K.C. et al. v. Townsend et al., Civil No. 6:09-CV-012-C, Hon. Sam R. Cummings

Expert Report

Customary International Law Applies and Supports U.S. Law To Bar or Limit Use of Certain Disciplinary Measures Taken Against Girls at Ron Jackson State Juvenile Correctional Complex

Professor Richard J. Wilson

Date: August 31, 2009 Signed: _____

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This expert report is prepared and submitted by Professor Richard J. Wilson, Professor of Law and Director of International Human Rights Law Clinic at American University's Washington College of Law. Prof. Wilson was retained as an expert on issues of international law by American Civil Liberties Union and Dechert LLP, who represent plaintiffs in the above-referenced matter regarding conditions of confinement, policies and practices at the Texas Youth Commission's Ron Jackson State Juvenile Correctional Complex in Brownwood, Texas ("TYC-Brownwood"). This report complies with requirements of Federal Rule of Civil Procedure 26(2)(B). I do not plan to use exhibits to summarize or support the opinions expressed here. FRCP 26(2)(B)(iii).

Professional Qualifications and Experience FRCP 26(2)(B)(iv)

I began my career as a public defender in Illinois in 1972, immediately after law school graduation. In 1974 I became director of a regional public defender office handling appeals by indigent defendants before Illinois appellate courts and the state Supreme Court, as well as federal courts, and continued in that position until 1980, when I became Director of the Defender Division of the National Legal Aid and Defender Association, in Washington, D.C. I have been a law professor since 1985, and since 1990 have exclusively devoted my career to international human rights teaching, scholarship, and practice. As director of American University's International Human Rights Law Clinic, I have represented or directly supervised litigation and other law-related projects in the field of international human rights. My students and I have appeared in various federal court cases, and I have authored several *amicus curiae* briefs in the United States Supreme Court, including one on behalf of 48 nations of the world community, cited by the majority in *Roper v. Simmons*, 543 U.S. 551 (2005) (striking down the death penalty for juveniles). I have appeared, argued and presented witnesses in three cases before the Inter-American Court of Human Rights in San José, Costa Rica, and my students and I have appeared in numerous regional and global human rights tribunals or bodies.

Outside of the clinical program, I have taught law school subjects across a wide spectrum of international or comparative law topics, including a survey course on International Law in the United States. I have participated in or directed successful summer programs in human rights, both at my own law school and in Santiago, Chile, as well as the more recently established summer program in international criminal law and international aspects of terrorism, held in The Hague, Netherlands. I am a member of the board of directors of the law school's Center for Human Rights and Humanitarian Law, and I am

President of the board of Human Rights USA, a not-for-profit organization litigating human rights issues throughout the United States. I have taught or visited in human rights courses in Oxford, England; Lima, Peru and Tokyo, Japan. This fall, I will be a visiting Scholar in Residence at the Center for Human Rights Research at the University of Utrecht Faculty of Law, in Utrecht, Netherlands, and in the spring semester of 2010, I will be a Sabbatical Scholar at the American Society of International Law. I have served as legal advisor to the Consulate of the Republic of Colombia in Washington, and was a Fulbright Scholar in that country in 1987.

I have published more than 70 books, articles, book chapters, and other publications since beginning my teaching career, most of which have focused on issues of international law and practice. I have been the recipient of the law school's Pauline Rulye Moore Scholarship and Egon Guttman Textbook Awards. A list of my publications for the past 10 years is attached to this report in compliance with FRCP 26(2)(B)(iv).

I have appeared in litigation as an expert witness on several occasions, but have neither testified nor been deposed during the past four years. FRCP 26(2)(B)(v). I testified in court in 1992 in *State v. Harris*, a state post-conviction action on behalf of a defendant under capital sentence, and was deposed in *Doyle v. Allegheny County Salary Board*, litigation brought by the ACLU to challenge the Public Defender Office of Allegheny County (Pittsburgh), Pennsylvania, in February 1998. Both cases involved my expertise on the structure and funding of indigent defense services in the United States.

I testified as an expert on customary international law relating to the juvenile death penalty (prior to *Roper v. Simmons*) in a pre-trial hearing in *Commonwealth v. Lee Boyd Malvo*, the younger of the two so-called "Washington Snipers." The testimony was given in a trial court in Fairfax County, Virginia in October 2003. Finally, I was retained by the NAACP Legal Defense Fund as an expert witness for the plaintiff, Joseph Hayden, in *Hayden v. Pataki*, 00 Civ. 8586 (LMM), U.S. District Court for the Southern District of New York, during 2004. My report, which was prepared and submitted to the NAACP, was on the existence of customary international norms relating to the right to universal, equal, and non-discriminatory suffrage. Mr. Hayden lost his right to vote in the state of New York during incarceration and parole for a felony conviction. The case was dismissed before the expert disclosure deadline.

I am compensated at a rate of $200/hour for preparation of this report and all other work in this matter, with payment at double that rate for oral testimony, including at depositions. FRCP 26(2)(B)(vi).

Data and Other Information Considered

FRCP 26(2)(B)(ii) requires the expert to disclose "data or other information considered" in forming opinions. I have considered the following materials in preparation of this report:

1) The First Amended Class Action Complaint for Declaratory and Injunctive Relief, filed by Plaintiffs on Sept. 24, 2008, and Defendants' Original Answer, filed Dec. 2, 2008;
2) Declarations of Plaintiffs' Experts Stuart Grassian and Anne M. Nelson, filed in this matter;
3) Declarations by nine current TYC-Brownwood residents, filed in support of Plaintiff's Motion for Leave to Amend in this matter: B.P., B.B., C.C., D.D., E.E., F.F., S.D., H.H., and I.I.;
4) Texas Youth Commission, General Administrative Policy Manual, Security and Control, Rule: Security Program, GAP.97.40 (2005) and proposed amendments to GAP.97.40 (May 15, 2009);
5) Various research memoranda prepared by my research assistant, Tanvi Zaveri, in conjunction with this matter;
6) Numerous books, articles, and domestic and international cases on the issues presented here, as cited in my report below.

Although I have not visited TYC-Brownwood, I believe the personal declarations listed above, assuming their veracity, provide an adequate factual basis for my conclusions below.

Executive Summary

Customary international law applies in this case and supports the following primary propositions:

1. **In all actions concerning detention of girls at Brownwood, the primary aim of the state must be their best interests;**
2. **The aim of the girls' detention at Brownwood must be their reform, rehabilitation and social reintegration;**
3. **Girls detained at Brownwood are held under unhealthful and unhygienic conditions in violation of customary international law;**
4. **Girls held at Brownwood are particularly vulnerable, and the state thus owes a higher duty to effectively care for them;**
5. **The principle of proportionality applies here and requires that (1) responses to the girls, including disciplinary measures, be based on each child's personal circumstances; and (2) medications be administered only for individualized treatment, by qualified medical personnel;**
6. **Girls subjected to the security regime at Brownwood, including the use of solitary confinement, handcuffs and pepper spray as punishment suffer degrading, if not cruel and inhuman treatment or punishment in violation of customary international law;**
7. **Girls detained at Brownwood subjected to routine removal of clothing and undergarments, including strip searches or other required non-private nudity suffer degrading, if not cruel and inhuman treatment in violation of customary international law.**

Opinions, with Basis and Reasons
(FRCP 26(2)(B)(i))

I. Framework for Discussion of Opinions: Customary international law – also known as the "law of nations" – has been recognized as federal law throughout U.S. history. Customary international law is routinely applied in the Supreme Court, in this Circuit, and throughout the federal courts, often on the very questions presented in this case. Expert opinion on the application of international law is appropriately considered by this court in the determination of such questions of law as: (a) the existence and scope of norms of customary international law; and (b) how such norms are relevant and should be applied in this case.

