Cornell International Law Journal

Volume 41
Issue 2 *Summer 2008*

Article 2

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

Tai-Heng Cheng

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

Tai-Heng Cheng†

Introduction

Over the last sixty years, the Universal Declaration of Human Rights of 1948 has become the touchstone for human rights.[1] On December 10,

† Tai-Heng Cheng, Associate Professor of Law, Associate Director, Center for International Law, New York Law School, J.S.D. (Yale), M.A. (Oxford). This paper was workshopped at the Sarah Lawrence College Seminar on Human Rights, where each participant made valuable contributions. Comments were also gratefully received at the New York Law School Faculty Workshop. Claude Aiken, Brian Kochisarli, Jessica Rose, Robert Trisotto, and Stuart Barden provided research assistance.

1. *See* International Conference on Human Rights, Apr. 22-May 13, 1968, *Declaration of Tehran*, ¶ 2, U.N. Doc. A/CONF.32/41 (May 13, 1968), *reprinted in* UNITED NATIONS, HUMAN RIGHTS, A COMPILATION OF INTERNATIONAL INSTRUMENTS 43-44 (1988) (noting that eighty-four states at the conference concluded that the Declaration "constitutes an obligation for the Members of the international community"); Resolution

1948, the United Nations General Assembly adopted it as a non-binding resolution.[2] State representatives hoped that one day it would become binding law.[3] This aspiration has been partially realized. The Declaration has generated countless other human rights instruments and treaties.[4] Government officials, judges, lawyers, and human rights advocates have

---

Adopted by the International Law Association, *reprinted in* INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-SIXTH CONFERENCE 29 (1994) (observing that the Declaration "[i]s universally regarded as an authoritative elaboration of the human rights provisions of the United Nations Charter" and concluding that "many if not all of the rights 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 (1996) ("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, ¶ 35 (2004) http://www.law.northwestern.edu/journals/JIHR/v2/5/5.pdf ("The Universal Declaration became the polestar, the holy writ, of the modern international human rights movement.") [hereinafter Glendon, *The Rule of Law*].

2. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); *see also* Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 796 (D. Kan. 1980) (explaining that the "standards set by the Universal Declaration of Human Rights [were] initially only declaratory and non-binding" (quoting Richard B. Bilder, The Status of International Human Rights Law, in INTERNATIONAL HUMAN RIGHTS: LAW AND PRACTICE 1, 8 (James C. Tuttle ed., 1978)); Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 876 (1983) ("Traditionally, United States courts have not considered United Nations General Assembly Resolutions to be authoritative sources of international law . . . . [T]he traditional attitude toward United Nations General Assembly Resolutions [has treated them] as non-binding recommendations reflecting idealized international legal principles . . . .").

3. *See* 1947 U.N.Y.B. 527 (recording that state representatives in the UN General assembly proposed that all nations should "[t]ake early action to bring their laws and practices in line with the Declaration"); JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, INTENT 14-19 (1999) [hereinafter MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS].

4. See, e.g., International Covenant on Economic, Social and Cultural Rights, pmbl., G.A. Res. 2200A (XXI), at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 53, U.N. GAOR, 21st Sess. U.N. Doc. A/6316 (Dec 16, 1966) ("[R]ecognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights . . . ."); Convention on the Elimination of All Forms of Discrimination against Women, pmbl., G.A. Res. 34/180, at 193, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46, (Sept. 3, 1981) ("[N]oting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex . . . ."); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pmbl., G.A. Res. 39/46, at 197, U.N. GAOR 39th Sess., Supp. No. 51, U.N. Doc. A/39/51/Annex (Dec. 10, 1984) ("[H]aving regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment . . . .").

both invoked and accepted some of the Declaration's provisions.[5] Consequently, certain provisions of the Declaration have acquired legality and legitimacy.[6]

The Declaration, however, ultimately falls short of the goals that it set for itself and that human rights advocates have set for it. In its Preamble, the Declaration claims to be a "common standard of achievement for all peoples and all nations."[7] The negotiating documents, however, reveal a prioritization of the human rights concerns of some people in some nations over those of other people in other nations. To the extent that human rights advocates and scholars regard the Declaration as a "beacon of the rights movement,"[8] there is a risk that this beacon will guide the development of an international human rights program that insufficiently prioritizes the human rights concerns that drafters of the Declaration failed to include. The roughly 150 states that were not yet in existence when the Declaration was adopted in 1948 may hold some of these concerns, as they never had an opportunity to shape, accept, or object to the Declaration's provisions.[9] Can we consider a document that did not equally account for the human rights concerns of all peoples and nations to be a common standard of achievement for us all?

Second, the Declaration aspires, by "progressive measures," to "secure [the] universal and effective recognition and observance" of the human rights contained in it.[10] Its preamble clarifies that law is one of the key modalities for universal and effective observance of these human rights, explicitly stating that "human rights should be protected by the rule of law."[11] The Declaration, however, does not provide a hermeneutic scheme to identify when progressive measures have transformed a particular provision from an aspiration into law. Additionally, it does not clarify what exactly its provisions mean. Consequently, some decisionmakers have accepted its provisions, while others have rejected them.[12] In some cases,

5. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 535 (6th ed. 2003) (calling the Declaration a "good example of an informal prescription given legal significance by the actions of authoritative decisionmakers").

6. *See* M.G. Kaladharan Nayar, *Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT'L L.J. 813, 815-16 (1978) ("At the present time, . . . 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. PUB. 11) 1, 15 (1965) ("This constant and widespread recognition of the principles of the Universal Declaration clothes it . . . in the character of customary [international] law.").

7. Universal Declaration of Human Rights, *supra* note 2, pmbl.

8. Oscar Schachter, Panel Discussion, *in The Genesis of the Universal Declaration: A Fresh Examination*, 11 PACE INT'L L. REV. 27, 57 (1999).

9. *Compare* Waldock, *supra* note 6, at 13 (noting that forty-eight states voted in favor of the Declaration, none voted against it, and eight states abstained from voting, for a total of fifty-six states present at the Declaration's birth), *with* United Nations, List of Member States, http://www.un.org/members/list.shtml (2006) (citing 192 member states as of October 2006).

10. Universal Declaration of Human Rights, *supra* note 2, pmbl.

11. *Id.*

12. *See infra* Part II.A.

government officials or judges have applied a provision of the Declaration inconsistently in different situations or have changed their minds as to whether a provision was even authoritative.[13]

The selection of some rights and omission of others in the Declaration and the inconsistencies in its application raise troublesome questions about 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? What other human rights not listed in the Declaration should decisionmakers protect? Which of these other rights should have equal footing with the rights in the Declaration? 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 law is of practical relevance in the United States. From the very moment that the United Nations adopted the Declaration on December 10, 1948,[14] there was at least a presumption that the United States should promote the Declaration's provisions because it had been a key supporter of the Declaration during its negotiation and adoption.[15]

The Declaration has also penetrated many domestic legal systems, including U.S. federal law.[16] Court cases spanning a range of issues have invoked the Declaration. Judges have considered the Declaration when deciding whether to grant an injunction against a bartenders' union that picketed in protest of a bar hiring women "barmaids,"[17] to strike down the U.S. travel ban to Cuba,[18] to affirm a class action lawsuit for retroactive food stamps,[19] to grant asylum,[20] to accord prisoners certain rights,[21] to

13. *Compare, e.g.*, Lareau v. Manson, 507 F. Supp. 1177, 1193 n.18 (D. Conn. 1980) (Cabranes, J.) ("The Universal Declaration is 'an authoritative statement of the international community,' which 'creates an expectation of adherence . . . .'") (quoting Filartiga v. Peña-Irala, 630 F.2d 876, 883 (2d Cir. 1980)), *with* Flores v. S. Peru Copper Corp., 414 F.3d 233, 261-62 (2d Cir. 2003) (Cabranes, J.) (holding the Declaration was not an independent source of international law).

14. *See* Universal Declaration of Human Rights, *supra* note 2.

15. *See* Levy v. Weksel, 143 F.R.D. 54, 56 (S.D.N.Y. 1992) (noting that the development of the Declaration "was led by the United States"); Cass R. Sunstein, *State Action is Always Present*, 3 CHI. J. INT'L L. 465, 469 (2002) (noting that Franklin Delano Roosevelt "stressed the importance of omnipresence of state action . . . an endorsement that helped in turn to influence the development of the Universal Declaration of Human Rights and dozens of constitutions all over the world").

16. *See, e.g.*, Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242, 1263 (11th Cir. 2005); *In re* Estate of Marcos Human Rights Litig., 978 F.2d 493, 499 n.14 (9th Cir. 1992); *Filartiga*, 630 F.2d at 883-84.

17. *See, e.g.*, Wilson v. Hacker 101 N.Y.S.2d 461 (Sup. Ct. 1950).

18. Zemel v. Rusk, 381 U.S. 1 (1965).

19. West v. Bowen, 879 F.2d 1122 (3d Cir. 1989).

20. *See, e.g.*, Zheng v. Gonzales, 192 F. App'x 733 (10th Cir. 2006); Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003).

21. *See, e.g.*, Sterling v. Cupp, 625 P.2d 123 (Or. 1981).

decline jurisdiction over a foreign suspect kidnapped by U.S. agents overseas in order to bring criminal charges before U.S. courts,[22] and to overturn the death penalty.[23] The Declaration continues to figure in the imaginations of lawyers, individuals, corporations, judges, and law professors[24] appraising creative claims for alleged abuses,[25] including labor conditions in rubber plantations and oil pipelines abroad.[26]

This article argues that the Declaration fails to achieve its goal of setting a common standard of human rights achievement for all nations because the foreign policies of various states and special interest groups politicized its formation, and because it does not instruct decisionmakers on how to determine the content and legality of its provisions. The Declaration, however, has promoted human rights and decisionmakers can at least partially cure its defects.

This article develops the above thesis in three parts. Part I shows how the political distortions in the Declaration trace back to its very creation. 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 and by political agendas of governments and interest groups.[27] Against this backdrop, rhetorical statements by state representatives claiming that the Declaration represented global human rights concerns are quickly unmasked for what they really were: attempts to co-opt the Declaration to the service of political goals. These goals included the prioritization of the human rights concerns of some special interests groups over those of other groups and the promotion of cold war ideologies.[28]

Part II demonstrates how the ambiguities inherent in the Declaration have caused difficulties for U.S., foreign, and international courts, resulting in inconsistent decisions and unjust results. It presents the results of the author's granular study of all 238 federal and state cases as of October 31, 2007 that have referred to the Declaration during the six decades of its

22. *See, e.g.*, United States v. Matta-Ballesetros, 71 F.3d 754 (9th Cir. 1995).

23. *See, e.g.*, State v. Skatzes, No. 15848, 2003 WL 24196406, at *63 (Ohio Ct. App. Jan. 31, 2003) (considering, though ultimately rejecting, the argument that the Declaration prohibited capital punishment under the specific facts of the case).

24. *See, e.g.*, Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 588 (2002); Igor Fuks, Sosa v. Alvarez-Machain *and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability*, 106 COLUM. L. REV. 112, 116-19 (2006); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2365-66 (1991); Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 117 (2004).

25. *See* Roe v. Bridgestone Corp., 492 F. Supp. 2d 988, 1008 (S.D. Ind. 2007) ("Since *Filartiga* . . . , many plaintiffs have used the [Alien Tort Statute] to pursue a wide variety of international human rights cases in the United States federal courts.").

26. *See id.* ("Count One seeks relief under the Alien Tort Statute, 28 U.S.C. § 1350, on behalf of adult plaintiffs on the theory that defendants violated the law of nations . . . . Plaintiffs rely on . . . the Universal Declaration of Human Rights"); Doe v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

27. *See infra* Part I.C.

28. *See infra* Part I.C-D.

existence.[29] 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, this study traces how courts have legitimated some provisions as hard law and others as soft law. It also shows, however, that many of the Declaration's provisions continue to lack legitimacy and that there is uncertainty as to precisely which provisions are legitimate or illegitimate. Consequently, the problems incipient in 1948 have now materialized and may call into question the utility of the Declaration in U.S. law. Part II also argues that the problems the Declaration has caused in U.S. courts are even more serious in light of their global context. A survey of foreign and international judicial decisions concerning the Declaration reveals that the problems U.S. courts face may in fact be global in nature. The Declaration has caused inconsistencies both within domestic systems and among different systems of law.[30]

Part III appraises these problems with the Declaration and makes recommendations to address them. It argues that critics should judge the problems of politicization and indeterminacy in the Declaration more severely than similar problems with domestic legislation.[31] Unlike domestic legislation, which lawmakers can amend if courts fail to give effect to legislative intent or if new social groups must be accounted for, the Declaration by its own terms sets out to achieve an immutable standard that reflects the universal concerns of all peoples and that will be applied to all states. Decisionmakers, however, can partially address the problem of politicization by developing the human rights program beyond the original confines of the Declaration to include and prioritize human rights that the Declaration itself did not originally emphasize. Courts can address the problem of indeterminacy, at least in part, if they use the Declaration as the starting point of an inquiry into international human rights, but not as the end point. Additionally, decisionmakers should canvass state practice, international judicial decisions, and the writings of eminent jurists to accurately determine the content and legal nature of any human right.[32]

I. The Creation and Politicization of the Declaration

Competing interests constantly tugged the negotiations of the Declaration in different directions.[33] Although human rights advocates and scholars regard the Declaration as a "ringing declaration,"[34] contemporaneous

29. The author of this article identified these cases by searching the Westlaw and Lexis databases for court decisions citing the Declaration and then reviewing these cases for relevance. In some instances, a lawsuit involved multiple decisions referring to the Declaration. These decisions were counted as one case.

30. *See infra* Part II.B.

31. *See* discussion *infra* Part III.

32. *See* discussion *infra* Part. III.

33. For an account of the drafting and adoption of the Declaration, see MARY ANN GLENDON, A WORLD MADE NEW (2001) [hereinafter GLENDON, A WORLD MADE NEW].

34. *See* Schachter, *supra* note 8, at 57.

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.[35]

In 1944, the United States submitted the first draft of the UN Charter at the Dumbarton Oaks Conference.[36] 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.[37] In 1945, delegates to the United Nations Conference on International Organization at San Francisco debated and ultimately adopted the UN Charter,[38] which reaffirmed "faith in fundamental human rights."[39] President Truman announced at the final plenary session at San Francisco on June 26, 1945 that "[u]nder this document we have good reason to expect 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."[40]

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."[41] On the other hand, this bill was to implicitly draw its inspiration from the U.S. Bill of Rights.[42] President Truman may have intended this reference to human rights from the U.S. perspective to appeal to his domestic constituents, including the American Jewish Committee and the American Law Institute, both of which had drawn up a proposed international bill of rights.[43]

---

35. *See* GLENDON, A WORLD MADE NEW, *supra* note 33, at 35-51.

36. Schachter, *supra* note 8, at 52 n.4.

37. *Id.* at 52.

38. *Id.* at 53; 1948-49 U.N.Y.B. 524, U.N. Sales No. 1950.I.11.

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

40. HARRY S. TRUMAN, 1945: YEAR OF DECISIONS, 1 MEMOIRS 292 (1955); UNITED NATIONS, DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, U.N. Doc. 1209/P/19/ 683 (1945).

41. *Id.*

42. *See* MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 3, at 1.

43. *See id.* at 1-2 (noting that the American Jewish Committee and American Institute of Law had drawn up bills of rights in February 1945 and February 1943, respectively). The author has not found direct evidence proving that President Truman saw these bills of rights prior to delivering his remarks. Documents do indicate, however, that both the American Jewish Committee and American Law Institute influenced the creation of the Declaration. *See* Am. Law Inst. v. Commonwealth, 882 A.2d 1088, 1090 (Pa. Commonw. Ct. 2005) ("[T]he American Law Institute's Essential Statement of Human Rights was used as the basis for the United Nations' Universal Declaration of Human Rights."); *see also* Am. Jewish Comm., Human Rights, http://www.ajc.org/site/c.ijITI2PHKoG/b.835983/ (last visited Feb. 21, 2008) ("AJC leaders such as Jacob Blaustein and Joseph Proskauer were official NGO consultants to the US delegation and successfully pressed to ensure that the UN Charter included international human rights guarantees."); Am. Jewish Comm., United Nations, http://www.ajc.org/site/c.ijITI2PHKoG/b.835981/k.A4B4/United_Nations.htm (last visited Feb. 21, 2008) ("AJC tracks proceedings at the UN and other human rights forums, monitoring their activities, combating anti-Semitic elements within the human rights community, building relationships with allies, and advancing our agenda.").

