The Incorporation of Customary International Human Rights Law into Domestic Legal Systems

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It is a great pleasure to be able to speak with you this afternoon, and I want to begin by expressing my gratitude to your Dean, Sasho Georgievski, the Vice-Dean, Irena Rajchinovska Pandeva, as well as Professor Elena Mihajlova, for their kind invitation. I am especially glad to resume what I hope will be a long period of cooperation with the Iustinianus Primus Law Faculty, following the hospitality shown to my class and to me when we visited you in Skopje in January.

The topic I want to discuss with you today is how principles of customary international law become part of domestic legal regimes. This is a critical subject, because unless it becomes part of the fiber of national governments, international law will always be something of an abstraction. It operates only to guide the conduct of sovereign states and their representatives: it has little or nothing to do with real human beings, going about their lives from day to day.

But human rights law, of course, is all about human beings. So if it is to have meaning, it must become part of the legal regimes in which human beings live. How that happens is the subject that I will address this afternoon, and that I hope you will find it as interesting, and as challenging, as I do.

You are all, I am quite sure, quite well aware that the Statute of the International Court of Justice sets out three primary sources of international law: treaties, custom, and general principles. The third of those – "the general principles of law recognized by civilized nations" – reflect, by definition, rules that are **already** parts of national legal regimes. These are the mortar that holds the bricks of the international law platform together: the assumptions, the requirements, that underlie any regime worthy of being called a system of law. General principles do not need to be "implemented" into national law, because they are already there.

In this brief survey, let me turn next to treaties. How treaties – and especially treaties in the field of human rights – become part of domestic law is not difficult to explain. Some international conventions expressly require states to enact laws to achieve specific purposes. The Genocide Convention, for example, which 152 states have ratified, provides at Article 5 that "The Contracting Parties undertake to enact, in accordance with

their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated" in the definition section. The Convention against Torture, even more widely subscribed with 173 parties, likewise in Article 2.1 requires each of them to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

Not all treaties contain such a mandate. Yet they enter the body of domestic law nonetheless. In some states – we use the word "monist" to describe their legal systems – once a treaty is signed and ratified, it becomes national law automatically and immediately. That rule is usually expressly stated in the basic document of national governance. So, for example, the Greek Constitution provides, at Article 28.1, that "international conventions as of the time they are ratified … and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law."

Other states may be termed "dualist," since for them, international and domestic law are related – perhaps they are cousins – but they do not live under the same roof. In such states, and the United Kingdom is a good example, a treaty is not domestic law unless and until the sovereign, usually acting through a legislative body, says that it is. In the United States, Article VI of our Constitution provides that "all treaties made, or which shall be made, under the authority of the United States," are part of "the supreme law of the land." Our Supreme Court, however, has held that the reference to "treaties" here means something quite different from what the Vienna Convention on the Law of Treaties means by that word.

The VCLT says, in Art. 2.1(a), that a treaty is any "international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." But in the U.S., a very emphatically dualist state although with a twist, a "treaty" means an international agreement made by the President and ratified only after the approval of two-thirds of the Senate. Thus the U.S. has entered into hundreds if not thousands of international agreements that are "treaties" in the eyes of international law, but are something else in American law, and are not the law of the land.

The Constitution of your country, incidentally, is equivocal on this issue. Article 8 provides that "the basic freedoms and rights of the individual and the citizen, recognized in international law and set down in the Constitution," as well as "respect for the generally accepted norms of international law," are stated to be among "the fundamental values of the constitutional order" of the Republic of North Macedonia. It does not say that these **are** law, but it suggests that they **guide** the law, and it strongly implies that a denial of those freedoms and rights cannot become the law.

Of course, many of the rights and corresponding obligations that make up the body of international human rights law today are incorporated into treaties, whether global or

regional, and most of those are indeed implemented in the domestic legal systems of states parties. North Macedonia is a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and most importantly, as a member of the Council of Europe, the European Convention on Human Rights. All of those are part of your law, and among other institutions, the European Court of Human Rights stands guard to insure that the rights included in those treaties are in fact observed.

