Before the

Inter-American Commission on Human Rights

Henry Hill *et al*.

***vs*.**

The United States of America

Case No. 12.866

Written Observations of Law

March 25, 2014

Presented as friends of the Commission by

Amnesty International

&

The Georgetown Law Human Rights Institute

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Statement Regarding the Parties

Amnesty International's mission is to conduct research and generate action to prevent and end grave abuses of human rights—including the rights to life, health, private life, equality, and non-discrimination—and to demand justice for those whose rights have been violated. The organization works independently and impartially to promote respect for human rights based on research and on legal standards agreed by the international community.

The Georgetown Law Human Rights Institute serves as the focal point for human rights activities at Georgetown Law, and promotes Georgetown Law's role as a leader in the field of human rights. The Institute's primary aim is to create opportunities for Georgetown Law students to master and engage human rights law while on campus and after graduation. The Institute's Legal Advocacy Project is one of the ways in which the Institute supports the human rights movement.

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I. INTRODUCTION

Amnesty International and the Georgetown Law Human Rights Institute present these written observations of law to provide additional support and context regarding the international human rights standards that apply to the case of *Henry Hill et al. vs. The United States of America*.

This case offers the Commission an opportunity to clarify the international law standards that govern the sentencing of children in conflict with the law in the Americas, and particularly how various norms of customary international law, incorporated through regional human rights obligations, prohibit life without parole sentences for children. Furthermore, through this case, the Commission can more explicitly interpret and apply the governing instruments of the Inter-American human rights system to reflect developments in the broad field of international human rights law protecting the rights of children.

The parties and other friends of the Commission raise a number of general and specific arguments regarding the legality of a life without parole sentence for any child, including the young people sentenced to die in prison in this case. This brief will focus specifically on how three norms of customary international law apply to and prohibit life without parole sentences for children. We urge the Commission to explicitly recognize the application of these norms in this case.

Section II of this brief will discuss the relationship between regional human rights obligations and norms of customary international law binding States in the Americas. Sections III, IV, and V will discuss the norms of customary international law recognizing and protecting child status, prohibiting torture or other forms of cruel, inhuman or degrading treatment or punishment of children, and prohibiting arbitrary detention of children, respectively. Together, these sections address how customary international law norms prohibit life without parole sentences for children, and how these norms are relevant to the interpretation of regional human rights obligations.

II. THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS CONSIDERS CUSTOMARY INTERNATIONAL LAW IN THE INTERPRETATION OF REGIONAL NORMS

The jurisprudence and practice of the Inter-American human rights system requires interpreting regional human rights obligations in light of the *corpus juris* of international human rights law, including norms of customary international law.[1]

The Inter-American Court has emphasized that the American Declaration "has its basis in the idea that the international protection of the rights of man should be the principle guide of an evolving American law."[2] Indeed, the Court has stated that the interpretation of *any* treaty that concerns human rights "must take into account not only the agreements and instruments related to the treaty, but also the system of which it is part."[3] The Court views this system as made up of "international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations)."[4] In short, the full breadth of international legal protections, including norms of customary international law, provides the

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[1] A norm of customary international law is established by general and consistent practice by states that is followed out of a sense of legal obligation; evidence of such norms can include treaties and conventions as well as other documents without direct legal effect, such as declarations and resolutions, in addition to the judicial decisions and the teachings of the most highly qualified publicists. *See* Charter of the United Nations and Statute of the International Court of Justice, arts. 38(1)(b), (d), June 26, 1945, 59 Stat. 1031, T.S. No. 993. *See also* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757-791 (2001); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS INTERNATIONAL LAW (1989).

[2] *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89*, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 37-38 (July 14, 1989) (internal citations omitted) (further stating that "the evolution of the here [-] relevant inter-American law mirrors on the regional level the developments in contemporary international law and especially in human rights law").

[3] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99*, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 113 (Oct. 1, 1999) (internal citations omitted).

[4] *Id.* ¶ 115 (internal citations omitted).

appropriate context for the interpretation of regional law by the Inter-American Court.[5]

The Inter-American Commission has also endorsed and applied a broad view of the relationship between regional and international human rights standards:

> According to the jurisprudence of the Inter-American human rights system, the provisions of its governing instruments—including the American Declaration—should be interpreted and applied in the context of developments in the field of international human rights law since those instruments were first composed, and with due regard to other relevant rules of international law applicable to Member States.[6]

In the context of clarifying the rights of children under regional human rights law, the Commission has been unequivocal:

> For an interpretation of a State's obligations vis-à-vis minors, in addition to the provision of the American Convention, the Commission considers it important to refer to other international instruments that contain even more specific rules regarding the protection of children. Those instruments include the Convention on the Rights of the Child and the various United Nations declarations on the subject.[7]

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[5] *See Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03*, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 157-58 (Sept. 17, 2003) (applying a broad set of international norms, including customary international law norms evidenced by international treaty bodies and other regional human rights courts, in interpreting regional human rights law).

