# Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons

Martin A. Geer*



* Associate Professor of Law, Director of Clinical Education, University of Baltimore School of Law; B.A., University of Michigan (1974); J.D., Wayne State University School of Law (1977); LL.M., Columbia University School of Law (1991).

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> Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they can't be seen on any map of the world. Yet they are the world of the individual person.
>
> —Eleanor Roosevelt[1]

> The degree of civilization in a society can be judged by entering its prisons.
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> —Fyodor Dostoyevsky[2]

## I. INTRODUCTION

Perhaps for the first time in history, the world is experiencing widespread cognizance of international human rights in its social, policy, and business discourse. Functioning international criminal tribunals for human rights violations have been developed, leading to the establishment of a permanent international criminal tribunal.[3] International peacekeeping activities, truth commissions,[4] and the use of force aimed at "human rights situations" have been implemented in places as diverse as Kosovo, Cambodia, Iraq, and East Timor. The policies of the World Bank and the International Monetary Fund are appreciably influenced by human rights concerns.[5] Scholars and policymakers widely debate the notion that international human rights may trump the sacred cow of sovereignty.[6] These worldwide trends evidence evolving legal norms and political culture, as complex human rights problems are addressed in a more open and direct manner. These developments have converged to lend focus upon U.S. domestic courts' incorporation of international law and their response to compelling social problems occurring

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1. Remarks at the United Nations in New York, N.Y. (Mar. 27, 1958), *quoted in* Richard Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WIS. L. REV. 171, 178 n.11 (1969).

2. THE HOUSE OF THE DEAD 76 (1857). Dostoyevsky spent four years in a Russian prison in Omsk.

3. *See generally* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) (advocating the duty to punish atrocious crimes under customary international law).

4. *See, e.g.*, Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497 (1994) (describing the process that the Commission followed in investigating the acts of violence in El Salvador between 1980 and 1991); David Weissbrodt & Paul W. Fraser, 14 HUM. RTS. Q. 601 (1992) (reviewing REPORT OF THE COMMISSION ON THE TRUTH FOR EL SALVADOR: FROM MADNESS TO HOPE, U.N. Doc. S/25500, Annexes (1993)).

5. *See, e.g.*, DEPENDENCE, DEVELOPMENT, AND STATE REPRESSION (George A. Lopez & Michael Stohl eds., 1990); KURT MILLS, HUMAN RIGHTS IN THE EMERGING GLOBAL ORDER (1998).

6. *See* Nancy D. Arinson, *The New Humanitarian Intervention*, *in* REFUGEES IN THE 1990S: NEW STRATEGIES FOR A RESTLESS WORLD 37–42 (Harlan Cleveland ed., 1993) ("National sovereignty has been revered as an almost sacred principle. Regrettably, it has been used to bar the international community from intervening to protect and assist internally displaced persons and other human rights victims . . . *Sovereignty must yield to human suffering.*") (emphasis added). *See generally* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); MILLS, *supra* note 5, at 9–53; HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 148–65 (1996).

both in and outside of our borders. Often, the responses have been neither effective nor responsible.[7]

An urgent human rights crisis at home is under close scrutiny by diverse groups including the United Nations, non-governmental organizations, the U.S. Department of Justice, and public interest lawyers. Within the context of a prison population explosion that dwarfs that of the rest of the world,[8] the undeveloped status of international human rights in U.S. domestic jurisprudence becomes more evident. Within prison populations, increasing numbers of women's lives are reduced to half-lives under the tortuous effects of sexual abuse by corrections officials. This dire situation presents the question: Can women prisoners continue to be denied the protections of international human rights standards[9] because of judicial and legislative resistance that defies the 100-year-old principle that "[i]nternational law is part of our law"?[10] The just, largely humane answer is no; the sources of institutional recalcitrance must be identified and approached at the risk of venturing into unfamiliar territory.

To that end, this Article reviews: (1) the human rights crisis in U.S. prisons, which has been the focus of international and domestic scrutiny; (2) the availability of international human rights standards as a source of law in U.S. jurisprudence; (3) a comparison of U.S. domestic protections with international law guarantees; (4) sources of international human rights norms applicable to this factual context; and (5) proposals for the incorporation of international human rights law by U.S. courts using domestic civil rights law.

The ironic and disturbing reality is that a disjunction in U.S. law provides legal recourse to non-citizen victims of abuse occurring either in the United States or abroad for international human rights violations.[11] By contrast, U.S. citizens are denied legal recourse in their attempts to raise international human rights claims for violations committed in the United States. This result reflects the failure of domestic jurisprudence to abide by either the century-old rulings of the U.S. Supreme Court or emerging international norms. This Article argues that the judiciary must gather the institutional will to finally assert itself to integrate and implement international human rights law. Until it does, the national policies supporting global economic

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7. Tracey Thompson, *Hijacker Gets 30-Year Prison Term*, WASH. POST, Oct. 5, 1989, at A39 (quoting U.S. District Judge Aubrey E. Robinson, Jr. of the District of Columbia).

8. For an excellent review of U.S. sentencing policy and its consequences, see MARK MAUER, RACE TO INCARCERATE (1999).

9. The various sources of international law which are applicable to female prisoners in the United States are discussed in Part III.

10. The Paquete Habana, 175 U.S. 677, 700 (1900) (declaring that international law must be ascertained and administered by the courts whenever questions depending on it are presented to the courts for determination).

11. *See* Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) ("The district court 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.").

development, democratization, and human rights protections both at home and abroad will be unfulfilled. To do so, this Article proposes the use of existing domestic civil rights law.

Part II of this Article provides an overview and context of the case of human rights abuses of women in U.S. prisons, setting the stage for later analyses. The background includes a review of the historic roots and current developments concerning women prisoners, the U.S. prison system, and recent international human rights investigations. Part III reviews recent legal shifts, both in case law and in legislation, that tend to diminish domestic constitutional law. In some instances domestic protections drop below international norms. Part IV establishes the relationship between international law and domestic civil rights law. Terminology and basic concepts are defined. Part V critiques recent court decisions struggling with international human rights law incorporation. This Part proposes a new theory of incorporation: the use of domestic civil rights statutes as a potential vehicle for asserting international law claims.

In this largely undeveloped area of law, both domestically and internationally, little is clear and significant obstacles exist to domestic implementation of international human rights law. Yet the Article concludes with cautious optimism that our jurisprudence can begin to approach these difficult issues with careful and thoughtful debate, effectively adopt the rule of law finding international law as a "part of our law" set 100 years ago,[12] and provide needed remedies for human rights violations at home.

## II. OVERVIEW, BACKGROUND, AND CONTEXT

### *A. U.S. Legal Culture*

To date, the United States has kept pace with the maturation of international law in an inconsistent manner. On the one hand, the United States has often led the charge in some arenas.[13] For instance, the United States has integrated "human rights" as a salient component of its global political relations vernacular.[14] Moreover, in so-called "private international law," the

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12. *The Paquete Habana*, 175 U.S. at 700 (1900).

13. One example is the international use of force for humanitarian purposes. *See, e.g.*, Richard B. Lillich, *A United States Policy of Humanitarian Intervention and Intercession*, *in* HUMAN RIGHTS AND AMERICAN FOREIGN POLICY 278–98 (Donald P. Kommers & Gilburt D. Loescher eds., 1979) (surveying the Carter administration's human rights policy). *But see Implications of Humanitarian Activities for the Enjoyment of Human Rights*, U.N. ESCOR Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, 46th Sess., at 65, U.N. Doc. E/CN.4/Sub.2/1994/39 (1994) (questioning the legal basis under the U.N. Charter for the use of force in Iraq, Somalia, Bosnia and Herzegovina).

14. One example is foreign aid. *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (1977–1998) (visited Nov. 20, 1999) <http://dosfan.lib.uic.edu/dosfan.html>; *see also* Foreign Assistance Act of 1961, 22 U.S.C.A. § 2304 (1990) (forbidding security assistance to countries that engage "in a consistent pattern of gross violations of human rights."); LAWYER'S COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, REVIEW OF THE DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 1983–1998 (1999); Olufunmilayo B. Arewa & Susan O'Rourke, *Country-Specific Legislation and Human Rights: The Case of Peru*, 5 HARV. HUM. RTS. J. 183 (1992).

United States has eagerly engaged in the globalization of the law of trade and intellectual property.[15] This record generally reflects a more global view of law at home and abroad.

On the other hand, the United States has failed to ratify or has significantly delayed its ratification of treaties at the heart of accepted international human rights norms, including international agreements prohibiting genocide[16] and torture.[17] When it has ratified human rights agreements, it has attached conditions in a manner often inconsistent with the purpose of the convention and the international law of treaties.[18] The United States has also refused to consent to the jurisdiction of international tribunals.[19]

The U.S. domestic legal culture has shown remarkably rapid growth in recognizing the justiciability of international human rights claims brought by aliens, primarily against other aliens for harms suffered on foreign soil, including claims against private actors.[20] Yet since the century-old edict of *The Paquete Habana*,[21] there has been little development of international human rights law in the context of claims based upon incidents within our borders. The path in this direction has been blocked by a variety of judicially created maxims, as well as by institutional discomfort fueled by unfamiliarity with the substantive law.

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15. *See, e.g.*, United Nations Conference of Trade Development, World Investment Report: Transnational Corporations and Integrated International Production, U.N. Doc. ST/CTC/156 (1993).

16. *See* Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (III), U.N. GAOR, 3d Sess., 179th Plen. Mtg. at 174, U.N. Doc. A/810 (1948) (not ratified by the United States until forty years later); Martin A. Geer, *Foreigners in Their Own Land: Cultural Land and Transnational Corporations-Emergent International Rights and Wrongs*, 38 VA. J. INT'L L. 331, 359 (1998) (critiquing the U.S.' ratification of the Convention on the Prevention and Punishment of the Crimes of Genocide with a number of "reservations" and "understandings"); *see also* International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 51, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (not ratified by the United States until 1988 with limiting reservations) [hereinafter ICCPR].

17. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res.39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. DOC. A/39/51 (1984) (entered into force June 26, 1987) [hereinafter Torture Convention]; *see also* American Convention on Human Rights, *signed* Nov. 22, 1969, 1144 U.N.T.S. 123 (not ratified by the United States, the only O.A.S. member who has declined) [hereinafter American Convention].

18. *See* Vienna Convention on the Law of Treaties, Jan. 27, 1980, arts. 2, 19–21, 115 U.N.T.S. 331 [hereinafter Vienna Convention]; Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995) (citing criticism of the packages of reservations, understandings, and declarations that the United States has attached to its ratifications of human rights treaties); Dinah Shelton, *International Law*, *in* U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 27, 29–33 (Hurst Hannum & Dana D. Fisher eds., 1993).

19. *See* American Convention, *supra* note 17; *see, e.g.*, Alien Tort Claims Act, 28 U.S.C.A. § 1350 (1994); *In re* Estate of Ferdinand Marcos, Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (1996).

20. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (acknowledging that the Torture Victim Protection Act permitted plaintiff classes of Bosnian victims to pursue their claims of official torture against leader of unrecognized Bosnian-Serb entity); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (holding that private actors may be liable for violations of international law even absent state action).

21. 175 U.S. 677 (1900).

That said, in the post-Civil War era and throughout the subsequent application of the Bill of Rights to the states via the Fourteenth Amendment and the domestic civil rights legislation of both the eighteenth and nineteenth centuries, there has been little reason to test these new international waters. Until recently, the domestic law of the United States has been, with exceptions, at or above international thresholds. International human rights norms evolved primarily in the wake of World War II, and countries have been both encouraged and even required to implement international human rights law domestically. Methods of implementation vary from nation to nation,[22] with U.S. domestic law establishing its own constitutional and civil rights law addressing human rights norms. The United States can contribute to the goal of accomplishing world-wide adoption of international human rights when its domestic law interpretations both meet and incorporate international human rights standards.

Now comes the rub. Since World War II,[23] the relatively rapid growth of international human rights has not been effectively incorporated into U.S. jurisprudence. Judicially created doctrines of avoidance have effectively precluded domestic court adjudication of international human rights claims.[24] Even the underlying principle that international law is part of federal common law has been recently attacked by a small group of scholars.[25] U.S. constitutional jurisprudence has lowered the bar below some emerging international human rights standards, which themselves have blossomed into international customary law. The clearest example is the issue of capital punishment of juveniles by the states. It is fair to say that such executions violate

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22. *See* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992) (discussing varied methods of treaty incorporation among states).

23. 1998 marked the 50th anniversary of the Universal Declaration of Human Rights, the most important document in the modern age of international human rights. *See generally* Stephen P. Marks & Burns H. Weston, *International Human Rights at Fifty: A Foreword*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 113 (1998).

24. *See generally* Cynthia R.L. Fairweather, *Obstacles to Enforcing International Human Rights Law in Domestic Courts*, 4 U.C. DAVIS J. INT'L L. & POL'Y 119 (1998); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); Donald J. Kochan, *Constitutional Structure As a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L.J. 153 (1998); Ellen Ash Peters, *The Capacity of Judicial Institutions to Play an Affirmative Role in the International Protection of Human Rights: Implications For and From Domestic Law*, 12 CONN. J. INT'L L. 219 (1997).

25. *Compare* Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) (arguing that courts should not apply customary international law as federal law unless expressly authorized to do so by the federal political branches) *and* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) (asserting that the view of customary international law as self-executing federal common law conflicts with the constitutional principles of separation of powers, federalism, and representative democracy) *with* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (positing that Bradley and Goldsmith's position would result in the proliferation of varying state rules of customary international law) *and* Gerald Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997) (advocating that incorporation of customary international law is within the understanding of judicial power).

current international customary law. As discussed later in this Article, "punishment" under the U.S. Constitution's Eighth Amendment has been a particular subject of re-definition. The development of the law of immunities and various statutory limitations have significantly impeded the accountability of official activities which violate rights protected by the Constitution.

Policy concerns under the guise of federalism and sovereignty often fuel the debate and resistance to incorporating international law. Thoughtful reflection should alleviate these concerns with respect to applying human rights law to stop the inexcusable treatment of U.S. women prisoners. The application of international customary human rights norms to U.S. prisons should create less dissonance than that experienced with foreign affairs matters because it is most often the practices of U.S. states, not the federal government, which are claimed to violate international law. State activities have traditionally been trumped by international treaty obligations.[26] Further, unlike the issue of capital punishment of juveniles, which is statutorily mandated, the abuse of women in confinement in violation of international human rights norms is not required by legislation. Thus, remedying this abuse does not require interference with the political process.

An initial focus on the compelling story of the victims may be the jumpstart needed to provide relief and resolution. Indeed, the "lawyer's primary task is translating human stories into legal stories and retranslating legal story endings into solutions to human problems."[27] To address the problem of women prisoners, a transformation is required: the "local narrative" of the reality of life of abused women prisoners must be transformed into "legal narrative" which not only supports the legal claims of women prisoners, but also effectively deters these human rights violations in a country that proclaims to seek justice for both the powerless and the powerful. Both the scholar and advocate are needed to accomplish this task.

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26. *See generally* U.S. CONST. art. VI; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987); Zschernig v. Miller, 389 U.S. 429 (1968) (holding that where state laws conflict with a treaty, they are superseded by the federal policy); Clark v. Allen, 331 U.S. 503, 508 (1947) (ruling that "if...provisions of a treaty have not been superseded or abrogated, they prevail over any requirements of [state] law which conflict with them"); United States v. Pink, 315 U.S. 203, 231 (1942) ("[T]he power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of forum must give way before the superior federal policy evidenced by a treaty or international compact."); Missouri v. Holland, 252 U.S. 416, 433–35 (1920) ("Valid treaties . . . are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States."); United States v. Rauscher, 119 U.S. 407, 418 (1886) (ruling that a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without aid of any legislative provision"); Edye v. Robertson, 112 U.S. 580, 598–99 (1884) ("A treaty . . . is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.").

27. DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 6 (1989). *See also* Clark D. Cunningham, *Legal Storytelling: A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989) (arguing that the concept of true storytelling is intimately part of client representation).

### *B. International and Domestic Scrutiny of Human Rights Violations—A Case Study of Women in the Michigan Prison System*

> Being violently assaulted in prison is simply not "part of the penalty that criminal offenders pay for their offenses against society."[28]

In 1995, the U.S. Department of Justice wrote the Governor of Michigan, concluding an investigation of the treatment of women prisoners in Michigan:

> The sexual abuse of women prisoners by guards, including rapes, the lack of adequate medical care, including mental health services, grossly deficient sanitation, crowding and other threats to the physical safety and well-being of prisoners, violates their constitutional rights . . . . Nearly every woman interviewed reported various sexually aggressive acts of guards.[29]

The compelling factual context of the mistreatment of women in prisons across the United States enlivens the theoretical and pragmatic legal issues facing the incorporation of the international customary law of human rights into U.S. legal doctrine. International[30] and domestic scrutiny[31] of U.S. correctional facilities have yielded troubling findings[32] regarding the mistreatment of female prisoners—perhaps the most marginalized sector of the U.S. population. The players in this disturbing drama include state and private institutions, the public, legislatures, the executive and judicial branches of state and federal government, domestic and international non-governmental organizations, international agencies such as the United Nations, domestic and multi-national corporations, and human rights advocates.

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28. Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

29. HUMAN RIGHTS WATCH, ALL TOO FAMILIAR—SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 236–37 (1996).

30. *See generally Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. ESCOR, 55th Sess., Agenda Item 12, at 4, U.N. Doc. E/CN.4/1999/68/Add.3 (1999) [hereinafter *Violence Against Women*].

31. *See* U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE HONORABLE ELEANOR HOLMES NORTON HOUSE OF REPRESENTATIVES, WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF 2–12 (1999) (focusing on staff-on-inmate sexual misconduct in four U.S. correctional jurisdictions); *see also Women in Prison: Nowhere to Hide* (NBC television broadcast, Sept. 10, 1999).

32. *See* Letter from Charlene Lowrie, Chief Investigator, Michigan's Office Ombudsman, to Warden, Crane Women's Facility (Apr. 26, 1993), *reprinted in* HUMAN RIGHTS WATCH, *supra* note 29, at 236 n.37. At the Scott facility, 67% of the female inmates who agreed to answer questions reported feeling uncomfortable during shakedowns, while 33% reported being groped, fondled, or inappropriately touched at one time or another during shakedown by staff. At the Crane facility, 35% of the women reported a problem with officers watching prisoners shower; 18% personally experienced unwanted sexually suggestive remarks; 18% had seen staff engage in a sexual encounter with a prisoner; 29% witnessed staff sexually harass other prisoners; 65% felt uncomfortable during shakedowns; 35% were aware of situations involving the exchange of sex for favorable treatment. *See id.*

A look in one of our own backyards focuses us on the human rights at stake and the people at risk. It also helps to place these issues in a legal context and, hopefully, generate a transformation to real solutions. To address these "relationships is to resist abstractions and to demand context."[33]

The State of Michigan is a fertile example of the factual and legal playing field in the discourse of international human rights application to women prisoners. Michigan's prisons were the site for *Glover v. Johnson,*[34] the seminal federal civil rights case in the United States involving female inmates. *Glover* was filed in 1977 on behalf of a class of women inmates seeking redress for denials of their constitutional rights to equal protection and access to the courts. After a 1979 ruling in their favor, the plaintiffs embarked upon a twenty-year struggle to enforce court-ordered remedies in the face of unprecedented recalcitrance by the State of Michigan:

> The history of this case shows a consistent and persistent pattern of obfuscation, hyper-technical objections, delay, and litigation by exhaustion on the part of the defendants to avoid compliance with the letter and the spirit of the district court's orders.[35]

Nonetheless, the case set in motion the means for hopeful change. For women prisoners in Michigan, significant scrutiny by "agents of change"—the courts and other agencies—resulted from this litigation.[36] Subsequent cases in other states successfully raised claims similar to those in *Glover.*[37]

With the increase in female inmate populations in Michigan and elsewhere since the 1970s, created in large part by long-term, mandatory, drug-related sentences, complaints of abusive conditions and treatment of female inmates also increased. Domestic and international responses to complaints have focused, in large part, on the conditions of confinement in Michigan. A

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33. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 216 (1990).

34. 934 F.2d 703 (6th Cir. 1991).

35. *Id.* at 715.

36. *Glover* was an action brought on constitutional grounds challenging the lack of educational programs for female inmates. The litigation had quite an extensive history. The district court first found a constitutional violation. *See* Glover v. Johnson, 478 F. Supp. 1075 (E.D. Mich. 1979). The district court further appointed a special administrator for the case. *See* Glover v. Johnson, 659 F. Supp. 621 (E.D. Mich. 1987). The Court of Appeals, however, vacated the order appointing an administrator and remanded to the district court to ascertain defendants' compliance with the prior order. *See* Glover v. Johnson, 855 F.2d 277 (6th Cir. 1988). On remand, the district court found prison officials in contempt for failure to comply with the previous injunction, to which the defendants appealed. *See* Glover v. Johnson, 721 F. Supp. 808 (E.D. Mich. 1989). The Court of Appeals held that although the prison officials failed to comply with the mandated measures and the lower court had properly appointed an administrator, the officials were wrongfully held in contempt by the district court. *See* Glover v. Johnson, 934 F.2d 703 (6th Cir. 1991).

37. The following cases illustrate successful cases in other states that were similar to *Glover*: Patterson v. Geshores, No. ECDU-95-397 (Ca. 1995); Cason v. Seckinger, No. 84-313-1-MAC (Ga. 1984); Blackman v. Coughlin, No. 84-5698 (N.Y. 1984).

series of individual court actions, local press,[38] and legislative scrutiny[39] initially brought to light patterns of sexual abuse of female inmates by male guards.

In the early 1990s, the abuse of female inmates in Michigan and other state and federal prisons came under investigation by the U.S. Department of Justice, international non-governmental organizations, including Human Rights Watch and Amnesty International, as well as the United Nations, resulting in several investigative reports and legal actions.

Between 1994 and 1996, Human Rights Watch (HRW) embarked upon a two and one-half–year study of women's prisons in the United States involving five states,[40] including Michigan, and the District of Columbia. In 1996, HRW issued a lengthy report[41] finding varying conditions ranging from commendable models to condemnable nests of international human rights violations. The report found significant abuses of female prisoners in the Michigan system, including rape, sexual harassment, impregnation, forced abortions, privacy violations and retaliation:

> Corrections employees have vaginally, anally and orally raped female prisoners and sexually assaulted and abused them. In the course of committing such gross abuses, male officers not only used actual or threatened physical force, but have also used their near total authority to provide or deny goods and privileges to female prisoners to compel them to have sex or, in other cases, to reward them for having done so. In other cases, male officers have violated their most basic professional duty and engaged in sexual contact with female prisoners absent the use or threat of force or any material exchange. In addition to engaging in sexual relations with the prisoners, male officers used mandatory pat-frisks or room searches to grope women's breasts, buttocks, and vaginal areas and to view them inappropriately while in a state of undress in the housing or bathroom areas. Male corrections officers and staff have also engaged in regular verbal degradation and harassment of female prisoners, thus contributing to a custodial environment in the state prisons for women which is often sexualized and excessively hostile.[42]

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38. *See, e.g.*, Valerie Basheda, *U.S. Women's Prisons a Disaster*, DETROIT NEWS, Mar. 30, 1995, at B1 (reporting on the violations found by the U.S. Justice Department after a 10-month investigation of Michigan's women prisons).

39. *See* HUMAN RIGHTS WATCH, *supra* note 29, at 235. *See also* MICHIGAN WOMEN'S COMMISSION, UNHEARD VOICES: A REPORT ON WOMEN IN MICHIGAN COUNTY JAILS (1993).

40. The other states were Georgia, California, Illinois, and New York.

41. *See* HUMAN RIGHTS WATCH, *supra* note 29.

