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Kristen B. Rosati

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The United Nations Convention Against Torture: A Self-Executing Treaty That Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*

KRISTEN B. ROSATI**

> The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being.***

Despite the horrors of persecution that many refugees face if returned to their home countries, United States (U.S.) immigration law has become increasingly restrictive in granting relief to these individuals. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[1], which amended the Immigration and Nationality Act (INA), is the latest salvo in the anti-immigration battle and has erected yet another set of barriers to relief for legitimate refugees through such methods as expedited removal, strict filing deadlines, and restrictions on eligibility for asylum and withholding of removal[2] for an increasing

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**Coppersmith Gordon Schermer Owens & Nelson, P.L.C. Ms. Rosati it a 1990 graduate of the University of Michigan Law School. She clerked for Judge Thomas Tang of the Ninth Circuit Court of Appeals and for Judge Earl Carroll of the District of Arizona. Ms. Rosati litigated the first Torture Convention case considered for relief by the Immigration & Naturalization Service. A member of the Board of Directors of the Florence Immigrant & Refugee Rights Project in Arizona, Ms. Rosati has also served as a Legal Counselor at the United Nations High Commissioner for Refugees.

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*** Siderman de Blake v. Republic of Argentina 965 F.2d 699, 717 (9th Cir. 1992).

1. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Pub. L. No. 104-208, 110 Stat. 3009 [hereinafter IIRIRA] (enacted as Division C of the Omnibus Appropriations Act of 1996) (codified as amended at 8 U.S.C. (Supp. 1996)).

2. The IIRIRA replaced the concepts of "deportation" and "exclusion" with "removal." Accordingly, this article will use the term "withholding of removal," although "withholding of deportation" may still apply to individuals put into deportation proceedings before

number of persons convicted of "aggravated" felonies.

In fact, even convictions for non-violent crimes such as theft, illegal gambling, fraud, forgery, and tax evasion are now classified as aggravated felonies and can result in the denial of asylum and withholding of removal for individuals who face severe persecution at home.[3] The following examples illustrate the harshness of these restrictions.

* An Amerasian refugee was convicted nine years ago of forging a check in the amount of $19.53. She was sentenced to six years in prison but served only six months. Despite the fact that this woman came to the U.S. when she was only four years old and her entire family (including three children) are U.S. citizens, she is ineligible for asylum or withholding because of her "aggravated" felony conviction.

* A teenager who threw a rock through a window of an abandoned building and merely reached into the window, but took nothing, was convicted of burglary and sentenced to five years. Although he served only nine months of his sentence, an immigration judge found him ineligible for asylum or withholding.

* A man, who had been severely tortured by Bulgarian security forces because of his political activities, entered the U.S. as a refugee in 1990. He was later convicted of a robbery involving $10 and possession of drug paraphernalia. He was sentenced to just over five years, served three years and four months, and later was found ineligible for asylum or withholding.

While some avenues of relief are thus closing to refugees, another may be opening for individuals, such as the Bulgarian national, who fear torture if returned to their home country. Claims based on the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention)[4] may be a viable alternative for refugees ineligible for asylum and withholding of removal: Article 3 of the Torture Convention prohibits the U.S. from expelling, returning, or extraditing "a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[5]

While there is currently no legislation or regulation implementing the obligations of the U.S. to prevent the removal or extradition of indi-

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the IIRIRA took effect. *Id.* §§ 308(e)(10), 308(e)(1)(F).

3. *See* Immigration & Nationality Act of 1990 § 101(a)(43), 8 U.S.C. §1101(a)(43) (1994) [hereinafter INA] (defining "aggravated felony").

4. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985) [hereinafter Torture Convention]. The Torture Convention is reproduced in Appendix I.

5. Torture Convention, *supra* note 4, art. 3.

viduals who are likely to be tortured upon return to their countries of origin, there is an informal administrative procedure exists to grant temporary relief to them under the Torture Convention. If informal administrative relief is not granted, however, advocates can pursue direct enforcement of the Torture Convention in immigration or federal court by demonstrating that Article 3 of the Torture Convention is a "self-executing" treaty provision enforceable in U.S. courts.

This is an important issue for two reasons. First, with the increasing restrictions on relief to legitimate refugees under U.S. immigration law, the Torture Convention, if found self-executing, would provide relief for many individuals otherwise facing the most abhorrent persecution upon return to their country of origin. Whether Article 3 of the Torture Convention is a self-executing treaty provision is an issue of first impression that has neither been addressed by the Board of Immigration Appeals (the "BIA"), nor the federal courts.

Second, whether a treaty provision is self-executing causes extensive confusion in the courts, which have been struggling — largely unsuccessfully — to apply the self-execution concept since it was developed in the nineteenth century.[6] The question, of whether individuals directly may enforce the Torture Convention in court, promises to provide an excellent opportunity for the courts to clarify the self-execution doctrine.

Part I explores the relevant provisions of the Torture Convention, discussing the standards for relief from removal and international case law interpreting the Convention. The article then examines the present implementation of Article 3 in the U.S. Part II discusses the informal administrative procedure under which the Immigration & Naturalization Service (the "INS") is considering Torture Convention claims. This part also explores legislation pending in Congress which, if enacted, will mandate the promulgation of formal Torture Convention regulations, but which has the potential for creating exceptions to relief that are inconsistent with the treaty. Part III examines the limited relief granted to date by immigration trial courts to prevent the return of individuals to torture, even where relief under the domestic immigration laws is unavailable.

The article's final section examines whether Article 3 of the Torture Convention is a self-executing treaty provision which may be applied by U.S. courts to prevent the return of an individual to torture. The article discusses four distinct approaches to the self-execution issue that have developed in the federal courts, arguing that under each approach, Arti-

6. *See* Carlos M. Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AMER. J. INT'L L. 695, 695 (1995) [hereinafter *The Four Doctrines*) (noting that "more than one lower federal court has pronounced the [self-executing doctrine] to be the 'most confounding' in the United States law of treaties").

cle 3 of the Torture Convention is enforceable in domestic courts at the behest of individuals. Moreover, the article advocates for the federal courts to use the Torture Convention to resolve the confusion regarding the self-execution doctrine and to return to the original understanding of the doctrine initially articulated by the Supreme Court.

I. THE TORTURE CONVENTION

The Torture Convention is a multilateral United Nations (U.N.) treaty which has provisions designed to prevent torture, prosecute torturers, and to compensate victims of torture.[7] The U.S. signed the treaty on April 18, 1988, and the Senate adopted its resolution of advice and consent to ratification on October 27, 1990.[8] The U.S. did not become a full party to the treaty until November 1994, one month after President Clinton deposited the ratification with the United Nations Secretary General.[9]

Article 3 of the Torture Convention prohibits the return of any person to a country where there are substantial grounds for believing that he or she would be in danger of being tortured:

> (1) No State Party shall expel, return (*"refouler"*)[10] or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

A. "Substantial Grounds" for Believing a Person Would Be Tortured

Article 3 prohibits the return of a person "where there are substantial grounds for believing that he would be in danger of being subjected to torture." Under the Senate "understandings" to its resolution of advice and consent to ratification,[11] the Senate stated that "substantial

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7. Torture Convention, *supra* note 4.

8. 136 CONG. REC. S17, 486-501 (daily ed., Oct. 27, 1990).

9. U.N. Doc. 571 Leg/SER. E/13. IV.9 (1995); Torture Convention, *supra* note 4, art. 27(2) (mandating "the Convention shall enter into force on the thirtieth day after the date of the deposition of [a State's] instrument of ratification or accession.").

10. *"Refouler"* is a French term which means exclusion or expulsion from a country. *See* Sale v. Haitian Ctrs. Council Inc., 509 U.S. 155, 180-82 (1993).

11. *See infra* notes 134-142 and accompanying text for a discussion of Senate "reservations," "declarations," and "understandings" to its resolutions of advice and consent to ratification of treaties.

grounds for believing" means that a person must demonstrate that it is "more likely than not that he would be tortured,"[12] equivalent to the standard for withholding of removal.

The anticipation of "cruel, inhuman or degrading treatment or punishment" does not prevent a person's return. While Article 16 of the Torture Convention provides that "[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1," the Article 3 protection against *refoulement* applies only where an individual is likely to be tortured.

B. The Definition of "Torture"

Article 1 of the Torture Convention defines torture as:

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

Accordingly, three elements are needed to establish "torture." First, it must be severe pain or suffering, either physical or mental. The inclusion of mental pain and suffering in the definition of torture is essential: many of the most barbaric and damaging tortures are psychological, such as mock executions or prolonged detention with sensory deprivation. In the understandings to its resolution of advice and consent to ratification, the Senate clarified the meaning of these terms:

> [M]ental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.[13]

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12. 136 CONG. REC., *supra* note 8, at S17492.
13. 136 CONG. REC., *supra* note 8, at S17491.

Second, to fall within the torture standard, the act must be inflicted intentionally. "[A]n action that results unintentionally or unforeseeably in severe pain or suffering does not qualify as torture."[14]

Third, the torture must be sanctioned, in some way, by a public official. To qualify as torture, an act must be inflicted "[b]y or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[15] In the Senate's resolution, the Senate expressed its understanding that, in order for an act to be taken with the "acquiescence" of a public official, the official must "prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity."[16] While the Senate report clarified that "awareness" includes "both actual knowledge and 'willful blindness,'"[17] it did not explain what the Senate intended by a "legal responsibility to intervene to prevent such activity."[18] The Office of the INS General Counsel takes the position that "[i]n order to acquiesce in an act of torture, a public official must know about the specific act of torture before it occurs and must breach a legal duty to prevent the act. Such duty may arise under either domestic or international law but in no case shall it be less than what is required by international law."[19] To the extent that the INS position excludes a public official's willful blindness or actual knowledge of general torture practices by requiring a public official to have actual knowledge about a *specific* act of torture, the INS position is inconsistent with the Senate understanding of the treaty obligations.

The requirement that a public official be somehow involved in the torture is perhaps the most significant limitation on Torture Convention relief, particularly when private groups such as organized private militias or "death squads" are engaged in torture as a political weapon. Of course, if these private groups operate with the consent or acquies-

14. Internal Memorandum from the Office of the General Counsel, *Compliance with Article 3 of the Convention Against Torture in the Cases of Removable Aliens*, at 4 (May 14, 1997) [hereinafter *Compliance with Article 3*] (internal memorandum released to non-governmental organizations in March 1998) (on file with the author).

15. Torture Convention, *supra* note 4, art. 1. *See also* S. EXEC. REP. NO. 101-30, at 6 (1990) (recommending ratification and limiting the scope of the Torture Convention, "The Convention deals only with torture committed in the context of governmental authority; acts of torture committed by private individuals are excluded . . . [t]he Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in U.S. law, it applies to torture inflicted 'under color of law.'"). *id.* at 14.

16. 136 CONG. REC., *supra* note 8, at S17491-92.

17. *See* S. EXEC. REP. No. 101-30 at 9 (explaining "The purpose of this condition is to make it clear that both actual knowledge and 'willful blindness' fall within the definition of the term 'acquiescence' in article 3.").

18. The Torture Convention's requirement that State Parties criminalize torture and train government officials to recognize torture may provide such a legal duty to intervene.

19. Office of the General Counsel, *Compliance with Article 3*, *supra* note 14, at 4.

cence of the government, torture by these private groups clearly falls within the Torture Convention. Moreover, if the government is aware that private groups practice torture, but the government is unable or unwilling to control that activity, the government has breached its legal responsibility to protect its nationals from torture, and could be treated as acquiescing to that torture under the Senate's understanding. Alternatively, if there has been a breakdown of governmental authority, the private groups practicing torture may have been acting "in an official capacity" in the region in which the victim was tortured.

Finally, the Convention provides that torture "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[20] In its understandings, the Senate provided:

> [T]he United States understands that "sanctions" includes judicially imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.[21]

Under this understanding, the death penalty in the U.S. does not constitute torture under the Convention. It also makes more difficult the argument that the death penalty in another country constitutes torture, unless the method in which the execution is conducted is particularly barbarous and causes extreme pain and suffering, or unless the imposition of death is not proportional to the crime committed.[22] The sanction must be *lawful*, however. Any sanction imposed for impermissible reasons, such as retaliation for political activity that does not legitimately constitute treason, would not be lawful and thus not fall within this exception.

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20. Torture Convention, *supra* note 4, art. 1.

21. 136 CONG. REC., *supra* note 8, at S17491. *See also* S. EXEC. REP. NO. 101-30 at 6 (emphasizing "It is imperative that other States Parties be prevented from using the 'lawful sanctions' exemption to justify actions which are clearly torture by declaring them lawful under domestic law").

22. In its internal memorandum, the INS General Counsel took the position that

> Lawful sanctions include not only penalties imposed to punish a violation of law, but also legitimate acts of law enforcement. Thus, imposition of the death penalty by a country where an alien has committed a crime proportionate to such a punishment and where there are adequate procedural safeguards would not in and of itself constitute torture. Moreover, failure to comply with relevant procedural safeguards does not make an act torture. However, a state cannot legitimize torture merely by providing for it in its domestic law. Whether a sanction provided for in domestic law or an act of domestic law enforcement is legitimate will ultimately depend on whether it conforms with international legal standards."

Office of the General Counsel, *Compliance with Article 3, supra* note 14, at 4.