Treaties and custom are the two principal sources of international law. The highly respected RESTATEMENT OF THE LAW THIRD: THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) ("Restatement Third") defines customary international law as a rule of international law that "results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement Third, § 102(2) This formulation parallels the definition given by the International Court of Justice, the UN-established tribunal that sits in The Hague, Netherlands, to adjudicate claims between nations. Its Statute, often cited by federal courts, affirms that the sources of international law include "international custom, as evidence of a general practice accepted as law." *Statute of the International Court of Justice*, 59 Stat. 1055, 3 Bevans 1179, Article 38(b) (1945).

The same section of the Restatement Third notes that a customary norm may be discerned from "international agreements," *i.e.*, treaties, "when such agreements are intended for adherence by states generally and are in fact widely accepted." § 102(3) Widely ratified treaties also can constitute strong evidence of customary norms. Indeed, "generalizable provisions in treaties give rise to rules of customary law binding upon all states. The custom is binding, not the treaty." ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 107 (1971). In this way, a treaty can be a measure the breadth of international custom and practice. "Indeed, a treaty ratified and implemented by most states may also, incidentally, create a prevalent pattern of behavior which, as 'customary law' obligates states that have not accepted the treaty." THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 189 (1990); *accord*, Restatement Third, § 102(3), Comment *i*. This concept has been followed by U.S. federal courts. The seminal case of *The Paquete Habana*, 175 U.S. 677 (1900) itself provides a framework for how courts should discern international law. *Flores v. Southern Peru Copper Corp*., 414 F.3d 233 (2d Cir. 2003) (citing *Paquete Habana*, *passim*). Other cases include: *Beanal v. Freeport McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999) (finding that the "means of ascertaining law of nations is 'by consulting work of jurists writing professionally on public law or by general usage and practice of nations'," citing various cases); *Najarro de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1396 n.13 (5th Cir. 1985) (same); *In re Alien Children Education Litigation*, 501 F. Supp. 544, 596 (S.D. Tex. 1980) (considering a claim as to whether a customary norm of a right to education had been established through evidence from "various treaties, agreements, declarations and

covenants"); *Beharry v. Reno*, 183 F.Supp.2d 584, 600-601 (E.D.N.Y. 2002), *rev'd on other grounds*, 329 F.3d 51 (2d Cir. 2003) (recognizing a customary norm protecting the family); *Kane v. Winn*, 319 F.Supp.2d 162, 197-198 (D. Mass., 2004) (applying customary international law to habeas corpus claims); *see also*, PAUST, *supra*, at 6 n. 19, 30-31 (gathering scores of cases on application of customary international law by domestic courts, and noting that US courts have considered "treaties and other international agreements" as sources of international custom). It is not the treaty itself that creates the binding customary norm, but the breadth of ratification of that treaty and the extent of its implementation by the ratifying countries. As will be demonstrated below, several international customary norms at play in this litigation are expressed through global and regional human rights treaties, UN resolutions and other standards, as well as extensive state practice.

Customary international law is federal law applicable in federal courts. "In 1793, then Chief Justice Jay recognized that 'the laws of the United States,' the same phrase found in Article III, section 2, clause 1 and in Article VI, clause 2 of the [U.S.] Constitution, includes the customary 'law of nations'." JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7-8 (2nd ed. 2003) (citing to Henfield's Case, 11 F.Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6,360)). The modern recognition of this and its related corollary, that cases arising under customary international law "are within the jurisdiction of the federal courts" pursuant to their Article III, section 2 powers in the Constitution, can be found in the Restatement Third. PAUST, *id.*, at 10; Restatement Third, § 111(1) and (2), and Comment *e*. Reporter's note 3 to § 111 recognizes "the modern view . . . that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts."

As stated by Justice Gray in *The Paquete Habana*, 175 U.S. 677, 700 (1900), the now-standard reference to the domestic effects of customary international law:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination.

See also, Restatement Third, § 111, Reporters' Notes 2 and 3.

The United States Supreme Court reaffirmed this view just five years ago in its decision in *Sosa v. Alvarez-Machain et al.*, 542 U.S. 692, 124 S. Ct. 2739 (2004). There, the Court interpreted the Alien Tort statute, 28 U.S.C. §1350, which gives federal district courts original jurisdiction in cases involving torts committed against aliens in violation of "the law of nations," that is, customary international law. After an exhaustive historical exegesis, the Court quoted the above passage from *The Paquete Habana* in its conclusion that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations." *Id.*, at 2764. In *Sosa*, the explicit issue was whether the Alien Tort statute, adopted in 1789, created an independent cause of action in federal court. That question is not at issue here. However, as to the portion of the statute dealing

with domestic recognition of customary international law, the court required that any such claim "rest on a norm of international character accepted by the civilized world." *Id.*, at 2761. The norm must, in the language of federal cases decided before and after *Sosa*, be "definable, universal and obligatory." *Sosa v. Alvarez-Machain*, at 2766. This is a very recent reaffirmation of customary international law's standing as federal law continuously since the founding of the United States. Cases decided after *Sosa* have found violations of customary international law in federal litigation and are cited below as applicable.

Finally, the Restatement Third notes that issues of "the determination or interpretation" of international law are questions of law, not fact. §113(1). Section §113(2) states that courts may consider, in their discretion, "any relevant material or source, including expert testimony," to resolve such questions. Comment c to that section notes that there are no fixed procedures under statute or rule for presenting international law in courts. The Reporters' Notes cite to numerous cases where expert testimony has been received, "without or over objection." *E.g., Navios Corp. v. The Ulysses II*, 161 F.Supp 932 (D. Md. 1958), *affirmed per curiam*, 260 F.2d 959 (4th Cir. 1958); *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 902 (N.D. Ga. 1985). This court is encouraged to hear testimony on the customary norms discussed below.

This report must necessarily be selective in referring to the voluminous material developed by the international community as to the human rights of prisoners and anyone detained by governments, as well as more general standards relating to criminal justice. In addition to the myriad sources cited in my opinion, there is a very detailed body of standards from the United Nations providing detailed guidance for domestic officials.[1] Federal and state courts have routinely referred to international law relating to prisoners and conditions of confinement. *See, e.g., Laureau v. Manson*, 507 F. Supp. 1177, 1187 n.

[1] The most significant of the international standards in the criminal justice area include the following: UN Standard Minimum Rules for the Treatment of Prisoners (1955, amended 1977); UN Basic Principles for the Treatment of Prisoners (1990); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); UN Code of Conduct for Law Enforcement Officials (1979); UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990); UN Basic Principles on the Independence of the Judiciary (1985); UN Basic Principles on the Role of Prosecutors (1990); UN Basic Principles on the Role of Lawyers (1990); UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (1990); UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985); UN Convention Against Transnational Organized Crime (2001); UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2001); ECOSOC Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2000); UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law (2005); UN Draft Principles Governing the Administration of Justice Through Military Tribunals (2006); UN Declaration on the Protection of All Persons from Enforced Disappearance (1992); UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989); Inter-American Convention to Prevent and Punish Torture (1985); Inter-American Convention on the Forced Disappearance of Persons (1994); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987); African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2005).

9 (D. Conn. 1980); *Sterling v. Cupp*, 290 Ore. 611 (Or. 1981); *Bott v. DeLand*, 922 P.2d 732 (Utah 1996), *overruled in part by Speckman v. Bd. of Ed.*, 16 P.3d 533 (Utah 2000).

II. International treaties, standards and decisions with regard to juveniles in state custody provide the following set of common principles as a framework for all issues regarding conditions of confinement of juvenile offenders in state facilities. In my opinion, the following principles express norms of customary international law applicable in U.S. courts:

1. **The term "child" includes all minors under the age of 18, and may include those over that age in some jurisdictions, especially as regards custody and treatment within juvenile justice system.**

The following two paragraphs set out relevant instruments, standards, and decisions that establish the existence of customary norms as to these enumerated principles. The *UN Convention on the Rights of the Child*, which entered into force in 1990, is the world's most widely ratified human rights treaty, with 193 ratifications. Only two countries, Somalia and the United States, have signed but not ratified the Convention. The Supreme Court cited to the Convention with approval in its opinion striking down the death penalty for juveniles, *Roper v. Simmons*, 543 U.S. 551, 576 (2005). The Court considered the treaty, despite its non-ratification by the United States, as evidence of the Eighth Amendment's prohibition of "cruel and unusual punishments."

