The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?

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Many scholars and human rights advocates have hailed the Universal Declaration of Human Rights as a triumph for the human rights movement. The occasion of its sixtieth anniversary in 2008 provides pause to appraise if in fact it has been a success and whether it still is of any value to the United States. To conduct such an appraisal, this article reviewed the contemporaneous records of negotiations leading to the adoption of the Declaration by the UN General Assembly. It also reviewed the decisions of U.S. federal and state courts, the International Court of Justice, and Australian courts that have referred to the Declaration. These data sets reveal a remarkably consistent trend to obfuscate the meaning and legal status of the Declaration. Beneath the rhetoric of universality, the framers of the Declaration each pursued their own foreign policy goals and special interests. To forge consensus among the UN member states, they designed the Declaration as a non-binding document that aspired to become authoritative through education, but which did not instruct decision makers on how to determine when provisions hardened into law and what the provisions meant. As a result of the congenital ambiguities of the Declaration, U.S., foreign and international courts have faced difficulty in determining the legal value of the Declaration and its meaning. This has resulted in inconsistent decisions and unjust results both within the United States and on a global scale. Nonetheless, the Declaration has advanced the human rights program in the United States. Rather than jettison it entirely from our jurisprudence, this Article proposes that judges and scholars focus their attentions on the proper interpretation and legal value of the Declaration in international law with a view to achieving greater consistency and just results.

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INTRODUCTION

Over the last sixty years, the Universal Declaration of Human Rights of 1948 has become the touchstone for human rights.² On December 10, 1948, the United Nations General

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Assembly adopted it as a non-binding resolution. State representatives hoped that one day it would become binding law. This aspiration has been partially realized. The Declaration has elaborated in the . . . Declaration . . . are widely recognized as constituting rules of customary international law.”); see also Hurst Hannum, The Status of the Universal Declaration of Human Rights in National and International Law, 25 GA. J. INT’L & COMP. L. 287, 290 (1995-96) (“The Universal Declaration remains the primary source of global human rights standards, and its recognition as a source of rights and law by states throughout the world distinguishes it . . .”); Mary Ann Glendon, The Rule of Law in The Universal Declaration of Human Rights, 2 NW. U. J. INT’L HUM. RTS. 5, 40 (2004) (“The Universal Declaration became the polestar, the holy writ, of the modern international human rights movement.”).


4 1947-48 U.N.Y.B. 527 (recording state representatives in the UN General Assembly proposed that all nations should “[t]ake early action to bring their laws and practices into line with the Declaration”).
generated countless other human rights instruments and treaties.\(^5\) Government officials, judges, lawyers and human rights advocates have invoked some of its provisions and others have often accepted them.\(^6\) Consequently, certain provisions of the Declaration have acquired normative and legal legitimacy.\(^7\)


\(^6\) See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 535 (6th ed. 2003) (calling
However, a problem of indeterminancy festers at the core of this apparent success. The Declaration does not provide a hermeneutic scheme to identify which of its provisions developed from a mere aspiration into law. Additionally, it does not clarify what exactly its provisions mean. Consequently, provisions that have been accepted by some decisionmakers have been rejected by others. In some cases, a government official or judge applied a provision of the Declaration inconsistently in different situations, or changed his mind as to whether the provision was even authoritative. These inconsistencies raise troublesome questions about the

the Declaration a “good example of an informal prescription given legal significance by the actions of authoritative decisionmakers”).

7 See M.G. Kaladharan Nayar, Human Rights: The United Nations and United States Foreign Policy, 19 HARV. INT’L L.J. 813, 815–816 (1978) (“At the present time, though, to say that the Universal Declaration has no legal effect is to deny the potency and creative force it has amply demonstrated over the years since its adoption…”); Humphrey Waldock, Human Rights in Contemporary International Law and the Significance of the European Convention, INT’L & COMP. L.Q., Supp. Publ. No. 11,15 (1965) (“[C]ommentators concluded the declaration has become a part of ‘binding, customary international law.’”).

8 See infra Part II (C).

9 See infra notes 101–104.

10 Compare Lareau v. Manson, 507 F. Supp. 1177, 1193 (D. Conn. 1980) (Cabranes, J.) (“The Universal Declaration is ‘an authoritative statement of the international community,’ which ‘creates an expectation of adherence and insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the
Declaration. How might decisionmakers determine which aspirations should become controlling prescriptions and which should not? How might decisionmakers determine which aspirations have in fact become controlling prescriptions? Of the provisions that may be binding, how might various jurisdictions determine their content? These uncertainties point to the most damaging question of all: What good is the Declaration if it does not tell us when and how it applies to real problems?

The inquiry into whether the Declaration provides proper guidance in policy-making and in law is of great practical relevance in the United States. Right from the moment that the United Nations adopted the Declaration on December 10, 1948, there was at least a presumption that the U.S. government should promote the Declaration’s provisions because the United States had been a key supporter of the Declaration during its negotiation and adoption.11

The Declaration has also penetrated many domestic legal systems, including U.S. federal law. The impact of the Declaration is discussed in detail later in this Article, and just one example of the impact of the Declaration on United States federal law suffices at this juncture. The Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, was originally enacted by the First Congress in 1789. Almost two hundred years later, the Second Circuit in *Filartiga v. Pena-Irala* extended the ATCA’s reach to foreigners that committed violations of fundamental international law norms against other foreigners overseas. The Declaration played an important role in defining the contours of the ATCA because the *Filartiga* court relied on the Article 5 of the Declaration prohibiting torture, among other international sources, to determine that this prohibition did indeed constitute a fundamental international norm triggering the court’s jurisdiction under the ATCA. Since *Filartiga*, twelve ATCA cases have considered the Declaration in determining if an international violation by a foreigner was subject to the jurisdiction of U.S. courts. The Declaration also now figures in the imaginations and

12 See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005); *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 499 (9th Cir. 1992).


14 *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

15 See *Taveras v. Taveraz*, 477 F.3d 767 (6th Cir. 2007); *Villeda Aldana v. Del Monte Fresh Produce, N.A.*, 452 F.3d 1284 (11th Cir. 2006); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003); *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996); *Abdullahi v. Pfizer, Inc.*, 2005 U.S. Dist. LEXIS 16126 (E.D.N.Y. 2005); *Doe v. Reddy*, 2003
machinations of lawyers, individuals, corporations, judges, and law professors,\textsuperscript{16} appraising creative claims for alleged abuses,\textsuperscript{17} including labor conditions in rubber plantations and oil pipelines abroad.\textsuperscript{18}


\textsuperscript{17} Roe v. Bridgestone Corp., 2007 U.S. Dist. LEXIS 46697, at *54 (D. Ind. 2007) ("Since \textit{Filartiga} . . . , many plaintiffs have used the ATS to pursue a wide variety of international human rights cases in the United States federal courts.").

The thesis of this Article is that the Declaration has caused significant problems for U.S. courts because it is pathologically indeterminate, but that measures can be implemented to address these problems. This thesis is developed in three parts. Part I demonstrates that ambiguities in the Declaration trace back to its very creation. In order to achieve consensus among states with divergent interests, the framers of the Declaration were vague about the meaning of the various articles of the Declaration and how to determine when and which provisions became law. Contemporaneous records of the negotiations leading to the adoption of the Declaration by the UN General Assembly reveal that the Declaration was founded at least in part upon contradictory policies towards human rights, deep anxieties that many human rights conflicts must be addressed contextually and not by abstract and unyielding standards, and by political agendas of governments and interest groups. Against this backdrop, rhetorical statements by state representatives claiming that the Declaration represented universal human rights standards are quickly unmasked for what they really were: attempts to co-opt the Declaration to the service of political goals, ranging from the protection of special interest groups to promotion of cold war ideologies.

Part II shows how the ambiguities inherent in the Declaration have caused difficulties for U.S. courts and have resulted in inconsistent decisions and unjust results. It presents the results of the author’s granular study of 232 federal and state cases that have referred to the Declaration in the six decades of its existence. This study reveals that the Declaration has confounded courts. They have struggled to understand and apply the Declaration to real problems requiring judicial solutions. By applying theories of norm creation, it traces how courts have legitimated some provisions as hard law and others as soft law. It also shows, however, that many other of the Declaration’s provisions continue to lack legitimacy and there is
uncertainty as to precisely which provisions are illegitimate or legitimate. Consequently, the incipient problems in 1948 have now materialized, and may call into question the utility of the Declaration in U.S. law.

Part III argues that the problems caused by the Declaration in U.S. courts are even more serious when appraised in a global context. However, the Declaration has made valuable contributions to U.S. jurisprudence, and its problems could be addressed through a variety of strategies. Through a survey of foreign and international judicial decisions concerning the Declaration, Part III reveals that the problems faced by U.S. courts may in fact be global in nature. The Declaration has caused inconsistencies both within domestic systems and among different systems of law. However, these problems are not unique to the Declaration. They may arise in other indeterminate areas of international law and whenever national courts in any country are called to apply international rules in a domestic context. The Article concludes by suggesting that the measures taken to educate domestic judges about international law generally may be implemented to achieve greater uniformity among judges specifically applying the Declaration.

I. THE CREATION OF THE DECLARATION AND ITS CONGENITAL AMBIGUITIES

During the negotiations of the Declaration, competing interests constantly tugged it in different directions. The only way to achieve sufficient state support for the Declaration was to obfuscate these differences. 19 Although some human rights advocates and scholars regard

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19 For a journalistic account of the drafting and adoption of the Declaration, see MARY ANN GLENDON, A WORLD MADE NEW (2001).
the Declaration as a “ringing declaration,”\textsuperscript{20} a “beacon of the rights movement,”\textsuperscript{21} and a statement of “precepts [that] are immutable and will remain valid forever,”\textsuperscript{22} contemporaneous documents recording the developments at the United Nations from 1945 to 1948 reveal that in fact the Declaration’s creation was fraught with anxieties about competing notions of human rights, thinly-veiled foreign policy agendas, and the special interests of particular groups. In order to secure the support of states for a human rights instrument that might diverge from national practices, the framers of the Declaration decided that it would be an educational document that sought voluntary compliance from states. It would not be a binding instrument that prescribed coercive enforcement against violators. In a Faustian deal for the votes of UN member states in favor of the Declaration, the framers also drafted the Declaration’s provisions vaguely to leave sufficient diplomatic space for each state to apply the provisions according to the pragmatic exigencies of each situation. Consequently, the Declaration was afflicted with congenital ambiguities about its meaning and legal value.