On February 15, 1946, the UN Economic and Social Council (ECOSOC) held its first session. Pursuant to Article 68 of the UN Charter mandating the creation of commissions to promote human rights,[44] at this session the ECOSOC established a nuclear commission to engage in preparatory work to define the terms of reference of a Commission on Human Rights (the Commssion).[45] The eighteen members of the nuclear commission met at Hunter College in New York from April 29 to May 20, 1946.[46] They recommended to ECOSOC that the Commission on Human Rights be responsible for producing an international bill of rights.[47] ECOSOC accepted this recommendation at its second session on June 21, 1946 and decided that the Commission would have eighteen members.[48] 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;
d) the prevention of discrimination on grounds of race, sex, language or religion;
e) any other matter concerning human rights not covered by items (a), (b), (c), and (d).[49]

With the exception of the catch-all provision in paragraph (e), these terms of reference were identical to the terms of reference of the nuclear commission.[50]

A careful comparison of these two sets of terms of reference also suggests that a desire to protect certain human rights over others 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.[51] However, the preferential enumeration of only certain human rights in paragraphs (a) through (d) provides a window into the more limited human rights concerns that animated the post-World War II era. The specific protection of political rights, civil liberties, and the rights of minorities and women was doubtlessly motivated by the horrific persecution of Jews prior to and during World War II and by growing postwar awareness of gender inequalities.[52]

---

44. U.N. Charter art. 68.
45. 1946-47 U.N.Y.B. 523, U.N. Sales No. 1947.I.18.
46. GLENDON, A WORLD MADE NEW, *supra* note 33, at 33; 1948-49 U.N.Y.B., *supra* note 38, at 525.
47. 1946-47 U.N.Y.B., *supra* note 45, at 523.
48. *Id.* at 524.
49. *Id.* at 523.
50. *See id.* (noting that the nuclear commission's terms of reference lacked paragraph (e)).
51. *See id.*
52. *See id.* (noting that UN members discussed "the necessity of achieving and promoting the recognition of human rights and fundamental freedoms for all, in the hope of drawing from the last World War the lessons which would aid the peoples to achieve the highest aspirations of mankind"); *see also* Johannes Morsink, *World War Two and the Universal Declaration*, 15 HUM. RTS. Q. 357, 358 (1993) [hereinafter Morsink, *World War*

There were also other global conditions requiring international responses, but the nuclear commission did not explicitly include these within the new Commission's scope of work. For example, these terms of reference failed to mention sexual orientation discrimination, even though Hitler had persecuted gays alongside Jews. The terms also fail to mention economic and social rights, which in subsequent decades became a primary goal for newly independent states—states that in 1945 were still colonies of the former imperial powers.

The Human Rights Commission held its first session in January and February of 1947. The Committee elected Eleanor Roosevelt, representative for the United States, as its chair, Peng Chun Chang from China as vice-chairman, and Charles Malik from Lebanon as rapporteur.[53] The Commission formed a drafting group comprising these three officers to prepare a bill as a draft resolution for presentation to the General Assembly.[54] It directed the drafting group to account for the views of the Commission. Notably, contemporaneous records show that—in contrast to the terms of reference—these views emphasized not just political rights, but also social rights and personal freedoms.[55] Unlike the terms of reference, these views also stressed "equality without distinction," without identifying particular groups, such as women or racial groups, specifically deserving of protection.[56] By this point, the emphasis appears to have shifted away from addressing particular concerns of interest groups in 1945 to drafting a more universal document.

On March 24, 1946, Roosevelt wrote to the President of ECOSOC informing him of the plan to expand the drafting group to a larger drafting committee.[57] ECOSOC noted this plan with approval at its fourth session and decided to produce the Declaration in stages.[58] By the time the UN General Assembly adopted the Declaration, the Declaration was to 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; and adoption by the

---

Two and the Universal Declaration] ("The horrors of the Holocaust shocked the delegates and the countries they represented into a reaffirmation and reiteration of the existence of human rights.").

53. 1946-47 U.N.Y.B., *supra* note 45, at 524.

54. *Id.*

55. *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.").

56. *Id.*

57. *Id.* at 525.

58. 1947-48 U.N.Y.B. 572, U.N. Sales No. 1949.I.13.

General Assembly as a whole.[59]

A. Preliminary Draft of the Drafting Committee

At the first meeting of the Drafting Committee in June 1946, difficulties obtaining sufficient state support for a binding international bill of rights emerged. Contemporaneous records show that Committee members had decided that a key purpose of the Declaration was "a reaffirmation of the most elementary rights," and thus, the document should be "short, simple, easy to understand and expressive."[60] By the first meeting of the Drafting Committee, however, disagreements arose among the drafters. Some thought that it was important not only to have a "declaration or manifesto," but also to implement human rights through enforceable conventions.[61] To address this tension, the drafting group decided that the United Nations should create both a declaration and a number of conventions that would address "(a) torture, physical integrity and cruel punishments; (b) the right to a legal personality; and (c) the right of asylum."[62] The interests of groups and states concerned with the abuses by the German Reich in World War II would be addressed through enforceable conventions, while other human rights concerns would be addressed by an educational but non-binding declaration.[63]

ECOSOC decided that the UN Secretariat would assist the Drafting Committee, a task which fell to John Humphrey,[64] director of the newly-formed Division of Human Rights of the Secretariat.[65] Various non-governmental groups had produced draft human rights bills, which Humphrey then collected and assimilated into a draft international human rights bill.

At the first session of the Drafting Committee, held in June of 1947, Humphrey presented his bill.[66] The Drafting Committee considered the Humphrey Bill together with certain proposals for revision by the United States. It also considered one text French Commission member Rene Cassin had prepared, along with another the United Kingdom had proposed.[67]

These early drafts reveal the framers' painful cognizance 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. The preamble of the document emphasized that "man does not

59. *See generally* GLENDON, A WORLD MADE NEW, *supra* note 33, at 271-314 (reprinting each of these successive drafts).

60. *Id.* at 524.

61. *Id.* at 525.

62. *Id.* at 526.

63. *See id.*

64. *Id.* at 525.

65. *See* Schachter, *supra* note 8, at 52.

66. *See* MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 3, at 7.

67. 1946-47 U.N.Y.B., *supra* note 45, at 525.

have rights only; he owes duties to the society of which he forms part."[68] Article 1 reiterated this message, stating, "Everyone owes a duty of loyalty to his State and to the United Nations. He must accept his just share of common sacrifices as may contribute to the common good."[69] Article 2 elaborated that "[i]n the exercise of his rights every one is limited by the rights of others and by the just requirements of the State and of the United Nations."[70] Only after introducing these duties and considerations as moderating rights in general did the Humphrey draft recognize the right to life in Article 3; and even then this right was subject to the death penalty in accordance with law.[71]

Likewise, the Cassin draft also sought to balance rights with duties and to harmonize conflicting rights. After stating in Article 1 that all men "possess equal dignity and rights,"[72] the Cassin draft stated in Article 3 that "each 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,"[73] and in Article 4 that "[t]he rights of all persons are limited by the rights of others."[74] Article 5 provided that "the law is the same for all,"[75] and Article 6 provided that "[n]o person shall suffer discrimination by reasons of his race, sex, language, religions or opinions."[76]

The Drafting Committee slightly revised the Cassin draft, which became the preliminary draft of the International Bill of Human Rights and submitted it to the Human Rights Commission for consideration. In its revisions, the Committee essentially preserved the principles from Articles 1 to 6 of the Cassin draft, while slightly amending the wording and organization.[77]

B. The Commission's First Draft

At the second session of the Human Rights Commission in Geneva from December 2 to 17, 1947, the Commission considered the preliminary draft of the International Bill of Human Rights that the Drafting Committee

68. Division of Human Rights of the Secretariat, *Draft Outline of an International Bill of Human Rights*, pmbl., *delivered to the Drafting Committee of the United Nations Commission on Human Rights* (1947), *reprinted in* GLENDON, A WORLD MADE NEW, *supra* note 33, at 271-74 [hereinafter *Humphrey Draft*].

69. *Id.* art. 1.

70. *Id.* art. 2.

71. *Id.* art. 3.

72. Rene Cassin, Representative of France of the Human Rights Commission, *Suggestions for Articles of the International Declaration of Human Rights*, art. 1 (1947), *reprinted in* GLENDON, A WORLD MADE NEW, *supra* note 33, at 275-80 [hereinafter *Cassin Draft*].

73. *Id.* art. 3.

74. *Id.* art. 4.

75. *Id.* art. 5.

76. *Id.* art. 6.

77. U.N. ECOSOC, Human Rights Commission, *Suggestions for the Drafting Committee for Articles of an International Declaration on Human Rights*, arts. 1-4, *delivered to the Drafting Committee of the United Nations Commission on Human Rights* (June 1947), *reprinted in* GLENDON, A WORLD MADE NEW, *supra* note 33, at 281-88 [hereinafter *June 1947 Human Rights Commission Draft*].

had prepared.[78] The Human Rights Commission 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 that "[i]n the exercise of his rights, every one is limited by the rights of others 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."[79]

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."[80] It moved this equal protection provision from Article 6 to Article 3, part 1.[81] The 1947-1948 Yearbook of the United Nations records that in its discussions, the Commission reiterated its intent that the Declaration be neither 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."[82]

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, New York, where it addressed comments from the Member States and redrafted the entire Declaration.[83] Immediately after the Drafting Committee's session concluded at the end of May, the Commission on Human Rights convened its third session at Lake Success from May 24 to June 18, 1948.[84] The Commission considered the redrafted text that the Drafting Committee proposed and amended this text before transmitting it to ECOSOC. The Commission's second draft was formally titled "Draft International Declaration of Human Rights."[85] This second draft of the Commission contained a turning point in the evolution of the Declaration. Its text notably moved the provision addressing duties and conflicting rights to the end of the draft[86] where it remained in the Declaration's final form.[87]

---

78. 1947-48 U.N.Y.B., *supra* note 58, at 572.

79. Drafting Committee, U.N. ECOSOC, Human Rights Commission, *Draft International Declaration on Human Rights*, art. 2 (May 1948), *reprinted in* GLENDON, A WORLD MADE NEW, *supra* note 33, at 289-93 [hereinafter *Geneva Draft*].

80. *Id.* art. 3.1.

81. *See id.*; *June 1947 Human Rights Commission Draft*, *supra* note 77, art. 6.

82. 1947-48 U.N.Y.B., *supra* note 58, at 573; *see also* 1948-49 U.N.Y.B., *supra* note 38, at 525 (recording a similar dichotomy of views at the first session of the Drafting Committee).

83. *See* 1947-48 U.N.Y.B., *supra* note 58, at 574.

84. *See id.*

85. *Id.* at 575.

86. Commission on Human Rights, *Draft International Declaration of Human Rights*, art. 27, U.N. Doc. E/CN.4/95 (June 18, 1948).

87. Universal Declaration of Human Rights, *supra* note 2, art. 29.

Another notable aspect of the Commission's decision-making process at Lake Success was that at least twenty-two non-governmental organizations participated in this session, many of which were Christian, Jewish, and women's groups.[88] The Christian groups included the International Federation of Christian Trade Unions, the Catholic International World Organization, the Catholic International Union for Social Service, the Commission of the Churches on International Affairs, the World Women's Christian Temperance Union, and the World's Young Women's Christian Association.[89] The Jewish groups included the Agudas Israel World Organization, the Consultative Council on Jewish Organizations, the Coordinating Board of Jewish Organizations for Consultation with the Economic and Social Council of the United Nations, and the World Jewish Congress.[90] The women's groups, in addition to the two listed above, included the International Alliance for Women, the International Council for Women, and others.[91]

The sheer number of Jewish, Christian, and women's lobby groups suggests more effective representation of their interests than the interests of other oppressed groups who had not galvanized into global movements, such as gays and lesbians, and the Third World. Additionally, other scholars have discovered records indicating the direct influence of some of these participating groups on the final language of the Declaration. For example, Johannes Morsink has observed that, based on his research, Article 3 on the right to life, liberty, and security of person omitted a qualification in earlier drafts for "cases prescribed by law and after due process," "primarily as a result" of a plea by Dr. Bienenfeld, speaking for the World Jewish Congress.[92] Dr. Bienenfeld had urged that the qualification was dangerous because "under the Nazi regime thousands of people had been deprived of their liberty under laws which were perfectly valid."[93] This advocacy is consistent with the mission of the World Jewish Congress, which includes "[s]afeguard[ing] the welfare and security of Jews."[94] Further, Hilary Chatsworth credits women's groups who were present with acting in concert with Chairman Eleanor Roosevelt to insert more gender-neutral language into the more masculine-oriented early drafts.[95]

---

88. *See* 1947-48 U.N.Y.B., *supra* note 58, at 574-75.

89. *Id.*

90. *Id.*

91. *Id.*

92. *See* Morsink, *World War Two and the Universal Declaration*, *supra* note 52, at 15.

93. *Id.* at 366 n.49 (quotation omitted); *see also* Am. Jewish Comm., *supra* note 43 (stating that "[AJC] leaders such as Jacob Blaustein and Joseph Proskauer were official NGO consultants to the US delegation and successfully pressed to ensure that the UN Charter included international human rights guarantees").

94. Am. Jewish Comm., Who We Are, http://www.ajc.org/site/c.ijITI2PHKoG/b.789093/k.124/Who_We_Are.htm (last visited Feb. 21, 2008).

95. *See* Hilary Charlesworth, *The Mid-Life Crisis of the Universal Declaration of Human Rights*, 55 WASH. & LEE L. REV. 781, 782 (1998) (explaining how the new Commission on the Status of Women successfully objected to Article 1 of the Cassin Draft, which had stated that "all men are brothers" and urging the substitution in the final Declaration that all "human beings are born free and equal in dignity and rights").

The Declaration was also consistent with Catholic doctrine. Decades later, the Holy See stated that it found "a great convergence between the Declaration and Christian anthropology."[96] 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."[97]

The influence of some groups and not others on the negotiations of the Declaration may explain why the Declaration's provisions are consistent with the interests of the lobby groups that were present at the negotiations but do not fully address the concerns of the groups that were not represented. For example, Article 16 of the Declaration provides that "[m]en and women . . . have the right to marry and to found a family" and that "[the] family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[98] Some readers could interpret this Article to exclude same sex couples from the essential human right to marry, thus barring their access to a fundamental group receiving protection.

In contrast to the lack of protections for gays and lesbians, successive drafts of the Declaration evolved towards progressively stronger protections against abuses the German Reich had perpetrated against other groups.[99] Whereas earlier drafts acknowledged that states could grant asylum but did not create an absolute duty for them to do so,[100] 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 and 12 respectively, that "[e]very one shall have the right to seek and be granted asylum from persecution."[101]

D. Consideration by ECOSOC

ECOSOC considered the second Commission draft at its seventh ses-

96. Pontifical Council for the Family, The Family and Human Rights, http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001115_family-human-rights_en.html (last visited June 29, 2008).

97. Jane Adolphe, *The Holy See and the Universal Declaration of Human Rights: Working Toward a Legal Anthropology of Human Rights and the Family*, 4 AVE MARIA L. REV. 343, 345 (2006).

98. Universal Declaration of Human Rights, *supra* note 2, art. 16; *see generally* Wendt v. Wendt, No. FA960149562S, 1998 WL 161165 (Conn. Super. Ct. Mar. 31, 1998) (citing Declaration in support of marriage as a partnership under U.S. law).

99. *See* MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 3, at 38.

100. *Compare Humphrey Draft*, *supra* note 68, art. 7 ("Every State shall have the right to grant asylum to political refugees."), *with June 1947 Human Rights Commission Draft*, *supra* note 77, art. 14 ("Everyone has the right to escape persecution . . . by taking refuge on the territory of any State willing to grant him asylum.").

101. *Geneva Draft*, *supra* note 79, art. 11; Drafting Committee, U.N. ECOSOC, Human Rights Commission, *Draft International Declaration of Human Rights*, art. 12 (June 1948), *reprinted in* GLENDON, A WORLD MADE NEW, *supra* note 33, at 294-99 [hereinafter *Lake Success Draft*].

sion in August 1948.[102] Due to the pressures of business at the session, the Council decided that each member state could make one statement of its position, without any debate or discussion other than a decision to transmit the draft to the General Assembly together with the statements of position.[103] These statements show that within the crucible of the Declaration swirled such conflicting interests that ECOSOC could only achieve consensus by drafting the provisions of the Declaration ambiguously. For example, 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 did not therefore give sufficient prominence to rights which could not be enumerated in national declarations, such as the right of asylum."[104] Additionally, the Brazilian representative grumbled that the "Declaration should not be introduced by philosophical postulates from outdated theories of natural law."[105]

Some states foreshadowed 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.[106] Poland expressed concern that the "Declaration was open to interpretation as an instrument of intervention in the domestic jurisdiction of states."[107] This fear has materialized, at least in part, as this article will discuss in detail in Part II, because some U.S. courts have read the Declaration alongside the Alien Tort Claims Act to regulate the treatment of foreigners by their governments overseas.[108]

Other representatives expressed concern that giving up enforcement to obtain consensus imposed too high a cost. The representative from the Netherlands stated that "the Declaration without measures for implementation was meaningless."[109] The representatives from New Zealand and Denmark concurred, stating that ECOSOC should adopt the Declaration together with an International Covenant on Human Rights.[110] The Soviet representative likewise expressed concern that the Declaration did not prescribe methods for implementing rights and freedoms.[111] The majority of states, however, took the view that the Declaration, standing alone, would still serve a useful purpose by "defining human rights."[112] At the end of the statements by member states, ECOSOC resolved without a vote to transmit the second draft of the Declaration to the UN General

102. *See* GUDMUNDER ALFREDSSON & ASBJORN EIDE, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: COMMON STANDARD OF ACHIEVEMENT 161 (1999).
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *See* discussion *infra* Part II.A.2.
109. 1947-48 U.N.Y.B., *supra* note 58, at 576-77.
110. *Id.* at 572, 577.
111. *Id.* at 577.
112. *Id.*

Assembly.[113]

E. Debates at the Third Committee of the UN General Assembly

The UN 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.[114] The Third Committee considered the Declaration, together with 168 proposed draft amendments, over the span of eighty-one meetings from October to December 1948.[115]

A consensus emerged that although the Declaration was not formally binding on states, it would, as Eleanor Roosevelt explained at the meetings, "by teaching and education promote respect for . . . rights."[116] 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."[117] 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."[118] 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."[119]

At the end of the Third Committee's deliberations, every member state voted in favor of the Declaration, with the exception of abstentions by the Soviet bloc and Canada.[120] According to William Schabas, Canadian government records indicate that Canada abstained from voting for a variety of reasons, including the fear of its Federal Cabinet that Communists could seek protection in the provisions providing for freedom of speech, assembly, association, and the right to employment.[121] The Cabinet also feared that the Declaration's freedom of religion provision would hinder the state's ability to restrict the activities of groups like Jehovah's Witnesses.[122] 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.

---

113. *Id.* at 527.

114. 1948-49 U.N.Y.B., *supra* note 38, at 526.