Article 1 of that treaty provides that a child "means every human being below the age of 18 years, unless under the law applicable to the child, majority is attained earlier." Similar provisions are found in the most relevant international standards relating to juveniles. *UN Rules for the Protection of Juveniles Deprived of their Liberty* ("United Nations Rules"), Rule 11(a), G.A. res. 45/113, U.N. Doc. A/45/49 (1990); OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS AND THE INTERNATIONAL BAR ASSOCIATION, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS ("MANUAL ON HUMAN RIGHTS"), Chapter 10, "The Rights of the Child in the Administration of Justice," at Section 3, pp. 401-403 (2003). The Council of Europe is a body of 47 European nations, all bound by the European Convention on Human Rights. The European Committee of Ministers, the Council's decision-making body, recently adopted the *European Rules for Juveniles Subject to Sanctions or Measures* ("European Rules") (5 Nov. 2008). In Rule 21.1, "juvenile offender" is defined as anyone below the age of 18. The *African Charter on the Rights and Welfare of the Child* ("African Charter"), ratified by 43 of the 53 countries of Africa as of December 2008, contains a similar provision in its Article 2. OAU Doc. CAB/LEG/24.9/49 (1990).

Some variation is found in the *UN Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules), G.A. res. 40/33, U.N. Doc. A/40/53 (1985), where "juvenile" is defined as "a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different than an adult." Rule 2.2. The Commentary notes a "wide variety of ages coming under the definition of 'juvenile',

ranging from 7 years to 18 years or above. Such a variety seems inevitable in view of the different national legal systems and does not diminish the impact of these Standard Minimum Rules." The Inter-American Court of Human Rights is a tribunal of independent experts on human rights appointed by the Organization of American States, the regional body of the 35 countries of the Americas, all of which are members.[2] In its *Advisory Opinion OC-17/2002, Juridical Condition and Human Rights of the Child* ("Advisory Opinion OC-17"), ¶ 40 (Aug. 28, 2002), the Court adopts a similar approach, noting that "the difference between those over and under 18 will suffice."

2. A primary consideration in all actions concerning children is the best interests of the child.

Article 3(1) of the Convention on the Rights of the Child is the key provision on the principle of best interests, and provides: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration*." (emphasis added). Reference is made to the "best interests" standard throughout the substantive protections of that treaty, in Articles 3, 9, 18, 20, 21, 37 and 40. Similar provisions can be found in the predecessor UN document on children, the 1959 *UN Declaration on the Rights of the Child*, in its Principle 2. G.A. res. 1386 (XIV), U.N. Doc. A/4354 (1959). *See also*, MANUAL ON HUMAN RIGHTS, Chapter 10, "The Rights of the Child in the Administration of Justice," at Section 4.2, p. 405-406 (2003); European Rules, Rule 5; African Charter, Article 4. Article 17(1) of the African Charter goes further, and links the issue of best interests to the issue that follows, that of reform and rehabilitation: "Every child accused or found guilty of having infringed penal law shall have *the right to special treatment* in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others." (emphasis added). The Inter-American Court of Human Rights extensively discusses and adopts the "best interests" standard in its Advisory Opinion OC-17. ¶¶ 56-61.

3. The aim of any system of juvenile justice must be child's reform, rehabilitation and social reintegration.

"The delinquent child must be reclaimed." In 1924, the League of Nations adopted the earliest modern statement on the rights of the child, indeed on any human right, the *Geneva Declaration of the Rights of the Child*, League of Nations O.J. Spec. Supp. 21, at 43, Article (2) (Sept. 26, 1924). The Declaration contains the ringing endorsement of the first sentence above, extolling rehabilitation as a primary goal of juvenile justice. The International Covenant on Civil and Political Rights ("ICCPR"), which has been ratified by the United States and 163 other countries, as of August 2009, provides that, "[i]n the case of juvenile persons the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation." G.A. res. 2200A (XXI) (16 Dec. 1966).

[2] Cuba and Honduras are currently excluded from participation.

In Article 40, the Convention on the Rights of the Child states that governments are obliged to treat children who have infringed criminal laws so as to recognize "the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." The Committee on the Rights of the Child adopted General Comment 10, *Children's Rights in Juvenile Justice*, in 2007. The General Comments interpret treaty principles in greater depth, and this one provides that children deprived of their liberty "should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement." ¶ 89. U.N. Doc. CRC/C/GC/10 (25 April 2007). The United Nations Rules, Rule 12, put the principle into greater detail:

> The deprivation of liberty should be affected in conditions and circumstances which ensure respect for the human rights of juveniles. Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.

See also, African Charter, Article 17(3) ("the essential aim of treatment for every child . . . shall be his or her reformation, re-integration into his or her family and social rehabilitation"; European Rules, Rule 50.1 ("Juveniles deprived of their liberty shall be guaranteed activities and interventions . . . that aims at . . . preparation for release and reintegration into society"); American Convention on Human Rights, Article 5(6) ("punishments consisting of deprivation of liberty shall have as an essential aim the reform and rehabilitation of the prisoners").

4. Juvenile detainees are entitled to healthful and hygienic conditions of confinement.

The sine qua non of the best interests of detained children is the conditions of confinement in detention facilities. The core requirements for conditions of confinement can be summed up in a statement by the UN Committee on the Rights of the Child, which stated, in its General Comment 10:

> Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities. ¶ 89.

The Beijing Rules state: "The objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society." Rule 26.2 Children are entitled to "facilities and services that meet all the requirements of health

and human dignity." United Nations Rules, Rule 31. The rules go on to include provisions on sanitary installation, in Rule 34 ("Sanitary installations should be so located and of a sufficient standard to enable every juvenile to comply, as required, with their physical needs in privacy and in a clean and decent manner"), and, in Rule 36, issues regarding clothing ("Detention facilities should ensure that each juvenile has personal clothing suitable for the climate and adequate to ensure good health, and which should in no manner be degrading or humiliating."). Similarly, the European Rules provide, in Rule 66.3, that suitable clothing "is clothing that is not degrading or humiliating." The latter standards seem particularly relevant to the descriptions given by girls and experts of the use of revealing "suicide barrel" gowns or smocks in the security facility. See, Nelson Declaration, at ¶ 7 ("they remove their regular clothing along with their bras and change into a suicide 'barrel', a padded dress with openings for the head and arms"); Grassian Declaration at ¶ 18 ("Girls on 'suicide alert' (SA) in security experience additional burdens. After they remove all their clothes and underwear, they are required to wear only a 'barrel' garment fastened together with velcro. The velcro tabs are worn and old, and can easily become unfastened, especially during any restraint maneuver. Thus girls on SA status are often rendered naked in front of male as well as female staff."); H.H. Declaration at ¶ 4 ("The gowns . . . are old and not washed right; plus, the Velcro is worn out and they pop open easily."), and ¶ 5 ("My gown popped open . . . [and] Mr. Quinn could see everything."); B.B. Declaration at ¶ 7 ("I . . . sit in a dirty room half-naked . . ."); D.D. Declaration at ¶ 9 ("Those gowns they give you on SA don't cover anything. I have seen girls get restrained in their SA [security alert] gowns, and the gowns just fall off. Any male staff in security can just see them naked being restrained.") Finally, the European Rules also require that "all parts of every institution shall be . . . kept clean at all times," (Rule 65.1); that juveniles "shall have ready access to sanitary facilities that are hygienic and respect privacy," (Rule 65.2), and that they "have a bath or shower daily if possible" (Rule 65.3).