In 1944, the United States submitted the first draft of the UN charter at the Dumbarton Oaks Conference.\textsuperscript{23} This first draft provided for human rights as one of the goals of the United Nations and thereby sowed the seed that would germinate into the Declaration.\textsuperscript{24} The

\begin{itemize}
  \item \textsuperscript{20} Oscar Schachter, \textit{The Genesis of the Universal Declaration: A Fresh Examination}, 11 \textit{PACE INT’L L. REV.} 51, 57 (1999).
  \item \textsuperscript{21} \textit{Id.}
  \item \textsuperscript{23} Schachter, \textit{supra} note 20 at 52 n.4 (1999).
  \item \textsuperscript{24} \textit{Id.} at 52.
\end{itemize}
draft UN charter thereafter was debated and at the United Nations Conference on International Organization at San Francisco Conference in 1945. At the conclusion of the San Francisco Conference, the UN Charter, which reaffirmed “faith in fundamental human rights,” was adopted. President Truman announced at the final plenary session at San Francisco on June 26, 1945:

Under this document we have good reason to expect the framing of an international bill of rights, acceptable to all the nations involved. That bill of rights will be as much a part of international life as our own Bill of Rights is part of our Constitution.

Even in this earliest of statements recording the desire for an international human rights document, the tension between the desire for universality and the interests of particular groups was apparent. On the one hand, there was a genuine desire to create an international bill “acceptable to all nations involved.” On the other hand, this bill was to implicitly draw its inspiration from the U.S. Bill of Rights. This reference to human rights from the U.S. perspective could have been intended for Truman’s domestic constituents, including the

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25 Id. at 53; 1948-49 U.N.Y.B. 524.

26 U.N. Charter, pmbl.; see also U.N. Charter arts. 1, 13, 55, 62, 76(c).

27 HARRY S. TRUMAN, 1945: YEAR OF DECISIONS, 1 MEMOIRS 292 (1955); 1 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO 1945 683 (Lib. of Cong. 1945).
American Jewish Committee and the American Institute of Law, both of which had each drawn up a proposed international bill of rights.²⁸

At the first session on February 15, 1946 of the UN Economic and Social Council (ECOSOC), pursuant to Article 68 of the UN Charter mandating the creation of commissions to promote human rights,²⁹ established a nuclear commission to engage in preparatory work to define the terms of reference of a Commission on Human Rights.³⁰ The 18 members of the nuclear commission met at Hunter College in New York from April 29 to May 20, 1946.³¹ It recommended to ECOSOC that the Commission on Human Rights should be responsible for producing an international bill of rights.³² ECOSOC accepted this recommendation, at its second session on June 21, 1946, and decided that the Commission would have eighteen members.³³ The terms of reference for this Commission were to prepare:

(a) an international bill of rights;

(b) international declarations or conventions on civil liberties, the status of women, freedom of information and similar matters;

(c) the protection of minorities;

²⁸ JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, INTENT 1–2 (1999) (noting that the American Jewish Committee and American Institute of Law had drawn up bills of rights in February 1945 and February 1943, respectively).

²⁹ U.N. Charter art. 68.


³¹ GLENDON, supra note 19 at 33; 1948-49 U.N.Y.B. 525.


(d) the prevention of discrimination on grounds of race, sex, language or religion;

(e) any other matter not concerning human rights not covered by items (a), (b), (c), and (d).  

These terms of reference were identical to the terms of reference of the nuclear commission, except that the nuclear commission’s terms lacked paragraph (e).

A careful comparison of these two sets of terms of reference also suggests that certain interests, rather than global concerns, motivated the project to draft an international bill of rights. The belated inclusion of paragraph (e) reflected a desire to create a human rights program that would be relevant to all people throughout time. However, the preferential enumeration of only certain human rights in paragraphs (a) to (d) provides a window into the more limited human rights concerns that animated the post-World War II era. The specific protection of civil liberties, minorities, and women, as well as the prohibition of discrimination were doubtlessly motivated by the horrific persecution of Jews and gender inequalities. But there were also


35 1946-47 U.N.Y.B. 523 (noting that the nuclear commission’s terms of reference lacked paragraph (e)).

36 1946-47 U.N.Y.B. 523 (noting that UN members discussed “the necessity of achieving and promoting the recognition of human rights and fundamental freedoms for all, in hope of drawing from the last World War lessons which would aid the peoples to achieve the highest aspirations of mankind.”); Johannes Morsink, World War Two and the Universal Declaration, 15 Hum. RTS. Quarterly 357, 1–2 (1993) (“The horrors of the Holocaust shocked delegates and the countries they represented into a reaffirmation and reiteration of the existence of human rights.”).
other global conditions that also required a global response but which the Commission was not specifically charged with addressing. These terms of reference fail to mention sexual orientation discrimination, even though gays, like Jews, had been persecuted by Hitler. They also fail to mention economic and social rights, which quickly became in subsequent decades a primary goal for newly independent states that in 1945 were still governed by colonial masters.

The Human Rights Commission held its first session in January and February of 1947. The Committee elected Eleanor Roosevelt, the representative from the United States, as chairman, Peng Chun Chang from China as Vice-Chairman and Charles Malik from Lebanon as Rapporteur.37 The Commission formed a drafting group comprising these three officers to prepare a bill as a draft resolution for presentation to the General Assembly.38 It directed that the drafting group should account for the views expressed by the Commission. Notably, the Yearbook of the United Nations 1946-1947 records that these views emphasized, in contrast to the terms of reference, not just political rights, but also social rights and personal freedoms.39 Unlike the terms of reference, these views also stressed “equality without distinction,” without identifying any group, such as women or racial groups, that deserved protection.40 Thus, the


38 Id.

39 Id. (“These included such personal rights as the right of personal freedom, freedom of religion, of opinion, of speech, information, assembly and association, and safeguards for persons accused of crime; such social rights as the right of security, the right to employment, education, food, medical care and the right to property; and political rights such as the right to citizenship and the right of citizens to participate in the government; and the right to equality without distinction”).

40 Id.
A pendulum appeared to swing away from addressing particular concerns of interest groups in 1945 to drafting a more universal document.

On March 24, 1946, the Chairman of the Committee on Human Rights wrote to the President of ECOSOC informing him of the plan to expand the drafting group to a larger drafting committee. ECOSOC noted this plan with approval at its fourth session. By Resolution 46(IV), it also decided to produce the Declaration in stages. By the time of the adoption of the Declaration by UN General Assembly, the Declaration would have gone through the following versions: a preliminary draft by a Drafting Committee; revision of the preliminary draft by the Commission; submission of the Commission draft to UN Member States for comments and a second draft by the Drafting Committee to account for those comments; revision of the second draft of the Drafting Committee by the Commission; consideration of the second Commission draft by ECOSOC; consideration by the Third Committee of the General Assembly; adoption by the General Assembly as a whole.

**A. Preliminary Draft of the Drafting Committee**

At the first meeting of the Drafting Committee in June 1946, difficulties in obtaining sufficient state support for a binding international bill of rights emerged. The Yearbook of the United Nations records that Committee members had decided a key purpose of the Declaration was “a reaffirmation of the most elementary rights,” and thus it was to be “short, simple, easy to understand and expressive.” By the first meeting of the Drafting Committee, however, disagreements arose. Some drafters thought that it was important not just to have a

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41 Id. at 525.


43 Id. at 524.
“declaration or manifesto,” but also to implement human rights through enforceable conventions. To address this tension, the drafting group decided that the United Nations should create both a declaration and a number of conventions, which would address: (a) torture, physical integrity and cruel punishments; (b) the right to a legal personality; and (c) the right of asylum.

The interests of groups concerned with the abuses by the German Reich in World War II would be addressed through enforceable conventions, while human needs that were more broadly applicable would by addressed by an educational but non-binding declaration.

ECOSOC decided that the UN Secretariat would assist the Drafting Committee, and this task fell onto John Humphrey, who had been appointed director of the newly-formed Division of Human Rights of the Secretariat. Humphrey collected and assimilated draft human rights bills produced by different non-governmental groups into a draft international human rights bill.

At the first session of the Drafting Committee from June 9 to 25, 1947, Humphreys presented his bill. The Drafting Committee considered the Humphrey bill together with certain proposals for revision by the United States. It also considered a text prepared by the French Commission member, Rene Cassin, and a bill proposed by the United Kingdom.

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44 Id. at 525.

45 Id. at 526.


47 Schachter, supra note 20 at 52.


These early drafts reveal that the framers were painfully cognizant that individual human rights needed to accommodate the practical demands of state governance and community interests. The Humphrey draft recognized that rights need to be tempered by duties and harmonized with conflicting rights. It emphasized its preamble that “man does not have rights only; he owes duties to the society of which he forms part.”50 Article 1 reiterated that “[e]everyone owes a duty of loyalty to his State and to the [international society] United Nations. He must accept his just share of common sacrifices as may contribute to the common good.”51 Article 2 elaborated that “[i]n the exercise of his rights every one is limited by the rights of others and by the just requirement of the State and of the United Nations.”52 Only after these duties and considerations moderating rights was the right to life recognized in Article 3, and even then this right was subject to the death penalty in accordance with law.53

Likewise, the Cassin draft also sought to balance rights with duties and to harmonize conflicting duties. After stating in Article 1 that all men “possess equal dignity and

rights,”54 it stated in Article 3 that “every man owes to society fundamental duties, which are: obedience to law, exercise of a useful activity, acceptance of burdens and sacrifices demanded for the common good”55 and in Article 4 that “[t]he rights of all persons are limited by the rights of others.”56 Article 5 provided that “the law is the same for all,”57 and Article 6 provided that “No person shall suffer discrimination by reasons of his race, sex, language, religions or opinions.”58

The Drafting Committee then slightly revised the Cassin draft, which became the preliminary draft of an International Bill of Human Rights and submitted it to the Committee on Human Rights for consideration. In these revisions, the principles in Articles 1 to 6 of the Cassin draft were essentially preserved, even though the wording and organization was slightly amended.59

58 The “Cassin Draft” art. 6, reprinted in Mary Ann Glendon, A WORLD MADE NEW 275–80 (2001).
B. The Commission’s First Draft

At the second session of the Human Rights Commission in Geneva from December 2 to 17, 1947, it considered the preliminary draft of an International Bill of Human Rights that the Drafting Committee had prepared.60 It revised this preliminary draft into its own Geneva draft. In the Geneva draft, the Commission accepted the Drafting Committee’s proposal to temper an individual’s rights with duties and the conflicting rights of others. Article 2 provided:

In the exercise of his rights, every one is limited by the rights of other and by the just requirements of a democratic state. The individual owes duties to society through which he is enabled to develop his spirit, mind and body in wider freedom.61

The Commission accepted the preliminary draft’s equal protection provision, and expanded the prohibition of discrimination to not just race, sex, language and religion, but also to “political or other opinion, property status, or national or social origin.”62 It moved this equal protection provision from Article 6 to Article 3.1.

