

9-1-1997

Resort to International Human Rights Law in Challenging Conditions in U.S. Immigration Detention Centers

Barbara MagGrady

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Barbara MagGrady, *Resort to International Human Rights Law in Challenging Conditions in U.S. Immigration Detention Centers*, 23 Brook. J. Int'l L. 271 (1997).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol23/iss1/12>

NOTE

RESORT TO INTERNATIONAL HUMAN RIGHTS LAW IN CHALLENGING CONDITIONS IN U.S. IMMIGRATION DETENTION CENTERS

*Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. . . . Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds.*¹

I. INTRODUCTION

Those words, written by the late Martin Luther King, Jr., had deep meaning for the 1960s civil rights movement. They have equally deep meaning to people locked away in immigration detention centers² throughout the United States, waiting for their ticket to freedom, especially for someone like Edwin Bulus. He fled to the United States “to escape torture at the hands of Nigeria’s military dictatorship after his brother was charged with treason for plotting a coup.”³ Instead of finding freedom, Edwin Bulus was deprived of the liberty he so desperately sought, being detained by immigration authorities in a county jail.⁴ During his detention, Edwin suffered abuse at the hands of guards. They “stomped on him, forced him to kneel

1. MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in WHY WE CAN’T WAIT 76, 77 (1964).

2. Other terms include “immigration jails,” “processing centers,” “refugee camps,” or “holding centers.”

3. Celia W. Dugger, *After a ‘Kafkaesque’ Ordeal, Seeker of Asylum Presses Case*, N.Y. TIMES, Apr. 1, 1997, at A1.

4. *See id.*

naked for hours, pushed his head in a toilet, left him to sleep naked on a bare mattress and subjected him to racist invective.”⁵ Edwin said the treatment “was typical of the military brutality” in his country, and that he could not “believe it happened in the United States,”⁶ a place he thought was a human-rights-loving country. Like Edwin Bulus, detainees in U.S. immigration detention centers fled their former countries, escaping torture, mutilation, oppression, persecution, and murder. And, like Edwin Bulus, they have not found freedom in the United States. Upon their arrival at U.S. borders they were promptly escorted to an immigration jail, as though they had committed a crime in preserving their lives. They are locked away for months, even years, until their asylum claims are processed. During their jail stays they endure squalid conditions and inhumane treatment. Such conditions include lack of fresh air and sunlight, overcrowding, unsanitary living quarters, inadequate medical care, limited access to legal counsel, and denial of reasonable access to exercise and recreation.⁷ Reports of inhumane treatment include shackling detainees’ arms and legs, solitary confinement, and physical, sexual, and verbal abuse.⁸

Immigration policy in the United States has received widespread attention over the last two decades, sparked by the influx of Cuban and Haitian refugees. Prior to the Reagan-Bush era, the general policy was to parole (release) asylum seekers, with or without bond, until their status could be determined.⁹ During the Reagan-Bush era, however, detention became the rule.¹⁰ Many have argued that such a rule is arbitrary, unnecessary, and in violation of U.S. constitutional principles.¹¹ For the most part, legal challenges involving asylum

5. *Id.*

6. *Id.*

7. See discussion *infra* Part II.B for a more detailed account of conditions in immigration jails.

8. See discussion *infra* Part II.B.

9. See IMMIGRANTS’ RIGHTS PROJECT, AMERICAN CIVIL LIBERTIES UNION, JUSTICE DETAINED: CONDITIONS AT THE VARICK STREET IMMIGRATION DETENTION CENTER 1-3 (1993) [hereinafter ACLU REPORT].

10. See *infra* text accompanying notes 37-40.

11. See, e.g., Maurice A. Roberts, *Some Thoughts on the Wanton Detention of Aliens*, 5 GEO. IMMIGR. L.J. 225 (1991); Mark D. Kemple, Note, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans: Constitutional, Statutory, International Law, and Human Considerations*, 62 S. CAL. L. REV. 1735

seekers attack the legality of detention itself. The constitutionality of the practice notwithstanding, detention has now become a harsh reality. Thus, this Note does not focus on the legality or arbitrary nature of detention itself. Rather, it addresses the human rights violations inflicted on detainees.

Past and present practices by the United States in its immigration detention centers ignore respect for human dignity, the very basis of international human rights standards,¹² and violate the principle that prohibits cruel, inhuman or degrading treatment.¹³ Whatever reason the U.S. government uses to justify its current immigration policy, whether it be overwhelming numbers of immigrants or an inability to process claims swiftly, there is no justification for treating detainees as anything less than human beings.

If the United States is to satisfy international human rights standards, it is required, at a minimum, to refrain from continuing its practices with respect to detainees. At best, the United States is required actively to provide a standard for alien detainees that conforms to international human rights norms. The first step in achieving international peace is the recognition and respect for basic human dignity. Only through respect for human dignity and fundamental human rights will the United States be able to claim that it has joined in the

(1989); Deborah M. Levy, *Detention in the Asylum Context*, 44 U. PITT. L. REV. 297 (1983); Note, *The Indefinite Detention of Excluded Aliens: Statutory and Constitutional Justifications and Limitations*, 82 MICH. L. REV. 61 (1983).

12. For example, the U.N. Charter reaffirms "faith in fundamental human rights" and the "dignity and worth of the human person." U.N. CHARTER preamble, para. 2. The Universal Declaration of Human Rights recognizes "the inherent dignity . . . of all members of the human family" as the "foundation of freedom, justice and peace in the world." Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, 183d plen. mtg., preamble, para. 1, at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

13. See Universal Declaration, *supra* note 12, art. 5, at 73; International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 7, SEN. EXEC. DOC. E, 95-2, at 23, 25 (1978), 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, *done* Nov. 4, 1950, art. 3, 213 U.N.T.S. 221, 224 (entered into force Sept. 3, 1953) [hereinafter European Convention]; American Convention on Human Rights, *done* Nov. 22, 1969, art. 5(2), SEN. EXEC. DOC. F, 95-2, at 41 (1978), 1144 U.N.T.S. 123, 146 (entered into force July 18, 1978) [hereinafter American Convention]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, art. 16, S. TREATY DOC. NO. 100-20, at 23 (1988), 23 I.L.M. 1027, 1031 [hereinafter Torture Convention].

quest for true international peace.

Part II of this Note discusses U.S. immigration detention policy since the Reagan-Bush era, and describes detention facility conditions in the United States during and since that era. Against that backdrop, Part III discusses existing international human rights standards, their binding force under international law, and their status in domestic courts. Part IV discusses the rights of alien detainees in challenging their detention conditions under international human rights law, and analyzes the scope and definition of those rights. This Note concludes by calling upon the judiciary to implement international law in this arena. Perhaps through the recognition and implementation of international law, inhumane conditions in immigration jails will come to an end, and people like Edwin Bulus will finally be treated as human beings.

II. BACKGROUND

Modern refugee law has developed from the international community's response to the mass exoduses and involuntary migrations of the two world wars.¹⁴ It reflects, on the one hand, the collective humanitarian commitment of states to protect those who are persecuted and forced to flee their countries of origin, while also protecting states' individual interests of sovereignty and immigration control.¹⁵ Principally, the international community affords protection to refugees through the Convention Relating to the Status of Refugees¹⁶ (Refugee Convention), which defines a refugee as:

any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . .¹⁷

14. See generally James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129 (1990).

15. See *id.* at 133.

16. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

17. *Id.* art. 1(A)(2), 19 U.S.T. at 6261, 189 U.N.T.S. at 152. The United States acceded to the Refugee Convention by signing and ratifying the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. The Protocol's main objective was to remove the tempo-

Nonrefoulement—the right not to be returned to a country where a refugee will be persecuted—is one of the fundamental rights protected by refugee law.¹⁸ Under article 33(1) of the Refugee Convention and its Protocol:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹⁹

The right of *nonrefoulement* is so fundamental that “[e]ven before the receiving country grants formal refugee status . . . a person claiming to flee persecution is protected”²⁰ Accordingly, if an individual satisfies the elements of the definition of a refugee, “he or she is clearly entitled to the protections afforded” by the Protocol Relating to the Status of Refugees (Refugee Protocol).²¹

Notwithstanding the collective commitment to protect refugees, individual states have focused on their own self-interests in maintaining sovereignty and in stemming the flow of mass immigration across their borders.²² One commentator observed this dichotomy by stating:

[N]o national right is more zealously guarded than the sovereign’s right to control its borders; nor is any moral principle more vehemently advocated than the human-rights-based insistence that foreign nationals fleeing life-threatening conditions in their homelands be provided refuge in neighboring countries.²³

ral and geographical limitations contained in the Refugee Convention’s definition of refugee. See Hathaway, *supra* note 14, at 130 n.6.

18. See Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 YALE L.J. 2335, 2342 (1991).

19. Refugee Convention, *supra* note 16, art. 33(1), 19 U.S.T. at 6276, 189 U.N.T.S. at 176; Refugee Protocol, *supra* note 17, art. 1(1), 19 U.S.T. at 6225, 606 U.N.T.S. at 268.