All statements, from both experts and girls, indicate that conditions in the security facility are fetid, unsanitary, and repulsive. Grassian Declaration at ¶ 15 ("many girls described these cells as filthy, often coated with blood, urine and feces. Several thought they had acquired Staph skin infections while housed in security"); H.H.. Declaration at ¶ 4 ("there are feces, pee, and blood on the walls, and sometimes girls get staph infections from being in there"); E.E. Declaration at ¶ 6 ("They don't clean it regularly, and there is sometimes blood and gross stuff on the walls and floor."); I.I. Declaration at ¶ 9 ("I do not really feel safe in security because it's grimy in there."); D.D. Declaration at ¶ 9 ("They don't clean the rooms, there's blood on the walls, and it smells bad. The shower is nasty – it's a black cage with just a trickle of water. My face breaks out badly when I go to security. Once I think I got a staph infection from being in there."); C.C. Declaration at ¶ 8 ("Rooms are nasty in security and don't get cleaned daily. The walls and floors are sometimes covered with blood and feces."); B.B. Declaration at ¶ 7 ("I can't stand going to security. The cells are filthy. It is dehumanizing to have to sit in a dirty room . . ."); B.P. Declaration at ¶ 8 ("it is nasty and dirty – there is pee all over the walls.")

5. **Young female offenders are particularly vulnerable, and the state owes a higher duty to effectively care for that population while in its custody.**

The MANUAL ON HUMAN RIGHTS, Chapter 10, "The Rights of the Child in the Administration of Justice," at Section 2, p. 400, notes that "young female offenders are particularly vulnerable and their needs must be effectively addressed." In 1980, the Sixth UN Congress on the Prevention of Crime and Treatment of Offenders, held in Caracas, Venezuela, passed Resolution 9, on "Specific Needs of Women Prisoners." U.N. Doc. A/CONF.87/14 (30 Oct. 1980). The resolution pointedly noted that women prisoners "often do not receive the same attention and consideration as do male offenders," and asked that "recognition should be given to the specific problems of women prisoners and the need to provide the means for their solution" by the Congress. The Beijing Rules, adopted some years later, now provide as follows: "Young female offenders placed in an institution deserve special attention as to their personal needs and problems. They shall by no means receive no less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured." Rule 26.4

The European Committee for the Prevention of Torture ("CPT"), an official organ of the 47-country Council of Europe, issued its *Safeguards against the Ill-Treatment of Juveniles* as part of its Ninth General Report in 1998. In it, the CPT concluded that "it is particularly important that girls and young women deprived of their liberty should enjoy access to such activities on equal footing with their male counterparts." ¶ 31(2) The Committee linked the special needs of girls to the hygiene principle discussed above, in principle 5: "The CPT . . . has observed a tendency to overlook the personal hygiene needs of female detainees, including juvenile girls. For this population in custody, ready access to sanitary and washing facilities as well as the provision of hygiene items, such as sanitary towels, is of particular importance." ¶ 30. These provisions seem particularly relevant to the conditions reported by girls held in security at TYC-Brownwood.

6. **The principle of proportionality requires that responses to juvenile offenders be based on each child's personal circumstances, including situations involving past physical, mental or sexual abuse, or other psychological factors in child's individual background, and medications should be administered only for individualized treatment, by qualified medical personnel.**

If the first objective of a system of juvenile justice is the best interests and well-being of the child, the second objective must be the principle of proportionality. That principle means that "the response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances." Such circumstances may include "social status, family situation, the harm caused by the offence or other factors." MANUAL ON HUMAN RIGHTS, Chapter 10, "The Rights of the Child in the Administration of Justice," at Section 5, at 409 (2003) (citing to Rule 5.1 of The Beijing Rules and its Commentary). AMNESTY INTERNATIONAL, FAIR TRIALS MANUAL 137 (1998) ("Any penalty must be proportional to the gravity of the offence and the circumstances of the young person."). General Comment 8 of the Committee on the Rights of the Child, *The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading forms of Punishment*, puts it eloquently in its ¶ 21: "The

distinct nature of children, their initial dependent and developmental state, their unique human potential as well as their vulnerability, all demand the need for more, rather than less, legal and other protection from all forms of violence." U.N. Doc. CRC/C/GC/8 (2 March 2007).

"Particular care shall be taken of the needs of juveniles who have experienced physical, mental or sexual abuse." European Rules, Rule 52.2, and Rule 73(f) ("Particular attention should be paid to the needs of . . . juveniles who have experienced physical, mental or sexual abuse."). As part of the overall approach of the European Rules, deprivation of liberty is to be carried out "in a manner that does not aggravate the suffering inherent in it," Rule 49.1, and "[a]s juveniles deprived of their liberty are highly vulnerable, the authorities shall protect their physical and mental integrity and foster their well-being." Rule 52.1.

Both experts who visited the facility and girls being held at TYC-Brownwood identified aggravation of past trauma: Grassian Declaration at ¶ 11 ("Every girl whom we interviewed manifested severe psychiatric illness and a staggering history of trauma." Specific trauma is described), and ¶ 12 ("staff dealing with these children have virtually no knowledge of these psychiatric difficulties and traumatic histories. . . Upon inquiry, the staff of the security unit were explicit in declaring that they had no knowledge of the psychiatric history of any of the children who were housed in security. . . Explicitly, the emotional background of the child was not relevant [to the psychological staff]."), and ¶ 21 and 22 ("There were many complaints about the unavailability of the psychiatrist and the difficulty of having medications reviewed. . . The issue of appropriate medication management is inextricably bound up with the behavioral and disciplinary problems these girls face at Brownwood"); Nelson Declaration at ¶ 5 ("most of the interviewees provided verbal lists of psychotropic medications that she had been prescribed while at Brownwood. Most interviewees relayed histories of sexual and physical abuse and other trauma that led to anti-social behaviors, ungovernability or running away from home, and substance abuse or self-medicating. . . Despite their ubiquitous mental health problems, interviewees reported that they did not trust most of the staff, [and] that they do not have any staff members whom they feel comfortable talking to about their problems. . ."), and ¶ 8 ("Isolating a child who is depressed or may be suicidal or self-destructive is not considered an effective intervention. . . A healthy relationship with a trusted adult is considered a more beneficial approach to suicide prevention than confinement and isolation."); I.I. Declaration at ¶ 9 ("I would like to get more counseling, but I haven't been able to speak to a doctor since I've been here. I have never been to group therapy."); F.F. Declaration at ¶ 4 ("I don't like to be touched by male guards, because it reminds me of some things in my past. . ."), and ¶ 6 ("Due to some things that have happened to me in my past, I hate it when people [staff member] pull my hair."); D.D. Declaration at ¶ 6 ("The very first time I was sent to security it was for saying that I did not feel safe in my room and that I wanted to speak to someone like a counselor. Instead of talking to me or helping me, they referred me to security on suicide alert (SA) and I was put in a room by myself, which is exactly what I didn't want."); B.P. Declaration at ¶ 6 ("Once when I self-referred to security I got caught with candy and was strip-searched. This brought back bad memories of things that happened to me when I was little.").

Of particular importance in this litigation is Rule 70.2, which states that "[s]pecial procedures shall be developed and implemented to prevent suicide and self-harm by juveniles, particularly during their initial detention, segregation and other recognized high risk periods." In this regard, The United Nations Rules provide that medicines "should be administered only for necessary treatment on medical grounds and, when possible, after having obtained the informed consent of the juvenile involved. In particular, they shall not be administered . . . as a punishment or as a means of restraint." Such medications should only be administered by "qualified medical personnel." Rule 55. Here, also, the experts and girls describe non-compliance with these standards: Grassian Declaration at ¶ 14 ("Some of the referrals to security were a result of concern that the child might be 'suicidal.' One youngster asked to speak to a counselor, saying that she did not feel 'safe' in her room. Without even asking her what she meant by 'safe', staff referred her to security, where she was strip-searched and left in a barren cell with no one to talk to, nothing to distract her from her painful thoughts."); F.F. Declaration at ¶¶ 7 and 8 ("Now I don't have a way to talk about how I am feeling when I don't trust staff. . . My suicidal feelings have gotten worse since I have been at Brownwood. It makes me upset because we are here to get help but I don't receive my counseling to discuss my problems; we are just given medication."); H.H. Declaration at ¶ 8 ("I feel like this place is making me psycho.").

