴See in the same journal citation as the works cited in note 22 *supra* - Hannum, H., 1995-6, 'The Status of the Universal Declaration of Human Rights in National and International Law', Pp. 287-397; Weisburd, A.M., 'Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights', Pp. 99-146; Paust, J.J., 'The Complex Nature, Sources, and Evidences of Customary Human Rights', Pp. 147-164; Maier, H.G., 'The Role of Experts in Proving IHRL in Domestic Courts', Pp. 205-223.

²⁵Stephens, B., 'Litigating Customary International Human Rights Norms', Pp. 191-203; Scotie, A., 1986, 'Enforcing the Customary International Law of Human Rights in Federal Court', 74 *California Law Review* Pp. 127-187; and Beyani, C., 1999, *Supra* note 15, P.32.

²⁶Simma, B and Alston, P., 1988-89, *Supra* note 18, Pp. 88 and 101.

²⁷Hannum, H., 1995-6, *Supra* note 24, Pp. 287-397.

opinio juris or both without encountering ideological challenges. As Henkin has argued, '(h)uman rights law has been established largely by treaty- the U.N. Charter and international human rights covenants and conventions- but without any foundation or context of custom'.²⁷

This observation appears to stem from a careful consideration of the fact that if it is to be said that some human rights norms developed as a result of custom, then it will be difficult, if not impossible, to satisfy the requirement of states practice and *opinio juris*.²⁸ This is in view of the historical antecedent to the adoption of the UDHR of gross human rights violations and continued violations in present times despite existing provisions enshrined in authoritative international human rights documents.²⁹ It would also not be suffice the existence of custom as a source of IHRL by explaining that past and present gross human rights violation were/are mere breaches of 'customary IHRL' and not evidence of states practice and *opinio juris* in that regard.³⁰ Such line of argument would have reconstituted the traditional requirements of the components of a rule of international law based on custom. For if a supposed rule of customary law was mostly observed in breach, it questions the validity of the assumption of state practice and a sense of legal obligation in that regard.

The unclear position as to whether or not there is any such thing as customary IHRL clearly does not satisfy the need to locate certain human rights norms in some sources other than treaty law. As a result, it has been proposed that certain human rights norms, such as those prohibiting slavery, torture, inhuman and degrading treatment are to be viewed as constituting part of *jus cogens* (peremptory norms which are regarded as non-derogable).³¹ On this note, Henkin has similarly suggested that there has since developed, in addition to conventional human rights law, 'non-conventional' but not customary sources of IHRL to be found in national constitutional laws and possibly 'sneaking on the back' of *jus cogens*?³² Further, the UN Human Rights Committee (HRC),³³ while analysing the provisions of Article 4 of International Covenant on Civil and Political Rights (ICCPR) 1966,³⁴ on matters of permissible derogations in states of emergency and the question of non-derogable rights, made the following remarks:

²⁷Henkin, L., 1995-96. *Supra* note 23, P. 36.

²⁸Simma, B and Alston, P., 1988-89. *Supra* note 18, Pp. 91-4.

²⁹*Ibid*.

³⁰*Ibid*.

³¹Parker, K., 1988-9. 'Jus Cogens: Compelling the Law of Human Rights.' 12 *Hastings International and Comparative Law Review*, Pp. 411-463.

³²Henkin, L., 1995-6. *Supra* note 23, Pp. 37-38.

³³This is the international treaty body responsible for the monitoring and supervision of compliance by States Parties with the human rights provisions of the International Covenant on Civil and Political Rights, 1966.

³⁴999 UNTS 171.