42. HUMAN RIGHTS WATCH, *supra* note 29, at 1–2. A former corrections officer reported that she tried to help an abused inmate and was stabbed by other officers, who were shielded by a powerful union that allows them to act with impunity. One inmate tried to commit suicide and was placed naked in five-point restraints without a blanket for nine hours, subjected to 24-hour surveillance for 29 days. *See id.* at 36.

The Justice Department's investigations corroborated these findings.[43]

Regarding facility access to investigate conditions, Human Rights Watch found:

> Among these states, however, the resistance of the Michigan Department of Corrections (MDOC) to monitoring and accountability was striking . . . . Such resistance to outside monitoring is not new to Michigan. In 1995, when the U.S. Department of Justice initiated its investigation into civil rights abuses of female inmates, Michigan refused to allow federal investigators access to the prisons.[44]

The report also noted that Michigan refused to permit a U.N. investigation of the facilities and that significant retaliation occurred against women prisoners who cooperated with investigators.[45]

Human Rights Watch concluded that serious international human rights violations existed in Michigan and other state's facilities. Human Rights Watch made recommendations to state officials including suggestions to follow the model practices reviewed in other states with regard to sexual misconduct.[46]

In 1998, another international NGO, Amnesty International, issued an extensive report of its investigations of a variety of human rights violation allegations in the United States.[47] The focus upon the United States reflected a major shift for Amnesty, which had previously focused on other countries. Amnesty paid particular attention to abuses within the penal system in addition to their traditional review of capital punishment practices.

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43. In a report to the Governor regarding Michigan's female prisons, Deval Patrick, Chief U.S. Assistant Attorney General, Civil Rights Division, found:

> There is sexual abuse by both male and female guards. Pregnancies have resulted from these activities and the authorities have punished women by revoking their parole. Nearly every inmate interviewed by the Justice Department reported various sexually aggressive acts by officers who corner inmates in cells and during work. Corrections officers are also said to expose their genitalia and make suggestive comments. Sexually suggestive comments and verbal abuse are so rife that they are treated as commonplace; inappropriate pat-searches are conducted by corrections officers. During routine pat-searches the officers touch all parts of the women's bodies, fondling and squeezing breasts, buttocks and genital areas in a manner not justified by legitimate security needs. In addition, many searches are conducted when the women are in their nightgowns in the evening; there is improper visual surveillance by the corrections officers. Many officers stand outside cells and watch prisoners undress and use the showers and toilets. Maintenance workers, in addition to corrections officers, are allowed to view women in various degrees of undress. The degree and kind of surveillance employed exceed legitimate security needs.

HUMAN RIGHTS WATCH, *supra* note 29, at 236–37.

44. Human Rights Watch, *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons* (visited Mar. 5, 2000) <http://www.hrw.org/hrw/reports98/women/Mich.htm>. The full text of this report is available in 10 HUMAN RIGHTS WATCH REPORTS 2(G), 5 (1998). Michigan was the only state for which a follow-up report on retaliation was issued.

45. *See id.*

46. *See* HUMAN RIGHTS WATCH, *supra* note 29, at 13–15.

47. *See* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: RIGHTS FOR ALL (1998).

Their investigation found overcrowded conditions, an exploding inmate population, physical brutality, sexual abuse, and shackling of pregnant prisoners.[48] The report discussed rights violations of women prisoners in Michigan, Arizona, and California, and made recommendations to state officials on ways to comply with international human rights standards.[49]

In 1999 the United Nations' Human Rights Commission Special Rapporteur on Violence Against Women issued a report on her investigation into Michigan's women's prisons:

> On the eve of her visit to Michigan the Special Rapporteur received a letter from the Governor of Michigan canceling her plans to meet with state representatives and her visits to women's prisons located in Michigan. This refusal was particularly disturbing since she had received serious allegations about misconduct . . . . The Special Rapporteur nevertheless continued with her journey to Michigan and had meetings with lawyers, academics, former guards and former prisoners. She was also able to speak to some prison inmates on the phone to hear their complaints. Given the seriousness of the allegations, corroborated by diverse sources, the Special Rapporteur decided that these allegations should form part of her report despite the lack of cooperation.[50]

In line with the growing pattern of prisoner litigation against states and the federal government, the class action case of *Nunn v. Michigan Department of Corrections* was filed in 1996 on behalf of all female prisoners under the State of Michigan's custody, alleging sexual assault and abuse by corrections officers.[51] The United States Department of Justice joined the suit, which brought claims under the Civil Rights of Institutionalized Persons Act.[52]

This is not genocide in Bosnia or Rwanda, or the tragic "extinction" of small indigenous groups in the Amazon. This is not the consequence of an impoverished country run by an inept or terrorizing regime, nor the result of a rigid, undeveloped or historically constrained legal system. This is human rights abuse in our own backyard, in a democratic, economically mature and robust nation that for centuries has been a world symbol for individual liberty and security of person. How then did the women prisoners in Michigan end up so vulnerable and victimized?[53]

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48. *See id.* at 56–65, 70.

49. *See id.* at 150.

50. *Violence Against Women*, *supra* note 30, at 4, para. 9. *See also* HUMAN RIGHTS WATCH, *supra* note 29, at 236–37. A prisoner who attempted suicide was placed in solitary for 20 days in four-point restraints, usually naked and allowed to shower only once a week, when she pleaded for her light to be turned off so she could sleep until a corrections guard finally tear-gassed her. *See id.*

51. In *Nunn v. Michigan Department of Corrections*, 1997 U.S. Dist. LEXIS 22970 (Feb. 4, 1997), the plaintiffs asserted claims under the First, Fourth, Eighth, Ninth, and Fourteenth Amendments to the U.S. Constitution, 42 U.S.C. § 1983, and the Violence Against Women Act, 42 U.S.C. § 13981 (1995).

52. 42 U.S.C. § 1997 (1994).

53. In the wake of the publicity and litigation described, the Michigan legislature is rushing a debate

The next Section will present a brief profile of U.S. women prisoners today, and the historical context of women in prisons in the United States. The following Sections suggest that the social and historical factors contributing to prisoner abuse include ignorance, lack of foresight, and negligence by prison administrators, rather than solely intentional wrongdoings which one usually presumes precipitate human rights abuses on this scale.

### *C. Who Are These Humans Whose Rights We Are Reviewing?*

In 1999, the United Nations Special Rapporteur on Violence Against Women continued her study and investigation of female prisoners in the United States.[54] Who are these women being studied? The increased number of women in U.S. prisons during recent years is staggering. The number of women in federal custody increased 254% from 1981 to 1991.[55] Between 1980 and 1995, the number of women in both state and federal institutions increased approximately 500%.[56]

The legal status of women incarcerated in the United States varies widely and includes convicted criminals, those awaiting trial, and non-criminal immigrant detainees. Female U.S. Immigration & Naturalization Service (INS) detainees, who number 15,000 on any given day, are less likely to be segregated from criminal inmates than men "because of their fewer numbers."[57] This population includes pregnant women and asylum seekers "fleeing human rights abuses in their own countries,"[58] and the conditions of their confinement often exacerbate their trauma.[59]

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on bills which would define "person" under state civil rights statutes to exclude prisoners from asserting civil rights claims. *See Rights Stripped: Lansing Rushes to Keep Prisoners in Their Place*, DETROIT FREE PRESS, Dec. 8, 1999, at A12; Pete Waldmeier, *Proposed New Rules for Cons Strip Away Last Shred of Dignity*, DETROIT NEWS, Dec. 9, 1999, at 10.

54. "At the invitation of the Government of the United States of America . . . I visited Washington, D.C. and the states of New York, Connecticut, New Jersey, Georgia, California, Michigan and Minnesota to study the issue of violence against women in the state and federal prisons." *Violence Against Women*, *supra* note 30, at 3.

55. *See* Sue Kline, *A Profile of Female Offenders in State and Federal Prisons*, *in* FEMALE OFFENDERS: MEETING THE NEEDS OF A NEGLECTED POPULATION (American Correctional Association ed., 1993). The rate of growth for men during same period was 147%. *See id.* at 1.

56. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 518 (Kathleen Maguire & Ann L. Pastore eds., 1996) [hereinafter SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS]. From 1980 to 1989, the number of women in state and federal institutions more than tripled. From 1990 to 1995, the number of women in state and federal institutions increased by over 50%. This compares to earlier years: from 1925 to 1980, the number of women in state and federal institutions roughly doubled every 27 years. Since 1980, it has roughly doubled every six years. Comparatively, from 1980 to 1989, the male population in state prisons increased 112%, while the female population increased 202%. *See* Kline, *supra* note 55, at 1.

57. *Violence Against Women*, *supra* note 30, at 44, para. 190. 10% of INS detainees are women. *See id.*

58. *Id.*

59. These problems are often further aggravated in private facilities. *See* Warren L. Ratliff, *Due Process Failures of America's Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371 (1997). For example, at a private detention facility in New Jersey, Esmor's mismanagement and corruption sparked a costly riot that forced INS to resume control. *See id.* at 378. Esmor's ill-paid and poorly trained staff physically abused detainees, stole their property, and served inedible food in dilapidated, unsanitary facilities. Fol-

Incarcerated women are the fastest growing part of an exploding prison population.[60] Currently, the United States has the largest prison population in the world. Absent change, the total number of inmates in the United States is expected to exceed two million by 2002.[61] Planners of prison systems in the last twenty years have been badly caught off guard by the rapid prison population increase.[62] Mandatory sentences for drug offenses have been a major factor in the dramatic increase in sentence length and the number of female prisoners in recent years.[63] Unlike their male counterparts, convicted female prisoners are generally serving time for nonviolent crimes[64] as well as shorter terms.[65]

In adult facilities, women range from teenagers to the elderly.[66] Relative to the general population, a significantly disproportionate number of female prisoners are women of color, particularly African-Americans.[67] A large

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lowing the INS's revocation of Esmor's contract, two officers were indicted for bribery and conspiracy to smuggle illegal immigrants into the United States. *See id.* at 378–79.

60. The cost of confining inmates in the United States doubled in the last five years, reaching $50 billion annually, or $33,334 per inmate per year. *See id.* at 376–77 n.8. Estimates show that one 700-bed jail and one 1600-bed prison need to be opened every week. *See id.*

61. *See id.* The U.S. prison population is approximately 1.6 million; China is next with 1.2 million. The U.S.' annual population growth rate is 1% per year, but 15% within its prisons. Another 1 million people are in the parole system. *See id.* at 372. *See generally* Martin E. Gold, *The Privatization of Prisons*, 28 URB. LAW. 359 (1996).

62. *See* NICOLE HAHN RAFTER, PARTIAL JUSTICE: WOMEN, PRISONS AND SOCIAL CONTROL 182 (2d ed. 1990). The crowding crisis became acute in the 1980s. The initial solution was to build at the existing sites where women were held. *Id.* However, Alabama, Florida, and North Carolina are beginning to abandon the idea of gathering all women prisoners under one roof. *See id.* at 183–84.

63. Observers claim the increase relates to "the war on drugs and related changes in legislation, law enforcement practices, and judicial decision-making. In fact, drug-related offenses accounted for 55% of the increase of the female population between 1986 and 1991." HUMAN RIGHTS WATCH, *supra* note 29, at 17 n.6, citing RUSS IMMARIGEON & MEDA CHESNEY-LIND, WOMEN'S PRISONS: OVERCROWDED AND OVERUSED 3 (National Council on Crime and Delinquency ed., 1992) and TRACY L. SNELL & DANIELLE C. MORTON, WOMEN IN PRISON: SURVEY OF STATE PRISON INMATES 1991 (Bureau of Justice Statistics ed., 1994). Ninety-six percent of women interviewed for drug smuggling, charged with A-1 drug felonies and sentenced to life imprisonment under N.Y.'s Rockefeller Drug laws had no prior criminal record. *See Violence Against Women*, *supra* note 30, at 7, para. 18. *See also* Barry R. McCaffrey, Speech delivered at the New York State Conference on Substance Abuse and the Criminal Justice System (June 30, 1999) ("The number of people jailed for drug offenses has grown from approximately 50,000 in 1980 to 400,000 today. It is clear that we cannot arrest our way out of the problem of chronic drug abuse and drug-driven crime.").

64. *See* Kline, *supra* note 55, at 1–2. In 1991, almost 64% of women in federal custody were serving time for a drug-related offense. The next most common offenses were: property offenses (6.3%) and extortion, bribery or fraud offenses (6.2%). By comparison, in 1981, only 26% of women inmates were incarcerated for drug related offenses. *See id.*

65. *See generally* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 56. However, there are some female death row residents. As of 1995, 1.6% of the 3054 prisoners under sentence of death in federal prisons were female. *See id.* at 556. *See also* Nicole Hahn Rafter, *Equality or Difference?*, *in* FEMALE OFFENDERS: MEETING THE NEEDS OF A NEGLECTED POPULATION (American Correctional Association ed., 1993).

66. In state prisons, 73% of women are under 35 and 15% of arrests in the United States were females under age 18. *See* AMNESTY INTERNATIONAL, BETRAYING THE YOUNG: CHILDREN IN THE U.S. JUSTICE SYSTEM 53 (1998).

67. African American women constitute 14.5% of the U.S.' female population, but 52.2% of its prison's female population, and have been hardest hit by the increase. Between 1986 and 1991, the num-

number of women are pregnant at the time they enter correctional facilities, which has limited their health care options.[68] A majority of incarcerated women are mothers (80%) with most having more than one child.[69] The number of women who are the custodial parent of their children at the time they enter prison, relative to men, is striking.[70]

At the time of entry, women inmates are often poor,[71] uneducated,[72] disabled,[73] non-English speaking,[74] HIV-positive,[75] and suffer from other serious medical problems,[76] including drug and alcohol addiction[77] and psychiatric illness.[78] The numbers of women prisoners who have been the subject of childhood sexual abuse[79] and domestic violence[80] is substantially higher than both that of male inmates and the general population.[81]

These characteristics make women prisoners particularly vulnerable in the often unscrutinized conditions of confinement. They thus require particular attention, and international human rights may assist in efforts to protect

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ber of black non-Hispanic women in state prisons for drug offenses nationwide increased more than eight times, from 667 to 6193, double that for Black/non-Hispanic males and more than triple that for white non-Hispanic females. *See* HUMAN RIGHTS WATCH, *supra* note 29, at 16–18 n.10; Kline, *supra* note 55, at 99. *See generally* BETH E. RICHIE, COMPELLED TO CRIME—THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN (1996).

68. *See* ELLEN BARRY, WOMEN PRISONERS AND HEALTH CARE, LOCKED UP AND LOCKED OUT IN MAN MADE MEDICINE (Karry L. Moss ed., 1996). *See generally* T.A. Ryan & James B. Grassano, *Pregnant Offenders: Profiles and Special Problems*, *in* FEMALE OFFENDERS: MEETING THE NEEDS OF A NEGLECTED POPULATION (American Correctional Association ed., 1993).

69. Some facilities, for example, Bedford Hills in New York, have recognized this issue and instituted programs consisting of activities designed to prevent family disintegration, enhance parenting skills, and prepare inmates and their families for reunification. *See Violence Against Women*, *supra* note 30, at 42, para. 180.

70. *See generally* Pargo v. Elliott, 894 F. Supp. 1243 (S.D. Iowa 1995). Notably, the court recognized the frequency of female inmates as custodial parents in endorsing the necessity for a family preservation program and found that "based on the factors of population size, security level, types of crimes, lengths of sentences, and special characteristics of inmates, the court concludes that [these] inmates are *not similarly situated* to the various categories of male inmates." *Id.* at 1261 (emphasis added).

71. Women and children make up 80% of the U.S. poor. *See* RAFTER, *supra* note 62, at 178.

72. *See id.*

73. *See id.*

74. *See id.* at 178–79.

75. *See generally* W. Travis Lawson Jr., M.D. & Lt. Lena Sue Fawkes, *HIV, AIDS and the Female Offender*, *in* FEMALE OFFENDERS: MEETING THE NEEDS OF A NEGLECTED POPULATION (American Correctional Association ed., 1987).

76. *See generally* Scarlett V. Carp & Linda S. Schade, *Tailoring Facility Programming to Suit Female Offenders*, *in* FEMALE OFFENDERS: MEETING THE NEEDS OF A NEGLECTED POPULATION (American Correctional Association ed., 1987).

77. *See id.*

78. *See id. See also Study Backs Views of Prisons as the New Mental Hospitals*, BALTIMORE SUN, July 12, 1998 at 3A (reporting on Justice Department study that reveals that 283,800 inmates (16%) in state and federal facilities suffer from severe mental illness).

79. *See* Jordan v. Gardner, 986 F.2d 1521, 1539 (9th Cir. 1993). *See also Violence Against Women*, *supra* note 30, at 9, para. 29.

80. *See Violence Against Women*, *supra* note 30, at 9, para. 29. *See also* RAFTER, *supra* note 62, at 178–79; RICHIE, *supra* note 67, at 69–100.

81. *See* HUMAN RIGHTS WATCH, *supra* note 29, at 19–20. A 1988 study found that 88% of incarcerated women sampled had experienced childhood physical or sexual abuse, adult rape, or battering. *See id.*

them.[82] This includes rights developed specifically for the protection of women, who often experience different types of injustice because of their gender.[83]

### *D. A Brief History of U.S. Women's Prisons*

The history of women in U.S. penal facilities reveals several recurring themes: (1) separation of female prisoners from male prisoners, (2) the problems of establishing habitable conditions (e.g., issues of overcrowding, sanitation, accommodating motherhood), and (3) the definition and implementation of "humane treatment" in the context of appropriate supervision, punishment measures, work assignments, and rehabilitation programs.

When state prisons were established in the late 1700s, there were so few women inmates that states chose not to create separate institutions for women. Housing female with male prisoners resulted in privacy problems, vulnerability to sexual exploitation, and high infant mortality.[84] As the number of female inmates increased, they were moved to separate quarters, generally in either a small cellblock in the prison yard or a separate unit just outside the wall. They were no longer isolated from other women and were less vulnerable to sexual exploitation. However, these arrangements gave them less access to medical, religious, food, and exercise services.[85]

During the 1870s, overcrowding became a serious problem, and the practice of segregating women from men became more difficult.[86] Michigan removed women entirely from their prisons and confined them in local houses of correction.[87]

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82. *See infra* Parts III–IV and Annex Tables.

83. *See* Table A.1 in Annex. For an excellent overview of the different parental experiences between male and female inmates in the United States, see William W. Patton, *Mommy's Gone, Daddy's in Prison, Now What About Me?: Family Reunification for Children of Single Custodial Fathers in Prison—Will the Sins of Incarcerated Fathers Be Inherited by Their Children?*, 75 N.D. L. REV. 179 (1999). *See also* RAFTER, *supra* note 62, at 28–31.

84. *See* RAFTER, *supra* note 62, at xxvi–xxix, 3–4.

85. *See id.* at 13–16.

86. *See* BLAKE MCKELVEY, AMERICAN PRISONS: A STUDY IN AMERICAN SOCIAL HISTORY PRIOR TO 1915, at 77 (1968). Fortunes of women convicts in different states varied considerably. While Connecticut and Missouri were erecting new cell houses with separate yards for women, Illinois crowded women into the fourth story of the warden's house, using its women's building for male population overflow. Agitation for the better care of women in prison prompted the appointment of matrons in an increasing number of prisons. New York continued to maintain its prison at Sing Sing as the only separate prison for women in the country. Two more decades would pass before New York provided for the care of some of its women felons in special reformatories. *See id.* at 78.

87. *See id.* at 65–66. In the 1870s, a secondary prison in Detroit became the first women's "reformatory" in America developed by reformer Zebulon Brockway. *See id.* Reformatory penology overlooked women in the last part of the 19th century, as their small population readily fit into the household economy of both jails and prisons. In New York, however, Josephine Shaw Lowell finally roused the state to establish the Hudson House of Refuge for women convicted of misdemeanors, chiefly those involving sex morality. These were the first women inmates to receive literary and trade instruction, separate cottages, and "wholesome" farm labor—the complete reformatory treatment. It heralded a new day for female prisoners. *See id.* at 116, 140–41. Ironically, Michigan's Detroit House of Corrections was the facility involved in the first major federal civil rights equal protection lawsuit of behalf of women prisoners in

In the South, women, children, and ill prisoners were moved into separate quarters. At the same time, experiments with plantations, industrial prisons, and road camps supplied promising patterns for a new convict leasing system to address the labor shortage resulting from the abolition of slavery.[88]

Reformers established the principle that women prisoners must be treated differently from men.[89] Inmates lived in relatively small cottages under matronly supervision. New reformatories were designed to rehabilitate by inculcating domesticity. Programs included outdoor work, but inmates were trained mainly to sew, cook, and wait on tables and were often paroled as domestic servants.[90]

Modern women's prisons combine an old tradition of public neglect with the reformatory's legacy of gender stereotyping, made harsher by longer modern sentences. After a slow mid-century increase in the number of female institutions, the pace has exploded.[91] The new supply and demand has had significant public economic costs. From 1980 to 1993, total corrections expenditures of federal, state, and local governments combined increased 363%.[92] Costs reached $25,000 per year to imprison each inmate, or $150,000 for the typical six-year drug sentence.[93] In the 1980s and 1990s,

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1979. *See* Glover v. Johnson, 478 F. Supp. 1075 (E.D. Mich. 1979).

88. *See* MCKELVEY, *supra* note 86, at 185–86; MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928 (1996). The slave traditions of the lease system recognized no distinctions until the practice of dividing the convicts into "full-hands," half-hands," and "dead hands" revealed the advantage of separate treatment for women and juveniles. Texas, North Carolina, Alabama, and Virginia were the first state prisons to establish asylum farms. By the close of the century, only Tennessee and Louisiana had failed to remove women and children from the general prison population. *See id.* at 212.

89. Dr. Katherine B. Davis took charge of New York's reformatory for women at Bedford Hills in 1900 shortly after it was opened to major offenders and made it the most active penal experiment in America. The cottage system was developed to supplement the first building equipment and provide a more homelike environment, the trade department was designed to train the women for occupations open to them after discharge, and special attention was given to the medical treatment of sex offenders. *See* MANCINI, *supra* note 88, at 214; RAFTER, *supra* note 62, at 33–35.

90. *See* RAFTER, *supra* note 62, at 82. Early founders of women's reformatories had little interest in dealing with serious felons, preferring to rehabilitate misdemeanants frequently guilty of offenses against chastity. *See id.*

91. *See id.* at 181–84. By 1992, the Federal Bureau of Prisons held 5103 women—7.4% of the 68,779 inmates it then housed. All 5103 were housed in 13 facilities, 6 of which were all-female. The largest all-female facility is the Federal Medical Center in Lexington, Kentucky, which holds more than 1800 women, or 36% of all female inmates in the Federal system. *See* Kline, *supra* note 55, at 1.

92. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 56, at 3.

