

AFFIDAVIT OF STEPHEN J. SCHNABLY

1. My name is Stephen J. Schnably. I am Professor of Law at the University of Miami School of Law. I have held this position since 1994. From 1988 to 1994, I was Associate Professor of Law. I served as Associate Dean of the Law School from 2000 to 2005. I received an A.B. *cum laude* from Harvard College in 1976, and a J.D. *magna cum laude* from Harvard Law School in 1981. My resume is attached to this Affidavit as Attachment A.

2. International human rights law, international law, and constitutional law have been regular courses in my teaching load over the past eighteen years. International human rights law is a major focus of my research and writing, as the list of publications on my resume indicates. Among other things, I am a co-author of *INTERNATIONAL HUMAN RIGHTS & HUMANITARIAN LAW: TREATIES, CASES, & ANALYSIS* (Cambridge University Press 2006). In addition, I have presented human rights cases before international tribunals, and have served as counsel on international law, international human rights law, and constitutional law issues in a number of cases in federal courts. In 1997 I was qualified as an expert witness and testified concerning international human rights law in a case before the federal district court in Miami involving the Cuban government's downing of civilian aircraft. *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997).

3. I have been asked to give an opinion as to the consistency with the United States' obligations under international law of the Juvenile Division's policy and practice regarding the routine use of arm and leg restraints on juvenile pre-trial detainees who appear before it in the Juvenile Justice Center. Specifically, I have been asked to render an opinion based on the following summary of relevant facts:

- a) All pre-trial detainees who are juveniles attend all juvenile court proceedings (except trial) in shackles – that is, in arm and leg restraints consisting of handcuffs and leg irons, the leg irons connected by a chain somewhere between fifteen and eighteen inches long.
- b) The shackles remain in place during the entire court proceedings.
- c) The shackles are used without any individualized review of factors such as the particular juvenile's age, gender, size, pending charge, criminal history, or history of violence or escape attempts.
- d) The shackles are used even though the courthouse has extensive security features in place to prevent escape, as set out in a memorandum from Marie Osborne, Chief, Juvenile Division, Public Defenders Office, to the Honorable Lester Langer, Associate Administrative Judge, Juvenile Division, Eleventh Judicial Circuit Court of Florida, May 17, 2006 (copy attached as Attachment B).

4. Based on my expertise in international human rights law, my conclusion, which is explained more fully in the remainder of this Affidavit, is that a state pol-

icy or practice as described in paragraph 3 is inconsistent with the United States' obligations under international human rights law.

II

5. As set out in Section II(A) below, there are two fundamental international law rules that are relevant to the Juvenile Division's policy and practice. The first is an obligation to treat persons under detention with humanity and respect for their dignity, and not to subject them to degrading treatment (paragraphs 7-9). The second is an obligation to provide children who are detained with all measures of protection required by their status as juveniles (*see* paragraphs 10-11 below). As set out in Section II(B) (paragraphs 13-21) below, these two obligations have been authoritatively interpreted to preclude the use of shackles on a juvenile detainee except where a determination has been made that the particular individual poses a risk of flight or of harm to self or others that cannot be dealt with except through shackling, and even then only to the extent strictly necessary.

6. The restriction on the use of shackles thus constitutes a customary international law norm. International customary law results from a "consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of the Foreign Relations Law of the United States §§ 102(1)(a), 102(2) (1986) [hereinafter "Restatement"]. *See* Restatement § 701 ("The United States is bound by the international customary law of human rights."). Evidence of international

customary law norms can take a number of forms. Treaties, particularly multilateral treaties, not only bind the parties to the treaties but “may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.” *Id.* § 102(3). The Restatement further notes:

International agreements constitute practice of states and as such can contribute to the growth of customary law Some multilateral agreements may come to be law for non-parties that do not actively dissent. That may be the effect where a multilateral agreement is designed for adherence by a number of states generally, is widely accepted, and is not rejected by a significant number of states.

Id. § 102, comment i. In addition, resolutions of the U.N. General Assembly and other international bodies may provide evidence of customary law norms when they are widely regarded as authoritative. *See* Restatement § 103, comment c (“Resolutions of universal international organizations, if not controversial and if adopted by consensus or virtual unanimity, are given substantial weight.”). Other evidence of customary international law norms may be taken from “judgments and opinions of international judicial and arbitral tribunals,” *id.* § 103(2)(a), and the “writings of scholars,” *id.* § 103(2)(c).