Of course, I am talking now about the laws **on the books**: as all students of international human rights law are aware – indeed, as anyone who has ever opened a newspaper is aware – states' solemn promises to honor the human rights of their citizens are all too often broken, betrayed, and disrespected.

Just as in domestic law, though, the fact that the law is violated – even if it is violated openly and often – does not mean that there is no law. It simply means that the governing authorities lack the resources or the will to demand compliance, by using the measures of coercion that are available to every functioning state. And this is not necessarily a sign of moral decay or a trend toward anarchy: it may well simply reflect the fact that the norms by which a society has organized itself have not yet found their way into the statute book. To illustrate this, let me point to the fact that in seven U.S. States and the District of Columbia, it is against the law for an unmarried couple to have sexual relations. I need hardly tell you that those laws are broken on a rather routine basis.

Before we can delve deeply into the question of whether, and if so how, customary international law, including the customary principles of human rights law, are incorporated into domestic legal systems, it would be helpful to have something of a more concrete definition of international custom. The Statute of the International Court, with which I trust everyone in this audience is well familiar, offers only this very unhelpful and perhaps even circular guidance: international custom is simply "evidence of a general practice accepted as law." The Court itself has put some meat on these bones, notably in the *North Sea Continental Shelf Case*, which established only in 1969 the two prerequisites that a candidate for the status of customary law must meet: uniform, if not universal, state practice, and *opinio juris*.

But that does not help very much, and it surely does not avoid the circularity of Article 38.1(b). If *opinio juris* means that states honor a customary norm out of a sense of legal obligation, then that means that a norm must be perceived as law in order to demonstrate that it is law. If we are not going to conclude that states are somehow collectively tricked or deluded into accepting some kind of false assumption, then it becomes extremely difficult to understand what can constitute the **source** of a principle of customary law. And when states actually disagree about whether a norm is or is not binding on them, then the problem becomes even more vexing. The Court, after all, refused in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* in 1996, to find widespread *opinio juris* around the prohibition of such weapons, given that no fewer than 10 states

today, and perhaps more, keep them in their arsenals claiming that they provide deterrence, through something like mutually-assured destruction.

Perhaps, though, we need not spend too much time trying to refine the definition. Perhaps it is sufficient to look at what states say, rather than what they do. If states regularly say that a principle has reached the status of customary law, and others do not affirmatively object, then the claim prevails. Or perhaps it is better to be straightforward here, rather than going down a rabbit-hole of semantics and nuance, adopting the approach of our Supreme Court Justice Potter Stewart, who famously said, in a case alleging that a certain film was pornography and could be banned by the State of Ohio, “I shall not today attempt further to define the kinds of material I understand to be embraced within [the term "hard-core pornography"], and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.” Perhaps the same can and should be said about international custom.

Ultimately, it will remain for judges, both domestic and international, to determine whether a norm is or is not a principle of customary international law. In the United States, as long ago as 1900 our Supreme Court held in a case called *The Paquete Habana* that:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, not for the speculations of their authors concerning what the law **ought to be**, but for trustworthy evidence of what the law **really is**.

Now, while these words provide strong encouragement for those who believe that international law can be so pervasive, so powerful, and so useful, they are also troublesome in their own right. In a legal system that contains elaborate procedures before legislation may be enacted, how can it be that the contents of that system may be determined by something so vague as “the customs and usages of civilized nations”? Doesn’t this threaten to wrest control of government from those elected by the people, giving it instead to unnamed “jurists and commentators” whose qualifications, whose neutrality, and even whose identity may be subject to serious question?

Of course, a legislature may decide expressly to incorporate international law, and when that happens, there is no threat to democratic governance. In the United States, as long ago as 1819, Congress enacted a law to make piracy a punishable crime. It read as follows: “if any person or persons whatsoever shall, upon the high seas, commit the crime of piracy **as defined by the law of nations**, and such offender or offenders shall be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof … be punished with death." So here, the people’s elected

representatives deliberately deferred the definition of piracy to international law, and in the absence of a treaty on point, **customary** international law at that. The very next year after the enactment of this statute, the Supreme Court in a case called *U.S. v. Smith*, rejected a challenge to its constitutionality on the grounds that it was overly vague, holding instead that "the crime is not less clearly ascertained" in the reference to "the law of nations" "than it would be by using the definitions of these terms as they are found in our treatises of the common law."