93. *See generally* Kenneth L. Avio, *On Private Prisons: An Economic Analysis of the Model Contract and Model Statute for Private Incarceration*, 17 NEW ENG. J. OF CRIM. & CIV. CONFINEMENT 265 (1991); MARTIN P. SELLERS, THE HISTORY AND POLITICS OF PRIVATE PRISONS: A COMPARATIVE ANALYSIS (1997). Historically, the economics of prison management have often been subject to a sure profit analysis. In a 1831 letter, Judge Wells, Director of the State Prison of Connecticut, provided the following figures to justify the building of a new penal facility: "cost of 500 convict prison $40,000 ($80 per prisoner); cost of food clothing and bedding per year $19,100 ($22 per prisoner). Total annual earnings of estimated 450 prisoners who can work 300 days a year at 25 cents per day totaled $33,750. Deducting $19,100 in expenses, net gain is $14,650." G. DE BEAUMONT & A. DE TOQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 178–80 (Herman R. Lantz ed. & Francis Lieber trans., Carey, Lea & Blanchard 1964) (1833).

the exploding prison population led to taxpayers financing the construction of prisons at a rate five times higher than prisons publicly financed in the 1960s.[94] Even at that rate, construction has failed to keep up with the increase in population, creating severe overcrowding.[95]

The complex and increasing problem of undeterred violations of the human rights of women prisoners in the United States is further aggravated by the increasing prison privatization in the last two decades.[96] This development has potentially serious implications for remedying human rights violations.[97]

## III. LOWERED CONSTITUTIONAL STANDARDS AND NEW LEGISLATIVE OBSTACLES

As Louis Henkin notes:

> By its reservations, the United States apparently seeks to assure that its adherence to a convention will not change, or require change, in U.S. laws, policies or practices, *even where they fall below international standards.*[98]

Well-documented factual investigations provide evidence of the compelling human rights problem in our prison systems.[99] Horrid conditions of confinement for women have increased with the prison population explosion. Over the past thirty years, there has been significant prison conditions liti-

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94. *See* DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 142 (1995).

95. The federal prison system is operating at 165% over capacity. California is at 181% of their rated capacity. Barry McCaffrey, Director of the Office of National Drug Policy, Speech at the New York State Conference on Substance Abuse and the Criminal Justice System (June 30, 1999).

96. Since the 1980s, the government has turned to private companies to operate correctional facilities. From 1991 to 1995, total beds under contract increased at an average of 35% per year. *See* Martin Gold, *The Privatization of Prisons*, 28 URB. LAW. 359, 371–72 (1996).

97. It is unclear if rehabilitation and other public goals have been furthered. *See* Paul Howard Morris, *Note: The Impact of Constitutional Liability on the Privatization Movement After* Richardson v. McKnight, 52 VAND. L. REV. 489 (1999). There are indications that privatization compromises public good and only benefits corporations. It is also criticized for unconstitutionally delegating government functions that cannot be ethically delegated to the private sector. It sacrifices quality of service, privacy, and individual liberty for profit. Privatization eliminates secure, well-paying government jobs in favor of less-secure jobs. The profit motive prevents private corporations from working for the public good. *See id.* at 491–99. An example of the growth potential of corporations running private prisons is Corrections Corporation of America (CCA). CCA was started in 1983 by founders and investors who had earlier started Kentucky Fried Chicken. CCA reported its first profit in fourth quarter 1989 with 12 facilities. PRIVATIZING CORRECTIONAL INSTITUTIONS 27 (Gary W. Bowman et al. eds., 1993) [hereinafter PRIVATIZING CORRECTIONAL INSTITUTIONS]. In 1999, CCA, now called Prison Realty Trust, Inc., is a publicly traded stock corporation with 51 prisons in 18 states and Britain. *See Prison Realty Shares Tumble, Payout is Cut, CEO is Leaving*, BALTIMORE SUN, Dec. 28, 1999, at 3C. It is questionable, however, whether public funds have been saved through privatization. *See* PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra*, at 375. Nonetheless, "[o]ver the last 20 years, privatization has experienced an unprecedented level of global support." Morris at 490–91.

98. *See* Henkin, *supra* note 18, at 342 (emphasis added).

99. *See* AMNESTY INTERNATIONAL, *supra* note 66, at 3–6; HUMAN RIGHTS WATCH, *supra* note 29.

gation under U.S. constitutional guarantees. The constitutional standards in the area of punishment have been in flux.[100] Recent legislative activities have also redefined legal avenues in response to abusive prison conditions.[101] Ironically, a "lowered bar" of domestic rights coincides with increased global awareness of the importance of international human rights standards.

The United States is a party to, or at least not opposed to, several international treaties and declarations designed to ensure the protection of basic human rights, including the International Covenant on Civil and Political Rights,[102] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[103] and the Universal Declaration of Human Rights.[104] Although the United States has ratified the ICCPR and the Torture Convention, it has attached reservations and failed to pass domestic enabling legislation. The various international standards under which a prisoner's rights may be protected include the prohibition of torture,[105] and cruel, inhumane or degrading treatment.[106] This Section reviews the status and trends in U.S. domestic norms concerning "punishment" and penal conditions.

The U.S. Constitution's Eighth Amendment obligates both the federal and state governments to prohibit "cruel and unusual punishment." However, recent court interpretations of this provision,[107] doctrines limiting li-

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100. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957 (1991); Turner v. Safely, 482 U.S. 78 (1987).

101. *See* Prison Litigation Reform Act of 1995, Title VIII of the Omnibus Budget Reconciliation Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) [hereinafter PLRA].

102. *See* ICCPR, *supra* note 16.

103. *See* Torture Convention, *supra* note 17.

104. Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), UN Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].

105. *See* Torture Convention, *supra* note 17.

106. Another related right includes privacy. "No one shall be subjected to arbitrary or unlawful interference with his privacy . . . ." ICCPR, *supra* note 16, art. 17. *See also* U.S. CONST. amend. IV; Bell v. Wolfish, 441 U.S. 520, 559 (1979) (stating cavity searches after contact visits were reasonable because of security concerns); Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993).

107. *See* discussion of *Harmelin*, 501 U.S. 957 (1991) and 482 U.S. 78 (1987) *infra* text accompanying notes 129–144. *See also* Fisher v. Goord, 981 F. Supp. 140, 175–76 (W.D.N.Y. 1997) (finding that verbal harassment, unsolicited stroking, and kissing of a female inmate does not rise to the level of an Eighth Amendment violation. The behavior of a guard who showed a female inmate naked pictures of himself, called her names, exposed himself, kicked her, and twisted her breasts, was "inappropriate," but it was "questionable" whether it constituted an Eighth Amendment violation.); Peddle v. Sawyer, 64 F. Supp. 2d 12, 16 (D. Conn. 1999) (finding that isolated allegations of sexual harassment, including threats in demand for sex and regular groping of breast and groin areas during searches, may not violate Eighth Amendment standards); Adkins v. Rodriguez, 59 F. 3d 1034, 1036 (10th Cir. 1995) (holding that absent physical contact, there is no clear established right to be free of sexual harassment in prison); Zehner v. Trigg, 133 F.3d 459, 461 (7th Cir. 1997) (finding that the PLRA applies to the Eighth Amendment claims and "does not permit recovery for custodial or emotional damages 'without showing a physical injury'"); Baez v. Gosline, No. 96-CV-1889 (N.D.N.Y. Mar. 5, 1999) (requiring plaintiff to meet the Eighth Amendment standards of *de minimis* injury, that is "significant, serious, or more than minor.") Evidence showed he was improperly frisked on thirty occasions in which [he] felt pain when his testicles were squeezed. "Viewed cumulatively, the physical injuries in the circumstances here remain *de minimis* given the momentary duration of the pain on each occasion and the absence of any permanency or even temporary impairment." *Id.*; U.S. v. Sanchez, 1999 WL 305090, at *4 (A.F.Ct.Crim. App., Apr. 12, 1999) (finding failure of plaintiff to "prove, as an objective matter" that the verbal abuse and sexual

ability,[108] as well as new federal legislation (Prison Litigation Reform Act) have significantly reduced the protections afforded to prisoners. In such an atmosphere, advocates now seek new sources of protection, including international law.

Advocates seek the option to pursue claims under both domestic and international law for a variety of reasons, including recent restrictions on domestic law claims, the ability to provide jurors and judges with alternate claims, and the desire to give alien and citizen plaintiffs equal access to these sources of law. Finally, it can be tactically effective to raise international human rights claims in settling litigation against the government, which fears public embarrassment. The threat of judicial findings of human rights violations is a powerful tool in forcing governments to meet their legal obligations.[109]

### *A. The Execution of Minors as "Punishment": An International Human Rights Violation Permitted Under Domestic Laws*

Although this Article focuses on the plight of women prisoners, it is useful to look at another, more clear-cut, example within the U.S. criminal justice system of the dissonance between domestic constitutional law prohib-

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harassment caused her "pain" in violation of the Eighth Amendment); Moya v. City of Alburquerque, No. 96-1257 (D. N.M. Nov. 17 1997) (dismissing female prisoners' claim that they were strip searched by male guards, with a resulting suicide attempt; a "few hours of lassitude and nausea and the discomfort of having her stomach pumped is not more than *de minimis* physical injury").

108. A thorough discussion of all preclusionary rules and their application to international human rights claims is beyond the scope of this Article. However, a variety of judicial doctrines restrict the ability of female prisoners to pursue sexual abuse claims for federal constitutional violations. *See, e.g.*, Flechsing v. United States, 991 F.2d 300 (6th Cir. 1992) (finding no state or federal statutory claim for the rape of a female inmate by a corrections officer, as the act was outside the scope of the employee's employment); Scott v. Moore, 114 F. 3d 51 (5th Cir. 1997) (holding that male staffing in a female housing unit where plaintiff was repeatedly raped over an eight hour shift by a male guard did not constitute a constitutionally impermissible risk creating municipal liability); Hovater v. Robinson, 1F.3d 1063 (10th Cir. 1993) (finding that qualified immunity precludes liability for county sheriff when he had no actual knowledge that guard who raped female prisoner might be a risk); Barney v. Pulsipher, 143 F.3d 1299 (10th Cir. 1998); Giron v. Corrections Corp. of America, 191 F.3d 1281 (10th Cir. 1999). For an extensive review of the practical problems related to burden of proof, liability limitations, including various immunities, see Amy Landerberg, Note, *The 'Dirty Little Secret': Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Constitutional Sexual Abuse*, 40 WM. & MARY L. REV. 323 (1998). These doctrines include Eleventh Amendment immunity, "qualified" and "absolute" immunities for individuals and entities, "state of mind" laity standards, judicial and legislative immunities, limitations of statutory application such as the definition of a "person" under 42 U.S.C. § 1983, and the exhaustion of remedies doctrine. For an excellent overview of these doctrines under domestic law, see MARTIN SCHWARTS & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES (1997); CONSTITUTIONAL TORTS (Sheldon H. Nahmod et al. eds., 1995). *See also* STEPHENS & RATNER, *supra* note 19.

109. This summary reflects the consensus in discussion among advocates at the 9th Annual Roundtable on Women in Prison, Jun. 30, 1999, University of Michigan. International human rights litigation was characterized, in part, as a form of mobilizing shame to protect victims. The proceedings of this roundtable have been compiled in BREAKING DOWN THE WALLS: COMMUNITIES IN THE NEW MILLENIUM (Jean M. Borger ed., 1999). *See generally* STEPHENS & RATNER, *supra* note 19.

iting "cruel and unusual punishment" and international human rights standards—the execution of minors.[110]

The execution of children in the U.S. justice system is the clearest example of domestic standards that are lower than international norms.[111] The execution of minors, which has been almost universally restricted, continues in the United States.[112]

The Convention on the Rights of the Child recently reiterated the international standard that "neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offenses committed by persons below eighteen years of age." While not ratified by the United States,[113] it has been adopted by 192 countries.[114] This is one of many

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110. While purely anecdotal, this author has lectured to law school students on human rights issues in a wide range of countries. Remarkably, whether in India or Brazil or elsewhere, the students invariably question U.S. practices, asking how the United States justifies violating international law when it executes minors and how the United States can credibly criticize other nations for violations of human rights when it refuses to follow the international standards on punishment of minors.

111. *See generally* D. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does it Make a Difference?*, 42 CRIME & DELINQ. 171 (1996); AMNESTY INTERNATIONAL, *supra* note 66. Many scholars and policy makers also argue that the growing tendency in the United States to punish and prosecute children as adults is inconsistent with treaties and standards set by the international community. *See id.* at 36.

112. The human rights standard prohibiting the execution of minors is specified in numerous international treaties signed and/or ratified by the United States, including the International Covenant on Civil and Political Rights (ICCPR) (ratified), the American Convention on Human Rights (ratified), the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment, and the Convention on the Rights of the Child. These conventions are evidence of customary international law. *See* Chisholm v. Georgia, 2 U.S. 419 (1793); Filartiga v. Pena-Irala, 630 F.2d 876, 877 (2d Cir. 1980). *See also* INTERNATIONAL LAW, CASES AND MATERIALS 164 (Louis Henkin et al. eds., 3d ed. 1993). The ICCPR provides: "the death penalty must not be imposed for crimes committed by people when they [are] under 18." ICCPR, *supra* note 16, art. 6(5). The United States ratified the ICCPR in 1993, but reserved the right not to implement section 6(5). *See* Louis Henkin, *Introduction* to THE INTERNATIONAL BILL OF RIGHTS (Louis Henkin ed., 1981), *reprinted in* INTERNATIONAL HUMAN RIGHTS 176 (Richard B. Lillich ed., 1991). This reservation has been the subject of criticism which questions its validity. *See* Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311, 1331–32 (1983); William A. Schabas, *Invalid Treaty Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277 (1995); Domingues v. State, 961 P.2d 1279, 1281 (Nev. 1998).

113. *See* Ronald J. Mann, *The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment*, 29 HOUS. L. REV. 493; Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. DOC. A/44/49 (1989) (entered into force Sept. 20, 1990) [hereinafter Children's Convention]. *See also Status of the Convention on the Rights of the Child*, U.N. ESCOR Comm'n on Hum. Rts., 54th Sess., Agenda Item 20, at 2, U.N. DOC. E/CN.4/1998/99 (1997); Connie de la Vega, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?*, 32 U.S.F. L. REV. 735, 753 (1998).

114. See Children's Convention, *supra* note 113. Somalia is the only other U.N. member state that has failed to ratify this Convention. The American Convention on Human Rights specifically prohibits the death penalty for children. During the drafting phase, the United States did not object to the prohibition of the execution of juvenile offenders and signed, but never ratified the Convention. *See* O.A.S.T.S. N.36, OS OFF.Rec.OEA/SERL/V/II. 23 Doc.21 REV.6 (1979). The U.S.' status as a signatory, however, may obligate it to not act inconsistently with the object and purpose of the treaty. *See* Vienna Convention, *supra* note 18, art. 18.

significant indicators reflecting a global consensus in opposition to the execution of minors.[115]

Since 1990, only six countries are known to have executed individuals who were under eighteen years old at the time of their crime: [116] Iran (4), Nigeria (1), Pakistan (2), Saudi Arabia (1), Yemen (1), and the United States (12).[117] The prohibition of the execution of minors has reached *jus cogens* status.[118]

Rather than accord and implement obligations under international law, the United States has followed the ruling of its Supreme Court solely under domestic constitutional law to determine when a child can be put to death. In 1988, the Court ruled in *Thompson v. Oklahoma*[119] that it was unconstitu-

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115. In *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) the U.S. Supreme Court recognized the world's opposition:

> [t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by leading members of the Western European community. Thus the American Bar Association and the American Law Institute have formally expressed their opposition to the death penalty for juveniles. Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.

487 U.S. 815, 830–31 (1988) (citations omitted).

116. AMNESTY INTERNATIONAL, JUVENILES AND THE DEATH PENALTY 3 (1988). Only eight countries have allowed such executions in the past 15 years, indicating almost universal recognition of the prohibition. HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH REPORT 1996, at 342 (1995) [hereinafter HUMAN RIGHTS WATCH WORLD REPORT].

117. Twenty-four U.S. states permit the use of the death penalty (minimum age in brackets): Alabama (16), Arizona (16), Arkansas (16), Delaware (16), Florida (16), Georgia (17), Idaho (16), Indiana (16), Kentucky (16), Louisiana (16), Mississippi (16), Missouri (16), Montana (16), Nevada (16), New Hampshire (17), North Carolina (17), Oklahoma (16), Pennsylvania (16), South Carolina (16), South Dakota (16), Texas (17), Utah (16), Virginia (16), Wyoming (16). *See* HUMAN RIGHTS WATCH WORLD REPORT, *supra* note 116, at n.159. The U.S. federal government, however, has set 18 as the minimum age for the death penalty. However, under international law, the United States has a responsibility to ensure that federal and state governments comply with international obligations. Recently, by Executive Order, the United States has recognized that it must "fully respect and implement its obligations under the international human rights treaties to which it is a party, including the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Racial Discrimination," and other relevant treaties concerned with the protection and promotion of human rights to which the United States is a party. *See* Exec. Order No. 13,107, 63 FR 68991, 1998 WL 865822 (Pres.) (Dec. 10, 1998). However, state practices continue unchanged.

118. "[A] norm accepted and recognized by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention, *supra* note 18, art. 53. Sean Sellers was executed on Feb. 4, 1999 in Oklahoma, the first person since 1959, for a crime committed at age 16. V. Dion Haynes, *Deeds of Youth and Death Row*, CHI. TRIB., Feb. 4, 1999, at 3. *See generally* Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455 (1996).

119. 487 U.S. 815 (1988).

tional to execute a minor who was only fifteen at the time of the crime.[120] Justice Stevens' plurality opinion (joined by Justices Brennan, Marshall and Blackmun) referred to both domestic and international standards and practices in determining whether the execution would meet the "evolving standards of decency that mark the progress of a maturing society."[121] Justice O'Connor concurred on other grounds.[122] Justice Stevens' use of international standards in reviewing the Eighth Amendment claim was a subject of Justice Scalia's stinging dissent: "The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency is totally inappropriate as a means of establishing the fundamental beliefs of this country."[123]

The debate on the use of international standards in defining the scope of the Eighth Amendment in capital cases arose again only one year later. In *Stanford v. Kentucky*,[124] the Court found the execution of a sixteen-year-old was neither "cruel and unusual" nor otherwise in violation of domestic constitutional protections.[125] In Part II of Justice Scalia's opinion for the Court (joined by the Chief Justice and Justices White, Kennedy, Stevens and O'Connor), he was quick to note:

> We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici (accepted by the dissent, see post, at 2984–2986) that the sentencing practices of other countries are relevant.[126]

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120. *See id.* at 838.

121. *Id.* at 821, 831 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (Warren, C.J.)).

122. *See id.* at 848. 851–52 (referring to international treaty prohibitions, in particular Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, only in determining congressional intent regarding recent domestic legislation).

123. *Id.* at 869 n.4. Justice Scalia's dissent, joined by Chief Justice Rehnquist and Justice White (Justice Kennedy did not participate) went on to say,

> [t]hat 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. *See* Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937) (Cardozo, J.). But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.

*Id.*

124. 492 U.S. 361 (1989).

125. *Id.*

126. *Id.* at 370 n.1. The dissent of Justice Brennan (joined by Justices Marshall, Blackmun and Stevens), referred to international practices and law:

While the make-up of the Court has changed since *Stanford*, there is no indication that a current majority would change the Court's position on the use of international standards in defining the Eighth Amendment.[127] Short of this unlikely scenario, the execution of minors will continue in the United States, permitted by domestic law that violates international human rights standards prohibiting cruel, inhumane or degrading punishment.

### *B. "Cruel and Unusual" in the United States—A Two-Pronged Test? Can Abuse Be Cruel but Not Unusual?*

U.S. courts continue to lower the bar of domestic human rights standards in the area of "punishment,"[128] including the conditions of confinement. Rulings interpreting the Eighth Amendment's "cruel *and* unusual punishment" clause are a recent example.[129] Various treaties and declarations, however, establish principles prohibiting torture, cruel, inhumane, *or* degrading treatment, thereby providing potentially broader sources of protection for women prisoners.

The U.S. Supreme Court in *Harmelin v. Michigan*[130] considered a claim that a mandatory life sentence without parole violates a first time offender's right to be free from "cruel and unusual punishment"[131] after a conviction for cocaine possession.[132] The Court, with Justice Scalia writing for the majority, held that the sentence[133] did not violate the Eighth Amendment.[134] In a portion of his opinion, joined by Chief Justice Rehnquist, Justice Scalia

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> Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis. Many Countries, of course—over 50, including nearly all in Western Europe—have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason .... Twenty-seven others do not in practice impose the penalty .... Of the nations that retain capital punishment, a majority—65—prohibit the execution of juveniles .... Since 1979, Amnesty International has recorded only eight executions of offenders under 18 throughout the world, three of these in the United States. The other five executions were carried out in Pakistan, Bangladesh, Rwanda, and Barbados. In addition to national laws, three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties. Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.

*Id.* at 389–90 (footnotes omitted).

127. Since *Stanford*, three of the dissenters, Justices Brennan, Marshall and Blackmun, as well as Justice White, who concurred in the opinion of the Court, have left the bench. A change in the *Stanford* position would require the votes of all four of the new Justices (Souter, Thomas, Ginsburg and Breyer) and Justice Stevens.

128. *Compare* Ingraham v. Wright, 430 U.S. 651 (1977) (corporal punishment is "not punishment within the meaning of the Eighth Amendment") *with* the ICCPR, *supra* note 16, art. 7.

129. *See* Harmelin v. Michigan, 501 U.S. 957 (1991); Turner v. Safely, 482 U.S. 78 (1987).

130. *See Harmelin*, 501 U.S. 957.

131. U.S. CONST. amend. VIII.

132. *See Harmelin*, 501 U.S. at 961.

133. § 333 Mich. Comp. Law. Ann., 7403(2)(a)(i) (1999).

134. *See Harmelin*, 501 U.S. at 995 n.117. (Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Connor and Souter, rejected the proportionality test of *Solem v. Helm*, 463 U.S. 277 (1983)).

found the Michigan sentence to be "cruel" but *not* "unusual."[135] In examining the origins of the phrase "cruel and unusual," he opined that it was intended to proscribe only certain types of punishment, not to guarantee proportional sentencing.[136] His analysis concluded with a new two-pronged test whereby only a punishment which is independently both cruel *and* unusual is unconstitutional. The decision offers no definitive test but reflects new directions in interpreting the Eighth Amendment. It has also created further ambiguities for courts and litigants.[137]

This decision and its progeny, using this new textual analysis, reflect the recent propensity of U.S. courts to reduce Eighth Amendment protections below the cruel *"or"* unusual standards under international human rights norms. As one might expect, Justice Scalia's analysis of the Eighth Amendment has had an impact on state courts. For instance, a Maryland court considered whether two concurrent sentences of twenty years violated either the Maryland or United States constitutions.[138] In invalidating the first twenty-year sentence, the court held there were still constitutional protections against grossly disproportionate sentences, but noted that the plurality decision of Justices Scalia and Rehnquist in *Harmelin* "clouds . . . the waters of Eighth Amendment proportionality jurisprudence."[139]

An Illinois court has indicated a willingness to adopt Justice Scalia's two-pronged "cruel *and* unusual punishment" test when it upheld a sentence of two consecutive twenty-year terms for sexual assault convictions.[140] The court noted that the majority in *Harmelin* had agreed that "severe, mandatory penalties may be cruel and yet are not unusual in the constitutional sense."[141]

State courts must follow both the U.S. and their respective state constitutions. A few state constitutions contain clauses prohibiting "cruel *or* unusual" punishment,[142] similar to international norms. Since *Harmelin*, some

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135. *See id.* at 965 n.117.

136. *See generally* David Sosa, *The Unintentional Fallacy*, 86 CAL. L. REV. 919 (1998) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION (Amy Gutman ed., 1997)) (discussing Justice Scalia's theories of statutory and constitutional interpretation).

137. "The problem with this reading of the clause is that it assumes that the Eighth Amendment prohibits only punishments that are both cruel and unusual. The text readily could bear a reading, consistent with the Court's tradition, that bars both cruel and unusual punishments." Mann, *supra* note 113, at 541 n.8 (citing REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING § 6.2, at 109–10 (2d ed. 1986) (discussing the ambiguity in the use of "and" to join modifiers that are not mutually exclusive) and Maurice B. Kirk, *Legal Drafting: The Ambiguity of "And" and "Or,"* 2 TEX. TECH L. REV. 235, 240 (1971) (noting that "and" is particularly ambiguous when used to join two adjectives that modify a plural noun)).

