Legal Status of the Universal Declaration of Human Rights

The Universal Declaration of Human Rights isthe first time an introduction of ethical and moral concerns into the international legal system takes place in an overt manner. Yet while there is now a widespread acceptance of the importance of human rights in the international structure, there is considerable confusion as to their precise nature and role in international law which this discussion will attempt to uncover.

The UDHR represents the first global expression of rights to which all human beings are inherently entitled. Accordingly the intent behind this document would probably be to guarantee these rights everywhere in the world. Yet human rights laws today are seen as emanating from various sources, not from the UDHR itself. Whether these sources eventually trace back to the UDHR is to be debated, however it does seem clear that on its own the UDHR is ineffective in achieving such aim.

The UDHR was adopted by the UN General Assembly on the 10th December 1948 without any dissent. As a General Assembly resolution the UDHR has no legally binding effect. The document was therefore only an expression of collective will by states to guarantee or at least recognise human rights.

That human rights laws today emanate from various other sources is due to developments elsewhere in international law, and the fact that the UDHR itself failed to provide meanings of the rights there stated. On the assumption that the UDHR would not impose sufficiently binding obligations, the UN Commission on Human Rights proceeded with the drafting of the Covenants on human rights designed to become legally binding on the UN’s member states. That work began in 1947, and was not completed until 1954, when two Covenants where presented to the UN General Assembly: the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights. It took a further twelve years before the General Assembly adopted these in 1966.

Although adopted by the General Assembly in 1966, the two Covenants did not come into force (by deposit of the 35th instrument of ratification) in 1976. While these two Covenants brought meanings of rights prescribed under the UDHR, there are still no provisions for interpretation and application of these rights. This vacuum would eventually be filled by later regional treaties.

Perhaps the most successful example is the European Convention on Human Rights. In the preamble of this European piece signed in 1950 are ‘the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration’. In its provisions for interpretation, application and enforcement the ECHR goes much further. It establishes a permanent Commission and Court of Human Rights to ensure the state parties ‘secure to everyone within their jurisdiction’ the rights and freedoms defined in the Convention. Similarly in the Americas, the obligations under the American Convention on Human Rights 1978 are absolute, and an Inter-American Court of Human Rights to enforce these rights.

The notable difference between the UDHR, ICSR and the ICESCR (collectively known as the International Bill of Rights) on one hand and the ECHR and the ACHR on the other is that the International Bill of Rights lags far behind the ECHR and the ACHR in its rate of
incorporation, with reservations and ‘opt-outs’ more frequent at the global level. Clearly this shows the ineffectiveness of the UDHR and the subsequent International Bill of Rights on the global stage.

However, this does not mean that it was a failed instrument. Although clearly not a legally enforceable instrument as such, the question arises as to whether the UDHR has subsequently become binding either by way of custom or state practice. After all, both the ECHR and the ACHR are reflections of the UDHR and therefore are successful implementations of the UDHR. Given that under Article 38(1)(b) of the Statute of the International Court of Justice custom is one of the sources of international law which can be cited, the UDHR can provide a force in legal argument concerning breach of human rights.

There is, however, a significant obstacle to a successful recognition of custom or state practice of the principles under the UDHR. It comes in the form of a separate human rights document, which is significantly different from the UDHR itself, and which was adopted by a significant minority of states. Such document is the Cairo Declaration of Human Rights in Islam, which essentially serves as the alternative human rights guidelines for Islamic countries. Given that state practice essentially requires a significant number of states following such practice, it is doubtful that the UDHR, as of today, can be recognised as custom in international law.

Nevertheless, the UDHR has been further empowered with effecting of the Vienna Convention on the Law of Treaties in 1980 which introduces the concept of *jus cogens* under Article 53. Even before the adoption of the VCLT, human rights were perceived as inherent to *jus cogens* as opposed to *jus dispositivum*. Such was Judge Tanaka’s dissenting opinion in the South West Africa Case in 1966. The cogency of *jus cogens* is, however, fairly weak due to its late formal introduction into treaty law. The concept is also quite vague at this point and probably no one could state confidently of what constitutes *jus cogens*. Andrea Bianchi has even gone to the extent of calling it ‘magic’.

In spite of these problems, the value of preemptory human rights norms is such that as *jus cogens* it would trump all other international laws in ‘lesser’ categories. The International Law Commission in 1966 had also provided examples of norms which could be characterised as preemptory in nature, and those concerned with human rights stood out. Thus *jus cogens* have essentially created a hierarchy of norms on which human rights sit at the very top.

The conclusion to this discussion therefore is that with the development of *jus cogens* in international law and with consistent state practice, the UDHR has the potential to serve as the bedrock of international constitutional rights. Already the European Court of Justice in Loizidou v. Turkey proclaimed the ECHR to be a ‘constitutional instrument of European public order’. The UDHR too is slowly moving towards becoming one for the global order.