20. Helton, *supra* note 18, at 2342.

21. *Id.*

22. See Hathaway, *supra* note 14, at 166. Hathaway argues that refugee law reflects neither humanitarian nor human rights concerns, but rather is a means of governing international migration for the benefit of state interests. *Id.*

23. Katherine L. Vaughns, *Taming the Asylum Adjudication Process: An Agenda for the Twenty-First Century*, 30 SAN DIEGO L. REV. 1, 3 (1993); see Bill

Indeed, the primacy of state interest is reflected in the Refugee Convention's protection scheme, where the implementation of refugee protection procedures and status determination is placed exclusively in the hands of the individual states.²⁴

A. Immigration and Alien Detention Policy in the United States

Immigration policy in the United States clearly demonstrates the dichotomy between humanitarian concerns and national self-interests. By enacting the Refugee Act of 1980,²⁵ the United States reiterated its humanitarian commitment to the protection of refugees and formally implemented into domestic law its obligations under the Refugee Protocol.²⁶ At the same time, however, the United States protects its own interests through a comprehensive immigration policy, which includes a discretionary scheme of providing asylum for refugees and detention of aliens seeking to enter the United States, despite their refugee status.

Refugees reaching U.S. borders are afforded some initial protection through the principle of *nonrefoulement*. The Immigration and Nationality Act (INA)²⁷ prohibits the Attorney General from deporting or returning an alien to a country where "such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."²⁸ However, in order to receive permanent protection, the refugee must satisfy the statutory framework established for granting asylum.²⁹

In order to receive asylum in the United States, an alien must first satisfy the INA's definition of a refugee, which is

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is

Coffman, Comment, *Organizational Membership and Political Opinion as Grounds for Refugee Status*, 18 HOUS. J. INT'L L. 465, 466 (1996).

24. See Hathaway, *supra* note 14, at 166.

25. Pub. L. No. 96-212, 94 Stat. 102 (1980)(codified as amended in scattered sections of 8 & 22 U.S.C.). This act was the first comprehensive legislation that exclusively addressed the reception of refugees and bound the United States to the Refugee Convention. See Coffman, *supra* note 23, at 471.

26. See Coffman, *supra* note 23, at 471.

27. 8 U.S.C. §§ 1101-1524 (1994).

28. *Id.* § 1253(h)(1).

29. See *id.* § 1158(a).

outside any country in which such person last habitually resided, and who is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.³⁰

Meeting the definition of refugee does not automatically entitle an alien to asylum, however, since the alien must apply for asylum and the decision to grant asylum is discretionary in the Attorney General.³¹ While an alien's asylum application is pending, he or she is likely to be detained by the Immigration and Naturalization Service (INS).

The detention policy that emerged in the early 1950s was to detain as few aliens as possible.³² "[B]oth excludable and deportable aliens were presumptively eligible for release and could be detained only if [they] pose[d] a security risk or a risk of absconding."³³ All others were released on bond or supervision.³⁴ The practice of releasing aliens was embraced by the Supreme Court in *Leng May Ma v. Barber*.³⁵

The parole of aliens seeking admission is simply a device

30. *Id.* § 1101(a)(42)(A).

31. Section 1158 states:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, *irrespective of such alien's status*, to apply for asylum, and the alien may be granted asylum *in the discretion of the Attorney General* if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) of [Title 8].

Id. § 1158(a) (emphasis added).

32. See Roberts, *supra* note 11, at 229. Roberts notes:

This policy ultimately led to the closing in 1954 of Ellis Island and later of other INS detention stations in other parts of the country. As part of this policy of nondetention, it became the standard practice to start deportation proceedings by issuing an order to show cause and serving it on the alien without taking him or her into actual custody under a warrant of arrest.

Id.

33. ACLU REPORT, *supra* note 9, at 3.

34. See *id.* The Refugee Act of 1980 permits the Attorney General, in her discretion, to parole any alien applying for admission. Refugee Act of 1980 § 203(f), 8 U.S.C. § 1182(d)(5)(A) (1994). "Parole" in this context refers to the release of aliens, and does not refer to parole as commonly used in the criminal context.

35. 357 U.S. 185 (1958).

through which needless confinement is avoided while administrative proceedings are conducted Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond. Certainly this policy reflects the humane qualities of an enlightened civilization.³⁶

This policy continued until 1980, when the United States was faced with an influx of Cuban and Haitian refugees.³⁷ To stem the flow of mass immigration and to deter illegal immigration, the INS adopted new regulations that required detention of aliens who could not present a valid claim for admission.³⁸ Under current construction, the INS will detain any alien who "appears to the inspecting officer to be inadmissible, and who arrives without documents . . . or who arrives with documentation which appears on its face to be false, altered, or to relate to another person, or who arrives at a place other than a designated port of entry"³⁹

Since the 1980s, detention has become the rule, and parole is the exception, resulting in mandatory detention for individuals previously eligible for release.⁴⁰ The Attorney General has discretionary authority to parole certain classes of aliens, including those "whose continued detention is not in the public interest, as determined by the district director."⁴¹ However, the INS has indicated that the parole power is to be used restrictively.⁴²

In 1990, the INS implemented a pilot project allowing for release of aliens who had credible claims to asylum and who could meet certain criteria.⁴³ Following the conclusion of the

36. *Id.* at 190 (citation omitted); see Levy, *supra* note 11, at 305.

37. See ACLU REPORT, *supra* note 9, at 3.

38. See Levy, *supra* note 11, at 305.

39. 8 C.F.R. § 235.3(b) (1996).

40. See ACLU REPORT, *supra* note 9, at 3.

41. 8 C.F.R. § 212.5(a)(2)(v).

42. See Letter from Warren A. Lewis, District Director, INS, to Jeffrey A. Heller, Esq. 2 (Apr. 15, 1995) (responding to request for release of detainee pending exclusion proceedings) (on file with the *Brooklyn Journal of International Law*) [hereinafter Lewis Letter]. The letter states: "The legislative history of the parole provision shows that it is the congressional intent that parole be used in a restrictive manner." *Id.*

43. See ACLU REPORT, *supra* note 9, at 4 n.16. Such criteria include: not presenting a threat to public safety, having a place to live, a lawyer, and a job or means of support. *Id.*

pilot program in 1991, then-INS Commissioner Gene McNary issued a memorandum reimplementing the project in 1992.⁴⁴ Nevertheless, the INS continues its mandatory detention policy,⁴⁵ even though parole does not change the alien's legal status as excludable.⁴⁶ Consequently, refugees sit in immigration jails indefinitely until their claims are processed.⁴⁷

Detention is used as a means to deter immigration.⁴⁸ For example, one INS deputy director claimed that detention is necessary because most asylum claims are without merit.⁴⁹ A newspaper reporter noted that the official defended detention because it "sends a message worldwide that would-be immigrants can't just come to the United States and 'automatically wander the streets.'"⁵⁰ A former INS Commissioner said "the harsh [detention] policy would send a message that immigrants would be held in conditions that won't be like the Ritz-Carlton."⁵¹ Maurice C. Inman, Jr., general counsel to the INS in 1986, claimed that "[t]hese people by rights should be in

44. See Memorandum from Gene McNary, Commissioner, INS, to All Regional Administrators et al. (Apr. 20, 1992) (on file with the *Brooklyn Journal of International Law*). Under the new program, the release criteria to be met included determining that: (1) the person's true identity has been ascertained, to a reasonable degree of certainty; (2) the asylum claim appears credible; (3) the person does not pose a threat to the community; (4) the person has legal representation or a place to live and means of support; and (5) the person agrees to stay in contact with the INS, appear for all hearings, and appear for deportation, if ultimately deemed excluded. See *id.* at 2-3. Additionally, the memo provides that the interviewer shall recommend parole if the criteria is met and the person does not present an unusually strong risk of absconding. Even in cases where a strong risk of absconding is present, or some of the criteria are not met, the person may be released on bond. *Id.* at 3.

45. See Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1109 & n.113 (1995).

46. See 8 U.S.C. § 1182(d)(5) (1994); ACLU REPORT, *supra* note 9, at 3; Kemple, *supra* note 11, at 1736; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953) (alien permitted entry pending a decision on admissibility is treated "as if stopped at the border").

47. See ACLU REPORT, *supra* note 9, at 3. If they are not admitted entry after their exclusion hearing, they are indefinitely detained pending deportation. See *id.*

48. See *id.*

49. See Elizabeth Llorente, *Shackled in the Land of Hope; Asylum Seekers Held for Months*, BERGEN RECORD (N.J.), Mar. 12, 1995, at A1, available in LEXIS, News Library, Njrec File.

50. *Id.* (quoting Bill Tillman, Deputy Director, INS, Newark, N.J.).

51. Alisa Solomon, *Yearning to Breathe Free*, VILLAGE VOICE, Aug. 8, 1995, at 25.

jail, . . . [t]hey are here illegally, . . . [t]hey are not worthy of much sympathy."⁵² In response to growing demands that illegal aliens were taking away job opportunities from U.S. citizens,⁵³ bills were introduced in Congress to sanction employers who knowingly hired undocumented aliens.⁵⁴ The INS also imposed bond conditions, requiring that aliens agree not to accept any employment unless authorized by the INS.⁵⁵

The INS claims its policy of deterrence has worked, by decreasing the number of attempted illegal entries significantly from 1992 to 1994.⁵⁶ Coupled with anti-immigrant sentiment in the United States,⁵⁷ the INS policy of detention sends a message to immigrants that the United States really does not want them here, and if they come, they will be subject to indefinite detention. Consequently, "[t]he detention policy has caused extreme hardship to thousands of innocent asylum applicants," and "[t]he policy actually has punished those 'oppressed of other nations' whom Congress sought to welcome with the Refugee Act of 1980."⁵⁸

The U.S. policy of detaining aliens is in dire need of reform. Until such reform can be accomplished, however, the conditions under which detainees live need even more serious attention.