(A)

7. The first international law obligation – to treat detainees with humanity and respect for their dignity, and not to impose degrading treatment or punishment – is embodied in all the key multilateral human rights instruments, including two

treaties to which the U.S. is a party. Article 5 of the Universal Declaration of Human Rights, a resolution of the U.N. General Assembly widely regarded as an authoritative expression of U.N. members' international human rights obligations, states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 7 of the International Covenant on Civil and Political Rights (ICCPR), to which the U.S. is a party, has exactly the same language. Complementing Article 7 of the ICCPR is Article 10(1), which provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."¹

8. Similar provisions are included in the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), art. 16 (prohibiting degrading treatment or punishment), to which the United States is a party, and in other human rights treaties. *See* American Convention on Human Rights, art. 5(2) ("No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. All persons deprived of their liberty shall be treated with respect for the inherently dignity of the human person."); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3 (prohibition on degrading treatment); African Charter of Human and Peoples' Rights, art. 5

¹ Attachment C provides a list of international treaties and resolutions cited in this Affidavit with full citation information, including U.N. and other official websites with copies of the instruments.

(“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading treatment and punishment shall be prohibited.”). In addition to these treaties, a number of U.N. resolutions make clear the status of this norm as part of customary international law. *See* United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3; United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 1 (requiring humane treatment of detainees and respect for their dignity); *id.*, Principle 6 (prohibiting degrading treatment or punishment); United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), ¶ 54 (“No child or young person should be subjected to harsh or degrading correction or punishment measures at home, in schools or in any other institutions.”).

9. The consistent inclusion of this obligation in the major global and regional human rights treaties, ratified by the vast majority of states – and also in a range of UN declarations – constitutes a general recognition by states of the binding nature of these rule requiring humane treatment of detainees and forbidding degrading treatment. As the U.N. Human Rights Committee (charged with implementing the ICCPR) has put it:

Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Human Rights Committee, *General Comment 21, Article 10*, ¶ 4 (Forty-fourth session, 1992), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994).

10. Just as basic as the obligation to treat detainees with humanity and respect for their dignity is the customary international law obligation to provide children with all measures of protection required by their status as juveniles. This norm is evidenced in a wide range of multilateral human rights treaties to which the vast majority of states are party. Article 24 of the ICCPR obligates states to provide “[e]very child” with “such measures of protection as are required by his status as a minor.” As the U.N. Human Rights Committee has noted, “this provision entails the adoption of special measures to protect children.” Human Rights Committee, *General Comment 17, Rights of the Child (Art. 24)* ¶ 1 (Thirty-fifth session, 1989). Similarly, the Convention on the Rights of the Child (CRC), ratified by nearly every country in the world, provides that “[i]n 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.” CRC art. 3(1).² Article 37(c) of the CRC is even more specific:

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.*

(Emphasis added.) Article 40 provides that in the administration of juvenile justice, states must treat every child

in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s assuming a constructive role in society.

11. More specialized or regional conventions evidence the same customary international norm requiring special protection appropriate to their age. *See, e.g., American Convention on Human Rights*, art. 16 (“Every child . . . has the right the protection that his status as a minor requires from his family, society and the State.”); *id.* art. 5(5) (“Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.”); African

² *See Roper v. Simmons*, 543 U.S. 551, 576 (2005) (noting that the U.S. and Somalia are the only states not to have ratified the CRC). While the U.S. has not ratified the CRC, it *has* signed it. Under international law, a state that has signed but not yet ratified a treaty “is obliged to refrain from acts that would defeat the object and purpose of the agreement.” Restatement § 312(3). In any case, the U.S. is bound by the customary international law norm discussed here.

Charter on the Rights and Welfare of the Child (1990), art. 17(1) (“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.”); International Convention on the Protection of the Rights of All Migrant Workers and Their Families (1990), art. 18(4) (“In the case of juvenile persons, the procedure [used in the determination of any criminal charge] shall be such as will take account of their age and the desirability of promoting their rehabilitation.”).

12. In short, these two norms – the one obligating states to treat all detainees (including, of course, children) humanely and with respect for their dignity, and the other requiring states to implement this requirement in the case of juveniles in a manner that respects their special needs and status as children – constitute binding obligations under customary international law, supreme over any inconsistent state law, policy, or practice. U.S. Constitution art. VI cl. 2. *See* Restatement § 111(1) (“International law and international agreements of the United States are law of the United States and supreme over the law of the several States.”); *id.* § 702, comment c (“The customary law of human rights is part of the law of the United States to be applied as such by State as well as federal courts.”). Customary international law, moreover, is enforceable in federal and state courts without regard to the distinction drawn in the case of treaties between those that are “self-executing” and

those that are “non-self-executing.” To put it differently, implementing legislation is *never* a prerequisite to the judicial enforcement of customary international law, though it may sometimes be in the case of treaties. *See* Restatement § 111(3) (noting that “Courts in the United States are bound to give effect to international law,” subject only to the exception that a non-self-executing treaty or other international agreement will be given effect only through implementing legislation).³