The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7). ... Furthermore, the category of peremptory norms extend beyond the list of non-derogable provisions as given in article 4, paragraph 2. State parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of ... peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.³⁵

A question which may be understandable at this juncture is: how are peremptory norms developed? One may get the sense that given the notion of the generality of the acceptance of some human rights norms as possessing non-derogable character as noted above, perhaps they have been developed as a result of state practice, and therefore, part of customary law.³⁶ However, as Simma and Alston have rightly noted, while the norms of *jus cogens* may be 'generally recognised and maintained, tangible State conduct frequently does not live up to these promises'.³⁷ This is where the argument as to whether peremptory as well as other non-conventional human rights norms have their source in 'general principles of law recognized by civilized nations' as contained in Article (1) (c) of the ICJ Statute becomes apposite. Again, Simma and Alston have presented a convincing analysis of the point in question.³⁸ As they have correctly argued, recourse to general principles of law demonstrates a consensualist recognition of some principles based on moral and humanitarian considerations which enjoy a 'more direct and spontaneous "expression in legal form"' regardless of conduct by States in that regard.³⁹ In the current author's opinion, this is a firmer ground to be used as a source of IHRL because it punctures the ideological barriers of norm formation under customary law while also ensuring that widely accepted human rights standards, not only of the peremptory nature, may have a legal basis even if they

³⁵ General Comment No. 29 'States of Emergency (Article 4)' UN Doc. CCPR/C/21/Rev II/Add. II.

³⁶ Simma, B and Alston, P., 1988-89. *Supra* note 18, P. 103.

³⁷ *Ibid.* P. 104.

³⁸ See *Ibid.* Pp 82-108 for more general discussion on the subject.

³⁹ *Ibid.* P. 105.

are often violated. This position also acknowledges the seemingly unique nature of IHRL out of general international law wherein principles espousing human rights norms 'have always preceded practice'

The present discussion on sources of IHRL will be incomplete without a consideration of the significance of the human rights provisions contained in some of the existing international and regional documents. The first point of reference is the human rights provisions of the UN Charter. This is because it is these provisions that appear to have signalled for the first time the agreement of sovereign States to cooperate in the protection of human rights and ensure their universal recognition everywhere. These provisions therefore constitute a key source of IHRL as presently constituted. One of the purposes of the UN as stated in Article 1 of its Charter is achieving 'international co-operation' for the 'promotion of and 'encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. Arguably, this provision, alongside other references to human rights in the preamble and other Articles of the UN Charter, constitutes the first reference to the term human rights in an international treaty.⁴¹ The Member states of the UN thus 'determined', as the second paragraph in the preamble of the UN Charter states, 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'. More importantly, the combined effects of Articles 55 and 56 of the UN Charter reflect the pledge by member states to cooperate with the UN in promoting 'universal respect for, and observance of, human rights and fundamental freedoms'. The subsequent observance of this pledge gave rise to the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. According to Simma and Alston⁴², the UDHR 'and the body of soft law'⁴³ following up and building upon it' may be regarded as 'authoritative interpretation[s] of the human rights provisions of the U.N. Charter.'

The UN Charter mentions human rights obligations for States but neither spells out its contents nor 'accord[s] legal entitlements to individuals'.⁴⁴ The UDHR for its part presents a catalogue of human

⁴¹ Ibid. P 107

⁴² Merrills, J.G. and Robertson, A.H., 2001. *Human Rights in Europe*. Fourth Edition. Manchester University Press. P 2

⁴³ Simma, B and Alston, P., 1988-89. *Supra* note 18, P 107.

⁴⁴ The term 'soft law' is usually used to refer to the Declarations and Resolutions of the General Assembly of the UN particularly in the area of human rights. [Footnote added]

⁴⁵ Kalin, W. and Kinzli, J., 2009. *The Law of International Human Rights Protection*. Oxford: University Press. P. 39.

rights with little or no indication of their core and maximum elements. It also posits that all persons everywhere and any place are entitled to all the rights 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.⁴⁵ It is, however, silent on the question of implementation of these rights but requires that⁴⁶ 'every individual and every organ of the society shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance' in every jurisdiction. The UDHR has been described as the 'first legal framework which set the stage for an international law of human rights'.⁴⁷