B. Conditions in U.S. Immigration Detention Centers

The INS uses a number of types of detention facilities. Those operated by the INS directly are called "Service Processing Centers" (SPCs).⁵⁹ The INS also makes use of state, county, and local jails to detain aliens, as well as "contract facilities," which are operated for the INS by private corporations.⁶⁰

52. Bob Drogin, *To This Illegal Alien It's a New Kind of 'Freedom Fight'*, L.A. TIMES, June 26, 1986, pt. 1, at 22.

53. See Roberts, *supra* note 11, at 229.

54. See *id.* at 229-30.

55. See *id.* at 230.

56. See Solomon, *supra* note 51, at 27.

57. See, e.g., ARIZ. CONST. art. XXVIII, §§ 1-2 (English-only provisions); Proposition 187, 1994 Cal. Legis. Serv. No. 6, at A-78 (West).

58. Arthur C. Helton, *Refugees: An Agenda for Reform*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 49, 58 (Louis Henkin & John Lawrence Hargrove eds., 1994).

59. See ACLU REPORT, *supra* note 9, at 5.

60. See *id.*

A contract facility located in Elizabeth, New Jersey, run by a private corporation, ESMOR Inc. (Esmor), was the subject of a recent investigation by the INS.⁶¹ The reports of abuses at that facility are shattering:

- Immigration lawyers complained that during interviews, their clients were chained to steel tables, with both legs shackled. Esmor claimed the practice was necessary because there were not enough guards on duty.⁶²
- Detainees complained of physical and verbal abuse, including racial slurs by guards, blazing lights in the middle of the night, limited exercise and no fresh air.⁶³
- Detainees are awakened repeatedly in the middle of the night, and often arbitrarily placed in isolation.⁶⁴
- Joyce Phipps, a Seton Hall law professor witnessed a guard slam a detainee against a wall. She also alleged that detainees did not receive proper medical care and have limited access to their attorneys.⁶⁵
- One detainee indicated that in the seven months that she was there, she was never outdoors, that she lived in dirty clothes, on insect-infested beds.⁶⁶
- The detainees are housed in crowded dormitories. Visits from immediate family are limited, food is sparse and inedible. Detainees are given only facility-issue orange jumpsuits and two pairs of underwear, which are changed once each week.⁶⁷
- One Sudanese detainee complained that she was ignored or dismissed by guards when she asked for help.

61. See IMMIGRATION AND NATURALIZATION SERVICE ASSESSMENT TEAM, THE ELIZABETH, NEW JERSEY CONTRACT DETENTION FACILITY OPERATED BY ESMOR INC.: INTERIM REPORT (July 20, 1995) [hereinafter INS INTERIM REPORT] (on file with the *Brooklyn Journal of International Law*).

62. See Ashley Dunn, *Harsh Criticism of Detention Center*, N.Y. TIMES, June 19, 1995, at B5.

63. See Richard Pérez-Peña, *Illegal Aliens Overrun a Jail in New Jersey*, N.Y. TIMES, June 19, 1995, at A1.

64. See Ashley Dunn, *U.S. Inquiry Finds Detention Center Was Poorly Run*, N.Y. TIMES, July 22, 1995, at A1.

65. See Maureen Castellano, *INS to Probe Conditions at Private Jails for Aliens*, N.J. L.J., June 12, 1995, at 5, 17.

66. See Pérez-Peña, *supra* note 63, at B5.

67. See Castellano, *supra* note 65, at 17.

Unable to get soap, she bathed with liquid laundry detergent. The Esmor staff forbade her to wear her own underwear and they gave her other detainees' used underpants, which often bore old menstrual stains.⁶⁸

- Guards denied the detainees basic toiletries, gave women men's underwear with question marks drawn on the crotch, and refused to give women sanitary pads.⁶⁹

In November 1994, the detainees staged a hunger strike, which was dismissed as a minor incident by the INS.⁷⁰ On the windows of the detention center, the detainees wrote messages about inhumane conditions.⁷¹ On June 18, 1995, a number of the detainees staged an uprising, protesting the inhumane conditions.⁷² After the uprising, the detainees were relocated to other facilities or to county and federal jails.⁷³ They had their wrists shackled behind their backs for eighteen hours, and they were deprived of food, water, and sanitary facilities.⁷⁴ Some detainees said they were beaten during the transfer, stripped naked, and forced to sleep on the floor.⁷⁵ The incident prompted an investigation by the INS, which confirmed the reports and allegations of abuse.⁷⁶

The report by the INS Assessment Team investigating the matter discovered that "detainees were subjected to harassment, verbal abuse, and other degrading actions perpetrated by some ESMOR guards,"⁷⁷ and that the complaints were credible.⁷⁸ The report states that "the evidence suggests that these incidents were part of a systematic methodology designed by some ESMOR guards as a means to control the general detainee population and to intimidate and discipline obstreper-

68. Elizabeth Llorente, *At Esmor, the Reign of Terror is Over*, BERGEN RECORD (N.J.), July 30, 1995, Rev. & Outlook sec., at 1, available in LEXIS, News Library, Njrec File.

69. *See id.*

70. *See* Llorente, *supra* note 49.

71. *See id.*

72. *See* Pérez-Peña, *supra* note 63, at A1; Solomon, *supra* note 51, at 25.

73. *See* Solomon, *supra* note 51, at 25.

74. *See id.*

75. *See id.* at 26.

76. *See* INS INTERIM REPORT, *supra* note 61, at 6.

77. *Id.* at 5.

78. *See id.* at 6.

ous detainees through the use of corporal punishment.”⁷⁹ From a confidential interview with a guard, the INS Assessment Team learned that “placement of detainees into segregation without a charging document was a frequent occurrence” and that “the segregation unit was used as a means both of punishing detainees for relatively minor offenses, and for more general harassment.”⁸⁰ As a result of the report and complaints from attorneys and human rights organizations, INS Commissioner Doris Meissner closed the detention center.⁸¹

The recent accounts of abuses are not new to the system. Extremely poor conditions were reported to exist at the Atlanta Penitentiary, which housed Cubans who arrived from Mariel Harbor in the “freedom flotilla” boatlift.⁸² The jail was overcrowded, housing groups of eight in a 210 square foot cell designed for four men, allowing only a twenty-eight square foot area for each man to live in.⁸³ The jail also had a history of violence. Between 1982 and 1987 there were “seven successful suicides, 158 suicide attempts, 2,000 incidents of serious self-mutilation, 4,000 episodes of self-mutilation, and nine homicides,”⁸⁴ all explainable as detainees’ responses to frustration over indefinite detention. Other conditions that were noted included substandard ventilation and lighting, and inadequate changes of clothing, underwear and towels.⁸⁵ In 1986, a Congressional Committee issued a report on the conditions in the Atlanta facility, stating that those conditions were “brutal,” “inhumane,” and “intolerable.”⁸⁶

Reports by former guards at the Port Isabel SPC in Los Fresnos, Texas, included allegations that: (1) supervisors and other personnel were sexually molesting female detainees; (2) supervisors would take young women from their sleeping quarters late at night, bring them out to the parking lot, and take

79. *Id.* at 5.

80. *Id.* at 8.

81. See Llorente, *supra* note 68.

82. See Kemple, *supra* note 11, at 1735. In the spring of 1980, approximately 125,000 Cubans fled Cuba by small boats and sailed to U.S. shores. See *id.* President Carter called for an orderly, safe, and humane evacuation process and ordered the Coast Guard to assist those at sea. See *id.* at 1735 n.2.