III. The customary international law norm prohibiting cruel, inhuman or degrading treatment of adults is unequivocally established in US law. Children are inherently entitled to a higher standard of care with regard to that norm. It is my opinion that this customary norm is violated by the practice of isolation or solitary confinement of juvenile girls in state detention facilities. Girls subjected to the security regime at TYC-Brownwood suffer degrading, if not cruel and inhuman treatment or punishment.

International law contains exhaustive references to the prohibition against "torture or other cruel, inhuman or degrading treatment or punishment." The formulation is the central construct of the *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment* ("Torture Convention"), G.A. res. 39/46 (10 Dec. 1984), a treaty to which the United States and 145 other nations are parties, as of August 2009. As such, the treaty constitutes strong evidence of customary international law. Its prohibition on torture or other cruel, inhuman or degrading treatment or punishment is reflected in numerous other global and regional human rights treaties. ASSOCIATION FOR THE PREVENTION OF TORTURE AND CEJIL, TORTURE IN INTERNATIONAL LAW: A GUIDE TO JURISPRUDENCE (2008). Moreover, the prohibition on cruel, inhuman or degrading treatment is among the most recognized of customary international norms in the U.S. courts, since the seminal case of *Filártiga v. Peña,* 630 F.2d 876 (2d Cir. 1980). That case, now nearly 30 years ago, exhaustively examined the customary law with regard to torture and cruel, inhuman, or degrading treatment, and found a customary international law prohibition against torture. The *Filártiga* line of cases was recently reaffirmed in the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*, discussed above. 542 U.S. 692.

International human rights law further requires that anyone deprived of his or her liberty "be treated with humanity and with respect and the inherent dignity of the human person." The ICCPR, a treaty cited above, and ratified by the United States, contains both the prohibition of torture or cruel, inhuman or degrading treatment, in Article 7, as well as this one, in its Article 10. The two provisions must be read together, and in conjunction with the Torture Convention discussed in the previous paragraph, when discussing norms of customary international law.

The United States, upon ratification of both the ICCPR and the Torture Convention, took similar reservations to Article 7 of the ICCPR,[3] and to Article 16 of the Torture Convention.[4] These reservations were meant to limit U.S. obligations under the treaty to the scope of the Eighth Amendment's "cruel and unusual" language. However, the first report of the United States on its compliance with Article 7 of the ICCPR makes clear that "[c]ruel and unusual punishments include uncivilized and inhuman punishments, punishments that fail to comport with human dignity, and punishments that include physical suffering." *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, Initial report of State parties due in 1993, Addendum, United States of America*, U.N. Doc. CCPR/C/81/Add.4 (1994), at ¶ 150. As to Article 10, the government asserts that "prisoners are treated with humanity and respect for their dignity, commensurate with their status." *Id*. at ¶ 259 In the section of its report on Article 7, the government argues that even adult prison inmates can be subjected to segregation "only in unusual circumstances." *Id*. at ¶ 155 Moreover, the United States argued that segregation "is not solitary confinement" because inmates "are permitted to read and to correspond. Depending upon the reason for their segregation, they may be permitted to listen to the radio and watch television if available." Id. at ¶ 160 In segregation, too, inmates "have limited contact with other inmates and with staff, but under no circumstances will they be denied all human contact." *Id*. at ¶161. Such is not the case for girls at TYC-Brownwood, where all contact with other girls is barred, and even reading is not permitted. (See references to declarations below.) The Human Rights Committee, in response to the United States' first report, urged that: "[c]onditions of detention in prisons, in particular in maximum security prisons, should be scrutinized with a view to guaranteeing that persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person." *Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/79/Add.50, A/50/40 (1995).

Torture is not alleged here, but in my opinion girls in TYC-Brownwood have been subjected to cruel, inhuman, or degrading treatment. If the heightened standard of care

[3] The United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

[4] T]he United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment", only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

for juveniles – and especially for girls – is applied to their situation, violations of this norm are patently obvious. Placement into "security" – the security building or unit – at TYC-Brownwood is routine, frequent, and sometimes prolonged, with many girls reporting referral on scores of occasions, often for trivial violations of prison rules. Once in security, the girls are in virtual isolation or solitary confinement in single cells equipped with a concrete shelf serving as a bed and a toilet, with a small window slot in the back. No reading or other activity is permitted, and they leave their cells only to shower, once a day. As documented below, referral is *always* accompanied by handcuffing and forced nudity to remove undergarments, allegedly for the safety of the girls.

Experts' and girls' declarations clearly document this pattern: Grassian Declaration at ¶ 8 ("staff recurrently act from one paradigm and one paradigm alone – the paradigm that if you punish unwanted behavior harshly, over and over again, the behavior will eventually improve."), and ¶ 15 ("there is no opportunity for any distraction. There is no television or radio. Books are not provided in security. Education materials are not provided. The Bible, being a book, is not provided. Nothing at all is provided."), and ¶ 25 *et seq*. ("The interviews, as well as the document review, reveal an attitude of control for control's sake, even for trivial matters."); Nelson Declaration at ¶ 8 ("Isolating a child who is depressed or may be suicidal or self-destructive is not considered an effective intervention."), and ¶ 11 (listing grounds for referral and actual reports of referrals. "Based on my review of documents and interviews with residents at Brownwood, I must conclude that referrals and admissions to the security unit are excessive in frequency and duration, with nebulous or ambiguous explanations. . ."); F.F. Declaration at ¶¶ 2 and 4 (30 to 40 referrals since March 2008); H.H. Declaration at ¶ 4 ("I have been referred to security somewhere around 500 times, and I was admitted most of the time."); I.I. Declaration at ¶¶ 2 and 4 (29 referrals to security since December 2008), and ¶ 5 ("The longest I have stayed in security was recently for two weeks. . . The isolation was difficult because I never got to come out of the rooms or stretch or anything when I was on the IDP program. All I was allowed to do was take a shower and go back to my rooms."); E.E. Declaration at ¶ 4 ("I have been referred to security over 200 times, and admitted over 100 times . . . Most of the girls in security are on meds and just sleep all day.") and ¶ 6 ("Most of the girls usually lie on the floor near the cell door, so they can talk to other girls through the space under the door."); D.D. Declaration at ¶ 9 ("During those 3 days on IDP and SA I just slept. I didn't even want to eat because that would mean waking up and dealing with how awful it is in there. There is nothing to do."); C.C. Declaration at ¶ 8 ("When I'm over there I just sit in the cell all day. There's no reading materials if you are there for just a few days – only program girls get books. . . There's nothing to do and there's nothing in the room but the toilet. We even have to ask for toilet tissue. They bring you your food in the cell and you have to eat in your room.").

Many federal courts, including the Court of Appeals of this Circuit, have recognized the customary prohibition on cruel, inhuman or degrading treatment. *Najarro de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985)(finding that "the standards of human rights that have been generally accepted – and hence incorporated into the law of nations – . . . [include] such basic rights as the right not to be . . . tortured,