The 1947-1948 Yearbook of the United Nations records that in its discussions, the Commission reiterated the Declaration neither intended to be a binding legal instrument nor even to contain aspirational prescriptions. Instead, its “force . . . would be of moral rather than a legal


nature” and it “would establish standards and indicate goals rather than impose precise obligations on states.”

C. Second Drafts of the Drafting Committee and Commission

The Drafting Committee held its second session from May 3 to 21, 1948, at Lake Success, to address comments from the Member States. It redrafted the entire draft of the Declaration.

Immediately after the Drafting Committee’s session, the Commission on Human Rights convened its third session at Lake Success from May 24 to June 18, 1948. The Commission considered the redrafted text proposed by the Drafting Committee, and amended this text before transmitting it to ECOSOC. This second draft of the Commission was formally titled “Draft International Declaration of Human Rights.” This second draft of the Commission contained a turning point in the evolution of the Declaration. Its text, notably, moved mention of duties and conflicting rights to the end of the draft, where it has stayed in the final form of the Declaration.

Another notable aspect of the decision-making process at the Commission was the presence of at least 22 non-governmental organizations involved at this session, and especially Christian, Jewish and Women’s groups. The Christian groups included:

63 1947-48 U.N.Y.B. 573. See also 1948-49 U.N.Y.B. 525 (recording a similar dichotomy of views at the First session of the Drafting Committee).
the International Federation of Christian Trade Unions, the Catholic International World Organization, the Catholic International Union for Social Service and the Commission of the Churches on International Affairs, the World Women’s Christian Temperance Union and the World’s Young Women’s Christian Association. The Jewish groups included the Agudas Israel World Organization, the Consultative Council on Jewish Organizations, the Co-ordinating Board of Jewish Organizations for Consultation with the Economic and Social Council of the United Nations and the World Jewish Congress. The women’s groups, in addition to the two listed above, included the International Alliance for Woman, the International Council for Woman, and others.66

Although the official records of the United Nations do not reveal the precise influence of these groups on the drafting process, the sheer number of Jewish and women’s lobby groups suggests that their interests were represented more than the interests of other oppressed groups who had not galvanized global movements, such as gays and lesbians, and the Third World. It may be more than coincidence, therefore, that whereas earlier drafts acknowledged that states could grant asylum but did not create an absolute duty for them to do so,67 the Commission’s first and second drafts came much closer to creating a positive duty on states to grant asylum by declaring, in Articles 11

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and 12, respectively, that “Every one shall have the right to seek and be granted asylum from persecution.”

The Declaration was also consistent with Catholic doctrine. Decades later, the Holy See admitted that it found “a great convergence between the Declaration and Christian anthropology.” At least one Catholic scholar found that Article 16 of the Declaration on the right of every man and woman to marry and found a family was consistent with the Catholic view that “the path to complete dignity is within the bosom of the family – a community of persons living in communion – which forms the foundational element of society.” Similarly, Hilary Chatsworth credits women’s groups who were present and Chairman Eleanor Roosevelt with the insertion of more gender neutral language into the more masculine-oriented early drafts.

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70 Hilary Chatsworth, *The Mid-Life Crisis of the Universal Declaration of Human Rights*, 55 Wash & Lee L. Rev. 781, 782 (1998) (noting that the new Commission on the Status of Women successfully objected to the Article 1 of the Cassin Draft which states “all men are brothers” and that the final Declaration states instead that all “human beings are born free and equal in dignity and rights.”).
D. Consideration by ECOSOC

ECOSOC considered the second Commission draft at its seventh session in August 1948. Due to the pressures of business, each member state could make one statement, without other debate or discussion other than a decision to transmit the draft to the General Assembly together with the statements.

The statements provide evidence that within the crucible of the Declaration swirled such conflicting interests that a human rights instrument could only be forged by drafting its provisions ambiguously. The representative from France stated that “the Declaration was not sufficiently universal or international because it was based on domestic legislation and classic statements on human rights, and therefore did not give sufficient prominence to rights which could not be enumerated in national declarations, such as the right to asylum.”71 The Brazilian representative grumbled that the “Declaration should not be introduced by philosophical postulates from outdated theories of natural law.”72

Some states foreshadowed the problems that would flow from the ambiguity in the Declaration in future decades. Venezuela and Chile worried that the Declaration had not resolved the problem of defining the relationship between individuals and the state.73 Poland expressed concern that the “Declaration was open to interpretation as an instrument of

72 Id.
73 Id.
This fear has at least partly materialized, as will be discussed in detail in Part II, because some United States courts have read the Declaration alongside our Alien Tort Claims Act to regulate the treatment of foreigners by their governments overseas.

Other representatives expressed concern that giving up enforcement to obtain consensus imposed too high a cost. The Netherlands representative stated that “the Declaration without measures for implementation was meaningless.” The New Zealand and Danish representatives concurred. They stated that the Declaration should be adopted together with a binding Covenant. The Soviet representative likewise expressed concern that the Declaration did not prescribe methods of implementation. The majority of states, however, took the view that the Declaration, standing alone, would still serve a useful purpose by “defining human rights.”

At the end of the statements by member states, ECOSOC resolved without a vote to transmit the second draft of the Committee to the General Assembly.

E. Debates at the Third Committee of the General Assembly

The General Assembly, at its 142nd meeting on September 24, 1948, referred the second draft of the Committee on Human Rights to the Third Committee of the General Assembly.

74 Id.
75 Id.
76 Id.
77 Id.
78 Id.
79 Id. at 578.
Assembly. The Third Committee considered the Declaration over eighty-one meetings from October to December 1948, and considered one hundred and sixty-eight draft amendments submitted at the meetings.

A consensus emerged that although the Declaration was not formally binding on states, it would, as explained by Eleanor Roosevelt at the meetings, “by teaching and education promote respect for . . . rights.” Other representatives anticipated the authoritative status that the Declaration would acquire in decades to come. The Norwegian representative stated that the Declaration “would undoubtedly serve as a basis for the discussion in the United Nations of any question of human rights.” The Mexican representative added that the Declaration “would define the human rights which states undertook to recognize and would serve as a criterion to guide and stimulate them.” Likewise, the United Kingdom representative acknowledged that the Declaration “would serve as a guide to governments in their efforts to guarantee human rights by legislation and through their administrative and legal practice.”

At the end of the Third Committee’s deliberations, every member state voted in favor of the declaration, with the exception of the Soviet bloc and Canada. According to William Schabas, his study of Canadian government records indicated that Canada abstained from voting because its Federal cabinet feared that communists would rely on the provisions

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81 Id.
82 Id.
83 Id.
84 Id.
85 Id.
providing for freedom of speech, assembly, association and the right to employment. The cabinet also feared that Jehovah’s Witnesses might rely on the freedom of religion provision of the Declaration.\(^{86}\) Canada’s calculus highlights the inherent malleability of the Declaration and the real potential for its abuse by decisionmakers who intentionally or inadvertently distort it.

**F. Adoption of the Declaration by the General Assembly**

After the draft declaration passed through the Third Committee, the General Assembly debated and voted on it at its 180th to 183rd plenary meetings on December 9 and 10, 1948.\(^{87}\) This decision-making process provides data to appraise whether the Declaration is universal. Certainly, there were many rhetorical claims that the Declaration was universal. The French representative stated that “the chief novelty of the Declaration was its universality.”\(^{88}\) The 1948-1949 Yearbook of the United Nations also records that “[a] number of representatives drew attention to the Declaration’s universality.”\(^{89}\) These claims are supported by the clear majorities that voted in favor of each of the Declaration’s provisions and the Declaration as a whole. Even those states that did not vote in favor merely abstained rather than opposed.\(^{90}\)

This pattern of voting and string of rhetorical claims do not, however, conclusively prove the Declaration’s universality. There were other claims that the Declaration


\(^{87}\) 1948-49 U.N.Y.B. 530.

\(^{88}\) *Id.* at 531.

\(^{89}\) *Id.* at 531.

\(^{90}\) *Id.* at 535 (noting 48 votes in favor of the Declaration, and 8 abstentions).
did not represent universal values. The representative for Saudi Arabia, which had not been included Committee on Human Rights, had stated at the Third Committee that the “Declaration was based largely on Western patterns of culture, which were frequently at variance with the patterns of culture of the Eastern States.”91 The Egyptian representative, at the Plenary Meeting, noted that an absolute right to marriage contradicted Islamic restrictions on the ability of Muslim women to marry non-Muslims.92 This and other religious concerns prevented Saudi Arabian representative from voting in favor of the Declaration.93

Claims that the Declaration represented universal values were also undermined by revelations that it was forged as a tool to advance the political interests of some states and particular groups. The Egyptian representative feared that freedom of religion would encourage “the machinations of certain missions, well-known in the Orient, which pursued their efforts to convert to their own beliefs the masses of the population of the Orient.” Such speculation may have been more than idle, since numerous Christian and Catholic NGOs, but – based on the UN’s records – no Islamic NGOs, had been involved in the various drafting stages of the Declaration.94 Indeed, fears of evangelism were not confined to the Islamic states. As mentioned above, Canada had opposed the Declaration in the Third Committee partially out of concern that Jehovah’s Witnesses would capitalize on freedom of religion.

91 Id. at 528.
92 Id. at 532.
94 1947-48 U.N.Y.B. 574–75 (listing the various NGOs involved in the draft).
Diplomatic records also suggest corruption of the Declaration by foreign policy agendas. Although the U.S. representative at the United Nations described the Declaration as “a statement of basic principles of inalienable human rights for all peoples and all nations,”95 in private meetings with U.S. allies she took a different view. After a lunch at Hotel Raphael on September 28, 1948 between Eleanor Roosevelt and the Canadian delegation, a Canadian diplomat reported, in official Canadian government records, that the United States supported the Declaration because “[n]o United States legislation would be needed for a declaration,”96 and that there was “only one clause biased to the USSR way of thinking [the provision on freedom to work].”97 In any event, the United States representative stated that the United States planned to exert control by “declar[ing] what we understand by each clause.”98 The Canadian diplomat also surmised that the United States might use the Declaration as a means of educating peoples and governments “of anti-communist propaganda.”99

95 See, e.g., 1948-49 U.N.Y.B. 527 (recording that the U.S. representative described the declaration as “a statement of basic principles of inalienable human rights for all peoples and all nations.”).


98 Id.

99 Id.
Later events confirm this suspicion. In *United States v. Campa*, the 11th Circuit Court of Appeals noted that in 1996 a Miami-based group “dropped thousands of leaflets into Cuba, which were printed with portions of the United Nations’ Universal Declaration of Human Rights and which encouraged Cubans to fight for their rights.”\(^{100}\) The Clinton administration also invoked the Universal Declaration to gain diplomatic advantage in negotiations. It used the Declaration as leverage in talks with China over its “most favored nation” status in U.S. trade.\(^{101}\) The George W. Bush administration has also used it as foreign policy tool to attack unfriendly foreign governments. It cited the Declaration to criticize Venezuelan President Hugo Chavez,\(^{102}\) and to express displeasure over Russian laws that controlled non-governmental organizations sympathetic to U.S. foreign policy goals.\(^{103}\) The Bush administrations have also used the

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\(^{100}\) U.S. v. Campa, 419 F.3d 1219, 1245 (11th Cir. 2005) *vacated on other grounds on rehearing en banc* 459 F.3d 1121 (2006).