83. See *id.* at 1741.

84. *Id.*

85. See *id.* at 1741 n.32.

86. See *id.* at 1741.

them into their cars; and (3) a former guard was required to escort a sixteen year-old girl from her sleeping quarters to the offices of supervisors, where the girl would be forced to dance for the supervisors in exchange for their promises to help her get out of the SPC.⁸⁷ The reports prompted an investigation by the Office of the Inspector General, which found the allegations unsubstantiated.⁸⁸ However, former guards indicated that they had been threatened with the loss of their jobs if they spoke to investigators.⁸⁹ Guards at the detention center had been trained to lack empathy. They were told not to talk to detainees, not even to joke or smile.⁹⁰ When former guards helped a female detainee who was fainting and spitting up blood, an immigration officer chastised them, accused the detainee of malingering, and kicked her. She died that night.⁹¹

At the Krome Avenue detention facility near Miami, Haitian detainees were surrounded by three rows of chain-linked fence topped with barbed wire, and supervised by armed guards.⁹² Sanitary conditions were primitive, with water pressure so low that detainees had resorted to showering in the urinals.⁹³ After months of confinement, many developed symptoms of depression; there were at least twenty-nine suicide attempts among the detainees. Others complained of blinding headaches, stomach cramps, and other illnesses.⁹⁴

In 1993, the American Civil Liberties Union (ACLU) issued a report condemning conditions at an immigration detention facility on Varick Street in Manhattan.⁹⁵ Among the problems cited were: (1) repeated citation of the staff for misconduct and failure to meet minimal standards; (2) abusive treatment by guards ranging from verbal harassment to physical abuse; (3) lack of access to counsel and the courts; and (4) inhumane living conditions, including overcrowding, unsanitary conditions, lack of fresh air and sunlight, inadequate exer-

87. See Solomon, *supra* note 51, at 28.

88. See *id.*

89. See *id.*

90. See *id.* at 29.

91. See *id.*

92. See Peter McGrath et al., *Refugees or Prisoners?*, NEWSWEEK, Feb. 1, 1982, at 24, 25.

93. See *id.*

94. See Janice Castro, *For 1,800 Haitians—Freedom*, TIME, July 26, 1982, at 14.

95. See generally ACLU REPORT, *supra* note 9.

cise and recreation, arbitrary use of segregation, lack of adequate medical care, and restrictive visitation policies.⁹⁶ The ACLU furnished its findings to the INS before publishing the report.⁹⁷ The INS, however, did not offer a response to the report.⁹⁸

It is evident from the above accounts that poor conditions are systemic in detention centers throughout the United States. These conditions are violative of basic human rights, specifically the prohibition against cruel, inhuman or degrading treatment, as recognized under customary international law and codified by a number of human rights treaties.

III. INTERNATIONAL HUMAN RIGHTS

A. Background

International human rights law has developed significantly since World War II, stimulated by the atrocities perpetrated by the Nazis against millions of people. The Nazis' acts were carried out with little interference from other nations.⁹⁹ The war and the Holocaust demonstrated that "unfettered sovereignty could not exist without untold suffering and . . . the danger of destroying . . . human society."¹⁰⁰ Hence, the founders of the United Nations decided to make promotion of human rights a prominent aim of the new world organization.¹⁰¹ The notion of human rights received formal recognition in the U.N. Charter,¹⁰² which states:

We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to *reaffirm faith in fundamental human rights, in the dignity and worth of the human person . . .*¹⁰³

96. *See id.* at 12-51.

97. *See id.* at 7.

98. *See id.*

99. *See* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 1 (1990).

100. *Id.*

101. *See* J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE 5 (1988).

102. U.N. CHARTER preamble.

103. *Id.* (emphasis added).

The concern for human rights is given normative expression in article 55 of the U.N. Charter, which provides that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."¹⁰⁴ Article 56 provides that "[a]ll Members pledge themselves to take joint and separate action in co-operation with the [U.N.] Organization for the achievement of the purposes set forth in Article 55."¹⁰⁵

The U.N. Charter authorized the Economic and Social Council (ECOSOC), one of the principal organs of the United Nations, to promote "respect for, and observance of, human rights and fundamental freedoms for all."¹⁰⁶ Pursuant to its authority, the ECOSOC established the Commission on Human Rights in 1946.¹⁰⁷

The Commission's first assignment was the preparation of an "International Bill of Rights."¹⁰⁸ The International Bill of Rights was conceived in concert with the Universal Declaration of Human Rights (Universal Declaration),¹⁰⁹ which defines the notion of human rights concerned, and two basic treaties—the International Covenant on Civil and Political Rights (ICCPR),¹¹⁰ and the International Covenant on Economic, Social and Cultural Rights¹¹¹—which mandate that States are legally obligated to guard their citizens' human rights and also construct an international system for ensuring the implementation of States' obligations.¹¹²

In addition to the International Bill of Rights, there are three regional treaties that promote and protect human rights: the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹¹³ the American Convention on

104. *Id.* art. 55; see also M. CHERIF BASSIOUNI, *THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE*, at xxiii (1994).

105. U.N. CHARTER art. 56.

106. *Id.* art. 62(2).

107. See BURGERS & DANIELIUS, *supra* note 101, at 6.

108. See *id.*

109. Universal Declaration, *supra* note 12.

110. ICCPR, *supra* note 13, SEN. EXEC. DOC. E, 95-2, at 23, 999 U.N.T.S. at 171.

111. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

112. See BURGERS & DANIELIUS, *supra* note 101, at 6.

113. European Convention, *supra* note 13.

Human Rights,¹¹⁴ and the Banjul Charter on Human and Peoples' Rights.¹¹⁵ There also exist numerous instruments on special subjects in the field of human rights.¹¹⁶

Among the specific rights set forth in the International Bill of Rights and the other regional conventions is the prohibition against torture or other cruel, inhuman or degrading treatment. As one author has noted, "[a]fter the end of the eighteenth century torture acquired a universally pejorative association and came to be considered the institutional antithesis of human rights"¹¹⁷

Nonetheless, torture was used by totalitarian regimes between the First and Second World Wars as a means of extracting confessions and spreading terror.¹¹⁸ These regimes also inflicted other forms of inhumane treatment upon their prisoners.¹¹⁹ With the formation of the United Nations, the Universal Declaration explicitly prohibited such practices.¹²⁰ It states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."¹²¹ Similar provisions are included in the other major conventions.¹²² This principle has attained *jus cogens* status,¹²³ and all the major conventions (except the Banjul Charter) prohibit derogation, even in times of war, public danger, or other emergency that threatens the security of the nation.¹²⁴ Alien detainees

114. American Convention, *supra* note 13.

115. Banjul Charter on Human and Peoples' Rights, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev.5, *reprinted in* 21 I.L.M. 58 [hereinafter Banjul Charter].

116. *See* BURGERS & DANIELIUS, *supra* note 101, at 7.

117. EDWARD PETERS, *TORTURE* 75 (1985).

118. *See* BURGERS & DANIELIUS, *supra* note 101, at 10.

119. *See id.*

120. *See id.* at 11.

121. Universal Declaration, *supra* note 12, art. 5.

122. *See, e.g.,* ICCPR, *supra* note 13, art. 7, SEN. EXEC. DOC. E, 95-2, at 25, 999 U.N.T.S. at 175; European Convention, *supra* note 13, art. 3, 213 U.N.T.S. at 224; American Convention, *supra* note 13, art. 5(2), SEN. EXEC. DOC. F, 95-2, at 42, 1144 U.N.T.S. at 146; Banjul Charter, *supra* note 115, art. 5, *reprinted in* 21 I.L.M. at 60.

123. *See Preliminary Report by the Special Representative of the Commission on the Human Rights Situation in the Islamic Republic of Iran*, U.N. ESCOR Comm'n on Hum. Rts., 41st Sess., Agenda Item 12, at 8-9, U.N. Doc. E/CN.4/1985/20 (1985) [hereinafter *Preliminary Report*]; BURGERS & DANIELIUS, *supra* note 101, at 12.

124. *See* ICCPR, *supra* note 13, art. 4, SEN. EXEC. DOC. E, 95-2, at 24, 999 U.N.T.S. at 174; European Convention, *supra* note 13, art. 15(1), 213 U.N.T.S. at 232; American Convention, *supra* note 13, art. 27, SEN. EXEC. DOC. F, 95-2, at 49,

will invoke this norm in challenging their detention conditions.

B. Binding Force of Treaties, Declarations, and Customary International Law

As a source of international law,¹²⁵ treaties or conventions are distinguishable from declarations or resolutions in that they contain legally binding obligations on those states that have become parties to them.¹²⁶ Where a State has signed but not ratified a treaty, it is obliged to refrain from acts which would defeat the object and purpose of the treaty.¹²⁷ Moreover, under the principle of *pacta sunt servanda*, States are obliged to keep their promises.¹²⁸

Customary international law consists of unwritten laws, and is established by acts of States that are consistent, repetitious, and undertaken with a conscious sense of a legal obligation to follow a certain practice (*opinio juris*).¹²⁹ Once a State practice reaches a consensus to which states feel legally obligated, a binding norm exists.¹³⁰ It is a generally accepted view that customary international law is binding on all nations, provided they have not expressly and persistently objected to the norm's development.¹³¹

The Universal Declaration, adopted as a U.N. General Assembly resolution, has no formal legally binding effect *per*

1144 U.N.T.S. at 152.

125. Article 38 of the Statute of the International Court of Justice lists the sources of international law as: international conventions (treaties); international custom (customary international law); general principles of law; and "judicial decisions and teachings of highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 3 Bevans 1179, 1187 [hereinafter I.C.J. Statute].

126. See BURGERS & DANIELIUS, *supra* note 101, at 7-8; see also Vienna Convention on the Law of Treaties, done May 23, 1969, arts. 11-15, 1155 U.N.T.S. 331, 335-336 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

127. See Vienna Convention, *supra* note 126, art. 18, 1155 U.N.T.S. at 336.

128. See *id.* art. 26, 1155 U.N.T.S. at 339.

129. See Suzanne M. Bernard, *An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners*, 25 RUTGERS L.J. 759, 762 (1994); *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20); I.C.J. Statute, *supra* note 125, art. 38(1)(b); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c (1987).