[6] *Doe v. Canada*, Case No. 12.586, Inter-Am. Comm'n H.R., Report No. 78/11, ¶ 70 (July 21, 2011).

[7] *Minors in Detention (Honduras)*, Case No. 11.491, Inter-Am Comm'n H.R., Report No. 41/99, ¶ 72 (Mar. 10, 1999) (citations omitted) (citing these treaty and customary international law norms in the context of interpreting the right to the measures of protection required by child status provided by Article 19 of the American Convention and further stating, "This combination of the regional and universal human rights systems for purposes of interpreting the Convention is based on Article 29 of the American Convention and on the consistent practice of the Court and of the Commission in this sphere.").

The Commission's analysis of the regional human rights law implicated by life without parole sentences for children must be conducted in light of the *corpus juris* of international human rights law protecting children generally. This *corpus juris* includes norms of customary international law recognizing and protecting child status, prohibiting torture or other cruel, inhuman or degrading treatment or punishment of children, and prohibiting the arbitrary detention of children. Indeed, the Commission should explicitly ground its decision in these norms.

III. LIFE WITHOUT PAROLE SENTENCES FOR CHILDREN VIOLATE THE NORM OF CUSTOMARY INTERNATIONAL LAW RECOGNIZING AND PROTECTING CHILD STATUS

International law and the municipal law of many States have long recognized and reflected many distinctions between children and adults.[8] In recent decades, these differences have crystallized in a distinct body of international human rights law protecting the rights of the child.[9] At the core of this body of law is the recognition of the obligation of States to recognize and protect child status, an obligation that is explicitly recognized in both the American Convention and Declaration.[10] As described below, these obligations take on special meaning where children are deprived of their liberty.

The interpretation of international human rights law protecting children's rights generally emphasizes four principles: the primary consideration of the child's best interests, the right to non-discrimination, the right to life and development, and the

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[8] For a brief review of various theories of childhood (as well as children's rights), see GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 1-6 (1995).

[9] *See, e.g.*, Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354, at 19 (Nov. 20, 1959); Geneva Declaration of the Rights of the Child of 1924, *adopted* Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

[10] American Declaration of the Rights and Duties of Man art. VII, adopted by the Ninth International Conference of American States, O.A.S. Res. XXX (1948) [hereinafter "American Declaration"] ("All women, during pregnancy and the nursing period, and all children have the right to special measures of protection"); Organization of American States, American Convention on Human Rights art. 19, *adopted* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter "American Convention"] (entered into force July 18, 1978) ("Every minor child 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.").

right of the child to be heard.[11] However, all human rights protections of children *as children* flow from the antecedent requirement that States recognize and protect child status.[12] The broad recognition of this obligation as a norm of customary international law is evidenced by its inclusion in general international and regional human rights treaties.[13] And this recognition is at the core of the Convention on the

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[11] *See, e.g.*, U.N. Comm. Rts. of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, ¶ 5, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007); U.N. Comm. Rts. of the Child, *General Comment No. 12: The Right of the Child to be Heard*, ¶ 2, U.N. Doc. CRC/C/GC/12 (July 20, 2009).

[12] *See* U.N. Comm. Rts. of the Child, *General Comment No. 12,* ¶ 18 ("The Convention recognizes the child as a subject of rights, and nearly universal ratification of this international instrument by States parties emphasizes this status of the child."). Another way of stating this proposition is that international law does not merely require states to recognize children as the subjects and objects of general human rights (i.e., rights-holders as protected persons under international law), but further requires states to recognize children as the subjects and objects of specific human rights—*qua* children. *See generally* VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 1; SARAH JOSEPH AND MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 701 (3d ed. 2013) ("Whilst historically international law may have reflected limited recognition of the civil and political rights of children, this is no longer the case. Children traditionally were defined by their incompetence, rather than as right-holders in international law. However, the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child demonstrate that civil and political rights are applicable to children, both as 'people' in the general sense and, where appropriate, specifically by virtue of their status as minors.").

[13] International Covenant on Civil and Political Rights art. 24, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter "ICCPR"] (entered into force Mar. 23, 1976) (including the prohibition as non-derogable: "Every child shall have, without any discrimination . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."). For detailed commentary on the development of the test of the ICCPR in this regard, see MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 424 (1993) ("Pursuant to Art. 24(1), the State is under a comprehensive duty to guarantee that all children subject to its jurisdictional authority are afforded protection." (citations omitted)). *See also* Universal Declaration of Human Rights art. 25(2), G.A. Res. 217 (III) A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810, at 71, 76 (Dec. 10, 1948) ("Motherhood and childhood are entitled to special care and protection. All children, whether born in or out of wedlock, shall enjoy the same social protection"); American Declaration art. VII ("All women, during pregnancy and the nursing period, and all children have the right to special measures of protection"); American Convention art. 19 ("Every minor child 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."); Organization of African Unity, African Charter on Human and Peoples' Rights art.