\(^{102}\) “Cuban, Venezuelan leaders challenge Bush,” *Australian Broadcasting Corporation* (May 30, 2007) (noting State Department official Tom Casey stated: “Freedom of expression is a fundamental human right. It's an essential element of democracy anywhere in the world. We'd certainly call on the government of Venezuela to abide by its commitments under the Universal Declaration of Human Rights and the Inter-American Democratic Charter and to reverse these policies they're pursuing to limit freedom of expression.”)

\(^{103}\) Jeffrey Thomas, “U.S. To Monitor Effects of Russian Law on Nongovernment Groups,” *Federal Information and News Dispatch* (April 5, 2006) (noting the State Department “will be monitoring very carefully the implementation of the provisions of [the new Russian NGO law]”
Declaration to support Christian interests in other countries,\textsuperscript{104} but has not invoked the Declaration to draw any attention to religious rights of Muslims to practice their faith.\textsuperscript{105} These records certainly cast a pall on the preamble of the Declaration, which states in relevant part that “every individual and every organ in society . . . shall strive by teaching and education to promote respect for these rights and freedoms.”\textsuperscript{106}

The foregoing analysis of the formation of the Declaration indicates that there were good faith efforts at creating a universal bill of human rights, and indeed some provisions of the Declaration could be universal. However, with other provisions, judgment of appropriate human rights norms were clouded by groups advocating national or religious interests and by the storm of Cold War politics gathering at the horizon. The conundrum that decisionmakers faced, and which they continue to face today, is how to distinguish between provisions of the Declaration that carried legal or normative force, and those provisions that did not. After all, the


\textsuperscript{105} An exhaustive search of over 3,000 State Department briefings, White House press releases, and other news articles from both the George W. Bush and Clinton administrations yields no mention in support of Muslim rights under the Declaration.

Declaration does not itself prescribe any heuristic test to distinguish true rights from mere aspirations. This task of penetrating this monolithic bill of rights to find its universal values is the subject of the next Part of this Article.

II. THE INCONSISTENT RECEPTION OF DECLARATION BY US COURTS

Although the Declaration, like other UN General Assembly resolutions, does not bind member states, the preparatory documents discussed in Part I show that some states fully intended the Declaration to guide the development of human rights. In the language of legal theory, these decisionmakers anticipated or intended the provisions of the Declaration to crystallize into soft norms. Soft norms which are not themselves legally binding, but which carry some authority and may secure compliance with their commands. \(^{107}\) They expected the Declaration to “educate” governments and peoples about human rights, and thereby eventually become accepted as authoritative. \(^{108}\) The Declaration did that and more. In time, exceeding the

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\(^{108}\) See *supra* note 82 and accompanying text.
expectations of these decisionmakers, some of the Declaration’s soft norms hardened into binding rules of customary international law.¹⁰⁹

Paradoxically, in this success of the Declaration lies its failure. Aspirational statements or claims to represent norms do not, without more, secure compliance.¹¹⁰ The author’s prior research has shown that in other areas of international law, such as international intellectual property law, aspirational claims are transformed into compliance-securing norms, be they “hard” or “soft” norms, through a combination of three processes.¹¹¹ First, the audience to whom statements are addressed, including governments, NGOs or scholars, may accept those statements as normatively legitimate if they believe that the statements prescribe desirable

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¹¹⁰ *See* Mary Ann Glendon, *At Century’s Dawn: The Future and Past of Human Rights and the Rule of Law: The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. U. J. INT’L HUM. RTS. 5, 5 (“It is commonplace that long lists of rights are empty words in the absence of a legal and political order in which rights can be realized.”).

¹¹¹ *See* Tai-Heng Cheng, *Power, Norms, and International Intellectual Property Law*, 28 MICH. J. INT’L L. 109, 138 (2006) (“An inherently legitimate outcome may modify preexisting norms in favor of that outcome if participants accept the modification as normatively desirable, if the new norms promote their interests, or if other participants deploy power in support of the modified norms.”).
outcomes. Second, statements may become authoritative if accepted by normatively legitimate or authoritative institutions, such as international tribunals or national courts. Third, statements may become legitimate through their repetition. For the provisions of the Declaration to have become authoritative, they too must have been processed in a combination of these three ways.

But processing is not automatistic. Decisionmakers engaged in processing can be expected to imbue the provisions of the Declaration with meaning and authority in accordance with their interests and their frames of reference. As a result of internal machinations of decisionmakers, and not necessarily in accordance with any hermeneutic algorithm embedded in the Declaration, some provisions of the Declaration have become authoritative, but others have not. Of the authoritative provisions, some provisions were authoritative in only some situations, but not others. In yet other provisions, their meanings were interpreted differently in different situations.

An examination of the reception of the Declaration by US courts highlights the lack of effective controls over such inconsistencies. Admittedly, a comprehensive study of the Declaration should include not just judicial cases, but also the entire spectrum of decisions, including the foreign policies of the U.S. government and the ratification of human rights treaties by Congress. Due to the constraints of space, this Article cannot address the entire panoply of decisions that the Declaration may have affected. Instead, it focuses on judicial decision-making.

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112 See GLENDON, supra note 110 (“The parts favored by Western advocacy groups were selectively promoted, while others . . . were ignored or pushed into the background.”); see also “Letter from R.A.D. Ford to Escott Reid” (13 September 1948) NAC RG 25, Vol. 3699, File 5475-DG-2-40 (noting the intent of the United Kingdom to make changes to the Declaration’s provisions to suit UK interests, especially on the “right to work”).
because court decisions generally control outcomes in conflicts that reach judges. Accordingly, examining court decisions provides insight into one concrete area in which the Declaration may or may not have had influence.

An arid formalist in international law might object to this exercise, on the grounds that U.S. courts are not international actors,\textsuperscript{113} and their decisions are not constitutive of international law.\textsuperscript{114} Such an objection, however, would ignore the reality that law and legal rules do not exist in abstract. They become meaningful only when applied to real problems and when they influence outcomes. The authoritative prescription of international law by U.S. courts within their jurisdictions is one way in which international law is animated and thus their interpretation of international law has a constitutive effect on international law itself. Further, it was the intent of the framers of the Declaration that it influence not just international law, but the protection of rights within domestic systems.\textsuperscript{115} Thus, it is appropriate to examine whether the Declaration has in fact done so within the U.S. legal system.

To assess the impact of the Declaration in U.S. courts, this author examined every reported federal and state case that referred to the Declaration from 1948 to July 2007. A list of

\begin{itemize}
\item \textsuperscript{113} See \textit{Oppenheim's International Law} 500 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("formerly, states alone used to be the subjects of international law").
\item \textsuperscript{114} Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, T.S. No. 993, art. 38 (enumerating positive sources of international law and not mentioning domestic judicial decisions).
\end{itemize}
the 232 cases is attached as Annex A. These cases were reviewed with two questions in mind. First, to what extent do judges rely on the Declaration to identify international legal rules? Second, to what extent has the Declaration authoritatively controlled outcomes in U.S. cases?

A. References to the Declaration

The Declaration has, over time, captured the imaginations of judges and lawyers. Figure 1: Cases Referring to the Declaration, indicates the increasing frequency with which the declaration is being cited. Figure 1 illustrates the trend of cases which refer to the Declaration from the years 2007 to 1948, expressed annually and in ten year cumulative periods. The jagged line indicates the number of cases per year and follows the numbering on the right vertical axis, 0 to 25. The bars indicate the ten year cumulative number of cases (at years 1998, 1988, 1978, 1968, 1958, and 1948) and follows the numbering on the left vertical axis, 0 to 140.

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116 Where there are multiple decisions in a particular case that refer to the Universal Declaration, all those decisions were counted as only one case.
As indicated in Figure 1, in the first three decades of the Declaration’s existence, only 16 cases referred to the Declaration. But in the last three decades, 216 cases have referred to the Declaration.

**B. Acceptance or Rejection of the Declaration**

Although the increased frequency with which the Declaration is cited might indicate greater judicial openness towards the Declaration, a deeper analysis suggests continuing resistance to the Declaration as an authoritative or persuasive statement of international law. As indicated in Figure 2: Acceptance or Rejection of the Declaration by Ten-Year Periods, most courts have avoided treating any provision of the Declaration as a codification of international law. In fact, in every decade, more than 50% of cases mentioning the Declaration have refused to decide whether the Declaration was indicative of international law.

![Figure 2: Acceptance or Rejection of the Declaration by Ten-Year Periods](image)

Of the 232 cases that referred to the Declaration, only 64 cases, or 27.6%, relied on any article of the Declaration as a statement of international law, whether as the sole authority or as one of several sources. This figure includes cases that accepted one or more articles as statements of
law, but rejected other articles. Additionally, it includes cases that referred to the Declaration generally, in contrast to a specific article. The other 168 cases, or 72.4%, either held that none of the provisions of the Declaration considered in each case amounted to international law, or did not address this issue.

A historical trend towards acceptance of the Declaration as a source of international law also appears to have reversed. Between 1978 and 1987, the first statistically significant sample decade, and 1988 to 1997, there was an increase of 19% in the number of courts which accepted the Declaration as a document of international legal force. However, between the past two decades, there has been a 22% decrease in the number of cases that have held the Declaration to be a codification of international law. This decrease was likely triggered by the 2004 U.S. Supreme Court decision in Sosa v. Alvarez-Machain. Some commentators and judges have interpreted it as instructing that the Declaration is not an authoritative source of international law. After Sosa, fewer courts have relied on the Declaration.

These trends are not surprising. The framers of the Declaration did not intend it to be a binding source of international law. Eleanor Roosevelt, a key leader in the drafting of the Declaration for the United States, stated that the Declaration was, “a statement of principles . . . setting up a common standard of achievement for all peoples and all nations” and “not a

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118 See infra note 144.

119 See infra note 148.

120 See generally MARY ANN GLENDON, A WORLD MADE NEW Ch. 2 (2001) (discussing Eleanor Roosevelt’s leadership role as the Representative for the United States in drafting the Declaration).
treaty or international agreement . . . impos[ing] legal obligations.”

U.S. courts cannot therefore be faulted for their hesitation in accepting the Declaration as a source of international law.

However, what may cause more concern is the potential for U.S. judges to selectively legitimate provisions of the Declaration as international law rules with few clear interpretative norms to guide courts in their decisions.

