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IN THE AFTERMATH OF *SOERING*, IS INTERSTATE EXTRADITION TO VIRGINIA ILLEGAL?

International customary law not only governs the United States relations with other nations, but also governs the United States actions towards its own citizens.[1] Generally, international customary law is part of the United States federal common law and thereby governs federal common law questions in the absence of conflicting federal statutes.[2] One principle of international customary law is the prohibition of inhuman and degrading treatment or punishment.[3] The European Court of Human Rights (European Court) held in the *Soering Case*[4] that extradition from the United Kingdom of a young, mentally unstable prisoner to Virginia's death row would constitute inhuman and degrading treatment.[5] Following *Soering*, extradition of a person into potentially inhuman and degrading conditions may violate international customary law.[6] Federal common law, incorporating customary law, governs interstate extradition cases. Therefore, if the European Court in *Soering* is correct in stating that under some circumstances Virginia's death row inmates suffer inhuman and degrading treatment, a state may violate federal common law by extraditing a prisoner to Virginia.

In March 1985, Jens Soering, a German citizen, allegedly committed two homicides in Bedford County, Virginia.[7] The victims were the parents of Soering's girlfriend, Elizabeth Haysom.[8] Soering, who was eighteen at the time of the homicides, allegedly murdered Haysom's parents by inflicting multiple stabbings and slashes.[9] In October 1985, Soering and Haysom disappeared and eventually fled to England where British authorities apprehended them.[10]

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1. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (hereinafter RESTATEMENT) (stating that international customary law arises "from a general and consistent practice of states followed by them from a sense of legal obligation").

2. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (stating that international law is part of United States law); RESTATEMENT, *supra* note 1, § 111, comment d (stating that international customary law is federal common law); Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1556-67 (1984) (discussing generally how international customary law became part of federal common law); *See generally* Kirgis, *Agora: May the President Violate Customary International Law?*, 81 AM. J. INT'L. L. 371 (1987) (arguing that only self-executing custom becomes part of federal common law); Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L. L. 332 (1988) (defining self-executing custom).

3. *See infra* notes 46-118 and accompanying text (discussing prohibition against inhuman and degrading treatment as customary law).

4. 161 Eur. Ct. H.R. (ser. A.) (1989), *reprinted in* 28 I.L.M. 1063 (1989).

5. Soering Case, 161 Eur. Ct. H.R. (ser. A.) (1989), *reprinted in* 28 I.L.M. 1063 (1989).

6. *See infra* notes 119-41 and accompanying text (discussing extradition into potentially inhuman and degrading conditions as violation of customary international law).

7. *Soering*, 28 I.L.M. at 1071.

8. *Id.*

9. *Id.*

10. *Id.*

While in England, Soering admitted in a sworn statement to British authorities that he had killed Mr. and Mrs. Haysom.[11] Following a Virginia grand jury indictment of Soering on two charges of capital murder, the United States requested that Britain extradite Soering to the United States.[12] In response to the United States request, the British government sought assurances from the United States that Soering would not receive the death penalty.[13] In a sworn statement, the Bedford County prosecutor guaranteed that during the sentencing hearing a United States government representative would relate to the judge the United Kingdom's wish that the death penalty not be imposed or executed.[14] However, the prosecutor later affirmatively stated to United Kingdom officials that, although the representation concerning the United Kingdom's wishes would still be made to the sentencing judge, the prosecutor intended to seek the death penalty.[15]

On June 16, 1987, the Bow Street Magistrates Court decided to extradite Soering to Virginia.[16] Soering appealed to the Divisional Court arguing that he faced a substantial risk of receiving the death penalty if extradited to the United States.[17] During the appeals process in England, psychiatric evidence demonstrated that Soering suffered "profound psychiatric effects" because of his fear of the conditions on Virginia's death row.[18] The United Kingdom courts found the psychiatric evidence irrelevant and upheld the lower court's decision to extradite.[19]

On July 8, 1988, Soering filed an application with the European Commission of Human Rights (Commission).[20] Soering claimed that if he

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11. *Id.*

12. *Id.* at 1072. The United States requested Soering's extradition in accordance with the Extradition Treaty of 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468, stating "[E]ach Contracting Party undertakes to extradite to the other, in the circumstances and subject to the condition specified in this Treaty, and any person found in its territory who has been accused or convicted of any offence [specified in the Treaty and including murder], committed within the jurisdiction of the other party." *Id.* at 1076.

13. *Id.* at 1072.

14. *Id.* at 1073.

15. *Id.*

16. *Id.*

17. *Id.* at 1074.

18. *Id.* at 1075. The psychiatric evidence demonstrated that Soering's "dread of extreme physical violence and homosexual abuse from other inmates on death row in Virginia is . . . having a profound psychiatric effect on him." *Id.* The intensity of Soering's fear caused the psychiatrist who examined him to classify Soering as a suicide candidate. *Id.* Another psychiatrist determined that Soering had lost his identity due to Soering's dependence on an absorbing relationship with Haysom, whom the psychiatrist described as a psychotically disturbed young woman. *Id.* at 1074. In the psychiatrist's expert opinion, Soering was very suggestible and believed in Haysom's "psychotic delusions." *Id.* According to the psychiatrist, Soering was unable to question Haysom's judgment or the wisdom of her suggested course, because of the extreme influence she exerted over him. *Id.*

19. *Id.* at 1075.

20. *Id.* at 1088. *See* Soering Case, ____Eur. Comm'n. H.R. ____(1988) (application no. 14038/88) (setting out European Commission of Human Rights opinion concerning Soering's application).

received the death penalty, he would suffer inhuman and degrading treatment due to the "death row phenomenon."[21] Soering alleged that because extradition would expose him to inhuman and degrading treatment, extradition would violate the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).[22] Although the United Kingdom is a party to the European Convention, the United States is not.[23] Because the Commission failed to satisfactorily solve the extradition problem, the Commission, the United Kingdom, and the Republic of Germany referred the *Soering Case* to the European Court.[24]

The main issue before the European Court was whether Soering's extradition to Virginia would violate article three of the European Convention.[25] Article three states, "No one shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."[26] Soering alleged that extradition to Virginia would violate article three because, if extradited, Soering risked receiving the death penalty and subsequent exposure to inhuman degrading punishment on Virginia's death row.[27] In determining whether extradition would violate article three, the European Court considered several factors including the probability that Soering would receive the death penalty, alleged conditions on Virginia's death row, and Soering's age and mental condition.[28] After examining the evidence and Virginia law of capital murder, the European Court concluded that Soering faced a significant risk of receiving the death penalty and of being incarcerated on Virginia's death row.[29]

The European Court stated that in cases containing an article three issue, treatment against an individual must reach a certain level of severity before the court will classify the treatment as inhuman and degrading.[30] To

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21. *Soering*, 28 I.L.M. at 1084, 1090. The death row phenomenon is the lengthy stay of prisoners on death row and the heightened level of anxiety accompanying impending death. *Id.* In Virginia, the average time between trial and death is six to eight years. *Id.* at 1084. During the six to eight years a prisoner may be sent to the death house several times. *Id.* at 1086.

22. *Id.* at 1088.

23. *Id.* In addition to claiming that extradition violates the prohibition against inhuman and degrading treatment contained in article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), Soering also claimed that extradition to the United States would violate article 6 § 3 of the European Convention on appeal in Virginia. *Id.* In addition, Soering claimed that the lack of remedy available in the United Kingdom for breach of article 3 was a breach of article 13 of the European Convention. *Id.*

24. *Id.* at 1069.

25. *Id.* at 1088, 1101-04 (listing Soering's claims and showing European Court's quick disposal of Soering's article 6 § 3 and article 13 claims).

26. Convention for the Protection of Human Rights and Fundamental Freedoms, § 1, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

27. *Soering*, 28 I.L.M. at 1090.

28. *See infra* notes 29-44 and accompanying text (discussing likelihood Soering would receive death penalty, conditions on Virginia's death row, and Soering's youth and mental condition).

29. *Soering*, 28 I.L.M. at 1094-95.