115. *See id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *See id.* at 530.

121. *See* William A. Schabas, *Canada and the Adoption of the Universal Declaration of Human Rights*, 43 McGILL L.J. 403, 433 (1998).

122. *See id.*; *see also Cabinet Conclusions*, NAT'L ARCHIVES OF CAN., RG 25, Vol. 3701, File 5475-DR-40, No. 294 (Nov. 25, 1948).

F. Adoption of the Declaration by the UN General Assembly

After the Third Committee passed the draft Declaration, the General Assembly debated and voted on the matter at its 180th to 183rd plenary meetings, held December 9th and 10th of 1948.[123] The UN General Assembly's decision-making process provides data to appraise whether the Declaration is indeed universal. Contemporaneous records document that "[a] number of representatives drew attention to the Declaration's universality."[124] Certainly, many representatives made rhetorical claims at this time that the Declaration was universal. The French representative stated that "the chief novelty of the Declaration was its universality."[125] The clear majorities that voted in favor of each of the Declaration's provisions, and the Declaration as a whole, support these claims. Even those states that did not vote in favor opted for abstention rather than opposition.[126]

This pattern of voting and string of rhetorical claims do not, however, conclusively prove the Declaration's universality. Other representatives claimed that the Declaration did not represent universal values. The representative for Saudi Arabia, which had not been included on the Committee on Human Rights, 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."[127] At the plenary meetings, the Egyptian representative noted that an absolute right to marriage contradicted Islamic restrictions on the ability of Muslim women to marry non-Muslims.[128] These criticisms and other religious concerns prevented the Saudi representative from voting in favor of the Declaration.[129]

Some representatives' accusations that particular states and groups forged the Declaration as a tool to advance their own political interests also rebutted contemporaneous claims of the Declaration's universality. 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."[130] Indeed, numerous Protestant and Catholic NGOs, but—based on the UN's records—no Islamic NGOs, participated in the various drafting stages of the Declaration.[131] Indeed, the Islamic states were not alone in their fears of evangelism. As mentioned above, Canada had opposed the Declaration in the Third Committee partially out of concern that proselytizing groups like the Jehovah's Witnesses would escape

123. *See* 1948-49 U.N.Y.B., *supra* note 38, at 530.

124. *Id.*

125. *Id.* at 531.

126. *Id.* at 535 (noting forty-eight votes in favor of the Declaration and eight abstentions).

127. *Id.* at 528.

128. *Id.* at 532.

129. *See* MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 3, at 25.

130. Schabas, *supra* note 121, at 433.

131. 1947-48 U.N.Y.B., *supra* note 58, at 574-75 (listing the various NGOs involved in the draft).

regulation under the freedom of religion provision.[132]

Diplomatic records also suggest distortion 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,"[133] in private meetings with U.S. allies she revealed that the Declaration represented a predominantly U.S. view of human rights. 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,"[134] and that there was "only one clause biased to the USSR way of thinking [the provision on freedom to work]."[135] In any event, the American representative stated that the United States planned to exert control by "declar[ing] what we understand by each clause."[136] The Canadian diplomat also surmised that the United States might use the Declaration as "anti-communist propaganda."[137]

Later events confirm this suspicion that the United States would use the Declaration as a foreign policy tool in its national interests. In *United States v. Campa*,[138] the U.S. Court of Appeals for the Eleventh Circuit 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."[139] The Clinton administration also invoked the Declaration to gain diplomatic advantage in negotiations with China over its "most favored nation" status in U.S. trade.[140] The George W. Bush administration also used it as a foreign policy tool to attack unfriendly foreign governments. It cited the Declaration to criticize Venezuelan President Hugo Chavez[141] and to express displeasure over Russian laws that controlled

132. *See* Schabas, *supra* note 121, at 433.

133. 1948-49 U.N.Y.B., *supra* note 38, at 527.

134. NAT'L ARCHIVES OF CAN., RG 25, Vol. 3699, File 5475-DG2-40, No. 74.29 (1948); *see also* ARTHUR M. SCHLESINGER JR., THE CYCLES OF AMERICAN HISTORY 99 (1986) (noting the politicization of criticizing human rights violations in the Cold War era); Eleanor Roosevelt, *Reply to Attacks on U.S. Attitude Toward Human Rights Covenant*, DEP'T OF STATE BULL., 59-60, (1952) (indicating selective use of the UDHR by Soviet bloc states).

135. NAT'L ARCHIVES OF CAN., RG 25, Vol. 3699, File 5475-DG2-40, No. 74.29 (1948).

136. *Id.*

137. *Id.*

138. 419 F.3d 1219 (11th Cir. 2005), *vacated on other grounds on reh'g en banc*, 459 F.3d 1121 (2006).

139. *Id.* at 1245.

140. President's News Conference, 1 PUB. PAPERS 991, 992 (May 26, 1994) (citing to human rights violations as a concern but ultimately renewing China's Most Favored Nation status).

141. *See* Tom Casey, Deputy Spokesman, Dep't of State, Daily Press Briefing (May 30, 2007), *available at* http://www.state.gov/r/pa/prs/dpb/2007/may/85568.htm ("Freedom of expression is a fundamental human right and it's an essential element of democracy anywhere in the world. . . . [W]e'd certainly call on the government of Venezuela to abide by its commitments under the Universal Declaration of Human Rights and the

non-governmental organizations sympathetic to U.S. foreign policy goals.[142] The Bush administration also used the Declaration to support Christian interests in other countries[143] but has not invoked the Declaration to draw any attention to religious rights of Muslims to practice their faith.[144] These records undermine Article 1 of the Declaration, which states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race . . . [or] religion."[145]

The foregoing analysis discussing the formation of the Declaration indicates good faith efforts at creating a universal bill of human rights. However, groups advocating national or religious interests clouded the prioritization and selection of rights, as did the storm of Cold War politics gathering at the horizon. Consequently, while the rights the Declaration enshrines are universal in the sense that they ought to accrue to all individuals everywhere, the Declaration as a whole may not reflect a truly global consensus on the prioritization and selection of rights for inclusion in the Declaration.

II. The Problem of Inconsistencies in U.S., Foreign, and International Courts

To secure the support of states for a human rights instrument that might diverge from national practices, the framers of the Declaration decided to create an educational rather than an enforceable document.[146] Although it would not prescribe coercive measures against violators, the Declaration sought to promote human rights through the rule of law and to develop common standards through progressive measures. To achieve consensus among UN member states in support of the Declaration, the framers also drafted the Declaration's provisions vaguely, leaving sufficient

---

Inter-American Democratic Charter and to reverse these policies they're pursuing to limit freedom of expression.").

142. *See* Paula Dobriansky, Under Sec'y for Democracy & Global Affairs, Dep't of State, Special Briefing on Release of Supporting Human Rights and Democracy: The U.S. Record 2005-2006 (April 5, 2006), *available at* http://www.state.gov/g/drl/rls/rm/2006/64148.htm (noting the State Department "will be monitoring very carefully the implementation of the provisions of" the new Russian NGO law and stating that "[o]ur strategy is to assist citizens in other countries in their efforts to spread democracy and the message of basic rights for all, as embodied in the Universal Declaration on Human Rights").

143. *See, e.g., 2005 International Religious Freedom Report: Hearing Before H. Int'l Relations Comm., Subcomm. on Afr.* (2005) (statement of John Hanford, Ambassador at Large) (invoking Declaration to support Muslim man's right to convert to Christianity).

144. 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 William J. Clinton administrations yields no mention in support of Muslim rights under the Declaration. In the instances that the Declaration was cited to criticize abuses that occurred in Bosnia and Iraq, the provisions on freedom of religion were not mentioned.

145. Universal Declaration of Human Rights, *supra* note 2, art. 1.

146. Wiktor Osiatynski, *On the Universality of the Universal Declaration of Human Rights*, Central European University 10th Annual Conference: The Individual v. The State (June 14-16 2002).

diplomatic space for each state to apply the provisions according to the pragmatic exigencies of each situation.[147] Consequently, the Declaration was afflicted with congenital ambiguities about its meaning and legal value.

Although the Declaration, like other UN General Assembly resolutions, does not bind member states,[148] the preparatory documents and preamble of the Declaration, discussed in Part I, show that some states fully intended the Declaration to guide the development of human rights.[149] In the language of legal theory, these decisionmakers anticipated or intended the provisions of the Declaration to crystallize into soft norms. Soft norms are not themselves legally binding but carry some authority and may secure compliance with their commands.[150] Drafters expected the Declaration to "educate" governments and peoples about human rights, eventually leading them to accept its precepts as authoritative.[151] The Declaration did that and more. In time, exceeding the expectations of these decisionmakers, some of the Declaration's soft norms hardened into binding rules of customary international law.[152]

Paradoxically, in the success of the Declaration lies also its failure. Aspirational statements or claims that the Declaration represents norms do not, without more, secure compliance.[153] The author's prior research has shown that in other areas of international law, such as international intellectual property law, aspirational claims transform into compliance-securing norms through a combination of three processes.[154] First, the audience a statement addresses, including governments, NGOs, or scholars, may accept the statement as normatively legitimate if the audience believes that the statement prescribes desirable outcomes. Second, state-

147. *See* Hans Peter Schmitz, *Explaining Success and Failure: The Universal Declaration of Human Rights and the Genocide Convention*, presented at the Cornell University Workshop on Transnational Contention (Mar. 10, 2003).

148. *See id.*

149. *See* discussion *supra* Part I.A.

150. *See* Tai-Heng Cheng, *Power, Norms, and International Intellectual Property Law*, 28 MICH. J. INT'L L. 109, 121-23 (2006) ("They [soft norms] are commonly understood to refer to nonbinding or incompletely binding norms that nonetheless are of a legal nature. Soft norms signal to participants, and may secure compliance with, expected standards of behavior."); Joseph Gold, *Strengthening the Soft International Law of Exchange Agreements*, 77 AM. J. INT'L L. 443, 443 (1983) ("The concept of 'soft law' in international law has been familiar for some years, although its precise meaning is still debated."); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 319 (2006) ("There is no accepted definition of 'soft law,' but it usually refers to any international instrument other than a treaty that contains principles, norms, standards, or other statements of expected behavior.").

151. *See supra* note 118 and accompanying text.

152. *See* BROWNLIE, *supra* note 5; *see also* Hannum, *supra* note 1 (conducting a survey of 202 judicial decisions from twenty-eight countries and finding that while some domestic courts have not given the Declaration any authoritative force, many others relied on the Declaration to resolve disputes).

153. *See* Glendon, *The Rule of Law*, *supra* note 1, at 1 ("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.").

154. *See* Cheng, *supra* note 150, at 138.

ments may become authoritative if normatively legitimate or authoritative institutions, such as international tribunals or national courts, accept them. Third, statements may become legitimate through their repetition.[155] For the provisions of the Declaration to have become authoritative, they too must have undergone a combination of these three processes.

But processing is not automatistic. Decisionmakers engaging in processing will likely imbue the provisions of the Declaration with meaning and authority in accordance with their interests and their frames of reference.[156] As a result of the 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.[157] Of the authoritative provisions, some provisions are controlling in some situations, but not in others.[158] Decisionmakers also have interpreted the meanings of other provisions inconsistently in different situations.

A. Inconsistencies in U.S. Courts

An examination of the reception of the Declaration by U.S. 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 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[159] and their decisions do not constitute international law.[160] Such an objection, however, would ignore the reality that law and legal rules do not exist in abstract. They become meaningful only if decisionmakers apply them to real

155. *Cf.* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2655-59 (1997).

156. *See* Glendon, *The Rule of Law*, *supra* note 1, at 15 ("[T]he 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 (Sept. 13, 1948), *in* NAT'L ARCHIVES OF CAN. 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").

157. *See infra* Part II.A.

158. *See infra* Part II.A.

159. *See* OPPENHEIM'S INTERNATIONAL LAW 500 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("[F]ormerly, states alone used to be the subjects of international law . . . .").

160. *See* Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 (enumerating positive sources of international law and not explicitly mentioning municipal judicial decisions).

problems and if they influence outcomes. The authoritative prescription of international law by U.S. courts within their jurisdictions is one way in which these courts animate international law, and thus their interpretations of international law have 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.[161] 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 from 1948 to October 31, 2007 which has referred to the Declaration. A list of the 238 cases accompanies this article as Annex A.[162] The author reviewed these cases with two principal 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?

1. *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 courts are citing the Declaration. Figure 1 illustrates the trend of cases which refer to the Declaration from the years 1948 to 2007, expressed both annually and in ten year cumulative periods.[163] The jagged line indicates the number of cases per year and follows the numbering on the right vertical axis, 0 to 30. The bars indicate the ten-year cumulative number of cases per decade, beginning with the year 1948 and ending with the year 2007, following the numbering on the left vertical axis, 0 to 140.

As Figure 1 indicates, in the first three decades of the Declaration's existence, only 16 cases referred to the Declaration. In contrast, over the last three decades, 222 cases have referred to the Declaration.

2. *Indeterminacy*

Although the increasing frequency with which courts have cited the Declaration might indicate greater judicial openness towards the Declaration, deeper analysis suggests continuing resistance to the Declaration as an authoritative or persuasive statement of international law.

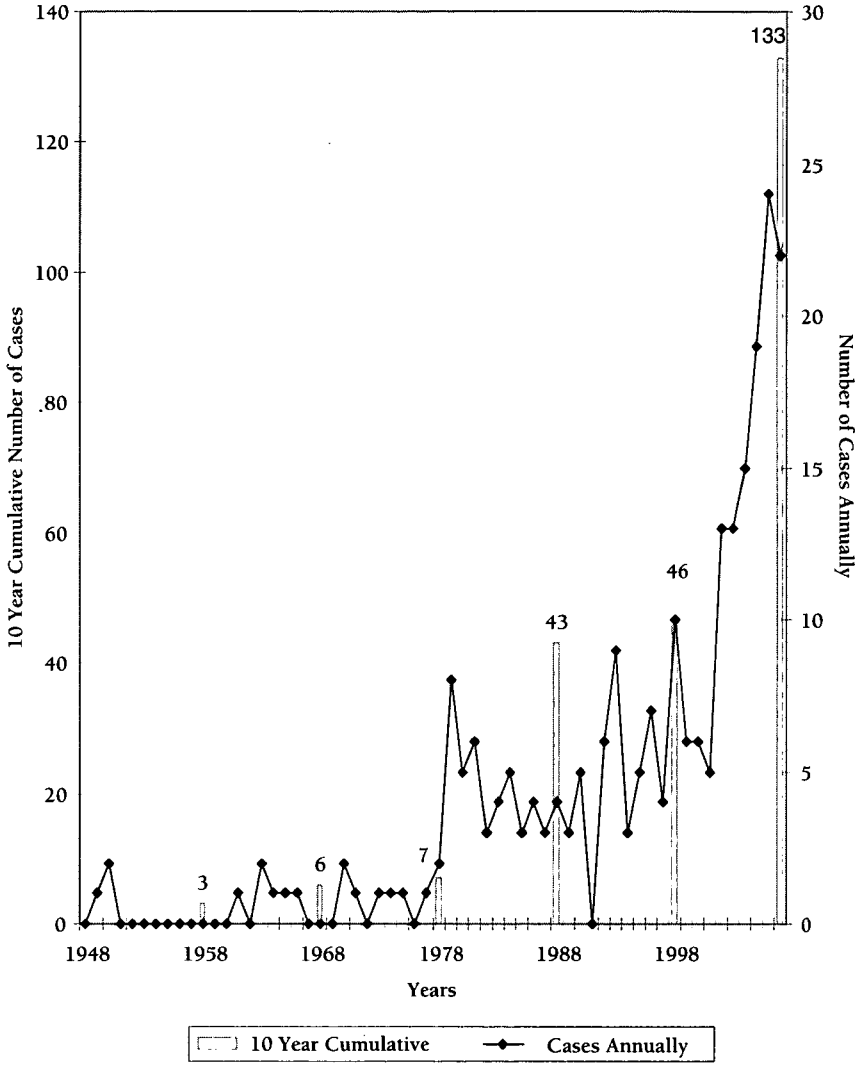
---

161. *See* 1947-48 U.N.Y.B., *supra* note 58, at 576-78; *see also* U.N. Office of the High Commissioner for Human Rights, *The Universal Declaration of Human Rights*, U.N. Doc DPI/1937/A (1997), *available at* http://www.unhchr.ch/udhr/miscinfo/carta.htm.

162. Where Annex A cites a case referring to the Universal Declaration, that citation includes any other decisions in that lawsuit that refers to the Declaration; together, the author has classified these decisions as only one case.

163. The number of references to the Declaration annually and in each decade were obtained through searches on Lexis and Westlaw using the terms "Universal Declaration" and UDHR with date restricted parameters.

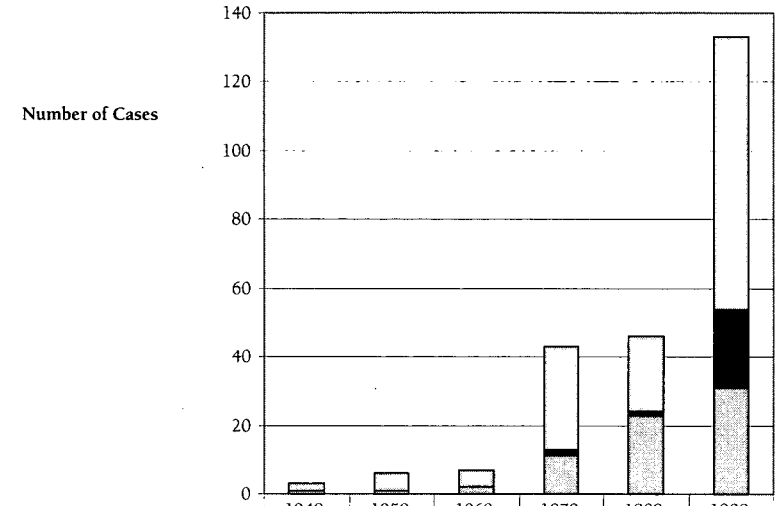
Figure 1: Cases Referring to the Declaration



As *Figure 2: Acceptance or Rejection of the Declaration as International Law by Ten-Year Periods* indicates, most courts have avoided treating any provision of the Declaration as a codification of international law.