or otherwise subjected to cruel, inhuman or degrading punishment."); *Aldana v. Del Monte Fresh Produce, N.A., Inc.,* 452 F.3d 1284 (11th Cir. 2006) ("When one looks to the sources of international law identified in *Sosa* – treaties, judicial decisions, the practice of governments, and the opinions of international law scholars – it is clear that there exists a universal, definable, and obligatory prohibition against cruel, inhuman, or degrading treatment or punishment"); *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (post-*Sosa* decision stating that cruel, inhuman, or degrading treatment or punishment has been condemned by numerous sources of international law and holding that conduct sufficiently egregious may be found to constitute cruel, inhuman, or degrading treatment or punishment under the Alien Tort Claims Act, 28 U.S.C. § 1350); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 437 (S.D.N.Y. 2002), *rev'd on other grounds by* 386 F.3d 205 (2d Cir. 2004) ("That it may present difficulties to pinpoint precisely where on the spectrum of atrocities the shades of cruel, inhuman, or degrading treatment bleed into torture should not detract from what really goes to the essence of any uncertainty: that, distinctly classified or not, the infliction of cruel, inhuman, or degrading treatment by agents of the state, as closely akin to or adjunct of torture, is universally condemned and renounced as offending internationally recognized norms of civilized conduct."); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *8 (S.D.N.Y. Feb. 28, 2002) (holding cruel, inhuman, or degrading treatment or punishment actionable under ATCA); *Jama v. I.N.S.*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998) ("American Courts have recognized that the right to be free from cruel, unhuman or degrading treatment is a universally accepted customary human rights norm"); *Xuncax v. Gramajo,* 886 F. Supp. 162, 186 (D. Mass. 1995) (holding that "[t]he international prohibition against [cruel, inhuman, or degrading treatment or punishment] appears to be no less universal than the proscriptions of official torture"); *Paul v. Avril,* 812 F. Supp. 207 (S.D. Fla. 1993) (entering default judgment against former Haitian military ruler on behalf of six alien plaintiffs for ATCA claims of cruel, inhuman, or degrading treatment or punishment); *Tavaras v. Tavaras*, 397 F. Supp. 2d 908, 915 (S.D. Ohio 2005) (post-*Sosa* case citing *Sosa* and concluding that the law of nations prohibits cruel, inhuman, or degrading treatment); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1181 (C.D. Cal. 2005) (finding claims of cruel, inhuman, or degrading treatment actionable). Finally, as noted by the Fifth Circuit in *Najarro de Sanchez v. Banco Central de Nicaragua*, cited above, at 1397, the norm against cruel, inhuman, and degrading treatment is explicitly included in the Restatement Third among those customary norms that constitute violations of international law in the United States. § 702(d).

The term "degrading treatment or punishment" is found in Article 16 of the Convention Against Torture, but is not explicitly defined there. One of the leading authorities on the law in this area is Prof. Manfred Nowak, who has written a treatise, with Elizabeth McArthur, entitled THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY (2008) ("Nowak and McArthur"). That treatise extensively discusses Article 16, and defines cruel, inhuman or degrading treatment as follows: "the infliction of severe pain or suffering, whether physical or mental, by or at the instigation of or with the acquiescence of a public official acting in an official capacity." "Degrading" treatment is defined as "the infliction of pain or suffering, whether mental or physical, which aims at *humiliating* the victim. Even the infliction of pain or suffering which does

not reach the threshold of 'severe' must be considered as degrading treatment or punishment if it contains a particularly humiliating element." (Both at 558, emphasis in original). In his companion treatise on the ICCPR, Prof. Nowak cites examples from individual complaints to the Human Rights Committee as examples of "degrading treatment." They include repeated solitary confinement "aimed at humiliating prisoners and making them feel insecure," forcing women to maintain certain positions for long periods of time, guards throwing food and water on the floor, and the repeated soaking of inmate mattresses by guards. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 165-166 (2d ed. 2005).

The norms, standards, and cases discussed above apply the prohibition against cruel, inhuman, or degrading treatment to adults, although the treaties themselves prohibit violations against "anyone." The general principles in the first section of this report require a heightened standard of care for children, and especially female juvenile detainees. This concept is explicitly recognized in the jurisprudence of the Inter-American Court of Human Rights, which sits in San Jose, Costa Rica, and animates their decisions dealing with juveniles. In *Juvenile Reeducation Institute v. Paraguay*, I/A Court H.R., Series C No. 112, Judgment of Aug. 31, 2004.[5] The Court found that in cases involving the right to humane treatment of children deprived of their liberty "the standard applied to classify treatment or punishment as cruel, inhuman or degrading must be higher in the case of children." *Id.* at ¶ 162*; see also Gomez-Paquiyauri Brothers v. Peru*, I/A Ct. H.R., Series C No. 110, Judgment of July 8, 2004, at ¶ 117 (finding torture on the facts, "taking especially into account that the alleged victims were minors"). The Inter-American Commission on Human Rights, too, has followed this theory. *See, e.g.*, *Minors in Detention v. Honduras*, Report No. 41/99, March 10, 1999, at ¶ 113 ("There is a clear tendency in international human rights law to afford greater protection to minors than to adults . . . This is why States are required to afford them greater guarantees in the event of their detention, which should only be an exceptional measure"); *Hernandez v. El Salvador*, Report No. 7/94, Feb. 1, 1994, at ¶ 11(3)(c) ("the victim is a minor and must be given all the necessary guarantees of due process and the special treatment that is her right as a minor"); *DaFonseca v. Brazil*, Report No. 33/04[1], March 11, 2004, at ¶ 64 ("in the case of children the highest standard must be applied in determining the degree of suffering, taking into account facts such as age [and] sex . . ."). These cases, too, are consistent with Article VII of the *American Declaration on the Rights and Duties of Man*, which gives children the right to "special protection, care and aid," although the decisions do not explicitly rely on the language of the Declaration. O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

Recourse to legitimate disciplinary measures against juveniles deprived of their liberty is certainly legitimate. Under international law, such measures may be used for the purpose of maintaining "the interest of safety and an ordered community life," but "should be consistent with the upholding of the inherent dignity of the juvenile and the fundamental objective of institutional care, namely, instilling a sense of justice, self-respect and

[5] Decisions of the Court can be found in English at http://www.corteidh.or.cr/casos.cfm.

respect for the basic rights of every person." United Nations Rules, Rule 66. The same rules, however, "strictly prohibit" the practice of "closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned." Rule 67. This same prohibition on the use of closed or solitary confinement of juveniles is contained in General Comment 10 of The Committee on the Rights of the Child. ¶ 89. The Committee elaborates, in its General Comment 8, by distinguishing between "the use of force motivated by the need to protect a child or others and the use of force to punish." ¶ 15. The same paragraph goes on to note that the "principle of the minimum necessary use of force for the shortest necessary period of time must always apply," as must guidance and training to "minimize the necessity to use restraint." The Committee Against Torture, the official UN body that oversees the Torture Convention, has itself called for the abolition of solitary confinement. Nowak and McArthur, *supra*, at 548-549.

The European Rules broadly prohibit any sanction or measure that will "humiliate or degrade" juveniles, Rule 7, and such measures "shall not be implemented in a manner that aggravates their afflictive character or poses undue risk of physical or mental harm," Rule 8. Sanctions are to apply the principle of minimum intervention: "only to the extent and for the period strictly necessary." The Rules are also quite explicit on the prohibition of solitary confinement. They bluntly state: "Solitary confinement in a punishment cell shall not be imposed on juveniles." Rule 95.3 The Commentary to that rule describes a punishment cell as "a bare cell which has no basic facilities, for example has no or only a concrete bed." *Draft Commentary to the European Rules for Juvenile Offenders Subject to Sanctions or Measures*, CM Documents, CM(2008) 128 addendum 1 (1 Sept. 2008). Without further defining that term, however, the Rules distinguish solitary confinement from both segregation and isolation. "Segregation," under the Rules, "shall only be imposed in exceptional cases where other sanctions would not be effective. Such segregation shall be for a specified period of time, which shall be as short as possible. The regime during such segregation shall provide appropriate human contact, grant access to reading material and offer at least one hour of outdoor exercise every day if the weather permits." Rule 95.4 "Isolation" is limited to the following circumstances: "a calming down cell as a means of temporary restraint shall only be used exceptionally and only for a few hours and in any case shall not exceed twenty-four hours. A medical practitioner shall be informed of such isolation and given immediate access to the juvenile concerned." Rule 91.4 The European Committee for the Prevention of Torture, commenting on the European Rules, argued that the 24-hour maximum for isolation was "too long," as confinement "for this purpose should not be necessary for more than a few hours." Moreover, the Committee argued that the "specified period of time" for segregation should not exceed three days. European Committee on Crime Problems, *Comments of the CPT on the Draft European Rules for Juvenile Offenders (doc. PC-CP (2006) 13 rev9)* (15 May 2008), at ¶ 8.