C. *No Exceptions to Relief for Persons Convicted of Crimes or Others Statutorily Ineligible for Asylum and Withholding of Removal*

Article 3 of the Torture Convention is a powerful tool for immigration advocates, because there are no exceptions to granting relief under the Convention if a person can show that it is more likely than not that he or she would be subjected to torture. The U.S. may not return such a person, even if the person has been convicted of an aggravated felony or other "particularly serious crime" in the U.S. This aspect of the Torture Convention is of utmost importance because there are numerous exceptions to granting asylum and withholding for persons convicted of crimes.[23]

At least three immigration courts have found that Article 3 protection cannot be denied to individuals who have committed crimes or who have engaged in conduct that renders them ineligible for asylum or withholding.[24] As immigration judge (IJ) John W. Richardson concluded:

> Under the terms of the Torture Convention, a person cannot be returned to a country in which he will be tortured even if he himself is a former torturer. In addition, a person cannot be denied the protection of *non-refoulement* and returned to face torture because he committed either an "aggravated felony" or a "particularly serious crime."[25]

The INS General Counsel has also recognized that "[t]here are no exclusion grounds in Article 3 or elsewhere in the Torture Convention. Therefore, an alien who satisfies the standard of proof outlined above may not be excluded from the scope of Article 3 for criminal, national security or other reasons."[26]

Moreover, the Committee Against Torture,[27] the U.N. organization

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23. *See* INA, *supra* note 3, § 208(b)(2) (prohibiting a grant of asylum where person participated in the persecution of others, has been convicted of a particularly serious crime, has committed a serious nonpolitical crime outside the U.S., is a danger to the security of the U.S., is inadmissible or removable for terrorist activities, or was firmly resettled in another country before arriving in the U.S.); INA, *supra* note 3, § 243(b)((3)(B) (withholding or removal may not be granted where person participated in the persecution of others, has been convicted of a particularly serious crime, has committed a serious nonpolitical crime outside the U.S., or is a danger to the security of the U.S.).

24. Neither the BIA nor the federal courts have addressed this issue.

25. Matter of Abu, A29 499 143, at 13 (IJ Feb. 19, 1997) (Phoenix) (pending on cross-appeal to the BIA); *see also* Matter of Diakite, A74212 940 at 11 (IJ Dec. 11, 1997) (noting "the Torture Convention does not bar any person from protection compared to the statutory bars to asylum and withholding of deportation precluding aggravated felons, former persecutors, and others from relief"); Matter of N-L- [file number redacted] (IJ Nov. 17, 1997) (refusing to enter order of deportation under Article 3, where respondent denied asylum and withholding of removal because he participated in the persecution of others).

26. *See* Office of the General Counsel, *Compliance with Article 3*, *supra* note 14, at 5.

27. Torture Convention, *supra* note 4, arts. 17-24. In addition to its monitoring re-

that monitors compliance with Torture Convention, has found in every case where there were substantial grounds for believing that a person would be subjected to torture upon return to a country, that Article 3 absolutely prohibits that person's removal.[28] This included one case in which the claimant had been convicted of a crime that would likely be considered a "particularly serious crime" in the U.S.[29]

The European Court of Human Rights has held that a similar treaty provision is an absolute bar to the return of an individual to torture, regardless of the State's compelling interest in deporting the person. That court held that Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which states that no "one shall be subjected to torture or to inhuman or degrading treatment or punishment," prohibited Great Britain from deporting a Sikh to India where he faced torture.[30] The fact that this man was a security risk to Great Britain because of his terrorist activities did not justify his deportation. The Court opined:

> Article 3 enshrines one of the most fundamental values of democratic society. . . . The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. . . . Article 3 makes

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sponsibilities, the Committee Against Torture hears complaints by individuals against States allegedly failing to comply with the Convention. Although the Committee may not hear complaints by individuals against the U.S. because the U.S. has not recognized the jurisdiction of the Committee, the case law of the Committee remains a useful tool in interpreting the Convention. *Id.*

28. *See* Committee Against Torture, Communication No. 43/1996, U.N. Doc. CAT/C/17/D/41/1996 (1996) (prohibiting Sweden from returning Kaveh Yaragh Tala to Iran, where he had been tortured as a member of the Mojahedin organization); Committee Against Torture, Communication No. 41/1996, U.N. Doc. CAT/C/16/D/41/1996 (1996) (obliging Sweden to refrain, under Article 3, from returning petitioner Pauline Muzonzo Paku Kisoki to Zaire, where as a member of a political opposition party she was detained without trial for one year, raped and severely beaten); Committee Against Torture, Communication No. 21/1995, U.N. Doc. CAT/C/16/D/21/1995 (1996) (determining that Switzerland would violate Article 3 of the Convention if it returned petitioner Ismail Alan to Turkey, where he had been arrested and tortured due to his affiliation with a Kurdish Marxist-Leninist organization); Committee Against Torture, Communication No. 15/1994, U.N. Doc. CAT/C/13/D/15/1994 (1994) (prohibiting Canada from returning petitioner Tahir Hussain Khan to Pakistan, where Khan had been arrested and tortured on two occasions for being a member of a political opposition organization); Committee Against Torture, Communication No. 13/1993, U.N. Doc. CAT/C/12/D/13/1993 (1994) (prohibitin Switzerland from returning petitioner Balabou Motombo to Zaire, who was a member of a political opposition group and arrested, tortured, and found guilty of conspiracy against the State for his political activities).

29. *See* Communication No. 15/1994, *supra* note 28, at 5 (deciding that Canada's return of claimant to Pakistan would violate Article 3 of the Convention, even though Khan had been convicted in Canada of assault causing bodily injury).

30. *See* Chahal v. United Kingdom, Eur. Ct. of H. R, 22441/93, at 22-33 (1996).

> no provision for exceptions and no derogation from it is permissible . . . even in the event of a public emergency threatening the life of the nation.
>
> [W]henever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. . . . In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.[31]

Article 3 of the Torture Convention, because of its similarity to the European provision, should be construed in the same manner.

D. No "On Account Of" Requirement

In establishing eligibility for relief under the asylum and withholding of removal provisions of the INA, an applicant must establish that he or she has been persecuted or fears persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[32] Relief under the Torture Convention is broader, however, because a person need not show that he or she fears torture because of these factors.[33] The Torture Convention may thus be an extremely useful tool where a person has a non-traditional claim that does not easily fit within the INA definition of "refugee".

While the Torture Convention does state that the torture be inflicted "for such purposes" as obtaining information or confessions, punishment, intimidation, coercion, or discrimination, this list is not exclusive.[34] Moreover, "intimidation" and "coercion" are such broad

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31. *Id.* at 22-23.

32. *See* INA, *supra* note 3, § 208(b) (permitting a grant of asylum to a "refugee"); INA, *supra* note 3, § 101(a)(42)(A) (defining refugee as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside of any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."); INA, *supra* note 3, § 241(b)(3)(A) (prohibiting removal if that person's "life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion").

33. *See* S. EXEC. REP. NO. 101-30 at 16 (explaining that "Article 3 would extend the prohibition on deportation under existing U.S. law to cases of torture not involving persecution on one of the listed impermissible grounds [in section 241(b)(3)].").

34. *Id.* at 14 (explaining that "The requirement of intent is emphasized in Article 1 by reference to illustrate motives for torture: obtaining information of a confession, intimida-

concepts that almost any reason for intentional torture would fall within these definitions.

E. Relief Applies to Prevent Future Torture Only

Torture Convention relief is more narrow than in asylum or withholding, however, in that an individual must fear future torture: no country may return a person to another country "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[35] If a person has been tortured in the past and is being returned to the same country, however, that past torture is certainly strong evidence that the individual will be tortured again if the human rights conditions in the country have not changed appreciably.[36]

II. ADMINISTRATIVE AND LEGISLATIVE IMPLEMENTATION OF ARTICLE 3 IN THE UNITED STATES

While proposed legislation to implement Article 3 of the Convention is currently before Congress, there is to date no legislation or regulation implementing the obligations of the U.S. to prevent the removal or extradition of individuals who are likely to be tortured upon return to their countries of origin. The INS has recognized its *non-refoulement* obligation under the Torture Convention, however,[37] and the General

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tion and coercion, or any reason based on discrimination of any kind. The purposes given are not exhaustive, as is indicated by the phrasing 'for such purposes as.' Rather, they indicate the type of motivation that typically underlies torture, and emphasize the requirement for deliberate intention or malice.").

35. Torture Convention, *supra* note 4, art. 3 (emphasis added).

36. *See, e.g.*, Committee Against Torture, Communication No. 41/1996, *supra* note 28 (advising that claimant's "history of detention and torture, should be taken into account when determining whether she would be in danger of being subjected to torture upon her return").

37. *See* Office of the General Counsel, *Compliance with Article 3, supra* note 14 (instructing its regional and district counsel regarding compliance with the Torture Convention.) (Its instructions are generally consistent with the discussion in Part I, except where noted, *supra*.); *see also* 62 Fed. Reg. 10312 (Mar. 6 1997) (supplemental information) (explaining the Attorney's General position:

> Although Article 3 of the Torture Convention is not self-executing, the Attorney General has sufficient administrative authority to ensure that the United States observes the limitations on removal required by this provision. In fact, the Service has received and considered individual requests for relief under the Torture Convention since November 1994 and has arranged for relief where appropriate. For the present, the Department intends to continue to carry out the non-refoulement provision of the Torture Convention through its existing administrative authority rather than by promulgating regulations. The Service is, however, developing thorough guidelines to address Article 3 issues and intends to issue those guidelines soon. These guidelines generally, and the expedited removal process in particular, will be

Counsel's Office of the INS therefore has developed an informal procedure under which Torture Convention claims will be considered.[38] If the General Counsel's Office finds that a person may be eligible for relief it will agree to a stay of removal, although no final relief to Torture Convention claimants will be provided until formal regulations are promulgated. The General Counsel's Office is presently finalizing such regulations, drafts of which have not yet been released.

Article 3 implementing legislation has been proposed, but the prospects for passage are uncertain. In February 1998, three separate bills were introduced in Congress to implement Article 3. At the time of this writing, all bills have been referred to committee but no hearings have been held.

Representative C. Smith and Senator Wellstone, along with numerous co-sponsors, introduced the Torture Victims Relief Act.[39] These identical bills establish a comprehensive program for the treatment and support of torture victims, call for the expedited processing of refugee, asylum, and withholding of removal applications for torture victims, create a presumption in favor of parole in lieu of detention for torture victims, and exempt claimed torture victims from expedited removal.[40]

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implemented in accordance with Article 3.

38. The following information was obtained by the author in conversations with the General Counsel's Office. In order to raise a claim under this interim administrative procedure, advocates should write to the INS district counsel with jurisdiction over the client, and send a copy to the General Counsel of the INS in Washington, D.C. It is advisable to include a detailed statement by the client regarding why he or she will be tortured upon return, and include any corroborating evidence demonstrating that the client has been tortured or will be tortured, including documentation from human rights organizations. Because the General Counsel's Office usually will not entertain Torture Convention claims unless a person has exhausted all other avenues for relief and has a final order of deportation, include an explanation of the procedural status of the case.
In addition, asylum officers conducting "credible fear" interviews as part of the expedited removal process are apparently inquiring whether an individual may be entitled to relief under the Torture Convention.
To receive a useful packet of information regarding the Torture Convention (including immigration court and Committee Against Torture decisions and a sample brief raising the Torture Convention before the BIA), contact the United Nations High Commissioner for Refugees (UNHCR) at 1775 K Street, N.W., Suite 300, Washington, D.C. 20006. *See also* Elisa C. Massimino, *Relief from Deportation under Article 3 of the United Nations Convention Against Torture*, published in 1997-98 IMMIGRATION & NATIONALITY LAW HANDBOOK (AILA 1997).

39. Torture Victims Relief Act, H..R. 3161, 105th Cong. (1998); Torture Victims Relief Act, S. 1606, 105th Cong. (1998).

40. In relevant part, the Torture Victims Relief Act provides:

> SEC. 4. PROHIBITION ON INVOLUNTARY RETURN OF PERSONS FEARING SUBJECTION TO TORTURE.
>
> (a) PROHIBITION — Notwithstanding any other provision of law, the United States shall not expel, remove, extradite, or otherwise return involuntarily an individual to a country if there is substantial evidence that a reasonable person in the circumstances of that individual

Most significantly, the proposed legislation prohibits the removal of an individual to a country where he or she fears torture.[41] Because the legislation does not require the promulgation of regulations to prevent such removal, however, it is unclear whether individuals challenging removal to torture would be required to make such a claim in the context of a refugee, asylum or withholding of removal application, in which case they may be faced with the statutory exceptions to such applications. However, the INS will likely promulgate separate Torture Convention regulations.

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would fear subjection to torture in that country.

(b) DEFINITION — For purposes of this section, the term "to return involuntarily," in the case of an individual, means—

(1) to return the individual without the individual's consent, whether or not the return is induced by physical force and whether or not the person is physically present in the United States; or

(2) to take an action by which it is reasonably foreseeable that the individual will be returned, whether or not the return is induced by physical force and whether or not the person is physically present in the United States.

SEC. 5. IMMIGRATION PROCEDURES FOR TORTURE VICTIMS.

(a) COVERED ALIENS — An alien described in this section is any alien who presents a claim of having been subjected to torture, or whom there is reason to believe has been subjected to torture.

(b) CONSIDERATION OF THE EFFECTS OF TORTURE — In considering an application by an alien described in subsection (a) for refugee status . . . , asylum . . . , or withholding of removal . . . , the appropriate officials shall take into account—

(1) the manner in which the effects of torture might affect the applicant's responses in the application and in the interview process or other immigration proceedings, as the case may be;

(2) the difficulties torture victims often have in recounting their suffering under torture; and

(3) the fear victims have of returning to their country of nationality where, even if torture is no longer practiced or the incidence of torture is reduced, their torturers may have gone unpunished and may remain in positions of authority.

(c) EXPEDITED PROCESSING OF REFUGEE ADMISSIONS — [R]efugees who have been subjected to torture shall be considered to be refugees of special humanitarian concern to the United States and shall be accorded priority for resettlement at least as high as that accorded any other group of refugees.