Of the 238 cases that have referred to the Declaration, only sixty-nine of them, or 29.0 % of the total, relied on any article of the Declaration as an authoritative 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. It also includes cases that accepted the Declaration generally without specifically mentioning any article of the Declaration. In the other 169 cases, or 71.0% of the total, the court either held that none of the provisions of the Declara-

Figure 2: Acceptance or Rejection of the Declaration as International Law by Ten-Year Periods



Ten-Year Periods	1948-1957	1958-1967	1968-1977	1978-1987	1988-1997	1998-2007
No. of cases that did not decide whether the Declaration represents international law	2	5	5	30	22	79
No. of cases that rejected the Declaration as international law	0	0	0	2	1	23
No. of cases that accepted the Declaration as international law	1	1	2	11	23	31

tion that it considered 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, 25.6% of cases accepted the Declaration as a source of international law. Between 1988 and 1997, this percentage almost doubled to 50%. But in the last decade, from 1998 to 2007, the percentage of cases accepting the Declaration as a source of international law fell back to 23.3%. The 2004 U.S. Supreme Court decision in *Sosa v. Alvarez-Machain*[164] is one likely trigger for this decrease. Some commentators and judges have interpreted the Court's opinion in this case as instructing that the Declaration is not an authoritative source of international law.[165] After *Sosa*, fewer courts have relied on the Declaration.[166]

164. 542 U.S. 692 (2004).

165. *See infra* note 192 and accompanying text.

166. *See infra* note 194 and accompanying text.

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,[167] 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 treaty or international agreement . . . impos[ing] legal obligations."[168] Critics cannot thus fault U.S. courts for their hesitation in accepting the Declaration as a source of international law.

What may cause more concern, however, is the potential for U.S. judges to selectively legitimate provisions of the Declaration as international law rules without clear guidance from within the Declaration itself. From 1948 to 1979, twenty-six cases considered the Declaration.[169] Only four of those cases accepted the Declaration as a source of international law.[170] 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, with customary international laws that bound the United States, or with U.S. constitutional protections. But these are matters beyond the question of whether the Declaration directly influenced U.S. courts.

---

167. *See generally* GLENDON, A WORLD MADE NEW, *supra* note 33, 21-34 (discussing Eleanor Roosevelt's leadership role as the Representative for the United States in drafting the Declaration).

168. *See* John Humphrey, *The UN Charter and the Universal Declaration of Human Rights*, *in* THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 39, 50 (Evan Luard ed., 1967); *see also* 1947-48 U.N.Y.B. *supra* note 58, at 573.

169. *See* Dandridge v. Williams, 397 U.S. 471, 521 (1970); Zemel v. Rusk, 381 U.S. 1, 15 (1965); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 n.16 (1963); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 776 (1961) (Douglas, J., concurring); Am. Fed'n of Labor v. Am. Sash & Door Co., 335 U.S. 538, 549 n.5 (1949); Sami v. United States, 617 F.2d 755, 759 (D.C. Cir. 1979); Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975); *In re* Weitzman, 426 F.2d 439, 461 (8th Cir. 1970); Davis v. INS, 481 F. Supp. 1178, 1180 (D.D.C. 1979); United States v. Williams, 480 F. Supp. 482, 486 n.3 (D. Mass. 1979); Huynh Thi Anh v. Levi, 427 F. Supp. 1281, 1286 (E.D. Mich. 1977); United States v. Gonzalez Vargas, 370 F. Supp. 908, 919 (D.P.R. 1974); Copeland v. Sec'y of State, 226 F. Supp. 20, 32 n.16 (S.D.N.Y. 1964), *rev'd on other grounds*, 378 U.S. 588 (1964); Schneider v. Rusk, 218 F. Supp. 302, 319 (D.D.C. 1963); Cramer v. Tyars, 588 P.2d 793, 805 n.1 (Cal. 1979) (Newman, J., dissenting); People v. Levins, 586 P.2d 939, 942 (Cal. 1978) (Newman, J., concurring); Bixby v. Pierno, 481 P.2d 242, 255 (Cal. 1971); *In re* White, 158 Cal. Rptr. 562, 570 (Ct. App. 1979); Sei Fujii v. State, 218 P.2d 595, 596 (Cal. Dist. Ct. App. 1950), *rev'd on other grounds* 242 P.2d 617 (Cal. 1952); Jamur Prods. Corp. v. Quill, 273 N.Y.S. 2d 348, 350 (Sup. Ct. 1966); Wilson v. Hacker, 101 N.Y.S.2d 461, 473 (Sup. Ct. 1950); *In re* Estate of Vilensky, 424 N.Y.S. 821, 826 (Sur. Ct. 1979); Commonwealth v. Sadler, 3 Phila. Co. Rptr. 316, 330-31 (Pa. Com. Pl. Ct. 1979); Bhargava v. C.I.R., 37 T.C.M. (CCH) 848 (1978), *aff'd*, 603 F.2d 211 (2d. Cir. 1979); Eggert v. City of Seattle, 505 P.2d 801, 802 (Wash. 1973); Pauley v. Kelly, 255 S.E.2d 859, 864 n.5 (W. Va. 1979).

170. *Gonzalez Vargas*, 370 F. Supp. at 919 (citing Declaration in support of right to democracy); *Bixby*, 481 P.2d at 251 (citing Declaration in support of judicial review over administrative decisions but relying principally on U.S. law and not explaining why court cited the Declaration); *Sei Fujii*, 218 P.2d at 596 (citing Declaration to interpret UN Charter); *Jamur Prods. Corp.*, 273 N.Y.S.2d at 356 (stating that Declaration represented human rights standards but holding that it did not create enforceable rights under U.S. law).

The situation changed in 1980. In that year, the U.S. Court of Appeals for the Second Circuit handed down its decision in *Filartiga v. Peña-Irala*[171] and started a trend to legitimize Article 5 of the Declaration as an authoritative source for the prohibition of torture.[172] *Filartiga* concerned the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, which was originally enacted by the First Congress in 1789.[173] The court extended the ATCA's reach to foreigners that committed violations of fundamental international law norms against other foreigners overseas.[174] The Declaration played an important role in defining the contours of the ATCA because the *Filartiga* court relied on Article 5 of the Declaration prohibiting torture to determine that this prohibition did constitute a fundamental international norm triggering the court's jurisdiction under the ATCA.[175] 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."[176] In other words, the Second Circuit regarded the Declaration as proof of international law. The Second Circuit, however, did not rely solely on the Declaration. It also cited other international law instruments prohibiting torture.[177] Thus, the court in *Flores v. S. Peru Copper Corp.*[178] was able to later claim that *Filartiga* held that the Declaration represented international law only insomuch as it comported with state practice.[179] However, an alternative interpretation of *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 the other international sources cited, was independently authoritative.[180]

---

171. 630 F.2d 876 (2d Cir. 1980).

172. *See id.* at 882 (holding that "the right to be free from torture . . . has become part of customary international law").

173. *See* Alien Tort Claims Act, 28 U.S.C. § 1350 (1789); *see also* Filartiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

174. *Filartiga*, 630 F.2d at 880.

175. *See id.* at 882.

176. *Id.*

177. *See id.* at 883-85 (citing the Declaration, the American Convention on Human Rights, International Covenant on Civil and Political Rights, and European Convention for the Protection of Human Rights and Fundamental Freedoms for the Prohibition of Torture); *see also* Kiobel v. Royal Dutch Petroleum Co., 465 F. Supp. 2d 457, 461 (S.D.N.Y. 2006) (explaining that *Filartiga* did not hold that the Declaration standing alone constituted sufficient evidence of international law).

178. 414 F.3d 233 (2d Cir. 2003).

179. *See id.* at 261 ("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 'insofar as the expectation is *gradually justified by State practice*.'"); *see also* Lareau v. Manson, 507 F. Supp. 1177, 1193 n.18 (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, a declaration may by custom become recognized as laying down rules binding upon the States.'") (citation omitted).

180. *Filartiga*, 630 F.2d at 883 ("[S]everal commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law.").

In the years following *Filartiga*, courts continued to follow the trend started by *Filartiga*. They cited different articles of the Declaration as authoritative sources of international law.[181] This repeated invocation by authoritative institutions helped to solidify the Declaration as an international legal norm 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.[182]

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.[183] In 1992, the U.S. Court of Appeals for the Ninth Circuit held in *Siderman de Blake v. Republic of Argentina* that "[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."[184] 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,"[185] 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

181. *See* United States v. Clotida, 892 F.2d 1098, 1106 (1st Cir. 1989) ("The presumption [of innocence] reflects a universally accepted norm proclaimed as a human right and fundamental freedom in Article 11 of the Universal Declaration of Human Rights."); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981) (citing Articles 3 and 9 of the Declaration as principles of international law); Ishtyaq v. Nelson, 627 F. Supp. 13, 27 (E.D.N.Y. 1983) (accepting Article 9 of the Declaration as customary international law); Von Dardel v. Union of Soviet Socialist Republics , 623 F. Supp. 246, 261 (D.D.C. 1985) (citing Article 3 of the Declaration as a principle of international law); Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1122 n.2 (N.D. Ga. 1983) (citing Articles 3 and 9 of the Declaration as principles of international law); Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1061 n.18 (N.D. Ga. 1981) (finding a violation of Article 9 of the Declaration); *In re* Alien Children Educ. Litig., 501 F. Supp. 544, 593-94 (S.D. Tex. 1980) (using Articles 24, 25, 26, and 27 of the Declaration indirectly as "international instruments").

182. *See* Singh v. Ilchert, 801 F. Supp. 313, 319 n.3 (N.D. Cal. 1992) (citing Article 5 of the Declaration as the sole international law authority, together with prior U.S. case law holding torture to be a violation of international law); *Lareau*, 507 F. Supp. at 1193 n.18 (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, Inc., 702 P.2d 570 (Cal. 1985) (Mosk, J., dissenting) (citing Article 17 of the Declaration as its sole authority for international law on right to ownership of property).

183. *See* Jean v. Nelson, 727 F.2d 957, 964 (11th Cir. 1984) (citing the Declaration as an international agreement); Beck v. Mfrs. Hanover Trust Co., 125 Misc. 2d 771, 775 (N.Y. Sup. Ct. 1984) (stating human rights violations may be actionable under the Declaration); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701 cmt.d (1987) ("[I]t 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.").

184. Siderman de Blake v. Argentina, 965 F.2d 699, 719 (9th Cir. 1992); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701 n.6 ("The Declaration has become the accepted general articulation of recognized rights.").

185. *In re Alien Children Educ. Litig.*, 501 F. Supp. at 593.

treaty."[186] Indeed, the Declaration appeared to be such an authoritative document that some courts began to mistakenly refer to it as a "treaty."[187] Although this is a patently false description of the Declaration, it draws attention to the extent to which 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 v. Alvarez-Machain* 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 thus aspirational rather than prescriptive.[188] Such a description of the Declaration is somewhat simplistic, for even General Assembly resolutions may be evidence of state practice[189] which, together with other instances of consistent state practice and opinio juris, might constitute customary international law.[190] This criticism of *Sosa*, however, is one which academics are free to make but which may not be readily available to federal courts under the supreme authority of their highest court.[191]

It is therefore a testimony to the enduring authority with which prior courts imbued the Declaration 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, eighteen decisions have taken *Sosa* to mean that the Declaration has no authoritative value and rejected counsel's invocation of the Declaration.[192]

---

186. Beharry v. Reno, 183 F. Supp. 2d 584, 596 (E.D.N.Y. 2002).

187. *See, e.g.*, *Wong*, 702 P.2d at 581 (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.").

188. Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004) ("[T]he Declaration does not of its own force impose obligations as a matter of international law.").

189. *See* Flores v. S. Peru Copper Corp., 414 F.3d 233, 261-62 (2d Cir. 2003) (interpreting *Filartiga* as holding that the Declaration represented international law only if it comported with state practice); *see also In re* Agent Orange Litig., 373 F. Supp. 2d 7, 126 (E.D.N.Y. 2005) ("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." (citing *Flores*, 414 F.3d at 166-67)).

190. *See* Kane v. Winn, 319 F. Supp. 2d 162, 197 (D. Mass. 2004) ("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."); *see also* BROWNLIE, *supra* note 5, at 8; MALCOLM N. SHAW, INTERNATIONAL LAW 70-71 (5th ed. 2003) (describing how customary law is formed by state practice and *opinio juris*).

191. *See, e.g.*, United States *ex rel.* Fein v. Deegan, 410 F.2d 13, 22 (2d. Cir. 1969) ("[W]e 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.").

192. *See* Stukes v. Knowles, 229 F. App'x 151, 152 (3d Cir. 2007); Padilla-Padilla v. Gonzales, 463 F.3d 972, 979-80 (9th Cir. 2006); Jogi v. Voges, 425 F.3d 367, 373 (7th Cir. 2005); Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1246-47 (11th Cir. 2005); Roe v. Bridgestone Corp. 492 F. Supp. 2d 988, 1010 (S.D. Ind. 2007); Torrez v. Corr. Corp. of Am., No. 07 Civ. 1551-PHX, 2007 WL 3046153, at *5 (D. Ariz. Oct. 16, 2007); Johnson v. Sears Roebuck & Co., No. 3:05 Civ. 139, 2007 WL 2491897, at *6 (D. Conn. Aug. 29, 2007); Hill v. Rincon Band of Luiseno Indians, No. 06 Civ.

In the middle ground, forty cases have avoided deciding whether the Declaration could amount to international law by disposing of the issues in other ways.[193] At the other extreme, twelve decisions have ignored the language of *Sosa* that rejects the Declaration as authority for international law and have continued to rely on the Declaration as evidence of international law, albeit often alongside other international instruments.[194] For these

---

2544-JAH, 2007 WL 2429327, at *4 (S.D. Cal. Aug. 22, 2007); Chen v. China Cent. Television, No. 06 Civ. 414, 2007 WL 2298360, at *2 (S.D.N.Y. Aug. 9, 2007); Ruiz v. Martinez, No. 07 Civ. 078-EP, 2007 WL 1857185, at *7 (W.D. Tex. May 17, 2007); Lewis v. Jones, 06 Civ. 988, 2007 WL 638131, at *3 (W.D. Okla. Feb. 27, 2007); Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495, 500 (S.D.N.Y. 2005); MacArthur v. San Juan County, 391 F. Supp. 2d 895, 1050 (D. Utah 2005) (concluding the Declaration is not indicative of international law); Reynosa v. Mich. Dep't of Corr., No. 5:05 Civ. 161, 2005 WL 3535061, at *6 (W.D. Mich. Dec. 22, 2005); Perry v. Levegood, No. A:05 Civ. 1090, 2005 WL 2296716, at *10 (E.D. Pa. Sept. 21, 2005); Abdullahi v. Pfizer, Inc., No. 01 Civ. 8118, 2005 WL 1870811, at *13 (E.D.N.Y. Aug. 9, 2005); Lacey v. Calabrese, No. 05 Civ. 2040, 2005 WL 1285702, at *3 (E.D.N.Y. May 26, 2005); *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 553 (S.D.N.Y. 2004).

193. *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007); Taveras v. Taveraz, 477 F.3d 767, 781 (6th Cir. 2007); Buqani v. Gonzales, 186 F. App'x 172, 174 (2d Cir. 2006); Martinez-Lopez v. Gonzales, 454 F.3d 500, 502-03 (5th Cir. 2006); Segovia-Plata v. Gonzales, 205 F. App'x 304, 306 (5th Cir. 2006); Yinen Zheng v. Gonzales, 192 F. App'x 733, 737 (10th Cir. 2006); United States v. Campa, 419 F.3d 1219, 1245 (11th Cir. 2005); Igartua-De La Rosa v. United States, 417 F.3d 145, 172 (1st Cir. 2005); El Bitar v. Ashcroft, 109 F. App'x 179, 180 (9th Cir. 2004); Arias v. Dyncorp, 517 F. Supp. 2d 221, 224 (D.D.C. 2007); O'Bryan v. Holy See, 471 F. Supp. 2d 784, 795 (W.D. Ky. 2007); Granger v. Manness, No. 1:07 Civ. 441, 2007 WL 2787680 (E.D. Tex. Sept. 20, 2007); Mitchell v. KDJM-FM, No. 06 Civ. 01427, 2007 WL 2572342 (D. Col. Aug. 8, 2007); Sneed v. Chase Home Fin., No. V:07 Civ. 0729 2007 WL 1851674, at *3 (S.D. Cal. June 27, 2007); Medina v. Pataki, No. 9:06 Civ. 0346, 2007 WL 1593029, at *9 (N.D.N.Y. Mar. 26, 2007); Clay v. United States, No. 06 Civ. 752, 2007 WL 731388, at *1 (S.D. Ill. Mar. 8, 2007); King v. State, No. 2:07 Civ. 10210, 2007 WL 603366, at *1 (E.D. Mich. Feb. 22, 2007); Carson v. Quarterman, No. 3:06 Civ. 0252-B, 2007 WL 136328, at *4 (N.D. Tex. Jan. 18, 2007); Ragland v. Angelone, 420 F. Supp. 2d 507, 512 (W.D. Va. 2006); Thunderhorse v. Pierce, 418 F. Supp. 2d 875, 897 (E.D. Tex. 2006); Witham v. Christian County Sheriffs Dep't, No. 04 Civ. 3401, 2006 U.S. Dist. LEXIS 81745, *8 (W.D. Miss. Nov. 8, 2006); Oluwa v. Sec'y of State, No. 05 Civ. 1596, 2006 WL 3147682, at *3 (E.D. Cal. Nov. 1, 2006); Muhammad v. U.S. Dep't of Hous. & Urban Dev., No. 06 Civ. 05298, 2006 WL 2598015, at *1 (N.D. Cal. Sept. 11, 2006); Harbury v. Hayden, 444 F. Supp. 2d 19, 31-32 (D.D.C. 2006); Fasano v. United States, No. 05 Civ. 5874, 2006 WL 1791206, at *1 (D.N.J. June 27, 2006); Keating-Traynor v. Westside Crisis Ctr., No. 05 Civ. 04475, 2006 WL 1699561, at *2 (N.D. Cal. June 16, 2006); Frazer v. Chi. Bridge & Iron, No. Civ. H:05 Civ. 3109, 2006 WL 801208, at *6 (S.D. Tex. Mar. 27, 2006); Collett v. Libya, 362 F. Supp. 2d 230, 241 (D.D.C. 2005); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1180 (C.D. Cal. 2005); Ciaprazi v. Goord, No. 02 Civ. 00915, 2005 WL 3531464, at *15 (N.D.N.Y. Dec. 22, 2005); Martinez-Aguero v. Gonzalez, No. EP: 03 Civ. 411, 2005 WL 388589, at *16 (W.D. Tex. Feb. 2, 2005); People v. Alfaro, 163 P.3d 118, 157 (Cal. 2007); People v. Hoyos, 162 P.3d 528, 567 (Cal. 2007); People v. Boyer, 133 P.3d 581, 636 (Cal. 2006); People v. Lewis, 140 P.3d. 775, 824 n.21 (Cal. 2006); People v. Cornwell, 117 P.3d 622, 659-60 (Cal. 2005); Baird v. State, 831 N.E.2d 109, 115 (Ind. 2005); State v. Conway, 2006-Ohio-516, No. 05AP-550, 2006 WL 3411422, at *4 (Ct. App. Nov. 28, 2006); Commonwealth v. Daniels, 592 Pa. 772 (Pa. Ct. Com. Pl. 2006); Am. Law Inst. v. Commonwealth, 882 A.2d 1088, 1090 (Pa. Commw. Ct. 2005) (declining to discuss whether the Declaration is indicative of international law).