(B)

13. The broad scope of these two fundamental international human rights law norms leaves the question of how they apply to particular practices. What is significant here is that while there may be a degree of state discretion in applying

³ Thus the applicability of these customary international law norms in court is not affected by the Senate’s declaration, in approving ratification of the ICCPR and CAT, that those two treaties would not be self-executing. *See* U.S. Reservations, Understanding, and Declarations, ICCPR, ¶ III(1), 138 Cong. Rec. 8068 (1992); U.S. Reservations, Understandings, and Declarations, CAT, ¶ III(1), 136 Cong. Rec. 36194 (1990). The non-self-executing nature of those treaties means only that without implementing legislation a court may not enforce any provisions in those treaties that go beyond customary international norms. Even then, the principle of *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) – that, as Chief Justice Marshall put it, “an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains” – makes the treaty provisions relevant. *See also* *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (interpreting the Eighth Amendment to be consistent with international law prohibiting execution of juvenile offenders). In light of the supremacy clause this principle applies with even more force to state law. *See* Restatement § 115, comment e (“Even a non-self-executing agreement of the United States, not effective as law until implemented by legislative or executive action, may sometimes be held to be a federal policy superseding State law or policy.”). In any event, because the norm discussed here is part of international customary law, the status of those two treaties in U.S. law as non-self-executing is irrelevant.

them as to some issues, *see* Human Rights Committee, *General Comment 17, Rights of the Child (Art. 24)* ¶ 4 (Thirty-fifth session, 1989), states and international organizations have widely interpreted the norms *not* to leave states with any discretion to engage in routine shackling of juveniles. This interpretation is embodied in a number of authoritative resolutions adopted by international bodies including the United Nations General Assembly and the Council of Europe. It is also embodied in judgments and rules promulgated by international tribunals.

14. The Standard Minimum Rules for the Treatment of Prisoners (SMR) were adopted by the U.N. in 1957 through its Economic and Social Council, with the General Assembly reaffirming the U.N.'s approval in 1971 and 1973 through resolutions calling on states to implement them. The SMR place strict limitations on the use of restraints for all prisoners:

33. Instruments of restraint, such as handcuffs, chains, irons and strait-jacket, shall never be applied as a punishment. Further, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:

- (a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;
- (b) On medical grounds by direction of the medical officer;
- (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.

34. The patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary.”

15. The SMR are not themselves a binding treaty. But as noted earlier, resolutions of the General Assembly can embody the specific interpretation of general obligations or include specific binding norms along with principles that have not yet attained the status of law. This is true of the SMR. As Nigel Rodley, a distinguished scholar and member of the U.N. Human Rights Committee has noted, the SMR are more than “an important platform for the activities worldwide of prison reformers,” because “some of their specific rules may also reflect legal obligations.” He goes on to cite the provisions in the SMR on the use of physical restraints as an example of a provision that “does more than just state something desirable: it appears to be restating . . . what has been seen to be a rule of international law.” NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 280, 281 (2d ed. 1999). *See also id.* at 281 (further noting that even as to other portions that may not in themselves reflect legal obligations, “it is reasonably clear that the SMR can provide guidance in interpreting the general rule against cruel, inhuman, or degrading treatment or punishment”). As the Restatement notes, the writings of international scholars have long been recognized as one important source of evidence for international law norms. Restatement § 103(2)(c).

16. Additional recognition of the status of the physical restraint provisions of the SMR as restatements of binding international law lie in the actions of inter-

national actors. One example, cited by Rodley, is the reliance on the SMR by the U.N.'s Special Rapporteur on Torture in condemning Pakistan's use of bar fetters as discipline. RODLEY, *supra*, at 281. A second example is the action of the Committee of Ministers of the Council of Europe. The Committee of Ministers is the Council's decision-making body, composed of the Foreign Affairs Ministers of all the member states of the Council of Europe. In 1973, the Committee adopted the Council of Europe Standard Minimum Rules for the Treatment of Prisoners. In so doing it made a number of revisions to the U.N.'s SMR, but it adopted ¶¶ 33 and 34 of the SMR nearly verbatim. The Committee of Ministers revised the rules in 1987 and renamed them the European Prison Rules, and has made a number of revisions since then, but the prohibition on the routine use of restraints has remained. The European Prison Rules' provision on restraints is essentially the same as that in the SMR, though phrased somewhat differently:

60.6 Instruments of restraint shall never be applied as a punishment.

...

68.1 The use of chains and irons shall be prohibited.

68.2 Handcuffs, restraint jackets and other body restraints shall not be used except:

a. if necessary, as a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority unless that authority decides otherwise; or

b. by order of the director, if other methods of control fail, in order to protect a prisoner from self-injury, injury to others or to prevent serious damage to property, provided that in such instances the director shall immediately inform the medical practitioner and report to the higher prison authority.