138. *See* Thomas v. Maryland, 634 A.2d 1 (Md. 1993).

139. *Id.* at 5.

140. *See* Illinois v. Belton, 682 N.E.2d 287 (Ill. 1993).

141. *Id.* at 293.

142. States whose consitutions use the phrase "cruel *or* unusual" include: ALA. CONST. art. I, § 15; ARK. CONST. art. II, § 9; CAL. CONST. art. I, § 17; HAW. CONST. art. I, § 12; KAN. BILL OF RIGHTS § 9; MD. DECLARATION OF RIGHTS art. XXV; MASS. CONST. art. XXVI; MICH. CONST. art. I, § 16; MINN. CONST. art. 1 § 27; N.D. CONST. art. I, § 11; OKLA. CONST. art. II, § 9; TEX. CONST. art. I, § 13; WYO.

state courts now interpret their state constitution's "cruel *or* unusual" language more broadly than the Eighth Amendment.[143] Notably, Michigan's constitution uses "or;" on that basis, the state supreme court struck down the statute upheld in *Harmelin*.[144]

### *C. International Standards: "Or" Not "And"*

Unlike the U.S. Constitution's Eighth Amendment, international instruments generally use "or" and do not require proof of more than one element. For example:

*Universal Declaration of Human Rights:*

> No one shall be subjected to torture *or* to cruel, inhuman *or* degrading treatment *or* punishment.[145]

*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:*

> Each State Party shall undertake to prevent in any territory under its jurisdiction other acts *or* cruel, inhuman *or* degrading treatment *or* punishment . . . .[146]

*The American Declaration of the Rights and Duties of Man:*

> Every person accused of an offense has the right . . . not to receive cruel, infamous *or* unusual punishment.[147]

*The American Convention on Human Rights:*

> No one shall be subjected to torture *or* to cruel, inhuman, *or* degrading punishment *or* treatment . . . .[148]

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CONST. Tit. 97-1-014.

143. *See, e.g.*, Michigan v. Bullock, 485 N.W.2d 866, 872–73 (Mich. 1992); California v. Castillo, 284 Cal.Rptr. 382, 399 (Cal. 1991).

144. *See Michigan*, 485 N.W.2d at 872–73.

145. Universal Declaration, *supra* note 104, art. 5 (emphasis added).

146. Torture Convention, *supra* note 17, art. 16(1) (emphasis added).

147. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, art. 26, International Conference of American States, 9th Conference, OAS Doc. OEA/Ser. L/V/I. 4 Rev. XX (1948), *reprinted in* Organization of American States, Basic Documents Pertaining to Human Rights in the Inter-American System, at 17, OAS Doc. OEA/Ser.L. V/II. 71, doc.6 rev.1 (1988) [hereinafter American Declaration].

148. American Convention, *supra* note 17, art 5. Under Article 27(2), there is no authorization to suspend Article 5.

*The African {Banjul} Charter on Human and People's Rights:*

> All forms of exploitation and degradation of man particularly . . . torture, cruel, inhuman *or* degrading punishment and treatment shall be prohibited.[149]

*The European Convention for the Protection of Human Rights and Fundamental Freedoms:*

> No one shall be subjected to torture *or* to inhuman *or* degrading treatment or punishment.[150]

*The International Covenant on Civil and Political Rights:*

> No one shall be subjected to torture *or* to cruel, inhuman *or* degrading treatment *or* punishment . . . .[151]

*The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment:*

> No person under any form of detention *or* imprisonment shall be subjected to torture *or* to cruel, inhuman *or* degrading treatment *or* punishment . . . .[152]

*Declaration on the Elimination of Violence Against Women:*

> The right not to be subjected to torture, *or* other cruel, inhuman *or* degrading treatment *or* punishment.[153]

*The Convention on the Rights of the Child:*

> No child shall be subjected to torture *or* other cruel, inhuman *or* degrading treatment *or* punishment.[154]

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149. African [Banjul] Charter on Human and People's Rights, *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, art. 5 [hereinafter Banjul Charter].

150. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 5, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention]. Under Article 15(2), there can be no derogation of Article 3.

151. ICCPR, *supra* note 16, art. 7.

152. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment G.A. Res. 43/173, U.N. GAOR 43rd Sess., Supp. No. 49, Annex, at 298, Principle 6, U.N. Doc. A/43/49 (1988) [hereinafter Body of Principles]. Principle 6 also provides: "No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment." *Id.*

153. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Annex, Supp. No. 49, at 217, art. 3, U.N. Doc. A/48/49 (1993).

154. Children's Convention, *supra* note 113, art. 37(a).

The use of the disjunctive "or" in these international instruments evidences a potentially higher standard of protection than that established by the U.S. Constitution.

To date, there have been no reported international tribunal decisions on the distinction between the textual import of "and" in domestic legislation versus "or" under international human rights standards. Doctrines of standing for individual petitioners, exhaustion of domestic remedies, limited resources of international tribunals, and ineffective jurisdiction over respondent countries[155] result in a paucity of decisions on these issues.

The European Court of Human Rights has reviewed prisoners' claims of torture *or* inhumane treatment under the European Convention on Human Rights.[156] In the 1978 decision in *Ireland v. United Kingdom*,[157] the Court reviewed allegations of torture of IRA members by British prison and military officials. The claims included sensory deprivation interrogation methods known as the "five techniques." [158] Under Article 3, which prohibits "torture or inhuman *or* degrading treatment or punishment,"[159] the Court held that "use of the five techniques did not constitute a practice of torture within the meaning of Article 3," but did constitute "inhuman and degrading treatment."[160] Logically, the conclusion would have differed if Article 3 used "and" instead of "or." A requirement that all elements of Article 3 be met would have led to a different result.[161] A similar analysis of the distinc-

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155. There is only one reported case of the Inter-American Court of Human Rights regarding the rights of a female prisoner. Under the American Convention of Human Rights, the prisoner was alleged to have been killed by a guard in Costa Rica. The Court dismissed the petition after two years for failure to exhaust domestic remedies, not reaching the Article V cruel treatment issue. *See* In the Matter of Vivian Gallardo et al. No.G 101/81, 8 Sept. 1983, with dissent of Judge Rodolfo E. Piza. Notably, Costa Rica waived the exhaustion requirement. Though the United States is a member of the Organization of American States, it has not acceded to the jurisdiction of the Inter-American Court of Human Rights.

156. *See* European Convention, *supra* note 150, art. 3.

157. Ireland v. United Kingdom, 2 Eur.Ct.H.R (ser. A) at 25 (1978).

158. *Id.* at para. 96. The court described these techniques in detail:

> (a) wall-standing: forcing the detainees to remain for periods of some hours in a 'stress position,' described by those who underwent it as being 'spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers'; (b) hooding: putting a black or navy colored bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation; (c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise; (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep; (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the center and pending interrogations.

*Id.* at para. 96.

159. European Convention, *supra* note 150, art. 3.

160. *Id.* at para. 246.

161. The Canadian Constitution's pertinent language is similar to the U.S. Constitution and defines its "cruel and unusual punishment" provision test as "whether the treatment is so excessive as to outrage standards of decency." Carlson v. Her Majesty The Queen [1998] F.C.R. T-1982-96, para. 30 (Can.). The South African and Brazilian Constitutions use "or" in analogous provisions. *See* S. AFR. CONST. ch.2, § 12(1)(e); Strydom v. Minister of Correctional Services and Others, 1999 (3) BCLR 342 (W), BRAZ. CONSTITUIÇÃO FEDERAL [C.F.] tit. II, ch. I. India, the world's largest democracy, does not have an analogous constitutional provision contained in its "Fundamental Rights" provisions. The domestic courts in

tions between "torture" and "cruel, inhuman or degrading treatment" under Article 10 of the American Convention on Human Rights makes it clear that a petitioner need not prove each element.[162] Notably, "[j]udicial attempts to interpret these concepts or to distinguish clearly among them [torture and cruel, inhuman and degrading treatment] in case law have proven difficult."[163] As one scholar concludes, "However basic this human right may seem, it is most complex indeed."[164]

Not only has the ambiguity on the impact of "or" in the Eighth Amendment created by the *Harmelin* decision failed to establish clear constitutional guidelines to prevent excessive punishments that may abridge human rights, but Justice Scalia's new two-pronged Eighth Amendment test also would not permit the judiciary to bar commonly imposed punishments, no matter how cruel.[165] Such a result would clearly drop below the international norm. The U.S. government's official position on treaty reservations which limit a treaty's reach to what is permitted by U.S. law has been that the Eighth Amendment adequately provides human rights protections.[166] Yet following *Harmelin*, *Turner v. Safely,* and the recent Prison Litigation Reform Act, this assertion may not be accurate.[167]

### *D. Lowering Constitutional Scrutiny Within the Prison Gates*—Turner v. Safely

The U.S. Supreme Court has also lowered the test used to evaluate all constitutional claims by prisoners. In *Turner v. Safely*,[168] the Court considered a First Amendment claim based upon restrictions of prisoners' rights to marry and use the mail. Justice O'Connor found that a prisoner's constitutional rights are not completely extinguished when she passes through the prison gates. However, she fashioned a new, significantly lower level of scrutiny for inmates' constitutional claims, replacing the "strict scrutiny" test with the "rational basis" test regardless of the rights at issue.[169] A prison practice or

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the U.K. have adopted Article 3 of the European Convention. *See* McKernan v. Governor of H.M. Prison Belfast, 1983 N1 83 (Q.B. 1982).

162. Julie Lantrip, *Torture and Cruel, Inhumane and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights*, 5 ILSA J. INT'L. & COMP. L. 551 (1999).

163. AMNESTY INTERNATIONAL, TORTURE IN THE EIGHTIES: AN AMNESTY INTERNATIONAL REPORT (1991).

164. CLOVIS C. MORRISSON, DYNAMICS OF DEVELOPMENT IN THE EUROPEAN HUMAN RIGHTS CONVENTION SYSTEM 72 (1981).

165. Some scholars have argued that this standard renders the Eighth Amendment purposeless. *See* Mann, *supra* note 113. Justice Scalia has also argued that the courts are not proper forums to resolve the harshness of criminal sanctions, holding that the issue should be left to the legislatures. This position would result in no punishment authorized by statutes being subject to review. *See generally* Peter Mahis Spett, Note, *Confounding the Graduation of Iniquity: An Analysis of Eighth Amendment Jurisprudence Set Forth in* Harmelin v. Michigan, 24 COLUM. HUM. RTS. L. REV. 203 (1992–1993).

166. "It has recently been policy to refuse to ratify any international treaty that is inconsistent with domestic standards, even where they fall below international standards." Henkin, *supra* note 18, at 342.

167. *See* Harmelin v. Michigan, 501 U.S. 957 (1991); Turner v. Safely, 482 U.S. 78 (1987). *See also* HUMAN RIGHTS WATCH, *supra* note 29, at 47; Sosa, *supra* note 136; Spett, *supra* note 165.

168. 482 U.S. 78 (1987).

169. *Id.* at 87. The stated policy behind this change was the Court's recognition of the deference due

regulation that burdens fundamental rights will be upheld so long as it is reasonably related to a legitimate penological interest of the government.[170]

*Turner* directly implicated First Amendment rights, one of the constitutional bases for claims of privacy and personal integrity raised by female inmates subject to sexual harassment and abuse. *Turner* lowers constitutional protections for women inmates, raising privacy claims under the First, Fourth, Ninth, and Fourteenth Amendments.[171]

*Turner*'s broad language left uncertainty as to whether the Court intended the rational basis standard to apply to Eighth Amendment claims of cruel and unusual punishment. The lower courts have split on this issue. The courts that have not applied the *Turner* analysis to Eighth Amendment claims generally continue to use the principle set forth in *Estelle v. Gamble* which prohibits punishment that is "unnecessary and wanton infliction of pain."[172] In post-*Turner* cases alleging that insufficient medical care amounts to cruel and unusual punishment, several courts have found that a violation occurs only when it is proven that officials are "deliberately indifferent" to a serious medical need.[173]

Some lower courts have applied the *Turner* test to Eighth Amendment claims without qualification.[174] Other courts have employed a combination of *Turner* and the more traditional Eighth Amendment tests. Generally, these courts determine whether the challenged prison regulation or action is reasonably related to a legitimate government interest and then review

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by courts to prison administrators.

170. Four factors are suggested in this analysis: (1) there must be a rational connection between the regulation and the legitimate government interest it promotes; (2) whether other alternative means of exercising the right are available to the prisoner; (3) the impact upon other inmates and prison resources of accommodating the constitutional rights; and (4) the absence of alternative means for accommodating the prisoner's rights. *See id.* at 89–90.

171. *See* discussion of claims raised in *Nunn v. Michigan*, *supra* note 51.

172. 429 U.S. 97, 104 (1976); *see also* Jordan v. Gardner, 986 F.2d 1521, 1530 (9th Cir. 1993) (declining to apply *Turner* to Eighth Amendment claim, dictum); Austin v. Hopper, 15 F. Supp. 2d 1210 (D. Ala. 1998) (rejecting *Turner*'s reasonableness standard and adopting both the "deliberate indifference" test for non-emergencies and a heightened standard of "obduracy and wantonness in emergencies"); Show v. Patterson, 955 F. Supp. 182, 192 (S.D.N.Y. 1997) (applying a two-part analysis of the seriousness of the injury and defendant's state of mind, rather than the *Turner* analysis).

173. For an overview of post-*Turner* cases, see generally Jones-Bey v. Wright, 944 F. Supp. 723 (N.D. Ind. 1996) (applying a two-prong objective/subjective test to determine if prisoner's placement on "medical separation status" for refusal to submit to a tuberculosis test violated the Eighth Amendment); Buckley v. Gomez, 36 F.Supp.2d 1216 (S.D.Cal. 1997) (applying *Estelle* test to prisoner's Eighth Amendment claim arising from lack of medical care); McCormick v. Stalder, 105 F.3d 1059 (5th Cir. 1997) (applying "deliberate indifference" test in analyzing whether the medical treatment of tuberculosis without informing inmate of risk violates prisoner's Eighth Amendment rights); Jolly v. Coughlin, 894 F. Supp. 734 (S.D.N.Y. 1995); Hasenmeier-McCarthy v. Rose, 986 F. Supp. 464 (S.D. Ohio 1998); Harris v. Thigpen, 941 F.2d 1495 (11th Cir. 1991).

174. *See* McPherson v. Coombe, 29 F. Supp. 2d 141 (W.D.N.Y. 1998) (failing to apply *Turner* analysis to Eighth Amendment violation claim); Johnson v. William, 768 F. Supp. 1161 (E.D. Va. 1991) (stating that cold meals, denial of orthopedic shoes, and restrictions on exercise and recreation do not offend contemporary notions of decency and remarking that even if the regulations infringed on a prisoner's constitutional rights, under *Turner*, regulations are valid if reasonably related to a legitimate penological interest).

whether the actual practice violates prohibitions against "deliberate indifference" or "wanton disregard."[175] Taking even another approach, some courts first determine whether challenged actions constitute "cruel and unusual" punishment and then apply *Turner*, validating the actions so long as they are reasonably related to a legitimate penological interest.[176]

It is, however, conceptually difficult to understand how the "unnecessary and wanton infliction of pain" can ever be reasonably related to a legitimate governmental interest. Such irrational analyses are the product of *Turner*, which fails to give clear direction to the lower courts. In the future, courts may generally find that *Turner* circumvents the entire analysis of "unnecessary and wanton infliction of pain" with a resulting *"reasonableness* standard" applied even to claims of "cruel and unusual punishment" that occur within prison walls.

As with the *Harmelin* decision, the effect of *Turner*'s low-threshold rational basis test upon constitutional claims by prisoners significantly lowers their domestic constitutional guarantees. The international human rights norms prohibiting cruel, inhuman or degrading treatment or punishment, privacy, and integrity, are less developed norms, but do not follow the *Turner* or *Harmelin* route. Unlike *Turner*, international human rights norms do not allow degradation of basic human rights based solely upon an individual's status as a prisoner.

### 1. The Prison Litigation Reform Act

The Prison Litigation Reform Act (PLRA) was signed into law in April 1996 and enacted primarily as a response to mounting concerns over the

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175. *See generally* Mendoza v. Blodgett, No. C-89-770-JMH, 1990 WL 263527 (E.D. Wash. 1990) (using a *Turner* evaluation first, then performing a three-part Eighth Amendment analysis in case where prisoner was placed in a dry cell to be watched to ascertain whether he ingested narcotics in a balloon. The court considered three factors: (1) wanton and unnecessary infliction of pain; (2) punishment which is disproportionate to the crime; (3) conditions which alone or combined deprive an inmate of minimal civilized measure of life's necessities); Navin v. Iowa Dept. of Corrections, 843 F. Supp. 500 (N.D. Iowa 1994); Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1987) (applying the *Turner* and Eighth Amendment analyses in considering a claim involving guards' use of taser guns during routine strip search was cruel and unusual); Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987) (applying first the *Turner* analysis and the "deliberate indifference test" in analyzing claim that prison policies unconstitutionally infringed upon women inmates' rights to elect to terminate their pregnancies); Terrovona v. Brown, 783 F. Supp. 1281 (W.D. Wash. 1991) (applying *Turner* to validate rectal probe policy in prison to prevent concealment of contraband but noted that "reasonableness" of policy could still be violative of the Eighth Amendment if wanton infliction of pain was present).

176. *See generally* Talib v. Gilley, 138 F.3d 211 (1998) (applying Eighth Amendment analysis to food deprivation claim then applying *Turner* analysis; finding no Eighth Amendment violation for *Turner* analysis to counter); Hershberger v. Scaletta, 861 F. Supp. 1470 (N.D. Iowa 1993) (applying *Turner* analysis, after mentioning the standard of "obduracy and wantonness," to challenge of exercise regulations requiring inmates to keep moving forward during exercise time or risk losing exercise privileges); Johnson v. William, 768 F. Supp. 1161 (E.D. Va. 1991) (stating that cold meals, denial of request for orthopedic shoes, and restrictions on exercise and recreation do not offend contemporary notions of decency (citing Rhodes v. Chapman, 452 U.S 337 (1981) and remarking that even if the regulations did infringe on a prisoner's constitutional rights under the *Turner* analysis, regulations are valid if reasonably related to a legitimate penological interest).

rising costs of prisoner litigation.[177] The PLRA carves out the area of prison litigation from all other cases before the judiciary, sets new rules and significantly affects past and future prison reform efforts as well as the scope of protections for individuals. The new restrictions include exhausting administrative remedies prior to filing a lawsuit, new limitations to allow proceedings *in forma pauperis*,[178] and a limitation on attorney fees for prevailing parties not applicable to non-prison related civil rights cases.[179]

The PLRA also dramatically limits a court's ability to remedy findings of unconstitutional prison conditions or practices.[180] Prior to granting relief, a court must find a violation of a constitutional or federal right, and then narrowly tailor the relief to that specific violation, even when the relief is agreed to by the parties in consent decrees.[181] Thus, a court cannot approve a consent decree without an independent finding of a constitutional violation. The PLRA's application to consent decrees is a significant change in federal civil procedure which only affects prison reform litigation. Now, under the PLRA, any consent decree that does not contain an admission by defendants or a finding of a constitutional or federal law violation is invalid. Such a requirement will obviously thwart efforts by parties to this complex and expensive litigation to enter into settlement agreements.[182] Surprisingly, the PLRA applies retroactively to outstanding consent decrees, thus placing them in jeopardy of abrogation, despite the agreement of the parties and approval of the court that ordered the relief.[183]

The PLRA also prohibits a prisoner from bringing a claim for mental or emotional injury in federal court without "*a prior showing of physical in-*

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177. *See generally* Jennifer A. Puplava, Note, *Peanut Butter and Politics: An Evaluation of the Separation-of-Powers: Issues in Section 802 of the Prison Litigation Reform Act*, 73 IND. L.J. 329 (1997); Deborah Decker, Comment, *Consent Decrees and the Prison Litigation Reform Act of 1995: Usurping Judicial Power or Quelling Judicial Micro-Management?*, 1997 WIS. L. REV. 1275 (1997).

178. *See* Prison Litigation Reform Act of 1995, Title VIII of the Omnibus Budget Reconciliation Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996). *See also* Decker, *supra* note 177, at 1276–81.

179. *See* Prison Litigation Reform Act of 1995, § 803, Title VIII of the Omnibus Budget Reconciliation Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996); 42 U.S.C. § 1988 (1994). *See also* Martin v. Hadix, 119 S. Ct. 1998, 2001 (1999) (upholding the fee limitation provision and giving it retroactive effect to pending cases).

180. *See* Prison Litigation Reform Act of 1995, § 802, Title VIII of the Omnibus Budget Reconciliation Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996). *See also* Decker, *supra* note 177, *at* 1276–81.

181. *See* Decker, *supra* note 177, at 1276–81. A consent decree is used in prison condition cases, in which a prisoner agrees to discontinue pending litigation in exchange for defendant's agreeing to correct allegedly unconstitutional conditions, but without any admission of wrongdoing by prison officials. *See id.* at 1276.

182. *See* HUMAN RIGHTS WATCH, *supra* note 29, at 37.

183. For a more in-depth discussion on the PLRA's effect on consent decrees see Puplava, *supra* note 177 and Decker, *supra* note 177. Under the PLRA, all remedial court orders enjoining unlawful prison practices or conditions are arbitrarily terminated after two years regardless of the degree of compliance. This automatic termination severely limits the likelihood for meaningful change in prison practices and conditions that violate constitutional standards, as two years is rarely enough time to implement significant institutional problems. *See, e.g.*, Glover v. Johnson, 934 F.2d 703, 715 (6th Cir. 1991) (noting the recalcitrance of the defendant State of Michigan).

*jury*."[184] This prohibition blocks any relief to prisoners who have been subjected to emotional abuse by prison officials and suffer injuries that are mental or emotional in nature.[185] Though Congressional hearings indicated that this provision would leave women prisoners victimized by sexual abuse without remedies, the Act passed with the provision intact.[186] This provision on its face limits the application of the Eighth Amendment's "cruel and unusual" punishment clause solely to violations which result in physical injuries. It also precludes other constitutional claims often raised in prisoner litigation where physical injury does not occur, such as violations of privacy, access to counsel, substantive due process, equal protection, and other First, Fourth, Fifth, Ninth, and Fourteenth Amendment rights.[187]

### 2. International Standards

These new legislative standards fly in the face of higher international human rights standards that recognize the importance of the inherent dignity of humans and accordingly prohibit acts of torture and other cruel, inhuman, or degrading treatment or punishment likely to cause pain or suffering to a prisoner, whether physical or mental. Physical injury has never been a required element of torture, cruel, inhuman or degrading treatment, or

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184. Prison Litigation Reform Act of 1995, § 803(d), Title VIII of the Omnibus Budget Reconciliation Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996). For an excellent analysis of this provision, see Stacey Heather O'Bryan, Note, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189 (1997).

185. Many constitutional rights claims by prisoners involve injuries that are not physical in nature. *See, e.g.*, Turner v. Safely, 482 U.S. 78 (1987) (concerning the First Amendment rights to marry and receive mail); Block v. Rutherford, 468 U.S. 576 9(1984) (challenging denial of all contact visits and searches of cells as violations of Fourteenth Amendment); Hudson v. Palmer, 468 U.S. 517 (1984) (involving Fourteenth Amendment claims of intentional, unauthorized deprivation of property).

186.