In addition to the UDHR, there have been successive declarations adopted by the General Assembly of the UN on human rights, particularly on some group-rights such as those on women; racial, ethnic, linguistic or religious minorities; children; refugees; migrant workers and their families; and persons with disabilities.⁴⁸ Some of these declarations have gone on to inform binding international treaties and conventions on the same focal points. It is useful to state here that the two International Covenants on Civil and Political Rights (ICCPR)⁴⁹ and Economic, Social, and Cultural Rights (ICESCR)⁵⁰ both of 1966 (the Covenants), were based on the provisions of the UDHR. The Covenants as well as the UDHR together form the International Bill of Rights. The Covenants and other conventions,⁵¹ for instance on group-specific rights, are enforceable multilateral international agreements as against the State Parties concerned and constitute the core of IHRL.

At this juncture, special mention needs to be made of the contribution of some regional instruments in force as sources of IHRL. Presently, there are in existence regional human rights treaties for the regions of Europe (chiefly the European Convention on Human Rights, 1950 and the European Social Charter, 1961 as revised in 1996⁵²); the Americas (for instance, the American Convention on Human Rights, 1969 and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,⁵³

⁴⁵Article 2 of the UDHR.

⁴⁶See the preamble of the UDHR.

⁴⁷See Al-Roken, M.A., 1997, 'Human Rights under the Constitution of the United Arab Emirates: Guarantees and Restrictions', 12 Arab Law Quarterly P.91; also for similar proposition see Brems, E., 2001, *Human Rights: Universality and Diversity*, The Hague, etc: Martinus Nijhoff, P.20.

⁴⁸For list of these Declarations, see <http://www2.ohchr.org/english/law/>; Brownlie, I and Goodwin-Gill, G.S., 2006, *Basic Documents on Human Rights*, Fifth edition, Oxford: University Press, P.1.

⁴⁹999 UNTS 171.

⁵⁰993 UNTS 3.

⁵¹For a list of the various conventions, see *supra* note 48.

⁵²Available at http://www.echr.coe.int/ECRy1/Basic_Texts/ Last visited 7 January 2014.

1988⁵³); and Africa (for example, the African (Banjul) Charter on Human and Peoples' Rights, 1981⁵⁴). The provisions of these regional instruments, and the judicial interpretations of some of their provisions, have continually served to enrich the jurisprudence of IHRL.⁵⁵ Though Asia as yet remains without a human rights mechanism for the entire region, there have been serious efforts towards attaining that goal.⁵⁶

Of importance is the adoption by the Association of Southeast Asian Nations (ASEAN) of the ASEAN Charter (the Charter) in 2007. One of the purposes of this Charter,⁵⁷ expressed in paragraph 7 of Article 1, is the protection of 'human rights and fundamental freedoms.' With a view to realizing this objective, Article 14 of the Charter provides for the establishment of an ASEAN human rights body.⁵⁸ The fulfillment of the provisions of Article 14 led to the inauguration of the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the entry into force of its Terms of Reference⁵⁹ (TOR) in 2009.⁶⁰ On the sub-regional level, some Muslim States have also adopted certain human rights instruments. Prominent amongst these are the Cairo Declaration on Human Rights in Islam adopted by the Organisation of the Islamic Cooperation⁶¹ (OIC) in 1990 and the Arab Charter on Human Rights (the Charter), adopted by the League of Arab States⁶² in 1994. It has been argued that human rights instruments such as these serve the significant purpose of reflecting the ideology that Islam 'is a relevant factor in the human rights discourse in the Muslim world.'⁶³ It is important to note that the Charter of 1994 never entered into force, having received criticisms from observers that it was inconsistent with

⁵³Available at <http://www.cdf.org/Basico/English/Basic2.American%20Declaration.html>. Last visited 7 January 2014.

⁵⁴Available at <http://www.achpr.org/english/info/charter/en.html>. Last visited 7 January 2014.