121 See John Humphrey, “The UN Charter and the Universal Declaration of Human Rights,” in THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 39, 50 (E. Luard ed.1967) (quoting Eleanor Roosevelt calling the Declaration “a statement of principles...setting up a common standard of achievement for all peoples and all nations” and “not a treaty or international agreement...impos[ing] legal obligations”); see also 1947-48 U.N.Y.B. 573.
From 1948 to 1979, twenty six cases considered the Declaration. Not one of those cases, however, explicitly accepted the Declaration a source or evidence of international law. Only two cases, *Bixby v. Pierno* and *In re White*, came close to doing so. But they too

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123 Bixby, 4 Cal. 3d 130.
ultimately fell short. In *Bixby*, the California Supreme Court cited the Declaration in general support of its position that courts should exercise judicial review over administrative decisions that affect substantial vested rights. However, it relied principally on California law on this point, and did not explain why it found the Declaration to be relevant.

In *In re White*, the Court of Appeal of California, Fifth Appellate District cited Article 13 of the Declaration on the freedom of movement in support of its statement that the right to travel was recognized internationally, suggesting that it accepted the Declaration as a source of international law. However, it then added that Article 13 expressed “more of a hope than reality.” Consequently, it is unclear whether the court meant that Article 13 represented a legal right to travel, which many people were in fact denied, or whether it meant that Article 13 represented a right to travel that was an aspiration rather than a legal right. It is fair to conclude, therefore, that in the United States prior to 1980, the Declaration did not contain any controlling prescription because it lacked the conclusive support of any court.

This is not to say, of course, that some provisions were not coextensive with other binding human rights treaties that the United States had ratified, or with customary international law.

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124 In re White, 97 Cal.App.3d 141.

125 Bixby v. Pierno, 4 Cal. 3d 130 (Cal. 1971) (citing the Declaration in general support of its position that courts should exercise judicial review over administrative decisions that affect substantial vested rights).

126 In re White, 97 Cal.App.3d 141, 148 (Cal. Ct. App. 1979) (citing Article 13 as a right recognized at the International level).

127 *Id.* (stating Article 13 as expressing more of a hope than reality).
laws that bound the United States. But that is another matter beyond the question of whether the Declaration directly influenced U.S. courts.

Things changed in 1980. In that year, the Second Circuit handed down its decision in *Filartiga v. Pena-Irala* and started a trend to legitimate Article 5 of the Declaration as an authoritative source for the prohibition of torture.\(^{128}\) It held that the international law prohibition of torture had become part of customary international law, “as evidenced and defined by the Universal Declaration of Human Rights.”\(^{129}\) In other words, the Second Circuit regarded the Declaration as proof of international law. The Second Circuit, did not, however, rely solely on the Declaration. It also cited other international law instruments prohibiting torture.\(^{130}\) Thus, *Flores* was able to later claim that *Filartiga* held that the Declaration represented international law only if it comported with state practice.\(^{131}\) However, an alternative interpretation of

\(^{128}\) *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (holding that the right to be free from torture has become part of customary international law).

\(^{129}\) See *id.* at 882.


\(^{131}\) See *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 261-262 (2nd Cir. 2003) (“The [Filartiga] Court explained that non-binding United Nations documents such as the Universal Declaration ‘create[] an expectation of adherence,’ but they evidence customary international law only...
Filartiga, based on a reading of the plain words in that decision, which referred to the Declaration as “evidence” of international law, was that the Declaration had become authoritative as state practice coalesced around it, and that it, like each of other international sources cited, was independently authoritative.\footnote{Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980) (“several commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law.”)}


\footnote{See also Lareau v. Manson, 507 F.Supp. 1177, 1193 (D. Conn. 1980) (“The Universal Declaration is ‘an authoritative statement of the international community’…which ‘creates an expectation of adherence’, and ‘insofar as the expectation is gradually justified by State practice’.”).}
Declaration as a legal norm in international law as it was applied in the United States. The repetition by authoritative institutions had such a strong legitimizing effect that at least two district courts in the Ninth and Second Circuits felt able to cite Article 5 of the Declaration as authority for international law without inquiring into state practice or citing any other authoritative international law source.\(^{134}\)

Eventually, the warm glow of judicial approval for Article 5 reflected onto the Declaration in its entirety, and courts began accepting the Declaration and imbuing it with legal authority.\(^{135}\) In 1992, the Ninth Circuit in *Siderman de Blake v. Republic of Argentina* held that

\(^{134}\) See *Singh v. Ilchert*, 801 F. Supp. 313, 319 (N.D. Cal. 1992) (the District Court of the Northern District of California cited Article 5 of the Declaration as the sole international law authority, together with a prior U.S. case that had held torture to be a violation of international law); *Lareau v. Manson*, 507 F.Supp. 1177, 1193 (D. Conn. 1980) (citing Declaration as authoritative source for prohibition of cruel, degrading and inhuman treatment without providing other evidence of state practice); *see also* *Wong v. Tenneco*, 39 Cal. 3d 126 (Cal. 1985) (Mosk, J., dissenting) (citing Article 17 of the Declaration as its sole authority for international law on right to ownership of property).

\(^{135}\) *Beck v. Manufacturers Hanover Trust Co.*, 125 Misc.2d 771, 775 (N.Y. Sup. Ct. 1984) (stating human rights violations may be actionable under the Declaration); *Jean v. Nelson*, 727 F.2d 957, 964 (11th Cir. 1984) (citing the Declaration as an international agreement); *see also*
“[t]he Universal Declaration of Human Rights is a resolution of the General Assembly of the United Nations. As such, it is a powerful and authoritative statement of the customary international law of human rights.”¹³⁶ The U.S. District Court for the Southern District of Texas in *In re Alien Children Education Litigation* stated, “The Universal Declaration is considered an authoritative interpretation of Article 55 of the U.N. Charter,”¹³⁷ and the Southern District of New York in *Beharry v. Reno* opined that “[w]hile the UDHR is not a treaty, it has an effect similar to a treaty.”¹³⁸

Indeed, the Declaration appeared to be such an authoritative document that some courts began to mistakenly refer to it as a “treaty.”¹³⁹ While this is a patently false description of

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¹³⁶ Siderman de Blake v. Rep. of Arg., 965 F.2d 699, 719 (9th Cir. 1992); see also Restatement (Third) of Foreign Relations Law § 701 cmt. d (“It is increasingly accepted that states parties to the [United Nations] Charter are legally obligated to respect some of the rights recognized in the Universal Declaration.”).


¹³⁹ *Wong*, 39 Cal. 3d at 142 (Mosk J., dissenting) (“The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on December 10, 1948. It was subsequently ratified by both the United States and Mexico. A treaty, of course, is universally recognized as the highest law of the land.”); *Carson v. Quarterman*, 2007 WL 136328, at *4 (N.D. Tex. 2007) (“Petitioner here argues that he has been deprived of rights under the United States Constitution and a treaty [the Declaration] that requires equal pay for equal work.”).
the Declaration, it draws attention to the extent that some courts regarded the Declaration as constitutive of international law.

This trend, however, abated in 2004. On June 29, 2004, the U.S. Supreme Court in *Sosa* instructed that the Declaration was not itself a source of international law, as it was a non-binding resolution of the UN General Assembly and aspirational rather than prescriptive.\(^{140}\)

Such a description of the Declaration is somewhat simplistic, for even General Assembly resolutions may be evidence of state practice,\(^{141}\) which, together with other instances of consistent state practice and *opinio juris*, might constitute customary international law.\(^{142}\)

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\(^{140}\) *Sosa*, 542 U.S. at 734 (holding “the Universal Declaration of Human Rights does not of its own force impose obligations as a matter of international law.”).

\(^{141}\) See *Flores*, 414 F.3d at 261-262 (holding that Filartiga held that the Declaration represented international law only if it comported with state practice); See also Nguyen Thang Loi v. Dow Chem. Co., 373 F. Supp. 2d 7 (citing Flores, “A General Assembly resolution, even though it is not binding…may provide some evidence of customary international law when it is unanimous (or nearly so) and reflective of actual state practice).

\(^{142}\) See *Ian Brownlie, Principles of Public International Law* 8 (Oxford University Press, 6\(^{th}\) ed. 2003); *Malcolm N. Shaw, International Law* 70-1 (Cambridge University Press, 5\(^{th}\) ed. 2003) (describing how customary law is formed by state practice and *opinio juris*); see also *Kane v. Winn*, 319 F. Supp. 2d 162, 197 (“A norm "crystallizes," or becomes binding as customary international law, when there is sufficient state practice consistent with it, and when there is *opinio juris* -- that is, states follow the norm out of a sense of legal obligation.”).
criticism of Sosa, however, is one which academics are free to make, but which is not readily available to federal courts under to the supreme authority of their highest court.\textsuperscript{143}

It is therefore testimony to the enduring authority that prior courts imbued the Declaration with that even the U.S. Supreme Court could not entirely put an end to the lower courts’ use of the Declaration. Lower courts have differed in their interpretation of Sosa’s pronouncement that the Declaration is not itself binding international law. At one extreme, sixteen decisions have taken Sosa to mean that the Declaration has no authoritative value and rejected counsel’s invocation of the Declaration.\textsuperscript{144}

\textsuperscript{143} U. S. ex rel. Fein v. Deegan, 410 F.2d 13, 22 (2d. Cir. 1969) (“we believe that we are bound by these decisions [of the Supreme Court of the United States] until such time as the Court informs us that we are not.”).

In the middle ground, thirty-seven cases have avoided deciding whether the
Declaration could amount to international law by disposing of the issues in other ways.\footnote{San Juan County, 391 F. Supp. 2d 895, 1050 (D. Utah 2005) (concluding the Declaration is not indicative of international law).} For

example, *Guaylupo-Moya v. Gonzales* held that there was a controlling US statute that made recourse to international law unnecessary. Thus, they did not need to decide if the Declaration constituted international law.

At the other extreme, ten other decisions have ignored the plain language of *Sosa* rejecting the Declaration as authority for international law. They have continued to rely on the Declaration as evidence of international law, albeit often alongside other international

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146 *Guaylupo-Moya*, 423 F.3d at 133-34; *see also Segovia-Plata*, 205 Fed. Appx. at 306; *Martinez-Lopez*, 454 F.3d at 502-03 (refusing to turn to international law where there was a controlling US statute).

147 *Guaylupo-Moya*, 423 F.3d at 133-34; *see also Segovia-Plata*, 205 Fed. Appx. at 306; *Martinez-Lopez*, 454 F.3d at 502-03.
instruments.\textsuperscript{148} For these courts, \textit{Sosa} has not limited their roles in imbuing the Declaration with some authoritative status. As was the situation prior to \textit{Sosa}, they have continued to string cite the Declaration along with other international sources.