194. *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); Cabello v. Fernandez-Larios,

courts, *Sosa* has not limited their roles in imbuing the Declaration with some authoritative status.

3. *Acceptance or Rejection of Specific Provisions*

The immense power of 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* makes the lack of control plainly obvious. Figure 3 summarizes this author's reading of each of the 238 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 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 of the Declaration have hardened into legal norms, including Articles 3 (life, liberty and security of person);[195] 5, part a (prohibition of torture);[196] 5, part b (prohibition of cruel,

---

402 F.3d 1148, 1154 (11th Cir. 2005) (citing the Declaration as a source of international law for the prohibition of torture); Guaylupo-Moya v. Gonzales, 423 F.3d 121, 133 (2d Cir. 2005) (characterizing the Declaration as indicative of international law); 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); Zhang v. Ashcroft, 388 F.3d 713, 720 (9th Cir. 2004) (indirectly using the Declaration to define religious persecution); United States v. Emmanuel, No. 06 Crim. 2002452, 2007 U.S. Dist. LEXIS 48510, *2 (S.D. Fla. July 5, 2007) (citing Declaration in support of international prohibition against torture); Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 461 (S.D.N.Y. 2006) (characterizing the Declaration as indicative of international law); Ficken v. Rice, No. A:04 Civ. 1132, 2006 WL 123931, at *6 (D.D.C. Jan. 17, 2006) ("Though the U.N. Declaration may be considered evidence of customary international law, it is not legally binding or self-executing."); Doe v. Qi, 349 F. Supp. 2d 1258, 1321 (N.D. Cal. 2004) (holding that numerous sources of international law, including the Universal Declaration of Human Rights, condemn cruel, inhuman, or degrading treatment); Jama v. INS, 343 F. Supp. 2d 338, 360 (D.N.J. 2004) (recognizing torture as violating customary international law); People v. Ramirez, 139 P.3d 64, 118 (Cal. 2006) (citing the Declaration in support for the right to a fair trial); Gonzalez v. City of Glendora, No. B182300, 2005 WL 2788820, at *4 (Cal. App. Oct. 27, 2005) ("[The Declaration 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 (C.D. Cal. 1999)).

195. *See* Hatley v. Dep't of Navy, 164 F.3d 602, 604 (Fed. Cir. 1998); Jean v. Nelson, 727 F.2d 957, 964 (11th Cir. 1984); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981); Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 2002 WL 319887, at *11 (S.D.N.Y. Feb. 28, 2002) (finding Article 3 of the Declaration to be indicative of international law); Alejandre v. Cuba, 996 F. Supp. 1239, 1252 (S.D. Fla. 1997); Caballero v. Caplinger, 914 F. Supp. 1374, 1379 (E.D. La. 1996); Forti v. Suarez-Mason

degrading and inhuman treatment);[197] and 9 (prohibition of arbitrary arrest, detention, exile).[198] Courts, however, have disagreed on whether many of the provisions represent international law, including equal protection (Article 7)[199] and the right to a standard of living adequate for health (Article 25).[200]

A close reading of these cases reveals subtle, but nonetheless material, inconsistencies in how a judge may determine whether provisions of the Declaration represent international law, due, in large part, to a general lack

---

(*Forti II*), 694 F. Supp. 707, 710 (N.D. Cal. 1988); Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246, 261 (D.D.C. 1985); Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1122 n.2 (N.D. Ga. 1983), *rev'd on other grounds*, 734 F.2d 576 (11th Cir. 2004).

196. *See Auguste*, 395 F.3d at 130; *Cabello*, 402 F.3d at 1154; *Nuru*, 404 F.3d at 1223; Zubeda v. Ashcroft, 333 F.3d 463, 480 (3d Cir. 2003); Senathirajah v. INS, 157 F.3d 210, 221 (3d Cir. 1998); Hilao v. Estate of Marcos, 103 F.3d 789, 794-95 (9th Cir. 1996); *In re* Estate of Marcos Human Rights Litig., 978 F.2d 493, 499 (9th Cir. 1992); Siderman de Blake v. Argentina, 965 F.2d 699, 717 (9th Cir. 1992); Filartiga v. Peña-Irala, 630 F.2d 876, 885 (2d Cir. 1980); United States v. Emmanuel, No. 06 Crim. 2002452, 2007 U.S. Dist. LEXIS 48510, at 2 (S.D. Fla. July 5, 2007); Jama v. INS, 343 F. Supp. 2d 338, 360 (D.N.J. 2004); Kane v. Winn, 319 F. Supp. 2d 162, 197 (D. Mass. 2004); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1345 (D. Ga. 2002); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996); Xuncax v. Gramajo, 886 F. Supp. 162, 177 (D. Mass. 1995); Singh v. Ilchert, 801 F. Supp. 313, 319 (N.D. Cal. 1992); Beck v. Mfrs. Hanover Trust Co., 125 Misc. 2d 771, 775 (N.Y. Sup. Ct. 1984) (all finding Article 5 of the Declaration to represent international law).

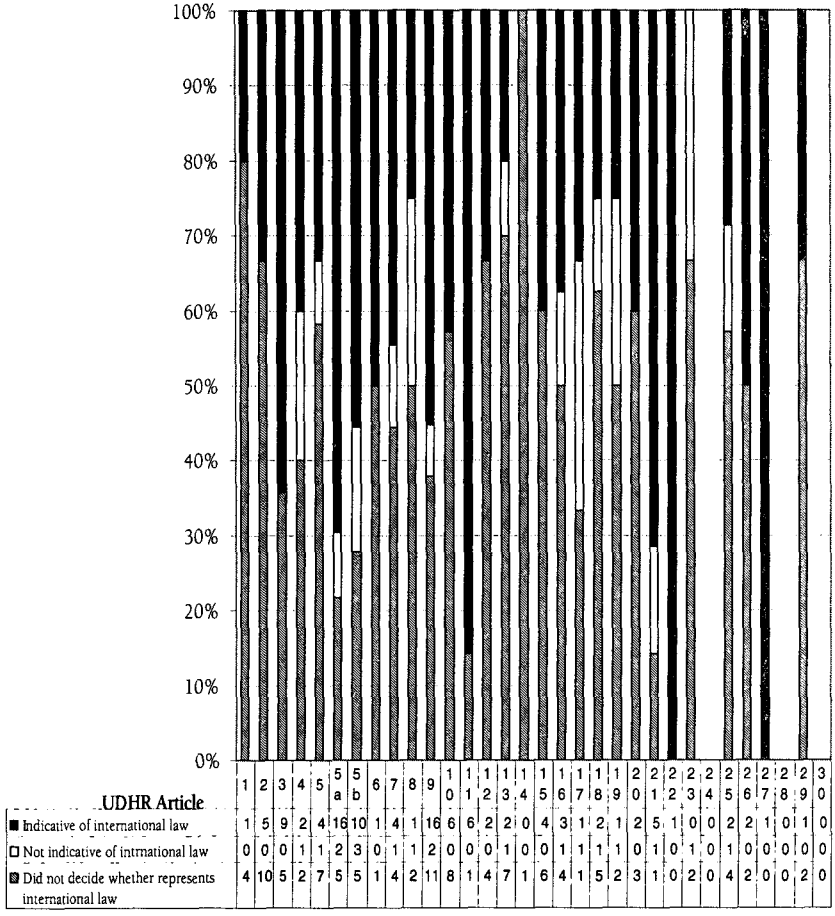
197. *See Hatley*, 164 F.3d at 604-05; *Hilao*, 103 F.3d at 794-95; *Qi*, 349 F. Supp. at 1321; *Jama*, 343 F. Supp. 2d at 360 (all finding the Declaration to be a source of international law for the prohibition of cruel, degrading and inhuman treatment); *Kane*, 319 F. Supp. 2d at 197; *Mehinovic*, 198 F. Supp. 2d at 1348; *Hawkins*, 33 F. Supp. 2d at 1257; *Xuncax*, 886 F. Supp. at 185; *Forti II*, 694 F. Supp. at 710; Lareau v. Manson, 507 F. Supp. 1177, 1193 (D. Conn. 1980). *But see Aldana*, 452 F.3d at 1284; *Adamu*, 399 F. Supp. 2d at 500; *Abdullahi*, 2005 WL 1870811 at *13; (finding the Declaration to not be a source of international law).

198. *See Guaylupo-Moya*, 423 F.3d at 133; United States v. Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1995); *Jean*, 727 F.2d at 964; *Rodriguez-Fernandez*, 654 F.2d at 1388; Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998); Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285 (S.D. Fla. 2003); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 325 (S.D.N.Y. 2003); Beharry v. Reno, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), *rev'd on other grounds*, 329 F.3d 51 (2d Cir. 2003); *Wiwa*, 2002 WL 319887, at *8; *Mehinovic*, 198 F. Supp. 2d at 1345; *Mojica v. Reno*, 970 F. Supp. 130, 146-48 (E.D.N.Y. 1997); *Caballero*, 914 F. Supp. at 1379; *Xuncax*, 886 F. Supp. at 185; United States v. Schiffer, 836 F. Supp. 1164, 1170-71 (E.D. Pa. 1993); *Forti II*, 694 F. Supp. at 710; *Fernandez-Roque*, 567 F. Supp. at 1122; Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1061 (N.D. Ga. 1981) (all finding Article 9 of the Declaration to be indicative of international law).

199. *Compare* Tachiona v. Mugabe, 234 F. Supp. 2d 401, 423 (S.D.N.Y. 2002), *Schiffer*, 836 F. Supp. at 1170-71; Borja v. Goodman, 1 N. Mar I. 63, 81 (1990), and Sablan v. Iginoef, 1 N. Mar. I. 146, 155 n.19 (1990) (finding Article 7 of the Declaration to be indicative of international law), *with In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 552 (S.D.N.Y. 2004) (finding Article 7 of the Declaration not to represent international law).

200. *Compare In re* Alien Children Educ. Litig., 501 F. Supp. 544, 593 (S.D. Tex. 1980) (finding Article 25 of the Declaration to be indicative of international law) *and* Moore v. Ganim, 660 A.2d 742, 780 (Conn. 1994), *with* Flores v. S. Peru Copper Corp., 414 F.3d 233, 261-62 (2d Cir. 2003) (rejecting Article 25 as an independent source of international law).

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



of interpretative norms within the Declaration to guide them. The *Filartiga* court comprised Judges Feinberg, Kaufman, and Kearse.[201] As this article discusses above, this court appeared to regard the Declaration as evidence of international law.[202] Twenty-three years later, however, the *Flores* court interpreted *Filartiga* as holding that the Declaration was not evidence of international law itself and that courts needed to determine whether state practice supported the Declaration.[203] *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.

However, *Kadic v. Karadzic*,[204] which the Second Circuit decided in 1995, muddies this reasoning. The judges in that case included Judge

201. *See* Filartiga v. Peña-Irala, 630 F.2d 876, 877 (2d Cir. 1980).
202. *See supra* notes 174-79.
203. *See Flores*, 414 F.3d at 261-62.
204. 70 F.3d 232 (2d Cir. 1995).

Feinberg, who also sat on the *Filartiga* court. In *Filartiga*, one of the sources that the court had cited together with the Declaration was the UN Declaration on the Protection of All Persons from Being Subjected to Torture. The *Kadic* court explained that *Filartiga* had regarded that latter declaration as "a definitive statement of norms of customary international law prohibiting states from permitting torture."[205] This judicial explanation might suggest that in fact the *Filartiga* court thought that some declarations could become definitive statements of customary law and did not require further inquiry into state practice. If this was really what the *Filartiga* 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. Judge Cabranes wrote the *Flores* decision.[206] In 1980, after the Second Circuit rendered the *Filartiga* decision, 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.[207]

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. Although he may well have changed his view by the time *Flores* reached the Second Circuit twenty-three years later and the rules of precedent certainly did not require him to explain why a Second Circuit decision departed from a prior district court opinion,[208] 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 over the discretion of judges to change the authoritative weight accorded to the Declaration from case to case.

---

205. *See id.* at 240.

206. *See Flores*, 414 F.3d at 236.

207. Lareau v. Manson, 507 F. Supp. 1177, 1193 n.17 (D. Conn. 1980) (citations omitted); *see also* 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").

208. *See* Data Gen. 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).

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 which of its aspirations have become hard law and when they have done so. 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.[209] 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.[210]

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.[211] The Vienna Convention states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[212] 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."[213] However, as this article discusses in Part I, the preparatory documents do not provide guidance. They indicate that although the drafters of the Declaration intended the Declaration to be a "statement of basic principles . . . setting up a common standard of achievement for all peoples and all nations,"[214] its adoption as international and domestic law was left to decisionmakers at a later time.[215]

Third, the Declaration and its negotiating documents are silent on the conduct that constitutes a violation of its provisions.[216] In *Forti v. Suarez-Mason* (*Forti I*),[217] the Northern District Court of California dismissed plaintiff's claim for cruel, inhuman, and degrading punishment reasoning

209. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]; *see also* Courtney Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271, 341 n.296 (1997) (urging that it is reasonable to apply the interpretation techniques of the Vienna Convention to the Declaration because of "its status as a law-creating instrument").

210. *See* Vienna Convention, *supra* note 209, art. 1.

211. *See* Theodor Meron, Comment, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 246 (1996) ("Obviously, the Vienna Convention's rules on treaty interpretation do not apply to customary law outside the treaty context.").

212. *See* Vienna Convention, *supra* note 209, art. 31.

213. *See id.* art. 32.

214. *See* Humphrey, *supra* note 168, at 50.

215. *See* 1947-48 U.N.Y.B., *supra* note 58, at 573; *see also* discussion *supra* Part I.

216. *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.").

217. 672 F. Supp. 1531 (N.D. Cal. 1987).

that the proposed tort lacked "the requisite elements of universality and *definability*."[218] The Court explained, upon the plaintiff's motion for reconsideration, that "[w]hile these and other materials establish a recognized proscription of 'cruel, inhuman or degrading treatment,' they offer no guidance as to what constitutes such treatment."[219]

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,[220] other courts might simply follow the trends in prior decisions of sister courts,[221] and a judge's particular view of international law, as shaped by his or her law school education, might influence yet other courts. Such impulses behind norm creation have led to the inconsistent views about different provisions of the Declaration and the Declaration as a whole that we now face in our courts.[222]

4. *Analysis of Whether the Declaration Was Dispositive*

A litmus test for 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[223] and that courts should interpret federal statutes consistently with international law.[224] However, out of the sixty-nine U.S. cases that regarded the Declaration as a statement of international law,[225] only one relied on the Declaration as the sole, albeit indirect, authority to dispose of a key issue in the case.[226] In *Zhang v. Ashcroft*, the

218. *Id.* at 1543 (citation omitted) (emphasis added).

219. *Forti II*, 694 F. Supp. 707, 712 (N.D. Cal. 1988).

220. *See, e.g.*, Filartiga v. Peña-Irala, 630 F.2d 876, 885 (2d Cir. 1980); *see also* Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998); Kane v. Winn, 319 F. Supp. 2d 162, 197 (D. Mass. 2004) (finding the Declaration to be an authoritative force of international law); Alejandre v. Cuba, 996 F. Supp. 1239, 1252 (S.D. Fla. 1997); Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1122 n.2 (N.D. Ga. 1983), *rev'd on other grounds*, 734 F.2d 576 (11th Cir. 2004); Lareau v. Manson, 507 F. Supp. 1177, 1193 (D. Conn. 1980).

221. *See, e.g.*, Siderman de Blake v. Argentina, 965 F.2d 699 (9th Cir. 1992) (citing *Filartiga* and others for the proposition that the Declaration is a *jus cogens* norm).

