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Michael Van Alstine

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The Universal Declaration and Developments in the Enforcement of International Human Rights in Domestic Law

MICHAEL VAN ALSTINE*

The Universal Declaration of Human Rights emerged in a time of high-minded hope in the ability of aspirations to propel law and law to control power. “It is essential,” the Declaration thus proclaims, “that human rights should be protected by the rule of law” as an antidote, among other things, to the reactive violence justified by “tyranny and oppression.”¹ This hope, however, was one tempered by experience with the human tendency to contrary impulses, and in particular by a painful familiarity with a half-century of near “universal” warfare. The immediate historical context of the Declaration, in other words, provided a blunt example of the capacity of power to control law.

As they assembled in the aftermath of World War II, therefore, the drafters of what became the Universal Declaration could have had few illusions about the ability of words alone to constrain domestic tyrants. The United Nations itself had few institutions or mechanisms for immediate enforcement, and none of any practical significance for individuals with particularized grievances. With this background, any bold attempt to declare immediately applicable international human rights “law” risked an appearance of detachment from the realities of law enforcement. As a founder of the U.S. American constitutional system had observed over a century and a

* Professor of Law, University of Maryland School of Law.

1. Universal Declaration of Human Rights, G.A. Res. 217A (III), pmb., para. 3, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

half earlier, “[i]f there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.”²

Certainly aware of such sentiments, the drafters of the Universal Declaration opted for a longer-term perspective. They did not set as the goal of the enterprise the creation of conventional legal norms for immediate enforcement by state or even international institutions. The animating spirit of the Universal Declaration was instead one of hope. Though clearly “an extraordinary achievement at the time,” as Oscar Schachter has aptly observed, “[i]n 1948 the Universal Declaration of Human Rights . . . was cautiously declared to express aspirations, but not binding law.”³ In its initial, fundamental conception, therefore, the Declaration did not purport to create binding norms even in the international legal system, a point U.S. American courts have emphasized with regularity.⁴

But aspirations, especially those solemnly declared, can plant the seeds of fundamental change. And as we reflect on the occasion of its 60th anniversary, by all appearances the seeds sown by the solemn aspirations of the Universal Declaration have already propelled quite remarkable changes in perspectives and even law itself. In a substantive sense, the Declaration has inspired progressive growth in a variety of more specific fields of human rights law at an international level, as the papers prepared for the other panels in this Conference explore in more detail. To be sure, the substantive domestic law effect of even these second generation human rights efforts remains uneven.⁵

But what the drafters of the Declaration may not have anticipated

2. THE FEDERALIST NO. 15, at 78 (Alexander Hamilton) (Clinton Rossiter ed., 5th prtg. 1999).

3. Oscar Schachter, *United Nations Law*, 88 AM. J. INT’L L. 1, 17 (1994).

4. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (“[T]he Declaration does not of its own force impose obligations as a matter of international law.”); *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 165 (2d Cir. 2003) (stating that the Universal Declaration does not reflect customary international law because it is merely aspirational in nature); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 818 (D.C. Cir. 1984) (declaring that the UDHR is a merely “precatory” document, designed as a statement of ideals and aspirations that does not create any legal obligations); *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1010 (S.D. Ind. 2007) (observing that the Declaration has only “moral authority” and has no legally binding force).

5. *See infra* note 9 and accompanying text (relating, as an example, the experience in the United States with the ICCPR and the ICESCR).

is how broadly and fundamentally domestic constitutional systems have subsequently adapted to embrace international law in general, and in some cases even the Universal Declaration in particular. My goal here is to set the framework for understanding the significance of these changes in domestic constitutional law in the sixty years since the adoption of the Universal Declaration. In specific, I will trace below how, in numerous respects, the strikingly varied constitutional systems of the world now share some structural similarities on the direct reception of international law in, or as, domestic law.

Indeed, this has become a common, express feature when drafters set about crafting modern constitutions. But the direct enforcement of customary international law by domestic courts and other legal institutions is not limited to these innovative, modern systems. It is also now an accepted principle in the interpretation of many long-established constitutional systems, even those firmly entrenched in the dualist tradition. Though by no means a universal phenomenon, the extent of this modern trend is worthy of emphasis on an important occasion such as this anniversary.