\textsuperscript{148} \textit{See} Auguste v. Ridge, 395 F.3d 123, 130 (3d Cir. 2005) (citing the Declaration as a source of international law for the prohibition of torture); Nuru v. Gonzales, 404 F.3d 1207, 1223 (9th Cir. 2005) (citing the Declaration as a source of international law for the prohibition of torture); Cabello v. Fernandez-Larios, 402 F.3d 1148, 1154 (11th Cir. 2005) (citing the Declaration as a source of international law for the prohibition of torture); Zhang v. Ashcroft, 388 F.3d 713, 720 (9th Cir. 2004) (indirectly using the Declaration to define religious persecution); Doe v. Liu, 349 F. Supp. 2d 1258, 1321 (N.D. Cal. 2004) (holding cruel, inhuman, or degrading treatment has been condemned by numerous sources of international law including the Universal Declaration of Human Rights); Ficken v. Rice, 2006 WL 123931, at *6 (D.D.C. 2006) (‘Though the U.N. Declaration may be considered evidence of customary international law, it is not legally binding or self-executing.’); U.S. v. Emmanuel, 2007 U.S. Dist. LEXIS 48510, at *2 (S.D. Fla. 2007) (citing Declaration in support of international prohibition against torture); Jama v. INS, 343 F. Supp. 2d 338, 360 (D.N.J. 2004) (recognizing torture as violating customary international law); People v. Ramirez, 39 Cal.4th 398, 479 (2006) (citing the Declaration in support for the right to a fair trial); Gonzalez v. City of Glendora, 2005 Cal.App. Unpub. Lexis 9838, at *4 (Ca. App. 2005) (‘[It is] only intended to ‘represent[] evidence of customary international law.’ [It is] not intended to be legally binding or create self-executing rights like other international treaties.’) (citing Hawkins v. Comparet-Cassani, 33 F. Supp. 2d 1244, 1257, quoting Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 719 (9th Cir. 1992)).
C. Acceptance or Rejection of Specific Provisions

The immense power of the U.S. courts to impart legal legitimacy to the provisions of the Declaration and to define their content creates a need for interpretative controls to guide the U.S. courts in their reception of the Declaration into the U.S. legal system. However, even a cursory scan of Figure 3: References to Provisions of the Declaration in U.S. Cases, below, makes the lack of control plainly obvious. Figure 3 summarizes this author’s reading of each of the 232 cases. It records, for each provision of the Declaration and for the Declaration generally, the number of cases that accepted the provisions as international law, rejected them as statements of law, or declined to decide this issue.

Figure 3: References to Provisions of the Declaration in U.S. Cases

Figure 3 illustrates the number of times courts refer to specific provisions of the Declarations. The column labeled Article 5 refers to instances where courts referred to Article 5 of the Declaration generally. Because courts have sometimes considered the individual limbs of Article 5 separately, Figure 3 also includes columns labeled 5a and 5b, which refer respectively...
to the prohibition of torture and the prohibition of cruel, degrading and inhuman treatment. As indicated in Figure 3, a majority of courts have agreed that some provisions have hardened into legal norms, namely articles 3 (life, liberty and security of person),\textsuperscript{149} 5a (prohibition of torture),\textsuperscript{150} and 9 (arbitrary arrest, detention, exile)\textsuperscript{151} of the Declaration. However, there are


other provisions in which courts disagreed on whether the provisions represent international law, namely the prohibition of cruel, degrading and inhuman treatment (Article 5);\textsuperscript{152} equal protection


(Article 7);\textsuperscript{153} the right to participate in government (Article 21),\textsuperscript{154} and the right to a standard of living adequate for health (Article 25).\textsuperscript{155}


\textsuperscript{155} Compare Moore v. Ganim, 233 Conn. 557, 637 (Conn. 1994); In re Alien Children Education Litigation, 501 F. Supp. 544, 593 (S.D. TX 1980) (finding Article 25 of the Declaration to be indicative of international law) \textit{with} Flores v. S. Peru Copper Corp., 414 F.3d 233, 261-262 (2d Cir. 2003) (holding that Filartiga held that the Declaration represented international law if it comported with state practice).
A close reading of these cases reveals inconsistencies in how a judge may determine whether provisions of the Declaration represent international law, and a general lack of interpretative norms to guide them. The *Filartiga* court comprised Judges Feinberg, Kaufman and Kearse. As discussed above, this court appeared to regard the Declaration as evidence of international law. Twenty-three years later, however, the *Flores* court interpreted *Filartiga* as holding that the Declaration was not itself evidence of international law, and that courts needed to determine whether state practice supported the Declaration. *Flores*’s clarification might appear to be a credible explanation of what the judges of the *Filartiga* court had in mind when they wrote that opinion, because Judge Kearse sat on both the *Filartiga* and *Flores* courts.

This reasoning, however, is muddied by *Kadic v. Karadzic*, which the Second Circuit decided in 1995. The judges in that case included Judge Feinberg, who also sat on the *Filartiga* court. In *Filartiga*, one of the sources that the court had cited together with the Universal Declaration of Human Rights was the UN Declaration on the Protection of All Persons from Being Subjected to Torture. The *Kadic* court explained that *Filartiga* had regarded that declaration as “as a definitive statement of norms of customary international law prohibiting states from permitting torture.” This judicial explanation might suggest that in fact the *Filartiga* court thought that some declarations could become definitive statements of customary law that did not require further inquiry into state practice. If this was really what the *Filartiga*

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156 See *Filartiga*, 630 F.2d 876 (2d. Cir. 1980).

157 See *Flores*, 414 F.3d at 261-62 (holding that *Filartiga* held that the Declaration represented international law only if it comported with state practice).

158 See *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995).
court had in mind when it wrote its decision, then the ex post explanation in *Flores* might have an element of revisionism to it.

The *Flores* decision may also suggest that another of its judges changed his view about the value of the Declaration as a source of international law. The *Flores* decision was written by Judge Cabranes. In 1980, after the *Filartiga* decision was rendered, Judge Cabranes, then a District Judge, authored the opinion in *Lareau v. Mason*, in which he cited Article 5 of the Declaration as proof of an international law against torture. He wrote:

The Universal Declaration is an authoritative statement of the international community, which creates an expectation of adherence, and insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States. As our Court of Appeals noted in *Filartiga*, several commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law. (citations and quotation marks omitted) 159

Judge Cabranes did not cite any other international source in support of the prohibition of torture. This might indicate that he understood Filartiga to mean that Article 5 was authoritative.

159 Lareau v. Manson, 507 F.Supp. 1177, 1193 (D. Conn. 1980); see also generally Louis B. Sohn, “Generally Accepted” *International Rules*, 61 WASH. L. REV. 1073, 1078 (1986) (explaining how a General Assembly resolution, “if accepted by an overwhelming majority of the General Assembly, usually by consensus or by an almost unanimous vote, can constitute ‘generally accepted’ principles of international law.”).
Although he may well have changed his view by the time *Flores* reached the Second Circuit twenty-three years later, and certainly was not required by the rules of precedent to explain why a Second Circuit decision departed from a prior district court opinion, it is frustrating to observers that he did not provide reasons for such a change of heart. This sequence of decisions also reveals the lack of controlling authority of the Declaration or other interpretative norms over the discretion of judges to rely on the Declaration when they wish, and to denounce it at other times.

The root of this confusion over the status of the Declaration is that the Declaration claims to be aspirational, but does not provide the reader with any method to determine when and which of its aspirations become hard law. Creative practitioners of international law may respond to this criticism by arguing that international law as codified in the Vienna Convention on the Law of Treaties does provide rules for interpreting international agreements. This response fails for three reasons. First, as a formal matter, the Declaration is not a treaty, and thus the Vienna Convention on the Law of Treaties by its own terms does not apply. Second, even if the rules of treaty interpretation apply, they would be used to determine the content of treaty provisions, and do not lend themselves easily to determining when certain provisions acquire legal status through an informal process of norm creation. The Vienna Convention states, “A treaty shall be interpreted in good faith in accordance with the

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160 See Data General Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1159 (1st Cir. 1994) (“Although the reasoning of the court below may provide a useful starting point for analysis, the district court's view of the law is not binding on a court of appeals.”) (citations omitted)).


ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”163 In order to confirm the meaning of an ambiguous provision, “recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.”164 However, as discussed in Part I, the preparatory documents indicate that the Declaration was intended to be a “statement of basic principles . . . setting up a common standard of achievement for all peoples and all nations,”165 but its adoption as international and domestic law would be left of decisionmakers at a later time.166

Third, the Declaration and its negotiating documents are deafeningly silent on the content of its provisions.167 For example, in *Forti v. Suarez-Mason*, the Northern District Court of California dismissed plaintiff’s claim for cruel, inhuman and degrading punishment, reasoning that “the proposed tort lacked ‘the requisite elements of universality and definability’ (emphasis added).”168 The Court explained, upon the plaintiff’s motion for reconsideration, that “[w]hile

166 *Id.* See also supra Part I.
167 *See* *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 168 (5th Cir. 1999) (“[I]t would be problematic to apply these vague and declaratory international documents to *Beanal’s claim because they are devoid of discernable means to define or identify conduct that constitutes a violation of international law.”).
these and other materials establish a recognized proscription of ‘cruel, inhuman or degrading
treatment,’ they offer no guidance as to what constitutes such treatment.”169

Thus, courts and other decisionmakers are left to struggle to divine the meaning of
the Declaration’s provisions without adequate guidance. Consequently, some courts might unquestioningly regard the Declaration as authoritative,170 other courts might simply follow the trends in prior decisions of sister courts,171 and – one might speculate – yet other courts might be influenced by their judges’ or law clerk’s particular view of international law as shaped by their law school educations. Such impulses behind norm creation would lead to the inconsistent views about different provisions of the Declaration, and the Declaration as a whole, that we now face in our courts.172


171 See, e.g., People v. Hillhouse, 27 Cal. 4th 469, 511 (Cal. 2002) (relying on previous precedent denying relief under the Declaration); Siderman de Blake v. Rep. of Arg., 965 F.2d 699 (9th Cir. 1992) (citing Filartiga and others for the proposition that the Declaration is a jus cogens norm).

D. Analysis of Whether the Declaration Was Dispositive

A litmus test of whether the Declaration has had an impact on human rights in the United States is the extent to which it has controlled outcomes in U.S. cases. The Supreme Court has long commanded that international law is part of U.S. common law, and that even federal statutes should be interpreted consistently with international law. However, out of the 64 that regarded the Declaration as an authoritative statement of international law, only one relied on the Declaration as the sole, albeit indirect, authority to dispose of a key issue in the case. In Lipscomb v. Simmons, 962 F.2d 1374 (9th Cir. 1992); compare Igartua-De La Rosa v. U.S., 386 F.3d 313 (1st Cir. 2005) with Kessler v. Grand Cent. Dist. Mgmt. Ass’n, 158 F.3d 92 (2d Cir. 1998).