Additional support for the limitation on confinement in isolation comes from one of the global tribunals adjudicating individual complaints of human rights violations. The Human Rights Committee, the official UN body whose responsibility is oversight of the ICCPR, recently decided the case of *Corey Brough v. Australia*, Communication No.

1184/2003, U.N. Doc. CCPR/C/86/D/1184/2003 (2006). The case involves a young Aboriginal boy of 16 at the time of his confinement with mild mental disabilities. He was forcibly stripped and kept in what was called a "dry cell" for 48 hours, and a few days later for 72 hours, without a pillow or blanket, which had been taken because of guards' belief that he had exhibited suicidal impulses and was obstructing the view into his cell. ¶¶ 2.4-2.10 The Committee found him to have been a victim of inhuman treatment under Article 10 of the ICCPR, discussed above, recalling that "persons deprived of their liberty *must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty*; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons." ¶ 9.2 (emphasis added). The highlighted portions of this passage make clear that the Committee does not favor any form of isolation or solitary confinement. The Committee concluded that "even assuming that [Braugh's] confinement to a safe or dry cell was intended to maintain prison order or to protect him from further self-harm, as well as other prisoners, the Committee considers that the measure [sic] [is] incompatible with the requirements of article 10." The Committee took Braugh's suicidal actions to be proof of "the hardship of his imprisonment," which suggests that isolation may well only exacerbate aberrant behaviors. ¶ 9.4.

The Inter-American Commission on Human Rights, citing to Article 37 of the Convention on the Rights of the Child,[6] notes in its report on terrorism that its decisions reflect the principle that "children must never be kept *incommunicado*." INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON TERRORISM AND HUMAN RIGHTS (2002) at ¶ 172. Taken together, the collected decisions of UN and regional human rights bodies provide overwhelming evidence of a customary norm of international law barring the use of solitary confinement, isolation or segregation as punishment of juveniles in confinement.

IV. In my opinion, strong evidence exists of a customary norm barring the use of restraints such as handcuffs or pepper spray as punishment. Restraints such as handcuffs must not be applied routinely or for longer than is strictly necessary, and toxic chemicals such as pepper spray are always inappropriate, as they are banned even in wartime, whether lethal or not.

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[6] Article 37 reads, in relevant part: "States Parties shall ensure that: *(a)* No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. . .; *(b)* . . . The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; *(c)* Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. . ."

"There is no ambiguity: 'all forms of physical or mental violence'[7] does not leave room for any level of legalized violence against children . . . [C]ruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them." Committee on the Rights of the Child, General Comment 8, ¶18 (no footnote in original). Handcuffs and pepper spray are routinely used during transportation of girls at TYC-Brownwood to the security facility, even when the girl offers no resistance. Cuffs are left on if the girl refuses to disrobe and remove her underwear, so isolation begins in restraints. Handcuffing is reported even for showers in the secure facility. H.H. Declaration at ¶ 5 ("He grabbed my feet and pulled them up after I was already restrained. They basically hog-tied me and carried me to 200 pod in the SA dorm."), and ¶ 7 ("I have been pepper sprayed like 10 times. . . Every time you get shipped, you are cuffed by the officers and put in a van."); I.I. Declaration at ¶ 6 ("I told them they did not have to restrain me because they had my compliance, but they did anyway. In the van on the drive to security, the officers kept provoking and threatening me with a pepper spray bottle. They put me in shackles and took me to a security cell. Later they dragged me out of the room by my feet. They only do these things when the cameras are not around."), and ¶ 7 ("I have been pepper sprayed 2 times since I have been at Brownwood."); F.F. Declaration at ¶ 4 ("They handcuffed me and then grabbed my arm to escort me to security . . ."); D.D. Declaration at ¶ 7 ("I was complying and on my way to security when he restrained me. Regardless of whether you resist, every time you are shipped to security you are handcuffed and put in a van."); C.C. Declaration at ¶ 6 ("Every time you get sent to security you are cuffed by the officers and put in a van, even if you don't resist."), and ¶ 7 ("When I got [to security], I refused to change over and give them my underwear. So they left me in the cell in handcuffs for about an hour."), and ¶ 8 ("They put you in handcuffs and take you to the shower . . ."); B.P. Declaration at ¶ 8 ("Every time you get sent to security you are cuffed by the guards and put in a van, even if you don't resist."); S.D. Declaration at ¶ 8 ("Lately there has been a string of violent restraints at Brownwood. Using pepper spray is harmful and being around it with my asthma makes me sick and I start to choke. I have never been pepper sprayed, specifically, but I have been around when they are pepper spraying someone else, which caused me to become sick and dizzy"), and ¶ 9 ("Every time you get sent to security you are cuffed by the officers and put in a van."); Grassian Declaration at ¶ 9 ("But the overall tone, and the majority of interactions with staff, bespoke an excessive need for control [and] an excessive use of force. . ."") and ¶ 16 ("The only diversion [in the security facility] is the opportunity to be led out of one's cell in the morning, handcuffed, to take a shower in a cage in the unit."), and ¶ 19 ("Girls who are being compliant with staff [during transportation to security] are still handcuffed. Girls who ask to be able to walk to the security unit are still put into a van."), and ¶ 25 ("The interviews, as well as the document review, reveal an attitude of control for control's sake, even for trivial matters."). Such practices constitute punishment for punishment's sake, not security, and are prohibited under international law.

[7] The quoted language comes from Article 19 of the Convention on the Rights of the Child, which requires states to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse . . .".

General Comment No. 10 of the Committee on the Rights of the Child, in ¶89, provides, in some detail, principles on the use of force or restraint:

> Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted. The use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment . . . ; Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care . . . ."

A similar provision can be found in the United Nations Rules, which provide as follows, in Rules 63 and 64:

> 63. Recourse to instruments of restraint and to force for any purpose should be prohibited, except as set forth in rule 64 below.
>
> 64. Instruments of restraint and force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorized and specified by law and regulation. They should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time.

The European Rules are quite specific. Rule 91.1 provides that "handcuffs . . . shall not be used except when less intrusive forms of use of force have failed . . . (and) if essential as a precaution against violent behavior or escape during a transfer." Similarly, Rule 91.2 provides that "instruments of restraint shall not be applied for any longer time than is strictly necessary." The Commentary to Rule 91 provides that handcuffs "should never be used routinely and only for a limited period."

Most global and regional human rights jurisprudence in the area of physical restraint while in detention involves severe mistreatment. The European Court of Human Rights does apply principles that are relevant in this context. The Court has emphasized, for example, that "in respect of [an adult] person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity" and its infringement is, in principle, a violation of the prohibition on cruel, inhuman, or degrading treatment. *Ribitsch v. Austria*, Case No. 42/1994/489/571, 21 November 1995 (finding that hitting and other mistreatment of person in police custody constituted both inhuman and degrading treatment). Similarly, the state has positive obligations to deter and prevent violence against children. "Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity." *A v. United Kingdom*, Case No. 100/1997/884/1096, Judgment of 23 Sept. 1998 (child abuse by stepfather).

I have found no standard or case dealing with the issue of pepper spray. However, it should be noted that the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction ("Chemical Weapons Convention") bans the use of "riot control agents as a method of warfare." Article 1.5. There are 188 states party to the Chemical Weapons Convention, making it strong evidence of the existence of a customary norm barring the use of such sprays in wartime. If barred in armed conflict, pepper spray should not be used against girls in detention at all.

V. In my opinion, customary international law recognizes that subjecting girls in state custody to routine removal of clothing and undergarments, including strip searches or other required non-private nudity constitutes degrading, if not cruel and inhuman treatment. When girls are required to undress or subjected to personal and body searches, that procedure should be carried out only by medical personnel or female officials and in a manner consistent with the dignity of the girl being searched.

Most international treaties and standards dealing with juvenile detention deal with protection of humane conditions of confinement, in which the dignity of the girl is maintained. Forced nudity or strip searches are not generally addressed in the rules, but are almost certainly degrading, particularly for girls with histories of abuse or sexual mistreatment. However, the European Rules do address the issue. Rule 89.2 provides that searches "shall respect the dignity of juveniles concerned and as far as possible their privacy. Juveniles shall be searched by staff members of the same gender. Related intimate examinations must be justified by reasonable suspicion in an individual case and shall be conducted by a medical practitioner only." The Commentary to that section provides that intimate searches "must be the rare exception."