30. *Id.* at 1096.

determine severity, the European Court stated that the court considers such factors as the nature and context of the treatment, both the mental and physical effects, and, in certain cases, age, sex, and health of the prisoner.[31] According to the European Court, for the punishment to be classified as inhuman and degrading, suffering experienced in connection with punishment for a crime must exceed the amount of suffering and humiliation normally associated with legitimate punishment.[32] The European Court emphasized that the court also considers mental anguish experienced by a prisoner in his anticipation of the execution of the punishment.[33]

In determining whether treatment on Virginia's death row would constitute inhuman and degrading treatment for Soering, the European Court found that in Virginia a person sentenced to death will spend an average of six to eight years on death row.[34] Although the European Court admitted that delays normally are due to a defendant's appeals, the court reasoned that part of the survival instinct of human nature is to take advantage of the appeals process.[35] Consequently, the safeguards intended to insure that sentencing judges and juries do not lightly impose the death penalty, extend the periods of mental anguish preceding execution.[36]

After examining the conditions on Virginia's death row, the European Court concluded that the severity of the regime at Mecklenburg Correctional Center, Virginia's death row, plus the extended length of a prisoner's stay, increased the degree of severity to a level approaching inhuman and degrading.[37] Among the conditions the European Court found objectionable were the waist shackles that prisoners must wear when the prisoners move about the prison and the small size of the prison cells.[38] Additionally, the European Court noted that Mecklenburg periodically conducts "lockdowns" that last approximately one week.[39] During lockdowns inmates are confined to their cells,[40] and recreation is halted completely.[41] The European Court found the lengthy detention of prisoners on death row combined with the mental effects caused by knowledge of impending execution to be the most objectionable circumstances.[42]

The European Court determined that the strict security at Mecklenburg and the prolonged mental anguish preceding execution, combined with

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31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 1098.
35. *Id.*
36. *Id.*
37. *Id.* at 1085, 1099. Mecklenburg Correctional Center is a maximum security prison with a capacity for 335 inmates. *Id.* at 1085. The European Court examined the conditions at Mecklenburg because the majority of persons facing the death penalty in Virginia are held in that facility. *Id.* at 1099.
38. *Id.* at 1085.
39. *Id.* at 1086.
40. *Id.*
41. *Id.*
42. *Id.*

Soering's youthfulness and disturbed mental state, brought the conditions at Mecklenburg within the article three provision prohibiting inhuman and degrading treatment.[43] The European Court further noted that Soering faced a real risk of inhuman and degrading treatment on Virginia's death row if extradited.[44] The European Court held, therefore, that the United Kingdom's extradition of Soering to Virginia would itself violate article three of the Convention.[45]

The *Soering Case* required the interpretation of a treaty provision prohibiting inhuman or degrading conditions.[46] The prohibition against inhuman and degrading conditions is also part of the unwritten rules of law that nations follow.[47] Such rules commonly are referred to as customary international law.[48] As part of customary international law, the prohibition against inhuman and degrading treatment could prevent a nation from extraditing a prisoner even though no specific treaty provision prohibiting extradition existed.[49]

Customary international law normally arises through consistent state practice, supported by *opinio juris*.[50] *Opinio juris* means that the nations feel a legal obligation to comply with the practice in question.[51] State practice need not be entirely consistent for a court to find an international custom.[52] Therefore, merely because some nations treat prisoners in an

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43. *Id.* at 1100.

44. *Id.* at 1100-01.

45. *Id.* at 1100.

46. *See supra* notes 20-22 and accompanying text (discussing Soering's allegation that extradition would violate article three of European Convention).

47. *See infra* notes 48-118 and accompanying text (examining prohibition against inhuman and degrading treatment as part of customary international law).

48. *See* G. SCHWARZENBERGER AND E. BROWN, A MANUAL OF INTERNATIONAL LAW 26 (6th ed. 1976) (stating that customary law refers to general practices of nations that nations accept as law). *See generally* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4-10 (4th ed. 1990) (defining and generally discussing sources of customary law).

49. *See infra* notes 119-42 and accompanying text (explaining that extradition may violate customary law prohibiting inhuman and degrading treatment).

50. *See* RESTATEMENT, *supra* note 1, § 102(2) (defining customary international law as law resulting from general and consistent practice of nations followed by nations from sense of legal obligation); Weisburd, *Customary International Law: The Problem of Treaties* 21 VAND. J. TRANSNAT'L. L. 1, 6 (1988) (noting that customary law exists if consistent state practice and *opinio juris* are present).

51. *See* Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 277 (stating that custom exists only if nations act from sense of duty); Case of the S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 1, 28 (Sept. 7) (explaining that custom exists if nations feel duty-bound to abstain from certain practice); Weisburd, *supra* note 50, at 7 (stating that *opinio juris* exists if state believes state has legal obligation to obey custom in question).

52. *See* Paquete Habana, 175 U.S. 677 (1900) (illustrating that state practice need not be entirely consistent for custom to exist). In *Paquete Habana*, the Court stated that England and France did not always refrain from capturing fishing vessels during war, nor did they always feel their duty was to exercise such restraint. *Id.* at 691-93. However, the United States Supreme Court found it significant that the countries had acknowledged and abided by the rule for the one hundred years preceding the case. *Id.* at 694.

inhuman and degrading manner does not mean a custom against such treatment does not exist. Instead, custom still may exist if most nations refrain from imposing such ill treatment, and most nations feel a duty to refrain from exposing prisoners to inhuman and degrading treatment.

Historically, courts have used treaty law, executive orders, judicial decisions, statutes, and the views of legal scholars to determine the existence of state practice and *opinio juris*.[53] Two of the most important sources that authorities use as supporting evidence of a human rights custom are treaties and declarations.[54] Use of treaty terms as evidence of custom is different from use of treaty terms to bind nations that are parties to the treaty.[55] When a treaty term demonstrates the existence of custom, the custom is binding on all nations, whether the nations are parties to the treaty or not.[56] The content of the provision would be binding not because the provision is part of a treaty, but because the provision states a practice recognized by the nations as custom.[57] A treaty may provide evidence of customary law in three ways. First, the treaty may codify preexisting custom. Second, the treaty may have crystallized an already forming custom. Finally, the treaty may act as a progenitor of custom.[58] When a treaty codifies preexisting custom, the treaty itself may state that the treaty is a codification of the custom. If a treaty crystallizes an already forming custom, some state practice and *opinio juris* will exist prior to the treaty and will increase after

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53. *See Paquete Habana*, 175 U.S. at 700 (emphasizing that courts should look to works of scholars to find evidence of customary law); United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (explaining that law of nations can be determined by looking to works of jurists, practice of nations, and judicial decisions); I. BROWNLIE, *supra* note 48, at 5 (naming fourteen sources of customary law including diplomatic correspondence, official policy statements, executive orders, judicial decisions, legislation, treaties, and United Nations General Assembly resolutions).

54. *See* A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 113-38 (1971) (examining importance of treaties in judicial decisions); Bleicher, *The Legal Significance of Re-citation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444, 449-51 (1969) (arguing that resolutions in some cases state or create customary law and supply evidence of international *opinio juris*); Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 300 (1968) (stating that treaties are often cited as evidence of customary international law and explaining probative force of treaties); *but see* M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 26-27 (6th ed. 1987) (questioning utility of treaties and declarations as evidence of customary law).

55. *See* R. LILLICH AND F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY (1979) (explaining that nonsignatory states are bound by customary law rules incorporated into treaties, not by treaties themselves).

56. *See* Weisburd, *supra* note 50, at 3 (stating "In the highly codified humanitarian law context, the primary and the most obvious significance of a norm's customary character is that the norm binds states that are not parties to the instrument in which that norm is restated").

57. *See* North Sea Continental Shelf Cases (Fed. Rep. Ger. v. Den. and Neth.), 1969 I.C.J. 4, 38 (asserting that treaty terms that state customary law bind nations who are not parties to treaty).

58. *See id.* at 41 (stating that if treaty term neither codifies nor crystallized customary law, treaty may still act as progenitor of custom).

the treaty. The practice may exist among nations that have signed the treaty and nations that have not. The important point is that the practice should be the product of an obligation felt by the state, not motivated out of convenience or mere courtesy. As a progenitor of custom, the treaty will declare the law as it should be, and the rule will become widely practiced and recognized by affected states.

In addition to state practice, the subject matter and structure of a treaty may also be important in ascertaining whether the treaty establishes custom.[59] If the treaty allows reservations[60] to the term proposed as custom, then the treaty is not good evidence of custom.[61] If several treaties repeat the treaty term and the term is nonderogable, a tribunal is much more likely to determine that the treaty term demonstrates the existence of custom.[62]

An examination of human rights treaties reveals that several treaties prohibit inhuman and degrading treatment.[63] These treaty prohibitions are nonderogable and absolute.[64] Treaty provisions that prohibit inhuman and degrading treatment appear to be representative of custom but are difficult to categorize.[65] Whether the provision against inhuman and degrading

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59. *See infra* notes 60-62 and accompanying text (explaining that nonderogable terms and repetition of terms in several treaties increases likelihood that terms represent custom).

60. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(d), U.N. Doc. A/Conf. 39/27, U.N. Sales No. E.70.V.6 (1969), *reprinted in* 63 AM. J. INT'L L. 875 (1969). A reservation is a clause added to the end of a treaty by a signing party, which excepts the party from certain duties or modifies the party's obligations under the treaty. *Id.*

61. *See North Sea Continental Shelf Cases*, 1969 I.C.J. at 39-40 (stating that treaty provisions that allow reservations cannot represent custom because obligations of custom apply equally to all nations).

62. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (finding evidence of custom against torture through repetition of treaty terms prohibiting torture and through nonderogable nature of treaty terms).

63. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 7, 999 U.N.T.S. 171 (stating that no person should be subjected to cruel, inhuman or degrading treatment or punishment); European Convention, *supra* note 26, art. 3 (same); American Convention on Human Rights, Nov. 22, 1969, art 5(2), O.A.S.T.S. No. 36, *reprinted in* 9 I.L.M. 673 (1970) (same); Banjul Charter on Human and Peoples' Rights, June 27, 1981, art. 5, Organization of African Unity Document CAB/LEG/67/3/Rev.5, (1981) *reprinted in* 21 I.L.M. 58,59 (1982) (stating that all forms of exploitation and degradation of man are prohibited, including inhuman and degrading treatment); Declaration of the Basic Duties of ASEAN Peoples and Governments, Dec. 9, 1983, art. 10, *reprinted in* A. BLAUSTEIN, R. CLARK, J. SIGLER, HUMAN RIGHTS SOURCE BOOK, 646, 654-57 (1987) (prohibiting cruel and degrading treatment or punishment).