See The Paquete Habana, 175 U.S. 677, 700 (1900) (“International law is part of our law . . .”); The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (“an act of Congress ought never to be constructed to violate the laws of nations, if any other possible construction remains . . .”); see also Lauritzen v. Larsen, 345 U.S. 571, 578 (1953) (quoting The Charming Betsy for the same proposition); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987); Edwin D. Dickinson, The Law of Nations as a Part of the National Law of the United States (pt. 2), 101 U.PA.L.REV. 792, 821 (1953) (stating that the “Supreme Court from the beginning has resolved interstate boundary disputes in recourse to the Law of Nations.”).

See, e.g., The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (“an act of Congress ought never to be constructed to violate the laws of nations, if any other possible construction remains . . .”).

See infra Figure 2.

Zhang v. Ashcroft, 388 F.3d 713, 720 (9th Cir. 2004).
Zhang v. Ashcroft, the U.S. Court of Appeals for the 9th Circuit was guided by the analysis set forth in the UNHCR Handbook to define religious persecution. The UNHCR Handbook stated, “The Universal Declaration of Human Rights…proclaim[s] the right to freedom of thought, conscience, and religion, which right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance.” The Zhang court relied on the Declaration’s definition to hold Zhang has shown a clear probability of persecution on account of his spiritual and religious beliefs.

Broadening the inquiry to include cases in which the Declaration was cited as one of several international authorities to dispose of a key issue only reaches fifteen cases. Most


178 Zhang, 388 F.3d at 720.

179 Id.

180 Id.

notably, *Filartiga* and its progeny relied on the Declaration to extend the court’s jurisdiction under the ATCA to foreigners who committed torture overseas.\(^{182}\)

Federal and state courts also have invoked the Declaration to determine the scope of prisoner’s rights under U.S. law. In Lareau *v.* Manson, the District Court for the District of Connecticut relied on the Declaration to determine prisoner’s rights under the “evolving standards of decency” in Eighth Amendment jurisprudence.\(^{183}\) In *Kane v. Winn*, the U.S. District Court for the District of Massachusetts relied on the Declaration, along with other international instruments, to hold that the Warden had failed to meet international standards for proper medical treatment and thereby also fell short of state law protections.\(^{184}\) In *Soroa-Gonzales v. Civiletti*, the U.S. District Court for the Northern District of Georgia, Atlanta Division, determined that the continued incarceration of the Petitioner amounted to arbitrary detention in violation of the Declaration.\(^{185}\) In *Sterling v. Cupp*, the Supreme Court of Oregon relied on the Declaration to interpret state constitutional provision relating to treatment of prisoners.\(^{186}\)

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\(^{182}\) *Filartiga*, 630 F.2d at 882–84.


In many other cases, however, the Declaration merely served to buttress the court’s holding under U.S. law. Typically, a court would state its view of U.S. law, and note that this was consistent with, or supported by, international law. For example, in Caballero v. Caplinger, the US District Court for the Eastern District of Louisiana held that 8 U.S.C.S. § 1252 was unconstitutional as it applied to the incarceration of an illegal alien. The Court cited the Declaration as support for its position, noting the Declaration is a United Nations document that condemns arbitrary detentions of persons. Such cases suggest that the Declaration did not have complete controlling authority. Instead, it was selectively used to support domestic

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190 See Caballero v. Caplinger, 914 F. Supp. at 1379.
outcomes preferred by the court as a decision-maker in disputes. Ironically, this approach to the Declaration is consistent with Eleanor Roosevelt’s suggestion in 1948 to Canadian diplomats that U.S. law was consistent with the Declaration, and that in any event, the governing elites should interpret the Declaration in a way that suited them best.191

Most frequently, however, U.S. courts preferred not to account for the Declaration or international law at all. In 139 cases, the courts held that because U.S. law governed the disputes in question, it was immaterial that international law might require a different result and so inquiry into international law was unnecessary.192

Although the Declaration has only had a very marginal impact on U.S. law in the sense that there have been very few cases in which it was truly dispositive, one should not ignore the contribution it has made to U.S. jurisprudence alongside other sources of law. There are few sources of international or even U.S. law that could be said to have single-handedly reshaped the contours of our law. More often, judges marshal several authorities in support of their holdings. To influence the outcomes of decisions as one of several sources of law – as the Declaration has done in the areas of torture, alien tort claims and prisoner’s rights – is therefore not an achievement to be scoffed at or ignored.

191 NAC RG 25, Vol. 3699, File 5475-DG-3-40“2” (recommending that the Declaration be interpreted according to the state interests of Canada).

But therein lies the peril of the Declaration. The foregoing examination of federal and state cases indicates that the Declaration’s use by our courts has been inconsistent, unpredictable, and without authoritative control by international or even domestic law norms of interpretation. This absence of control has permitted the selective and self-serving importation of human rights into U.S. law. Consequently, while the prohibition of torture is now firmly entrenched in our law, many other rights remain relatively undeveloped, such as freedom from cruel treatment, the rights to health, right to own property, or the right to privacy.

Inconsistencies among federal and state cases have long been apparent. In 2002, the U.S. District Court for the Eastern District of New York in Nicholson v. Williams, held that the Declaration was “an authoritative statement of the international community” and cited the

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195 Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003).


prohibition of arbitrary interference with privacy and home in Article 12 to support the U.S. plaintiff’s Fourteenth Amendment claim. However, on April 29, 2004, two months prior to the decision in Sosa, the same court held in the Fernandez v. Immigration and Naturalization Services took a different view of Article 12. In that case, petitioner sought to avoid deportation, and invoked Article 12. Rather than consider Article 12 in the context of U.S. constitutional protections, as the court had done in Nicholson, the court in Fernandez rejected Article 12 out of hand by stating that the Declaration did not create a private right of action under U.S. law.

Inconsistencies have continued post-Sosa. In 2005, in Adamu v. Pfizer, Inc., the U.S. District Court for the Southern District of New York, refused to “forge broad aspirational language into customary international law” to enforce the prohibition of cruel, degrading and inhuman treatment in Article 5 of the Declaration. It followed Sosa to hold that the Declaration “‘does not of its own force impose obligations as a matter of international law,’” But on December 8, 2004, over 5 months after Sosa, the U.S. District Court for the Northern District of California cited Article 5 of the Declaration as a source of international law that condemns cruel, degrading, and inhuman treatment. Such inconsistent outcomes among courts, especially, courts bound by their own precedent, are unjust and undermine one of the most basic ideals of the rule of law – predictability.


III. GLOBAL PROBLEMS AND SOLUTIONS

Having identified the problems that the Declaration has caused in U.S. law in Part II, this Part studies whether these problems extend to other domestic jurisdictions and internationally, and if so, whether there might be possible solutions. It argues that the problems that the Declaration has caused in U.S. jurisprudence are magnified when the Declaration is appraised globally. Indeed, these problems are also not unique to the Declaration. Other sources of international law are also by their nature indeterminate. These other sources face similar problems of ambiguity in content and application in domestic systems. However, just as decisionmakers can address these problems in international law through practical and incremental steps, they can also do so with the Declaration.

A. Global Inconsistencies in the Application of the Declaration.

The Declaration is pathologically indeterminate. These uncertainties have triggered schizophrenic judicial responses in not just the United States, but other countries as well.202

While a complete survey of every country’s cases is beyond the scope of this Article, this Part will compare the impact of the Declaration on the United States with its impact in Australia, a country geographically at the other end of the world, but which shares common law traditions with the United States. It will also compare the attitudes of these national courts to that of the International Court of Justice.

Australian judges have disagreed about whether the Declaration is evidence of international law and therefore judicially enforceable. Opinions have variously referred to the Declaration as an authoritative set of fundamental principles,\(^{203}\) as enforceable obligations,\(^{204}\) as (citing the Declaration as determinative of the question whether arbitrary interference in the home is permissible).

\(^{203}\) J. v. Lieschke (1987) 162 C.L.R. 447, 462 (Austl.) (referring to the Declaration as containing those rights and authority properly recognized as fundamental, as having deep roots in the common law and “in the absence of an unmistakable legislative intent to the contrary, they cannot properly be modified or extinguished by the exercise of administrative or judicial powers otherwise than in accordance with the basic requirements of natural justice.”); accord Chakravarti v. Advertiser Newspapers Ltd. (1998) 173 C.L.R. 519, 575 (Kirby, J., concurring) (Austl.) (“the protection of an individual's reputation is a fundamental human right, recognized by [the Declaration].”).

\(^{204}\) X v. Minister for Immigration & Multicultural Affairs (1999) 92 F.C.R. 524, 536 (Austl.) (“The translation of the Universal Declaration of Human Rights into enforceable obligations at international law was achieved by the adoption in 1966 of the International Covenant on Civil and Political Rights.”).
guaranteed freedoms, and as universal values common to all societies. In contrast, other cases have regarded the Declaration merely as an aspirational document that did not constitute international or Australian law. The Declaration has also been labeled a non-binding declaration upon which judicial recourse is not prohibited.

Australian courts have also disagreed on the extent to which they were permitted to use the Declaration to resolve questions of Australian law. At one extreme, some courts have held


206 Gerhardy v. Brown (1985) 57 A.L.R. 472, 495 (Austl.) ("The concept of human rights as it is expressed in the Convention and in the United Nations Universal Declaration of Human Rights evokes universal values, that is, values common to all societies.").

207 See Plaintiff S157/2002 v. Commonwealth, (2003) 211 C.L.R. 476, 518 (Austl.) (noting that the Declaration is an aspirational instrument lacking universal unanimity and is neither effective nor enforceable..."even with respect to those [provisions] about which there is a large measure of agreement, views about their timing, identification and enforcement are unlikely to be unanimous."); Newcrest Mining LTD v. Commonwealth of Aust. (1997) 147.A.L.R. 42, 190 C.L.R. 513, 657 (Austl.) (although influential, "[the Declaration] is not a treaty to which Australia is a party. Indeed it is not a treaty at all. It is not part of Australia's domestic law, still less of its Constitution.").

208 SRYYY v. Minister for Immigration and Multicultural and Indigenous Affairs, (2005) 220 A.L.R. 394 (Austl.) (holding that recourse to non-binding instruments such as the Declaration in the context of public international law disputes is common and not excludable).
that they should not consider the Declaration at all. At the other extreme, other courts have held that although the Declaration was not authoritative under Australian law, it could be used to interpret ambiguous federal legislation.

Admittedly, the confusion about the proper role of the Declaration is not universally shared. In some countries, their constitutions or statutes mandate compliance with either international law generally, or the Declaration specifically. The courts of these countries have found it much easier to apply the Declaration to domestic disputes.