THE UNIVERSAL DECLARATION IN LEGAL CONTEXT

The Universal Declaration came into being in the context of a structural challenge for the actual enforcement of the international human “rights” it sought to define and protect. Even in the modern age of the middle of the last century, the basic premise of the traditional international legal system was that states, and states alone, were both its subjects and objects. States could, of course, bind themselves by conventional international law to protect the rights of individuals—and in certain limited spheres states have done just that for some time.⁶ At particular points, customary international law likewise created obligations that ran in favor of individuals and against states. Stated in broad terms, the fundamental goal of the Universal Declaration was to expand these examples to the broad

6. A prominent example of states agreeing by treaty to create directly enforceable rights in favor of individuals is found in so-called treaties of “amity, commerce and navigation,” which have existed for well over two centuries. For the United States see, for example, the Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 18, 1794, 8 Stat. 116; and the Treaty of Friendship, Limits and Navigation, U.S.-Spain, Oct. 27, 1795, 8 Stat. 138. Over sixty such treaties are now in force for the United States alone. See note following 8 U.S.C. 1101 (2003) (listing such treaties).

field of international human rights, both by inspiring express adoption in future formal treaties and by initiating the dialogue and actions necessary for the recognition of customary international law.

The challenge arose, however, with the forum for the vindication of those individual rights. Absent express consent, international law generally required states neither to submit to suits by individuals in foreign courts nor to open their own for the same purpose—*par in parem non habet jurisdictionem*, as the traditional Latin phrase runs. To be sure, international juridical institutions such as the International Court of Justice could declare the violation of individual rights by states under international law. But without more effective enforcement mechanisms at the international level, the force of these individual rights in practical terms depended on their reception as law in domestic legal systems. The challenge, in other words, was whether the individual rights secured in international law were subject to direct recognition and enforcement in domestic courts at the behest of the individuals themselves.

Viewed from the perspective of *international* human rights law, the Universal Declaration has had significant influence in the sixty years since its birth. Thus, for example, subsequent formal treaties have affirmed some noteworthy aspects of the Universal Declaration, most notably of course the International Covenant on Economic, Social and Cultural Rights⁷ and the International Covenant on Civil and Political Rights.⁸ These treaties in turn have found broad acceptance at an international level. In the important respect of propelling the progressive agreement on formal treaties on international human rights law, therefore, the Universal Declaration is already much of a success.

Even for formal treaties, however, the translation into immediately enforceable domestic law requires a substantially more nuanced analysis. For, with quite rare exceptions, domestic constitutions require some form of formal approval by municipal legislatures before treaties may function as directly enforceable law. In some cases and to some extent, domestic courts have directly applied these subsequent formal treaties to protect individual rights. But more commonly, notions of “direct effect” or “self-execution” have functioned as significant impediments to domestic enforcement. And

7. Dec. 16, 1966, 993 U.N.T.S. 3.

8. Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

in some states, such as the United States, these doctrines have effectively precluded the direct enforcement even of the second generation human rights treaties they have expressly ratified.⁹

My focus here, however, is on the broader and more fundamental question of the domestic law force of the norms reflected in the Universal Declaration through their distillation into customary international law. For this form of international law, enforcement by domestic courts and other institutions depends almost exclusively on the general approach to the reception of international law by their respective constitutional systems. And in this respect, the last sixty years have witnessed some quite interesting developments in modern constitutional law at the municipal level. As a forthcoming, multi-country work on the subject explores,¹⁰ a striking congruence exists among quite divergent legal systems on the direct applicability of norms of customary international law the formal sanction of domestic lawmaking procedures is absent. This principle is particularly true for constitutions that came into force after the adoption of the Universal Declaration. But it may surprise that the rules of customary international law also have a direct effect in a number of states that hew closely to the traditional dualist separation of international and domestic law.

In the pages that follow, I will review some of the more noteworthy examples of this modern development in domestic constitutional law. These constitutions create a framework for the enforcement in domestic law of the international human rights the Universal Declaration originally sought to promote and protect.

9. See, e.g., *Alvarez-Machain*, 542 U.S. at 728 (noting that upon ratification the United States declared that the substantive provisions of the ICCPR “were not self-executing” and that, therefore, “the Senate has expressly declined to give the federal courts the task of interpreting and applying” that treaty). Accordingly, federal appellate courts have expressly refused to give domestic law effect to the ICCPR. See, e.g., *Beazley v. Johnson*, 242 F.3d 248, 267 (5th Cir. 2001); *Buell v. Mitchell*, 274 F.3d 337, 371–72 (6th Cir. 2001); *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (per curiam).