(d) PROCESSING FOR ASYLUM AND WITHHOLDING OF REMOVAL —[setting forth special expedited procedures for victims of torture]

(e) PAROLE IN LIEU OF DETENTION — The finding that an alien is a person described in subsection (a) shall be a strong presumptive basis for a grant of parole . . . in lieu of detention.

(f) EXEMPTION FROM EXPEDITED REMOVAL — [exempting aliens described in subsection (a) from expedited removal.]

41. *See id.* § 4(a).

The third bill introduced by Senator Grams, the Survivors of Torture Support Act, is substantially similar to legislation proposed last session.[42] This bill states that it "shall be the policy" of the U.S. not to return persons to torture, and requires the promulgation of regulations within 120 days of enactment to implement Article 3.[43] The Survivors

42. Survivors of Torture Support Act, S. 1603, 105th Cong. (1998). *Cf.* The Foreign Affairs Reform and Restructuring Act of 1997, S. 903, 105th Cong. (1997) (originally designating Article 3 implementation as § 1606); Foreign Relations Authorization Act, Fiscal Years 1998 & 1999, H.R. 1757, 105th Cong. (1997)(renumbering Article 3 implementation designated as § 1702 as § 1272). Section 1272 was withdrawn from the legislation by the Senate-House Conference Committee, and inserted into the District of Columbia appropriations bill. *See* An Act Making Appropriations for the Government of the District of Columbia and Other Activities, H.R. 2607, 105th Cong. § 2242 (1997) (The relevant language was later folded into the Commerce-State-Justice appropriations bill, but was deleted with other foreign affairs provisions before passage); Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1998, H.R. 2267, 105th Cong. (1997), Pub. L. No. 105-119.

43. The relevant portions of the Survivors of Torture Support Act provide:

> SEC. 4 UNITED STATES POLICY WITH RESPECT TO THE INVOLUNTARY RETURN OF PERSONS IN DANGER OF SUBJECTION TO TORTURE.
>
> (a) POLICY — It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing that the person would be in danger of subjection to torture, regardless of whether the person is physically present in the United States.
>
> (b) REGULATIONS — Not later than 120 days after the date of enactment of this Act, the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms [sic] of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.
>
> (c) EXCLUSION OF CERTAIN ALIENS — To the maximum extent consistent with the obligations of the United States under the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, the regulations described in subsection (b) shall exclude from the protection of such regulations aliens described in section 241(b)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)(B)).
>
> (d) REVIEW AND CONSTRUCTION — Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the procedures adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).
>
> (e) AUTHORITY TO DETAIN — Nothing in this section shall be con-

of Torture Support Act also tracks the Torture Victims Relief Act in establishing a program for the treatment and support of torture victims, calling for the expedited processing of refugee, asylum, and withholding of removal applications for torture victims, creating a presumption in favor of parole in lieu of detention for torture victims, and exempting claimed torture victims from expedited removal.

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strued as limiting the authority of the Attorney General to detain any person under any provision of law, including, but not limited to, any provision of the Immigration and Nationality Act.

(f) DEFINITIONS —

(1) CONVENTION DEFINED — In this section , the term "Convention" means the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984.

(2) SAME TERMS AS IN THE CONVENTION — Except as otherwise provided, the terms used in this section have the meanings given such terms under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of advice and consent to ratification of the Convention.

SEC. 5. IMMIGRATION PROCEDURES FOR TORTURE VICTIMS

(a) COVERED ALIENS — An alien described in this section is any alien who presents a claim of having been subjected to torture, or whom there is reason to believe has been subjected to torture.

(b) CONSIDERATION OF THE EFFECTS OF TORTURE — In considering an application by an alien described in subsection (a) for refugee status . . . , asylum . . . , or withholding of removal . . . , the appropriate officials shall take into account—

(1) the manner in which the effects of torture might affect the applicant's responses in the application and in the interview process or other immigration proceedings, as the case may be;

(2) the difficulties torture victims often have in recounting their suffering under torture; and

(3) the fear victims have of returning to their country of nationality where, even if torture is no longer practiced or the incidence of torture is reduced, their torturers may have gone unpunished and may remain in positions of authority.

(c) EXPEDITED PROCESSING OF REFUGEE ADMISSIONS — [R]efugees who have been subjected to torture shall be considered to be refugees of special humanitarian concern to the United States and shall be accorded priority for resettlement at least as high as that accorded any other group of refugees.

(d) PROCESSING FOR ASYLUM AND WITHHOLDING OF REMOVAL — [setting forth special expedited procedures for victims of torture]

(e) PAROLE IN LIEU OF DETENTION — The finding that an alien is a person described in subsection (a) shall be a strong presumptive basis for a grant of parole . . . in lieu of detention.

(f) EXEMPTION FROM EXPEDITED REMOVAL — [exempting aliens described in subsection (a) from expedited removal.]

Id.

Unfortunately, the Survivors of Torture Support Act also calls for the required regulations to exclude individuals ineligible for withholding of removal, "to the maximum extent consistent with the Torture Convention."[44] As discussed above, however, no exceptions are allowed to the prohibition against return under the Torture Convention,[45] so regulations attempting to exclude persons otherwise eligible for relief would not be "consistent with the Torture Convention."

If the resulting regulations do, in fact, contain such exceptions, it would still be possible to raise a claim in immigration or federal court directly under Article 3, as discussed, *infra*, in Parts III and IV. While legislation that is passed after the ratification of a treaty may "trump" a treaty's provisions under the "last in time doctrine,"[46] the proposed legislation explicitly states that it is intended to be consistent with the treaty.[47] Accordingly, any regulations inconsistent with the treaty would exceed the scope of the implementing statute.[48] Alternatively, if the proposed legislation does not pass and the INS promulgates regulations that are inconsistent with the treaty, the treaty supersedes the regulations under the Supremacy Clause.[49]

III. IMPLEMENTATION OF ARTICLE 3 IN THE IMMIGRATION TRIAL COURTS

At least four immigration judges to date have prohibited the removal of individuals who meet the criteria for Article 3 relief.[50] While none concluded that Article 3 is a self-executing treaty provision, these judges held that either the customary international law of *non-refoulement* to torture, or their obligations as officers of the Executive

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44. *See* Survivors of Torture Support Act, § 4(c).

45. *See* text accompanying notes 23-31.

46. *See* The Head Money Cases (Edye v. Robertson), 112 U.S. 580, 596 (1884) (determining that a congressional act "must prevail in all the judicial courts in this country" if it is in conflict with a treaty).

47. *See* Survivors of Torture Support Act, § 4(c) (mandating "To the maximum extent consistent with the obligations of the United States under the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, the regulations" shall exclude those aliens ineligible for withholding of removal).

48. *See* Loma Linda Univ. v. Schweiker, 705 F.2d 1123, 1126 (9th Cir. 1983) (stating that "regulations must be consistent with and in furtherance of the purposes and policies embodied in the congressional statutes that authorize them"); United States v. Doe, 701 F.2d 819, 823 (9th Cir. 1983) (noting that where INS regulation conflicts with a statute, the statute controls).

49. *See, e.g.*, Alaska Fish & Wildlife Federation & Outdoor Council, Inc., v. Dunkle 829 F.2d 933, 940-41 (9th Cir. 1987) (concluding that regulations must be consistent with treaties governing migratory bird hunting).

50. The BIA has not addressed the application of Torture Convention relief in immigration courts, although it did agree to stay at least one appeal pending development of the new administrative procedure to process Torture Convention claims. *See* Matter of R-N-G-, [file number redacted] (BIA April 1, 1996).

Branch to follow the treaty obligations of the U.S., prohibited the return of the individuals to their countries of origin. This section briefly explains customary international law,[51] and discusses these administrative judge decisions.

A body of human rights law, called "customary international law," has grown out of the principles contained in numerous international human rights treaties and the United Nations Charter.[52] This law reflects basic norms of a universal character that are followed by States regardless of whether those obligations are reflected in treaties.[53] Customary international law is part of U.S. law in the absence of conflicting domestic law,[54] and accordingly, the government must act consistently with it.[55]

The prohibition against removing a person who faces torture upon return constitutes customary international law with which the U.S. must comply. Torture has long been condemned by international law, as evidenced by the number of multilateral treaties and declarations prohibiting torture.[56] Indeed, the prohibition against torture is one of

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51. For a more complete discussion of customary international law and its utilization in court on behalf of individuals see Hoffman & Strossen, *Enforcing International Human Rights in the United States*, *in* L. HENKIN & J.L. HARGROVE, HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 477 (1994); Ann Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 4 MICH. J. INT'L L. 1 (1992); Michael L. Bazyler, *Litigating the International Law of Human Rights: A "How To" Approach*, 7 Whittier L. Rev. 713 (1985); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CINC. L. REV. 3 (1983).

52. For a straightforward discussion of customary international law, see THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS (West 1995).

53. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. [hereinafter RESTATEMENT OF FOREIGN RELATIONS LAW], § 102(2) (1986) (defining customary international law is the "general and consistent practice of states followed by them from a sense of legal obligation").

54. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (declaring "International law is part of our law . . . 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. . . .").

55. *See* RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 53, § 111, cmt. c (explaining "That international law and agreements of the United States are law of the United States means also that the President has the obligation and the necessary authority to take care that they be faithfully executed.").

56. *See* American Convention on Human Rights, 1977, art. 5(2), O.A.S. Treaty Ser. No. 36, Off Rec. OEA/Ser. L/V/II. 23 doc 21 rev. 6; International Covenant on Civil and Political Rights, ar. 4, G.A. Res. 2200 (XXI), U.N. GAOR, 29th Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967); Inter-American Convention to Prevent and Punish Torture, 25 I.L.M. 519 (1986); 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Eur.T.S. No. 126, reprinted in 27 I.L.M. 1152 (1988); Declaration of the Protection of all Persons from Being Subjected to Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, G.A. Res. 34/52, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/10408 (1976); *see also* Torture Convention, *supra* note 4.

the handful of norms of international law that have attained the status of *jus cogens* ("compelling law"), and from which *no derogation is permitted* by any country, regardless of its domestic law.[57]

In addition, the principle of *non-refoulement* of refugees is a well-accepted and fundamental tenet of customary international law.[58] In fact, there is an emerging consensus that this principle has achieved the status of *jus cogens*, as well, so that international law creates a binding obligation with which every country must comply, regardless of its domestic law.[59] This is particularly true when a country seeks to re-

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57. *See* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714, 717 (9th Cir. 1992) (explaining "[A] *jus cogens* norm, also known as a peremptory norm of international law, is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international having the same character."; concluding in light of "extraordinary consensus" that "the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*") (internal quotations omitted); Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 941 (D.C. Cir. 1988) (listing the prohibition of torture among the few norms which meet the criteria for *jus cogens*); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, T., concurring) (noting that "[C]ommentators have begun to identify a handful of heinous actions — each of which violates definable, universal and obligatory norms" including bans on governmental torture); Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980) (concluding after "Having examined the sources from which customary international law is derived — the usage of nations, judicial opinions and the works of jurists — we conclude that official torture is now prohibited by the law of nations.") (footnote omitted); *see also* RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 53, § 702(d) & cmt. n (identifying the practice of torture as a violation of *jus cogens*).

58. *See, e.g.*, Conclusion No. 15 (XXX) of the Executive Committee of the High Commissioner's Programme on "Refugees Without a Country of Asylum," 34 U.N. GAOR, Supp. No. 12A, at 17, 18 U.N. Doc. A/34/12/Add.1 (1979) (urging observance of "the recognized principle of non-refoulement"); *see also* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 97-100 (1983); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY INTERNATIONAL LAW 95-98 (1989); Scott M. Martin, *Non-Refoulement of Refugees: United States Compliance with International Obligations*, 23 HARV. INT'L L. J. 357 (1983).

59. *See* Report of the United Nations High Commissioner for Refugees, 40 U.N. GAOR, Supp. No. 12 at 6, U.N. Doc. A/40/12 (1985) (noting that "Due to its repeated reaffirmation at the universal, regional and national levels, the principle of *non-refoulement* has now come to be characterized as a peremptory norm of international law"); Cartagena Declaration on Refugees, 1984-85 Report of the Inter-American Commission on Human Rights, at 177-82, Conclusion 5 (characterizing *non-refoulement* as "a cornerstone of the international protection of refugees. This operative principle concerning refugees should be recognized in the present state of international law, as a principle of *jus cogens*."); *see also* Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 435-36 (1989) (discussing that "The principle of *non-refoulement*, usually referred to only in its refugee law application, is also part of human rights law and humanitarian law, and is acknowledged as a *jus cogens* norm. . . . [I]n all its applications, the right of *non-refoulement*, like all *jus cogens* norms, exists outside of treaties, and is non-derogable, binding and judicially enforceable.") (internal citations omitted); *see also* Guy S. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, *in* THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980's 104-106 (D.

turn a person to a nation with a record of egregious human rights violations.[60] Federal courts have increasingly allowed litigants to make claims based on customary international law.[61]

Based on customary international law, IJ John Richardson in Phoenix refused to enter an order of deportation in *Matter of Abu*[62] for a Nigerian man who faced arrest and murder in Nigeria if returned. Judge Richardson held that he did not have authority under the INA to order *relief* from deportation under *Matter of Medina*,[63] which had held that an immigration judge could not grant voluntary departure under customary international law where the INA did not provide for such relief. Judge Richardson, however, reasoned that there is "an important distinction between the grant of relief, which is limited specifically to the [INA], and the decision of the Immigration Judge to not enter an illegal order of deportation."[64] Moreover, because the immigration judges are empowered under the regulations to "take any other action consistent with applicable law and may not enter an order of deportation which directly contravenes the obligations of the U.S. under international law,"[65] and because "international law remains binding on this Court, as on every Court in the U.S., and prohibits the U.S. from returning a person to a country where they will be tortured," an order deporting the claimant would have been illegal.[66] The Immigration Judge thus held Mr. Abu's case in abeyance pending a change in circumstances in Nigeria that would allow Mr. Abu to return safely, or until Torture Convention legislation is enacted "and relief can be granted to the respondent under such legislation."[67] Judge Richardson later terminated the removal proceedings. [68]

IJ James R. Fujimoto did not utilize customary international law,

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Martin ed., 1988) (discussing the principle of *non-refoulement* in customary international law unambiguously encompasses a prohibition against the deportation of persons with a well-founded, particularized fear that their lives or freedom would be threatened if they returned to their homeland).