130. See Bernard, *supra* note 129, at 762.

131. See *id.*; *North Sea Continental Shelf*, 1969 I.C.J. at 41-44; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987).

se.¹³² However, it is the generally accepted view that the human rights principles expressed in the Universal Declaration have attained the status of customary international law, and as such are binding on all nations.¹³³ The Universal Declaration gave expression to the human rights principles contained in the U.N. Charter.¹³⁴ Thus, as an emanation of the U.N. Charter, the Universal Declaration provides common standards of conduct for all peoples and all nations.¹³⁵ As noted in one report on human rights, "[t]hrough practice over the years, the basic provisions of the Universal Declaration of Human Rights can be regarded as having attained the status of international customary law and in many instances they have the character of *jus cogens*."¹³⁶ Member states of the United Nations are bound to abide by the principles contained in the U.N. Charter, which are more fully expressed in the Universal Declaration.¹³⁷

Many of the principles laid out in the Universal Declaration are contained in subsequent treaties as codification of existing customary law: "The International Covenants on Human Rights give added conventional force to those provisions of the Universal Declaration of Human Rights which already reflect international customary law,"¹³⁸ which is particularly true for the right against torture or other cruel, inhuman or degrading treatment or punishment.¹³⁹ Under international law, states are bound not only by human rights treaties to which they are parties, but also by those provisions which have attained the status of customary international law.

For alien detainees seeking to challenge their living conditions under this principle, one issue to be addressed is whether international human rights law, either conventional or customary, is binding under U.S. domestic law.

132. See BASSIOUNI, *supra* note 104, at xxiv.

133. See *Preliminary Report*, *supra* note 123, at 8; BASSIOUNI, *supra* note 104, at xxiv; BURGERS & DANIELIUS, *supra* note 101, at 12.

134. *Preliminary Report*, *supra* note 123, at 8.

135. See *id.*

136. See *id.* *Jus cogens*, or peremptory norms, are those rules of international law of such fundamental importance that no derogation from them is permitted. See NEWMAN & WEISSBRODT, *supra* note 99, at 270 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987)).

137. See *Preliminary Report*, *supra* note 123, at 9.

138. *Id.*

139. See *id.* at 8; BURGERS & DANIELIUS, *supra* note 101, at 12.

C. *International Law and United States Law*

Although States are bound by international law, how they incorporate it into their own law is a matter of domestic policy. Under the dualist theory of international and national law, the two systems are viewed as entirely distinct.¹⁴⁰ International law is viewed as a body of law applicable between sovereign states, while national law is applicable within a state, regulating the relations of its citizens with the executive power.¹⁴¹ Under the monist theory, international law and national law are concomitant aspects of one system.¹⁴² Where conflicts between the two arise, international law prevails.¹⁴³ A monist model requires national law to comport with international law.¹⁴⁴

The United States has aspects of both theories. It is monist in the sense that the U.S. Constitution considers treaties to be the supreme law of the land,¹⁴⁵ while in practice, a dualist model emerges through the doctrine of self-executing treaties—treaties must be implemented by federal legislation in order to be incorporated into U.S. domestic law.¹⁴⁶

1. Treaties in U.S. Law

A treaty accepted by the United States is the supreme law of the land, of equal status to federal statutes.¹⁴⁷ Where there is a conflict between a treaty and the Constitution, however,

140. See BURNS H. WESTON ET AL., *INTERNATIONAL LAW AND WORLD ORDER* 172 (2d ed. 1990) (citing ACADEMY OF SCIENCE OF THE U.S.S.R., *INTERNATIONAL LAW* 14-15 (D. Ogden trans., 1961)).

141. See *id.* at 175 (citing IAN F. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 33-35 (3d ed. 1979)).

142. See *id.*

143. See *id.*

144. See *id.* at 174 (citing *Note on Ying Tao, "Recognize the True Face of Bourgeois International Law from a Few Basic Concepts,"* in 1 J. COHEN & H. CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW* 104-05 (1974)).

145. U.S. CONST. art. VI, cl. 2.

146. See *Foster v. Nielsen*, 27 U.S. (2 Pet.) 253, 314 (1829).

147. The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

the Constitution will prevail.¹⁴⁸ Where a conflict exists between a treaty and federal legislation, the last in time prevails.¹⁴⁹ Where a later federal statute conflicts with an existing treaty, it is presumed that Congress does not intend to override the treaty, and courts will construe both so as to give effect to both.¹⁵⁰ However, the "last in time rule" applies only to self-executing treaties, i.e., those that operate by themselves and require no implementing legislation.¹⁵¹

2. Doctrine of Self-Executing Treaties

Courts have developed a doctrine that only self-executing treaties are judicially enforceable.¹⁵² The doctrine, originated by Justice Marshall in *Foster v. Nielsen*,¹⁵³ states that a treaty is self-executing and hence "equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."¹⁵⁴ The effect of this doctrine is that while the United States is still bound to its treaties under international law, non-self-executing treaties will not be deemed to confer a private cause of action and hence, will not be enforced in a U.S. court.¹⁵⁵

3. Customary International Law in U.S. Law

Since the Supreme Court decided *The Paquete Habana*,¹⁵⁶ it is well-settled that customary international law is part of U.S. domestic law.¹⁵⁷ The Court in *The Paquete Habana* stated:

International law is part of our law, and must be ascertained

148. See *Reid v. Covert*, 354 U.S. 1, 17 (1957) (determining that treaties must comply with the Constitution).

149. See *id.* at 18; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) cmt. a (1987).

150. See NEWMAN & WEISSBRODT, *supra* note 99, at 575.

151. See *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 314 (1829).

152. See NEWMAN & WEISSBRODT, *supra* note 99, at 579.

153. 27 U.S. (2 Pet.) 253, 314 (1829).

154. *Id.*

155. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (per curiam) (Bork, J., concurring).

156. 175 U.S. 677 (1900).

157. See Eric George Reeves, Comment, *United States v. Javino: Reconsidering the Relationship of Customary International Law to Domestic Law*, 50 WASH. & LEE L. REV. 877, 877 & n.1 (1993).

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 nations¹⁵⁸

The Alien Tort Statute¹⁵⁹ also incorporates international law into domestic law. It states, "The district courts shall have original jurisdiction of 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."¹⁶⁰ Where there is no treaty at issue, courts have interpreted "law of nations" to include customary international law.¹⁶¹

There is little controversy that the U.S. Constitution prevails over a conflicting rule of customary international law.¹⁶² However, there is considerable debate whether a federal statute prevails over a conflicting customary norm, and it is unclear whether the "last in time" rule applies in this area.¹⁶³

As set forth below, an alien detainee's best argument for challenging detention conditions would be one grounded in customary international law.

IV. INTERNATIONAL HUMAN RIGHTS LAW AS A BASIS FOR CHALLENGING DETENTION CONDITIONS

The statutory framework of U.S. immigration law, together with constitutional jurisprudence involving aliens have, in effect, left refugees with no legal foundation on which to base a claim that challenges their conditions of confinement. This

158. *The Paquete Habana*, 175 U.S. at 700.

159. 28 U.S.C. § 1350 (1994).

160. *Id.* (emphasis added).

161. *See* *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (resorting to customary international law in determining whether cause of action exists under Alien Tort Statute); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1538 (N.D. Cal. 1987) (*Forti I*) (using international torts in violation of customary international law as basis for cause of action under Alien Tort Statute).

162. *See* *Reeves*, *supra* note 157, at 877.

163. *See id.* *Reeves* offers a detailed analysis of the relationship of customary international law to other forms of federal law, and posits that the Second Circuit is the first federal appeals court to suggest that customary international law may override a federal statute. *See id.* at 879 (discussing *United States v. Javino*, 960 F.2d 1137 (2d Cir. 1992)).

note argues that international human rights law—specifically the principle prohibiting cruel, inhuman or degrading treatment—provides the only meaningful substantive basis for refugees in challenging their detention conditions.

A. *The Failure of U.S. Law to Respond*

Jurisprudence in the United States has left refugees with little, if any, constitutional protection against inhumane detention conditions. This limited protection is due, in part, to refugees' classification as "excludable" under U.S. immigration law, but mainly, as posited by Professor Margaret Taylor, to the "plenary power doctrine" adopted by courts in giving extreme deference to the other governmental branches in immigration matters.¹⁶⁴

Detainees in immigration jails can be classified under two categories: "excludable" and "deportable" aliens. An alien is excludable under the INA if she or he has not made an actual entry into the United States.¹⁶⁵ Refugees seeking to enter the United States for the first time fall into the excludable category of aliens.¹⁶⁶ Aliens who are apprehended at U.S. borders, such as a refugee arriving at an airport, have not technically "entered" the country, even though they are on U.S. soil and are physically detained within U.S. borders under custody of the INS.¹⁶⁷ Deportable aliens, on the other hand, are those who have already entered the United States, either by permission or through illegal means.¹⁶⁸ A lawfully admitted alien is subject to deportation for reasons set forth in the INA, such as

164. See Taylor, *supra* note 45, at 1127. While several provisions of the U.S. Constitution, i.e., the Fifth, Eighth, and Fourteenth Amendments, seemingly provide the substantive basis necessary for challenging detention conditions, jurisprudence in the alien context has effectively redefined the substantive law to limit the protections available to excludable aliens. See *id.* at 1127-57.