The *Paquete Habana* decision from 1900 to which I just referred and from which I read to you the key passage, addressed a presidential, rather than a legislative, reference to "the law of nations" as distinguishing permissible from impermissible conduct. But the essence of the case is the same: where customary international law is "clearly ascertained" – or to use more modern language where it is **unambiguous** – then its definitions may be imported into domestic law with no fear that responsibility it being abdicated to a murky group of anonymous "foreigners."

Yet since 1900 – a long time ago, as you will all have noticed – the United States Supreme Court has not been nearly so deferential to, or respectful of, customary international law. This trend away from treating customary law as real law affecting real people may be seen in a case that I will describe to you in some detail. It came before the Court in 1992.

Enrique Camarena Salazar was an undercover agent of the U.S. Drug Enforcement Administration. He was assigned to infiltrate a ring of cocaine smugglers in Guadalajara, Mexico, and apparently he did his job very well. He won the confidence of the gang members, and was able to learn about their plans. Yet before he could report the results of his work to the Agency, so that it could interrupt those plans and perhaps arrest those involved, he was spotted. He was, in the slang term, "outed." He was identified as a law enforcement officer, and I need hardly tell you, he was, to say the least, *persona non grata*.

The drug lords attempted to obtain information from Camarena about how he had managed to get inside their gang. But he had been trained not to disclose anything. Camarena was tortured, by increasingly brutal methods. He still would not talk. And of course killing him would not provide the criminals with what they needed. So they called in a physician, who was connected to the gang, in order to keep Camarena alive to be tortured more and more, over a period reaching five days, before he died.

The doctor who allegedly performed this service was named Humberto Alvarez-Machain. Needless to say, when news of Camarena's death reached the DEA, Alvarez-Machain was considered to be Public Enemy Number 1. The DEA resolved to find him and, to use an expression badly overused and misused among politicians, "to bring him to justice."

The United States has a treaty of extradition with Mexico, but the geancy was reluctant to use it. There were concerns about whether the doctor, who was apparently a man of some influence, might have been able to defeat an extradition demand. There was little trust that the Mexican authorities would cooperate, and fear that they might instead help

him to escape. So the officers of a U.S. government instrumentality decided to take the law into their own hands.

Dr. Alvarez-Machain was kidnapped in Guadalajara, and was taken to Juarez, Mexico, which is on the opposite side of the Rio Grande from El Paso, Texas. Once he was brought across the border – but not until then – he was arrested by the FBI (the federal police force), and was transported to Los Angeles to stand trial for murder.

Before the federal court of first instance in LA, and then on appeal, Alvarez-Machain successfully argued that his abduction was a violation of international law, and that he could not lawfully be tried in California because his presence there had been illegally procured. U.S. law is reasonably clear that a person brought before a court through an unlawful act of the government, such as fraud or kidnapping, is entitled to be released. I can explain that principle in more detail if anyone is interested, but for now, let's take it as a given. Please assume also that U.S. law prohibits and punishes crimes committed against government agents who are working outside the country, and that this extraterritorial reach is consistent with international law, specifically the so-called "passive personality principle." Again, I can elaborate later. But those were not the key issues here. What the courts had to decide was whether the manner by which Alvarez-Machain was caused to appear before the court in Los Angeles was legal.

The trial court ruled that it was not, and the U.S. Court of Appeals affirmed that decision. The government presented the case to the Supreme Court. And the highest Court in the land, by a vote of 6-3, reversed.