10. See Michael P. Van Alstine, *The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions*, in *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* (David Sloss ed., forthcoming 2009) (manuscript at sec. II.E., on file with author).

INTERNATIONAL HUMAN RIGHTS AND MODERN DEVELOPMENTS IN
CONSTITUTIONAL LAW

Perhaps the most prominent examples of the international law friendly constitutions adopted since the end of World War II are those of Germany, Russia, and South Africa. The German “Basic Law” (*Grundgesetz*) of 1949 contains a particularly stark affirmation of the direct effect of customary international law. Its Article 25 explicitly declares that the “[t]he general rules of international law are an integral part of federal law.”¹¹ Lest there be any doubt, the same provision emphasizes that such norms “directly create rights and duties for the residents” of the country.¹² Indeed, it also declares that the general rules of international law even “take precedence over statutory law.”¹³ A special jurisdictional provision in the *Grundgesetz* also delegates exclusive authority over issues of customary international law—and thus over its direct effect in domestic law—to the German Constitutional Court.¹⁴

The South African Constitution of 1996 contains some of the most detailed provisions on the direct effect and other influence of international law. A special section directed solely to the subject (Section 232) declares that “[c]ustomary international law is law in the Republic”¹⁵ (although, unlike Germany, such norms of an international origin must yield to statutory law adopted by the Parliament¹⁶). Separately, the Constitution expressly sets forth an instruction, which commonly applies in other countries as well, that domestic courts must prefer an interpretation of legislation “that is consistent with international law.”¹⁷ More fundamentally, the Constitution directs domestic courts to interpret its own Bill of Rights, which was fashioned around international human rights documents such as the Universal Declaration, with reference to

11. Grundgesetz für die Bundesrepublik Deutschland [GG] [Constitution] art. 25 (F.R.G.) (translation by author).

12. *Id.*

13. *Id.*

14. *Id.* art. 100(2) (providing that if any doubt arises in a lower court over “whether a rule of international law is part of federal law and whether it directly creates rights and obligations for individuals,” then the court shall refer the matter to the Federal Constitutional Court) (translation by author).

15. S. AFR. CONST. 1996 s. 232.

16. *Id.* (providing that customary international law does not apply if “it is inconsistent with the Constitution or an Act of Parliament”).

17. *Id.* s. 233.

international law.¹⁸

The Russian Federation's Constitution of 1993 sets forth similarly broad principles on the direct effect of customary international law. Article 15(4) of the Constitution declares that, in addition to treaties, all "[g]enerally recognized principles and norms of international law . . . shall be an integral part" of the Russian legal system.¹⁹

These exemplars of Germany, Russia, and South Africa are by no means anomalies. Numerous other constitutions adopted or adapted after the Universal Declaration declare similar principles. A common feature of these modern constitutions is an express declaration that customary international law forms a direct part of the country's domestic law. The Serbian Constitution of 2006, for example, declares not only that "[g]enerally accepted rules of international law . . . shall be an integral part of the legal system in the Republic of Serbia," but also that such rules shall be "applied directly."²⁰ The Greek Constitution of 2001 likewise affirms that "[t]he generally recognized rules of international law . . . shall be an integral part of domestic Greek law."²¹ Indeed, like the German *Grundgesetz*, the same provision in the Greek Constitution states that such international law rules "shall prevail over any contrary provision of the law."²² In the same vein, the Constitution of Austria as reconstituted in 1945 provides that "[t]he generally recognized rules of international law . . . shall be an integral part of federal law."²³ A number of other constitutions have express provisions to the same effect, including the Philippines Constitution of 1987,²⁴ the Portuguese Constitution of 1976,²⁵ the Namibian Constitution of 1990,²⁶ the

18. *Id.* s. 39 (stating that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law").

19. Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 15(4) (Russ.).

20. Const. of the Republic of Serb. 2006, art. 16.

21. 1975 Syntagma [SYN] art. 28 (Greece).

22. *Id.*

23. Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1930, as last amended by Bundesgesetz [BG] BGBl I No. 100/2003, art. 9 (Austria).

24. CONST. (1987), Art. II, sec. 2 (Phil.) ("The Philippines . . . adopts the generally accepted principles of international law as part of the law of the land . . .").

25. Const. of the Portuguese Republic 1976, art. 8(1) ("The rules and principles of general or ordinary international law are an integral part of Portuguese law.").

26. Const. of the Republic of Namib. 1990, art. 144 ("Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law . . . shall form part of the law of Namibia.").