64. *See* Ireland v. United Kingdom, 1976 Y.B. EUR. CONV. ON HUM. RTS. 602, 752 (holding that under article three of European Convention, emergency situations cannot justify application of torture); Tyrer Case, 1978 Y.B. EUR. CONV. ON HUM. RTS. 612, 616 (stating that degrading punishment in violation of European Convention article three is never justified under European Convention even if government demonstrates that law and order cannot be maintained without using degrading punishment); Banjul Charter on Human And Peoples' Rights, *supra* note 63 (containing no reservation clauses); P. SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 161 (1982) (asserting that many treaties allow no derogation from prohibition against inhuman and degrading treatment).

65. *See* Declaration of the Basic Duties of ASEAN Peoples' and Governments, *supra*

treatment codified an already existing custom or acted as a progenitor of custom is unclear, because pinpointing exactly when a custom comes into existence is difficult. Standing alone, the existence of treaty terms containing the prohibition against inhuman and degrading treatment does not definitively prove that the prohibition is part of customary law. However, the repetition of the terms throughout many treaties and the widespread support that these treaties enjoy is certainly strong evidence of a custom prohibiting inhuman and degrading treatment.[66]

In addition to treaties, United Nations General Assembly resolutions sometimes provide evidence of international customary law.[67] International tribunals have used United Nations declarations as evidence of customary law, and the International Court of Justice has stated that consent to authoritative General Assembly Resolutions is evidence of a nation's *opinio juris*.[68] In the area of expropriations decisions made by arbitrators, arbitrators have stated that United Nations Resolution 1803 (Resolution 1803), which provides a scheme for compensation in expropriation cases, reflects

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note 62 (exhibiting strong evidence of custom against inhuman and degrading treatment). The ASEAN declaration states principles in terms of duties instead of rights. *Id.* For instance, article 10 states "It is the duty of government, under any and all circumstances, to refrain from engaging in or authorizing torture, other cruel and degrading treatment or punishment, unexplained disappearances and extra-legal execution, and to take steps to eliminate such practices by others." *Id.*

66. *See* International Covenant on Political and Civil Rights, *supra* note 63 (consisting of 89 members as of Jan. 1, 1990); European Convention, *supra* note 26 (consisting of 23 members as of Nov. 8, 1989); American Convention on Human Rights, *supra* note 63 (consisting of 21 members as of Jan. 1, 1990); Banjul Charter on Human and Peoples' Rights, *supra* note 63 (consisting of 38 members as of Jan. 1, 1990); Declaration of the Basic Duties of ASEAN Peoples and Governments, *supra* note 63 (consisting of six members as of 1987).

67. *See* I. BROWNLIE, *supra* note 48, at 14-15 (stating that resolutions can serve as evidence of customary law and enumerating important "law-making" resolutions); M. AKEHURST, *supra* note 54, at 27 (stating that resolutions that address general international law norms sometimes are evidence of custom); G. VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 20 (4th ed. 1981) (asserting that resolutions may serve as first phase in development of new rules of customary international law); J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 50-51 (9th ed. 1984) (stating that resolutions may lead to formation of international custom).

Several United Nations Declarations contain prohibitions against inhuman and degrading treatment. *See* U.N. Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, G.A. Res. 40/144 (1985), art. six (stating "No alien shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); Code of Conduct for Law Enforcement Officials (1979) G.A. Res. 34/169, 34 U.N. GAOR (Supp. No. 46) at 185, U.N. Doc. A/34/36 (1979), article five (stating "No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman, or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances . . . or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment").

68. *See* Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 25 (stating that consent to authoritative General Assembly Resolutions is evidence of nation's *opinio juris*).

customary law.[69] One arbitrator relied on the fact that Resolution 1803 had been accepted by consensus and by a broad range of interested members.[70] Therefore, precedent exists for accepting United Nations declarations as reflective of customary law.

As further evidence that resolutions may state customary law, a United States court of appeals has stated that the Universal Declaration of Human Rights (UDHR), a United Nations resolution, reflects international customary law and is binding on the United States.[71] The UDHR is a declaration of the United Nations General Assembly that codified the United Nations view of how nations should treat citizens and aliens.[72] At the time of the UDHR's adoption, the United Nations General Assembly did not view the UDHR as a codification of customary law.[73] Over time, however, many scholars have come to view the UDHR as reflective of custom.[74] In order for the UDHR or any other United Nations declaration to provide evidence

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69. *See* Sedco, Inc. v. National Iranian Oil Co., 10 Iran-U.S. C.T.R. 180, 25 I.L.M. 629, 634 (1986) (stating that Resolution 1803 reflects customary international law and referring to 1803 in determining what type of compensation complies with custom); Libyan American Oil Co. v. Libyan Arab Republic, 20 I.L.M. 1, 67 (1981) (stating that Resolution 1803 is evidence of international opinion and awarding compensation for expropriation in accordance with Resolution 1803); Texaco Overseas Petroleum Co./ California Asiatic Oil Co. v. Libyan Arab Republic, 17 I.L.M. 1, 30 (1977) (stating that Resolution 1803 reflects state of customary law in field of expropriations).

70. *See* Texaco Overseas Petroleum Co./ California Asiatic Oil Co. v. Libyan Arab Republic, 17 I.L.M. 1, 30 (1978) (finding that of several United Nations General Assembly resolutions concerning expropriation, only Resolution 1803 could be considered reflective of customary law). The arbitrator stated that unlike other expropriation resolutions, Resolution 1803 "was supported by a majority of Member States representing all of the various groups (developed and undeveloped countries)." *Id.*

71. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 882-883 (2d Cir. 1980) (stating that Universal Declaration of Human Rights reflects customary law and is binding on United States).

72. Universal Declaration of Human Rights, G.A. Res. 217A (III), 3(1) U.N. GAOR Res. 71, U.N. Doc. A/810 (1948), *reprinted in* 43 AM. J. INT'L L. SUPP. 127 (1949) [hereinafter UDHR].

73. *See* Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, 1959 Am. Socy. Int'l Law Proceedings 217, *reprinted in* R. LILLICH AND E. NEWMAN, *supra* note 55, at 60 (illustrating that authors of UDHR originally did not consider UDHR to be binding); Humphrey, *The Universal Declaration of Human Rights: Its History Impact and Juridical Character*, *reprinted in* B. RAMCHARAN, HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 32 (1978) (stating that UDHR was not meant by United Nations General Assembly members to be binding). Humphrey states "Nothing could be clearer than that the Declaration was never meant to be binding as part of international law . . ." *Id.* In fact, several delegations stressed that they did not consider the resolution to be binding. *Id.* To become binding international law, General Assembly resolutions, which are normally only recommendations, must become part of customary law. *Id.* at 33.

74. *See* R. LILLICH AND E. NEWMAN, *supra* note 54, at 65-66 (stating that UDHR has come to represent custom); I. BROWNLIE, *supra* note 47, at 14, 698 (stating that UDHR represents at least customary law); M. MCDOUGAL, H. LASSWELL, & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER, 274 (1980) (stating that resolutions now accept UDHR as customary law).

of custom, the declaration should contain authoritative language.[75] For example, a resolution using "shall" in place of "may" is phrased authoritatively. The General Assembly used "shall" language in declaring that "No one shall be subjected to torture or to cruel, inhuman and degrading treatment or punishment" and stated the UDHR's other articles as if the articles were the law, not recommendations.[76] A declaration's value as evidence of custom is also increased if a large number of member states vote in favor of the declaration.[77] When the United Nations adopted the UDHR in 1948 the vote was forty-eight to none with eight abstentions.[78] Because the General Assembly stated the rules contained in the UDHR authoritatively, and members overwhelmingly supported the UDHR, the UDHR is strong evidence of a custom prohibiting inhuman and degrading treatment.

Other commentators, however, view the UDHR not only as a statement of customary law, but also as an official interpretation of articles fifty-five and fifty-six of the United Nations Charter.[79] Article fifty-five states that members of the United Nations should promote observance of human rights.[80] In article fifty-six members of the United Nations pledge to take action to achieve the purposes of article fifty-five.[81] Because of the generality

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75. *See* RESTATEMENT, *supra* note 1, § 103 reporters' note 2, (stating that resolution which purports to state law is evidence of custom); M. AKEHURST, *supra* note 53, at 27 (arguing that in order for resolutions to be given effect, authoritative language must be used).

76. UDHR, *supra* note 72, art. 5. Several UDHR articles provide examples of authoritative and forceful language. *See* article 4 (stating that "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms"); Article 9 (stating that "No one shall be subjected to arbitrary arrest, detention or exile"); Article 11(2) (stating that "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed"); Article 15(2) (stating that "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality").