⁵⁵For a compilation in summary form of some of the recent decisions of these regional bodies but specifically on ESC rights, see 'Leading Cases on Economic, Social and Cultural Rights: Summaries Working Paper No 7 ESC Rights Litigation Programme Centre On Housing Rights And Evictions (COHRE) 2009.

⁵⁶Available at http://www.cohre.org/view_page.php?page_id=381. Accessed 25 May 2012.

⁵⁷For detailed discussions and some documentation of these efforts, see *The Report of the Fourth Workshop on Regional Human Rights Arrangements in the Asian and Pacific Region*, Kathmandu, 26-28 February 1996, Close, P. and Askew, D., 2004. *Asia Pacific and Human Rights: A Global Political Economy Perspective*. Aldershot: Ashgate, Pp. 109-131. Nowak, M., 2003. *Introduction to the International Human Rights Regime*. Leiden/Boston: Martinus Nijhoff, P. 253. Haas, M., 2008. *International Human Rights: A Comprehensive Introduction*. London & New York: Routledge, Pp. 306-310.

⁵⁸Full text of the Charter is available at <http://www.aseansec.org/21069.pdf>. Accessed 16 June 2012.

⁵⁹Ibid.

⁶⁰Available at <http://www.aseansec.org/RDOC-TOR-AHRB.pdf>. Accessed 16 June 2012.

⁶¹See the ASEAN Cha-am Hua Hin Declaration of 23rd October, 2008, available at <http://www.aseansec.org/documents/Declaration-AICHR.pdf>. Accessed 16 June 2012.

⁶²Established in 1969 with the stated purpose of acting as a collective voice for the Muslim World. The organization is presently comprised of 57 Member states across four continents. See http://www.oic-oci.org/page_detail.asp?pid=40. Last accessed 7 January 2014.

⁶³Established in 1945 as a regional organization of Arab states geographically located across Southeast Asia, North and Northeast Africa. It is presently comprised of 22 Member states. See <http://www.arableagueonline.org/ias/index.jsp>. Last accessed 7 January 2014.

⁶⁴Badenn, M. A., 2007. 'Islam and the Realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives', 4(1) *Muslim World Journal of Human Rights*, P. 2.

international standards.⁵² However, a revised version of the Charter entered into force in 2008 two months after it received seven ratifications in accordance with its Article 45.⁶⁵ In 2009, an Arab Human Rights Committee established by virtue of Article 45 (1) of the Charter was formed to supervise the implementation of its provisions.⁶⁶

III. HOW 'UNIVERSAL' IS THE IDEA OF UNIVERSALITY OF HUMAN RIGHTS STANDARDS?

An important feature of the current international regime for human rights protection is the idea of its all-inclusiveness in relation to all persons everywhere. This feature appears to have strong roots in the principle of universality of human rights. This principle, as contended, substantially came alive in modern times with the UDHR.⁶⁷ Yet the question as to whether the rights protected under IHRL are in fact 'universal' has generated an avalanche of divergent views. Notable within relevant literature are strong promoters of the concept of cultural relativism or simple relativity of human rights in the stead of the universality principle.⁶⁸

The debate on universality of human rights appears sharpened by a substantially different contention that 'human rights are countercultural'.⁶⁹ The basis for the argument is that human rights ideology essentially evolved to alter or reform entrenched socio-cultural behaviours that violate human dignity from which no society was hitherto historically free.⁷⁰ There has also been the invitation to dispense entirely with the universalism/cultural relativism terminology. According to this notion, it is more instructive to view the human rights concept as *neither relative nor universal* but rich in global

⁵²Rishmawi, M., 2010. 'The Arab Charter on Human Rights and the League of Arab States: An Update', 10(1) *Human Rights Law Review*, P. 170.

⁶⁵*Ibid.* P. 189.

⁶⁶*Ibid.* P. 172.

⁶⁷Brems, E., 2001. *Supra* note 47, P. 20.