Alvarez-Machain relied primarily on the extradition treaty, which obviously makes no provision for kidnapping. Like the many such treaties in the world, it provides a very specific procedure for requesting the rendition of a person suspected of a crime, from the country where he happens to be, to the one whose laws he is alleged to have broken. The U.S. authorities had deliberately not invoked the treaty. Furthermore, and presenting the issue that I want to illustrate to you, the doctor argued that customary international law prohibits a state from enforcing its criminal laws on the territory of another state without its express permission. And of course Mexico had given no consent to, and in fact had no prior knowledge of, the forcible removal of one of its citizens against his will to another country to be prosecuted. Indeed, not only Mexico, but a number of other Latin American countries expressed outrage over this case, and one or two even temporarily recalled their ambassadors from Washington.

That customary principle has no treaty counterpart. While certainly the U.S.-Mexico Extradition Treaty does not mention kidnapping, it also does not prohibit it. The Supreme Court first disposed of the treaty argument by saying two things. First, while it was clear that the treaty was not invoked, that does not logically mean that it was violated. It was simply ignored. Nothing in the treaty says that the procedure for requesting the host state to deliver up an individual is the **exclusive** lawful means of getting your hands on him. And second, said the then-Chief Justice of the United States William Rehnquist, even if

the Treaty was violated, the party with standing to assert that violation was not Humberto Alvarez-Machain, but the government of Mexico.

The Chief Justice said that the Treaty was an agreement between two states, and that individuals have no enforceable rights under it. Therefore, he reasoned, if an argument is to be made that the U.S. violated its Treaty obligations, it was open to Mexico, and only Mexico, to present that case, perhaps in a diplomatic forum, and perhaps before an international tribunal, but in any event, **not** before a court in the United States.

Now, I happen to believe, and I think I can defend this view in detail, that Chief Justice Rehnquist was wrong on both scores. First, the construction of a system for requesting extradition **does**, I submit, directly imply that other ways of obtaining custody over a person are not permitted. More importantly, as to the second argument, the fact that a convention is between or among governments manifestly does **not** mean that no one else has the right to assert violations of the rules the treaty contains. And in my view the Extradition Treaty **does** confer rights on people potentially to be extradited, at least to ensure that the terms of the Treaty itself are properly and consistently applied. The Treaty, after all, is about individuals: they are its subjects and its objects.

But what is most striking in the decision in *United States v. Alvarez-Machain* was that the Supreme Court **conceded** that the kidnapping of a Mexican citizen from Mexican soil without the consent of the government was a violation of customary international law. At least since the time of the Permanent Court's decision in *The S.S. Lotus* in 1927, it has been well-established that – subject to a few exceptions not relevant here – a state may not enforce its criminal jurisdiction over individuals physically located on the soil of another state, without the permission of that state. Yet in the view of the six Justices who joined in the Court's opinion, the interpretation of international law principles, however established they may be, is not the proper job of the judiciary.

Justice John Paul Stevens, in a characteristically powerful and even caustic dissent, disagreed. He called the decision "monstrous." Clearly, at the very least, the opinion of the Court endorsed lawlessness and cowboy justice: countries engaging in self-help, taking the law into their own hands. And it also slammed the brakes on any progress toward the incorporation of the customary international law of human rights into the law of the United States.

The Supreme Court's decision in *Alvarez-Machain*, however, was not the end of the story. In line with that opinion, the doctor was put on trial in Los Angeles. But then something unexpected happened. The government had only the scantiest of evidence actually connecting Alvarez-Machain to the death of Enrique Camarena. After the prosecution presented its case, and before the defense was even called upon to offer its evidence, the trial judge dismissed the charges. The defendant was released, but he did not go away quietly.

To explain the next step, I have to tell you a little more about American history. In 1789, just after our Constitution was ratified by the original 13 colonies (and then States), the

very first Congress enacted a statute to organize the judicial branch of government. The Judiciary Act outlined the jurisdiction of the various federal courts, clarifying the powers conferred upon them by the Constitution itself.