68.3 Instruments of restraint shall not be applied for any longer time than is strictly necessary.

68.4 The manner of use of instruments of restraint shall be specified in national law.⁴

17. Also instructive is the practice of states. A U.N. survey in 1974 of member states showed a fairly wide degree of variance in the extent to which several of the provisions of the SMR were reported by member states responding (62 in all) as having been fully implemented in their country. But the survey revealed a great deal of uniformity with regard to the SMR's rules on the use of restraints. Fifty-seven of the 62 responding states reported having fully implemented the SMR in that regard. See Standard Minimum Rules for the Treatment of Prisoners in Light of Recent Developments in the Correctional Field, Fourth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Annex I, at 39-50, U.N. Doc. A/CONF.43/3 (1970), as discussed in Daniel L. Skoler, *World Implementation of the United Nations Standard Minimum Rules for Treatment of Prisoners*, 10 J. INT'L L. & ECON. 453, 460-61, 465-466, 482 (1975). States' re-

⁴ As is evident, the main differences between the European Prison Rules and the SMR are (a) the subsumption of the specific medical exception in ¶ 33(b) of the SMR into the more general provision in the European Prison Rules limiting the use of restraints to situations where other methods of control have failed or where necessary to prevent injury to self or others or damage to property, and (b) the express reference in ¶ 68.2(a) of the European Prison Rules to judicial or administrative authority to order the use of restraints where permitted under those Rules. Neither difference has any bearing on the essential point, which is the effective recognition by the Council of Europe of the status of the SMR's rules on restraints as customary international law norms.

sponses to the survey, then, are consistent with the conclusion that the rules set out in the SMR regarding restraints reflect obligations of customary international law.

18. The United States itself recognizes the significance of the Standard Minimum Rules as evidencing international standards of treatment. In looking to relevant international standards in considering whether deliberate indifference to serious medical needs of prisoners violates the Eighth Amendment, the Supreme Court specifically cited the Standard Minimum Rules. *Estelle v. Gamble*, 429 U.S. 97, 103 n.8 (1976). Moreover, while taking the position that the Standard Minimum Rules do not in themselves constitute a binding instrument, the U.S. State Department specifically advises its consulates to seek to ensure that U.S. citizens detained abroad are “treated humanely in accordance with conventions in force and commonly accepted international standards,” including specifically the Standard Minimum Rules, as well as the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (1990) (see paragraph 20 below). United States Department of State Foreign Affairs Manual, vol. 7, 433.1(2), (3) (08-26-04).⁵

⁵ The Manual is available through the State Department website at <http://foia.state.gov/REGS/Search.asp>. The State Department’s position also reflects that the U.S. has not established itself (or indeed attempted to establish itself) as a “persistent objector” to the applicable customary law. As the Restatement notes, in rare cases a state may not be bound by a norm of customary international law if it persistently dissents from the norm during the time in which the norm is formed. See Restatement § 102, comment d. Promoting other states’ acceptance

19. International tribunals are in accord with the SMR. For example, Rule 83 of the Rules of Procedure of the International Criminal Tribunal for Rwanda provides as follows:

Instruments of restraint, such as handcuffs, shall be used only on the order of the Registrar as a precaution against escape during transfer or in order to prevent an accused from self-injury, injury to others or to prevent serious damage to property. Instruments of restraint shall be removed when the accused appears before a Chamber or a Judge.

This provision appears in a section of the Rules concerning "Case Presentation" but it clearly applies – as its unequivocal language states – at any time "when the accused appears before a Chamber or Judge," which the Rules contemplate happening in pre-trial appearances as well as during trial; *see id.* Rule 62. Equally significant are the rules the Tribunal has adopted as the supervising authority for defendants who are detained while awaiting trial. Rules 48-50 of the Tribunal's "Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal" provide as follows:

48. Instruments of restraint, such as handcuffs, shall only be used in the following exceptional circumstances:
- a. As a precaution against escape during transfer from the Detention Unit to any other place, including access to the premises of the host prison for any reason;
 - b. On medical grounds by direction and under the supervision of the medical officer;

and practice of the norms contained in the SMR would preclude any claim of dissent to the SMR's rules on the use of restraints.

- c. To prevent a detainee from self-injury, injury to others or to prevent serious damage to property.

In all accidents involving the use of instruments of restraint, the Commanding Officer shall consult the medical officer and report to the Registrar, who may report the matter to the President.

49. Instruments of restraint shall be removed at the earliest possible opportunity.

50. If the use of any instrument of restraint is required under Rule 48, the restrained detainee shall be kept under constant and adequate supervision.”