222. *Compare* Guaylupo-Moya v. Gonzales, 423 F.3d 121 (2d Cir. 2005), *with* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); *compare* Igartua-De La Rosa v. United States, 386 F.3d 313 (1st Cir. 2004), *with* Kessler v. Grand Cent. Dist. Mgmt. Ass'n, Inc., 158 F.3d 92 (2d Cir. 1998).

223. See The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law . . . ."); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be constructed to violate the law of nations, if any other possible construction remains . . . ."); *see also* Lauritzen v. Larsen, 345 U.S. 571, 578 (1953) (quoting The Schooner Charming Betsy for the same proposition); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987); Edwin Dewitt 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) (arguing that the "Supreme Court from the beginning has resolved interstate boundary disputes in recourse to the Law of Nations").

224. *See, e.g.*, *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 118.

225. *See supra* Figure II.

226. *See* Zhang v. Ashcroft, 388 F.3d 713, 720 (9th Cir. 2004).

U.S. Court of Appeals for the Ninth Circuit defined religious persecution largely through the guidance of the Office of the United Nations High Commissioner for Refugees (UNHCR) Handbook.[227] 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."[228] The *Zhang* court relied on the Declaration's definition of the right to freedom of religion in holding that Zhang had shown a clear probability of persecution because of his spiritual and religious beliefs, and granted his request for withholding of removal from the United States.[229]

Broadening the inquiry to include cases in which courts have cited the Declaration as one of several authorities to dispose of a key question of international law only reaches eighteen cases.[230] Most notably, *Filartiga* and its progeny relied on the Declaration to extend the court's jurisdiction under the ATCA to foreigners who committed torture overseas.[231]

There are other cases in which courts have invoked the Declaration not as authority on a question of international law but to help interpret U.S. law. For example, federal and state courts have invoked the Declaration to determine the scope of prisoners' rights under U.S. law. In *Lareau v. Manson*, the District Court for the District of Connecticut relied on the Declaration to determine prisoners' rights under the "evolving standards of decency" in Eighth Amendment jurisprudence.[232] 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 a prison warden had failed to meet international standards for proper medical

227. *Id.* at 720.

228. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, U.N. Doc. HCR/IP/4/Eng./REV.2 ¶ 71 (1979, re-edited 1992) [hereinafter UNHCR HANDBOOK].

229. *Zhang*, 388 F.3d at 720-21.

230. *See* Filartiga v. Peña-Irala, 630 F.2d 876, 883-84 (2d Cir. 1980); *see also* Doe v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002); Senathirajah v. INS, 157 F.3d 210, 221 (3d Cir. 1998); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388-89 (10th Cir. 1981); United States v. Emmanuel, No. 06 Crim. 2002452, 2007 U.S. Dist. LEXIS 48510, at 2 (S.D. Fla. July 5, 2007); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1321, 1325 (N.D. Cal. 2004); Jama v. INS, 343 F. Supp. 2d 338, 360 (D.N.J. 2004); Estate of Rodriquez v. Drummond Co., Inc., 256 F. Supp. 2d 1250, 1264 (N.D. Ala. 2003); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 325 (S.D.N.Y. 2003); Beharry v. Reno, 183 F. Supp. 2d 584, 596 (E.D.N.Y. 2002), *rev'd on other grounds*, 329 F.3d 51 (2d Cir. 2003); Tachiona v. Mugabe, 234 F. Supp. 2d 401, 423 (S.D.N.Y. 2002); Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 2002 WL 319887, at *11 (S.D.N.Y. Feb. 28, 2002); United States v. Fraguela, No. A:96 Crim. 339, 1998 WL 351851, at *1 (E.D. La. June 26, 1998); Alejandre v. Cuba, 996 F. Supp. 1239, 1252 (S.D. Fla. 1997); Forti v. Suarez-Mason, 694 F. Supp. 707, 710 (N.D. Cal. 1988); United States v. Gonzalez Vargas, 370 F. Supp. 908, 919 (D.P.R. 1974); Sei Fujii v. State, 217 P.2d 481, 487 (Cal. Dist. Ct. App. 1950); Borja v. Goodman, 1 N. Mar. I. 63, 81 (1990) (all using the Declaration as an international authority).

231. *See Filartiga*, 630 F.2d at 882-84.

232. Lareau v. Manson, 507 F. Supp. 1177, 1193 n.18 (D. Conn. 1980).

treatment and thereby also fell short of state law standards.[233] In *Soroa-Gonzales v. Civiletti*, the U.S. District Court for the Northern District of Georgia determined that the continued incarceration of the petitioner amounted to arbitrary detention in violation of the Declaration.[234] In *Sterling v. Cupp*, the Supreme Court of Oregon relied on the Declaration to interpret a state constitutional provision relating to treatment of prisoners.[235]

In many other cases, however, the Declaration has merely served to buttress the court's holding under U.S. law.[236] A typical situation is one in which a court states its view of U.S. law and then notes that this view is consistent with, or supported by, international law.[237] In *Caballero v. Caplinger*, the U.S. District Court for the Eastern District of Louisiana held that 8 U.S.C. § 1252 was unconstitutional as applied to the incarceration of an illegal alien.[238] The court cited the Declaration to support its position, stating that the Declaration is a United Nations document that condemns arbitrary detentions of persons.[239] Such cases suggest that courts have selectively used the Declaration to support their preferred outcomes. This approach to the Declaration is consistent with Eleanor Roosevelt's statement in 1948 to Canadian diplomats that the governing elites would interpret the Declaration in a way that suited them best.[240]

Most frequently, however, U.S. courts have preferred not to consider the Declaration or international law at all. In 144 cases, the courts held that because U.S. law governed the disputes in question, it was immaterial whether international law might require a different result and so inquiry into international law was unnecessary.[241]

---

233. Kane v. Winn, 319 F. Supp. 2d 162, 197 (D. Mass. 2004).

234. Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1061 (N.D. Ga. 1981).

235. Sterling v. Cupp, 625 P.2d 123, 131 (Or. 1981).

236. *See, e.g.*, Maria v. McElroy, 68 F. Supp. 2d 206, 234 (E.D.N.Y. 1999); Caballero v. Caplinger, 914 F. Supp. 1374, 1379 (E.D. La. 1996); Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 WL 142006, at *6 (S.D.N.Y. Apr. 11, 1994) (all indirectly using the Declaration to support the courts' holdings).

237. *See* Levy v. Weksel, 143 F.R.D. 54, 56-57 (S.D.N.Y. 1992) (citing Article 10 of the Declaration as consistent with United States law); Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246, 261 (D.D.C. 1985); *see also* Heldman *ex rel.* T.H. v. Sobol, 846 F. Supp. 285, 288-89 (S.D.N.Y 1994) (citing Article 10 of the Declaration in support of United States law).

238. See Caballero, 914 F. Supp. at 1379; *see also* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388-89 (10th Cir. 1981) (using the Declaration's provisions as well as other methods of interpretation to conclude that indefinite detention of aliens was not permissible); Beharry v. Reno, 183 F. Supp. 2d 584 (E.D.N.Y. 2002) ("Provisions of the UDHR may be used in statutory construction."), *rev'd on other grounds*, 329 F.3d 51 (2d Cir. 2003); *Mojica v. Reno*, 970 F. Supp. 130, 146-48 (E.D.N.Y. 1997) (using the Declaration in statutory construction).

239. See *Caballero*, 914 F. Supp. at 1379.

240. *See* NAT'L ARCHIVES OF CAN., RG 25, Vol. 3699, File 5475-DG-3-40-2 (recommending that the Declaration be interpreted according to the state interests of Canada).

241. *See, e.g.*, Buqani v. Gonzales, 186 F. App'x 172, 174 (2d Cir. 2006); United States v. Terrazas-Carrasco, 861 F.2d 93, 96-97 (5th Cir. 1988); Fasano v. United States, No. 05 Civ. 5874, 2006 WL 1791206, at *1 (D.N.J. June 27, 2006); Davis v. INS, 481 F. Supp. 1178, 1183 (D.D.C. 1979); Sheridan Road Baptist Church v. Dep't of Educ., 396 N.W.2d 373, 408 (Mich. 1986); State v. Conway, 2006-Ohio-6219, No. 05AP-550, 2006

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, there are few sources of international or even U.S. law that 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 critics should belittle or ignore.

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,[242] many other rights remain relatively undeveloped, such as the rights to health,[243] to own property,[244] and to privacy.[245]

Inconsistencies among cases have long been apparent. In the 2002 case of *Nicholson v. Williams*,[246] the U.S. District Court for the Eastern District of New York held that the Declaration was "an authoritative statement of the international community" and cited the prohibition of arbitrary interference with privacy and home in Article 12 to support the U.S. plaintiff's Fourteenth Amendment claim.[247] However, on April 29, 2004, two months prior to the decision in *Sosa*, the same court took a different view of Article 12 in *Fernandez v. Immigration and Naturalization Services*.[248] There, the petitioner sought to avoid deportation and invoked Article 12.[249] 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.[250]

WL 3411422, at *4 (Ct. App. 2006) (declining to discuss whether the Declaration was indicative of international law).

242. *See generally* Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004); Auguste v. Ridge, 395 F.3d 123, 130 (3d Cir. 2005); Cabello v. Fernandez-Larios, 402 F.3d 1148, 1154 (11th Cir. 2005); Nuru v. Gonzales, 404 F.3d 1207, 1223 (9th Cir. 2005); Siderman de Blake v. Argentina, 965 F.2d 699, 716 (9th Cir. 1992); Filartiga v. Peña-Irala, 630 F.2d 876, 885 (2d Cir. 1980); United States v. Emmanuel, No. 06 Crim. 2002452, 2007 U.S. Dist. Lexis 48510, at *2 (S.D. Fla. July 5, 2007); Xuncax v. Gramajo, 886 F. Supp. 162, 177 (D. Mass. 1995) (indicating the Declaration to be a source of international law for the prohibition of torture).

243. *See* Flores v. S. Peru Copper Corp., 414 F.3d 233, 254-55 (2d Cir. 2003).

244. *See* Carpa v. Smith, No. 96 Civ. 1435 PHX, 1998 WL 723153 (D. Ariz. July 20, 1998); Sei Fujii v. State, 217 P.2d 481, 487 (Cal. Dist. Ct. App. 1950).

245. *See* Fernandez v. INS, No. 03 Civ. 2623, 2004 WL 951491 (E.D.N.Y. Apr. 29, 2004).

246. 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

247. *Id.* at 234.

248. *See Fernandez*, 2004 WL 951491.

249. *Id.* at *2.

250. *Id.* at *3.

Inconsistencies in application of the Declaration have continued post-*Sosa*. In the 2005 case *Abdullahi v. Pfizer, Inc.*,[251] the U.S. District Court for the Southern District of New York announced a refusal to "forge broad aspirational language into customary international law" by enforcing the prohibition of cruel, degrading and inhuman treatment in Article 5 of the Declaration.[252] It followed *Sosa* in holding that the Declaration "does not of its own force impose obligations as a matter of international law."[253] Conversely, on December 8, 2004, over five 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 condemning cruel, degrading, and inhuman treatment.[254] Such apparently inconsistent outcomes among courts are unjust and undermine one of the most basic ideals of the rule of law: predictability.

B. Global Inconsistencies

The problems that the Declaration has caused in U.S. jurisprudence are magnified when the Declaration is appraised in a global context. The Declaration is pathologically indeterminate. These uncertainties have triggered inconsistent judicial responses in not just the United States, but other countries as well.[255] Although a complete survey of every country's case law is beyond the scope of this article, this section compares the impact of the Declaration on courts in the United States with its impact in Australia, a country geographically distant but sharing common law traditions with the United States. It also compares 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 is judicially enforceable. Some opinions have referred to the Declaration as an authoritative set of fundamental principles,[256] as guaranteed freedoms,[257] and as universal values common

251. *See* No. 01 Civ. 8118, 2005 WL 1870811 (S.D.N.Y. Aug. 9, 2005).

252. *Id.* at *13.

253. *Id.* (quotations omitted).

254. Doe v. Qi, 349 F. Supp. 2d 1258 (N.D. Cal. 2004).

255. *See also* Ramirez v. Canada, [1994] 88 F.T.R. 208, 208 (Fed. Ct.) (Can.) (stating that the Declaration is not a binding covenant). *Compare* Miron v. Trudel, [2006] 124 D.L.R. (4th) 693 (Can.) (holding that Article 16 of the Declaration is binding on Canada as international law), *and* Kay v. Lambeth, L.B.C., (2006) 2 A.C. 465 (U.K.) (citing the Declaration as determinative in regard to whether arbitrary interference in the home is permissible), *with* Gosselin v. Québec, [2002] 221 D.L.R. (4th) 257, 307 (Can.) (referring to the Declaration as "unambiguously and directly defin[ing] the rights to which individuals are entitled (even though they may not be actionable)"), *and* Boyce v. The Queen, (2005) 1 A.C. 400, 409 (P.C.) (U.K.) (providing that "[t]he American Declaration of the Rights and Duties of Man (1948) and the Universal Declaration of Human Rights (1948) are not binding upon states.").

256. J. v. Lieschke (1987) 69 A.L.R. 647, 658 (Austl.) (referring to the Declaration as containing those rights and authority properly recognized as fundamental, as having deep roots in the common law and which "in the absence of an unmistakable legislative intent to the contrary, 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

to all societies.[258] In contrast, other cases have regarded the Declaration merely as an aspirational document that did not constitute international or Australian law.[259]

Australian courts have also disagreed about the extent to which they could use the Declaration to resolve questions of Australian law. Some courts have held that they should not consider the Declaration at all.[260] Other courts have held that although the Declaration is not authoritative under Australian law, it could be used to interpret ambiguous federal legislation.[261]

Admittedly, some countries do delineate a specific, consistent role for the Declaration. The constitutions or statutes of these countries mandate compliance with either international law generally or the Declaration specifically.[262] Courts in these countries have found it much easier to apply the Declaration to domestic disputes.[263]

Judges of the International Court of Justice have also invoked the Dec-

---

C.L.R. 519, 575 (Austl.) (Kirby, J., concurring) ("[T]he protection of an individual's reputation is a fundamental human right, recognised by [the Declaration].").

257. Minister for Immigration & Multicultural Affairs v. Mohammed (2000) 98 F.C.R. 405, 421 (Austl.) (reasoning that "[g]iven the freedoms guaranteed under the Universal Declaration of Human Rights and other international conventions, it could not have been consistent with the purpose of the Refugee Convention to require that persons claiming to be refugees be deprived of their fundamental human rights and freedoms in the country from whom they are seeking protection.").

258. Gerhardy v. Brown (1985) 159 C.L.R. 70, 102 (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.").

259. *See* Plaintiff S157/2002 v. Australia, (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. Australia (1997) 190 C.L.R. 513, 657 (Austl.) (noting that 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").

260. *See 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.").

261. *See* Dir. Pub. Prosecutions v. Logan Park Invs. Prop. Ltd., (1995) 125 F.L.R. 359, 366 (Austl.) (noting that to the extent that the Declaration's provisions "state applicable principles of international law, they are available to assist in the construction of ambiguous Federal legislation."); *see also* Koroitamana v. Australia (2006) 227 C.L.R. 31, 51-52 (Austl.) (holding that the Declaration, although not binding as a rule of law, provides a useful context for the exposition of what Australian law requires).

262. *See* COST. art. 10 (Italy); *see also* Hannum, *supra* note 1, at 298-99 (collecting instances of the Declaration's influence on the construction of human rights guarantees in different countries).

263. *See* Ephrahim v. Pastory & Kaizilege, 87 I.L.R. 106, 110 (High Ct. 1990) (Tanz.) (citing Article 7 of the Declaration, "which is part of our Constitution" in overturning an unconstitutional norm of Tanzanian customary law which discriminated against women); *see also* Kishore Chand v. State of Himachal Pradesh, 1990 S.C.J. 2140, 2146-47 (India) (citing the Declaration in support of the principle of an "effective and meaningful defense at trial.").

laration in support of international law,[264] albeit more frequently in dissents and separate opinions.[265] Nevertheless, some of these judicial statements have been persuasive in international law. For example, at least one prominent scholar has noted Vice-President Ammoun's separate opinion in the *South West Africa* case that the provisions of the Declaration could "bind states on the basis of custom . . . whether because they constitute a codification of customary law . . . or because they have acquired the force of custom through a general practice accepted as law."[266]

Following Vice-President Ammoun's analysis, the International Court of Justice invoked, *mirabile dictu*, 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 U.S. courts from undertaking.[267] 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."[268] In contrast to U.S. and Australian courts that have struggled with the indeterminacy of some of the Declaration's provisions,[269] such as the human rights implicated by

264. *See, e.g.*, South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 288, 293 (July 18) (Tanaka, J., dissenting) (noting that while "[the Declaration] . . . is no more than a declaration adopted by the General Assembly and not a treaty binding on the member States," it does constitute "evidence of the interpretation and application of the relevant Charter provisions"). *But cf.*, South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J. 319, 604 (Dec. 21) (Van Wyk, J., dissenting) ("The principle of effectiveness cannot transform a mere declaration of lofty purpose—such as a universal declaration of human rights—into a source of legal rights and obligations.").

265. *See* 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."); Aegean Sea Continental Shelf (Greece v. Turk.), 1978 I.C.J. 3, 82-83 (Dec. 19) (Stassinopoulos, J., dissenting) ("[C]onstitutional 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."); Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 63 (Apr. 6) (Guggenheim, J., dissenting ad hoc) (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); Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 290-94, 320 (Nov. 20) (Alvarez, J., dissenting) (noting that because asylum has been written into the Declaration, this case was important for all other countries).

266. Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, 71 (June 21) (Ammoun, V.P., separate op.); *see* Hannum, *supra* note 1, at 336.

267. 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).