60. *See* Karen Parker, *The Rights of Refugees under International Humanitarian Law, in* REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES 3 (Ved P. Nanda ed., 1989) (explaining that "When torture is alleged under human rights law, the right of non-refoulement arises when the country of origin tortures or is a gross violator of human rights.").

61. *See, e.g.,* Filartiga, 630 F.2d 876.

62. Matter o,f Abu, A29 499 143 (IJ Feb. 19, 1997) (Phoenix) (on cross-appeal to the BIA).

63. Matter of Medina, 19 I. & N. Dec. 734, 746 (BIA 1988).

64. Matter of Abu, A29 499 143, at 15.

65. *Id.*

66. *Id.*

67. *Id.* at 19.

68. *See also* Matter of A-H, [file number redacted] (IJ July 14, 1997) (Arlington) (IJ Milo Bryant) (staying deportation of an alien accused of involvement in terrorist activities until person's claim could be considered by the INS under future Torture Cconvention regulations).

but similarly refused to enter an order of deportation where a Liberian man would be tortured upon return. In *Matter of Diakite*,[69] the court held that while the respondent was ineligible for asylum and withholding of deportation due to aggravated felony convictions, the Torture Convention prevented his deportation to Liberia:

> Immigration Judges are not free to violate international law which most obviously includes treaties to which the United States is a signatory in the absence of contrary domestic legislation. It is well recognized that treaties entered into by the United States have authority tantamount to that of statutes enacted by Congress.[70]

Judge Fujimoto did not discuss whether Article 3 is self-executing.

Using similar reasoning, IJ Jack Staton held that as an officer of the Executive Branch he was bound to follow international law, including Article 3 of the Torture Convention, whether or not it was self-executing:

> An immigration judge cannot act in violation of a treaty obligation. . . . An immigration judge is without authority to order an alien removed where the government, through its attorney of the INS, concedes the alien will more likely than not be tortured upon return to his native land. The Convention Against Torture is binding on the officers of the government, who must see that the honor of the nation is not sullied by failing to follow our treaty obligation. I therefore have no jurisdiction to enter an order of removal.[71]

In short, these immigration judges held that as officers of the Executive Branch they have the duty to follow the treaty obligations of the U.S., even if those obligations have not been incorporated into domestic law. This is a defensible position: while present domestic immigration laws make asylum and withholding of removal unavailable for certain individuals, no present domestic law explicitly conflicts with Article 3 of the Torture Convention by requiring their removal. The IIRIRA thus does not prevent the enforcement of Article 3 under the last-in-time doctrine.[72]

Litigating an Article 3 claim in the immigration or federal courts in the absence of implementing legislation or regulations raises difficult

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69. Matter of Diakite, A74 212 940 at 10-12 (IJ Dec. 11, 1997) (Chicago).

70. *Id.* at 10. Moreover, the court distinguished *Matter of Medina* as holding , *inter alia*, that an immigration judge did not have the authority to create a new form of relief: in this instance, the court did not create a new form of relief, "rather [it] only [sought] to comply with the mandate of international law." *Id.* at 11-12.

71. Matter of N-L, [file number redacted] at 9-10 (IJ Nov. 12 1997) (Imperial, Cal) (IJ Jack W. Staton).

72. *See* Head Money Cases, 112 U.S. at 596 (noting that a congressional act passed after a treaty prevails if it is in conflict with a treaty).

and complex problems, because courts in the U.S. have traditionally been hesitant to apply international law if that law has not already been "incorporated" into U.S. domestic law by legislation or regulation. While at least a few immigration judges have overcome this hesitancy and applied the customary international prohibiting return to torture, or have directly applied the Torture Convention without discussing whether Article 3 is self-executing, many courts may not. The alternative is enforcing Article 3 of the Torture Convention in U.S. courts as a self-executing treaty provision, as discussed extensively in the next section.

IV. ARTICLE 3 OF THE TORTURE CONVENTION: A SELF-EXECUTING TREATY PROVISION

The Supremacy Clause of the Constitution declares that treaties are of equal stature to other federal laws.[73] The federal courts, however, have long held that an individual may not enforce a treaty in U.S. courts unless the treaty provision being applied is "self-executing," so that legislation is not required to implement the treaty rights.[74] Whether a treaty provision is self-executing is an exceedingly confusing area in federal law which has spurred inconsistent cases and a great deal of academic commentary.[75]

Professor Carlos Vázquez has explained that the concept of self-execution does not have a static definition and means different things to different courts.[76] In fact, Professor Vázquez has identified four distinct ways in which federal courts have looked at whether a treaty provision is self-executing, the application of which could lead to different conclusions about whether Article 3 of the Torture Convention is self-executing. First, some courts — including the Supreme Court in the

73. U.S. CONST. art. VI, § 2 (declaring that "All Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

74. *See, e.g.*, Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985) (concluding that "Treaties made by the United States are the law of the land . . ., but if not implemented by appropriate legislation they do not provide the basis for a private lawsuit unless they are intended to be self-executing").

75. See, e.g., Vázquez, *The Four Doctrines*, *supra* note 6; Carlos Vázquez, *The "Self-Executing" Character of the Refugee Protocol's Nonrefoulement Obligation*, 7 GEO. IMMIGR. L. J. 39 (1993); Jon H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AMER. J. INT'L L. 310 (1992); Carlos Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082 (1992) [hereinafter Vázquez, *Treaty Based Rights*]; Jordan J. Paust, *Self-Executing Treaties*, 82 AMER. J. INT'L L. 760 (1988) [hereinafter Paust, *Self-Executing Treaties*]; Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VIR. J. INT'L L. 627 (1986) [hereinafter Iwasawa, *A Critical Analysis*].

76. *See* Vázquez, *The Four Doctrines*, *supra* note 6.

cases which originated the self-execution doctrine—look at whether the parties to the treaty intended to give substantive rights to individuals that can be enforced by a court without domestic implementing legislation (the "treaty interpretation" approach). Other courts look at whether the treaty provision is justiciable by a court. Next, some courts examine whether the treaty provision provides a right of action to an individual. And finally, courts may examine whether the treaty makers had the constitutional power to undertake the subject of the treaty.[77] To make matters even more complicated, many courts have used different analytical methods in different cases, or have even used different approaches in the same case, largely due to the confusion about what it means for a treaty provision to be self-executing.[78] Still other courts have decided the issue without any analysis whatsoever.[79]

This Part examines each of these analytical methods in detail and discussea whether Article 3 of the Torture Convention should be held to be self-executing under each approach. It also argues that in deciding whether Article 3 is a self-executing treaty provision, the federal courts should use this opportunity to clarify the meaning of the self-execution doctrine and return to the original understanding of the doctrine. As explained below, only the treaty interpretation approach adequately reflects the presumption under the Constitution that treaties are self-executing, and that this method of treaty enforceability analysis should be adopted by the federal courts.

A. The Treaty Interpretation Approach

1. Determining the Mutual Intent of the Treaty Parties

Since the introduction of the self-execution doctrine in the nineteenth century, many courts have looked at whether treaty-makers intended to give individuals immediately enforceable rights without the need for implementing legislation. Some courts — including the Supreme Court in the cases originating the self-execution doctrine — looked solely at the language of the treaty to determine the intent of the treaty parties. More recently, however, some courts have departed from this approach, examining evidence of the unilateral intent of the U.S. to determine whether the treaty-makers in the U.S. intended to give individuals immediately enforceable rights. This section explores the difference in these approaches and the application of each to Article 3 of the Torture Convention.

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77. *Id.*

78. *See* United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979) (commenting that "The self-execution question is perhaps one of the most confounding in treaty law.").

79. *See, e.g.*, United States v. Thompson, 928 F.2d 1060, 1066 (11th Cir. 1991); United States v. Bent-Santana, 774 F.2d 1545, 1550 (11th Cir. 1985).

The self-execution doctrine originated in *Foster v. Neilson*,[80] a case concerning whether, under a treaty transferring sovereignty of the Louisiana territory to the U.S., certain Spanish subjects had valid title to land granted to them by the King of Spain. To answer the question, Chief Justice Marshall looked at the language of the treaty to determine whether the parties to the treaty intended that the treaty *itself* confirm the plaintiffs' title, or whether the parties to the treaty intended that the domestic legislatures first enact implementing legislation to confirm such rights.[81]

In the first expression of the concept of self-execution (but without using those words)[82] the Chief Justice stated:

> Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[83]

The English version of the treaty stated that the Spanish grants "shall be ratified and confirmed to the persons in possession of the lands."[84] The Court held that this language contemplated future action by the legislature and therefore did not operate "of itself without the aid of any legislative provision."[85] Only four years later, the Court reversed itself in *United States v. Percheman* when it examined the Spanish version of the same treaty, which stated that the grants "shall remain ratified and confirmed."[86] This language demonstrated that the treaty did not "stipulat[e] for some future legislative act" and thus "operated by rhe force of the instrument itself."[87]

The Court's conclusion, that the treaty "operated of itself" if the treaty did not "stipulate for some future legislature act,"[88] reflected the constitutional presumption under the Supremacy Clause that treaties are self-executing. This constitutional presumption arises from the language of the Supremacy Clause and the constitutional history leading up to the ratification of the Constitution.

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80. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

81. *Id.* at 314-15.

82. The first case to use the language "self-executing" was *Bartram v. Robertson*, 122 U.S. 116, 120 (1887) (Field, J.).

83. Foster, at 314-15.

84. *Id.* at 314.

85. *Id.* at 314-15.

86. United States v. Percheman, 32 U.S. (7 Pet.) 51, 88-89 (1833) (Marshall, C.J.).

87. *Id.*

88. *Id.*

Before the Constitution was drafted, the U.S. was plagued by its inability to enforce its treaties, in part because of state legislatures' refusal to follow the treaties of the Continental Congress and their refusal to enact the laws required by those treaties. The U.S. was, at that time, operating under the same system of treaty law as Great Britain, where treaties were not enforceable in court unless the legislature implemented the treaty through legislation. In other words, all treaties were treated in Great Britain as non-self-executing. This reflected concerns in Great Britain with the allocation-of-powers: because treaties were concluded by the Crown without the participation of Parliament, treaties would not be treated as municipal law until Parliament had acted to incorporate the treaties into domestic law.[89]

Because the British law of treaties was causing severe problems for the new country, however, when the Constitution was drafted the Framers ensured that treaties would be immediately enforceable as U.S. law rather than dependent for their execution on the legislature.[90] The historical evidence surrounding the Constitutional Convention makes it absolutely clear that the Framers expected that all treaties would be self-executing, reversing the British presumption that all treaties would be non-self-executing.[91] Congress adopted John Jay's report, for instance, that a treaty "made, ratified and published by Congress, . . . immediately [became] binding on the whole nation, and superadded to the laws of the land. . . . Hence [it was to be] . . . received and observed by every member of the nation. . . ."[92] Recommendations that treaties be ratified by congressional legislation were defeated.[93] Moreover, the Federal papers and debates on the ratification of the Constitution reveal that the framers had an expectation that treaties would be enforceable by individuals: Alexander Hamilton, for instance, wrote that "treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations."[94] The historical record is replete with evidence that the Framers intended treaties to be self-executing and enforceable by individuals.[95]

Moreover, early cases reflected the intent of the Framers that treaties be immediately enforceable, and they applied treaties without dis-

89. *See* Vázquez, *The Four Doctrines*, supra note 6, at 697.

90. *See id.* at 699.

91. *See* Paust, *Self-Executing Treaties*, *supra* note 75 (discussing historical evidence that Framers intended treaties to be self-executing).

92. *Id.* at 760-61 & 782 n.3 (quoting Jay, Report to Congress, Oct. 13, 1786, *in* 1 C. BUTLER, THE-TREATY MAKING POWER OF THE UNITED STATES 268 n.4, 270, 389 (1902).

93. *Id.* at 761 & 783 n.10 (citing J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION of 1787, at 520, and citing THE FEDERALIST NO. 64, at 421-24 (Jay)).

94. *Id.* at 762, & 783 n.13 (quoting THE FEDERALIST NO. 22, at 197 (Hamilton)).

95. *Id.* at 760-764.

cussion of whether the treaty was self-executing or non-self-executing (i.e. whether legislation was required to implement the treaty rights). Chief Justice Marshall, for instance, wrote,"if [a treaty] be constitutional, . . . I know of no court which can contest its obligation."[96] The Chief Justice also noted: "Whenever a right grown out of, or is protected by, a treaty, . . . it is to be protected. . . . The reason for inserting that clause [Art. III, sec. 2, cl. 1] . . . was, that all persons who have real claims under a treaty should have their causes decided. . . ."[97] In fact, until *Foster* and *Percheman*, courts enforced treaties without discussion of whether they were enforceable in the absence of implementing legislation: it was assumed that under the Supremacy Clause, treaties were to be treated as law of the land.[98]

Given the Supremacy Clause's directive that treaties are law of the land, the Framers' intent that treaties be immediately enforceable in domestic courts as law, and the early cases enforcing treaties without examination of whether the treaties were enforceable in the absence of domestic legislation, at least one commentator has noted that the Supreme Court's distinction in *Foster* "between 'self-executing' and 'non-self-executing' treaties is a judicially invented notion that is patently inconsistent with express language in the Constitution affirming that 'all Treaties . . . shall be the supreme Law of the Land.'"[99] "Indeed, it is difficult to imagine that something shall be supreme federal 'law of the land' but not operate directly as 'law' except by believing in one of the most transparent of judicial delusions."[100] To the extent, however, that the treaty *itself* reflects the intent of the treaty parties that the treaty be enforceable only through domestic legislation, *Foster* and *Percheman* deviate not at all from the language of the Supremacy Clause and the intent of the Framers: those cases simply call for the direct application of the treaty along with any limitations contained in the treaty.[101] In other words, *Foster* and *Percheman* are more about treaty interpretation, and less about the creation of a new doctrine of when treaties become law of the U.S.