209 In Re Citizen Limbo (1989) 92 A.L.R. 81, 82 (Austl.) (“Unless the proposed statement of claim reveals that the alleged breaches of international human rights standards [the Declaration] create causes of action under Australian domestic law or are relevant to the application of Australian domestic law, the proposed proceedings would appear to be an abuse of process.”).


The judges of the International Court of Justice have also consistently invoked the Declaration in support of international law. Admittedly, judges have invoked the Declaration (website http://www.cortecostituzionale.it last accessed 8/12/07); see also Hannum, supra note 2 at 298–99 (collecting instances of the Declaration’s influence on the construction of human rights guarantees in Canada and India and describing its role in defining the French conception of international order.).


more frequently in dissents and separate opinions.\footnote{Asylum Case (Colombia v. Peru), 1950 I.C.J. 266, 290-294, 320 (Nov. 20) (Alvarez, J., dissenting) (noting that since asylum has been written into the Declaration, this case presented importance for all other countries); Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 4, 63 (Apr. 6) (Guggenheim, J., ad hoc dissenting) (considering that by refusing to recognize the Declaration’s basic right to nationality, and therefore the exercise of diplomatic protection, those individuals whose nationality is disputed or inoperative are rendered abandoned); Aegean Sea Continental Shelf, 1978 I.C.J. 3, 83 (Dec. 19) (Stassinopoulos, J., dissenting) (“constitutional law, unlike civil law, there being no 'code' of rules, the original source of general principles is to be found in the idea of freedom and democracy and, beyond that, in the Universal Declaration of Human Rights.”); Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. 177, 211 (Dec. 15) (Evensen, J., separate op.) (“[Article 16] is a concrete expression of an established principle of human rights in the modern law of nations, [and] has been similarly expressed in other international law instruments.”).}

Nevertheless, some of these judicial statements in these dissents and separate opinions have been highly persuasive in international law. For example, at least one prominent scholar has noted Vice-President Ammoun’s separate opinion in the \textit{South West Africa case} that the provisions of the Declaration could “bind states on the basis of custom within the meaning of the same Article, whether because they constitute a mere declaration of lofty purpose-such as a universal declaration of human rights-into a source of legal rights and obligations.” (citation omitted).
codification of customary law . . . or because they have acquired the force of custom through a
general practice accepted as law.”

Following Vice-President Ammoun’s analysis, the ICJ was able, _mirabile dictu_, to invoke
the Declaration as a source of international law without referring to codification of customary
law or providing evidence of state practice, a step the U.S. Supreme Court in _Sosa_ was unwilling
to excuse. In the _Case Concerning United States Diplomatic and Consular Staff in Tehran_,
the court relied on the Declaration to support a prohibition of “deprivation of freedom” and
“physical constraint in conditions of hardship.” By comparison with U.S. and Australian
courts that have struggled with the indeterminacy of some of the Declaration’s provisions,

215 Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J. 16, 71 (June
21) (Ammoun, V.P., separate op.); _see generally_ Hurst Hannum, _The Status of the Universal

216 _Sosa_ v. _Alvarez-Machain_, 542 U.S. 692, 734 (2004) (holding the Universal Declaration of
Human Rights does not of its own force impose obligations as a matter of international law.).

217 Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J.
3, 98 (May 24) (“Wrongfully to deprive human beings of their freedom and to subject them to
physical constraint in conditions of hardship is in itself manifestly incompatible with the
principles of the Charter of the United Nations, as well as with the fundamental principles
enunciated in the Universal Declaration of Human Rights.”).

involves a paradox because the rights which are accorded to individuals in particular societies are
the subject of infinite variation throughout the world . . . Although there may be universal
such as the human rights implicated by environmental damage,\textsuperscript{219} the ICJ has found no difficulty in extrapolating the provisions of the Declaration to novel areas like the environment.\textsuperscript{220}

The willingness of the International Court of Justice and some foreign courts to treat the Declaration as authoritative in international law and to aid in the interpretation of other laws does not address the criticism that the Declaration has failed to secure the systematic development of human rights. If anything, it proves that the inconsistent application of the Declaration by U.S. courts is not a just domestic problem. On a global scale, these inconsistencies are magnified. The Declaration has influenced greatly the jurisprudence of some national courts and international tribunals, but has had limited effect on others. Consequently, human rights are now highly developed in some domestic legal systems but not others. If the moral imperative of human rights is universal, and law exists in the service of man, then it cannot be just that a man in one country may have fewer judicially-recognized human rights than his brethren in another country.

\begin{itemize}
\item \textsuperscript{219} See generally, Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d. Cir. 2003).
\item \textsuperscript{220} Accord Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, 91–92 (Sept. 1997) (Weeramanrty, V.P., separate op.) (“It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.”).
\end{itemize}
B. Appraisal and Recommendations

The problems with the Declaration are undoubtedly serious. Part I has shown that the problem of indeterminacy is pathological to the Declaration, and, considering the conflicting state interests in its formation, perhaps inevitable. Part II has shown that the congenital ambiguities in the Declaration caused U.S. courts to interpret and apply it inconsistently. Part III.A has provided some proof that the problem of inconsistency in interpretation and application is not unique to the United States, and that it is in fact a global problem.

But not every defective international instrument is useless or beyond repair. Quite the contrary. The Declaration has proven to be useful in developing human rights. Even without considering the impact of the Declaration on countless constitutions and human rights treaties, the Declaration has through judicial interpretation strengthened the protection of certain human rights, such as the prohibition of torture. To now jettison the Declaration from U.S. or international jurisprudence would needlessly forgo the potential impact the Declaration may yet have on other areas of human rights.

And although the inconsistencies caused by the Declaration continue to pose policy-concerns, there may be solutions. These problems are not unique to the Declaration, and the solution to the Declaration’s problems may be found in the approaches to broader issues in international law. As to the problem of indeterminacy, international law scholars face this issue with any evolving international law norm. International law is not a petrified block of rules.

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221 See supra note 5 and Part III.A.

222 See supra Part II.

It is an organic bundle of norms that multiply, change and die. This evolution sometimes occurs dramatically. More often it creeps imperceptibly. Any snapshot of international law norms, such as the Declaration, cannot completely depict international law as it will have developed in the decade after the snapshot was taken, let alone six decades later.

The solution to difficulties in appraising evolving international norms, such as the Declaration, may be to consider them in their proper context. Documents such as the Declaration must be the starting point of an inquiry into the content of international laws, not the end. Scholars can assist judges and practitioners by illuminating the value and limits of aspirational documents, as this Article has attempted to do. They can also explain norm creation in international law in practical terms, as other scholars have done. In time, judges and practitioners may begin to glance at international law and the Declaration with a more nuanced eye.

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of banking norms hardening into binding law); Patrick Kelly, The Twilight of Customary International Law, 40 VA. J. INT’L L. 449, 450 (2002) (“there is neither a common understanding of how customary international legal norms are formed, nor agreement on the content of those norms.”).

There are also measures to address inconsistencies in the reception of the Declaration into domestic law. This is a problem that afflicts international law generally.\footnote{225} In response to the differing judicial views throughout the Commonwealth countries about the role of international law in domestic cases, the Commonwealth Secretariat in London convened a meeting of judges in Bangalore, India, in 1988.\footnote{226} Among those present were Justice Ruth Bader Ginsburg, then a judge of the Federal Appeals Court, and Justice Kirby of the Australian Supreme Court, then President of the Court of Appeals of New South Wales.\footnote{227} The Bangalore


\footnote{226} Michael Kirby, To Judge is to Learn, 48 HARV. INT’L L.J. 36, 37 (2007).

\footnote{227} Id.
Principles that emerged from this conclave stated that where there was a gap in common law or where a domestic statute was ambiguous, a judge may look to international law for guidance.\(^{228}\) It may be more than coincidence that Justice Ginsburg subsequently authored Supreme Court opinions that looked to international sources to interpret ambiguous federal law.\(^{229}\) The causal connection between the Bangalore Principles and Justice Kirby’s method of judging is even clearer. He has admitted to applying the Bangalore Principles in *Dairy Farmers Cooperative Milk Co. v. Acquilina*. In that case, he turned to the International Covenant on Civil and Political Rights to resolve a domestic human rights issue.\(^{230}\)

Using the Bangalore conference as a model, the international college of judges might consider convening other conclaves to discuss judicial attitudes towards the Declaration. The success of the Bangalore conference suggests that a similar conference on the Declaration might help align national courts in their reception of the Declaration into domestic law.

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\(^{229}\) *See generally* El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999) (relied on a House of Lords’ decision interpreting the Warsaw Convention's limitations on airline liability for injury to a passenger); Eldred v. Ashcroft, 537 U.S. 186, 199 (2003) (upheld against constitutional challenge a statute conforming our copyright term to the European Union's “life plus seventy years.”)

These measures to address the problems of the Declaration are not complete solutions. It would be too glib to suggest otherwise. The problems inherent in international law – its aspirational quality and its uneasy relationship with states that keep one eye on their sovereignty while casting the other to opportunities beyond their shores – are too complicated to solve in one law review article. The measures suggested here do, however, provide hope that the Declaration, with all its imperfections, need not be abandoned. If the Declaration does not instruct judges on how to determine when its provisions become law and what they mean, then judges, scholars and law teachers must find ways to do so and spread their learned views. Ironically, approaching the limitations of the Declaration in this way would validate its essential and stated purpose: “To strive by teaching and education to promote respect for these rights and freedoms[.]”231

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Annex A: Cases Referring to the Declaration from December 1948 to July 2007

11. An v. Chun, 134 F.3d 376 (9th Cir. 1998).
33. Caldwell v. Medical Council of California, 113 F.3d 1234 (6th Cir. 1997).

40. Cerrillo-Perez v. I.N.S., 809 F.2d 1419 (9th Cir. 1987).


58. Dickens v. Lewis, 750 F.2d 1251 (5th Cir. 1984).
63. Early v. Lamanna, 182 F.3d 917 (6th Cir. 1999).
73. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
74. Flores v. Southern Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003).
78. Fresenius Med. Care Cardiovascular Resources v. PR and Carrib. Cardiovascular Center, 322 F.3d 56 (1st Cir. 2003).
82. Habtemicael v. Ashcroft, 360 F.3d 820 (8th Cir. 2004) (Mar. 9, 2004); 370 F.3d 774 (8th Cir. 2004) (June 7, 2004).
89. Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996).
93. Igartua-De La Rosa v. United States, 386 F.3d 313 (1st Cir. 2004).
95. In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992).
98. In re Weitzman, 426 F.2d 439 (8th Cir. 1970).
124. Lipscomb v. Simmons, 962 F.2d 1374 (9th Cir. 1992).
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