The International Criminal Tribunal for the Former Yugoslavia has the same provisions. *See* Rules of Procedure and Evidence, Rule 83, IT/32/Rev. 37; Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, IT/38/REV.9, Rules 50-52.⁶

20. Part I of the SMR (which includes ¶¶ 33-34) applies “to all categories of prisoners, criminal or civil, untried or convicted,” SMR ¶ 4. It would make no sense to apply the SMR’s provisions on restraints to adults but not to juveniles. Particularly to the extent that shackling juveniles causes them psychological harm that adults would not experience, imposing greater restrictions on the shackling of adults than on the shackling of juveniles would be utterly contrary to the international law obligation of states to provide children with all measures of protection required by their status as juveniles. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), adopted by the U.N.

⁶ The Rules of the two Tribunals are available through their websites, www.un.org/icty and www.icttr.org.

General Assembly in 1985, make it clear that juveniles are protected from routine shackling as well. The Beijing Rules provide important guidance in applying the rules of customary international law requiring humane treatment of all detainees and protection of children as required by their status as juveniles. *See, e.g., T v. United Kingdom*, European Ct. Hum. Rts. No. 24724/94, 7 BHRC 659 (1999), at ¶¶ 71, 74-75 (Beijing Rules, though not a binding instrument in the same sense as a treaty, can provide “indication of the existence of an international consensus” on matters as to which they lay out rules for states). Paragraph 13.3 of the Beijing Rules provides that “[j]uveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations.” Paragraph 13.3 is consistent with the basic principle that juvenile detainees are entitled to at least the level of protection accorded adult detainees. In addition, the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, approved by the U.N. General Assembly in 1990, provide:

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. By order of the director of the administration, such instruments might be resorted to in order to prevent the juvenile from inflicting self-injury, injuries, to others or serious destruction of property. In such instances, the director

should at once consult medical and other relevant personnel and report to the higher administrative authority.

...

66. Any disciplinary measures and procedures should maintain the interest of safety and an ordered community life and 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 respect for the basic rights of every person.”

21. Beyond these U.N. Resolutions, the decisions of the European Court of Human Rights provide additional confirmation of the conclusion that the physical restraint provisions in the U.N. rules referred to in paragraphs 14-20 above represent international customary law or at the very least the international community’s interpretation of the binding rules of customary international law. In *DG v. Ireland*, [2002] ECHR 39474/98 (2002), a juvenile detainee who was handcuffed for court appearances asserted that Ireland had violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which as noted earlier prohibits degrading treatment. The Court held that “treatment [of a detainee] may be considered degrading if it is such as to arouse in its victims feelings of fear, anguish and inferiority Moreover, it is sufficient if the victim is humiliated in his or her own eyes.” *Id.* ¶ 95. Observing that handcuffing was not *per se* a violation of Article 3, it ruled that the use of handcuffs was permissible in this case only in light of the fact that the Irish court had determined the detainee “to be a danger to himself and others in light of his history of criminal activity, of self-harm and of violence to others.” *Id.* ¶ 99. In reaching this conclusion the

Court relied on *Raninen v. Finland*, (1998) 26 EHRR 563, [1997] ECHR 20972/92 (1997), in which the applicant challenged his handcuffing at the time of his arrest as a violation of Article 3. There the Court held:

. . . [T]he Court is of the view that handcuffing does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with lawful arrest or detention and does not entail use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In this regard, it is of importance for instance whether there is reason to believe that the person concerned would resist arrest or abscond, cause injury or damage or suppress evidence.

Id. ¶ 56. See also *Herczegfalvy v. Austria*, [1992] ECHR 10533/83 (1992) ¶¶ 79-84 (upholding on grounds of “medical necessity” application of handcuffs to mentally ill prisoner who had violently refused medical treatment for the effects of a hunger strike).

III

22. In sum, shackling a juvenile detainee without any individualized determination that he or she poses a risk of flight or of harm to self or others that cannot be dealt with except through shackling, as described in paragraph 3 above, violates the United States’ obligations under customary international law.

I declare under penalty of perjury that the foregoing is true and correct.

Date: August 25, 2006

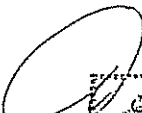


Stephen J. Schnably, Professor of Law

STATE OF FLORIDA
COUNTY OF DADE

The foregoing instrument was acknowledged before me this 25th day of August, 2006, by Stephen J. Schnably

name of person acknowledging


 ANNE E. WHELAN
 Commission Expires 03/01/2011
 Signature of Notary Public in State of Florida
 Banded thru (800)432-4200
 Florida Notary Assn., Inc.