268. United States Diplomatic & 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.").

269. *See* Gerhardy v. Brown (1985) 159 C.L.R. 70, 93 (Austl.) ("[Interpreting the Declaration] involves a paradox because the rights which are accorded to individuals in

environmental damage,[270] ICJ judges have found no difficulty in extrapolating the provisions of the Declaration to novel areas like the environment.[271]

The willingness of the International Court of Justice and some foreign courts to treat the Declaration as authoritative in international law and as an 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 just a domestic problem. On a global scale, these inconsistencies grow more serious. The Declaration has greatly influenced the jurisprudence of some national courts and international tribunals but has had a limited effect on others. The Declaration has not therefore lived up to its aspiration of securing human rights universally in all states. 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.

III. Appraisal and Recommendations

The problems with the Declaration are serious. Part I has shown that the problem of politicization is pathological to the Declaration and, considering the conflicting state and group interests in its formation, perhaps inevitable.[272] This politicization has not prevented the Declaration from enumerating rights that are undoubtedly universal in the sense that they should attach to everyone and are regarded as important by everyone. It has, however, resulted in less clarity as to whether the Declaration includes other universal rights that were perhaps not the primary concerns of the states and interest groups that shaped the Declaration. For example, do the rights of the Declaration include freedom from sexual orientation discrimination? Politicization caused the prioritization of rights that mattered to the states and interest groups at the UN in 1948 over the rights that matter to many Third World and developing states that gained independence after 1948. To the extent that the drafters intended the Declaration to shape the development of human rights,[273] and to the extent that it has influenced human rights, its failure to emphasize and recognize rights

particular societies are the subject of infinite variation throughout the world . . . . Although there may be universal agreement that a right is a universal right, there may be no universal or even general agreement on the content of that right.").

270. *See generally* Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d. Cir. 2003).

271. *See* Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 91-92 (Sept. 25) (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.").

272. *See generally supra* Part I.

273. *See* Universal Declaration of Human Rights, *supra* note 2, pmbl. ("[E]very individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance . . . .").

of crucial significance to groups excluded from the Declaration's negotiations has distorted the development of the international human rights program.[274]

Part II has shown that congenital ambiguities in the Declaration caused U.S., foreign, and international courts to interpret and apply it inconsistently.[275] Consequently, some rights within the Declaration now benefit from legal protection, but not others. Even the rights that have achieved legal recognition and enforcement have found uneven protection in different states.[276] This has caused further distortions in the development of human rights internationally and within states.

To be sure, the problem of politicization of legislative processes is not unfamiliar to domestic lawyers, judges, and legislators. After all, our own decision-making processes leading to legislation or regulations are highly politicized.[277] We should, however, be less tolerant of politicization in the drafting and adoption of the Declaration than we are in domestic law. The Declaration claims to be universal, yet less than a quarter of the current states in the world participated in its drafting and adoption. Imagine if the U.S. Congress were able to pass a law, or even adopt a non-binding resolution, by securing consensus of only one quarter of our representatives and senators. Even if we were to set aside concerns about the non-democratic nature of such a process, it would be absolutely critical that the small club of congressmen and senators supporting the resolution or law represent the concerns of all citizens and not just their constituents.

Further, domestic decisionmakers can and have amended legislation, and even the U.S. Constitution, to correct prior errors of judgment or to accommodate new circumstances and understandings of human rights. By comparison, as a practical matter, it would be all but impossible for the UN General Assembly to secure consensus among states today for a revised version of the Declaration. Indeed, eminent scholars, such as the late Oscar Schachter and Harvard Law School Professor Mary Ann Glendon, have cast the Declaration as an unchangeable document, respectively describing the Declaration as "precepts [that] are immutable and will remain valid forever"[278] and "the holy writ [ ] of the human rights movement."[279] If the Declaration is immutable, it is not sufficient that the human rights in the Declaration matter to everyone. It must also represent every human right that would matter to each individual or group, and it must represent a consensus among all peoples of the world as to the relative importance of different rights. The need to represent the human rights concerns that matter to all the various constituencies of the world commu-

274. *See, e.g., supra* Part I, at p. 258.
275. *See supra* Part II.
276. *See supra* Part III.B.
277. *See, e.g.*, Methanex Corp. v. United States, (Can. v. U.S.), 44 I.L.M. 1345, pt. IV, ch. D, ¶¶ 9-10 (NAFTA Ch. 11 Arb. Trib. 2005), *available at* http://naftaclaims.com/Disputes/USA/Methanex/Methanex_Final_Award.pdf (noting that the U.S. legislative process is "notorious" for being politicized).
278. *See* Schachter, *supra* note 8, at 57.
279. *See* Glendon, *The Rule of Law*, *supra* note 1, at 40.

nity is especially critical because the Declaration proclaims itself as a "common standard of achievement for all peoples of all nations."[280]

The problems of inconsistency and uncertainty in the application of the Declaration in domestic, foreign, and international law are also familiar to domestic lawyers and judges, who frequently encounter cases that interpret particular laws differently. The Declaration, however, should be held to a higher standard of certainty than domestic legislation or international treaties. If courts misinterpret a law or if changed circumstances render a law anachronistic, the legislature may revise the law.[281] If an interpretation by a tribunal shows that a treaty's provisions lack sufficient clarity, signatory states may renegotiate the treaty, as some states have done by replacing old bilateral investment treaties (BITs) with a new generation of clearer BITs. In contrast, the UN General Assembly has no opportunity to amend or clarify the Declaration because, as mentioned, amending the Declaration would be practically impossible today.[282] Further, as mentioned above, scholars have come to regard the Declaration as a statement of human rights that is forever frozen.[283] Consequently, it was absolutely essential that the framers of the Declaration included every universal right and that they gave equal importance to the rights that matter to different global constituencies.

Although the Declaration is defective, it is not 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,[284] the Declaration has, through judicial interpretation, strengthened the protection of certain human rights such as the prohibition of torture.[285] To now jettison the Declaration from U.S. or international jurisprudence would needlessly stunt the potential impact that the Declaration may yet have on other areas of human rights. Instead, we should seek solutions to address the flaws of the Declaration.

As to the problem of politicization, judges, legislators, and policy-makers should avoid regarding the Declaration as a comprehensive statement of all essential human rights. They should instead view it for what it is: a statement of some human rights that were important to the decisionmakers involved in its drafting and which continue to be important today. But as social conditions change and new constituents emerge globally, decisionmakers must account for and protect the human rights concerns of all groups equally. Although the Declaration may not have emphasized the human rights concerns of all peoples, these concerns are just as important as those that the Declaration explicitly acknowledges.

280. Universal Declaration of Human Rights, *supra* note 2, pmbl.

281. *See* Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 534-35 (2000).

282. *See* discussion *supra* Part I.

283. *See supra* notes 278-79.

284. *See, e.g.*, *supra* note 4 and accompanying text; *see also supra* Part II.A.

285. *See supra* Part II.

Indeed, consistent with the object and purpose of the Declaration to protect "the inherent dignity . . . and the equal and inalienable rights of all members of the human family,"[286] contemporary decisionmakers may even interpret the Declaration's provisions to extend to human rights that it did not explicitly acknowledge at the time of its drafting.

As for the problem of inconsistency in judicial application, a solution may lie in the approaches decisionmakers take to broader issues in international law. International law scholars face some uncertainty with any evolving international law norm.[287] International law is not a petrified block of rules, rather it is an organic bundle of norms that multiply, change, and die.[288] This evolution sometimes occurs dramatically; but 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.

A solution to difficulties in appraising evolving international norms, such as the Declaration, may be to consider them in their proper context. The Declaration, being a resolution of the UN General Assembly, is evidence of state practice.[289] But the Declaration is not necessarily conclusive evidence of any particular human right as a customary law. Decisionmakers must therefore consider it along with other evidence of customary law, such as other human rights treaties, resolutions, and declarations of states and international organizations, as well as the writings of jurists.[290]

Therefore, the Declaration serves as a useful starting point in an inquiry into international law but not as a stopping point. This approach finds some support in U.S. jurisprudence.[291] At one extreme, some decisions suggest that the Declaration is an authoritative statement of interna-

286. Universal Declaration of Human Rights, *supra* note 2, pmbl.

287. *See* Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125, 173-80 (2005) (discussing the difficulties of banking norms hardening into binding law); *see also* J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 450 (2002) ("[T]here is neither a common understanding of how customary international legal norms are formed, nor agreement on the content of those norms.").

288. *See, e.g.*, Filartiga v. Peña-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (stating that courts must interpret international law not as it was in the past but as it has evolved and exists among the nations of the world today).

289. *See* Lena Ayoub, *Nike Does It–And Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 429 (1999) (stating that provisions found in the U.N. Charter, the Universal Declaration of Human Rights, and applicable General Assembly Resolutions, while not legally binding may reflect state practice and compel *opinion juris*).

290. *See* Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

291. *See, e.g.*, *Filartiga*, 630 F.2d at 882 (using the Declaration along with other evidence to determine that the prohibition against torture has become part of international customary law).

tional law, such as *Siderman* and *Beharry*.[292] These cases have gone too far. At the other extreme, some decisions instruct that the Declaration is not itself evidence of international law, such as *Sosa* and *Flores*.[293] These cases have gone too far in the other direction. *Filartiga*, however, used exactly the approach this article proposes.[294] *Filartiga* considered the Declaration as a relevant piece of evidence in determining the customary law on the prohibition of torture and weighed it alongside other evidence of customary law, such as conventions prohibiting torture and other UN resolutions.[295]

Scholars also have a role to play. They 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.[296] In time, judges and practitioners may begin to glance at international law and the Declaration with a more careful eye.

Judges and practitioners may also further harmonize their understanding of the proper role of the Declaration in domestic law through international discussions of this issue. 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.[297] Among those present were Justice Ginsburg, then a judge of the U.S. Court of Appeals, and Justice Kirby of the Australian Supreme Court, then President of the Court of Appeals of New South Wales.[298] The Bangalore Principles that emerged from this conclave stated that if there was a gap in common law or if a domestic statute was ambiguous, a judge may look to international law for guidance.[299] It may be more than coincidence that Justice Ginsburg subsequently authored Supreme Court opinions that looked to international sources to interpret ambiguous federal law.[300] The connection between the Bangalore Principles and Justice Kirby's method of judging is

292. *See* Siderman de Blake v. Argentina, 965 F.2d 699, 719 (9th Cir. 1992); Beharry v. Reno, 183 F. Supp. 2d 584, 596 (E.D.N.Y. 2002).

293. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 734-35 (2004); Flores v. S. Peru Copper Corp., 414 F.3d 233, 261-62 (2d Cir. 2003).

294. *See Filartiga*, 630 F.3d at 882.

295. *See id.* at 883.

296. *See, e.g.*, Levit, *supra* note 287, at 167-73 (2005) (demonstrating norm creation in the context of banking law); *see also* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 533-42 (2002) (demonstrating norm creation in the context of cyberlaw).

297. *See* Michael Kirby, *International Law–The Impact on National Constitutions*, 21 AM. U. INT'L L. REV. 327, 334-36 (2006).

298. *See id.*

299. BANGALORE PRINCIPLES ON THE JUDICIAL APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW, *reprinted in* 14 COMMONWEALTH L. BULL. 1196 (1988).

300. *See generally* Eldred v. Ashcroft, 537 U.S. 186, 199 (2003) (rejecting constitutional challenge against a statute conforming U.S. copyright terms to the European Union's "life plus seventy years."); El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999) (relying on a House of Lords' decision interpreting the Warsaw Convention's limitations on airline liability for injury to a passenger).

even clearer. He has admitted to applying the Bangalore Principles in *Dairy Farmers Coop. Milk Co. v. Acquilina.*[301] In that case, he turned to the International Covenant on Civil and Political Rights to resolve a domestic human rights issue.[302]

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

These measures address the problems of the Declaration but are not complete solutions. The problems inherent in international law—its partly aspirational nature 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 this article suggests do, however, provide hope that, despite all its imperfections, decisionmakers need not abandon the Declaration. 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 professors must find ways to do so and communicate 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 . . . ."[303]

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

1. Abdullahi v. Pfizer, Inc., No. 01 Civ. 8118, 2005 WL 1870811 (S.D.N.Y. Aug. 9, 2005).
2. Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495 (S.D.N.Y. 2005).
3. Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994).
4. Aldana v. Del Monte Fresh Produce, N.A., Inc., 305 F. Supp. 2d 1285 (S.D. Fla. 2003), *aff'd in part, vacated in part*, 416 F.3d 1242 (11th Cir. 2005).
5. Alejandre v. Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997).
6. Alvarez-Garcia v. INS, 234 F. Supp. 2d 283 (S.D.N.Y. 2002).
7. Am. Civil Liberties Union of N.J., Inc. v. County of Hudson, 352 N.J. Super. 44 (2002).
8. Am. Fed'n of Labor v. Am. Sash & Door Co., 335 U.S. 538 (1949).
9. Am. Law Inst. v. Commonwealth, 882 A.2d 1088 (Pa. Commw. Ct. 2005).

301. *See* Kirby, *supra* note 297, at 340-41.

302. *See* Dairy Farmers Coop. Milk Co. v. Acquilina, (1963) 109 C.L.R. 458, 464; *see also* Kirby, *supra* note 297, at 337-38.

303. Universal Declaration of Human Rights, *supra* note 2, pmbl.

10. Am. Nat'l Ins. Co. v. Fair Employment & Hous. Comm'n, 32 Cal. 3d 603 (1982).
11. An v. Chun, 134 F.3d 376 (9th Cir. 1998).
12. Anderman v. Austria, 256 F. Supp. 2d 1098 (C.D. Cal. 2003).
13. Arias v. Dyncorp, 517 F. Supp. 2d 221 (D.D.C. 2007).
14. Auguste v. Ridge, 395 F.3d 123 (3d Cir. 2005).
15. Backlund v. Hessen, 904 F. Supp. 964 (D. Minn. 1995).
16. Baird v. State, 831 N.E.2d 109 (Ind. 2005).
17. Bankhole v. INS, 306 F. Supp. 2d 185 (D. Conn. 2003).
18. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999).
19. Beck v. Mfrs. Hanover Trust Co., 125 Misc. 2d 771 (N.Y. Sup. Ct. 1984).
20. Beharry v. Reno, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), *rev'd on other grounds* Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003).
21. Belic v. Amtrak, 31 Conn. L. Rptr. 548 (Super. Ct. 2002).
22. Benas v. Baca, No. 00 Civ. 11507, 2001 WL 485168 (C.D. Cal. Apr. 23, 2001).
23. Bhargava v. Comm'r, 37 T.C.M. (CCH) 848 (1978), *aff'd*, 603 F.2d 211 (2d Cir. 1979).
24. Bixby v. Pierno, 481 P.2d 242 (Cal. 1971).
25. Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).
26. Boehm v. Superior Court of Merced County, 223 Cal. Rptr. 716 (Ct. App. 1986).
27. Borja v. Goodman, 1 N. Mar. I. 63 (1990).
28. Bott v. DeLand, 922 P.2d 732 (Utah 1996).
29. Buqani v. Gonzales, 186 F. App'x 172 (2d Cir. 2006).
30. Caballero v. Caplinger, 914 F. Supp. 1374 (E.D. La. 1996).
31. Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005).
32. Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996).
33. Caldwell v. Med. Council of Cal., 113 F.3d 1234 (6th Cir. 1997).
34. Carmichael v. United Tech. Corp., 835 F.2d 109 (5th Cir. 1988).
35. Carpa v. Smith, No. 96 Civ. 1435 PHX, 1998 WL 723153 (D. Ariz July 20, 1998).
36. Carson v. Quarterman, No. 06 Civ. 0252-B, 2007 WL 136328 (N.D. Tex. Jan. 18, 2007).
37. Caston v. Puttin, No. 01 Civ. 0464, 2002 WL 107087 (N.D. Tex. Jan. 22, 2002).
38. Cauthern v. State, 145 S.W.3d 571 (Tenn. Crim. App. 2004).
39. Ctr. for Independence of Judges and Lawyers of the U.S., Inc. v. Mabey, 19 B.R. 635 (D. Utah 1982).
40. Cerrillo-Perez v. INS, 809 F.2d 1419 (9th Cir. 1987).
41. Chen v. Ashcroft, 85 F. App'x 700 (10th Cir. 2004).
42. Chen v. China Cent. Television, No. 06 Civ. 414, 2007 WL 2298360 (S.D.N.Y. Aug. 9, 2007).