Moreover, whether or not the self-executing distinction is completely consistent with the Constitution, it is clear that the self-execution doctrine as formulated in *Foster* and *Percheman* did not re-

96. *Id.* at 765 & 783 n.34 (quoting United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

97. *Id.* at 765 & 783 n.35 (quoting Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348-49 (1809).

98. *Id.* at 764-766 (citations omitted).

99. *Id.* at 760.

100. *Id.* at 766.

101. *See* Vázquez, *The Four Doctrines*, *supra* note 6, at 705 (discussing the Court's analysis in *Foster and Percheman*: "As noted, the Court in *Foster* and *Percheman* relied on the treaty's terms, which reflect the intent of the parties to the treaty, not just that of the United States.").

verse the constitutional presumption that treaties would be immediately enforceable as law. The Court in *Foster* made that clear by contrasting the system of treaty law in Great Britain with that in the U.S. After discussing the British rule of treaties, the Court noted:

> *In the United States a different principle is established.* Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.[102]

Moreover, the Court in *Percheman* clarified that the presumption was in favor of self-execution when it enforced a treaty that did not "stipulate for some future legislative act" and thus "operated of itself."[103] *Foster* and *Percheman* established that unless a treaty *itself* states that it is to be enforced through future domestic legislation, that treaty is immediately enforceable in domestic courts in the U.S.[104]

After *Foster* and *Percheman*, however, courts have struggled to determine when a treaty provision "operates of itself without the aid of any legislative provision."[105] Some courts, appropriately following the methodology of *Foster* and *Percheman*, have looked to the language of the treaty to determine whether the treaty-makers contemplated future legislation to enact those rights.[106] This approach also squares with the basic rule of treaty interpretation that a court must first look to the language of a treaty to determine its meaning.[107]

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102. Foster, 27 U.S. (2 Pet.) at 314 (emphasis added).

103. Percheman, 32 U.S. (7 Pet.) at 88-89.

104. Vázquez, *The Four Doctrines*, *supra* note 6, at 704.

> The Court's reversal of its *Foster* holding in *Percheman*, and its statement in the latter case that a treaty is self-executing if its 'stipulates for [a] future legislative act,' is probable best understood as a recognition that the standard applied in *Foster* took inadequate account of the Founders' establishment of a 'different principle' in the United States. *Percheman*, in other words, should be interpreted to require a clear statement — a stipulation — that, whatever the case might be for the other states parties, implementing legislation is not required to make the treaty cognizable by the courts of the United States.
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> *Id.*

105. Foster, 27 U.S. (2 Pet.) at 314-15.

106. *See* Frolova, 761 F.2d at 373 (acknowledging that "Of course, if the parties' intent is clear from the treaty's language courts will not inquire into the remaining factors."); Cardenas v. Smith, 733 F.2d 909, 918 (D.C. Cir. 1984) (examininf the language of a treaty which stated explicitly that its restrictions "shall not give rise to a right of any person to . . . obtain judicial relief").

107. *See* United States v. Alvarez-Machain, 504 U.S. 653, 663 (1992) (articulating the rule that a court must "first look to [a treaty's] terms to determine its meaning"); *see also* Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27 (1969), *entered into* force Jan. 27, 1980, art. 31(1) (establishing that treaties are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in

Turning to Article 3 of the Torture Convention, the language of the provision indicates that it was intended to grant substantive rights to individuals whether or not domestic legislation was enacted. There is no language in Article 3 indicating that future legislation is contemplated to enact the right to *non-refoulement*. This absence triggers the presumption that the treaty provision is self-executing.[108]

> Interpreting Article 3 as granting immediately enforceable rights is especially appropriate in view of many other provisions of the Torture Convention that explicitly call for further legislative action by the State Parties in order to comply with their obligations under the Convention,[109] and for which Congress has passed implementing legislation.[110] In stark contrast to these other provisions,[111] Article 3 calls for no legislative or other action by the States to comply with their *non-refoulement* obligations, simply providing that States "shall not" return individuals to torture.

Indeed, Article 3's direct prohibition that States "shall not" return individuals to torture indicates that these rights are immediately effective as domestic law. Other treaties containing such direct prohibitory language have been judged to be self-executing. In *Rainbow Navigation, Inc. v. Department of Navy*, [112] for instance, the court held that a treaty between the U.S. and Iceland regarding military cargo operations was self-executing due to the presence of its mandate that cargo transportation services "shall be provided" in a certain manner. The

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their context and in the light of its object and purpose") [hereinafter Vienna Convention].

108. *See* Rainbow Navigation, Inc. v. Department of Navy, 686 F. Supp 354, 357 (D.D.C. 1988) (noting presumption of self-execution unless the language of the treaty "manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation. . . .").

109. *See* Torture Convention, *supra* note 4, art. 2(1) (mandating that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."); *supra* note 4, art. 4 ("1. Each State Party shall ensure that all acts of torture are offenses under its criminal law.. . . "2. Each State Party shall make these offences [sic]punishable by appropriate penalties which take into account their grave nature."); *supra* note 4, art. 5 ("1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences [sic] referred to in Article 4. . . ."); *supra* note 4, art. 14(i) ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress. . . .").

110. To implement Article 14 of the Convention, Congress created a civil cause of action for individuals who have been tortured when it passed the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), codified at 28 U.S.C. § 1350 (1994). More recently, Congress implemented Articles 2, 4, and 5 of the Torture Convention by including criminal penalties for torture in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-236, 108 Stat. 463, and amended Pub. L. No. 103-322, 108 Stat. 1979, codified at 18 U.S.C. § 2340 *et seq* (Supp. 1996).

111. "Some provisions of an international agreement may be self-executing and others non-self-executing." *United States v. Noriega*, 808 F. Supp. 791, 797 n. 8 (S.D. Fla. 1992) (citing RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 53, § 111 cmt. h).

112. 686 F. Supp. at 357.

court stated that this "language of the treaty itself suggests that it was intended to operate of its own force upon ratification."[113]

Significantly, the BIA has recognized that the Protocol relating to the Status of Refugees, which contains almost identical language in Article 33 prohibiting *non-refoulement* of refugees,[114] is self-executing.[115] While a recent BIA decision may throw this holding into doubt,[116] and some federal courts have held that the Protocol is not self-executing,[117] the Supreme Court has recently refused to decide whether the *non-refoulement* provision of the Protocol is self-executing in a case in which the issue was squarely presented and forcefully urged by the Executive Branch.[118]

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113. *Id.*

114. Article 33 of the Convention relating to the Status of Refugees provides, in part, that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The U.S. acceded to Articles 2-34 of the Convention relating to the Status of Refugees when it ratified the Protocol relating to the Status of Refugees.

115. *See* Matter of Dunar, 14 I. & N. Dec. 310, 313 (BIA 1973) (concluding that the Convention, "being self-executing, has the force and effect of an act of Congress").

116. *See* Matter of Q-T-M-T-, Int. Dec. # 3300 (BIA 1996) (implying in deciding whether aggravated felony bar complied with the Protocol, that the Protocol is non-self-executing: "Congress has plenary authority under the Constitution to enact implementing legislation which defines the United States' obligations under a non-self-executing international treaty to which the country is a signatory.").

117. *See e.g.* Haitian Refugee Center, Inc. v. Baker, 949 F.2d 1109, 1110 (11th Cir. 1991) (concluding "The language of the Protocol and the history of the United States' accession to it leads to the conclusion that Article 33 is not self-executing and thus provides no enforceable rights to the Haitian plaintiffs in this case."); Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir. 1982) (determining that the Protocol's provisions "were not themselves a source of rights under our law unless and until Congress implemented them by appropriate legislation"); Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396, 1405-06 (D.D.C. 1985) (concluding that the Protocol not self-executing), *aff'd on other grounds,* 809 F.2d 794 (D.C. Cir. 1987). *But see* Nicosia v. Wall, 742 F.2d 1005, 1006 n. 4 (5th Cir. 1971) (applying Protocol to extradition proceedings, but not deciding self-execution issue); Fernandez-Roque v. Smith, 539 F. Supp. 925, 935 n. 25 (N.D. Ga. 1982) (inclining toward view that Protocol is self-executing, but not deciding issue); Sannon v. United States, 427 F. Supp. 1270, 1274, 1277 (S.D. Fla. 1977) (holding regulations invalid where they conflicted with the Protocol), *vacated & remanded on other grounds,* 566 F.2d 104 (5th Cir. 1978).

118. *See* Sale, 504 U.S. 155, 113 S. Ct. 2549 (not reaching the self-execution issue, although the district and circuit courts had dismissed the challenge to the Haitian interdiction program on that ground). Moreover, the Supreme Court's dicta in INS v. Stevic, 467 U.S. 407, 428 n. 22 (1984), that Article 34 of the Protocol relating to the Status of Refugees is not self-executing should not affect an analysis of Article 3 of the Torture Convention, because Article 34 of the Protocol does not contain prohibitory language and clearly calls for further steps to be taken to implement that provision.

2. Determining the Unilateral Intent of the U.S. Treaty Makers

While the Supreme Court's self-execution formula in *Foster* and *Percheman* clearly requires a court first to examine the language of a treaty to determine whether it gives individuals immediately enforceable rights, this approach does not always yield clear results, as evidenced by the Supreme Court reversal of *Foster* four years later in *Percheman*.[119] Many courts, thus, have gone outside of the treaty language to determine the intent of the parties.[120] Because determining the mutual intent of the parties is exceedingly difficult from international instruments accompanying a treaty,[121] however, some courts have looked to the ratification instruments of the U.S. to determine the *unilateral* intent of the U.S. treaty-makers regarding self-execution. Some courts have even considered the unilateral intent of government officials.

As Professor Vázquez points out, however,

> This modification of the self-execution doctrine is problematic given the apparent purposes of the Supremacy Clause. The clause was made applicable to treaties to avert conflicts with other nations that could be expected to result from violations of treaties attributable to the United States . . . Permitting the "different principle" established in the Supremacy Clause to be altered through the unilateral acts of U.S. officials is a greater inroad on the clause's purposes, and thus requires an extension of the "intent-based" category of non-self-executing treaty beyond what was recognized in *Foster* and *Percheman*. [122]

Utilizing the unilateral intent of the U.S. treaty makers to determine whether a treaty provision is self-executing does not adequately reflect the Constitutional presumption that treaties are self-executing. Article 3 of the Torture Convention is an excellent example of that in-

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119. *See* Vázquez, *The Four Doctrines*, *supra* note 6, at 703-04 (acknowledging that: The *Foster* holding is easier to describe than to apply. . . . [I]nferring an intent to require legislation in the absence of unambiguous language to that effect is a hazardous enterprise, given the multiplicity of national constitutional rules regarding the domestic effect of treaties. As noted above, for some nations treaties always require implementing legislation. It is thus possible that the language chosen by the parties simply reflects the possibility that the treaty will require implementing legislation for certain parties no matter what the parties intended. Under the Supremacy Clause, however, a treaty can be 'self-executing' in the United States even if it is 'non-self-executing' for other nations by virtue of their constitutions").

120. Arguably, some courts have ignored the clear language of a treaty. *See* Postal, 589 F.2d 877-78 (reasonsing that "On its face, this language [of the treaty] would bear a self-executing construction. . . . We are admonished, however, to interpret treaties in the context of their promulgation, and we think the context of article 6 compels the conclusion that it is not self-executing.").

121. Iwasawa, *A Critical Analysis*, *supra* note 75, at 656 n.122.

122. Vázquez, *The Four Doctrines*, *supra* note 6, at 705-06 (footnotes omitted).

adequacy. Under the mutual intent approach articulated by the Supreme Court, Article 3 is undoubtedly self-executing, as discussed above.[123]

On the other hand, if a court looks past the language of Article 3 to determine the unilateral intent of the U.S., it may be tempted to conclude that Article 3 is not self-executing, as has one immigration judge,[124] because the Senate included a "declaration" in its resolution of advice and consent to ratification of the treaty that Articles 1-16 of the Torture Convention are not self-executing .[125]

This Senate declaration, however, need not preclude a court from concluding that an individual may enforce Article 3 in court. First, it is quite possible that the Senate intended this declaration to mean only that Article 3 does not provide a federal cause of action, but that the Senate did not intend to prevent individuals otherwise before a court from relying on Article 3 for substantive rights. The Senate appended a similar non-self-executing declaration to its resolution of advice and consent to ratification of the International Covenant on Civil and Political Rights (the "Covenant").[126] In the Report of the Senate Foreign Relations Committee recommending ratification of the Covenant to the full Senate, the Committee stated that the self-executing declaration was designed to ensure that a private cause of action could not be based on the Covenant.[127]

While the Senate Foreign Relations Committee Report on the ratification of the Torture Convention contains mixed messages regarding the meaning of the self-executing declaration in the Torture Convention, the Report does indicate that the Senate did not contemplate that

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123. See id. at 706 (noting that "[I]n the absence of the declarations attached to the Convention by the United States, Article 3 would undoubtedly have been considered judicially enforceable.").