Commissioned Name of Notary Public

Personally known or produced identification _____

Type of Identification produced _____

**Affidavit of Stephen J. Schnably
Attachment A**

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1984- Wilmer, Cutler & Pickering, Washington, D.C. (now Wilmer Cutler Pickering Hale
1988: and Dorr, LLP)

Associate.

Primarily engaged in general litigation, international arbitration and transactions, federal consumer credit law, and human rights cases, including Spadafora v. Panama, Resolution No. 25/97, Case 9726 (Int.-Am. C.H.R.)

1981- Chambers of Hon. Leonard I. Garth, United States Circuit Judge

1982: United States Court of Appeals for the Third Circuit. Law clerk to Judge Garth.

Education

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Publications

Schnably, *The OAS and Constitutionalism: Lessons from Recent West African Experience*, 33 SYRACUSE J. INT'L LAW & COMMERCE 263 (2005)

"Constitutionalism and Democratic Government in the Inter-American System," in Brad R. Roth and Gregory Fox, eds., *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 155-98 (Cambridge University Press, 2000)

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Francisco Forrest Martin, Stephen J. Schnably, et al., INTERNATIONAL HUMAN RIGHTS & HUMANITARIAN LAW: TREATIES, CASES & ANALYSIS (1997; 2d ed. Cambridge University Press 2006)

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Works in Progress/Forthcoming

Nicaragua and the Inter-American Democratic Charter (in progress)

Non-Legal Publications

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Schnably and Bocalandro, *A Murder and What It Says About Panama*, Miami Herald, August 2, 1987, at 1C

Conferences and Other Presentations

"The OAS and Constitutionalism," American Society of International Law (panel on "Democratic Norms and Regional Stability: Global Challenges and Responses in the Americas"), Washington, D.C., April 1, 2005

"Three Paths to Legitimacy: The WTO Dispute Settlement Process & Human Rights" (Commentary), Presentation for the Ariel F. Sallows International Human Rights Conference, University of Saskatchewan School of Law, November 3, 2001

"Incorporating International and Comparative Law into First-Year Property Courses," Presentation for panel sponsored by Innovations in Teaching International Law Interest Group, American Society of International Law, Washington, D.C., March 25, 1999 (remarks summarized in Proceedings of the 93rd Annual Meeting of the American Society of International Law 359 (1999))

"The Role of Property Concepts in Institutional Reform Litigation," Presentation at the AALS Annual Meeting, Property Section, New Orleans, January 9, 1999

"Using International Human Rights Law in Death Penalty Cases," Presentation to the Florida Public Defender's Office for CLE Credit, December 6, 1996

"Rights of Access and the Right to Exclude" (paper presented at an International Colloquium on Property Law on the Threshold of the 21st Century, University of Limburg, Maastricht, Aug. 30, 1995)

"Safe Zones and Invisibility in *Pottinger v. City of Miami*" (paper presented at Law and Society Association, Toronto, June 2, 1995)

"The Brady Bill and the Tenth Amendment" (speech to Daughters of the American Revolution, Miami, FL, Sept. 17, 1994)

"Author Meets Reader: Margaret Jane Radin, Reinterpreting Property" (paper presented at Law and Society Association, Phoenix, June 16, 1994)

Speaker, "Regional Collective Action: The OAS and the Haitian Problem" (paper presented at St. Thomas University School of Law, Miami, FL, April 19, 1993)

"Open Door v. Ireland" (brief summary and analysis of European Court of Human Rights decision on right to information about abortion under the European human rights convention, Women in International Law Interest Group, American Society of International Law, Newsletter, January 1993)

Commentator, "The Judicial Process in Context" (paper presented at the conference on "Transition to Democracy in Latin America: The Role of the Judiciary," University of Miami, March 19-22, 1992)

Speaker, "The Santiago Commitment and the New World Order: Preliminary Thoughts on Their Significance for Democracy and Human Rights in the Americas" (paper presented at the Workshop on the Evaluation of the Inter-American System of Human Rights, sponsored by the Instituto Latinoamericano de Servicios Legales Alternativos (ILSA), Bogota, Colombia, Oct. 19-22, 1991)

Consulting and Pro-Bono Matters

Expert Witness on International Human Rights Law, *Alejandro v. Republic of Cuba*, No. 96-10126, *Mendez v. Republic of Cuba*, No. 96-10127, *de la Peña v. Republic of Cuba*, No. 96-10128 (S.D. Fla. 1997). Certified as expert on international human rights law in case involving Cuban government's downing of civilian aircraft

Cooperating Attorney, ACLU, in *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992), settled after appeal, Oct. 1, 1998. Co-operating attorney for ACLU in case raising issues under the Fourth, Fifth, and Eighth Amendments, the right to travel, and other constitutional provisions. District Court's order required City to refrain from deliberately harassing homeless people, and to set aside "safe zones" where homeless people would be protected from arbitrary arrest and other harassment. Settlement Agreement creates police protocol limiting power to arrest homeless people for misdemeanor offenses arising from innocent, life-sustaining conduct (e.g., eating, sleeping) that homeless people must carry on in public, establishes an Advisory Committee to monitor compliance, and provides for awards of up to \$1,500 per person to each homeless person who was wrongly arrested or had property destroyed.