> Disturbing reports of sexual abuse of female prisoners by male prison officials confirmed the need for judicial oversight to prevent physical abuse of prisoners. In fact, one speaker stressed the need for Congress to exercise particular caution when removing protections for juvenile and female prisoners, reminding Congress that only recently . . . 'correctional officers and other prison employees repeatedly coerced female prisoners in the Georgia Women's Correctional Institution and other facilities to have sexual relations . . . . [A] religious leader employed by the Department of Corrections to provide religious services engaged in sexual activities with at least three women prisoners over a three-month period. A night shift supervisor had sexual relations with at least seven prisoners over a five-year period. An officer who supervised a first-time prisoner regularly demanded that she perform sexual acts. Women prisoners filed more than 230 affidavits detailing sexual relations with prison employees. The prison employees told the women that they would not be believed—or that they would suffer harm—if they reported the abuse. When the women pursued the matter, many were not believed, others suffered intimidation by prison employees they implicated . . . . Many allegations that were reported were simply never investigated.'

O'Bryan, *supra* note 184, at 1195–96 (quoting Prison Litigation Reform Act: Hearings Before the Senate Judiciary Comm. (1996) (statement of Mark I. Soler, President, Youth Law Center)).

187. *See* Davis v. District of Columbia, 158 F.3d. 1342 (D.D.C. 1998) (finding that PLRA's preclusion of a constitutional privacy claim alleging only psychological injury does not deny inmates access to court or equal protection).

punishment under international human rights standards.[188] Mental suffering alone has consistently been held to violate the ICCPR and the European Convention protections.[189]

In addressing the issue of solitary confinement in the United States, which, like many forms of sexual harassment, causes psychological suffering without physical injury, U.S. domestic protections fail to meet international protections.[190]

Historically, under U.S. domestic standards, rather than only forbidding the infliction of certain physical harms, both the Eighth and Fourteenth Amendments prohibited treatment of prisoners that is "offensive to human dignity" so as to "shock the conscience."[191] This constitutional standard is central to protecting prisoners from the psychological harms arising out of sexual harassment by prison guards. In *Women Prisoners of the District of Co-*

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188. *See, e.g.*, Ireland v. United Kingdom, 2 Eur.Ct.H.R (ser. A) at 25 (1978) (encompassing "mental effects" such as severe humiliation); United Nations Human Rights Commission, The Greek Case, Report of Nov. 5, 1969 (1969) 12 Yearbook 186–510 (finding mental or physical mistreatment "degrading if it grossly humiliates [someone] before others"); *see also* FRANCIS G. JACOBS & ROBIN WHITE, EUROPEAN CONVENTION ON HUMAN RIGHTS 49–68 (2d ed. 1996); Lantrip, *supra* note 162, at 555 (analyzing the proof requirements of Article 5 protections under the American Convention and stating that violations include treatment that "is cruel, inhuman or degrading to the physical, *mental or moral integrity* of the person.") (emphasis added); Velaquez Rodriguez v. Honduras, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No.4 paras. 156, 187 (1988) (finding that isolation alone violates this protection). *See also Report of Special Rapporteur, Mr. Nigel S. Rodley: Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. ESCOR Comm'n on Hum. Rts., 52nd Sess., Item 8(a) of the Provisional Agenda, U.N. Doc. E/CN.4/1996/35 (1996).

189. The U.N. Human Rights Commission has consistently found mental suffering alone to violate Article VII of the ICCPR. *See* Annual Report of the Committee to the General Assembly, (1981–1982) II Y.B. Hum. Rts. Comm., 383, U.N. Doc. CCPR/3/Add.1 (1989); WILLIAMS, TREATMENT OF DETAINEES: EXAMINATION OF ISSUES RELEVANT TO DETENTION BY THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 28–29, 35 (1990); DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 369, 389 n.99 (1991); NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW, Annexes 1–8e (1987). *See also*, Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1988) *reprinted in* 11 Eur. H.R. Rep. 439 (1989) (finding that Article 3 prohibition against "cruel, inhuman or degrading treatment" would be violated by an extradition to the United States in which the prisoner would be exposed to the psychological suffering known as the "death row phenomenon"); Richard B. Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128 (1991).

190.

> In conclusion, the international community, in the spirit of a changing, more sophisticated understanding of the importance of mental well-being to human dignity, has recently extended the protection against *"cruel, inhuman or degrading treatment or punishment" to include, not only physical conditions, but also the mental effects of certain prison practices.* Because of this application, the use of solitary confinement as used in the United States would clearly violate the evolving international standards. Unfortunately though, even with clear clinical documentation of the severely detrimental psychological syndrome caused by solitary confinement, the United States has failed to find a general violation of the Eighth Amendment to which its analysis of prisoners' complaints is limited.

Nan B. Miller, Comment, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT'L L.J. 139, 170 (1995) (emphasis added).

191. Rochin v. California, 342 U.S. 165 (1952).

*lumbia v. District of Columbia*,[192] decided pre-PLRA, female inmates filed a class action suit alleging pervasive sexual harassment and coercion in the Washington, D.C. prison system. In addition to finding that rape, coerced sodomy, and unsolicited touching of female prisoners' bodies violated constitutional protections, the court also held that "vulgar sexual remarks of prison officers, the lack of privacy within . . . cells and the refusal of some male guards to announce their presence in the living areas of women prisoners" constituted a separate violation of Eighth Amendment rights.

Although the female inmates who had been raped would meet the PLRA's physical injury threshold, the "significant depression, nausea, frequent headaches, insomnia, fatigue, anxiety, irritability, nervousness and loss of self-esteem" for inmates who had merely been harassed would be now unredressable mental and emotional injuries under the PLRA.[193]

### *E. Conclusion*

This recent legislation[194], as well as new trends seen in judicial opinions on constitutional standards in prison cases, reflects a radical change in the appropriate governmental response to these issues. Through these changes, the United States has significantly reduced and, in some cases, effectively eliminated domestic constitutional protections.[195]

## IV. INTERNATIONAL HUMAN RIGHTS AS PART OF U.S. JURISPRUDENCE

International humanitarian law provides another source of law for human rights organizations and advocates. Worldwide recognition of the human rights and humanitarian law norms should, in turn,

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192. 877 F.Supp. 634 (D.D.C. 1994).

193.

> Sexual harassment of female prisoners was considered particularly invidious because in free society, a woman who experiences harassment may seek the protection of police officers, friends, coworkers or relevant social service agencies. She may also have the option of moving to locations where the harassment would no longer occur. In sharp contrast, the safety of women prisoners is entrusted to prison officials, some of whom harass women prisoners and many of whom tolerate harassment. Furthermore, women are tightly confined, making escape from harassment as unlikely as escape from jail itself.

O'Bryan, *supra* note 184, at 1211–12.

194. One court has questioned whether systematic sexual harassment of female prisoners is a "condition of confinement" within the meaning of the PLRA. *See* Peddle v. Sawyer, 64 F.Supp. 2d 12 (D.Conn. 1999).

195. *See* decisions, *supra* notes 107–108, including Fisher v. Goord, 981 F.Supp. 140 (W.D.N.Y. 1997); Adkins v. Rodriguez, 59 F.3d 1034, 1036 (10th Cir. 1995) (holding that absent physical contact, there is no clearly established right to be free of sexual harassment in a prison setting); Zehner v. Trigg, 133 F.3d 459, 461 (7th Cir. 1997) (finding that PLRA applies to the Eighth Amendment and "does not permit recovery for custodial or emotional damages 'without a showing of physical injury.'"); Baez v. Gosline, No. 96-CV-1889 (N.D.N.Y.Mar. 5,1999).

> lead to more widespread acceptance and implementation of fundamental rights.[196]

While "[i]nternational law is part of our law,"[197] the applied meaning of this language in the incorporation of international law into the domestic jurisprudence of the United States has been the subject of significant scholarly debate over the last 100 years.[198] Unfortunately, the U.S. Supreme Court has provided little guidance for the judiciary in the incorporation process.

This Section briefly reviews the sources of international law under U.S. jurisprudence and identifies international treaties, declarations, and guidelines providing potential international human rights protection of women prisoners subjected to abuse in U.S. prisons.

There are two primary sources of international law: treaties and customary law.[199] The Restatement (Third) of the Foreign Relations Law of the United States delineates the customary international law of human rights:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . .
> (d) torture or other cruel, inhuman, or degrading treatment or punishment, or . . .
> (g) a consistent pattern of gross violations of internationally recognized human rights.[200]

The list is not intended to be exhaustive.[201]

U.S. courts, in determining international customary law, review a variety of sources:

> What the law of nations on this subject is, may be ascertained by consulting the work of jurists, writings professedly on public law;

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196. David Weissbrodt, *An Introduction to the Sources of International Human Rights Law*, C339 ALI-ABA 1 (1989).

197. The Paquete Habana, 175 U.S. 677, 700 (1900) (Gray, J.). This was not a new concept in U.S. law even then. *See* The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815), in which Chief Justice Marshall referred to the "law of nations;" *see also* U.S. CONST. art.1, §8, cl. 10. The Alien Tort Claims Act, 28 U.S.C. § 1350 (1994), is the most commonly used basis for statutory international human rights claims for torts committed in other countries (derived from the Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77). *See generally* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

198. This topic is beyond the scope of this Article. For an excellent debate on these issues, *see Symposium: Century: U.N. Human Rights Standards and U.S. Law*, 66 FORDHAM L. REV. 1 (1997).

199. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987); *see also* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).

200. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702.

201. *Id.* § 702 cmt. a ("Human rights not listed in this section may have achieved the status of customary law, and some rights may achieve that status in the future.").

> or the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.[202]

The "law of nations" forms an integral part of federal common law. A review of the history surrounding the adoption of the Constitution demonstrates that the "law of nations" became part of U.S. common law upon the adoption of the Constitution.[203] When Justice Jay stated in *Chisolm v. Georgia*[204] that "the United States by taking a place among the nations of the earth [became] amenable to the law of nations," he was speaking of customary international law, not merely treaties.[205] Under the Articles of Confederation, the states applied international law as common law, but with the signing of the U.S. Constitution, "the law of nations became preeminently a federal concern:"[206] "[i]t is now established that customary international law in the United States is kind of federal law, and like treaties and other international agreements, it is accorded supremacy over state law by Article VI of the Constitution."[207] This principle is frequently reiterated.[208]

### *A. Treaties: Reservations, Declarations, and Self-Execution in the Modern Age*

Justice Scalia's position that U.S. jurisprudence should not incorporate international human rights standards[209] was ironically affirmed by the U.S.'s qualified ratification of the ICCPR and the Torture Convention, declaring both treaties to be "non-self-executing,"[210] and the failure to pass enabling

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202. United States v. Smith, 18 U.S. (5 Wheat,) 153, 160–61 (1820); *see also The Paquete Habana*, 175 U.S. at 700. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (2), 103 (2). International customary law "results from a general and consistent practice of states followed by them from a sense of legal obligation." Statute of the International Court of Justice, art. 38(1)(d).

203. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 885–86 (2d Cir. 1980) (noting 1 BLACKSTONE, COMMENTARIES 263–64).

204. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793).

205. *See id.* at 474. *See also* Ware v. Hylton, U.S. (3 Dall.) 199, 281 (1796) ("when the United States declared their independence they were bound to receive the law of nations."); *Filartiga*, 530 F.2d at 877 ("upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law.").

206. *See Filartiga* at 877–78.

207. INTERNATIONAL LAW, EC CASES AND MATERIALS 164 (Louis Henkin et al. eds., 3d ed. 1993). *See also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964).

208. *See* First National City Bank v. Banco Para de Comercio de Cuba, 462 U.S. 611, 623 (1983) (comenting that federal common law is necessarily informed by international customary law); *see also* Ill. v. City of Milwaukee, Wis., 406 U.S. 91, 99–100 (1972) ("A case properly 'arises under the 'Laws of the United States" for Article III purposes if grounded upon statutes enacted by Congress or upon the common law of the United States."); Ivy Broad. Co., Inc. v. AT&T Co., 391 F.2d 486, 492 (2d Cir. 1968).

209. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815 (1988); Stanford v. Kentucky, 492 U.S. 361 (1989).

210. *See* ICCPR, *supra* note 16. *See also* Restatement (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (1987); HUMAN RIGHTS WATCH, *supra* note 29, at 47 n.121. The Senate attached three reservations, five understandings and two declarations to the Torture Convention, and five reservations, five understandings, and four declarations to the ICCPR. *See* Torture Convention, *supra* note 17, art. 22; Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16,

legislation.[211] These Conventions also contain reservations limiting the treatise to the scope of the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution.[212]

Recent U.S. policy to issue reservations to anything in a treaty inconsistent with domestic law raises serious questions about what effect these reservations have on treaties such as the ICCPR and the Torture Convention.[213] As discussed later in this Article, these issues have been a recent source of debate among scholars.[214]

When Congress uses its constitutional authority to legislate in the international rights area, it has and can provide domestic judicial remedies for international human rights violations.[215] Ratification of a treaty, on the other hand, may not similarly result in establishing the treaty as binding authority in our courts. In general, the ability of individuals or groups to enforce treaties in U.S. courts has proved to be prohibitively difficult. Although treaties are the "Supreme Law of the Land,"[216] this constitutional

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1966, 99 U.N.T.S. 302.

211. The United States, as other states, has a responsibility under international law to implement their treaty obligations domestically. *See* Koh, *supra* note 25; LOUIS HENKIN, HOW NATIONS BEHAVE (2d ed. 1979).

212. *See* 136 CONG. REC. S17486 (daily ed. Oct. 27, 1990) (Senate Reservation I(2) to the U.S. ratification of the Torture Convention); 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992) (U.S. Reservation I(3) to the ICCPR states, "[t]hat the United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.").

213. *See* General Comment (No. 24) on issues relating to reservations made upon ratification or accession to the [ICCPR] or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, U.N. GAOR Hum. Rts. Comm., 52d Sess., 1382d mtg., para. 19, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) ("States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such.").

214. *See generally* DINAH SHELTON, *Issues Raised by the United States Reservations, Understandings, and Declarations, in* U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 269 (Hurst Hannum & Dana D. Fischer eds., 1993); Henkin, *supra* note 197; Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self- Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515 (1991); John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287 (1993); Michael J. Glennon, *The Constitutional Power of the United States Senate to Condition Its Consent to Treaties*, 67 CHI.-KENT L. REV. 533 (1991); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627 (1986); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 51–79 (1997); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571 (1991); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

215. *See* Alien Tort Claims Act, 28 U.S.C. § 1350 (1994). Courts will also look to declarations of international bodies such as the United Nations and the Organization of American States (OAS) to determine international customary law. *See generally* Harold Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599 (1997); Richard B. Lillich, *International Human Rights Law in U.S. Courts*, 2 J. TRANSNAT'L L. & POL'Y 1 (1993); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805 (1990); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTRALIAN INT'L Y.B. 82 (1992).

216. U.S. CONST. art. VI, § 2 ("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.")

principle may have little practical impact in our courts. Under long standing U.S. Supreme Court doctrine, it is only so-called "self-executing"[217] treaties which supersede all state or prior federal laws and are justiciable.[218] Generally, the record of U.S. courts shows a clear unwillingness to find international human rights treaties to be "self-executing."[219] The international human rights treaties which the United States has ratified are, in the vast majority of cases, not *directly* enforceable in our courts due to this judicial doctrine.[220] Alternative statutory bases for raising treaty rights are discussed in Part V, *infra.*

### *B. Additional International Conventions, Declarations, Standards, and Practices Affecting the Human Rights of Women in Confinement*

A review of the domestic laws and practices of states is important as courts interpreting international law also look to the practices and customs of states in determining customary law.[221] The principles supporting reference to state practice are well summarized by Louis Henkin:

> [P]rinciples common to legal systems often reflect natural law principles that underlie international law . . . [I]f the law has not yet developed a concept to justify or explain how such general principles enter international law, resort to this secondary source seems another example of the triumph of good sense and practical needs over the limitations of concepts and other abstractions.[222]

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217. *See* The Paquete Habana, 175 U.S. 677, 700 (1900). The doctrine first appeared in Foster v. Neilson, 27 U.S. (2 Pet.) 253, 254 (1829).

218. *See The Paquete Habana*, 175 U.S. at 700.

219. In the over 160 years since the creation of the doctrine, few U.S. courts have found a human rights treaty to be "self-executing." *See generally* Bert Lockwood, *The United Nations Charter and United States Civil Rights Litigation*, 69 IOWA L. REV. 901 (1984); RICHARD LILLICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS (1983).

220. A constitutional amendment was proposed by U.S. Senator Bricker in the early 1950s to make all treaties "non-self-executing." The amendment was considered a response to the growing domestic Civil Rights movement to end racial discrimination and a fear that international treaties might create a legal basis to support such efforts. *See* Henkin, *supra* note 18, at 348 (quoting Senator Bricker's declaration: "My purpose in offering this resolution is to bury the so-called Covenant on Human Rights so deep that no one holding office will ever dare to attempt its resurrection."). Even though his constitutional amendment failed, the International Covenant on Civil and Political Rights was not ratified by the Senate for over forty years and, ironically, with a "declaration" that the convention was "non-self-executing." *Id.*

221. *See* INTERNATIONAL LAW 35–68 (Louis Henkin et al. eds., 2d ed. 1987); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) §§ 102–103 (1987).

222. Louis Henkin, *International Law: Politics, Values and Functions: General Course in Public International Law*, 216 RECUEIL DES COURS 61–62 (1989-IV).

### 1. Cross-Gender Searches and Monitoring of Women in Prison Housing Units: State Practices and International Standards

Female prisoners who are the victims of sexual assault, physical and verbal harassment, violations of privacy and personal integrity, degrading, cruel, inhuman, or unusual treatment, and discrimination by male correctional employees are affected by rights protected by a variety of international human rights standards.

Policies that permit unsupervised male guards to search and monitor in female prisoner housing units have been identified as a primary cause of the high degree of incidences of abuse in U.S. prisons.[223]

The only international standards that directly address this issue are found in the 1959 United Nations Standard Minimum Rules for Treatment of Offenders:

> (1) women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.
> (2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.
> (3) Women prisoners shall be attended and supervised only by women officers.[224]

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223. *See, e.g.*, Nicole Hahn Rafter, *Even in Prison, Women are Second Class Citizens: Through a Series of Lawsuits, Women Inmates are Forcing U.S. to Confront Basic Inequalities in the American Justice System*, 14 SPG HUMAN RIGHTS 28 at 30; Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993). Recommendations to remedy the abuse described in Michigan prisons have included:

> I. Protecting Privacy: The Need for a Policy
> A. MDOC should institute a policy to protect the privacy of women prisoners consistent with several federal court decisions recognizing that prisoners have a constitutionally protected right to privacy. Corrections employees should be fully trained in this policy, and it should be enforced strictly. Such a policy should include, among other things:
> B. A requirement that male officers announce their presence before entering a women's housing unit, toilet, or shower area;
> C. Permission for prisoners to cover their cell windows for limited intervals while undressing or using the toilets in their cells; and
> D. A rule that only female officers should be present during gynecological examinations.
> E. MDOC should cease "unclothed body searches" of women prisoners either by or in the presence of male employees, or under circumstances where a male employee may be in a position to observe the prisoner while she is undressed. Strip searches should be administered in a location that limits access by other prisoners or employees.
> F. MDOC should use female officers to pat-search female prisoners whenever possible. All officers should be trained in the appropriate conduct of pat-frisks and in the disciplinary sanctions associated with improperly performed searches. Women prisoners who either pull away during offensive pat-searches or request that the search be conducted by a female officer should not be subjected automatically to disciplinary action.

HUMAN RIGHTS WATCH, *supra* note 29, at 273–74.

224. United Nations Standard Minimum Rules for Treatment of Prisoners, *adopted* Aug. 30, 1955, U.N. Doc A/CONF/6/1, annex I, A (1956) [hereinafter Standard Minimum Rules].

In subsequent resolutions in 1971 and 1973, the United Nations urged its members to adopt and incorporate these rules into their national legislation and "to make all possible efforts to implement the Standards."[225] These standards, while non-binding, are a source of international customary law.[226]

In the 1970s, these rules resulted in "a picture of spotty implementation"[227] of the standards. In 1974, sixty-two member nations responded to a U.N. survey on compliance, the most comprehensive review of implementation. On Rule 53, quoted above, only thirty-two countries, including the United States, indicated full compliance.[228] While the U.N. Rules "enjoyed a surprising degree of world consensus and acceptance in original adoption and subsequent actions of endorsement," two decades later there was "meager evidence of progress." In 1984, the U.N. concluded: "The degree of incorporation of the [Standard Minimum] Rules into domestic law has been disappointing but a case can be made that the [Standard Minimum] Rules are now part of the corpus of international customary human rights law."[229] Now, over four decades since their adoption, the U.N. appears to have abandoned any significant support for implementation of these standards, including Rule 53.[230]

With regard to state practices in the United States, it is important to review the apparent abandonment of policies prohibiting cross-gender searches and staffing in female correctional housing units.[231] As of the early 1980s,

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225. *See* Daniel L. Skoler, *World Implementation of the United Nations Standard Minimum Rules for Treatment of Prisoners*, 10 J. INT'L L. & ECON. 453, 458 (1975).

226. *See generally* Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982); Louis Sohn, *Generally Accepted International Rules*, 61 WASH. L. REV. 1073 (1986); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977).

227. *See* Skoler, *supra* note 225, at 467.

228. *See* Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Working Paper Prepared by the Secretariat, Annex I, Agenda Item 4, at 120–21, U.N. Doc. A/CONF.56/6 (1975).

229. *See* HUMAN RIGHTS SOURCEBOOK 115 (Albert P. Blaustein et al. eds., 1987); Committee on Crime Prevention and Control, Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 1984/47, U.N. ESCOR, 76th Sess., Supp. No. 1, at 29, U.N. Doc. E/1984/84 (1984). *See generally* Suzanne M. Bernard, *An Eye for An Eye: The Current Status of International Law on the Humane Treatment of Prisoners*, 25 RUTGERS L.J. 759 (1994).

230. In 1990, the U.N. issued a declaration of ten principles referencing and adopting various human rights conventions but omitted any reference to the U.N. Minimum Rules. *See* United Nations High Commissioner for Human Rights, Basic Principles for the Treatment of Prisoners, . G.A. Res. 111, U.N. GAOR, 45th Sess., 68th mtg., Supp. No. 49A, at 199, U.N. Doc. A/RES/45/49 (1990). There is no principle analogous to Rule 53.

231. For example, in India, the world's largest democracy of nearly one billion people, female prisoners are supervised in housing units solely by female corrections officers. There are, however, no formal laws requiring these policies, but the practice results from cultural norms. Interview with Prof. K.D. Gaur, Lucknow University School of Law, (Lucknow, India) in Baltimore, Maryland (Oct. 12, 1999). *See generally* K.D. Gaur, *Human Rights Detainees and Prisoners: Suggestions for Prison Reform*, COCHIN UNIV. L. REV. 393 (1985).

official U.S. federal and state corrections standards were generally consistent with U.N. Minimum Rule 53,[232] as noted by U.S. courts.[233]

Yet despite the U.S. Supreme Court's decision in *Dothard v. Rawlinson,*[234] courts began, under equal protection and employment discrimination analyses, to strike down correctional policies which precluded female guards from monitoring and conducting searches in male inmate housing units[235]. For example, in Michigan, which currently has a significant crisis in its female prisons, the state corrections department practice of precluding female officers from working in male units was struck down as a violation of equal protection.[236] A federal court summarily found that equal employment rights trump any privacy or other constitutional rights which male prisoners may hold.[237] Subsequent lawsuits and policy changes soon followed in Michigan against the federal government[238] and other states, permitting

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232. Federal standards had provided:

> It is widely recognized, first, that even convicted prisoners retain claims to personal dignity, and also that under the conditions of arrest and imprisonment the relation between the sexes poses particularly sensitive issues. These assumptions underlie most contemporary statements of the relevant standards for penal institutions. Thus the Federal Standards for Corrections published by the Department of Justice postulate that "(e)ach facility develops and implements policies and procedures governing searches and seizures to ensure that undue and unnecessary force, embarrassment or indignity to the individual is avoided." Specifically, when body searches are required, staff personnel avoid unnecessary force and strive to preserve the dignity and integrity of the inmate. Issues of embarrassment and indignity arising from sexual differences traditionally have been stated with a view of the rights of female prisoners. Standards for jails published by the Department's Bureau of Prisons stress, in connection with searches of newly admitted prisoners, that "(n)aturally, admission for women should be completely separate from that for men and should be conducted by female staff members." They continue with the advice that "(t)he following conditions must be met if difficulties are to be avoided in jails housing both male and female prisoners.
>
> 1. Women prisoners must be completely separated from male prisoners, with no possibility of communication by sight or sound.
> 2. All supervision of female prisoners must be by female employees. In the larger jail a full-time matron should provide constant supervision. Smaller jails may have a part-time matron who retains the key to the women's section and is on call as needed.
> 3. Male employees must be forbidden to enter the women's section unless they are accompanied by a matron.