77. *See* M. AKEHURST, *supra* note 53, at 27 (stating that value of resolution as custom increases if large number of member states vote for resolution); I. BROWNLIE, *supra* note 48, at 14 (finding that when resolutions concern general norms of international law and are accepted by large majority, resolutions are evidence of custom).

78. *See* S. SOHN AND I. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 515 (1973) (stating that of 58 members of United Nations, 48 members voted for UDHR and eight abstained).

79. *See* P. SIEGHART, *supra* note 64, at 53-54 (finding UDHR to be authoritative interpretation of articles 55 and 56 of United Nations Charter); Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1, 17 (1982) (stating that UDHR provides specificity that United Nations Charter lacks and finding that United Nations views UDHR as official interpretation of articles 55 and 56 of United Nations Charter).

80. U.N. CHARTER, *reprinted in* R. LILLICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, 10.1 (1990). Article 55 states: "[T]he 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." *Id.*

81. U.N. CHARTER, *supra* note 80. Article 56 states: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." *Id.*

of articles fifty-five and fifty-six, United States courts have held that the terms of the articles by themselves cannot be given effect as federal law; the terms are not self-executing.[82] Unlike articles fifty-five and fifty-six, the UDHR specifically lists human rights that nations should observe.[83] The UDHR explicitly prohibits inhuman and degrading treatment.[84] The UDHR, if treated as an official interpretation of articles fifty-five and fifty-six of the United Nations Charter, makes the prohibition against inhuman and degrading treatment part of articles fifty-five and fifty-six.[85] Under this theory the interpretation become part of the article much like a United States court interpretation of a federal statute becomes binding as part of the statute. The United States is a member of the United Nations Charter; therefore, under the theory that the UDHR is an official interpretation of the United Nations Charter, the United States is bound by the prohibition against inhuman and degrading treatment contained in the UDHR.[86]

In addition to United Nations declarations, the Restatement of United States Foreign Relations Law (Restatement) also serves as evidence of customary international law. The drafters of the Restatement attempt to clarify and simplify existing international law. In determining international custom, the legal scholars who assemble the Restatement rely upon evidence of state practice and attitudes of the international community.[87] Section 702

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82. *See* Hitai v. Immigration and Naturalization Service, 343 F.2d 466, 468 (2d Cir.) *cert. denied*, 382 U.S. 816 (1965) (holding that United Nations Charter, article 55 is not self-executing and therefore not enforceable); Camacho v. Rogers, 199 F. Supp. 155, 158 (S.D.N.Y. 1961) (ruling that general wording of United Nations Charter, article 55 shows that article was not meant to be self-executing); Sei Fuji v. State, 38 Cal. 2d 718, 242 P.2d 617, 621-22 (1952) (holding articles 55 and 56 of United Nations Charter "lack mandatory quality and definiteness" and are not self-executing).

83. UDHR, *supra* note 71. The UDHR includes among the human rights that nations should observe the right to life, liberty and security of person, the prohibition against slavery, the prohibition against torture or cruel, inhuman or degrading treatment or punishment, the right to recognition as a person before the law, the right to equal protection under the law, the right to an effective remedy for violations of fundamental rights granted by the constitution or the law, the prohibition against arbitrary arrest, detention or exile, the right to a fair and public hearing by an impartial tribunal, the right to be presumed innocent until proven guilty, and a prohibition against ex post facto laws. *Id.*

84. *See* UDHR, *supra* note 71, art. 5 (stating that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment").

85. *See* Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 529 (1976) (stating that as official interpretation of United Nations Charter, articles 55 and 56, UDHR is binding upon United Nations members); M. MCDOUGAL, H. LASSWELL, & L. CHEN, *supra* note 73, at 273-74 (accepting UDHR as "quasi-legislation").

86. *See* U.S. CONST. art. VI (providing that "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"). Once treaty provisions become self-executing, the provisions are the supreme law of the land. *Id. See generally* I. BROWNLIE, *supra* note 48, at 11-15; HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION, 1-37 (B. Ramcharan ed. 1979).

87. *See* RESTATEMENT, *supra* note 1, § 701 (listing sources for determining practice of states and thereby determining makeup of customary human rights law).

of the Restatement identifies international human rights customs that the authors have determined are peremptory norms. Peremptory norms are customs which are so compelling and widely observed that they are considered the highest ranking authority in international law.[88] Because of the compelling nature of peremptory norms, treaties are considered void if the treaties violate peremptory norms.[89] Peremptory norms are also absolutely binding on all states, meaning that states may not opt out of the norms.[90] In contrast, a nation may opt out or exempt itself from normal customs by making known its opposition to the custom early in the development of the custom and by consistently voicing the nation's opposition to the custom.[91]

The Restatement reports that at least six practices exist that violate peremptory norms if the practices occur as a result of state policy: genocide, slavery, murder, torture or other inhuman and degrading punishment or treatment, prolonged arbitrary detention and systematic racial discrimination.[92] Because the Restatement is a statement and clarification of the international rules which govern United States law, United States courts respect and refer to the Restatement in determining what is international law.[93] Therefore, United States courts should be willing to find an international custom prohibiting inhuman and degrading treatment.

In addition to the drafters of the Restatement, many other international law scholars discuss customs that have risen to the level of peremptory

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88. *See* Committee of United States Citizens in Nicaragua v. Reagan, 859 F.2d 929, 935 (D.C. Cir. 1988) (stating that peremptory norms are highest laws in hierarchy of international law, outranking both treaties and customary law); Parker & Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTING INT'L & COMP. L. REV. 411, 417 (1989) (asserting that peremptory norms are highest rules in hierarchy of international law); Janis, *The Nature of Jus Cogens in colloquy with Turpel & Sands, Peremptory International Law and Sovereignty: Some Questions*, 3 CONN. J. INT'L L. 359, 363 (1988) (arguing that peremptory norms are "international constitutional law" serving as foundations for international legal system).

89. *See* Vienna Convention on the Law of Treaties, *supra* note 60, art. 53 (stating that "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law"); RESTATEMENT, *supra* note 1, § 702, comment n (stating that treaties which violate peremptory norms are void).

90. *See* Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U. S.), 1986 I.C.J. 14, 114, 238 (finding that United States was bound by peremptory norm prohibiting aggressive use of force, even though United States persistently objected to rule); Parker & Neylon, *supra* note 88, at 418 (stating that peremptory norms are absolutely binding rules which states may not opt out of, even through persistent objection).

91. *See* I. BROWNLIE, *supra* note 48, at 10-11 (stating that if nation persistently objects to custom during formation of custom, nation is not bound by custom).

92. RESTATEMENT, *supra* note 1, § 702.

93. *See* Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988) (citing Restatement's definition of customary law); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987) *reconsideration granted in part*, 694 F. Supp. 707 (N.D. Cal. 1988) (citing Restatement as evidence that law of nations prohibits murder condoned by government); Lareau v. Manson, 507 F. Supp 1177, 1188 (D. Conn. 1980) *aff'd in part and modified in part*, 651 F.2d 96 (2d Cir. 1981) (citing Restatement as evidence of customary law).

norms.[94] Customs concerning human rights often are considered peremptory norms, because customs spring from ethical considerations and a sense of justice.[95] However, peremptory norms are not created by scholars, judicial bodies, or international organizations, but instead exist because of an international consensus.[96] Most scholars and nations recognize torture as having the status of a peremptory norm, but the international consensus is not as strong in the case of inhuman and degrading treatment.[97]

In addition to torture, the prohibition against inhuman and degrading treatment may have risen to the level of a peremptory norm.[98] The Restatement and the treaties that prohibit torture all group torture with inhuman and degrading treatment.[99] Inhuman and degrading treatment is prohibited

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94. *See* RESTATEMENT, *supra* note 1, § 702 (listing peremptory norms); L. HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW, 425-519 (1988) (discussing in detail human rights customs which have achieved status of peremptory norms); I. BROWNLIE, *supra* note 47, at 513 (stating that prohibition of use of force, genocide, racial discrimination, slavery, piracy, and crimes against humanity are relatively uncontroversial examples of peremptory norms); Robledo, *Le Ius Cogens International: sa Genese, sa Nature, ses Fonctions*, 172 RECUEIL DES COURS 9, 167-87 (1981) (discussing identification of peremptory norms and violations of customary human rights law which qualify as violations of peremptory norms).

95. *See* South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), 1966 I.C.J. 6, 298 (Tanaka, J., dissenting) (arguing that whole of human rights law constitutes peremptory norms); Parker & Neylon, *supra* note 88, at 419-422 (illustrating that peremptory norms are based upon religious, secular, or philosophical ideas of what is just).

96. *See* U.N. Conference on the Law of Treaties, 1st and 2d Sess. Vienna, Mar. 26 - May 24, 1968, U.N. Doc. A/Conf./39/11/Add. 2 (1971), statement of Mr. Suarez (Mexico) at 294 (stating that peremptory norms have always existed); Parker & Neylon, *supra* note 87, at 419-420 (finding that peremptory norms arise from natural law principles or universal ethical standards).