Of Counsel, *Alliance of Descendants of Texas Land Grants v. United States*, 27 Fed. Cl. 837 (1993), aff'd, 37 F.3d 1478 (Fed. Cir. 1994) (Fed. Cir. 1994). Advised plaintiffs' lawyers in Washington, D.C., and Corpus Christi, Texas, on the relationship between the Fifth Amendment and international law governing claims settlement; case stemmed from the United States' taking of Texas lands granted to plaintiffs' ancestors by the Mexican and Spanish governments, and its subsequent attempt to settle the land takings claims by means of treaty with Mexico in 1941

Counsel to International Human Rights Law Group, Washington, D.C., December 1991-January 1992. Advised Law Group on possible lawsuit against Gen. Antonio Noriega under the federal Alien Tort Claims Statute; visited Panama to meet with special prosecutor investigating murder of Hugo Spadafora on Noriega's orders, and with head of the Panamanian government agency in charge of recovering Noriega's assets

Counsel to International Human Rights Law Clinic, Washington College of Law, American University, Fall 1991. Advised Law Clinic on presentation of Case No. 10,026 to the Inter-American Commission on Human Rights; case concerned the Noriega regime's firing of judges in Panama in violation of the American Convention on Human Rights

Counsel to Panamanian Law Firm, Fall 1990. Advice on the applicability to the U.S. invasion of Panama of Fourth Geneva Convention on the Treatment of Civilians in Time of War, U.S. War Powers Resolution, and other legal provisions

Professional Affiliations and Memberships

Member, American Bar Association, American Society of International Law

Admitted to practice, District of Columbia, 1981; U.S. Courts of Appeals for the Third, Eleventh, and Federal Circuits; U.S. District Court for the District of Columbia



Affidavit of Stephen J. Schnably
Attachment B

LAW OFFICES OF THE
PUBLIC DEFENDER
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
1320 NW 14TH STREET
MIAMI, FLORIDA 33125

BENNETT H. BRUMMER
PUBLIC DEFENDER

(305) 545-1600

MEMORANDUM

TO: Honorable Lester Langer

FROM: Marie Osborne, Chief, Juvenile Division, Public Defender's Office

DATE: May 17, 2006

SUBJECT: Shackling Children in Court

The practice of shackling our detained children for their court appearances, including for their trials, is a draconian procedure unwarranted by any real security rationale. For over twenty years, I have practiced in juvenile and adult courts, and during that time, children and adults were not shackled absent evident danger. During that same time, we have been without the many, modern security measures we currently have.

Now, we have weapons detectors and security guards stationed at the only two entrances/exits to the Juvenile Justice Center. We have Miami Dade police officers permanently stationed within yards of the courtrooms. We have courtroom bailiffs, walkie talkies, judicial buzzer alarms and electronic gates capable of closing on a moment's notice.

Our four courtrooms are small and cramped with staff, and furniture. Each courtroom is adjacent to the detention center, connected by a secure hallway with doors that are locked at all times. The door to the detention center, from where the child enters and exits, is the farthest point from the only other courtroom door leading to the waiting room.

To leave the waiting room one has to pass the mini police station adjacent to the only waiting room exit. This singular exit is itself on the second floor of the complex. Any leaving still requires navigating two flights of stairs, by-passing security guards and getting under the remote controlled security gates. And, this being a courthouse, there is no shortage of police officers throughout the compound.

May 17, 2006
Page 2
M. Osborne Memo re: Shackling Children in Court

Despite all this increased hardware and personnel security, and with no increased danger or need, DJJ's policy of shackling children *while in transport* has been extended to shackling children period.

Shackling children is an affront to our principles of justice. It makes a mockery of the presumption of innocence doctrine, interferes with the right to freely think and express yourself in your own defense, demeans the dignity of an American courtroom and runs counter to the rehabilitative nature inherent in juvenile court. Adult clients accused of the most serious crimes are not shackled absent evident danger.

American courts have traditionally followed the common law rule that an accused must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape. The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. In the absence of exceptional circumstances, the right not to be physically restrained during trial is an essential component of a fair and impartial trial.