One of the provisions of that Act was the subject matter of what remains the most famous and most important Supreme Court decision ever handed down. In *Marbury v. Madison*, Chief Justice John Marshall established the principle of judicial review: the power of the unelected courts to strike down legislation adopted by Congress and signed by the President, whenever it is inconsistent with the Constitution. Although that document itself nowhere alludes to such authority, the Chief Justice wrote that "it is emphatically the duty of the Judicial Department to say what the law is." "Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each." This doctrine, controversial at the time, has been the country's greatest protection for the rule of law, the rights of minorities, and the processes of justice through the courts over the whole of our national existence. It has justifiably been the model for numerous other national governments, which similarly extend to independent judges the role of guardians of the Constitution.

But the Judiciary Act of 1789 did more than this. Another provision of that same statute, which is still in effect today, gave to the federal courts the power to hear "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The word "alien," in 1789, meant simply a non-citizen. A "tort" is a civil wrong, called a "delict" in continental legal systems: that is, a violation of a duty owed by one member of society to another.

What has come to be called the Alien Tort Statute was included in the Judiciary Act to send a signal to the rest of the world that the newly-created United States of America intended to take its place as an equal member of the community of nations. It was important to let the world know that claims of violations of international law – say, mistreatment of a diplomatic representative – would be heard in federal court, subject to the guarantees of constitutional rights, before judges appointed and confirmed through a system designed to ensure that they were above politics and were not beholden to any local or private interests.

In 1789, the kinds of conduct that might give rise to suits under that statute were few. Aside from interference with diplomats, piracy was a "violation of the law of nations." Perhaps engaging in trade of enslaved persons was, or would soon be, as well. But there was little else, and the statute sat on the books unused and overlooked for nearly two centuries.

But with the emergence of international human rights law following the end of the Second World War, the creation of the United Nations, and adoption of the Universal Declaration of Human Rights, the notion of "violations of the law of nations" took on vastly expanded meaning. Under that regime, the way in which a state treats its own citizens is a matter of legitimate international concern. Beginning in 1980, U.S. courts began to hear cases

under the Alien Tort Statute, alleging human rights violations in other countries, so long as the defendant accused of committing those acts could be found on American soil.

Especially noteworthy, in any consideration of that statute, is that the courts' jurisdiction is predicated on a violation of "the law of nations" **or** "a treaty of the United States." The use of the word "or" suggests that international law violations encompass much more than breaches of treaties. And that "more" can **only** mean customary law, as the courts may interpret that elusive and elastic term. I should add here, just for the sake of clarity, that the defendant in such cases must be an individual or perhaps a corporation, and not a sovereign state, because however flagrant their systematic abuses of human rights, and with very few exceptions, states are entitled to sovereign immunity from suit.

And so, for example, a police chief from Paraguay, who was alleged to have tortured to death the teenaged son of a political opponent of the government, was successfully sued in Brooklyn, New York, under the statute. Ferdinand Marcos, the former autocratic president of The Philippines, was sued in Hawaii for a laundry list of human rights violations, and some of his assets in the United States were seized by the victims.

Now, back to the story of Humberto Alvarez-Machain. After the charges against him for the Camarena murder were dismissed in California, the doctor returned to Mexico. And then he filed suit, under the Alien Tort Statute, in the same federal court in Los Angeles. He claimed that he met all of the three prerequisites for such an action. He was surely a non-citizen. His case sounded in tort. And he argued that his kidnapping and detention in Mexico – that is, before the FBI arrested him on U.S. soil in El Paso – were violations of the law of nations.

That case too went to the Supreme Court. It was decided in 2004, under the name *Sosa v. Alvarez-Machain*. The George W. Bush Administration, for political reasons, sided with the defendants, and asked the Court to restrict the Statute, or even to declare it essentially without application. The arguments the government raised were not substantively different from those of the accused pirate in the *Smith* case in 1820: that Congress, not the courts, should define causes of action, and that the vagueness of the statute conferred too much discretion on judges, effectively to make the law, rather than just to interpret it.

Many observers assumed that the Supreme Court would accept the invitation to sideline the Alien Tort Statute. But it did not do so. Instead, in a 6-3 opinion, the Court asked and answered the question of what might constitute an actionable "violation of the law of nations." It concluded that the doors of the courthouse are not open to just any fanciful claim that this or that norm has qualified as established international law, whether of human rights or of anything else. To state a cause of action will require a plaintiff to show that the norm that she or he argues was violated was "**specific**, **universal**, and **obligatory**."