97. *See* RESTATEMENT, *supra* note 1, § 702 (finding that torture violates peremptory norm); L. HANNIKAINEN, *supra* note 94, at 502 (stating that prohibition against torture is peremptory norm); Parker & Neylon, *supra* note 87, at 437 (asserting that torture is commonly recognized as violating peremptory norm); Higgins, *Derogation Under Human Rights Treaties*, 48 BRIT. Y:B. INT'L L. 281, 282 (1976-77) (noting that consensus exists that freedom from torture is fundamental right which may not be derogated).

98. *See* RESTATEMENT, *supra* note 1, § 702(d), comment n (asserting that prohibition against inhuman and degrading treatment or punishment is peremptory norm); A. CASSESE, HUMAN RIGHTS IN A CHANGING WORLD 166 (1990) (discussing Swiss Federal Court opinion stating that prohibition against inhuman and degrading treatment had attained status of peremptory norm); M. MCDOUGAL, H. LASSWELL, & L. CHEN, *supra* note 74, at 274 (asserting that all prohibitions of UDHR are peremptory norms); *but see* L. HANNIKAINEN, *supra* note 94, at 499-510 (questioning whether inhuman and degrading treatment has become violation of peremptory norm).

99. *See* European Convention, *supra* note 26, art. 3 (stating that "No one shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment"); American Convention on Human Rights, *supra* note 63, art. 5(2) (stating that "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment"); Banjul Charter on Human and Peoples' Rights, *supra* note 63, art. 5 (stating that "All forms of exploitation and degredation of man particularly . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited"); RESTATEMENT, *supra* note 1, § 702(d) (stating that "A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment").

within the same sentence and with the same force as torture.[100] However, due to the evolving nature of the terms "inhuman and degrading," courts are more likely to apply the prohibition as a part of customary law rather than as a peremptory norm.

Although inhuman and degrading treatment is more difficult to define than torture,[101] definitions and examples of inhuman and degrading treatment are available in the opinions of the European Court of Human Rights, the European Commission of Human Rights, and the United Nations Human Rights Committee (Committee) and within international instruments.[102] The most widely accepted definition is the definition authored by

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100. *See supra* note 99 and accompanying text (demonstrating that torture and inhuman and degrading treatment are prohibited in same sentence and with same force).

101. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR, Supp. (No. 51) at 197, U.N. doc. A/39/51 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *substantive revisions printed in* 24 I.L.M. 535 (1985) [hereinafter Convention Against Torture]. The Convention Against Torture provides:

> The term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id.

102. *See* Standard Minimum Rules for the Treatment of Prisoners *adopted* Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/6/1, annex I, A (1956), *amended* May 13, 1977, E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977), art. 31-32(2) (stating that applying punishment prejudicial to physical or mental health of prisoners is inhuman treatment); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 1, § 2, G.A. Res. 3452, 30 U.N. GAOR, Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975) (stating "torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment"); Case of Ireland v. United Kingdom, 1978 Y.B. EUR. CONV. ON HUM. RTS., 602, 604 (Eur. Ct. H.R.) (stating that interrogation techniques of hooding, subjecting prisoners to continuous loud, hissing noise, depriving prisoners of sleep, reducing prisoners' diets, and forcing prisoners to stand for long periods against wall in painful position used by British forces amounted to inhuman and degrading treatment, but did not reach level of torture); Tyrer Case, 1978 Y.B. EUR. CONV. ON HUM. RTS. 612, 614 (Eur. Ct. H.R.) (stating that birching school child is degrading treatment); East African Asians, 1970 Y.B. EUR. CONV. ON HUM. RTS. 928, 972 (Eur. Comm. H.R.) (stating that degrading treatment is treatment, "lowering in rank, position, reputation, or character" which lowers the recipient in his eyes or the eyes of others and holding that government's taking away citizenship and making East Afican Asians stateless was degrading treatment); The Greek Case, 1969 Y.B. EUR. CONV. ON HUM. RTS. 1, 186 (Eur. Comm. H.R.) (stating that inhuman treatment is at least treatment that deliberately causes severe mental or physical suffering and explaining that degrading treatment "grossly humiliates [the recipient] before others or drives him to act against his will or conscience"); Pratt v. Jamaica, 44 U.N. GAOR supp. 40 at 222, U.N. Doc. A/44/40 (U.N. H.R. Comm.) (stating

the European Court of Human Rights. The European Court stated that inhuman treatment is at least treatment which leads to physical or mental suffering.[103] Degrading treatment is treatment that arouses "fear, anguish and inferiority capable of humiliating and debasing" the victim and that may break the victim's moral resistance.[104] The European Court consistently uses these definitions in determining what constitutes inhuman and degrading treatment.[105] Treatise writers use the European Court's definition to explain inhuman and degrading treatment,[106] and at least one federal district court has used the European Court's definition.[107]

In addition to the European Court's decision in *Soering*, *Pratt v. Jamaica*[108] sheds light on what conditions specifically can qualify as inhuman

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that delay of almost twenty hours from time petitioner's stay of execution was granted to time he was removed from death cell amounted to inhuman and degrading treatment and commenting that prolonged judicial proceedings in capital punishment case might be inhuman and degrading); Acosta v. Uruguay, 44 U.N. GAOR, Supp. 40 at 183, U.N. Doc. A/44/40 (U.N. H.R. Comm.) (ruling that Acosta suffered inhuman and degrading treatment because forced to stand for long periods of time in cold with nothing to drink or eat); Bouton v. Uruguay, 36 U.N. GAOR supp. 40 at 143, U.N. Doc. A/36/40 (U.N. H.R. Comm.) (finding inhuman and degrading treatment in the absence of torture). Members of the Joint Forces made Ms. Bouton stand for thirty-five hours, tied her wrist with coarse cloth, bandaged her eyes, and threatened to torture her. *Id.* Later the Joint Forces kept Ms. Bouton sitting blindfolded on a mattress and did not allow her to move. *Id.* Ms. Bouton could bathe only every ten to fifteen days. *Id.*

103. Case of Ireland v. United Kingdom, 1978 Y.B. EUR. CONV. ON HUM. RTS. at 606.

104. The Greek Case, 1969 Y.B. EUR. CONV. ON HUM. RTS. at 186.

105. *See* Soering Case, 28 I.L.M. 1063, 1096 (Eur. Ct. H.R.) (citing definition of inhuman and degrading treatment contained in both Ireland Case and Greek Case); Ireland v. United Kingdom, 1978 Y.B. EUR. CONV. ON HUM. RTS. 602, 604-606 (Eur. Ct. H.R.) (repeating definition of inhuman and degrading treatment from Greek Case); The East African Asians Case, 1970 Y.B. EUR. CONV. ON HUM. RTS. 928, 972 (Eur. Ct. H.R.) (quoting definition of degrading treatment from Greek Case).

106. *See* 1 T. MERON, HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 128 (1984) (using European Court's definition of inhuman and degrading treatment to illuminate meaning of inhuman and degrading as contained in Universal Declaration of Human Rights, article five); E. DAES, THE INDIVIDUAL'S DUTIES TO THE COMMUNITY AND THE LIMITATIONS ON HUMAN RIGHTS AND FREEDOMS UNDER ARTICLE 29 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, UNITED NATIONS E/CN.4/Sub.2/432/Rev.2 (1983) (giving definition similar to European Court's definition). Daes states "'Inhuman treatment' means the deliberate infliction of physical or mental pain or suffering against the will of the victim. Degrading should also cover degrading situations which under certain circumstances might be the result of the application of unjust or wrong economic or social factors or a tyrannical and oppressive national policy in general." *Id. See also* L. HANNIKAINEN, *supra* note 94, at 507-09 (1988) (discussing the European Court's definition, but also stating, "There is *no accepted definition* of 'cruel, inhuman of degrading treatment or punishment'"); P. SIEGHART, *supra* note 64, at 167-69 (1983) (explaining meaning of inhuman and degrading treatment by using European Court's definition); F. JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 26-36 (1975) (referring to definition contained in Greek Case as explanation of meaning of inhuman and degrading treatment).

107. *See* Ahmad v. Wigen, 726 F.Supp. 389, 415 (E.D.N.Y. 1989) (applying European Court's definition of inhuman and degrading treatment), *aff'd*, 910 F.2d 1063 (2d Cir. 1990).

108. 44 U.N. GAOR, Supp. No. 40 at 222, U.N. Doc. A/44/40 (1989) (U.N. H.R. Comm.).

and degrading. In *Pratt*, defendant Pratt allegedly committed capital murder on October 6, 1977 and first stood trial on January 15, 1979.[109] The Jamaican Home Circuit Court at Kingston found Pratt guilty and sentenced him to death.[110] The Jamaican courts ruled against Pratt on all of his appeals, and on February 13, 1987, issued a warrant for Pratt's execution.[111] During all phases of the appeals, Jamaican authorities detained Pratt within the section of the prison reserved for prisoners awaiting execution.[112] The day before Pratt's scheduled execution, the state granted a stay of execution;[113] however, the prison officials did not inform Pratt of the stay until forty-five minutes prior to the time of his execution.[114] In his appeal to the committee, Pratt maintained that the delays in the judicial proceedings and his detention on death row since the time of his conviction in 1979 amounted to cruel, inhuman and degrading treatment.[115] The Committee reasoned that delay in a capital case can constitute such treatment, but the Committee held that Pratt had not made a sufficient showing that the delay in Pratt's case constituted cruel, inhuman and degrading treatment.[116] The Committee did not actually address the issue of whether prolonged detention on death row constitutes inhuman and degrading treatment.[117] However, the Committee did hold that the delay of twenty hours from the time of Pratt's stay of execution to the time prison authorities informed Pratt that his execution had been stayed amounted to inhuman and degrading treatment.[118] *Pratt* leaves open the question of whether the long appeals process for United States capital cases amounts to inhuman and degrading treatment.