Sterling v. Cupp, 625 P.2d 123, 130 (1981) (citing UNITED STATES BUREAU OF PRISONS, THE JAIL: ITS OPERATION AND MANAGEMENT 19, 71–72).

233. *See Sterling,* 625 P.2d at 128–30; Lareau v. Manson, 507 F. Supp. 1177, 1189 (D. Conn. 1980) (noting Connecticut's adoption of the U.N. Standard Minimum Rules for Treatment of Prisoners).

234. 433 U.S. 321 (1977) (Alabama's height and weight policies which discriminated against women corrections officers are bona fide occupational qualifications for placement in prisons with a high percentage of male sex offenders).

235. *See generally,* Karoline Jackson, *The Legitimacy of Cross-Gender Searches and Surveillance in Prisons: Defining an Appropriate and Uniform Review,* 73 IND. L.J. 959 (1998); Lisa Krim, *Reasonable Woman's Version of Cruel and Unusual Punishment: Cross-Gender, Clothed-Body Searches of Women Prisoners,* 6 UCLA WOMEN'S L.J. 85 (1999).

236. *See* Griffin v. Michigan Dept. of Corrections, 654 F. Supp. 690 (E.D. Mich. 1982). The court referred to a growing practice in federal and state corrections systems permitting female guards in male prisoner housing units. The State of Michigan did not appeal this decision.

237. *See id.*

238. *See, e.g.,* Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia, 877 F. Supp. 634 (D.D.C. 1994).

male guards in female prisoner housing units.[239] Even when allegations of abuse have been proven, the courts have often permitted the employment practice to continue while imposing other remedies.[240] Georgia, however, has been a model state in resisting this trend. Georgia has implemented policies that limit the access of male guards to female housing units and restrict cross-gender searches consistent with U.N. Minimum Rule 63. The Georgia standards have been praised as effective in stopping widespread misconduct which victimized female prisoners.[241]

Canada, like the United States, was quick to adopt and implement U.N. Rule 53 in the 1950s. As late as 1989, male correctional staff was not permitted to supervise women inmates in housing units in Canadian prisons.[242] This policy changed when a male corrections officer successfully challenged the policy on equal employment grounds.[243] Canada, however, remains open to revisiting this issue. In 1993, the Supreme Court of Canada found that the practice of prohibiting male guards from frisking female inmates was not discriminatory even though male inmates are subject to cross-gender searches.[244]

### 2. Privacy Rights of Female Prisoners Under International Law

The most pertinent major international standards regarding protections from torture, cruel, inhumane or degrading treatment applicable to prisoners include the ICCPR, the American Convention on Human Rights, the European Convention for the Protection of Human Rights, the Universal Declaration of Human Rights, and the U.N. Minimum Rule for Treatment of Prisoners. These documents have been previously discussed and compared to U.S. domestic law.

Diminished privacy protections for prisoners under U.S. law have also been discussed as a cause of the abuses described.[245] The following international conventions and declarations recognize a right to privacy:

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239. *See, e.g.*, Forts v. Ward, 471 F. Supp. 1095 (S.D.N.Y. 1979); Torres v. Wisconsin Dept. of Health & Soc. Services, 857 F.2d 1523 (7th Cir. 1988).

240. *See generally* Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia, 877 F. Supp. 634 (D.D.C. 1994) (limiting remedies to better training and administrative remedies for complaints even though abuse was found). *See also* U.S. GENERAL ACCOUNTING OFFICE, WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF (1999) (describing the federal system and Texas, California and the District of Columbia and recommending better training, complaint providing and monitoring and reporting).

241. *See* HUMAN RIGHTS WATCH, *supra* note 29, pp. 127–63.

242. *See* Cross Gender Monitoring Project, Correctional Services of Canada, *Second Annual Report 1999*, *available at* the Correctional Service of Canada Web site (visited Feb. 22, 2000) <http://www.csc-scc.gc.ca/text/prgrm/fsw/gender2/cg_e-01.shtml>.

243. *See id.* (reporting on *King v. Canada Correctional Service*, an unreported decision of the Canadian Public Service Commission Appeal Board (July 5, 1989)).

244. *See* Weatherall v. Canada (Attorney General) [1993] 2 S.C.R. 872 (Can.).

245. *See generally* O'Bryan, *supra* note 184, at 1204–11 (discussing the potential loss of any privacy based claims under the new PLRA); Mary Ann Farkas and Kathyrn R. L. Rand, *Female Correctional Officers and Prisoner Privacy*, 80 MARQ. L. REV. 995, 1029 (1997) (concluding that "Court decisions regarding

*Universal Declaration of Human Rights:*

> No one shall be subjected to arbitrary interference with his privacy . . . .[246]

*The American Declaration of the Rights and Duties of Man:*

> Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.[247]

*The American Convention on Human Rights:*

> No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.[248]

*The European Convention for the Protection of Human Rights and Fundamental Freedoms:*

> Everyone has the right to respect for his private and his family life, his home and his correspondence.[249]

*The International Covenant on Civil and Political Rights:*

> No one shall be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.[250]

Privacy rights under international standards are well recognized, but have not been the subject of decisions by international tribunals in the prison context. Notably, unlike other rights, most international conventions that

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prisoner privacy and cross-gender searches are all over the board, making it difficult for prison management to accurately take into account any potential liability and act accordingly."); *see also* Gary H. Loeb, *Protecting the Right to Informational Privacy for HIV-Positive Prisoners*, 27 COLUM. J.L. & SOC. PROBS. 269, 272–73 (1994) (discussing the impact of *Turner* on the disclosure of HIV status in prisons.); Michenfelder v. Sumner, 860 F.2d, 328, 331 (9th Cir. 1988) (finding that male prisoners had no privacy right to not be strip searched by female guards under the rational relationship test put forth in *Turner*); Somers v. Thurman, 109 F.3d 614, 617 (9th Cir. 1997); Griffin v. Michigan Dep't of Corrections, 654 F. Supp. 690, 701 (E.D. Mich. 1982) (refusing to assume that it is more intrusive to be viewed naked by the opposite sex than by one's own gender). *But see* Sterling v. Cupp, 625 P.2d 123, 130 (finding that women prisoners have a qualified right to privacy that protects them from opposite-sex "pat down" searches by guards).

246. Universal Declaration, *supra* note 104, art. 12.

247. American Declaration, *supra* note 147, art. 5.

248. American Convention, *supra* note 17, art. 11.

249. European Convention, *supra* note 150, art. 8(1).

250. ICCPR, *supra* note 16, art. 17; *see also* Children's Convention, *supra* note 113, art. 16.

contain privacy protections permit derogation of the right in certain circumstances.[251]

### 3. Other Conventions, Principles, and Declarations as Sources of International Customary Law Protecting Women Prisoners

There are as many as seventeen conventions, declarations, and principles under international human rights law which may be sources of protection for U.S. women prisoners: the Universal Declaration of Human Rights;[252] the Vienna Declaration and Programme of Action;[253] the Geneva Conventions of 1949;[254] the Geneva Convention Relative to the Protection of Civilian Persons During Time of War;[255] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[256] the American Declaration of the Rights and Duties of Man;[257] the American Convention on Human Rights;[258] the African [Banjul] Charter on Human and People's Rights;[259] the European Convention for the Protection of Human Rights and Fundamental Freedoms;[260] the International Covenant on Civil and Political Rights;[261] the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment;[262] the United Nations Standard Minimum Rules for Treatment of Prisoners;[263] Protocol I of the Geneva Conventions;[264] Protocol II of the Geneva Conventions;[265] the Convention on the Elimination of All Forms of Discrimination Against

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251. *See, e.g.*, American Convention, supra note 17, art. 27; European Convention, *supra* note 150, art. 15.

252. *See* Universal Declaration, *supra* note 104.

253. *See* Vienna Declaration and Programme of Action, *adopted* June 25, 1993, 32 I.L.M. 1661 (1993) U.N. Doc. A/CONF.157/24.

254. *See* Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 135.

255. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

256. *See* Torture Convention, *supra* note 17.

257. *See* American Declaration, *supra* note 147.

258. *See* American Convention, *supra* note 17.

259. *See* Banjul Charter, *supra* note 149.

260. *See* European Convention, *supra* note 150.

261. *See* ICCPR, *supra* note 16.

262. *See* Body of Principles, *supra* note 152.

263. *See* Standard Minimum Rules, *supra* note 224. *amended* May 13, 1977, E.S.C. Res. 2076, 62 U.N. ESCOR Supp. No. 1, at 35, U.N. Doc. E/5988 (1977) (adding Article 95).

264. *See* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, 16 I.L.M. 1391 (1977).

265. *See* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex II, 16 I.L.M. 1442 (1977).

Women;[266] the Declaration on the Elimination of Violence Against Women;[267] and the Convention on the Rights of the Child.[268]

Beyond what has been discussed, these seventeen documents contain numerous articles, rules, and paragraphs relevant to the factual context raised in this Article. A textual delineation, explanation, and interpretation of each and every principle is beyond the scope of this Article. For the sake of efficiency, however, the numerous provisions of these documents are set forth in a series of tables categorized by the various types of protections and containing specific language of each provision.[269]

The international conventions and declarations noted reflect strong evidence of international customary law recognizing the rights of women prisoners to be free from abuse and exploitation by their custodians.[270] The abuses discussed in Part II involve mistreatment as varied as threats, rape,[271] verbal harassment, discrimination, retaliation, unwanted touching,[272] and invasion of privacy[273] of women by male officials,[274] and are touched upon by a wide range of international standards.

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266. *See* Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/180 (1980) (entered into force Sept. 3, 1981).

267. *See* Declaration on the Elimination of Violence Against Women, *supra* note 153.

268. *See* Children's Convention, *supra* note 113.

269. *See* Appendix.

270. For a general discussion of domestic law and remedies related to this problem, see Ashley Day, Comment, *Cruel and Unusual Punishment of Female Inmates: The Need for Redress Under 42 U.S.C. Sec. 1983*, 38 SANTA CLARA L. REV. 555 (1998).

271. *See generally* Theodor Meron, *Rape As a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424 (1992); Kadic v. Karadzic, 70 F. 3d 232 (2d Cir. 1996); Women Prisoners of the District of Columbia Dept. of Corrections v. District of Columbia, 877 F. Supp. 634 (D.D.C. 1994); U.N. ESCOR Comm'n on Hum. Rts. 48th Sess., para. 35, U.N. Doc. E/CN.4/1992/SR.21 para. 35 (finding rape a form of torture and a "particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being"); Doe v. Islamic Salvation Front, 993 F. Supp. 3 (D.D.C. 1998); Jama v. INS, 22 F. 2d 353 (D. N. J. 1998); Mining Community of Caracoles v. Bolivia, Case 7481, Inter-Am. C.H.R. 36, OEA/ser.L/V/II.57, doc. 6,rev.1 (1982); Ita Ford, et al., v. El Salvador, Case 7575, Inter-Am. C.H.R. 53, OEA/ser.L/V/II.61, doc.22, rev.1 (1983) (finding rape a violation of the Torture Convention); *Report on the Situation of Human Rights in Haiti*, OEA/Ser.L/V/II.88, Doc.10 rev.9 (1995) (classifying rape as a violation of Article 5(2) of the American Convention); Fernando Mejia Egocheaga and Raquel Martin de Mejia v. Peru, Case 10.970, Inter-Am. C.H.R. 157, OEA/ser.L/V/II.91, doc.7 rev. (1996); I, App. Nos. 6780/74 and 6950/75 (10 July 1976), 4 Eur. H.R. Rep. 482 (1982); X and Y v. Netherlands, 91 Eur. Ct. H.R. (ser.A) para.18 (1985) *reprinted in* 8 Eur. H.R. Rep. 235 (1985); Aydin v. Turkey, 25 Eur. H.R. Rep. 251 (1998).

272. *See, e.g.*, Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993).

273. Male prisoners have also litigated the issue of their privacy rights with respect to female guards. *See* Kent v. Johnson, 821 F.2d 1220 (6th Cir. 1987); Calhoun v. Detella, 1997 WL 75658 (N.D. Ill. 1997); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir. 1980).

274. *See* Beth Stephens, *The Civil Lawsuit As a Remedy for International Human Rights Violations Against Women*, 5 HASTINGS WOMEN'S L.J. 143, 157 (1993).

## V. THE INCORPORATION OF INTERNATIONAL HUMAN RIGHTS NORMS: STRATEGIES FOR JUDICIAL IMPLEMENTATION

The guidepost of this Part is the 100-year-old maxim that "international law is part of our law."[275] The historical roots of our Constitution strongly support the conclusion that "the law of nations *has always* been part of our federal common law."[276] Moreover, the "modern position" on international customary law incorporation as articulated by scholars and the vast majority of recent judicial decisions affirms Justice Gray's opinion in *The Paquete Habana*. The United States has companions in the struggle to incorporate international human rights standards into domestic jurisprudence.[277]

There are no clear legislative bases for implementing the modern incorporation position for international human rights claims by U.S. citizens for violations occurring within the United States. By contrast, aliens can assert these claims in our courts under the Alien Tort Claims Act (ATCA). The variety of reasons for this status of the law include: the relatively recent development of international human rights, the unfamiliarity of the practicing legal culture with public international law, the recent resistance by the U.S. Supreme Court to using international standards in interpreting the U.S.

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275. The Paquete Habana, 175 U.S. 677, 700 (1900); *see also* First National City Bank v. Banco Para de Comercio de Cuba, 462 U.S. 611, 623 (1983) (noting the "frequently reiterated" principle that federal common law is necessarily informed by international customary law).

276. *See* Filartiga v. Pena-Irala ,630 F.2d 876, 885–86 (2d Cir. 1980) (adding that "[d]uring the Eighteenth Century, it was taken for granted on both sides of the Atlantic that the 'law of nations' forms part of the common law" and quoting 1 BLACKSTONE, COMMENTARIES 263–64 (1st ed. 1765–69)).

277. For an excellent comparative review of the theories of incorporation of international human rights law into the national jurisprudence of Italy, United Kingdom, Germany, France, Chile, Argentina, Austria, Israel, Japan, Canada, and China, see ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS (Benedetto Conforti & Francesco Francioni eds., 1997).

South Africa's new constitution includes provisions which see to avoid the muddied waters of U.S. jurisprudence. *See, e.g.*, S. AFR. CONST. ch. 14 § 231 (4) ("Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."); S. AFR. CONST. ch. 14 § 232 ("Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.") S. AFR. CONST. ch. 14 § 233 ("When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.") For critiques of judicial review of human rights claims under South Africa's interim constitution, *see* Penuell Maduna, *Judicial Review and the Protection of Human Rights Under a New Constitutional Order in South Africa*, 21 COLUM. HUM. RTS. L. REV. 73 (1989); Adrien Wing, *The New South African Constitution: An Example for Palestinian Consideration*, 7 PAL. Y.B. INT'L L. 105 (1992–94); Ziyad Motala, *Independence of the Judiciary, Prospects and Limitations of Judicial Review in Terms of the United States Model in a South African Order: Towards an Alternative Judicial Structure*, 55 ALBANY L. REV. 367 (1991). After the end of apartheid, South Africa was permitted to join the Organization of African Unity as its fifty-third member in June, 1994, adopting the African [Banjul] Charter on Human and People's Rights.

*See also* BRAZ. CONST. ch. I para. 2 ("The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party."). The author's experience, in joint training projects involving the U.S. and Brazilian judiciary, reflected a resistance by the Brazilian federal judiciary to implement international human rights law similarly seen with U.S. judges, despite this constitutional provision.

Constitution,[278] and the lack of statutory authority specifically allowing claims by citizens under "the law of nations," as provided to non-citizens.[279]

Judges, advocates, and scholars must be thoughtful and creative in developing the new doctrinal area of human rights litigation. The rule of law requires credible, supportable norms to implement the incorporation doctrine which has been avoided by U.S. courts for this past century. International rights can effectively provide remedies only if they are developed with care.[280]

This Part explores potential bases for the implementation of the international customary law of human rights in response to the human rights crisis in U.S. prisons.

### *A. 42 U.S.C. § 1983*

The primary and most developed source of domestic human and civil rights law enforcing federal constitutional guarantees is 42 U.S.C. § 1983, which states in pertinent part:

> Every person who, under color of any state statute, ordinance, regulation, custom, or usage, of any state . . . [deprives a person] of any *rights, privileges, or immunities secured by the Constitution and laws*, shall be liable to the party injured in an action at law, or suit in equity.[281]

This Section explores the question of whether international human rights protections can be asserted under § 1983, which protects rights "secured by the Constitution *and laws*."

The U.S. Supreme Court has held that an aggrieved person is entitled to § 1983 relief for federal statutory violations *unless* Congress has "specifically foreclosed a remedy under Sec. 1983"[282] and that § 1983 is to be "broadly

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278. *See* Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (1988) (Scalia, J. dissenting) ("Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans . . . .")

279. For example, the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)), permits citizens to sue only for acts of torture suffered in another country by officials acting under "color of law" of a foreign sovereign. Congress has not implemented the Torture Convention.

280. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971).

281. *See* Monroe v. Pape, 365 U.S. 167 (1961) (emphasis added), the seminal modern case discussing § 1983. Its jurisdictional counterpart is 28 U.S.C. § 1343(a)(3).

282. *See* Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989); Smith v. Robinson, 468 U.S. 992, 1005 n.5 (1984); Dennis v. Higgins, 498 U.S. 439 (1991); Felder v. Casey, 487 U.S. 1, 4 (1988). Where the right is not sufficiently protected by domestic law, the need for recognition of international law is particularly compelling, as there are insufficient non-judicial enforcement mechanisms created by Congress or the within international community. *See* John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 540 (1976); *see also* Note, *Judicial Enforcement of International Law Against Federal and State Governments*, 104 HARV. L. REV. 1269, 1283 (1991).

construed" to provide a remedy "against all forms of official violation of federally protected rights."[283] The U.S. Supreme Court also notes that, "[W]e do not lightly conclude that Congress intended to preclude reliance on Sec. 1983 as a remedy for the deprivation of a federally secured right."[284]

### 1. Treaties and § 1983

Treaties are the "[S]upreme Law of the Land."[285] However, as discussed, the justiciability of claims based directly upon treaties is severely limited by the "non self-executing" doctrine. Treaties have the same legal import as federal statutes.[286] Thus, a closer look at the language, interpretation, and policies underlying 42 U.S.C. § 1983 as a potential right of action for treaty-based rights is appropriate.[287]

Despite acknowledgment that the primary focus of § 1983 was to "ensure a right of action to enforce the protections of the Fourteenth Amendment,"[288] the U.S. Supreme Court cautions that "this does not mean that jurisdiction cannot be found to encompass claims nonexistent in 1871 or 1874."[289] The Court has regularly rejected attempts to limit the scope of both the "rights, privileges and immunities"[290] and the "Constitution *and laws*"[291] clauses of § 1983; "[r]ather, we have given full effect to its broad language."[292]

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283. *See* Monell v. N.Y. City Dept. of Social Services, 436 U.S. 658, 700–01 (1978); *Golden State*, 493 U.S. at 106 (1989).

284. *See* Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 423–24 (1987); Smith v. Robinson, 468 U.S. 992, 1012 (1984).

285. U.S. CONST. art. VI § 2. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) § 111 (1), (3) & cmts. c, d.

286. *See* Foster v Neilson, 27 U.S. (2 Pet.) 253 (1829).

287. In conflicts between a treaty and statute, the "last in time" trumps. *See* Whitney v. Roberstson, 124 U.S. 190, 193–95 (1888). For a review of the history and a critique of this doctrine, *see* Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985). Suffice to say, many seminal U.S. civil rights statutes were passed in the nineteenth century and thus precede international human rights treaties. *See, e.g.*, Civil Rights Act of 1866, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (1994)); Civil Rights Act of 1871 (codified as amended at 42 U.S.C. § 1983 (1994)) and the 1874 Revision to the Civil Rights Act of 1871, Revised Stat. 1979, which divided § 1 into a remedial section (codified as amended at 42 U.S.C. § 1983) and a jurisdictional section (codified as amended at 28 U.S.C. § 1343 (3)). Even if the date of the passage of the Civil Rights Act of 1964, which recodified the Civil Rights Act of 1866 and 1871, was considered to be the operative date, it would have little impact, as the majority of the international human rights treaties were ratified after 1964. *See, e.g.*, Torture Convention, *supra* note 17; ICCPR, *supra* note 16.

288. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 611 (1979).

289. *See id.* at 611–12.

290. *See, e.g.*, Lynch v. Household Finance Corp., 405 U.S. 538 (1972); United States v. Price, 383 U.S. 787, 800–06 (1966).

291. *See* Maine v. Thiboutot, 448 U.S. 1, 4, 6–8 (1980). The words "and laws" were added in the 1874 revision. The legislative history of the early version of the statute is scant and ambiguous, though the Court has also noted that "there is weight to the claim that Congress, from 1874 onward, intended to create a broad right of action in federal court for deprivations by a State of any federally secured right." *Chapman*, 441 U.S. at 611.

292. *See* Dennis v. Higgins, 498 U.S. 439, 444. Notably, the original version states that it is, "[a]n Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States,

The U.S. Supreme Court has never directly ruled upon the application of § 1983 as a basis for treaty based rights. However, the Court has stated:

> Even though that Clause is not a source of any federal rights, it does "secure" federal rights by according them priority whenever they come in conflict with state law. In that sense all federal rights, whether created by *treaty*,[293] by statute, or by regulation, are "secured" by the Supremacy Clause.[294]

When determining whether § 1983 is a proper basis for a claim based upon another federal statute, the Court has outlined a three-prong inquiry:[295]

1. Does the provision in question create binding obligations upon the government or "does [it do] no more than express a congressional preference for certain kinds of treatment?" [296]
2. Is the right sought to be protected "too vague and amorphous" to be "beyond the competency of the judiciary to enforce?" [297]
3. Can the defendant meet its burden to show that Congress "specifically foreclosed a remedy under § 1983?"[298]

In applying this treatment of statutes to treaties, the conclusion depends primarily upon the treaty and any attached reservations, declarations, or understandings. For example, a broad application of § 1983 would certainly include the rights guaranteed by the Convention on Torture.[299] Ratification commits the United States to the provisions of the treaty, which is given

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*and For Other Purposes.*" Civil Rights Act of 1866, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (1994)) (emphasis added).

293. Though the Alien Tort Claims Act has been the primary statutory basis for asserting the international customary law of human rights in U.S. courts, the statute includes a provision for claims based upon violations of "a treaty" in addition to the often used "law of nations." 28 U.S.C. § 1350. The treaty section has not been the source of review in any reported cases.