124. *See* Matter of Abu, A29 499 143 at 14 (concluding that Article 3 is not self-executing).

125. *See* 136 CONG. REC., *supra* note 8, at S17492 (declaring that the provisions of Articles 1-16 of the Convention are not self-executing."); RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 53, § 314 cmt. d (concluding that Senate declaration is binding on U.S. courts).

126. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 *entered into force* Mar. 23, 1976 (guaranteeing certain rights in criminal proceedings). *See* 138 CONG. REC. S4784, (daily ed. Apr. 2, 1992) (setting forth the Senate's non-self-executing declaration).

127. *See* John Quigley, *The Rule of Non-Inquiry and Human Rights Treaties*, 45 CATH. U. L. REV. 1213, 1230 (1996) [hereinafter Quigley, *The Rule of Non-Inquiry*] (citing SENATE COMM. ON FOREIGN RELATIONS, 102nd CONG., REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, SEN. EXEC. REP. 102-30 (1992) *reprinted in* 31 I.L.M. 645, 657 (1992) (providing that "[t]he intent is to clarify that the Covenant will not create a private cause of action in U.S. courts")).

implementing legislation would be required for Article 3 relief.[128] Moreover, the Senate later stated that it intended its non-self-executing declaration for the Covenant to be "virtually identical" to that in the Torture Convention; that is, to prevent that treaty from providing a cause of action.[129]

Additionally, in light of the real confusion in the courts regarding the meaning of self-execution and the contemporaneous judicial opinions equating self-execution with whether treaties provided a federal cause of action,[130] it is even more likely that the Senate declaration was simply intended to prevent the Torture Convention from providing a federal cause of action. Construing the self-executing declaration as addressing only whether Article 3 creates a cause of action—and allowing individuals to defend against removal or extradition to torture[131]—would allow the U.S. to maintain its treaty compliance. Courts should construe laws in such a way to maintain the U.S.'s treaty com-

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128. *See* S. EXEC. REP. NO. 101-30 at 10 (1990) (noting that "The administration proposed a declaration that the Convention is not self-executing for articles 1 through 16. Since the majority of the obligations to be undertaken by the United States pursuant to the convention are already covered by existing law, additional implementing legislation will be needed only with respect to article 5, dealing with areas of criminal jurisdiction. The effect of the proposed declaration is to clarify that further implementation of the Convention will be through implementing legislation. In keeping with past practice, upon enactment of this legislation, the President will deposit the instrument of ratification.") ; *id. at* 12 (non-self-executing declaration recommended "to clarify that the provisions of the Convention would not of themselves become effective as domestic law," but containing no further explanation of what is meant by "effective as domestic law"); *id.*, at 41, app. B, Letter from Janet G. Mullins, Assistant Secretary, Legislative Affairs, Department of State, to Senator Pressler (April 4, 1990) (announcing "We have proposed a formal declaration that the Convention is not 'self-executing.' Any prosecution (or civil action) in the United States for torture will necessarily be pursuant to existing or subsequently enacted Federal or State law. In fact, as indicated in the original Presidential transmittal, existing Federal and State law appears sufficient to implement the Convention; thus, *the Convention will not itself provide an independent cause of action U.S. courts. . . .*") (emphasis added).

129. SEN. EXEC. REP. 102-23 (1992) *reprinted in* 31 I.L.M. 645, 657 (recommending, "For reasons of prudence, [] [the inclusion of] a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated. *We recommend the following declaration, virtually identical to . . . the one adopted by the Senate with respect to the Torture Convention. . . .")* (emphasis added)).

130. *See* Tel-Oren , 716 F.2d 774 . See discussion of *Tel-Oren* and the "cause of action" approach to self-executing treaties, *infra.*

131. As explained below, when an individual is in removal proceedings, no independent cause of action is required: the individual is already before the court and is using Article 3 as substantive law in defense to removal. Alternatively, if the Article 3 claim is raised in federal court through habeas corpus jurisdiction, the cause of action is in habeas and Article 3 merely provides the substantive law to be applied by the court.

pliance.[132]

Moreover, even if the Senate declaration was intended to prevent individuals from relying on Article 3 as substantive law in removal proceedings, there has been considerable debate regarding whether courts must defer to such declarations.[133] Many courts have recognized that it is the province of the judiciary to determine whether a treaty provision is self-executing.[134]

In fact, a Senate "declaration" may not be a part of the treaty at all, and, thus, would not be part of U.S. law under the Supremacy Clause. The Senate commonly includes "reservations," "declarations" and "understandings" in its resolutions of advice and consent to ratification of human rights treaties. A "reservation" modifies the terms of the treaty between the State making the reservation and the States accepting the reservation, and changes the international obligations of these States.[135] "Understandings" and "declarations," on the other hand, are unilateral statements by a State concerning its interpretation of a treaty provision and do not modify the State's international obligations.[136]

In the only published case to address the affect of a Senate resolution, declaration or understanding on the operation of a treaty, the District of Columbia Circuit held in 1957 that a Senate statement that does not affect the U.S.'s international obligations, but has only domestic ef-

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132. *See e.g.* Macleod v. United States, 229 U.S. 416, 434 (1913) ("[An act of Congress] should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, . . . and it should not be assumed that Congress proposed to violate the obligations of this country to other nations"); Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (urging that "[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . "); The Over The Top, 5 F.2d 838, 842 (D. Conn. 1925) (concluding that "[U]nless it unmistakably appears that a congressional act was intended to be in disregard of a principle of international comity, the presumption is that it was intended to be in conformity with it."); *see also* RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 53, § 114 (advising that "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

133. *See e.g.* Stefan A. Risenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571 (1991) [hereinafter Risenfeld & Abbot]; Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 532 (1991) [hereinafter Damrosch]; Charles H. Dearborn, III, Note, *The Domestic Effect of Declarations That Treaty Provisions Are Not Self-Executing*, 57 TEX. L. REV. 233 (1979) [hereinafter Dearborn].

134. *See e.g.* Frolova, 761 F.2d at 373 (concluding that "Whether a treaty is self-executing is an issue for judicial interpretation."); Postal, 589 F.2d 876 (asserting "[W]hether a treaty is self-executing is a matter of interpretation for the courts. . . .").

135. Vienna Convention, *supra* note 107, art. 2(1)(d) (defining reservation as a statement made by a state purporting to modify the effect of the treaty).

136. RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 53, § 313 cmt. g.

fect, is not part of a treaty and thus is not binding on courts as U.S. law.[137] In that case, involving a treaty between the U.S. and Canada regarding the production of power from the Niagara River, the Senate had included in its resolution of advice and consent to ratification of the treaty a "reservation" that an act of Congress was necessary to designate the use of the U.S.'s share of the power.[138] The court held that because the U.S.'s internal use of the Niagara power was of no consequence to Canada, the reservation did not change the international obligations of the U.S., was thus not a true "reservation" to the treaty, and was thus not a part of the treaty.[139] The reservation was thus not applied by the court.[140]

The Senate declaration that Article 3 of the Torture Convention is not self-executing is similarly a matter of purely domestic concern, because it deals with whether an individual can raise such a claim in domestic courts. Under *Power Authority*, the Senate declaration that Article 3 of the Torture Convention is not self-executing is not a part of the treaty, and is thus not a part of U.S. law.

Finally, it is possible that a Senate declaration that a treaty provision is non-self-executing is unconstitutional, although that discussion is beyond the scope of this article.[141] While the Constitution granted the Senate the power to withhold consent to a treaty, it "does not contemplate a power in the Senate to impose terms not contained in the treaty as negotiated by the President. The Senate enjoys a veto power, not a power of revision."[142] Moreover, because this non-self-executing

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137. *See* Power Authority of New York v. Federal Power Comm'n, 247 F.2d 538, 542-544 (D.C. Cir.), *vacated and remanded with instructions to dismiss as moot*, 355 U.S. 64 (1957).

138. *Id.* at 539.

139. *Id.* at 542 (noting that "A party to a treaty may presumably attach to it a matter of purely municipal application, neither affecting nor intended to affect the other party. *But such matter does not become part of the treaty*") (emphasis in original).

140. Moreover, the Senate itself has stated that its declarations "have no legal effect on the treaty." *See Genocide Convention: Hearing on Executive Order Before a Subcomm. of the Senate Comm. on Foreign Relations*, 92nd Cong., 1st Sess. 106 (1971) ("[S]o long as [the language of declarations or understandings] does not substantively affect the terms or international obligations of the treaty, or relates solely to domestic matters, there would be no legal effect on the treaty").

141. For an examination of the constitutionality of such declarations and other issues concerning Senate declaration and understandings, see Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AMER. J. INT'L L. 341, 346-48, 49 (1995); John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287 (1993); Jordan J. Paust, *Avoiding Fraudulent Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257 (1993); Risenfeld & Abbott, *supra* note 132; Michael J. Glennon, *The Constitutional Power of the United States Senate to Condition Its Consent To Treaties*, 67 CHI.-KENT L. REV. 533 (1991); Dearborn, *supra* note 133.

142. *See* Quigley, *The Rule of Non-Inquiry*, *supra*, note 127, at 1234; *see also* Vázquez, *supra* note 6, at 708 & 723 n. 60 (stating "Nor does the truism that the greater power in-

declaration concerns the domestic effect of a treaty, it may be, in effect, domestic legislation without the participation of the House of Representatives.[143]

In summary, a court using the mutual intent approach articulated by the Supreme Court in *Foster v. Neilson* and *United States v. Percheman* would conclude that Article 3 of the Torture Convention is self-executing: its direct prohibitory language that an individual "shall not" be returned to torture creates immediately enforceable rights and contemplates no implementing legislation. Moreover, a court should not look to the unilateral intent of the Senate to determine whether Article 3 is self-executing, because looking to such unilateral intent is fundamentally inconsistent with the constitutional presumption that a treaty is self-executing. In any event, the Senate declaration that Article 3 is not self-executing should not prevent an individual from relying on Article 3 for substantive rights: the Senate likely intended its declaration to mean only that Article 3 does not create a federal cause of action, and there are strong arguments that courts need not defer to Senate declarations on self-execution.

B. The Justiciability Approach

Other courts have determined whether a treaty provision is self-executing by examining whether it raises a "justiciable" issue capable of court resolution. This method of analysis arises from the Supreme Court opinion in the *Head Money Cases*, in which the Court held that a treaty may be enforced by individuals when it "prescribes a rule by

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cludes the lesser lend support to the notion that the treaty makers have the power unilaterally to make a treaty judicially enforceable. The power not to enter into a treaty at all does not include the power to enter into a treaty but make it judicially unenforceable.").

143. *See* Power Authority, 247 F.2d at 543 (stating "No court has ever said . . . that the treaty power can be exercised without limit to affect matters which are of purely domestic concern and do not pertain to our relations with other nations."); *see also* Fourteen Diamond Rings v. United States, 183 U.S. 176, 184 (1901) (J. Brown, concurring) (opining that the resolution of Senate after ratification of treaty had no legal effect on treaty and could not be treated as domestic legislation without the assent of the House of Representatives); New York Indians v. United States, 170 U.S. 1, 23 (1898) (concluding Senate proviso regarding treaty "cannot be considered as a legislative act since the power to legislate is vested in the [P]resident, [S]enate and [H]ouse of [R]epresentatives.").
In Professor Vázquez's work in progress, *Treaties as Law of the Land*, he suggests that a Senate non-self-executing declaration may be constitutional because "if the U.S. treaty makers possess the constitutional power to abrogate a treaty for purposes of domestic law, even when such abrogation is not permitted by international law, they must also possess the constitutional power to enter into a treaty but unilaterally deny it domestic force." Vázquez, *The Four Doctrines*, *supra* note 6, at 708 & 723 n.61 (discussing work in progress). However, while the U.S. Congress *as a whole* constitutionally can abrogate a treaty by passing inconsistent domestic legislation, it is debatable whether the U.S. treaty makers alone have such power to abrogate a treaty without the participation of the House of Representatives.

which the rights of the private citizen or subject may be determined."[144] A number of lower courts have taken this language to mean that a treaty must have definite and specific standards to be enforced by a court.[145]

The Ninth Circuit takes such an approach, examining four factors to determine whether a treaty provision is self-executing, including: the purpose of the treaty provision; the existence of domestic procedures appropriate for direct implementation of the treaty provision; the availability and feasibility of alternative enforcement methods of the treaty provision; and the immediate and long-range social consequences of a finding of self- or non-self-execution.[146] Other courts have added such factors as the circumstances surrounding the execution of the treaty, the nature of the obligations imposed by the treaty, and, generally, "the capability of the judiciary to resolve the dispute."[147] Still other courts have determined whether treaty language is precatory, and thus unenforceable by courts.[148]

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144. Head Money Cases, 112 U.S. at 598-99.

145. *See* Vázquez, *The Four Doctrines, supra* note 6, at 713-14 & 723 nn.82-85 (citing cases determining whether a treaty is "too vague for judicial enforcement," or "provides specific standards," or is "phrased in broad generalities," or has "language of a broad and eneral nature.") (citations omitted); *see also* RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 53 § 111 n.5 (instructing that a treaty is self-executing if it "can be readily given effect . . . without further legislation.").

146. People of Saipan v. United States Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974) (applying these factors, holding that the Trusteeship Agreement under which the U.S. administered the Trust Territory of the Pacific Islands (Micronesia) established "direct, affirmative, and judicially enforceable rights").