As illustrated above, inhuman and degrading treatment by itself is a violation of international customary law.[119] Additionally, extradition into a country where the extraditee may experience inhuman and degrading treatment violates international customary law.[120] In *Soering*, the European Court determined whether extradition that might result in exposing Soering to inhuman and degrading conditions would violate a treaty provision prohibiting inhuman and degrading treatment.[121] The European Court concluded that the United Kingdom would violate the treaty provision if it extradited

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109. Pratt v. Jamaica, 44 U.N. GAOR Supp. (No. 40) at 222, U.N. Doc. A/44/40 (1989) (U.N. H.R. Comm.).

110. *Id.*

111. *Id.* at 223.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 223-24.

116. *Id.* at 230.

117. *Id.*

118. *Id.*

119. *See supra* notes 46-118 and accompanying text (arguing that inhuman and degrading treatment violates customary international law).

120. *See infra* notes 121-142 and accompanying text (discussing extradition as violation of customary international law).

121. Soering Case, 161 Eur. Ct. H.R. (ser. A) (1989) *reprinted in* 28 I.L.M. 1063, 1090.

Soering to Virginia.[122] Because the prohibition against inhuman and degrading treatment is also found in customary international law, the extradition would have been unlawful even in the absence of a treaty. The European Court, however, did not decide whether inhuman and degrading treatment is a violation of customary law, because the European Court does not have jurisdiction to determine the violation of custom.

In *Soering*, the United Kingdom argued that Soering's extradition would violate article three of the Convention only if the degrading treatment resulting from extradition was "certain, imminent and serious."[123] The European Court rejected the United Kingdom's argument.[124] Instead the European Court held that extradition would violate article three of the Convention if the extraditee established on substantial grounds that the extraditee faced a real risk of torture or inhuman and degrading treatment.[125]

The European Court has consistently stated that extradition may violate article three of the European Convention if exceptional circumstances are present.[126] To establish that exceptional circumstances exist, the extraditee must show that the extraditee faces a real risk of treatment prohibited by article three.[127] According to the European Court, Soering made this showing by introducing statements of the Virginia prosecutor that the prosecutor intended to prosecute Soering for capital murder,[128] and that if Soering were extradited to the United States he faced "some risk" which was "more than merely negligible" of receiving the death penalty.[129] The European Court held that Soering faced a real risk of receiving the death penalty and, therefore, of being exposed to inhuman and degrading treatment on Virginia's death row at Mecklenburg.[130]

Although article three does not mention extradition, the European Court's interpretation of article three makes extradition under exceptional circumstances a violation of the Convention.[131] As a widely adopted treaty,

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122. *Id.* at 1107.

123. *Id.* at 1090.

124. *Id.* at 1090-91. The European Court reasoned that because the provision against inhuman and degrading treatment is a nonderogable provision and because it is an internationally accepted standard, the spirit and intention of article 3 demanded a somewhat broad interpretation. *Id.* According to the European Court the United Kingdom's test would not sufficiently protect an individual's rights because the test would require "a very high degree of risk, proved beyond reasonable doubt, that ill-treatment will actually occur" in the demanding state. *Id.* at 1090.

125. *Id.* at 1093.

126. *See infra* note 131 (enumerating European Court cases which examine whether extradition is inhuman and degrading); Digest of Strasbourg Case-Law Relating to the European Convention on Human Rights, art. 3, 117-155 (discussing extradition as violation of European Convention, article three); P. SIEGHART, *supra* note 64, 168 n. 46-48 (1983) (discussing extradition as inhuman and degrading).

127. Soering Case, 161 Eur. Ct. H.R. (ser. A) (1989) *reprinted in* 28 I.L.M. 1063, 1092.

128. *Id.* at 1073.

129. *Id.* at 1094.

130. *Id.* at 1095.

131. *See* Lynas v. Switzerland, 6 Eur. Comm'n H.R. 141 (1976) (discussing whether

the European Conventions prohibition against extradition as inhuman and degrading treatment may crystallize a custom prohibiting extradition when a substantial risk exists that the extraditee will be subjected to inhuman and degrading treatment.[132] In addition to the European Court, international law scholars have determined that if substantial grounds exist to believe that extradition will expose someone to inhuman and degrading treatment, the extradition itself amounts to inhuman and degrading treatment.[133] The extradition is more likely to reach the degree of severity required for inhuman and degrading treatment if the extraditee's mental health is so fragile that the extradition might lead to serious health problems or to suicide.[134]

The United Nations Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (Convention Against Torture) states that if substantial grounds exist for believing an extraditee will be in danger of torture, the nation shall not extradite.[135] The United Nations General Assembly has accepted the Convention Against Torture as a codification of custom.[136] Therefore, extradition into a torture situation

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extradition into country where government agent may murder extraditee is inhuman and degrading). In *Lynas* the European Commission stated that "a person's extradition may, in exceptional circumstances, be contrary to the Convention and, in particular, Article 3, where there are strong reasons to believe that this person will be subject to treatment prohibited by that Article, in the country to which he is being sent." *Id.*; X. v. Federal Republic of Germany, 5 Eur. Comm'n H.R. 137 (1976) (discussing whether extradition of X into country where he may be executed by nongovernmental group is inhuman and degrading). The European Commission stated, "The expulsion of an individual to a particular country can, under exceptional circumstances be contrary to Article 3." *Id.*; Becker v. Denmark, 4 Eur. Comm'n H.R. 215 (1975) (considering whether return of Montagnard children to Vietnam violates European Convention, article 3); Bruckmann v. Federal Republic of Germany, 1974 Y.B. EUR. CONV. ON H.R. 458, 476 (1974) (Eur. Comm. H.R.) (examining whether extradition of Bruckmann was inhuman and degrading in light of danger she may have committed suicide if extradited).

132. *See* North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and The Netherlands), 1969 I.C.J. 4, 38 (discussing crystallization of custom).

133. *See* P. SIEGHART, *supra* note 64, at 168 (asserting that extradition is inhuman and degrading if substantial risk exists that extraditee will be subjected to inhuman and degrading treatment in receiving state); A. CASSESE, *supra* note 98, at 166 (stating that extradition clauses must be interpreted in light of custom prohibiting torture or any other inhuman and degrading treatment); Quigley & Shank, *Death Row as a Violation of Human Rights: Is It Illegal to Extradite to Virginia?*, 30 VA. J. INT 'L L. 241, 271 n. 177 (1989) (stating that extradition to death row may violate international custom prohibiting inhuman and degrading treatment).

134. *See* Bruckmann v. Federal Republic of Germany, 1974 Y.B. EUR. CONV. ON H.R. 458, 476 (Eur. Comm. H.R.) (1974) (accepting Bruckmann's application which alleged that extradition to East Germany would be inhuman and degrading treatment). The Commission gave special consideration to the fact that Bruckmann might commit suicide if extradited. *Id.* Bruckman had already attempted suicide twice and had gone on a hunger strike. *Id.*; *see also* P. SIEGHART, *supra* note 64, at 168 (finding extradition is more likely to be inhuman and degrading if extradition might lead to serious health problems or suicide).

135. Convention Against Torture, *supra* note 101.

136. *See id.* at paragraph five (stating that United Nations General Assembly intended to achieve "a more effective implementation of the existing prohibition under international and

is a violation of custom.[137] Although the Convention Against Torture does not extend the prohibition to inhuman and degrading conditions, the Convention Against Torture does recognize that facilitating a human rights violation by another state through extradition can violate customary law.[138] Because of the close relationship between torture and inhuman and degrading treatment, the prohibition may extend to inhuman and degrading treatment under customary law.[139]

To summarize, the prohibition against inhuman and degrading treatment is part of customary international law which is binding upon nations.[140] Under the rationale of *Soering* and other European Court decisions, extradition where a real risk exists of the extraditee being subjected to inhuman and degrading treatment is a violation of the prohibition against inhuman and degrading treatment.[141] Finally, extradition may violate not only article three of the European Convention, but also the prohibition against inhuman and degrading treatment contained in international customary law.[142]

As stated earlier, once a court determines that an international custom exists, generally that custom becomes a part of United States federal common law.[143] Courts should apply federal common law cases concerning

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national law of the practice of torture and other cruel, inhuman or degrading treatment or punishment"); U.N. G.A. Res. 39/118, passed Dec. 14, 1984 (reiterating General Assembly's belief that Convention codified existing customary law by referring to "the existing prohibition under international law of every form of cruel, inhuman or degrading treatment or punishment"); Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 392 (1988) (stating that Convention Against Torture codified or crystallized custom).

137. *See supra* notes 53-78 and accompanying text (discussing treaties and declarations that codify custom).