Slovenian Constitution of 1991,²⁷ and the Estonian Constitution of 1992.²⁸

Similarly directed provisions in other modern constitutions simply declare that the state must conform to international law. The Polish Constitution of 1997, for example, proclaims that “[t]he Republic of Poland shall respect international law binding upon it.”²⁹ The Italian Constitution of 1948 likewise states, in a provision solely directed to the subject, that “the legal system of Italy conforms to all generally recognized principles of international law.”³⁰ The modern constitutions of Belarus,³¹ Georgia,³² Hungary,³³ and Mongolia³⁴ contain similar declarations.

Some modern Constitutions have even expressly granted domestic law force to the Universal Declaration by name. The two most prominent examples are the Constitutions of Spain and Argentina. Section 10(2) of the Spanish Constitution of 1978 expressly requires that the provisions “relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights.”³⁵

A special modern amendment to the Constitution of Argentina is

27. Const. of the Republic of Slovenia 1991 (as amended), art. 8 (“Laws and regulations must comply with generally accepted principles of international law”); *see also id.* art. 153 (“Laws must be in conformity with generally accepted principles of international law.”).

28. Const. of the Republic of Estonia 1992, art. 3(1) (“Universally recognized principles and norms of international law shall be an inseparable part of the Estonian legal system.”); *cf.* Const. of the Republic of Bulgaria 1992, art. 149(1)(4) (granting to the Bulgarian Constitutional Court the power to “rule on the compatibility of domestic laws with the universally recognized norms of international law”).

29. Const. of the Republic of Poland 1997, art. 9.

30. COST. [Constitution] art. 10 (Italy).

31. Const. of the Republic of Belarus 1994, art. 8 (“The Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles.”).

32. Const. of Georgia 1995, art. 6(2) (“The legislation of Georgia shall correspond to universally recognised principles and rules of international law.”).

33. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA art. 7(1) (Hung.) (“The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country’s domestic law with the obligations assumed under international law.”).

34. Const. of Mongolia 1992, art. 10(1) (“Mongolia adheres to the universally recognized norms and principles of international law . . .”).

35. Constitución [C.E.] art. 10(2) (Spain); *see also* Constitution of the Republic of Yemen 1994, art. 5 (“The state shall abide by the United Nations Charter, the Universal Declaration of Human Rights, the Charter of the League of Arab States and the generally accepted norms of international law.”).

even broader. It identifies by name not only the Universal Declaration, but also a number of the principal international treaties designed to protect individual and collective human rights. In specific, a provision on the powers of the Congress of Argentina proclaims that these named international human rights treaties together with “the Universal Declaration of Human Rights . . . have constitutional hierarchy in the full force of their provisions.”³⁶ Although they do not supplant other constitutional principles, these international law norms “are to be understood as complementing the rights and guarantees recognized” in the Constitution.³⁷ The same provision then entrenches the rights in the Universal Declaration and the other identified instruments by establishing a special two-thirds voting requirement in both houses of the national legislature for any attempt at denunciation.³⁸

Interestingly, even some states that follow a purer dualist approach to the interaction of international *treaties* and domestic law have recognized the direct effect of *customary* international law. In broad terms, this tradition separates international treaty-making by the national executive from the required domestic treaty-implementation by the legislature. The states that follow this tradition include Australia, Canada, India, Israel, and the United Kingdom. Perhaps ironically, in the forthcoming work on treaty enforcement noted above,³⁹ the country chapters for all five of these states report that domestic courts have recognized the direct effect of the rules of customary international law even without formal endorsement by the legislature.⁴⁰

The jurisprudence of the Supreme Court of India is worthy of special note in this regard. Under its so-called “Doctrine of Incorporation,” the rules of customary international law have direct and automatic effect in the domestic legal system of India.⁴¹ This principle follows from the reasoning that the state policy of India as reflected in its Constitution favors domestic law compliance with the country’s international obligations. As the Indian Supreme Court thus declared in a landmark ruling of 1984, “[t]he comity of nations

36. Constitución Argentina [CONST. ARG.] sec. 75(22).

37. *Id.*

38. *Id.*

39. See Van Alstine, *supra* note 10, sec. II.E.

40. *Id.*

41. See *id.* (summarizing the more detailed review in the chapter for India).

requires that rules of international law may be accommodated in the municipal law even without express legislative sanction, provided they do not run into conflict with Acts of Parliament.”⁴²