165. See 8 U.S.C. § 1182(a) (1994).

166. See Taylor, *supra* note 45, at 1095.

167. See *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1988) (detention of aliens in custody pending determination of their admissibility does not constitute legal entry, despite their physical presence within the United States); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953) (excludable aliens are treated "as if stopped at the border" even when they are paroled or confined within the United States).

168. See 8 U.S.C. § 1251(a); *Jean v. Nelson*, 727 F.2d 957, 961 n.1 (11th Cir. 1984).

criminal conduct.¹⁶⁹ Those who have entered or remain in the United States illegally are also subject to deportation.¹⁷⁰

The distinction is significant in the immigration context, as deportable aliens generally enjoy a broader framework of procedural safeguards than those available to excludable aliens with respect to their status, their deportability, and their length of detention.¹⁷¹ Moreover, deportable aliens have greater constitutional protections than excludable aliens.¹⁷² In fact, it has been asserted that excludable aliens, because they have not "entered" the United States, are "constructively outside the Constitution's jurisdictional reach."¹⁷³ The irony behind this framework is that those who have presented themselves to immigration officials upon arrival are afforded less protection than those who have surreptitiously crossed the border. However, deportable and excludable aliens are alike in two respects. First, as noted by Professor Taylor, they are not subject to penal incarceration.¹⁷⁴ Although deportable aliens are not typically detained unless they are awaiting deportation for criminal conduct,¹⁷⁵ their detention occurs after they have served their sentences. They are not charged with a crime while detained for purposes of deportation.¹⁷⁶ Likewise, excludable aliens are not charged with a crime. Their only "offense" is arriving at U.S. borders without valid documentation.¹⁷⁷ Second, deportable and excludable aliens share one classification for international human rights purposes: they are human beings. As such, they are entitled to respect for the

169. See 8 U.S.C. § 1251(a); Taylor, *supra* note 45, at 1096.

170. See 8 U.S.C. § 1252; Taylor, *supra* note 45, at 1096.

171. For example, detained deportable aliens may petition an immigration judge to redetermine their custody status; must be released after six months of a final deportation order; and may claim procedural due process protection. See Taylor, *supra* note 45, at 1097.

172. See *id.*

173. Kemple, *supra* note 11, at 1756; see *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953). With respect to detention itself, the Fourth and Eleventh Circuits have adopted the position that excludable aliens have no constitutional rights whatsoever regarding their detention. See Kemple, *supra* note 11, at 1742-43; *Palma v. Verdeyen*, 676 F.2d 100, 104 (4th Cir. 1982); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1447-48 (11th Cir. 1986).

174. Taylor, *supra* note 45, at 1098.

175. See *id.* at 1097.

176. See *id.* at 1098 n.59.

177. See 8 U.S.C. § 1182(a)(20) (1994).

"inherent dignity and worth of the human person."¹⁷⁸

The limited rights of aliens due to their excludable status are augmented by the adoption by U.S. courts of the plenary power doctrine, which has "silently and improperly infiltrated some cases adjudicating the conditions claims of aliens in immigration detention,"¹⁷⁹ resulting in a "realm where the Constitution does not always apply."¹⁸⁰ The basic premise of this doctrine is that the congressional and executive branches should be given extreme deference in their authority over immigration matters.¹⁸¹ Professor Taylor suggests that this doctrine, rooted in the "racist backlash against Chinese laborers" in the nineteenth century, continues to permeate immigration law, despite remarkable strides in constitutional law throughout the twentieth century.¹⁸²

In the 1950s the Supreme Court denied due process to aliens who were excluded by the Attorney General without a hearing.¹⁸³ In both cases, the court held that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."¹⁸⁴ Although the primary issue in these cases was whether an excludable alien possessed due process rights with respect to the decision to admit or exclude the alien, the broad language of these holdings has tended to be applied to the issue of detention itself.¹⁸⁵ In *Fernandez-Roque v. Smith*, the Eleventh Circuit stated that continued incarceration of excludable aliens does not deprive them of a liberty interest because they have no right to admission in the first place.¹⁸⁶ The Fourth Circuit adopted this reasoning, holding that excludable aliens can be detained indefinitely as part of the exclusion process.¹⁸⁷ Indeed, as noted by Professor Taylor, the broad language in *Knauff* and *Mezei* has

178. U.N. CHARTER preamble.

179. Taylor, *supra* note 45, at 1127.

180. *Id.*

181. *See id.* at 1128.

182. *Id.* at 1129.

183. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-44 (1950); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 215 (1953).

184. *Shaughnessy*, 345 U.S. at 212 (quoting *Knauff*, 338 U.S. at 544).

185. One commentator suggested that "the caging of aliens within U.S. prisons is viewed as part and parcel of an application for admission, with the resulting infliction of human suffering abstracted away." Kemple, *supra* note 11, at 1756.

186. *See Fernandez-Roque v. Smith*, 734 F.2d 576, 582 (11th Cir. 1984).

187. *See Palma v. Verdeyen*, 676 F.2d 100, 104 (4th Cir. 1982).

"opened the door for government officials to argue that excludable aliens in their custody 'possess no constitutional rights' to challenge abusive treatment or inhumane detention conditions."¹⁸⁸

Other courts have limited the scope of the plenary power doctrine. In *Rodriguez-Fernandez v. Wilkinson*, the Tenth Circuit held that the Attorney General lacked the authority to detain excludable aliens beyond "a reasonable period of negotiations for their return to the country of origin."¹⁸⁹ After that period, such aliens are entitled to release.¹⁹⁰ This reasoning was adopted by the First Circuit in *Amanullah v. Nelson*.¹⁹¹ Beyond the issue of detention itself, recent cases have limited the scope of the plenary power doctrine and have afforded excludable aliens constitutional protection to challenge the conditions of their confinement.¹⁹² *Jean v. Nelson*,¹⁹³ a class action case involving Haitian refugees, added strength to the plenary power doctrine,¹⁹⁴ but it also recognized that aliens "can raise constitutional challenges . . . outside the context of entry or admission, when the plenary authority of the political branches is not implicated."¹⁹⁵ Surely one would be hard pressed in arguing that the inhumane treatment of alien detainees is entitled to deferential treatment by the judiciary.¹⁹⁶ Indeed, the "boundary of the plenary power doctrine" proffered by Professor Taylor was defined in *Lynch v. Cannatella*,¹⁹⁷ a Fifth Circuit case involving excludable aliens who claimed severe mistreatment while in custody. Recognizing that excludable aliens had limited constitutional rights with respect to immigration matters, the Fifth Circuit nevertheless concluded that the precedent of the plenary power

188. Taylor, *supra* note 45, at 1132.

189. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1389 (10th Cir. 1981).

190. *See id.* at 1390.

191. 811 F.2d 1, 9 (1st Cir. 1987).

192. *See Taylor, supra* note 45, at 1143.

193. 727 F.2d 957 (11th Cir. 1984) (en banc).

194. *See id.* at 984 (finding that excludable aliens cannot make equal protection challenges to the decisions of executive officials with regard to their applications for admission, asylum, or parole).

195. *Id.* at 972.

196. *See Taylor, supra* note 45, at 1132 nn.231-32 (citing cases that have recognized, in dicta or dissenting opinions, the outer limits of the plenary power doctrine as applied to conditions of confinement).

197. 810 F.2d 1363 (5th Cir. 1987).

doctrine "does not limit the right of excludable aliens detained within United States territory to humane treatment."¹⁹⁸ While simultaneously recognizing the underlying premise of the plenary power doctrine as a matter of sovereignty and self-determination,¹⁹⁹ the Fifth Circuit noted that sovereignty concerns are not threatened by entitling aliens to challenge their confinement conditions. The court stated that "we cannot conceive of any national interests that would justify the malicious infliction of cruel treatment on a person in United States territory simply because that person is an excludable alien."²⁰⁰ The court held, therefore, that "whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials."²⁰¹

For alien detainees subject to cruel and inhuman treatment, *Lynch* provided a glimmer of hope. Unfortunately, subsequent cases have undermined *Lynch's* promise by turning the language that condemned the actions of the defendants into a legal standard of proof. In order to state a viable due process claim, courts have required excludable aliens to show "malicious infliction of cruel treatment" or "gross physical abuse,"²⁰² a threshold higher than what is required for pretrial detainees and convicted prisoners.²⁰³ Thus, a standard rejected as too stringent by the Supreme Court for convicted prisoners challenging prison conditions under the Eighth Amendment²⁰⁴ leaves alien detainees with virtually no protection against inhumane treatment.

B. The Role of International Human Rights Law

As was stated in a report to the Economic and Security Council's Commission on Human Rights:

It is well established that all individuals are endowed with basic human rights which are inherent attributes of human

198. *Id.* at 1373; see Taylor, *supra* note 45, at 1145.

199. *Lynch*, 810 F.2d at 1373.

200. *Id.* at 1374.

201. *Id.*; see Taylor, *supra* note 45, at 1145.