138. *See* Convention Against Torture, *supra* note 101, art. 3(1) (stating "No State Party shall . . . extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture").

139. *See id.* at art. 16(2) (stating that Convention's provisions are without prejudice to international instruments or national laws relating to extradition). Article 16 seems to be at odds with article 3. *Id.* Arguably, a nation cannot deny extradition under article 3 without using the Convention to prejudice an international extradition agreement as prohibited by article 16. One way to avoid this conflict is to interpret article 16 to mean that the Convention Against Torture must not be invoked by a nation in bad faith.

140. *See supra* notes 46-118 and accompanying text (arguing that infliction of inhuman and degrading treatment violates customary international law).

141. *See supra* notes 119-42 and accompanying text (discussing extradition as violation of customary international law).

142. *See supra* notes 53-62 and accompanying text (discussing treaty provisions as reflections of customary international law).

143. *See* RESTATEMENT, *supra* note 1, § 702(c) (observing that customary human rights law is part of United States law and should be applied by both state and federal courts); Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. OF INT'L L. 332, 347 (1988) (stating that federal common law incorporates the norms of international law); Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561-62 (1984) (arguing that because judges *find* international law instead of *make* international law, it is not true common law, but nevertheless should be applied like common law); Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 HARV. INT'L L. J. 53, 57-58 (1981) (stating that international customary law is part of federal common law).

the rights and duties of the United States in cases involving interstate or international disputes where the rights of the states or nations are in conflict and in cases of admiralty.[144] Federal common law applies to extradition, because extradition involves potential conflicts of rights between the states.[145] Federal common law, however, will not apply if the common law is in direct conflict with federal statutory law.[146] Therefore, if the custom against inhuman and degrading treatment is in conflict with a federal statute governing extradition, the statute, not custom, will apply.[147] Although courts have interpreted the extradition clause of the Constitution and the Extradition Act in ways which may impede implementation by courts of the custom against inhuman and degrading treatment in extradition cases involving both international and interstate extradition, neither the Constitution nor the Extradition Act is in direct conflict.[148] However, once a court acknowledges that federal common law prohibits inhuman and degrading treatment, the court should interpret extradition statutes so as not to conflict with federal common law.[149]

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144. *See* Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (stating that courts should refer to federal common law in interstate and international disputes and cases of admiralty); FRIEDENTHAL, KANE, & MILLER, CIVIL PROCEDURE, 223 (1989) (stating that courts apply federal common law most often in cases of admiralty, interstate disputes, international relations, and federal statutory gaps).

145. *See Texas Industries*, 451 U.S. at 641 (discussing application of federal common law to interstate disputes); FRIEDENTHAL, KANE, & MILLER, *supra* note 144, at 225 (same).

146. *See* Wayne v. Tennessee Valley Authority., 730 F.2d 392, 398 (5th Cir. 1984) (stating that if Congress has legislated on subject, federal legislation should be applied in place of federal common law), *cert. denied*, 469 U.S. 1159 (1985); Milwaukee v. Illinois, 451 U.S. 304, 316 (1981) (stating that when federal common law conflicts with federal statutory law, courts should apply statutory law); RESTATEMENT, *supra* note 1, § 115 (finding that when federal statute conflicts with prior rule of customary law, courts should apply federal statute).

147. *See* RESTATEMENT, *supra* note 1, § 115 (asserting that prior rule of customary law may be superseded by federal statute); R. LILLICH, INVOKING INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC COURTS (1985) (noting that subsequent federal statutes take precedence over conflicting rules of customary international law); *But see* Henkin, *supra* note 143, at 1561-67 (arguing that customary law is equal in authority to federal statutes and courts should give effect to customary law in face of earlier conflicting federal statutes); *see generally* Goldklang, *Back on Board the Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143 (1985) (concluding that United States statutes take precedence over international customary law).

148. *See* U.S. CONST. art. IV, § 2, cl. 2 (stating that "a Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime"); 18 U.S.C. § 3182 (1948) (stating that if state executive demands fugitive from justice and produces certified affidavit charging fugitive with some crime, then state to which fugutive fled shall arrest fugitive and deliver him to agent of demanding state); Pacileo v. Walker, 449 U.S. 86, 88 (1980) (holding that "sending" state does not have authority under Extradition Act, 18 U.S.C. § 3182, to question prison condition of receiving state, because interstate extradition is meant to be summary, executive proceeding), *rehearing denied*, 450 U.S. 960 (1981); Sami v. United States, 617 F.2d 755, 774 (D.C. Cir. 1979) (observing that courts traditionally have read U.S. Const. art. IV, § 2, cl. 2, as conferring no rights upon extraditee).

149. *See* RESTATEMENT, *supra* note 1, § 114 (asserting that courts should interpret federal statutes to avoid violation of customary law by United States).

In the past, United States federal courts would not have applied the custom against inhuman and degrading treatment to a dispute between the United States and a United States citizen, because the United States federal courts held that international law only applied to disputes and relations between the United States and other countries.[150] The judiciary considered international law inapplicable to disputes between a citizen and the citizen's sovereign state.[151] In the past decade, however, the judiciary has retreated significantly from this position, and has been more willing to apply international customary law to conflicts between a citizen and his sovereign.[152]

As a result of the courts' new willingness to apply international customary law to domestic disputes, the effects of *Soering* become important because international customary law potentially affects the United States government's action towards United States citizens. The extradition of a person into a nation where a substantial danger exists that the extraditee will face torture or other inhuman and degrading treatment is a potential violation of international customary law.[153] Possibly, due to *Soering*, a state in the United States would violate federal common law, which incorporates customary law, by extraditing a capital offender to Virginia's death row.[154]

The leading case in which a federal court applied international customary law to a human rights dispute between a nation and its own citizen is *Filartiga v. Pena-Irala*.[155] One of the issues that the United States District Court for the Eastern District of New York considered was whether torture violates international customary law.[156] The Filartigas were citizens of the Republic of Paraguay who applied for political asylum in the United States.[157] The Filartigas brought suit against Pena-Irala, a citizen of Paraguay, who had acted under color of state authority.[158] The Filartigas alleged

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150. *See* Dreyfus v. Von Finck, 534 F.2d 24, 31 (2d Cir.) (stating that violation of international law cannot occur when plaintiff and defendant are nationals of same country), *cert. denied*, 429 U.S. 835 (1976); United States v. Matheson, 400 F. Supp. 1241, 1245 (S.D.N.Y. 1975) (stating that citizen may not invoke international law in another county against her sovereign state), *aff'd*, 532 F.2d 809 (2d Cir), *cert. denied*, 429 U.S. 823 (1976).

151. *See Dreyfus*, at 31 (holding that no violation of international law can occur between citizen and his sovereign); Blum & Steinhardt, *supra* note 143, at 64 (explaining that in previous decades nations did not answer to international law for crimes against their own citizens).

152. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (allowing citizen of Paraguay to sue officer of Paraguay); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) (allowing Argentinian citizen to sue former Argentinian general); R. LILLICH, *supra* note 147, at 12-16 (describing courts' application of international law to disputes between sovereign state and their citizens).

153. *See supra* notes 119-142 and accompanying text (arguing that extradition can be violation of customary law prohibiting inhuman and degrading treatment).

154. *See* Quigley & Shank, *supra* note 133, at 271 n. 177 (stating that if European Court's construction of international law is correct, then states extraditing to Virginia will violate federal common law).

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

156. *Id.* at 884.

157. *Id.* at 876.

158. *Id.* at 878.

that Pena-Irala caused their son's death by means of torture.[159] The court applied the old rule of international law which excluded violations occurring between a state and its own citizens from federal jurisdiction.[160] On appeal the United States Court of Appeals for the Second Circuit found jurisdiction under the Alien Tort Claims Act.[161] The Alien Tort Claims Act requires a violation of the laws of nations, which includes international custom, in order to grant jurisdiction.[162] The Second Circuit examined United Nations General Assembly resolutions, treaties, a European Court of Human Rights's case, and the practice of nations to determine if a custom prohibiting torture exists.[163] The Second Circuit found that the prohibition against torture is a "clear and unambiguous" violation of the law of nations that applies equally to aliens and citizens.[164]

The Second Circuit's opinion in *Filartiga* dramatically demonstrates that customary human rights law is part of United States law and can be applied by a United States court even when the parties are of the same nationality. Significantly, the Second Circuit set up a framework for analyzing customary law that other courts can follow. Following the Second Circuit's example, other courts should look to treaties, United Nations resolutions, the Restatement, and the practice of nations to determine the existence of a certain custom. Once customary law is found, courts should apply that law as part of federal common law.[165]

Another example of a United States court defining and applying international customary law is the decision by the United States District Court for the Northern District of California in *Forti v. Suarez-Mason*.[166] One of the issues in *Forti* that the district court considered was whether the prohibition against inhuman and degrading treatment is part of customary international law.[167] In *Forti*, Argentine citizens residing in the United States brought an action under the Alien Tort Claims Act against a former Argentine general.[168] Among other claims, the citizens alleged that the general had violated customary international law by inflicting inhuman and degrading treatment on their relatives.[169] The district court determined that the Argentine citizens failed to present evidence indicative of an international custom prohibiting inhuman and degrading treatment.[170] The *Forti* court

159. *Id.* at 876.