⁶⁸For some exposition of these theories and their relationship to each other, including the influence of some concepts such as globalization and capitalism on contemporary understanding, see: Toley, J. J., 2000. 'Cultural Relativism', 22 *Human Rights Quarterly*, Pp. 513-528; Goodhart, M., 2003. 'Origins and Universality in the Rights Debates: Cultural Essentialism and the Challenge of Globalization', 25 *Human Rights Quarterly*, Pp. 938-952; Howard, R., 1993. 'Cultural Absolutism and the Nostalgia for Community', 15 *Human Rights Quarterly*, Pp. 317-322; Englehart, N. A., 2000. 'Rights and Culture in the Asian Values Argument: The Rise and Fall of Confucian Ethics in Singapore', 22 *Human Rights Quarterly*, Pp. 548, 563-8; Walker, S. and Poe, S. C., 2002. 'Does Cultural Diversity Affect Countries' Respect for Human Rights?', 24 *Human Rights Quarterly*, Pp. 240-247; Ibhawoh, B., 2000. 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State', 22 *Human Rights Quarterly*, Pp. 838-9; Waltz, S., 2001. 'Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights', 23 *Human Rights Quarterly*, Pp. 67-72; Donnelly, J., 1984. 'Cultural Relativism and Universal Human Rights', 6 *Human Rights Quarterly*, Pp. 400-752.

⁶⁹Brems, E., 2001. *Supra* note 47, P. 366.

⁷⁰*Ibid.*

⁷¹Goodhart, M., 2008. 'Neither Relative nor Universal: A Response to Donnelly', 30 *Human Rights Quarterly*, P. 134.

appeal because of its utility in regulating various power relations.⁷² A converse but persuasive contribution to the debate is the idea that both for conceptual and enforcement purposes, human rights must encapsulate due measures of both universalism and relativism.⁷³ The result envisaged is an inclusive theory of *relative universality* of human rights⁷⁴ which will 'identify and critically evaluate a wide range of claims of universality and/or relativity.'⁷⁵

The current author is of the opinion that there is a lot of merit in this last argument. The reason being that even the UDHR appears to recognise in the last paragraph of its preamble that a common understanding of human rights is pivotal to 'full realization of the pledge' to guarantee and protect human rights to all persons⁷⁶. This may have accounted for why some legal writers⁷⁷ have sought to defend the principle of universality of human rights by reference to an alleged cross-cultural participation of all major political divides in the process of drafting the provisions of the UDHR. However, such notions have been challenged with the claim that the "human rights pronouncements of the representatives [of the countries that participated in the drafting process of the UDHR] did not, in and of themselves, reveal the level of their understandings and the depth of their commitments-or those of the states they represented."⁷⁸

Nevertheless, the conception in this work is that the adoption of the principle of relative universality of human rights in the implementation and enforcement of human rights standards may underscore a fundamental point. It is that for practical and pragmatic purposes, levels of understanding and commitment to the human rights concept must as of necessity vary from one national context to the other.

Therefore, efforts should rather be geared (as a number of UN treaty bodies currently attempt to do by their Concluding Observations and General Comments) towards achieving, a possible, a common conceptual recognition and agreement on minimum standards. Such 'common recognition', to the current author, constitutes the 'universal' content of the human rights concept. The enforcement of the agreed

⁷²Ibid.

⁷³Donnelly, J., 2007. 'The Relative Universality of Human Rights,' 29 *Human Rights Quarterly*, Pp.281-306 and 2006, 'Human Rights: Both Universal and Relative (A Reply to Michael Goodhart),' 30 *Human Rights Quarterly*, Pp. 194-204.

⁷⁴Ibid.

⁷⁵Ibid (2008) P.203.

⁷⁶See the preambular provisions of the UDHR, 1948.

⁷⁷See Glendon, M.A., 2001. *Supra* note 14 and Waltz, S., 2001. *Supra* note 68, Pp. 44-72.

⁷⁸Afsiuri, R., 2007. *Supra* note 10, P. 55.