43. Ciaprazi v. Goord, No. 9:02 Civ. 915, 2005 WL 3531464 (N.D.N.Y. Dec. 22, 2005).
44. City of Santa Barbara v. Adamson, 610 P.2d 436 (Cal. 1980).
45. Clay v. United States, No. 06 Civ. 752, 2007 WL 731388 (S.D. Ill. Mar. 8, 2007).
46. Clever v. Cherry Hill Bd. of Educ., 838 F. Supp. 929 (D.N.J. 1993).
47. Collett v. Libya, 362 F. Supp. 2d 230 (D.D.C. 2005).
48. Commonwealth v. Bordallo, 1 N. Mar. I. 52 (1990).
49. Commonwealth v. Daniels, 592 Pa. 772 (Pa. Ct. Com. Pl. 2006).
50. Commonwealth v. Sadler, 3 Phila.Co.Rptr. 316 (Pa. Ct. Com. Pl. 1979).
51. Copeland v. Sec'y of State, 226 F. Supp. 20 (S.D.N.Y. 1964), *rev'd on other grounds*, 378 U.S. 588 (1964).
52. Cramer v. Tyars, 588 P.2d 793 (Cal. 1979).
53. Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983).
54. Dandridge v. Williams, 397 U.S. 471 (1970).
55. Davis v. INS, 481 F. Supp. 1178 (D.D.C. 1979).
56. Demjanjuk v. Petrovsky, No. 85 Civ. 3435, 1993 WL 394773 (6th Cir. Aug. 3, 1993).
57. Denegri v. Republic of Chile, No. 86 Civ. 3085, 1992 WL 91914 (D.D.C. Apr. 6, 1992).
58. Dickens v. Lewis, 750 F.2d 1251 (5th Cir. 1984).
59. Dixon v. Xcel Energy Inc., No. 01 Civ. 1968, 2002 WL 1802184 (D. Minn. Aug. 5, 2002).
60. DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275 (D.C. Cir. 1989).
61. Doe v. Qi, 349 F. Supp. 2d 1258 (N.D. Cal. 2004).
62. Doe v. Reddy, No. 02 Civ. 05570, WL 23893010 (N.D. Cal. Aug. 4, 2003).
63. Doe v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002).
64. Early v. Lamanna, 182 F.3d 917 (6th Cir. 1999).
65. Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997).
66. Eggert v. City of Seattle, 505 P.2d 801 (Wash. 1973).
67. El Bitar v. Ashcroft, 109 F. App'x 179 (9th Cir. 2004).
68. Elwood v. Drescher, 90 F. App'x 501 (9th Cir. 2004).
69. Estate of Rodriquez v. Drummond Co. Inc., 256 F. Supp. 2d 1250 (N.D. Ala. 2003).
70. Fasano v. United States, No. 05 Civ. 5874, 2006 WL 1791206 (D.N.J. June 27, 2006).
71. Fernandez v. INS, No. 03 Civ. 2623, 2004 WL 951491 (E.D.N.Y. Apr. 29, 2004), *rev'd on other grounds*, 734 F.2d 576 (11th Cir. 2004).

72. Fernandez-Roque v. Smith, 567 F. Supp. 1115 (N.D. Ga. 1983) *rev'd on other grounds*, 734 F.2d 576 (11th Cir. 2004).
73. Ficken v. Rice, No. 04 Civ. 1132, 2006 WL 123931 (D.D.C. Jan. 17, 2006).
74. Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).
75. Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003).
76. Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal. 1988).
77. Founding Church of Scientology of Wash., D.C., Inc. v. Regan, 670 F.2d 1158 (D.C. Cir. 1981).
78. Frazer v. Chi. Bridge & Iron, No. H:05 Civ. 3109, 2006 WL 801208 (S.D. Tex. Mar. 27, 2006).
79. Fresenius Med. Care Cardiovascular Res. v. P.R. & Caribbean Cardiovascular Ctr. Corp., 322 F.3d 56 (1st Cir. 2003).
80. Fulop Family v. United States, 919 F.2d 738 (6th Cir. 1990).
81. Gonzalez v. City of Glendora, No. B182300, 2005 WL 2788820 (Cal. App. Oct. 27, 2005).
82. Granger v. Manness, No. 07 Civ. 441, 2007 WL 2787680 (E.D. Tex. Sept. 20, 2007).
83. Guaylupo-Moya v. Gonzales, 423 F.3d 121 (2d Cir. 2005).
84. Habtemicael v. Ashcroft, 360 F.3d 820 (8th Cir. 2004), *superseded by* 370 F.3d 774 (8th Cir. 2004).
85. Haitian Refugee Ctr. v. Gracey, 809 F.2d 794 (D.C. Cir. 1987).
86. Hanoch Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981).
87. Harbury v. Hayden, 444 F. Supp. 2d 19 (D.D.C. 2006).
88. Hatley v. Dep't of Navy, 164 F.3d 602 (Fed. Cir. 1998).
89. Hawkins v. Comparet-Cassani, 33 F. Supp. 2d 1244 (C.D. Cal. 1999).
90. Heldman *ex rel.* T.H. v. Sobol, 846 F. Supp. 285 (S.D.N.Y. 1994).
91. Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996).
92. Hill v. Rincon Band of Luiseno Indians, No. 06 Civ. 2544, 2007 WL 2429327 (S.D. Cal. Aug. 22, 2007).
93. Hinkie v. United States, 715 F.2d 96 (3d Cir. 1983).
94. Humphers v. First Interstate Bank of Or., 696 P.2d 527 (Or. 1985).
95. Huynh Thi Anh v. Levi, 427 F. Supp. 1281 (E.D. Mich. 1977).
96. Igartua-De La Rosa v. United States, 417 F.3d 145 (1st Cir. 2005).
97. *In re* Alien Children Educ. Litig., 501 F. Supp. 544 (S.D. Tex. 1980); 482 F. Supp. 326 (J.P.M.L. 1979).
98. *In re* Estate of Marcos Human Rights Litig., 978 F.2d 493 (9th Cir. 1992).
99. *In re* Estate of Vilensky, 424 N.Y.S.2d 821 (Sur. Ct. 1979).
100. *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

101. *In re* Weitzman, 426 F.2d 439 (8th Cir. 1970).
102. *In re* White, 158 Cal. Rptr. 562 (Ct. App. 1979).
103. Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961).
104. Ishtyaq v. Nelson, 627 F. Supp. 13 (E.D.N.Y. 1983).
105. Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981).
106. Jama v. INS, 343 F. Supp. 2d 338 (D.N.J. 2004).
107. Jamur Prods. Corp. v. Quill, 273 N.Y.S.2d 348 (Sup. Ct. 1966).
108. Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984).
109. Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005).
110. Johnson v. Duluth Hous. & Redev. Auth., No. 99 Civ. 156, 2001 WL 224735 (D. Minn. Jan. 9, 2001).
111. Johnson v. Sears Roebuck & Co., No. 3:05 Civ. 139, 2007 WL 2491897 (D. Conn. Aug. 29, 2007).
112. Kane v. Winn, 319 F. Supp. 2d 162 (D. Mass. 2004).
113. Keating-Traynor v. Westside Crisis Ctr., No. 05 Civ. 04475 CRB, 2006 WL 1699561 (N.D. Cal. June 16, 2006).
114. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).
115. Kessler v. Grand Cent. Dist. Mgmt. Ass'n, Inc., 158 F.3d 92 (2d Cir. 1998).
116. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007).
117. King v. State, No. 2:07 Civ. 10210, 2007 WL 603366 (E.D. Mich. Feb. 22, 2007).
118. Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457 (S.D.N.Y. 2006).
119. Knight v. Florida, 528 U.S. 990 (1999).
120. Kyler v. Montezuma County, 203 F.3d 835 (10th Cir. 2000).
121. Lacey v. Calabrese, No. 05 Civ. 2040, 2005 WL 1285702 (E.D.N.Y. May 26, 2005).
122. Laker Airways Ltd. v. Pan Am. World Airways, Inc., 604 F. Supp. 280 (D.D.C. 1984).
123. Lareau v. Manson, 507 F. Supp. 1177 (D. Conn. 1980).
124. Leonoff v. Oklahoma, 60 F. App'x 233 (10th Cir. 2003).
125. Levy v. Weksel, 143 F.R.D. 54 (S.D.N.Y. 1992).
126. Lewis v. Jones, No. 06 Civ. 988-T, 2007 WL 638131 (W.D. Okla. Feb. 27, 2007).
127. Lipscomb v. Simmons, 962 F.2d 1374 (9th Cir. 1992).
128. Lopez-Pacheco v. United States, 627 F. Supp. 1224 (D.P.R. 1986).
129. M-A-A26851062 v. INS, 858 F.2d 210 (4th Cir. 1988).
130. MacArthur v. San Juan County, 391 F. Supp. 2d 895 (D. Utah 2005).
131. March v. Brown, 74 F.3d 1260 (Fed. Cir. 1996).
132. Maria v. McElroy, 68 F. Supp. 2d 206 (E.D.N.Y. 1999).
133. Martinez v. City of Los Angeles, 141 F.3d 1373 (9th Cir. 1998).

134. Martinez-Aguero v. Gonzalez, No. EP:03 Civ. 411, 2005 WL 388589 (W.D. Tex. Feb. 2, 2005).
135. Martinez-Lopez v. Gonzales, 454 F.3d 500 (5th Cir. 2006).
136. Maugein v. Newmont Mining Corp., 298 F. Supp. 2d 1124 (D. Colo. 2004).
137. Medina v. Pataki, No. 9:06 Civ. 0346, 2007 WL 1593029 (N.D.N.Y. Mar. 26, 2007).
138. Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002).
139. Milman v. Prokopoff, 100 F. Supp. 2d 954 (S.D. Iowa 2000).
140. Mitchell v. KDJM-FM, No. 06 Civ. 01427, 2007 WL 2572342 (D. Colo. Aug. 08, 2007).
141. Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997).
142. Moore v. Ganim, 660 A.2d 742 (Conn. 1995).
143. Mugmuk v. Beyer, No. 86 Civ. 3552, 1988 WL 80875 (D.N.J. Aug. 1, 1988).
144. Muhammad v. U.S. Dep't. of Hous. & Urban Dev., No. 06 Civ. 05298, 2006 WL 2598015 (N.D. Cal. Sept. 11, 2006).
145. Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005).
146. Munoz v. Ashcroft, 339 F.3d 950 (9th Cir. 2003).
147. Nevius v. McDaniel, 218 F.3d 940 (9th Cir. 2000).
148. Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975).
149. Nicholson v. Williams, 203 F. Supp. 2d 153 (E.D.N.Y. 2002).
150. Noyola v. Cockrell, No. 1:01 Civ. 172, 2001 U.S. Dist. LEXIS 19462 (N.D. Tex. Nov. 29, 2001).
151. Nuru v. Gonzales, 404 F.3d 1207 (9th Cir. 2005).
152. O'Bryan v. Holy See, 471 F. Supp. 2d 784 (W.D. Ky. 2007).
153. Oluwa v. Sec'y of State, No. S:05 Civ. 1596, 2006 WL 3147682 (E.D. Cal. Nov. 1, 2006).
154. Ortiz-Moreno v. INS, 7 F.3d 234 (6th Cir. 1993).
155. Padilla-Padilla v. Gonzales, 463 F.3d 972 (9th Cir. 2006).
156. Paige v. Virginia, 67 F.3d 296 (4th Cir. 1995).
157. Pan v. INS, 176 F.3d 484 (9th Cir. 1999).
158. Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979).
159. People v. Alfaro, 163 P.3d 118 (Cal. 2007).
160. People v. Boyer, 133 P.3d 581 (Cal. 2006).
161. People v. Cornwell, 117 P.3d 622 (Cal. 2005).
162. People v. Ghent, 739 P.2d 1250 (Cal. 1987).
163. People v. Hillhouse, 40 P.3d 754 (Cal. 2002).
164. People v. Hoyos, 162 P.3d 528 (Cal. 2007).
165. People v. Levins, 586 P.2d 939 (Cal. 1978).
166. People v. Lewis, 140 P.3d 775 (Cal. 2006).
167. People v. Ramirez, 139 P.3d 64 (Cal. 2006).
168. Perkovic v. INS, 33 F.3d 615 (6th Cir. 1994).

169. Perry v. Levegood, No. A:05 Civ. 1090, 2005 WL 2296716 (E.D. Pa. Sept. 21, 2005).
170. Phaidin v. United States, 28 Fed.Cl. 231 (1993).
171. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003).
172. Ragland v. Angelone, 420 F. Supp. 2d 507 (W.D. Va. 2006).
173. Reynosa v. Mich. Dep't of Corr., No. 5:05 Civ. 161, 2005 WL 3535061 (W.D. Mich. Dec. 22, 2005); Reynosa v. Schultz, No. 4:06 Civ. 106, 2006 WL 2708619 (W.D. Mich. Sept. 20, 2006).
174. Rivera v. Warden, No. 01 Civ. 0096, 2001 U.S. Dist. LEXIS 24344 (M.D. Pa. June 12, 2001).
175. Rodgers v. Ohio Dep't of Rehab. & Corr., 632 N.E.2d 1355 (Ohio Ct. App. 1993).
176. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).
177. Rodriguez-Roman v. INS, 98 F.3d 416 (9th Cir. 1996).
178. Roe v. Bridgestone Corp., 492 F. Supp. 2d 988 (S.D. Ind. 2007).
179. Ruiz v. Martinez, No. EP:07 Civ. 078, 2007 WL 1857185 (W.D. Tex. May 17, 2007).
180. Sablan v. Iginoef, 1 N. Mar. I. 146 (1990).
181. Sablan v. Tenorio, 4 N. Mar. I. 351 (1996).
182. Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979).
183. Sanchez v. Dankert, No. 00 Civ. 1143, 2002 WL 529503 (S.D.N.Y. Feb. 22, 2002).
184. Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983).
185. Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).
186. Schneider v. Kissinger, 310 F. Supp. 2d 251 (D.D.C. 2004).
187. Schneider v. Rusk, 218 F. Supp. 302 (D.D.C. 1963).
188. Segovia-Plata v. Gonzales, 205 F. App'x 304 (5th Cir. 2006).
189. Sei Fujii v. State, 217 P.2d 481 (Cal. Dist. Ct. App. 1950), *reh'g denied*, 218 P.2d 595 (Cal. Dist. Ct. App. 1950), *rev'd on other grounds*, 242 P.2d 617 (Cal. 1952).
190. Senathirajah v. INS, 157 F.3d 210 (3d Cir. 1998).
191. Setharatsomphou v. Ashcroft, No. 02 Civ. 0655, 2003 U.S. Dist. LEXIS 10211 (N.D. Ill. Nov. 18, 2003).
192. Sheridan Road Baptist Church v. Dep't of Educ., 396 N.W.2d 373 (Mich. 1986).
193. Siderman de Blake v. Argentina, No. 82 Civ. 1772, 1985 U.S. Dist. LEXIS 21985 (C.D. Ca. Sept. 28, 1984); 965 F.2d 699 (9th Cir. 1992).
194. Simanonok v. Simanonok, 918 F.2d 947 (Fed. Cir. 1990).
195. Simpson v. Socialist People's Libyan Arab Jamahiriya, No. 00 Civ. 1722, 2001 WL 1701673 (D.D.C. June 18, 2001).
196. Singh v. Ilchert, 801 F. Supp. 313 (N.D. Cal. 1992).

197. Sneed v. Chase Home Fin. LLC, No. 07 Civ. 0729, 2007 WL 1851674 (S.D. Cal. June 27, 2007).
198. Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049 (N.D. Ga. 1981).
199. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
200. State v. Conway, 2006-Ohio-6219, No. 05AP-550, 2006 WL 3411422 (Ohio Ct. App. 2006).
201. State v. Skatzes, 2003-Ohio-516, No. 154848, 2003 WL 24196406 (Ohio Ct. App. 2003).
202. State v. Tenace, 2003-Ohio-3458, No. L-00-1002, 2003 WL 21500249 (Ohio Ct. App. 2006).
203. Sterling v. Cupp, 625 P.2d 123 (Or. 1981).
204. Stukes v. Knowles, 229 F. App'x 151 (3d Cir. 2007).
205. Tachiona v. Mugabe, 234 F. Supp. 2d 401 (S.D.N.Y. 2002).
206. Taveras v. Taveraz, 477 F.3d 767 (6th Cir. 2007).
207. Tayyari v. N.M. State Univ., 495 F. Supp. 1365 (D.N.M. 1980).
208. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).
209. Thunderhorse v. Pierce, 418 F. Supp. 2d 875 (E.D. Tex. 2006).
210. Torrez v. Corr. Corp. of Am., No. 07 Civ. 1551 PHX, 2007 WL 3046153 (D. Ariz. Oct. 16, 2007).
211. United States v. Acosta Martinez, 106 F. Supp. 2d. 311 (D.P.R. 2000).
212. United States v. Campa, 419 F.3d 1219 (11th Cir. 2005).
213. United States v. Clotida, 892 F.2d 1098 (1st Cir. 1989).
214. United States v. Copeland, 830 F. Supp. 216 (S.D.N.Y. 1993).
215. United States v. Emmanuel, No. 06 Crim. 2002452, 2007 U.S. Dist. LEXIS 48510 (S.D. Fla. July 5, 2007).
216. United States v. Fraguela, No. A:96 Crim. 339, 1998 WL 351851 (E.D. La. June 26, 1998).
217. United States v. Gonzalez Vargas, 370 F. Supp. 908 (D.P.R. 1974).
218. United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995).
219. United States v. Schiffer, 836 F. Supp. 1164 (E.D. Pa. 1993).
220. United States v. Terrazas-Carrasco, 861 F.2d 93 (5th Cir. 1998).
221. United States v. Williams, 480 F. Supp. 482 (D. Mass. 1979).
222. United States *ex rel.* Chunie v. Ringrose, 788 F.2d 638 (9th Cir. 1986).
223. Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985).
224. Weinstein v. Lasover, No. 93 Civ. 1552, 1993 WL 475505 (E.D. Pa. Nov. 12, 1993).
225. Wendt v. Wendt, No. FA96 0149562 S, 1998 WL 161165 (Conn. Super. Ct. Mar. 31, 1998).
226. West v. Bowen, 879 F.2d 1122 (3d Cir. 1989).

227. Wilson v. Hacker, 101 N.Y.S.2d 461 (Sup. Ct. 1950).
228. Wilson v. United States, No. A:93 Civ. 513, 1998 WL 720632 (D.C. Cir. July 20, 1998).
229. Witham v. Christian County Sheriffs Dep't, No. 04 Civ. 3401, 2006 U.S. Dist. LEXIS 81745 (W.D. Miss. Nov. 8, 2006).
230. Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).
231. Wong v. Ilchert, 998 F.2d 661 (9th Cir. 1993).
232. Wong v. Tenneco, Inc., 702 P.2d 570 (Cal. 1985).
233. Woodruff v. Abott, No. 03 Civ. 198L, 2003 WL 21518762 (D.R.I. June 2, 2003).
234. Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995).
235. Yinen Zheng v. Gonzales, 192 F. App'x 733 (10th Cir. 2006).
236. Zemel v. Rusk, 381 U.S. 1 (1965).
237. Zhang v. Ashcroft, 388 F.3d 713 (9th Cir. 2004).
238. Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003).