202. See Taylor, *supra* note 45, at 1147-50.

203. See *id.* at 1151.

204. See *id.* at 1152-54.

dignity and which are recognized by virtue of international law that both recognizes and protects them. States, in turn, are obliged to ensure respect for those universally recognized human rights which are essential to the survival, dignity and well-being of all persons subject to their jurisdiction.²⁰⁵

Alien detainees should consider invoking international human rights law in challenging their detention conditions. Substantively the prohibition against cruel, inhuman or degrading treatment may rekindle the glimmer of hope bestowed upon excludable aliens by *Lynch*—that regardless of status, a person under U.S. jurisdiction is entitled to humane treatment. Unfortunately, U.S. courts have been reluctant to enforce international law, claiming that it belongs in the area of foreign policy, which is the prerogative of the executive and legislative branches.²⁰⁶ As a matter of comity, U.S. courts are reluctant to evaluate the legitimacy of actions undertaken by other nations²⁰⁷ lest a foreign nation sit in judgment of the U.S. government. Additionally, international law has traditionally been viewed as involving disputes between sovereign states, not individuals. With the development of human rights law, however, there is little question that the individual is an appropriate party to a dispute arising under international law.²⁰⁸

This part discusses the substantive provisions available to detainees in challenging their conditions of confinement, and suggests that U.S. courts directly incorporate these norms into domestic law, lest the promise of *Lynch* be lost forever.

205. *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights Resolution 1995/57*, U.N. ESCOR, Comm'n on Hum. Rts., 51st Sess., Prov. Agenda Item 9(d), at 6, U.N. Doc. E/CN.4/1996/52/Add.2 (1995) [hereinafter *Deng Report*].

206. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 815 (D.C. Cir. 1984) (per curiam) (Bork, J., concurring) (invoking political question doctrine as basis for refusing jurisdiction under international law claim); Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2281-83 (1991).

207. See Brilmayer, *supra* note 206, at 2281-82.

208. See BASSIOUNI, *supra* note 104, at xxiv. The author notes that:

These provisions [of the U.N. Charter] unequivocally assert the existence, primacy and direct applicability of internationally protected human rights in those national legal systems that have ratified the Charter, irrespective of traditional claims of sovereignty. Thus, these provisions have put to rest the question of whether the individual is a subject of international law.

Id.

1. Treaty Law

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)²⁰⁹ and the ICCPR²¹⁰ are two treaties that are applicable to the detention facility conditions; both treaties have been signed and ratified by the United States. The Torture Convention specifically deals with the prevention and punishment of acts of torture or other "cruel, inhuman or degrading treatment or punishment." Although the convention primarily focuses on torture, those provisions specifically dealing with torture are also applicable to "other acts of cruel, inhuman or degrading treatment or punishment."²¹¹ Acts prohibited by the convention are limited to acts "committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."²¹² Accordingly, the victims of such acts must be understood as persons "deprived of their liberty" or persons "who are otherwise under the factual power or control of the person responsible for the treatment or punishment."²¹³ The INS, as an arm of the U.S. Department of Justice, would qualify as a "public official or other person acting in official capacity."

The ICCPR confers a wide degree of individual human rights, among them the freedom from "torture or other cruel, inhuman or degrading treatment or punishment." contained in article 7.²¹⁴ The Human Rights Committee²¹⁵ stated that the principal purpose of article 7 is to "protect the integrity

209. Torture Convention, *supra* note 13, S. TREATY DOC. NO. 100-20, at 19, 23 I.L.M. at 1027.

210. ICCPR, *supra* note 13, SEN. EXEC. DOC. E, 95-2, at 23, 999 U.N.T.S. at 171.

211. Article 16(1) states: "[T]he obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment." Torture Convention, *supra* note 13, art. 16(1), S. TREATY DOC. NO. 100-20, at 23, 23 I.L.M. at 1031.

212. *Id.*, arts. 1, 16(1), S. TREATY DOC. NO. 100-20, at 19, 23; *see* BURGERS & DANIELIUS, *supra* note 101, at 20, 149.

213. *See* BURGERS & DANIELIUS, *supra* note 101, at 149.

214. ICCPR, *supra* note 13, art. 7, SEN. EXEC. DOC. E, 95-2, at 25, 999 U.N.T.S. at 175.

215. The Human Rights Committee is the body established under the ICCPR to monitor implementation of the Covenant's provisions. *See id.* art. 28, SEN. EXEC. DOC. E, 95-2, at 31, 999 U.N.T.S. at 179.

and dignity of the individual.”²¹⁶ For all persons deprived of their liberty, “article 7 is supplemented by the positive requirement of article 10(1) . . . that they shall be treated with humanity and with respect for the inherent dignity of the human person.”²¹⁷ The Human Rights Committee has stressed that “States parties should ensure that the principle stated [in article 10(1)] is observed in all institutions and establishments within their jurisdiction where persons are being held,”²¹⁸ and that “[t]reating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule.”²¹⁹

As U.S. treaties, these instruments have the status of the “supreme Law of the Land” under the Constitution,²²⁰ except that the United States, in ratifying the treaties, made specific declarations that they shall not be self-executing.²²¹ Since Congress has made its intent clear, it is certain that the courts will not enforce these treaties in a domestic action. Nevertheless, the United States is bound under international law to adhere to the obligations imposed on it by these treaties. To that end, the United States is required, at a minimum, to refrain from continuing its inhumane practices with respect to detainees.

Treaties, however, are not the only source of international law. Other sources are available, specifically customary international law, upon which to base a claim against detention conditions.

216. *Report of the Human Rights Committee, General Comment No. 7*, U.N. GAOR Hum. Rts. Comm., 37th Sess., Supp. No. 40, at 94, U.N. Doc. A/37/40 (1982).

217. *Id.* at 95.

218. *Deng Report*, *supra* note 205, at 33.

219. *Id.*

220. U.S. CONST. art VI, cl. 2.

221. See MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, STATUS AS AT 31 DECEMBER 1995, at 187, U.N. Doc. ST/LEG/SER.E/14, U.N. Sales No. E.96.V.5 (1996) [hereinafter MULTILATERAL TREATIES] (declaration of United States that provisions 1 through 16 of the Torture Convention are not self-executing); *id.* at 130 (declaration of United States that provisions 1 through 27 of the ICCPR are not self-executing).

2. Customary International Law

Customary law is a source of international law.²²² As stated earlier,²²³ customary international law is part of U.S. law. In *The Paquete Habana* stated that “[i]nternational 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 on it are duly presented for their determination.”²²⁴ The principles espoused by the Torture Convention and the ICCPR are codifications of already-existing customary law.²²⁵ Thus, as a matter of customary law, the prohibition against cruel, inhuman or degrading treatment should serve as a basis for enforcement of detention conditions through *The Paquete Habana* vehicle. However, the rule established under that case was modified by dictum indicating that before a claim based on custom would be entertained, there must be an absence of a treaty or controlling executive or legislative act.²²⁶ Some scholars argue that this dictum compels courts to apply domestic law over international custom, while others argue the primacy of customary law.²²⁷ Nevertheless, it can be argued that neither a “controlling executive or legislative act” nor a treaty exists that would prevent the application of customary law in the detention condition context.

Although the detention of excludable aliens is clearly within the realm of the executive and legislative branches,²²⁸ the mistreatment of detainees cannot plausibly be considered as the controlling executive or legislative act that bars the application of customary law. With respect to treaties, despite the fact that the United States signed and ratified the Torture Convention and the ICCPR, the United States’ declarations that those treaties are not self-executing might serve as an argument that no treaty exists. If the court is prohibited, by virtue of the declarations, from relying on a treaty, it is as if no treaty exists.

222. See I.C.J. Statute, art. 38, 59 Stat. 1055, 1060, 3 Bevans 1179, 1187.

223. See *supra* notes 157-61 and accompanying text.

224. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

225. See *supra* notes 134-39 and accompanying text; see also *infra* notes 237-45 and accompanying text.

226. *The Paquete Habana*, 175 U.S. at 700.

227. See Reeves, *supra* note 157, at 885-86.

228. See discussion *supra* Part IV.A.

Additionally, a reservation to the ICCPR serves as evidence that no applicable treaty exists. In its ratification to the ICCPR, the United States announced a reservation to article 7, stating:

[T]he United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.²²⁹

This reservation makes the treaty inapplicable because the U.S. Constitution itself is inapplicable to conditions in immigration detention centers for a number of reasons. First, excludable aliens have virtually no due process rights, as explained earlier. Second, the Eighth Amendment proscribes cruel and unusual *punishment*, whereas the ICCPR proscribes cruel, inhuman or other degrading *treatment* or punishment. The alien detainees are not in penal situations, and are not charged with a crime. Finally, the U.S. Supreme Court has held: "[t]he Eighth Amendment does not outlaw cruel and unusual '*conditions*'; it outlaws cruel and unusual '*punishments*.'"²³⁰

Because of the non-self-executing status of the Torture Convention and the ICCPR, and because of the limiting reservation to article 7 of the ICCPR, there is no treaty on which a court may rely in ascertaining and administering international law. Accordingly, "resort must be had to the customs and usages of civilized nations."²³¹ In order to invoke customary international law, however, it must first be established that "cruel, inhuman or degrading treatment" has been recognized as a customary norm.