147. *See* Frolova, 761 F.2d at 373 (describing the analysis used to determine intent: "[C]ourts consider several factors in discerning the intent of the parties to the agreement: (1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute.") (citing, *inter alia*, Saipan); *see also* Postal, 589 F.2d 877 (referring to *Saipan* factors "[i]n the specific context of determining whether a treaty provision is self-executing"); Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976); American Baptist Churches v. Meese, 712 F. Supp. 756, 770 (S.D. Cal. 1989) (concluding that treaty was not self-executing where the "language used does not impose any specific obligations," depriving the court of "any intelligible guidelines for judicial enforcement"); Greenpeace U.S.A. v. Stone, 748 F. Supp. 749, 767 (D. Haw. 1990) (determining treaty provision not enforceable where it lacked "standards and procedures to judicially enforce the treaty").

148. *See, e.g.*, Tel-Oren, 726 F.2d at 809 (Bork, J., concurring) (indicating that "Articles 1 and 2 [of the United Nations Charter] . . . contain general 'purposes and principles,' some of which state mere aspirations and none of which can sensibly be thought to have been intended to be judiciallly enforceable at the behest of individuals.").
Professor Vázquez argues that determining whether a treaty provision is "precatory," and thus, unenforceable, is an appropriate exercise to determine which treaty provisions are more appropriately left to implementation by the political branches of government under separation of powers. *See* Vázquez, *The Four Doctrines, supra* note 6, at 712-13 ("Complying with an obligation to 'use our best efforts' or to 'cooperate' to accomplish certain

Because this approach is not tied to the language of the treaty itself (although the purpose of a treaty can certainly be derived from such language), this method of analysis allows judges to evaluate — without any fixed standards — whether a treaty should be enforceable by individuals. This "free-wheeling inquiry into [a] treaty's enforceability . . . appears to ask the courts to engage in an open-ended inquiry to determine on a case-by-case basis whether judicial enforcement of a particular treaty is a good idea."[149] It also allows a court to determine the issue without any reference whatsoever to the intent of the treaty parties regarding whether the treaty provision should be immediately enforceable in court. This method accordingly does not reflect adequately the constitutional presumption that treaties are self-executing. Indeed, because of the federal judiciary's discomfort with enforcement of treaties, the "justiciability" approach is likely to result in many courts holding treaty provisions unenforceable where the language of the treaty reflect a clear intent by the treaty parties that the treaty be enforceable without implementing legislation.[150]

Despite the difficulties with the justiciability approach, if a court employs this method of analysis Article 3 of the Torture Convention clearly would be self-executing. The purpose of Article 3 indicates that it is self-executing. Article 3 creates a right that inures to individuals, not to the State Parties.[151] The Supreme Court has held that where in-

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ends, or to ' promote' or 'encourage' them, requires the consideration and balancing of numerous disparate demands on our resources to determine what the 'best' we can do under the circumstances is. The conclusion that, in our system of separated powers, this determination is not for the judiciary to make is so intuitive as to make the propriety of this category of judicially unenforceable treaties seem self-evident. It is nonetheless important to recognize that such treaties are judicially unenforceable not because of the intent of the parties (or anyone), but for domestic separation-of-powers reasons.") (footnotes omitted). However, because a precatory treaty provision — having language that calls for the parties to take actions in the future to enforce the treaty provision — would be judged to be non-self-executing under the treaty interpretation approach, there is really no need for a court to evaluate whether a precatory treaty provision is "justiciable." That analysis is subsumed in the decision of whether a treaty "stipulates for [a] future act" under the *Foster* and *Percheman* analysis.

149. Vázquez, *The Four Doctrines*, *supra* note 6, at 715.

150. *Id.* at 717 (reasonsing that "[B]ecause the lower courts are less accustomed to enforcing treaties and tend to regard foreign relations questions as the province of the other branches, they have typically been exceedingly timid in enforcing treaties, particularly when individuals have sought to enforce them against the executive branch of the federal Government. A doctrine that effectively asks the courts to decide on a treaty-by-treaty basis whether treaties should be 'judicially enforceable' and provides little guidance on the question is thus likely to result in a far more restricted judicial role than the Constitution contemplates.") (footnote omitted).

151. As recognized by the drafters of the Torture Convention, the purpose of Article 3 is to prohibit States "[f]rom exposing an individual to serious risks outside its territory by handing him or her over to another State from which treatment contrary to the Convention might be expected." J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE

dividual rights are conferred pursuant to treaty provisions, they are self-executing.[152] As one court noted in concluding that the Geneva Convention Relative to the Treatment of Prisoners of War was self-executing:

> [I]t is inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs—not to create some amorphous, unenforceable code of honor among the signatory nations. "It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.[153]

It similarly would be "inconsistent with both the language and spirit of the treaty and with [the U.S.'s] professed support of [Article 3's] purpose"[154] to find that the rights established by Article 3 cannot be enforced by an individual in removal or habeas proceedings.

Moreover, there are domestic procedures available for direct implementation of Article 3 relief.[155] Article 3's command is simple: it prohibits the removal of a person "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[156] Such fact-finding is well within the province of immigration and district court judges, and procedures for withholding of removal are available to implement those findings.

Additionally, if a person is not eligible for asylum or withholding of removal, there is currently no other feasible alternative available to prevent that person's removal from the U.S. While the INS is currently

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AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, at 125 (Martinus Nijhoff Publishers) (1988) (original emphasis omitted).

152. *See* The Head Money Cases, 112 U.S. at 598-99 (explaining that "A treaty, then, 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. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."); *cf.* Diggs, 555 F.2d at 851 (finding United Nations Security Council Resolutions non-self-executing where "[t]hey do not by their terms confer rights upon individual citizens; they call upon governments to take certain action").

153. Noriega, 808 F. Supp. at 794 (quotation omitted). *But see* Tel-Oren, 716 F.2d 774 (J. Bork, concurring) (concluding that the Geneva Convention Relative to the Treatment of Prisoners is not self-executing).

154. Noriega, 808 F. Supp. at 794.

155. People of Saipan, 502 F.2d at 97.

156. Torture Convention, *supra* note 4, art. 3; *c.f.* People of Saipan, 502 F.2d at 97, 99 (determing that substantive rights for the U.S. to "promote the economic advancement and self-sufficiency" of Micronesian people and to protect them "against the loss of their lands and resources," held not to be too vague for judicial enforcement: the court can look "to the relevant principles of international law . . . which ha[s] achieved a substantial degree of codification and consensus").

granting temporary stays of removal for individuals eligible for Torture Convention relief, the INS will not provide any final relief to Torture Convention claimants unless formal regulations are promulgated. Even in the event procedures for final relief are promulgated pursuant to the pending legislation, that fact alone should not preclude a finding of self-execution: courts should balance all of these factors to determine the issue. Moreover, if the final regulations attempt to exclude individuals not eligible for withholding of removal as discussed above, those individuals will find relief from removal to torture only through application of Article 3 in U.S. courts.

Finally, the "immediate and long-range social consequences"[157] favor a finding of self-execution. The standard under the Torture Convention is not an easy one to meet: it requires a demonstration that there are substantial grounds for believing that the person would be tortured upon return, or in other words, that it would be "more likely than not" that he would be tortured.[158] The social consequences of providing relief to the individuals who can meet this standard do not militate against finding Article 3 to be self-executing. Particularly where an individual does not constitute a danger to the community, there is no adverse consequence to the U.S. for granting such relief.

In summary, while courts should not utilize the justiciability approach in determining self-execution because it fails to reflect the Constitutional presumption of self-execution, a claim under Article 3 is indeed a "justiciable" issue that compels a finding that Article 3 is self-executing: the purpose of Article 3 is to create an individual right to avoid removal to torture; there are domestic procedures appropriate for direct implementation Article 3; there are presently no alternative avenues to obtain final relief under Article 3; and the immediate and long-range social consequences weigh in favor of finding Article 3 self-executing.

C. The Private Right of Action Approach

The third approach courts have used to determine self-execution looks at whether a treaty provision provides a cause of action to an individual. This approach is best illustrated in *Tel-Oren v. Libyan Arab Republic*,[159] in which a group of Israeli plaintiffs sued the Libyan government, the Palestine Liberation Organization (PLO) and other organizations for the PLO's kidnapping, torturing, and killing a number of persons taken as hostage in exchange for Israel's release of PLO prisoners. The district court dismissed the case, and the District of Columbia Circuit upheld the dismissal. Each circuit judge, however, filed a

157. People of Saipan, 502 F.2d at 97.
158. *See* 136 CONG. REC., *supra* note 8, at S17492.
159. 716 F.2d 774 (D.C. Cir. 1984).

separate concurring opinion, each expressing widely divergent reasons for affirmance. Judge Bork's concurring opinion — including his holding that a self-executing treaty must provide a cause of action — has become very controversial.[160]

Judge Bork first concluded that the Alien Tort Act, 28 U.S.C. § 1350, which provides subject matter jurisdiction to the federal courts to hear claims by aliens for torts "committed in violation of the law of nations or a treaty of the United States," did not confer a cause of action on the plaintiffs.[161] Rejecting that statutory basis for a cause of action, Judge Bork then examined whether the treaties cited by the plaintiffs created a cause of action, and found that they did not.[162]

Judge Bork stated: "Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action."[163] To the extent this holding requires plaintiffs to assert a federal cause of action to have access to the federal courts, it is uncontroversial. However, Judge Bork's statement that a treaty is only self-executing if it provides a private right of action is erroneous, and the Supreme Court and D.C. Circuit cases on which he relied do not stand for that proposition.[164]

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160. *See Anthony D'Amato, What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AMER. J. INT'L L. 92 (1985); Michael C. Small, *Enforcing International Human Rights in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L. J. 163 (1985).

161. Tel-Oren, 726 F.2d at 801-808 (J. Bork, concurring).

162. These treaties included the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Articles 1 and 2 of the United Nations Charter, the Convention with Respect to the Laws and Customs of War on Land, the Geneva Convention Relative to the Treatment of Prisoners of War, and the Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crime Against Persons and Related Extortion That Are of International Significance. *See id.* at 808-809. Judge Bork did not address the self-execution of the treaties cited by plaintiffs that had not at that time been ratified by the U.S., including the International Covenant on Civil and Political Rights.

163. *Id.* at 808.

164. In *The Head Money Cases*, 112 U.S. at 598-99, the Court noted that a treaty may: [C]ontain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . A treaty, then, 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.*"
(Emphasis added). But at no point did the Court hold that the cause of action was required to be found in the treaty. The prior D.C. Circuit decision cited by Judge Bork similarly did not require a treaty to provide a cause of action to be self-executing. *See* Diggs, 555 F.2d at 851 (holding that provisions of a United Nations Security Council Resolution was not self-executing because they did "not by their terms confer rights upon individual citizens; they call upon governments to take certain actions.") (citing People of Saipan, 502 F.2d at 101).

Judge Bork's analysis reveals that, initially, he simply determined whether the treaties created enforceable rights for individuals by looking at such traditional self-execution factors as whether the language of the treaties explicitly contemplated implementing legislation.[165] However, because the plaintiffs in *Tel-Oren* had no other source for a cause of action other than the treaties, Judge Bork then examined whether the treaties granted individuals the right to seek damages for a violation of the treaty provisions, but labeled this second step as determining "self-execution," as well.[166] Judge Bork thus erroneously conflated the issue of self-execution and a cause of action.[167] A number of other courts have been similarly confused by this equation of the self-execution issue with whether a treaty provides a cause of action, often where the only possible cause of action in the case is a treaty.[168]

These decisions holding that a treaty must provide a cause of action should, therefore, be confined to cases in which there is no other cause of action for plaintiffs in a civil action. None of these decisions hold that a treaty provision must provide a cause of action in order to be *enforceable* in court as substantive law if the plaintiffs can demonstrate a distinct cause of action to gain access to the federal courts. In fact, the

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165. Tel-Oren, 726 F.2d at 809-810.

166. *Id.* at 810.

167. *See* RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 53, § 111 cmt. h (providing "Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies.").

168. *See* Goldstar (Panama), S.A. v. United States, 967 F.2d 965, 968-69 (4th Cir. 1992) (declaring that "Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action"; holding that the Hague Convention Respecting the Law and Customs of War on Land is "not self-executing and, therefore, does not, by itself, create a private right of action for its breach."); Columbia Marine Servs. v. Reffet Ltd., 861 F.2d 18, 21 (2d Cir. 1988) (providing that "An action arises under a treaty only when the treaty expressly or by implication provides for a private right of action. The treaty must be self-executing; i.e. it must 'prescribe[] rules by which private rights may be determined.'"); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298 (3d Cir. 1979) (requiring that "[U]nless a treaty is self-executing, it must be implemented by legislation before it gives rise to a private cause of action."); Smith v. Socialist People's Libyan Arab Jamahiriya, 886 F. Supp. 306, 311 n. 6 (E.D.N.Y. 1995) (noting that "A treaty is self-executing when it expressly or impliedly provides private right of action."), *aff'd on other grounds* 101 F.3d 239 (2d Cir. 1997); Noriega, 808 F. Supp. at 798 (noting that "Essentially, a self-executing treaty is one that becomes domestic law of the signatory nation without implementing legislation, and provides a private right of action to individuals alleging a breach of its provisions"; concluding that the Geneva Convention Relative to the Treatment of Prisoners of War is self-executing due to its purpose of protecting individual rights, and thus enforceable in habeas); Greenpeace USA, 748 F. Supp. at 767 (conflating self-execution with providing a cause of action, but then deciding that a Convention relating to the disposal of hazardous waste was not self-executing because there were "no standards or procedures to judicially enforce the treaty"); Handel v. Artukovic, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985) (holding that a treaty is self-executing when it provides a private right of action, but using the "justiciability" factors of People of Saipan to determine whether treaties are self-executing).

adjudication of constitutional claims provides a useful parallel: the source of the substantive rights (the Constitution) does not itself create a cause of action — some other source must be found to assert federal jurisdiction — but that does not make the Constitution unenforceable.[169]

While Article 3 is not self-executing under the "private right of action" approach to the issue, that should not prevent individuals from relying on Article 3 as *substantive* law to be applied by the court, where those individuals are in removal proceedings, have been sued, or are being prosecuted and thus need not demonstrate a cause of action,[170] or where those individuals have a cause of action in another source, such as common-law forms of action, habeas corpus, 18 U.S.C. § 1983, or the Administrative Procedure Act.[171] In removal proceedings, where people are already before the court and need not demonstrate a cause of action, Article 3 may be used as substantive law by courts.