The opinion by then-Justice David Souter said that to be "specific," the principle of customary law must be clear as to what it covers. It must be "universal," meaning essentially that it must qualify as custom under the *North Sea Continental Shelf* test for

widespread state practice. And it must be "obligatory," meaning that it must contain a prohibition, and not anything less emphatic. But the set of human rights norms that meet those criteria is far from empty. The outlawing of torture, for example, and other cruel and inhumane treatment, satisfies them. And so cases basing jurisdiction on the Alien Tort Statute continue to be brought, heard, and decided in the United States.

But although the Statute itself was protected by the Court, that did not help Dr. Alvarez-Machain. The Court unanimously concluded that the violation of his rights could have constituted no more than a few hours of restricted freedom, from the time of his kidnapping to the moment of his arrest in Texas. The reasoning here was that the detention became legal under international law once he was on U.S. soil, and that it was only the activities of the agents in Mexico that even potentially constituted an unlawful act. And his confinement for that brief period, the Court said, did not add up to a violation of a norm that is "specific, universal, and obligatory."

Incidentally, the Court has further restricted the scope of the Alien Tort Statute since the *Sosa* decision. Three recent cases have asked the Court whether corporations may be defendants, and if so, under what circumstances. This is an interesting question, because it essentially asks whether it is sensible to describe private businesses as having obligations under international law. Or, to put the question slightly differently, it poses the issue whether corporations have "international legal personality." If, for example, a U.S. company employs grossly underpaid labor, say on cocoa farms in Côte d'Ivoire, or if it collaborates with a foreign partner that violates *jus cogens* norms in Myanmar, or if it is responsible for causing widespread and serious environmental consequences on banana plantations in Honduras, can it be alleged that the company, rather than any individual, acted "in violation of the law of nations"?

Unfortunately, the current conservative makeup of the Supreme Court has led to a restrictive interpretation of what is and what is not within the proper reach of the international human rights law regime. The Court has said, for example, that only if the alleged violation "touches and concerns" the United States in some meaningful way may the Alien Tort Statute be the basis of federal court jurisdiction. It has held that foreign corporations may not be sued, although it declined the Trump Administration's invitation to expand that holding to U.S. companies as well. But it did not agree to interpret the Statute to mean that the violation itself must have occurred in the United States: another holding invited by the government during the Trump era, but not, in the end, found acceptable by the Supreme Court.

That, in a nutshell, is the current state of the law in the United States regarding the incorporation of customary international law, and specifically the customary law of human rights. This country has been something of a laggard: not moving quickly, and sometimes not moving at all, to implement even binding treaty law domestically. To the contrary, it has become routine for the U.S., when ratifying a human rights treaty – including even one like the Torture Convention, which is pretty basic, after all, and should not be terribly controversial – to append to the instrument of ratification a statement to the effect that

“the Senate's advice and consent is subject to the following declarations: the provisions of articles 1 through 16 of the Convention [that is, the operative clauses] are not self-executing.” We have done the same with the ICCPR. And it is arguable that if the treaties themselves are not self-executing, a concept I will explain in a moment, then their contents are not enforceable, and thus not the law of the land.

A treaty is said to be "self-executing” when it is the source, or the guarantor, of rights that may be enforced in court. For example, if a treaty between Countries X and Y provides that citizens of X may work in Y and vice versa without the need for a special permit, a court may order a remedy if a citizen of X is denied employment in Y because she is not a national. But a treaty that does not deal in individual rights – such as, say, the United Nations Charter – is not self-executing. No one can file suit in a court of the United States alleging that the defendant has violated the Charter.