In determining whether a rule has achieved the status of a customary norm, judges rely on the Supreme Court's enumeration of the sources of international law:²³² "[T]he law of nations . . . may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and

229. MULTILATERAL TREATIES, *supra* note 221, at 130.

230. Farmer v. Brennan, 511 U.S. 825, 837 (1994) (emphasis added).

231. See The Paquete Habana, 175 U.S. 677, 700 (1900).

232. See NEWMAN & WEISSBRODT, *supra* note 99, at 596.

enforcing that law."²³³ Courts will determine whether a standard has ripened into a "settled rule of international law"²³⁴ by interpreting international law as it has "evolved and exists among the nations of the world today."²³⁵

The Second Circuit in *Filartiga* has held that official torture violates international law.²³⁶ That court concluded:

In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.²³⁷

In determining that the proscription against torture was an established customary norm, the *Filartiga* court relied on the U.N. Charter and the Universal Declaration: "This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights"²³⁸ The court also relied on the international consensus condemning torture as evidenced in numerous international treaties and accords.²³⁹ The prohibition against "other cruel, inhuman or degrading treatment or punishment" was not at issue in *Filartiga*, and thus, the court did not address whether that prohibition is a customary norm. However, according to the Restatement (Third) of Foreign Relations Law, torture or other cruel, inhuman, or degrading treatment or punishment is recognized as a rule of customary international law.²⁴⁰

One court, in *Forti v. Suarez-Mason*, did address the issue of cruel, inhuman or degrading treatment, and found that the plaintiff had failed to establish "the requisite degree of international consensus which demonstrates a customary internation-

233. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

234. *The Paquete Habana*, 175 U.S. at 694.

235. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

236. *See id.* at 884.

237. *Id.* at 880.

238. *Id.* at 882.

239. *Id.* at 882.

240. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(d) (1987).

al norm"²⁴¹ with respect to his claims. The court further held that the norm lacks definability and readily ascertainable parameters.²⁴² On a motion to reconsider, the plaintiff presented evidence of numerous international instruments proscribing "cruel, inhuman or degrading treatment," the very same instruments that contain the proscription against torture.²⁴³ Nonetheless, the court was concerned with the lack of clear definition of the term in all the instruments. Conceding that the rule had achieved the *status* of a customary norm, the court ruled that it must be characterized by universal consensus in the international community, not only as to its status, but also as to its *content*, and dismissed the allegation.²⁴⁴

Courts should be wary in adopting the *Forti* court's reasoning with respect to the definability prong of determining a customary norm. Such reasoning ignores the purpose of the norm against cruel, inhuman or degrading treatment—to protect the integrity and dignity of the individual—and opens the door for the same type of substantive manipulation that quelled the promise under *Lynch*. The *Forti* court is correct in conceding that "cruel, inhuman and degrading treatment" has achieved the status of customary international law. In fact, the standard sits side by side with the prohibition against torture in all the major international instruments: i.e., "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."²⁴⁵ A court adopting the *Filartiga* methodology is unlikely to refute the existence of "cruel, inhuman or degrading treatment" as a customary international norm. However, the *Forti* court was mistaken in denying its existence as a customary norm for lack of definability.

241. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1543 (N.D. Cal. 1987).

242. *See id.*

243. *See Forti v. Suarez-Mason*, 694 F. Supp. 707, 711 (N.D. Cal. 1988) (*Forti II*).

244. *See id.* at 712.

245. Universal Declaration, *supra* note 12, art. 5; ICCPR, *supra* note 13, art. 7, SEN. EXEC. DOC. E, 95-2, at 25, 999 U.N.T.S. at 175; European Convention, *supra* note 13, art. 3, 213 U.N.T.S. at 224; American Convention, *supra* note 13, art. 5(2), SEN. EXEC. DOC. F, 95-2, at 42, 1144 U.N.T.S. 123, 146; Banjul Charter, *supra* note 115, art. 5, 21 I.L.M. at 60. The Torture Convention specifically applies those provisions against torture to other "cruel, inhuman or degrading treatment or punishment." Torture Convention, *supra* note 13, art. 16(1), S. TREATY DOC. NO. 100-20, at 23, 23 I.L.M. at 1031.

None of the international instruments noted above²⁴⁶ define "torture," yet the *Filartiga* and *Forti* courts had little difficulty in holding that its proscription was a customary international norm. In fact, the first formal definition of torture was produced in the Torture Convention, adopted four years after *Filartiga* was decided.²⁴⁷ The same should hold true for the prohibition against "cruel, inhuman or degrading treatment," since that prohibition appears in the same sentence as "torture" in all the major conventions. Moreover, the Eighth Amendment to the U.S. Constitution, which prohibits cruel or unusual punishment, is undefined, vague and lacks consensus, yet courts have entertained claims based upon the Eighth Amendment since its inception. While there has been some difficulty in precisely defining "cruel, inhuman or degrading treatment" in the human rights field, a fact-based analysis to the definition seems to have emerged.

For example, the ICCPR requires treatment "with humanity and with respect for the inherent dignity of the human person."²⁴⁸ The Human Rights Committee noted that the ICCPR does not contain any definition of the concepts covered by article 7,²⁴⁹ but it did not consider it necessary "to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied."²⁵⁰ The Committee stated, however, that the prohibition in article 7 relates "not only to acts that cause physical pain but also to acts that cause mental suffering to the victim."²⁵¹ For all people deprived of their liberty, article 7 is to be read in conjunction with article 10, requiring treatment with humanity and with respect for the inherent dignity of the human person.²⁵²

The European Court of Human Rights, in interpreting the

246. See generally those instruments cited in footnote 122.

247. See generally Torture Convention, *supra* note 13, S. TREATY DOC. NO. 100-20, at 23, 23 I.L.M. at 1027.

248. ICCPR, *supra* note 13, art. 10(1), SEN. EXEC. DOC. E, 95-2, at 26, 999 U.N.T.S. at 176.

249. See Report of the Human Rights Committee, General Comment No. 20, U.N. GAOR Hum. Rts. Comm., 44th Sess., at 1, 2, U.N. Doc. CCPR/C/21/Rev.1/Add.3 (1992).

250. *Id.*

251. *Id.* at 2.

252. See *id.* at 1.

scope of article 3 of the European Convention, made a distinction between the concepts of "torture" and "inhuman or degrading treatment," stating that the distinction comes principally from the different intensity of suffering inflicted.²⁵³ The court emphasized that the assessment of ill treatment is relative, depending on "all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc."²⁵⁴ "Inhuman" treatment was considered by the court to be anything that causes "if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto."²⁵⁵ "Degrading" treatment was considered to be treatment that "arouse[s] in . . . victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking down their physical or moral resistance."²⁵⁶ "Torture" constitutes an "*aggravated* and deliberate form of cruel, inhuman or degrading treatment or punishment."²⁵⁷

In a case involving corporal punishment,²⁵⁸ the European Court of Human Rights determined that judicial corporate punishment was "degrading" because:

although the [victim] did not suffer any severe or long-lasting physical effects, his punishment—whereby he was treated as an object in the power of the authorities—constituted an assault on precisely that which is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity.²⁵⁹

Finally, the Draft International Human Rights Conformity Act of 1993,²⁶⁰ which conforms U.S. law to the requirements of the ICCPR, states that cruel, inhuman or degrading treatment

253. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 66-67 (1978).

254. *Id.* at 65.

255. *Id.* at 66.

256. *Id.*

257. *Id.* at 67.

258. *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 4 (1978) (challenging the sentencing of a 15-year old boy to three strokes of a birch).

259. *Id.* at 16.

260. Draft International Human Rights Conformity Act of 1993, reprinted in Michael H. Posner & Peter J. Spiro, *Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1228 (1993).

or punishment "shall be given such content and definition by the courts of the United States as provided for by recognized authorities under governing principles of international law, and should depend on the kind, purpose, and severity of the particular treatment."²⁶¹

V. CONCLUSION

The current definitions of the norm make it clear that cases invoking "cruel, inhuman or degrading treatment" will be decided on a case-by-case basis. This type of analysis may be the key to successfully advancing a case. The first step in attempting a definition is quite simple: that individuals are entitled to respect for their human dignity. As with any type of law, the norm is subject to interpretation and change over time. That uncertainty in itself should not discourage the judiciary from hearing claims invoking the standard as an established rule of customary international law. As stated by Judge Rogers in *Fernandez v. Wilkinson*, "No country in the world has been more vocal in favor of human rights [than the United States]. It would not befit our history as a guarantor of human rights for our own citizens, to decline to protect unadmitted aliens against arbitrary governmental infringement of their fundamental human rights."²⁶²

The norm has clearly achieved the status of customary international law, and U.S. courts should agree to entertain claims based upon the norm on that basis alone. As stated in *Filartiga*, new norms must be applied as they emerge and evolve.²⁶³ One common element emerging from the international instruments on human rights and the adjudication of human rights norms is the protection of a person's inherent dignity. Although it may seem to be a rule without teeth, it will get some teeth when judges allow it to bite.

Barbara MacGrady

261. Draft International Human Rights Conformity Act of 1993 § 105(c), reprinted in Posner & Spiro, *supra* note 260, at 1230.

262. *Fernandez v. Wilkinson*, 505 F. Supp. 787, 799 (D. Kan. 1980); see Louis B. Sohn, *Can International Law Provide Extra-Constitutional Protection for Excludable Aliens?*, 21 GA. J. INT'L & COMP. L. 329, 344 (1991).

263. *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