Unfortunately, the approach of the United States to the direct effect of customary international law is subject to some doubt. The well-known and long-accepted view, as reflected in the famous *Paquete Habana* case of 1900, is that “international law is part of our law.”⁴³ But more modern Supreme Court opinions have left some confusion in their wake. The Court’s 2004 decision in *Sosa v. Alvarez-Machain*,⁴⁴ for example, quoted *The Paquete Habana*’s famous declaration with approval.⁴⁵ But it did not then simply apply customary international law. Rather, the Court focused narrowly on the original intent of Congress in adopting the jurisdictional statute at issue.⁴⁶ Moreover, in a string of recent cases culminating in *Medellín v. Texas*,⁴⁷ the Supreme Court refused to enforce undisputed international law obligations of the United States, even those founded in treaties and expressly declared by the International Court of Justice.⁴⁸

This noteworthy distraction aside, the message from a review of modern constitutional developments is that international law protections of individual rights are finding increasing traction in domestic law. The progression, to be sure, has been neither uniform nor linear. And the receptivity to the basic principle has continued to parallel in an unhealthy way the traditional political, cultural, and religious fault lines that divide so many other aspects of the modern world. Easily the most troubling aspect of this division is that in some measure it arises from the perception—real or imagined—that customary international law itself reflects the particular value set of only the industrialized Western world.

Skeptics also justifiably have raised concerns about the absence of

42. See *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey*, A.I.R. 1984 S.C. 667 (India).

43. 175 U.S. 677, 700 (1900).

44. 542 U.S. 692 (2004).

45. *Id.* at 729.

46. *Id.* at 720 (concluding based on a review of history that Congress intended the Alien Tort Statute “to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations”).

47. 128 S. Ct. 1346 (2008).

48. *Id.* at 1356–60.

fully transparent democratic procedures for the creation and recognition of non-conventional international human rights norms. Without formal lawmaking procedures, tyrants may equally well corrupt law to be a mask for the naked exercise of power with the refrain, “international law made me do it.” In this way, false “law” risks becoming merely a means for utilizing power to control real law. Without naming names, careful observers of international human rights law will rightly question whether some of the states expressly noted above follow, in actual practice, the solemn declarations in their constitutions about the domestic force of customary international law. Moreover, the absence of lawmaking procedures fully legitimized through democratic processes has led to well-grounded concerns by some about the power of unelected domestic judges to recognize as binding non-conventional norms of international law.

Nonetheless, as the examples reviewed above attest, the last sixty years have witnessed a discernible and serious trend in domestic constitutional law toward the express reception of customary international law in, or as, domestic law. The result of this trend is an ever firmer framework in domestic law for direct enforcement of international human rights by domestic institutions, and in particular domestic courts. In other words, an ever greater number of domestic constitutions—through their reception of customary international law—now provide a mechanism for individuals to vindicate the individual rights recognized on an international law level directly against their state’s instrumentalities on a domestic level.

CONCLUSION

I do not mean to suggest here that the Universal Declaration now exists in some Panglossian world of fully and immediately protected international human rights.⁴⁹ For one thing, a fine-grained appreciation of the actual enforcement of human rights depends as much on the attitude of the domestic judges “in the trenches” as it does on broad constitutional structures. Moreover, as the other authors on the panel entitled “The Influence of the Universal Declaration as Law” have observed, even today international human rights law faces

49. See FRANÇOIS-MARIE AROUET DE VOLTAIRE, *CANDIDE, OR OPTIMISM* 293 (1759) (containing the famous optimistic statement by Dr. Pangloss at the very end of the book that “there is a concatenation of all events in the best of possible worlds”).

significant challenges from countervailing political forces (such as executive branch responses to terrorism). For these and myriad other reasons, therefore, I acknowledge immediately that significant challenges remain for the international acceptance of the rights declared by the Universal Declaration sixty years ago and in particular for their regular, uniform, and direct enforcement in domestic law.

Nonetheless, one can say with some level of comfort that the hope that animated the Universal Declaration of Human Rights sixty years ago is even more justified today. Through its solemnly declared aspirations, the Declaration has already accomplished much toward propelling the international community to protect human rights in law. And the noteworthy developments in domestic constitutional law briefly reviewed here have increasingly created a framework for the direct enforcement of those rights in domestic law. Though by no means universal, in short, the Universal Declaration of Human Rights has already provided convincing evidence that aspirations can indeed drive law and law can control power.