The Supreme Court’s holding in *Alvarez-Machain* said, in effect, that the Extradition Treaty was not self-executing: it did not provide someone a right whose violation could be the basis of a lawsuit by that person. But the U.S. “declarations” appended to the instruments of ratification are of very uncertain legal effect. As a matter of international law, the Vienna Convention allows a state to file a “reservation” to a treaty, defined as “a unilateral statement, however phrased or named, made by a State, when … ratifying … a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.” If a state ratifies a treaty with a reservation, another state may object, meaning that the treaty (or at least the relevant provision) is in force as between the two countries. But that does not describe exactly what the United States has done.

In any event, the VCLT does not say anything about “declarations” (or “understandings,” as they are sometimes called), and it is far from clear whether a state may reject another state’s “declarations,” and it is permitted to do with reservations. Nor, as a matter of U.S. law, is it obvious that a unilateral declaration by one House of Congress can have the domestic effect of preventing the courts from deciding that, on a correct reading, the treaty in question **is** in fact self-executing. So far, to my knowledge, no American court has ever entertained the idea that these “declarations” have no legal significance. I think that is a very powerful argument, and I have no idea why it has not attracted more attention.

But returning to the issue of customary law, an open question, with ramifications for many countries and not only the United States, is whether refusal to become a party to a treaty, or the entry of a proviso that might undermine the state’s commitments to it, can make that state a “persistent objector” to the evolution of the treaty's contents into customary law. Surely any state may resist the application of an emerging custom if it openly opposes that transformation, as the International Court of Justice held in, among others, the *Fisheries Jurisdiction Case* in 1951. But is abstaining from participation in a treaty sufficient evidence of such objection? If so, then the state would certainly be justified in declining to incorporate the norm into its domestic law. But on the other hand, South Africa’s persistent objection to the notion that enforced separation of the races was a

violation of human rights law did not protect it from the demand that it end apartheid. Indeed, the norm against such government-sponsored racial discrimination is now considered a *jus cogens* norm, to which no quantity of resistance is permissible.

If human rights law is to be respected as law, then it must be incorporated into municipal law, and it must be enforceable in domestic courts. The underlying premise of human rights law is that it imposes obligations on states in their treatment of people under their control. And there must be a mechanism for calling them to task when they fail to observe international standards. Here in North Macedonia, membership in a regional organization like the Council of Europe guarantees some measure of enforceability. But the United States, although a member of the Organization of American States, has elected not to subject itself to the jurisdiction of the Inter-American Court of Human Rights.

If a conclusion of broad applicability is possible from all of this, it has to be that when a state automatically incorporates international law according to its own constitution, or does to by virtue of its membership in a group of states that requires such adoption, the question of enforceability answers itself. But as for states that do not have such constitutional provisions, and that are not parts of such organizations, the implementation of human rights law appears subject to the political will of the legislature, and the courage and creativity of the courts.

Yet, this implementation is vital. Talk, as the saying goes, is cheap. Article 35 of the Constitution of the People's Republic of China says that its citizens “enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.” No one inside or outside of China believes that. The Constitution of the Russian Federation today, at Article 21, provides that “everyone shall be guaranteed freedom of thought and speech.” Yet we all know that, even today, calling the invasion of Ukraine a “war,” much less describing it accurately as a flagrant violation of the United Nations Charter, is a criminal offense in Russia.

If human rights are to be legal rights, then they cannot be, as a United States judge once wrote, “a mere set of benevolent yearnings, never to be given effect.” My human rights correspond to the obligations of the state of my nationality, and the state in which I might find myself. And it must be possible to hold those states to the commitments they voluntarily undertook.

So the incorporation of the customary as well as the conventional law of human rights into domestic legal systems is something to which all practitioners and students of the law must dedicate themselves. With it, and only with it, there is hope for the development of an equitable, predictable, and secure regime to protect the disadvantaged, to encourage the respectful treatment of our global environment, and to end war crimes, state-sponsored violence, and arbitrary arrest and punishment.

International law, acting alone, cannot achieve these goals. But domestic legal regimes can, and must, provide the impetus for that kind of future for us, and for the generations to come.

Again, let me thank Dean Georgievski and his colleagues for inviting me to offer this lecture, and I look forward to addressing your questions.

Ti blagodaram mnogu! Thank you very much.