Because of the confusion created by Judge Bork's approach to the self-execution issue, however, the courts should abandon any conflation between self-execution and whether a treaty provides a cause of action. Where an individual has no other federal cause of action and brings a claim under a treaty, it is, of course, appropriate for a court to examine whether a treaty provides a cause of action. But, where an individual has an independent cause of action or is already before the court, the court should not demand that the treaty, also, provide a cause of action in addition to providing enforceable individual rights.[172]

In fact, to the extent that the "private right of action" cases look for

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169. *See* Vázquez, *The Four Doctrines*, *supra* note 6, at 719-20 (conceding that "private parties may maintain an action in court to enforce a treaty provision only if they possess a right of action. It is a mistake, however, to assume that a treaty may be enforced in court by private parties only if it confers a private right of action itself. Instead, they typically impose primary obligations on individuals (including government officials) without expressly addressing matter of enforcement. A treaty that does not itself address private enforcement is not less judicially enforceable by individuals than constitutional or statutory provisions that do not themselves address private enforcement. The 'private right of action' to enforce a treaty may have its source in laws other than the treaty itself.") (footnotes omitted).

170. *See* Vázquez, *The Four Doctrines*, *supra* note 6, at 720 & 723 n.117 (citing Kolovrat v. Oregon, 336 U.S. 187, 187 (1961); Patsone v. Pennsylvania, 232 U.S. 138, 145 (1914)).

171. *Id.* at 723 n.121 (citing, *e.g.*, United States v. Rauscher, 119 U.S. 407 (1886) (extradition treaty enforced in federal habeas corpus action); Florida v. Furman, 180 U.S. 402, 428 (1901) (treaty enforced in action to remove cloud on legal title); Jordan v. Tashiro, 278 U.S. 123, 125 (1928) (state mandamus action); *see also* Vázquez, *Treaty-Based Rights and Remedies of Individuals*, *supra* note 75, at 1143-1156 (discussing § 1983 and the APA as sources for rights of action to enforce treaties).

172. *See* Vázquez, *The Four Doctrines*, *supra* note 6, at 710 (arguing that "Even if a treaty does not confer a remedy, an otherwise justiciable treaty obligation is, by virtue of the Supremacy Clause, enforceable in court at the behest of individuals, either defensively by persons who have standing or offensively by persons who have a right of action.").

an intent to make treaties enforceable by U.S. courts, rather than look for the intent *not* to make them enforceable without implementing legislation, this approach turns the constitutional presumption that treaties are self-executing on its head.[173] Such an approach should be abandoned.

•*D. The Constitutional Power Approach*

Still other courts have examined whether the subject of a treaty provision is within the constitutional power of the treaty-makers, and label the exercise "self-execution," as well. This approach holds that a treaty is not self-executing if it attempts to do what the Constitution otherwise relegates to Congress as a whole or to the House of Representatives.[174] For instance, treaties that attempt to raise revenue or appropriate money or attempt to make conduct criminal have been held to be non-self-executing because those subjects are not within the constitutional power of the U.S. Senate.[175] Article 3 does not involve a subject outside of the constitutional ability of the Senate, however, and would be held self-executing under this approach.

While it is appropriate for courts to determine whether a treaty provision is within the constitutional power of the treaty makers before enforcing such a provision,[176] the labeling of this exercise as determining whether a treaty is "self-executing" is misleading. A treaty provision can be "self-executing" in the sense that the provision grants individuals immediately enforceable rights without the need for implementing legislation, yet not be within the constitutional power of the treaty makers to grant. The constitutionality of a treaty provision should thus be an analytically distinct step in enforcing a treaty provision and should not be labeled "self-execution."

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173. *Id.*

174. *See* Postal, 589 F.2d at 877 (noting that "[T]reaties cannot affect certain subject matters without implementing legislation. A treaty cannot be self-executing to the extent that it involves governmental action that under the Constitution can be taken only by the Congress.") (internal quotations and citation omitted).

175. Vázquez, *The Four Doctrines*, *supra*, note 6, at 718, 723 n.108 (citing Hopson v. Krebs, 622 F.2d 1375, 1380 (9th Cir. 1980) ("Treaty regulations that penalize individuals. . . .[a]re generally considered to require domestic legislation before they are given any effect."); Edwards v. Carter, 580 F.2d 1055, 1058 (D.C. Cir. 1978) (raising revenue).

176. As Professor Vázquez notes:

> The Supremacy Clause does not eliminate every possible obstacle to a litigant relying on a treaty might face, [such as a challenge to the constitutionality of the treaty,] but it does eliminate one: without the clause, the nation's treaties would merely have possessed the status of international law enforceable only by states and only in international fora; the Supremacy Clause gives treaties the character of municipal law enforceable in domestic courts at the behest of private individuals.

Vázquez, *The Four Doctrines*, *supra*, note 6, at 700.

•E. Conclusion Regarding Self-Execution

In evaluating whether Article 3 of the Torture Convention is self-executing, courts should return to the treaty interpretation approach articulated by the Supreme Court in *Foster v. Neilson* and *United States v. Percheman*. Under that original articulation of the doctrine, a treaty provision may be enforced by individuals in U.S. courts *unless* the treaty language itself demonstrates that the treaty "stipulate[s] for some future legislative act."[177] This is the only approach to the self-execution problem that adequately reflects the constitutional presumption that a treaty be immediately enforceable as domestic law in the U.S.

Each of the other analyses articulated by courts to determine self-execution have substantial flaws that render the doctrine difficult to apply and inconsistent with the constitutional presumption that treaties are immediately enforceable in U.S. courts. Determining whether a treaty is self-executing from the unilateral intent of the U.S. treaty makers, for instance, does not honor that constitutional presumption. The justiciability approach, as articulated by the Ninth Circuit in *People of Saipan*, is unprincipled because it largely depends on the judges' opinions of whether the treaty provision *should be* enforceable by individuals, and may result in treaties being held unenforceable where the treaty language clearly calls for immediate enforceability.The right of action approach, as illustrated by Judge Bork's concurring opinion in *Tel-Oren*, erroneously conflates the concept of self-execution with whether a treaty provides a cause of action, and turns the constitutional presumption on its head by looking for an explicit intent to make a treaty enforceable (indeed, for a treaty to provide a cause of action).

And the final approach, in which courts determine whether the treaty provision is within the constitutional power of the treaty makers is distinct from the issue of whether a treaty provides enforceable rights to individuals. The courts should thus return to the original understanding of the self-execution doctrine.

Because of the considerable confusion in the federal courts over what it means for a treaty provision to be "self-executing," however, it is advisable for advocates litigating a Torture Convention claim to demonstrate to a court that, under each distinct approach to the problem, Article 3 of the Torture Convention provides individual rights that are immediately enforceable by U.S. courts. And one important principle must be kept in mind: regardless of whether Article 3 of the Torture Convention is found to be self-executing, the U.S. must comply with it.[178]

177. Percheman, 32 U.S. (7 Pet.) at 88-89.

178. *See* Matter of N-L, [file number redacted] at 8-9 (IJ Nov. 21, 1997) (Imperial, Cal.)

V. CONCLUSION

Article 3 of the Torture Convention provides a viable alternative to prevent the removal of an individual who is otherwise ineligible for asylum or withholding of removal under the domestic immigration laws. The INS will agree to temporary stays of removal for those individuals who can demonstrate that there are "substantial reasons" to believe that they will be tortured upon return. Moreover, formal regulations governing final relief under the Torture Convention are being finalized by the INS, and proposed implementing legislation may be passed as well.

In addition, it is possible, though substantially more complex, to raise a claim in immigration or federal court that Article 3 prohibits a person's removal to a country in which he or she faces torture. The use of the "customary international law" prohibiting return to torture has recently met with success in the immigration courts.

Moreover, there are strong arguments available that Article 3 of the Torture Convention is a "self-executing" treaty provision so that an individual can raise an Article 3 claim in U.S. courts even if there is no legislation or regulation implementing Article 3. Under each of the four approaches to determining self-execution that have developed in the federal courts, Article 3 should be held to be enforceable by individuals in U.S. courts. Most significantly, under the original doctrine articulated by the Supreme Court in the early nineteenth century, Article 3 demonstrates an intent of the treaty parties that Article 3 be immediately enforceable in the domestic courts of the treaty parties. Its language indicates that it was intended to grant substantive rights to individuals whether or not domestic legislation was enacted, and, in fact, there is no language in Article 3 indicating that future legislation is contemplated to enact the right to *non-refoulement.* Indeed, Article 3's direct prohibition that States "shall not" return individuals to torture

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(a treaty that is non-self-executing "[i]s not a nullity. Even where the Congress has failed to plainly enact legislation dealing with the treaty, the treaty remains an obligation of the United State[s] and the supreme law of the land. . . . An immigration judge cannot act in violation of a treaty obligation"); *see also* RESTATEMENT OF FOREIGN RELATIONS LAW, supra, note 53, § 111, cmt. h (explaining "If an international agreement or one of its provisions is non-self-executing, the United States is under an international obligation to adjust its laws and institutions as may be necessary to give effect to the agreement."); Louis Henkin, Treaties in a Constitutional Democracy, 10 MICH. J. INT'L L. 406, 425 (1989) (noting that "The international obligation of the United States under a treaty is immediate, whether a treaty is self-executing or not. . . .[T]he United States has an obligation to enact necessary legislation promptly so as to enable it to carry out its obligations under the treaty."); Damrosch, *supra* note 132, at 532 (explaining that "U.S. courts generally follow a rule of attempting to construe domestic sources of law harmoniously with international obligations. . . . Even though a non-self-executing declaration purports to tell courts not to give direct effect to the treaty, it does not go so far as to instruct them to violate it.").

indicates that these rights are immediately effective as domestic law.

While Article 3 should be treated as a self-executing treaty provision under the other approaches to determining self-executing, as well, the federal courts should take this opportunity to clarify the self-execution doctrine and return to the original understanding of the concept. None of the other approaches adequately reflect the presumption of the Constitution that treaties are self-executing, and thus must be abandoned.

APPENDIX I

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity ofthe human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975 (resolution 3452 (XXX)),

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

Part I

Article 1

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

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of waror a threat or war, internal political instability or any otherpublic emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures aa may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph .1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present, shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, to the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said State and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences

as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offenses. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested state.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with civil proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. 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.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

Article 11

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.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there it reasonable ground to believe that an act of torture has been committee in any territory under its jurisdiction.

Article 13

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 its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. 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 including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which it established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction 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. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.

Part II

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of 10 experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General

of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that

(a) Six members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present. 3 . The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.

4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

5. The State Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement of the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 above.

Article 19

1. The States Parties shall submit to the Committee, through the Secretary- General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of this Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken, and such other reports as the Committee may request.

2. The Secretary-General shall transmit the reports to all States Parties.

3. Each report shall be considered by the Committee which may make such comments or suggestions on the report as it considers appropriate, and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments or suggestions made by it in accordance with paragraph 3, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 2 . If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1.

Article 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations which may have been submitted by the State Party concerned as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.

3. If an inquiry is made in accordance with paragraph 2, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.

4. After examining the findings of its member or members submitted in accordance with paragraph 2, the Committee shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

Article 21

1. A State Party to this Convention may at any time declare under this article 3 that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State

shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, references to domestic procedures and remedies taken, pending, or available in the matter.

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee by notice given to the Committee and to the other State.

(c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies it unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

(d) The Committee shall hold closed meetings when examining communications under this article.

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in the present Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission.

(f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information.

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing.

(h) The Committee shall, within 12 months after the date of receipt of notice under subparagraph (b), submit a report.

> (i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached.
>
> (ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General.

Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to re eive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party to the Convention which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communication submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned/

5. The Committee shall not consider any communication from an individual under this article unless it has ascertained that:

(a) The same matter has not been, and is not being examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies it unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit parties thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General.

Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 23

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph 1 (e), shall be entitled to the facilities, privileges and immunities of experts on missions for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 24

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

Part III

Article 25

1. This Convention is open for signature by all States. 2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 2

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.

2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 29

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secre tary-General shall thereupon communicate the proposed amendment to the States Parties to this Convention with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the State Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 30

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other States Parties shall not be bound by the preceding paragraph with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 31

1 A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary- General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective. Nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 32

The Secretary-General of the United Nations shall inform all members of the United Nations and all States which have signed this Convention or acceded to it, or the following particulars:

(a) Signatures, ratifications and accessions under articles 25 and 26;

(b) The date of entry into force of this Convention under article 27, and the date of the entry into force of any amendments under article 29;

(c) Denunciations under article 31.

Article 33

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

On February 4, 1985, the Convention was opened for signature at United Nations Headquarters in New York. At that time, representatives of the following countries signed it: Afghanistan, Argentina, Belgium, Bolivia, Costa Rica, Denmark, Dominican Republic, Finland, France, Greece, Iceland, Italy, Netherlands, Norway, Portugal, Senegal, Spain, Sweden, Switzerland and Uruguay. Subsequently, signatures were received from Venezuela on February 15, from Luxembourg and Panama on February 22, from Austria on March 14, and from the United Kingdom on March 15, 1985.