294. *See Chapman,* 441 U.S. at 612–13 (emphasis added). The few lower courts addressing this issue have not yet definitely found that an international treaty may be the basis for rights asserted under § 1983. However, regarding "self-executing" treaties asserted under § 1983, one court has stated, "This suggests that, to the extent state officials deny justice to an alien in violation of a self-executing treaty, federal courts could and should permit suit under § 1983." Air Transp. Ass'n of Am. v. City of Los Angeles, 844 F. Supp. 550, 558 (C.D. Cal. 1994) (finding no implied right of action under the Conventions on International Civil Aviation and numerous Bilateral Air Service Agreements). *See also* Republic of Paraguay v. Allen, 134 F.3d 662 (4th Cir. 1998); Jewish War Veterans of the United States v. Am. Nazi Party, 260 F. Supp. 452, 453–54 (N.D. Ill. 1966); Faulder v. Johnson, 178 F.3d 741 (5th Cir. 1999). See also Ronan Doherty, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281 (1996).

295. *See* Middlesex County Sewage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19 (1981); *Dennis*, 498 U.S. at 448.

296. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 19 (1981).

297. Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 431–32 (1987) "We have also asked the question whether the provision was intended to benefit the putative plaintiff." *Id.* at 430.

298. Smith v. Robinson, 468 U.S. 992, at 1005 n.9, 1012 (1984).

299. *See* Torture Convention, *supra* note 17.

legal status under the Constitution. Further, the treaty is not so amorphous as to be beyond the competency of a judiciary, which regularly evaluates and enforces Constitutional and civil rights claims of equal or greater complexity. Thus the requirements of the first two prongs of the Court's test are met. Regarding the third prong, there is nothing in the U.S. legislative history nor in U.S. reservations to the Torture Convention specifically prohibiting § 1983 as a domestic enforcement mechanism. The reservations indicate that the Torture Convention's mandate is to prevent "cruel, inhuman or degrading treatment or punishment,"[300] only to the extent prohibited "under the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States."[301] This reservation, on its face, does not preclude a claim under § 1983. It may, however, limit the extent of the rights asserted. In fact, another provision in the U.S. reservations indicates that the Convention will be implemented under U.S. legislative and judicial jurisdiction,[302] which includes § 1983.

U.S. ratification of the Torture Convention was also accompanied by a declaration commonly attached to recent human rights treaties stating that its provisions are not "self-executing."[303] While the Senate is thereby indicating its position that the treaty does not permit a direct cause of action under the Convention, a § 1983 claim is neither specifically nor necessarily precluded.

For an example by analogy, the Court in *Maine v. Thiboutot* held that the Federal Social Security Act did not provide a cause of action, implied or otherwise, for rights provided under the Act.[304] That finding alone, however, did not preclude a claim under § 1983 absent a clear showing of Congressional intent indicating otherwise. The Court found a right to use § 1983 as a cause of action for rights under the Social Security Act.[305]

In pertinent ways, international human rights treaties, which specifically address the issue of civil/human rights, are stronger candidates for enforcement under § 1983. Analysis of these issues, unfortunately, has been given scant review by both the courts and scholars.[306]

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300. *See id.* art. 16.

301. *See* Torture Convention, Reservation I (1), *supra* note 212.

302. *See id.*, Reservation II (5).

303. *See id.*, Reservation III (1) ("The United States declares that the Provisions of Articles 1 through 16 of the Convention are not self-executing."). Again, the propriety of this declaration has been openly criticized by scholars.

304. 448 U.S. 1, 9 (1980).

305. *See id.* A small retreat from this position is seen in two cases in which the Court specified two situations in which federal statutory rights are not enforceable under § 1983. *See* Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981) (holding that spending authorization constituted a congressional declaration of policy providing no substantive rights enforceable under § 1983); Middlesex County Sewage Auth. V. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981) (holding that no rights are enforceable under § 1983 where a comprehensive set of specific remedies under the statute at issue indicated a congressional intent that they were exclusive).

306. *See* Romero v. Kitsap County, 931 F.2d 624, 626 (9th Cir. 1991). *But see* Hoopa Tribe v. Nevins, 881 F.2d 657, 662–63 (9th Cir. 1989) (discussing treaty rights between the U.S. government and Indian

### 2. Can Treaty Reservations Limit a § 1983 Claim to the Limits of Domestic Law?

As discussed, the U.S ratified many international human rights treaties with reservations or declarations limiting their scope to domestic jurisprudence decisions interpreting the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Regarding § 1983-based claims asserting treaty rights, the courts must address the question of whether these reservations constrain a § 1983 claim.

As Louis Henkin aptly notes:

> By its reservations, the United States apparently seeks to assure that its adherence to a convention will not change, or require change, in U.S. laws, policies or practices, even where they fall below international standards. For example, in ratifying the International Covenant on Civil and Political Rights, the United States refused to accept a provision prohibiting capital punishment for crimes committed by persons under eighteen years of age. In ratifying the Torture Convention, the United States, in effect, reserved the right to inflict inhuman and degrading treatment (when it is not punishment for a crime), and criminal punishment when it is inhuman and degrading (but not "cruel and unusual"). Reservations designed to reject any obligation to rise above existing law and practice are of dubious propriety: if states generally entered such reservations, the convention would be futile . . . . Even friends of the United States have objected that its reservations are incompatible with that object and purpose and are therefore invalid.[307]

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tribes and supporting treaty based claims under § 1983). *See also* Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1144–1153 (1992). These cases are cited by Professor Vasquez as support for the proposition that the courts have found "treaties" to be "laws" within the meaning of § 1983. It should be noted, however, that treaties with foreign sovereigns and domestic indigenous tribes are subject to different constitutional and statutory authority than with domestic indigenous tribes. *See id.* at 1148, 1163 n.273. While several courts have held U.S. government-Indian treaties to be within the scope of § 1983, no court has similarly made a conclusory finding that a § 1983 international treaty has a right of action under the civil rights statute. *See* Roman-Nose v. New Mexico Dept. of Human Services, 967 F.2d 435 (10th Cir. 1992). With reference to the allegation by plaintiff that § 1983 provided a right of action for a violation of the International Covenant on Civil and Political Rights, the Tenth Circuit found, "nor do we know of any manner by which Plaintiff can obtain relief from state actions which violate international treaties." *Id.* at 436–37. *See generally* Cree v. Waterbury, 78 F.3d 1400, 1403 (9th Cir.1996); Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904 (8th Cir. 1997); Shoshone-Bannock Tribes v. Fiah & Game Commission, 42 F.3d 1278 (10th Cir. 1994).

Professor Vazquez also notes that the term "law" in a closely related provision of the Civil Rights Act of 1870, the predecessor to the current version of § 1983, included "a treaty between this Government and a foreign nation." Vazquez at 1146 n.271. *See also* Baldwin v. Franks, 120 U.S. 678 (1887); Jordan Paust, *Breard and Treaty-Based Rights Under the Consular Convention*, 92 AM. J. INT'L L. 691, 693 (1998) (discussing, in part, § 1983 and the rights of consular officers under the Vienna Convention, which Prof. Paust describes as a "self-executing treaty").

307. *See* Henkin, *supra* note 18, at 342–43.

The Vienna Convention on Treaties states that a nation may not enter a reservation that "is incompatible with the object and purpose of the treaty."[308] With regard to the ICCPR, the U.N. states that "[s]tates should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such."[309] While a thorough discussion of these issues is beyond the scope of this Article, courts and litigants will be required to address these complex concerns. They will need to consider if the international rights asserted, such as privacy, found in constitutional amendments other than the Fifth, Eighth and Fourteenth Amendments, are also limited by the reservations.

If reservations, understandings, or declarations are incompatible with the purpose of the convention,[310] questions arise as to whether courts should strike down the reservation or void the treaty's ratification.[311] The result upon a finding of an "invalid reservation as a matter of international law is not entirely clear."[312]

Only one reported domestic case has addressed this issue in the prison context. In *Austin v. Hooper*,[313] inmates brought a class action under § 1983 challenging the use of "chain gangs" and "hitching posts" as violating their constitutional rights and international human rights guarantees, including the ICCPR. The court concluded that the use of hitching posts constituted "cruel and unusual punishment" under the Eighth Amendment, as this technique was not used in other states. The *Austin* court went on to find:

> Although international jurisprudence interpreting and applying the ICCPR would appear to assist this court, two sources preclude reliance on such precedent: the Supreme Court's directive in Stanford v. Kentucky; and the reservations attached to the ICCPR. The court will therefore rest its analysis entirely on American sources to determine whether the hitching post violates evolving standards of decency.[314]

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308. Vienna Convention, *supra* note 18.

309. General Comment 24, *supra* note 213, para. 4.

310. *See id.* paras. 6, 10. *See also* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28) (adopting similar standard). The United States has not ratified the Vienna Convention, but (through the State Department) it has indicated that it believes that much of the Convention reflects customary international law.

311. *See* William A. Schabas, *supra* note 112, at 317–18 (1995); Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the International Role of International Law*, 86 GEO. L. J. 479, 537 n.243 ("These [reservations, declarations, and understandings] include retention of certain substantive rights that are in conflict with provisions of the Covenant, such as the right to execute juveniles."). *See also* Nanda, *supra* note 112, at 1331–32 (1983).

312. *See* Bradley, *supra* note 311, at 537 n.1250. *See also* Schabas, *supra* note 311, at 317–18; *but cf.* Certain Norwegian Loans (Fr. V. Nor.), 1957 I.C.J. 9, 66.

313. 15 F. Supp. 2d 1210 (M.D. Ala. 1998).

314. *See* Austin v. Hopper, 15 F. Supp. 2d 1210, 1259 (D. Ala. 1998). The *Austin* court also referred to the Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 102d Cong., 2d Sess. (1992). *See id.* at 1259 n.222. *See also* Power

Regarding the ICCPR reservations, one other U.S. state court has noted that the non-derogation provision of the ICCPR may void any U.S. reservation which limits the protections against "cruel, inhumane or degrading treatment or punishment," as a fundamental protection which is "non-derogable."[315]

### 3. International Customary Law and § 1983

If the human right asserted has developed into international customary law, it is also incorporated into our jurisprudence as federal common law.[316] The same three-prong test applied in the previous Section concerning § 1983 and treaties is applicable to claims based on international customary law: (1) are binding obligations created, (2) which are not too amorphous for the courts to competently enforce, and (3) has Congress specifically fore-

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Auth. of New York v. Federal Power Comm'n, 247 F.2d 538 (D.C. 1957). In reviewing a purported improper reservation to a 1950 treaty between the United States and Canada, the court found no change in the relationship between the United States and Canada under the treaty and that the reservation had nothing at all to do with the rights or obligations of either party. The court further stated that "to the extent here relevant, the treaty was wholly executed on its effective date." *Id.* The U.S. Supreme Court granted certiorari and vacated the decision as moot without explanation. American Public Power Ass'n v. Power Auth. of New York, 355 U.S. 64 (1957).

315.

> Following a brief hearing, the district court summarily concluded that the death sentence was facially valid in spite of an international treaty signed by the United States which prohibits the execution of individuals who were under eighteen years of age when the crime was committed. I believe this complicated issue deserved a full hearing, evidentiary if necessary, on the effect of our nation's ratification of the ICCPR and the reservation by the United States Senate to that treaty's provision prohibiting the execution of anyone who committed a capital crime while under eighteen years of age.
>
> The penultimate issue that the district court should have considered is whether the Senate's reservation was valid. Article 4(2) of the treaty states that there shall be no derogation from Article 6 which includes the prohibition on the execution of juvenile offenders. ICCPR, 999 U.N.T.S. at 174. Furthermore, there is authority to support the proposition that the Senate's reservation was invalid.
>
> If the reservation was not valid, then the district court should determine whether the United States is still a party to the treaty. If the reservation was a "sine qua non" of the acceptance of the whole treaty by the United States, then the United States' ratification of the treaty could be considered a nullity. But, if the United States has shown an intent to accept the treaty as a whole, the result could be that the United States is bound by all of the provisions of the treaty, notwithstanding the reservation.
>
> These are not easy questions and testimony about the international conduct of the United States concerning the subjects contained in the treaty, in addition to expert testimony on the effect of the Senate's reservation may be necessary. A federal court that deals with federal law on a daily basis might be better equipped to address these issues; however, the motion is before the state court and it should do its best to resolve the matter. Accordingly, I would reverse the district court's denial of Domingues' motion and remand the case for a full hearing on the effect of the ICCPR on Domingues' sentence.

Domingues v. Nevada, 961 P.2d 1279, 1280 (1998) (Rose, J., dissenting). See generally, M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL C. REV. 1169, 1190–93 (1993).

316. *See* Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804) ("It has also been observed that an Act of Congress ought never be construed to violate the law of nations if any other possible construction remains.")

closed a remedy under § 1983?[317] Of particular importance, § 1983 provides a right of action regardless of whether another judicial remedy exists.[318]

The U.S. Supreme Court has not specifically ruled upon this issue. However, the Court's reasoning in *Maine v. Thiboutot*[319] and its progeny indicate doctrinal support for an international customary law claim under § 1983. Importantly, an international customary law claim does not come with attached reservations. Though a few lower courts have recently recognized the legitimacy of such a claim, they have shown significant uneasiness with this area of law.[320] The U.S. Supreme Court ultimately will need to address this issue with the resolve and leadership already demonstrated by the Second and Ninth Circuits.[321]

### *B. Section 1331 Jurisdiction, Implied Causes of Action and Federal Common Law*

There are two possible statutory bases for asserting international human rights claims: § 1983 and the Alien Tort Claims Act (ATCA). This Section reviews the potential for asserting these claims under the U.S. doctrines permitting implied causes of action under federal common law theories.

The vast majority of litigation raising international human rights claims in U.S. courts are brought under the ATCA.[322] These cases primarily concern claims by aliens, as statutorily required,[323] against aliens for international human rights violations which occurred on foreign soil.[324] The statute does not require the defendant and location of the alleged violation to be foreign, however.

ATCA claims generally allege violations of the "law of nations."[325] Such actions are also potentially actionable under federal common law, with ac-

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317. This test is significantly easier to meet than the "special factors" requirements of *Bivens* when determining if a direct right of action exists.

318. For example, an international human rights claim based upon international customary law would be precluded under a *Bivens* theory if the putative plaintiff arguably has a claim under state or federal law.

319. *See* Maine v. Thiboutot, 448 U.S. 1, 4, 6–8 (1980).

320. The "special factors counseling hesitation" test, applicable to implied cause of action analysis, is used to sidestep the conclusion a § 1983 review leads them to. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971); *see also* White v. Paulsen, 997 F. Supp. 1380 (E.D. Wash. 1998); Hawkins v. Comparet-Cassani, 33 F. Supp. 2d 1244 (C.D. Cal. 1999), discussed *infra* Part V.B.

321. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Jota v. Texaco, 157 F.3d 153 (2d Cir. 1998); *In re* Estate of Ferdinand E. Marcos, Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992).

322. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789), codified at 28 U.S.C. § 1350 (1982) ("The district court 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.").

323. "Aliens" within the meaning of the ATCA would include those who reside in the United States, *see, e.g.*, *Filartiga*, 630 F.2d 876 and *Marcos*, 978 F.2d 493, as well as in its prisons, *see* Jama v. INS, 22 F. Supp. 2d 353 (D. N.J. 1998). In 1996, there were 19,000 "noncitizens" (18%) inmates in federal prison. *See* U.S. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 56, at 534.

324. *See, e.g.*, Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 2 (1985).

325. 28 U.S.C. § 1350.

companying federal subject matter jurisdiction.[326] The courts facing this issue have almost uniformly sidestepped ruling on the "law of nations" claims not based on the ATCA. Although some courts have acknowledged a basis for a federal common law claim arising from "laws within the meaning of 28 U.S.C.A. § 1331,"[327] and that "a good argument can be made that customary international law should be sufficient for federal question jurisdiction,"[328] the clear pattern has been to decline ruling on the issue and limit any right of action to the ATCA.[329]

The doctrine that "international law is our law"[330] includes its federal common law Article III and Supremacy Clause status over state law.[331] However, the courts caution that neither the Supremacy Clause, Article III, nor § 1331, alone, create a right of action.[332]

That said, the issue becomes whether or not a cause of action is either "implied" under the Constitution or whether federal common law would allow the assertion of international human rights customary law claims.[333] Over a decade ago, one scholar noted "the case law in this area is truly a quagmire, it would be folly to suggest that any interpretation has talismanically defined 'arising under' within the meaning of § 1331." [334] While a few courts have recently begun to step back into this quagmire, the decisions have done little to clarify these complex issues. Without direction from the U.S. Supreme Court, most lower courts are likely to continue to avoid these

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326. 28 U.S.C. § 1331.

327. *See* 32A Am. Jur. 2d Federal Courts Sec 1046, (Federal Common Law) (1995) ("The term 'laws,' within the meaning of 28 U.S.C.A. § 1331 embraces claims founded on federal common law. The statutory grant of jurisdiction in 28 U.S.C.A. § 1331 will support claims founded upon federal common law as well as those of a statutory origin; federal common law as articulated in rules that are fashioned by court decisions are 'laws' as that term is used in § 1331."); Illinois v. City of Milwaukee, Wis., 406 U.S. 91 (1972); *see also* Airco Indus. Gases, Inc. v. Teamsters Health & Welfare Pension Fund, 850 F.2d 1028 (3d Cir. 1988). *See also* 13b CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3563 60 (1984) ("The most significant expansion of 'laws' in section 1331 has been with regard to what is called 'federal common law.")

328. *See* WRIGHT, *supra* note 327, at 62–63; Judge Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

329. *See* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Jama v. INS, 22 F.Supp. 2d 353 (D. NJ. 1998); Doe v. Islamic Salvation Front (FIS), 993 F. Supp. 3 (D.D.C. 1998); *In re* Estate of Ferdinand E. Marcos, Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987).

330. *See* The Paquete Habana, 175 U.S. 677 (1900).

331. *See Marcos*, 978 F.2d at 502–03. *See also* U.S. CONST. art. VI; U.S. CONST. art. III, § 2.

332. *See* Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 249 (1951) ("The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions.")

333. There is current academic debate on the impact of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) upon federal common law's inclusion of international law. *Compare* Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, *with* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of Federal Law*, 111 HARV. L. REV. 1824 (1998). The courts implicitly recognize, however, by relying upon *The Paquete Habana*, that the federal common law of international customary law survived *Erie*.

334. *See* Kenneth Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 354 (1988).

important questions, using both traditional and newly grafted doctrines of avoidance when faced with non-ATCA based international human rights claims. The recent analysis in *White v. Paulsen* [335] is indicative of the courts' more recent approach to these issues. The opinion is discussed at some length because of the pattern it reflects. From the outset, the *White* court agreed that nonconsensual medical experimentation on prisoners violated international customary law.[336] The court did not accept, however, that international customary law necessarily creates a cause of action: "[I]nternational law does not require any particular reaction to violations of law . . . . Whether and how the United States wishes to react to such violations are domestic questions."[337] Though the court agreed that the judiciary could find an implied cause of action where no statutory cause of action exists,[338] it noted that "not every federal right of magnitude gives rise to an implied right of action."[339]

The *White* court looked to the *Bivens* doctrine[340] as the test to be applied to a proposed implied right of action based upon international customary law. "[F]ederal courts must also consider whether there exist 'special factors counseling hesitation in the absence of affirmative action by Congress.'"[341] The court went on to evaluate other *Bivens* factors such as the existence of adequate domestic remedies for the alleged violations of international law. On this point, it found the availability of federal and state claims determinative.[342] The court distinguished *Bivens*, which found an implied cause of action, as a case "where there is 'no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from agents, but must instead be remitted to another remedy.'"[343] Curiously, the *White* court found the Torture Victim Protection Act (TVPA)[344] determinative on this point.[345] While conceding that the TVPA did not apply, it went on to say that "[this] does not mean this Court should not show deference to Congress' balancing of the policy considerations underlying its action."[346] The Court seemed to suggest that

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335. 997 F. Supp. 1380 (E.D. Wash. 1998).

336. *See White*, 997 F. Supp. at 1383.

337. *Id.* at 1383, citing *Marcos*, 25 F.3d at 1475.

338. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). This raises the question, beyond the scope of this Article, as to why the judiciary needs statutory permission to enforce the constitution. *See* Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 291 (1995) (asking the purpose served by § 1983).

339. *White*, 997 F. Supp. at 1384, *noting* Schweiker v. Chilicky, 487 U.S. 412 (1988).

340. *See Bivens*, 403 U.S. 388. *Bivens*, however, concerned an implied cause of action directly under the Fourth Amendment, not an international law claim raised under a federal common law theory. *See id.*

341. *White*, 997 F. Supp. at 1384, citing *Bivens*, 403 U.S. at 396.

342. *See White*, 997 F. Supp. at 1384.

343. *Id.*

344. *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)).

345. *See White*, 997 F. Supp. at 1384.

346. *Id.*

any legislative activity in the area of torture protection precluded it from implying rights that Congress *possibly* had an opportunity to create.[347] The *White* court was not bothered by the TVPA's clear language that the Act did not apply, ignoring explicit language in its legislative history that the Act was *not* an attempt to implement the Convention Against Torture, any other international human rights convention or international customary law.[348]

The Court also suggested that it lacked the competence to ascertain the international law of consent.[349] Lastly, as a basis for refraining from deciding an international issue, the *White* court stated that it "was being asked to address a matter that is principally entrusted by the federal constitution to Congress or the Executive."[350] The court found this factor to be the most persuasive in "counseling judicial hesitation in the implication of additional remedies,"[351] and declining to imply a cause of action based on the violations of international law for "crimes against humanity."[352]

The *White* analysis reveals the lack of doctrinal guidance provided to the lower courts in deciding these new, complex issues. It also reflects a more general attitude that recognition of a right of action for international human rights violations is to be avoided. The *White* court uses the "special factors counseling hesitation" language of *Bivens* to deny the international customary law claim, an approach without precedent in this area. The U.S. Supreme Court has primarily applied this dicta from *Bivens* in cases involving "the framework of the Military establishment."[353] Reliance upon the traditional role of the executive and legislative branches in foreign policy matters is tenuous at best when the claim before it involves a U.S. citizen suing a state agency for activities occurring in the State of Washington.[354]

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347. *See id.* There is nothing in the Torture Victim Protection Act's legislative history nor any doctrinal basis to support a finding that because Congress may have had a chance to decide an issue that the courts should read in an implicit determination when they choose not to.

348. *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)); Statement By President George Bush Upon Signing H.R. 2092, 28 Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992) *reprinted in* 1992 U.S.C.C.A.N. 91.

349. *See White*, 997 F. Supp. at 1385 n.2.

350. *Id.* at 1385. "The determination of what international obligations the United States chooses to recognize or enforce is an area that long has been recognized as entrusted principally to the Legislative and Executive branches of federal government." *Id.*

351. *Id.*

352. *Id.* at 1380.

353. *See* Chappell v. Wallace, 462 U.S. 296 (1983); U.S. CONST. art. I, § 8, cl. 14. In a case involving claims of drug experimentation by government officials, noted in *White*, the military framework was a "special factor" which the majority relied upon to refuse to imply a cause of action. *See* United States v. Stanley, 483 U.S. 669 (1987). Justice O'Connor's dissent noted, however, that "no judicially crafted rule should insulate from liability the involuntary and unknowing human experimentation alleged . . . particularly when the international legal community specifically outlawed involuntary medical experiments upon human prisoners in the standards set by the Nuremberg Tribunals." *Id.* at 709–10; *See also* United States v. Brandt (The Medical Case), 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 181 (1949).