There are severe consequences of shackling an accused. The three most-cited detrimental effects of shackling are the following:

- (1) the use of physical restraints on the accused will prejudice the decision-making against the accused;
- (2) the use of physical restraints on an accused during trial will interfere with his thought processes, the use of his faculties, and his ability to communicate with counsel; and,
- (3) the use of physical restraints on an accused during trial is an affront to the dignity of judicial proceedings.

An additional consequence of shackling is specific to youth: (4) the use of physical restraints on an accused during trial is inconsistent with the rehabilitative purpose of the juvenile justice system.

These four concerns, together with the knowledge that shackling is likely to be more traumatic for children than for adults, compel a finding that physically restraining a child in shackles during a court proceeding constitutes a *per se* violation of the child's legal rights and risks great emotional and psychological harm to the child. Because juvenile courtrooms are open to the public, any citizen who sees a shackled child, while observing a court hearing, will likely walk away with the impression that the child is dangerous and a menace to society. I doubt that's the false impression judges want to give.

The courtroom is the judge's domain. It is up to the judiciary to uphold constitutional standards and to insure the dignity of the court process. I urge you to stop this practice in your courtroom.

**Affidavit of Stephen J. Schnably
Attachment C**

List of Treaties and Resolutions Cited

- African Charter on Human and Peoples' Rights ("Banjul Charter"), OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 I.L.M. 58 (1982). Entered into force Oct. 21, 1986. Available through the African Union website at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>.
- African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990). Entered into force Nov. 29, 1999. Available through the African Union website at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>
- American Convention on Human Rights, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36. Entered into force July 18, 1978. Signed by U.S. on June 1, 1977; not yet ratified by U.S. Available through the O.A.S. website at http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/DI L/treaties_and_agreements.htm.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85. Entered into force June 26, 1987. Ratified by U.S.; entered into force for U.S. Nov. 20, 1994. Available through the website of the U.N. High Commissioner for Human Rights at <http://www.ohchr.org/english/law/index.htm>.
- Convention on the Rights of the Child, 1577 U.N.T.S. 3. Entered into force Sept. 2, 1990. Signed by U.S. on Feb. 16, 1995; not yet ratified by U.S. Available through the website of the U.N. High Commissioner for Human Rights at <http://www.ohchr.org/english/law/index.htm>.
- Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, approved the U.N. General Assembly, G.A. Res. 3452 (XXX) (1975). Available through the website of the U.N. High Commissioner for Human Rights at <http://www.ohchr.org/english/law/index.htm>.
- European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, E.T.S. 5. Entered into force Sept. 3, 1953. Available through the Council of Europe website at <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG>

International Covenant on Civil and Political Rights, 999 U.N.T.S. 171. Entered into force March 23, 1976. Ratified by U.S.; entered into force for U.S. Sept. 8, 1992. Available through the website of the U.N. High Commissioner for Human Rights at <http://www.ohchr.org/english/law/index.htm>.

International Convention on the Protection of the Rights of All Migrant Workers and Their Families, Doc. A/RES/45/158 (1990). Entered into force July 1, 2003. Available through the website of the U.N. High Commissioner for Human Rights at <http://www.ohchr.org/english/law/index.htm>.

United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, approved by the U.N. General Assembly, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988). Available through the website of the U.N. High Commissioner for Human Rights at <http://www.ohchr.org/english/law/index.htm>.

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United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, approved by U.N. General Assembly Resolution 45/113 (1990). Available through the website of the U.N. High Commissioner for Human Rights at <http://www.ohchr.org/english/law/index.htm>.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), approved by U.N. General Assembly Resolution 40/33 (1985). Available through the website of the U.N. High Commissioner for Human Rights at <http://www.ohchr.org/english/law/index.htm>.

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Standard Minimum Rules for the Treatment of Prisoners, Council of Europe Res. 73(5), Appendix, adopted by the Committee of Ministers at the 217th Meeting of Ministers' Deputies, 19 Jan. 1973, as revised by Recommendation No. R(87)3 of the Committee of Ministers to Member States on the European Prison Rules, Appendix, adopted by the Committee of Ministers at the 404th Meeting of the Ministers' Deputies, 12 Feb. 1987; current version, European Prison Rules, Appendix to Recommendation Rec(2006)2 of the Committee of Ministers, adopted by the Committee of Ministers at the 952nd Meeting of the Ministers' Deputies. Available through the Committee of Ministers' website at http://www.coe.int/T/CM/adoptedTexts_en.asp.

Universal Declaration of Human Rights, approved by the U.N. General Assembly, G.A. Res. 217A(III), U.N. GAOR, 3rd Sess., Pt. I, Resolutions, at 71, U.N. Doc. A/810 (1948). Available through the website of the U.N. High Commissioner for Human Rights at <http://www.ohchr.org/english/law/index.htm>.