160. *See id.* at 880 (referring to United States District Court for Eastern District of New York's unpublished opinion).

161. *Id.* at 887.

162. 28 U.S.C. § 1350 (1948). The Alien Tort's Claims Act provides that "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."

163. *Filartiga*, 630 F.2d at 880-85.

164. *Id.* at 884.

165. *Id.* at 882.

166. 672 F. Supp. 1531 (N.D. Cal. 1987).

167. Forti v. Suarez-Mason, 672 F. Supp. 1531, 1538 (N.D. Cal. 1987).

168. *Id.* at 1531.

169. *Id.*

170. *Id.* at 1543.

also indicated that in its own capacity the court was not aware of the existence of such evidence.[171] In addition to finding a lack of international custom, the *Forti* court also had a problem defining how inhuman and degrading treatment differs from torture or prolonged arbitrary detention.[172] The court stated that the prohibition both lacked universality and escaped definition and, therefore, was not a part of international customary law.[173]

Although the *Forti* court ruled that the term "inhuman and degrading treatment" lacked definability, international tribunals and treaties have defined inhuman and degrading treatment and have distinguished between torture and inhuman and degrading treatment.[174] The *Forti* court's statement that the court knew of no authority of the universality of the custom prohibiting inhuman and degrading treatment is even less reasonable. The same treaties that the court cites in finding that summary execution is a violation of international custom, prohibit inhuman and degrading treatment.[175] Furthermore, the court does not discuss the two main requirements of custom, state practice and *opinio juris*.[176] Because of the *Forti* court's faulty analysis, its opinion that inhuman and degrading treatment is not prohibited by customary law should be discounted.[177]

The United States Court of Appeals for the Fifth Circuit also has struggled with the issue of what constitutes international customary law. In *De Sanchez v. Banco Central de Nicaragua*,[178] defendant bank under orders from the Sandinista government expropriated money the bank owed the plaintiff.[179] The Fifth Circuit considered whether expropriation is a violation of international customary law.[180] The Fifth Circuit reasoned that human rights which have become part of the law of nations are limited.[181] The *De*

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171. *Id.*

172. *Id.*

173. *Id.* at 1543.

174. *See supra* notes 101-07 and accompanying text (discussing definitions of inhuman and degrading treatment).

175. *Forti*, 672 F. Supp. at 1542. *See* UDHR, *supra* note 72, art. 5 (stating "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); International Covenant on Civil and Political Rights, *supra* note 63, art. 7 (stating "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment"); The American Convention on Human Rights, *supra* note 63, art. 5(2) (stating "No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment"); RESTATEMENT, *supra* note 1, § 702 (stating "A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment").

176. *Forti*, 672 F. Supp. at 1543.

177. *See generally*, Note, *Remedying Foreign Repression Through U.S. Courts:* Forti v. Suarez-Mason *and the Recognition of Torture, Summary Execution, Prolonged Arbitrary Detention and Causing Disappearance as Cognizable Claims Under the Alien Tort Claims Act*, 20 N.Y.U. J. INT'L L. & POL. 405 (1988).

178. De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir. 1985).

179. *Id.* at 1386-87.

180. *Id.* at 1397.

181. *Id.*

Sanchez court found that the prohibitions against murder, torture, cruel, inhuman or degrading punishment, slavery, and arbitrary detention are part of international customary law.[182] The court held that no comparable custom had arisen regarding a state's expropriation of property owned by its own nationals.[183] In dictum, however, the Fifth Circuit recognized that inhuman and degrading treatment is a violation of customary law.[184] The court's opinion in *Sanchez*, therefore, provides further evidence that courts are willing to acknowledge international custom as part of United States law, particularly the custom prohibiting inhuman and degrading treatment.

In *Ahmad v. Wigen*,[185] the United States District Court for the Eastern District of New York applied the *Soering* holding to an extradition case. Ahmad was a naturalized United States citizen who formerly lived on the Israeli Occupied West Bank.[186] Ahmad allegedly fired upon an Israeli bus, killing one person and wounding another.[187] Israel sought Ahmad's extradition from the United States pursuant to the Convention on Extradition Between the Government of the United States and the Government of the State of Israel.[188] Ahmad claimed that his extradition would violate international law, because Israel would not provide him with due process and would subject him to inhuman and degrading treatment.[189] The district court relied on *Soering* as the most recent explanation of international law's relationship to extradition and human rights.[190] The district court followed the analysis of the *Soering* opinion closely, stating that in determining whether extradition is likely to result in international law violations, all circumstances of the case should be considered. The district court stated that torture and other inhumane punishments "are now outlawed by civilized countries."[191]

The district court followed the general holding of *Soering* and stated that persons should not be extradited if a substantial risk that the extraditee will be subjected to inhuman and degrading treatment exists.[192] However, after receiving testimony and reviewing the evidence, the district court found no evidence of a substantial risk that Ahmad would be treated inhumanely

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182. *Id.*

183. *Id.*

184. *Id.*

185. Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989), *aff'd* 910 F.2d 1063 (2d Cir. 1990).

186. *Ahmad*, 726 F. Supp. at 394.

187. *Id.*

188. *Id.* at 389.

189. *Id.* at 395.

190. *Id.* at 413

191. *Id.* at 416. Because custom does not require that civilized countries outlaw an act, the *Ahmad* court may have applied the law incorrectly. The court may have assumed that the "laws of nations" referred only to "the general principles of law recognized by civilized nations." *See* I.C.J. Statute, art. 38. Custom is also part of the law of nations and only requires *opinio juris* and consistent state practice over a period of time. *Id.*

192. *Ahmad*, 726 F. Supp. at 416.

if extradited to Israel.[193] The district court concluded that the Israeli prison conditions were not inhuman and degrading, because the conditions were similar to conditions found in United States prisons.[194]

Ahmad demonstrates that a United States court was willing to apply *Soering* to a United States extradition case to determine the legality of the extradition. The *Ahmad* court agreed with *Soering* that extradition into a real risk of inhuman and degrading treatment would be unlawful.[195] The *Ahmad* court's point of divergence from the *Soering* court is that the *Ahmad* court did not find the conditions of the Israeli prison to be inhuman and degrading.[196] The court was somewhat hesitant to condemn a foreign prison system, raising the problem that United States courts may be very reluctant to apply the terms inhuman and degrading to our own prison system.

Although the Second Circuit affirmed the Eastern District of New York in *Ahmad*, the Second Circuit rejected the district court's analysis. In the Second Circuit held that "it is the function of the Secretary of State to determine whether extradition should be denied on humantarian grounds."[197] In the Second Circuit's view, the executive branch is the branch responsible for adhering to international law in extradition cases.[198] The executive branch does have primary responsibility for adherence to international law in extradition cases, but the judicial branch also has a duty to follow international law.[199]

The District Court's opinion in *Ahmad* is a step in the right direction for United States courts. Although the court in *Ahmad* applied *Soering* to international extradition, not interstate extradition, *Ahmad* demonstrates that some courts are willing to apply customary law and use analysis and interpretations of customary law applied by international courts. United States courts have yet to decide whether customary law also affects interstate extradition. But logically, customary law must affect interstate extradition, because federal common law which embodies customary law governs interstate extradition.

In conclusion, because international customary law prohibits inhuman and degrading treatment, that prohibition is part of United States federal common law.[200] International courts have held that inhuman and degrading

193. *Id.* at 416-19.
194. *Id.* at 418.
195. *Id.* at 416.
196. *Id.* at 416-18.
197. Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990).
198. *Id.*
199. *See* RESTATEMENT, *supra* note 1, § 702 comment o (stating that violation of customary law prohibiting inhuman and degrading treatment also violates international obligations to all other nations); Note, Stanford v. Kentucky *and* Wilkins v. Missouri*: A Violation of an Emerging Rule of Customary International Law*, 32 WM. & MARY L. REV. 161, 197-205 (1990) (discussing international custom that courts must consider international law).
200. *See supra* notes 46-118 and accompanying text (discussing prohibition of inhuman and degrading treatment as custom).

treatment encompasses extradition if a real risk exists that the extraditee will be exposed to inhuman and degrading treatment as a result of the extradition.[201] According to the European Court of Human Rights, youthful, mentally unstable prisoners face a real risk of experiencing inhuman and degrading treatment when extradited to Virginia's death row.[202] Therefore, a state which extradites to Virginia's death row may be violating federal common law. The executive branch has primary responsibility in extradition cases to ensure that its prisoners are not extradited in violation of the law. However, the judicial branch must police the executive branch and question the executive branch when human rights are at stake. Therefore, it is proper for United States courts to engage in an analysis of the type of conditions an extraditee may face in a receiving state prison. If the court finds that the prisoner is in real danger of experiencing inhuman and degrading treatment in the receiving state, the court should not extradite.

LAURA LEIGH BLACKSTON

201. *See supra* notes 119-42 and accompanying text (examining extradition as violation of custom prohibiting inhuman and degrading treatment).

202. *See supra* notes 27-45 and accompanying text (discussing European Court's opinion in *Soering*).