Again, the girls and the experts describe a routine pattern at TYC-Brownwood of forced nudity and constant, routine degradation and humiliation during processing into security cells, with ongoing restraint being the consequence of refusal to disrobe, as described above. H.H. Declaration at ¶ 7 ("Regardless of whether you are admitted or have tried to harm yourself, when you get to security you have to remove your bra and underwear in front of whoever is standing there. If they ask us to remove our panties and we are on our period, we don't have to remove them but we have to prove that we are on our period."); E.E. Declaration at ¶ 7 ("When I got to security, they asked me to remove my underwear but I refused, so they left me handcuffed to the cell"); C.C. Declaration at ¶ 7 ("Eventually I said I would remove my underwear. Ms. Matta came and took of [sic] my handcuffs, but then she stood in the doorway watching me. This made me uncomfortable and I asked her not to watch, but she wouldn't look away. When I still refused to change over, she started trying to put the cuffs back on my and I resisted. Another staff came in and both of them tried to restrain me. Eventually, Mr. Clemons came over and calmed me down. Another staff member agreed to shut my door while I removed my underwear."); S.D. Declaration at ¶ 9 ("Regardless of whether you are admitted or have tried to harm yourself, when you get to security you still have to remove your bra and underwear in front of whoever is standing there. This feels like a strip search."); Grassian Declaration

at ¶ 12 ("Explicitly, the emotional background of the child was not relevant. If the procedure was to strip search, the girl was strip searched."). *See also* factual allegations included in Section II(4) above.

International human rights tribunals have dealt with extreme forms of intimate searches. In *X and Y v. Argentina*, Report No. 38/96, Oct. 15, 1996, the Inter-American Commission on Human Rights found violations of the right to physical integrity (protection against cruel, inhuman or degrading treatment), privacy and the rights of the child when Argentine prison officials required vaginal inspections for the wife and 13-year-old daughter visiting an inmate in prison. As to the issue of degrading treatment, the Commission noted that "when the state performs any kind of physical intervention in individuals, it must observe certain conditions in order to assure that such treatment does not generate a greater degree of anguish and humiliation that that which is inevitable." *Id.* at ¶ 87. As to the right to privacy, the Commission found that the instant case "involves a particularly intimate aspect of a woman's private life and that the procedure in question . . . is likely to provoke intense feelings of shame and anguish in almost all persons who are submitted to it." The procedure risks "serious psychological damage that is difficult to evaluate." *Id.* at ¶ 93. The Commission also found violations of a provision of the American Convention on Human Rights protecting children.[8] Here, the young girl "is especially vulnerable to violations" as "children have no legal standing in most cases to make decisions concerning situations that may have grave consequences on their well being." State officials requiring routine disrobing and removal of underwear prior to entry into security have no lesser responsibility for the girls in their care.

The European Court of Human Rights faced a similar but less drastic situation in *Wainwright v. United Kingdom*, No. 26/12/2006, 26 September 2006. There, a mother and her son, who was 22 at the time of the incident and had cerebral palsy, were ordered to be strip searched before entering a prison to visit an inmate. Both submitted but left the prison traumatized. In examining the issue of whether the searches violated the prohibition on degrading treatment, the court applied a standard as to whether a procedure has as "its object . . . to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality." *Id.* at ¶ 41 The court concluded that the searches in question were not proportionate to the legitimate aim of controlling drugs in prisons in the way they were carried out. *Id.* at ¶ 48

Finally, state practice, including that of the United States, Britain, Scotland, and Canada, has taken a dim view of invasive strip searches, banning them on grounds of degradation to the victim, or alternatively on privacy grounds. Such was the case in the U.S. Supreme Court's decision in *Safford v. Redding*, 129 S. Ct. 2633 (2009), decided at the end of the past Supreme Court term, which dealt with the strip search of a 13-year-old girl in middle school. In a search on school premises, she was ordered to undress to her bra and underpants, her bra was pulled out and shaken, and the elastic in her underpants was pulled out. The case makes no reference to international law, but the court does use the

[8] Article 19 provides that "Every minor has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state."

language of international law in finding that "exposing for a search is . . . so degrading" that several communities have found strip searches of students to be per se unreasonable. *Id.* at 2642. The court also found that such searches should be treated as "categorically distinct" because of "subjective and reasonable societal expectations of personal privacy." *Id.* at 2641. In these two references, the court references the two key elements of international law dealing with intimate searches of girls: degradation and privacy. This is true for all girls, whether the context is school or juvenile detention.

In the years leading up to the *Wainwright* decision by the European Court of Human Rights, discussed in the paragraph above, there were two groundbreaking decisions by domestic courts striking down strip searches in England and Scotland, and Canada later followed suit. *Lindley v. Rutter*, [1981] Q.B. 128, 1980 WL 148604 (1980), was decided by the Queen's Bench, a trial court in Great Britain, and *Henderson v. Fife Police*, 1988 S.L.T. 361, 1987 WL 74386 (1987), was decided by the Scottish Outer House, another trial court. In each case, police followed what they asserted was "standing orders" in conducting strip searches against women involving removal of their brassieres, asserting that the removal was "for their own protection." In each case, the court found that the strip search was inappropriate and unjustified. The judge in *Lindley* found that the courts must be "ever zealous to protect the personal freedom, privacy and dignity of all who live in these islands." *Lindley v. Rutter*, at 134. Finally, the Canadian Supreme Court, in *Regina v. Golden*, 2001 SCC 83 (2001), reached a similar result, relying on doctrines of privacy, where the strip search in question was carried out by police in a restaurant at the location of a drug arrest, rather than at the station-house. State practice thus further supports the limitations imposed by international standards and cases, particularly in the case of intimate searches of women.

VI. Even if this court does not find that customary international law applies directly, it is my opinion, consistent with long-standing domestic judicial precedents, that customary international law provides strong corroborating support for plaintiffs' domestic causes of action in this case. Texas and federal law must be construed in a manner consistent with international law whenever possible.

This Court should interpret domestic law, whether statutory or common law, to be consistent with U.S. obligations under international law. *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) ("[a]n act of Congress ought never to be construed so as to violate law of nations if any other possible construction remains, and consequently can never be construed to violate . . . rights . . . further than is warranted by law of nations as understood in my country."); *Weinberger v. Rossi*, 456 U.S. 25 (1982); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1983). The *Charming Betsy* doctrine has been cited with approval in this Circuit, in *Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1447 (5th Cir. 1993) ("Public international law has been incorporated into common law of United States, [relevant citations] and we are thus bound to construe the federal common law, to the extent reasonably possible, to avoid violating principles of international law."); *U.S. v. Suerte*, 291 F.3d 366, 373-374 (5th Cir. 2002). This process does not mean that the courts must use international law to override domestic law; rather, courts are urged to harmonize domestic and international law

whenever possible. *Beharry v. Ashcroft*, 183 F. Supp. 2d 584, 598 (E.D.N.Y. 2002), *rev'd on other grounds*, 329 F.3d 51 (2d Cir. 2003)("United States courts should interpret legislation in harmony with international law and norms wherever possible.").

This doctrine of statutory construction has a rich history that begins with the first Chief Justice, John Marshall. In *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801), Chief Justice Marshall indicated that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law." 5 U.S. at 43. In *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 64, the Supreme Court considered whether an Act of Congress adopted to suspend trade between the United States and France authorized the seizure of neutral vessels, an action that would violate customary international law. The Court held the seizure invalid, reaffirming that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Id.* at 118.

Thus, even if this court concludes that the authorities cited in this report do not constitute binding norms of customary international law, the international sources referred to here provide strong interpretive support for the domestic causes of action, supplement plaintiffs' domestic authority, and should be applied by this court so as to harmonize domestic practice with international law, wherever possible.