354. *White* also fails to give equal weight to another maxim of *Bivens*: "where federally protected rights have been invaded, it has been the rule from the beginning that courts will alert to adjust their remedies so as to grant the necessary relief." Bivens v. Six Unknown Named Agents of the Fed. Bureau of

The *White* court's conclusory finding that the Eighth Amendment provides a sufficient remedy also fails to address the scienter requirements of the "cruel and unusual" punishment clause. The medical experimentation in *White* involved individuals who were aware of the imposition. The question was whether or not an inmate can truly "consent" to experimentation in a potentially inherently coercive atmosphere. This issue does not likely meet the "unnecessary and wanton infliction of pain" or "deliberate disregard" thresholds of the Eighth Amendment. The Court further fails to review the implications of the relaxed "rational basis" scrutiny of *Turner v. Safely*[355] to claims before it.[356]

The *White* analysis was followed verbatim in a subsequent case in which international customary law claims were raised.[357] The new, unsupportable doctrines of avoidance seen in *White* will continue to find followers[358] in this undeveloped area of law, absent thoughtful guidance from higher courts.

Other courts which explore incorporating international human rights via federal common law and § 1331 have ultimately backed away, determining that a ruling on the issue is not necessary because alternative bases exist.[359]

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Narcotics, 403 U.S. 388, 392 (1971), citing Bell v. Hood, 327 U.S. at 684. *See also* George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the* Bivens *Dissenters Prevailed?*, 64 IND. L.J. 263 (1989). Prof. Brown notes,

> Nine years after *Bivens* was decided, then-Justice Rehnquist urged the Court to overrule it, denouncing it as a 'decision by a closely divided court, unsupported by the confirmation of time.' As an initial matter, Justice Rehnquist's attack seems surprising, even inaccurate .... Today, however, Justice Rehnquist's 1980 critique has a ring of prophecy. Four times in the last six years the Court has held *Bivens* unavailable .... The Court may insist that *Bivens* is alive and well, but one has to wonder, and worry .... The basic question is availability of judicial relief for constitutional violations.

*Id.* at 264–65.

355. *See* Turner v. Safely, 482 U.S. 78, 89 (1987) and discussion in Part III.

356. While beyond the scope of this Article, the *White* court's conclusion that adequate alternative bases exist under domestic law also fails to review the myriad of immunity, standing and applicable state law affecting constitutional claims. In the context of sexual abuse of female prisoners, *see* Landerberg, *supra* note 108. *See generally* Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559 (1988); J.E. KIRKLIN & MARTIN SCHWARTZ, § 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES (2d ed. 1991).

357. *See* Hawkins v. Comparet-Cassani, 33 F. Supp. 2d 1244 (C.D. Cal. 1999). Further muddying these unchartered waters, the court stated that all cases "that found a cognizable right under *jus cogens* norms of international law involved either acts committed on a foreign citizen or acts committed by a foreign government or government official. There is no reported case of a court in the United States recognizing a cause of action under *jus cogens* norms of international law for acts committed by United States government officials against a citizen of the United States." *Id.* at 1255. This analysis and conclusion are simply incorrect. The cases referred to by the court involve "aliens" because the claims are under the ATCA. At the time *Hawkins* was decided, there were opinions finding violations of international customary law for acts committed by U.S. officials. *See, e.g.*, Jama v. INS, 22 F. Supp.2d 353 (D. N.J. 1998). Further, the issue has been rarely addressed by the courts simply out of their own reluctance. Interestingly, *White* recognized that "federal courts have the authority to imply the existence of a private right of action for violations of *jus cogens* norms of international law." White v. Paulsen, 997 F. Supp. 1380, 1383 (E.D. Wash. 1998).

358. In *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1382 (9th Cir. 1998), the Ninth Circuit refused to find an implied cause of action under § 1331 for an international customary law claim because the defendants were state, not federal officers as in *Bivens*, a distinction without meaning.

359. *See* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Jama v. INS, 22 F. Supp. 353, where the

There is no U.S. Supreme Court precedent nor doctrinal support for refusing to permit more than one claim based upon the same factual allegations.[360]

A consistent irony seen in the recent opinions discussed is the facial acceptance of the maxim that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[361] The "law of nations" adjudicated on behalf of aliens is deliberately avoided when raised by citizens in opinions finding that such issues are more properly within the powers of the other branches of government.[362] The lower courts, without guidance, have seemingly worsened the existing quagmire in reviewing § 1331 jurisdiction for federal common law claims based upon international customary law.

## VI. CONCLUSION

A fundamental assumption underlying this Article is that our jurisprudence includes the consideration of international human rights claims. International human rights law is part of our law[363] and has been for over a hundred years.

Historically, federal courts have been open to resolving civil/human rights claims. Recently, significant changes in judicial doctrine, the increasing conservatism of the bench, and legislative reforms have diminished the effectiveness and will of the federal courts in remedying many civil and human rights violations. This has been particularly true for claims arising within our prison walls.

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plaintiffs also alleged an implied cause of action for violation of international law. With even less analysis of the issue, *Jama* concluded that "[b]ecause the ATCA provides jurisdiction over Plaintiffs' claims based upon international law, it is unnecessary to decide if 28 U.S.C. § 1331 (federal question jurisdiction) provides an independent basis for jurisdiction." *Id.* at 363. *See also* Heinrich v. Sweet, 49 F. Supp. 2d 27 (D. Mass. 1999).

360. These claims do not trigger the doctrine that a claim involving both statutory and constitutional issues should normally be adjudicated on non-constitutional grounds. The U.S. Supreme Court has never found that the federal common law of international customary law is "constitutional" law. The newer decisions, in fact, seem to suggest that the constitutional questions should be decided instead of the federal common law claim. *See White*, 997 F. Supp. at 1380; *Hawkins*, 33 F. Supp. 2d. at 1244 (finding no need to decide the international customary law claim when the Eighth Amendment creates a possible remedy).

361. *See* The Paquete Habana, 175 U.S. 677, 700 (1900). The Court went on to say, "For this purpose, where there is no treaty, and no controlling executive or legislative act *or judicial decision*, resort must be had to the customs and usages of civilized nations." *Id.* (emphasis added).

362. *See Hawkins*, 33 F. Supp. 2d at 1256 (citing Handel v. Artukovic, 601 F. Supp. 1421, 1428 (C.D. Cal 1985)); *White*, 997 F. Supp. at 1385; Randall, *supra* note 324, at 407 ("international issues occupy one of the post-Erie enclaves of federal judge-made law," citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964)). *See also* Justice Harry Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39 (1994) ("Although commentators continue to debate the extent of executive, legislative or judicial power to trump international law, the import of *The Paquete Habana* is clear: Customary international law informs the construction of domestic law, and, at least in the absence of any superceding positive law, is controlling.").

363. *See The Paquete Habana*, 175 U.S. at 700. *See generally* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

The effective protection of human rights must include the judiciary.[364] This Article seeks to broaden the discourse on these issues within our legal institutions and culture[365] by addressing these complex questions within the context of a human rights crisis at home. Accordingly, this approach adopts the adage that a vital role of both legal scholars and advocates is "translating human stories into legal stories and re-translating legal story endings into solutions to human problems."[366] We must face up to the failure of U.S. domestic jurisprudence to incorporate international human rights standards, particularly violations within its borders.

The international scrutiny of the conditions of confinement for the rapidly increasing female inmate population has brought significant attention to a serious human rights problem. This factual context was used to enhance an understanding of this important crisis and as a case study to explore the possibilities of applying international human rights law. Just how this incorporation is achieved may not be critical. It may be incorporated by reviewing constitutional protections with reference to international standards,[367] through domestic legislation implementing international human rights conventions, or by a more direct incorporation of international law into our jurisprudence.[368]

Judicial leadership in this incorporation process is necessary for several reasons. Congress has regularly failed to pass implementing legislation when ratifying international human rights conventions. We have seen strong resistance by a critical number of Justices on the current U.S. Supreme Court to the idea of referencing international norms in determining constitutional standards. The international and regional human rights judicial tribunals are few, relatively new, possess few resources, seek political consensus, issue few decisions, and certainly cannot adjudicate more than a small number of cases. Moreover, international human rights law is in its infancy and the process of jurisprudential development has just begun.

Given this status of the law, this Article reviews the recent diminution of constitutional protections for prisoners. Federal legislation and U.S. Su-

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364. For a thoughtful review of the success and failures of U.S. courts in furthering rights and changing social policy such as segregation, see GERALD R. ROSENBERG, THE HOLLOW HOPE (1991). *See also* T. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA (1981). *Compare* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Clients Interests In School Desegregation Litigation*, 85 YALE L. J. 470 (1976) *with* Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 (1988) on the conflicts in the lawyer's role when implementing social change. FRANK SIKORA, THE JUDGE: THE LIFE AND CASES OF ALABAMA'S FRANK M. JOHNSON, JR. (1992).

365. *See* Ellen Ash Peters, *supra* note 24, at 219.

366. Alison Anderson, *Lawyering in the Classroom: An Address to First Year Students*, 10 NOVA L. REV. 271, 274 (1986).

367. For judicial perspectives on international human rights law incorporation theory, *see* Blackmun, supra note 362; Edward D. Re, *The Universal Declaration and the Domestic Courts*, 31 SUFFOLK U. L. REV. 585 (1998).

368. *See generally* Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 15 MICH. J. INT'L L. 1 (1992); Jackson, *supra* note 22.

preme Court decisions have made it increasingly difficult and sometimes impossible for prisoners to obtain protections under domestic law. At the same time, international human rights standards are gaining acceptance in our culture and are increasingly being imposed as norms throughout the world. Our domestic incorporation doctrine has not kept up with these trends. Domestic incorporation of international human rights standards is in a muddied, under-developed stage. However, advocates for victims of human rights violations see significant benefits in asserting international law claims. International standards sometimes provide greater protections than domestic norms. Advocates may gain important tactical benefits by raising international human rights claims even when they may not exceed domestic legal standards.

The road to the incorporation of international human rights standards for citizens who allege abuses within our borders is laden with obstacles. This Article reviews and proposes a new use of domestic law, especially 42 U.S.C. § 1983, as a right of action similar to that provided to non-citizens through the Alien Tort Claims Act.[369] The simple lack of decisions on these issues affirms the resistance in our legal culture to apply international norms. Regarding treaty-based rights, the impact of reservations attached by other branches of governments will prove difficult for the judiciary to resolve. Ultimately, however, they must.[370] The inclusion of international customary law through § 1983 and as direct causes of action under § 1331 jurisdiction is new terrain. This Article provides doctrinal support for these theories of adjudication for international human rights claims.

While a direction seems clear, currently there are no clear, easy answers at this stage of the debate. The evolution, as in most areas of law, is likely to be incremental. The development of new legal strategies may prove difficult in the current culture for the variety of reasons discussed. But change has never come quickly nor easily in our legal institutions. If the courts do not create, develop, and implement incorporation doctrine, they will risk falling short of these international legal obligations to litigants seeking protection of the law.

This Article is intended to take small, though important, steps towards expanding U.S. jurisprudence to effectively incorporate international human rights law for violations committed both within and outside the United States, for citizens and aliens alike. Hopefully, women prisoners subject to abuse at home, and currently under international scrutiny, will benefit from the debate.

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369. *See* the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) ("The district court 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.").

370. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971).

| TABLE A.1 | RIGHTS TO LIFE, LIBERTY, SECURITY OF PERSON, AND NON-TORTURE |
|---|---|
| I.A. *Universal Declaration of Human Rights* | Everyone has the right to life, liberty, and the security of person. [*Art. 3*] No one shall be subjected to arbitrary arrest, detention or exile. [*Art. 9*] No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. [*Art. 5*] |
| I.B. *Vienna Declaration and Programme of Action* | Sec. 5, "Freedom from Torture", para.58, Special attention should be given to ensure universal respect for, and effective implementation of, the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly physicians, in the Protection of Prisoners and Detainees, and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations. |
| I.C. *Geneva Conventions of 1949* | In the case of armed conflict not of an international character ... the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to [persons taking no active part in the hostilities]: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; [and] ... (c) outrages upon personal dignity, in particular humiliating and degrading treatment...[*Common Article 3*]. |
| I.D. *Geneva Convention Relative to the Protection of Civilian Persons During Time of War* | Grave breaches of this Convention shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilfull killing, torture or inhuman treatment, ... wilfully causing great suffering or serious injury to body or health ... [*Art. 147*]. |
| I.E. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* | Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. [*Art. 2(1)*] For the purposes of this Convention, 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 ... intimidating 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. [*Art. 1 (1)*] Each State Party shall undertake to prevent ... other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1 when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. [*Art. 16 (1)*] |
| II.A. *American Declaration of the Rights and Duties of Man* | Every person has the right to life, liberty, and the security of his person. [*Art. I*] |
| II.B. *American Convention on Human Rights* | Everyone has the right to have his life respected. [*Art. 4*] Every person has the right to have his physical, *mental, and moral integrity* respected. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. [*Art. 5*] Everyone has the right to personal liberty and security. [*Art 7(1)*]. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. [*Art. 5(2)*] Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women. [*Art. 4(5)*]. |
| II.C. *African [Banjul] Charter on Human and People's Rights* | Every human being shall be entitled to respect for his life and the integrity of his person. [*Art. 4*] Every individual shall have the right to liberty and the security of his person. No one may be arbitrarily arrested or detained. [*Art. 6*]. Every individual shall have the right to the respect of the dignity inherent in a human being. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited. [*Art. 5*] |
| *II.D. European Convention for the Protection of Human Rights and Fundamental Freedoms* | Everyone's right to life shall be protected by law. [*Art. 2*] No one shall be subjected to torture or to inhuman or degrading treatment or punishment. [*Art. 3*]. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in accordance with the procedure prescribed by law. [*Art. 5 (1)*] |

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| III.A. *International Covenant on Civil and Political Rights* | Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. [*Art. 9 (1)*]. Every human being has the inherent right to life. This right shall be protected by law. [*Art. 6 (1)*]. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. [*Art. 7*]. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes. [*Art. 6(2)*]. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. [*Art. 6(5)*] |
| III.B. *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* | All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person. [*Principle 1*]. No persons under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment. [*Principle 6*]. The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time. [*Note, Principle 6*]. |
| III. C. *United Nations Standard Minimum Rules for Treatment of Prisoners* | Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offenses. [*Rule 31*]. The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings. [*Rule 60(1)*]. |
| IV.A. *Protocol I of the Geneva Conventions*<br><br>IV.B. *Protocol II of the Geneva Conventions* | [Prohibited acts] whether committed by civilian or by military agents [include]: (a) violence to the life, health, or physical or mental well-being of persons, in particular ... (ii) torture of all kinds, whether physical or mental; ... and (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault. [*Art. 75*].<br>[T]he following acts [are prohibited]: (a) violence to life, health and physical or mental well-being of persons, [including] cruel treatment such as torture,... (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault...[*Art. 4 (2)*]. |
| IV.D. *Declaration on the Elimination of Violence Against Women* | Women are entitled to the equal enjoyment and protection of (a) The right to life; ...(c) The right to liberty and security of person ... (h) The right not to be subjected to torture, or other cruel, inhuman, or degrading treatment or punishment. [*Art. 3*]. For purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or private life. [*Art. 1*]. |
| IV.E. *Convention on the Rights of the Child* | States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age. (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law. [*Art. 37 (a), (b)*]. States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement of coercion of a child to engage in any unlawful sexual activity. [*Art. 34*]. States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. [*Art. 39*]. |

| TABLE A.2. | JURIDICAL AND POLITICAL RIGHTS: Judicial Access, Due Process, Privacy, Honor, Etc. |
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| I.A. *Universal Declaration of Human Rights* | Everyone has the right to *recognition* everywhere as a *person* before the law. [*Art. 6*]. Everyone has the right to an effective remedy by the competent tribunals for acts violating the *fundamental rights* granted him by the constitution or by law. [*Art. 8*].<br>No one shall be subjected to arbitrary interference with his privacy, *family*, home or correspondence, nor to attacks upon his honour and *reputation*. Everyone has the right to the protection of the law against such interference or attacks. [*Art. 12*]. |
| I.B. *Geneva Convention Relative to the Protection of Civilian Persons During Time of War* | Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. [*Art. 27*] |
| *I.C. Vienna Declaration and Programme of Action* | Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice ... and especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights. [*I(27)*]. |
| *I.D. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* | Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction. [*Art. 12*]. Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authority. [*Art. 13*]. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation. [*Art. 14(1)*]. |
| II.A. *American Declaration of the Rights and Duties of Man* | Every person may resort to the courts to ensure respect for his *legal rights*. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights. [*Art. XVIII*]. Every person who has been deprived of his liberty has the right to have the *legality of his detention* ascertained without delay by a court. [*Art. XXV*]<br>Every person has the right to protection of the law against abusive attacks upon his honor, his reputation, and his private and *family life*. [*Art. V*]. |
| II.B. *American Convention on Human Rights* | Every person has the right as a person before the law. [*Art. 3*]. Every person has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized ... by this Convention, even though such violations may have been committed by persons acting in the course of their official duties. [*Art. 25*].<br>No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. Everyone has the right to the protection of the law against such interferences or attacks. [*Art. 11 (2)-(3)*] |
| II.C. *African [Banjul] Charter on Human and People's Rights* | Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force. [*Art. 7(1)(a)*]. |
| II.D. *European Convention for the Protection of Human Rights and Fundamental Freedoms* | Everyone whose rights ... as set forth [here] are violated shall have a ... remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. [*Art. 13*]. Everyone has the right to respect for his private and family life. [*Art. 8(1)*]. |

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| III.A. *International Covenant on Civil and Political Rights* | Everyone shall have the right to recognition everywhere as a person before the law. [*Art. 16*]. Each State party ... undertakes (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State. [*Art. 2 (3)*].<br>Everyone has the right to the protection of the law against [arbitrary or unlawful interference with his privacy, family, home or correspondence] or [unlawful attracks on his honour and reputation]. [*Art. 17*]. |
| III.B. *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* | Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority ... with information on and an explanation of his rights and how to avail himself of such rights. [*Principle 13*].<br>(1) A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers. (2) In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of this principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights. [*Principle 33(1)(2)*]. |
| III.C. *United Nations Standard Minimum Rules for Treatment of Prisoners* | Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations. [*Rule 35(1)*]. (1) Every prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him. (2) It shall be possible to make requests or complaints to the inspector of prisions during his inspection. (3) Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels. (4) Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay. [*Rule 36*]. |
| IV.A. *Global Refugee Rights of 1954* | A refugee shall have free access to the courts of law on the territory of all Contracting States. [Art. 16 (1)] |
| IV.B. *Convention on the Elimination of All Forms of Discrimination Against Women* | States Parties shall accord to women equality with men before the law. [*Art. 15(1)*]. |
| IV.C. *Declaration on the Elimination of Violence Against Women* | States should ...(d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm they have suffered; States should also inform women of their rights in seeking redress through such mechanisms. |
| IV.D. *Convention on the Rights of the Child* | States Parties recognize the right of every child .... recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth... [*Art. 40(1)*].<br>Every child alleged as or accused of having infringed the penal law has at least the following guarantees: ...(vii) To have his or her privacy respected at all stages of the proceedings. [*Art. 40(2)(b)(vii)*].No child shall be subjected to arbitrary or unlawful interference with his or her privacy..., nor to unlawful attacks on his or her honour and reputation. [*Art. 16 (1)(2)*]. |

| TABLE A.3. | PROTECTION OF, AND SPECIAL ISSUES CONCERNING, WOMEN |
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| I.A. *Geneva Convention Relative to the Protection of Civilian Persons During Time of War* | Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. [*Art. 27*]. |
| I.B. *Vienna Declaration and Programme of Action* | The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. The human rights of women should form an integral part of the United Nations human rights activities. [*II(18)*].<br>The World Conference on Human Rights stresses the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices. II(38) In particular, the World Conference on Human rights stresses the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, elimination of gender bias in the administration of justice .... |
| II.D. *African [Banjul] Charter on Human and People's Rights* | The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. [*Art. 18(3)*]. |
| III.A. *International Covenant on Civil and Political Rights* | Sentence of death shall not be carried out on pregnant women. [*Art. 6(5)*]. |
| III.B. Body *of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* | These principles shall be applied to all persons with the territory of any given State, without distinction of any kind, such as ... sex, ... national, ethnic or social origin, ... or other status. [*Principle 5(1)*]. Measures applied under the law and designed solely to protect the rights and special status of women, ... shall not be deemed to be discriminatory. [*Principle 5(2)*]. |
| III. C. *United Nations Standard Minimum Rules for Treatment of Prisoners* | (1) In an institution for both men and women, the part ... set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution. (2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer. (3) Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out thier professional duties in institutions or parts of institutions set aside for women. [*Rule 53(1)(2)(3)*]. |

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| IV.A. *Protocol I of the Geneva Conventions*<br><br>IV.B. *Protocol II of the Geneva Conventions* | Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault. [*Art. 76(1)*].<br><br>The following acts ... are and shall remain prohibited at any time and place [against persons not taking part in hostilities]: (c) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault .... [*Art. 4 (2)(e)*]. |
| IV.B. *Convention on the Elimination of All Forms of Discrimination Against Women* | States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. [*Art. 5(a)*]. |
| IV.C. *Declaration on the Elimination of Violence Against Women* | For purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or private life. [*Art. 1*]. Violence against women shall be understood to encompass, but not be limited to the following: (a) Physical, sexual and psychological violence occurring in the family, including ... marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) Physical, sexual and psychological violence occurring in the general community, including rape, sexual abuse, sexual harassment and intimidation...; (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs. [*Art. 2*]. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: ...(c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons. [*Art. 4(c)*]. |

| TABLE A.4. | SPECIAL ISSUES OF CONCERN TO PRISONERS |
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| I.A. *Vienna Declaration and Programme of Action* | National and international mechanisms should be strengthened for the defense and protection of children, in particular, the girl-child, ... sexually exploited children, ... children in detention. [*I(21)*]. |
| I.B. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* | Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. [*Art. 10(1)*]. Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture. [*Art. 11*]. |
| II.A. *American Declaration of the Rights and Duties of Man*<br><br>II.B. *American Convention on Human Rights* | Every individual who has been deprived of his liberty ...has the right to humane treatment during the time he is in custody. [*Art. XXV*].<br><br>Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age; ... nor shall it be applied to pregnant women. [*Art. 4 (5)*].<br>Work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority ... shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company or juridical person. [*Art. 6(3)(a)*]. |
| II.C. *African [Banjul] Charter on Human and People's Rights* | Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. [*Art. 6(5)*]. |
| III.B. Body *of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* | The authorities which ... keep [a person] under detention ... shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority. [*Principle 9*]. It shall be prohibited to take undue advantage ... of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person. [*Principle 21*].<br>Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers. [*Principle 7(2)*]. |
| III. C. *United Nations Standard Minimum Rules for Treatment of Prisoners* | Officers of the institution shall not, in relations with prisoners, use force except in self-defense or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers using force must use no more than is strictly necessary and must report the incident immediately. [*Rule 54(1)*].<br>Preferably institutional industries and farms should be operated directly by the administration and not by private contractors. (2) Where prisoners are employed in work not controlled by the administration, they shall always be under the supervision of the institution's personnel. [*Rule 73(1)(2)*]. |
| IV.B. *Convention on the Elimination of All Forms of Discrimination Against Women*<br>IV.C. *Declaration on the Elimination of Violence Against Women* | ...Concerned that some groups of women, such as ... women in institutions or in detention, female children, ... are especially vulnerable to violence ...[*Preamble*]. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: ...(f) Adopt measures directed towards the elimination of violence against women who are especially vulnerable to violence. [*Art 4 (f)*]. |
| IV.D. *Convention on the Rights of the Child* | States Parties shall take all appropriate measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of ... any person who has the care of the child. [*Art. 19 (1)*]. |