Rights of the Child.[14] As the Inter-American Commission has observed, "the Convention on the Rights of the Child works a substantial change in the manner of addressing children . . . replacing the 'irregular situation doctrine' by the 'comprehensive protection doctrine,' in other words, moving from a conception of 'minors' as the object of protection and repression to considering children and youths as full subjects at law."[15]

Inseparable from the requirement that States recognize and protect child status is the affirmative obligation of States to provide children with special measures of protection. The right of children to special care and protection is proclaimed in the American Declaration[16] and guaranteed in the International Covenant on Civil and Political Rights (ICCPR),[17] among other instruments. The Human Rights Committee

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18, *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force Oct. 21, 1986) ("The State shall . . . ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.").

[14] Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

[15] Inter-Am. Comm'n H.R., *Third Report on the Situation of Human Rights in Paraguay* ch. VII, ¶ 11, OEA/Ser.L/V/II.110, doc. 52 (2001) (citing Mary Ana Beloff, *La aplicación directa de la Convención Internacional sobre Derechos del Niño en el ámbito interno*, *in* LA APLICACIÓN DE LOS TRATADOS DE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES (1998)). *See also César Alberto Mendoza et al. v. Argentina,* Case No. 12.651, Inter-Am. Comm'n H.R., Report No. 172/10, ¶¶ 135-36 (Nov. 2, 2010) ("Children, therefore, are the *titulaires* of the same human rights that all persons enjoy; however, they are also the *titulaires* of special rights resulting from their condition, and are entitled to the protections that are the specific duty of the family, society and the States. In other words, children are entitled to special measures of protection . . . This added obligation of protection and the special duties that attend it must be determined to the particular needs of the child *as a subject of law*." (citations omitted and emphasis added)).

[16] American Declaration art. VII.

[17] Indeed, the ICCPR recognizes these special measures of protection explicitly as those which are required by the recognition and protection of child status. ICCPR art. 24 (including the prohibition as non-derogable: "Every child shall have, without any discrimination . . . the right to such measures of protection *as are required by his status as a minor*, on the part of his family, society and the State." (emphasis added)); NOWAK, CCPR COMMENTARY 424. Notably, a further consequences of the obligation of states to provide special measures of protection is that human rights obligations of a universal character frequently apply differently to children than to adults—or with specific content. U.N. Hum. Rts. Comm., *General Comment No. 17 (Article 24)*, ¶ 2, *in Report of the Human Rights Committee*, U.N. GAOR, 44th Sess., Supp. No. 40, U.N. Doc. A/44/40, at 173 (Sept. 29,

has emphasized that the obligation to provide special measures of protection derives from the obligation to recognize and protect child status. The Committee has also stressed that implementation of this obligation goes beyond merely ensuring that children enjoy those human rights guaranteed to all persons under the ICCPR.[18] In short, States have additional obligations when it comes to ensuring that children enjoy a range of human rights obligations that apply to all persons.[19]

In the context of the penal law, State procedures for responding to children in conflict with the law must differ from procedures and treatment for adults—they must take the child's status into account.[20] There are two important consequences

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1989) ("The Committee points out that the rights provided for in article 24 are not the only ones that the Covenant recognizes for children and that, as individuals, children benefit from all of the civil rights enunciated in the Covenant. In enunciating a right, some provisions of the Covenant expressly indicate to States measures to be adopted with a view to affording minors greater protections than adults . . . In other instances, children are protected by the possibility of the restriction—provided that such restriction is warranted—of a right recognized by the Covenant.").

[18] U.N. Hum. Rts. Comm., *General Comment No. 17,* ¶ 1 ("Consequently, the implementation of this provision entails the adoption of special measures to protect children, in addition to the measures that States are required to take under [ICCPR] article 2 to ensure that everyone enjoys the rights provided for the in the Covenant . . . This is more than mere reinforcement of the rights guaranteed elsewhere in the Covenant; the laws of a State party must reflect the special status of a minor and afford special protection to the child . . . The right to special measures of protection belongs to every child because of his status as a minor.").

[19] JOSEPH AND CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 703 ("Article 24 ensures a child's rights to those measures of protection required of his or her family, society, and the State. This is more than mere reinforcement of the rights guaranteed elsewhere in the Covenant; the laws of a State Party must reflect the special status of a minor and afford special protections to the child. Indeed, *it seems that article 24 acts to 'top up' the other civil rights offered to children by the ICCPR's other guarantees by more explicitly requiring positive measures of protection*." (emphasis added))..

[20] ICCPR art. 14(4); U.N. Hum. Rts. Comm., *General Comment No. 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, ¶ 42, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) ("Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14 of the Covenant. In addition, juveniles need special protection."); Convention on the Rights of the Child art. 40(1) (referring to the objective of "promoting the child's reintegration and the child's assuming a constructive role in society."); U.N. Standard Minimum Rules for the Administration of Juvenile Justice ¶¶ 1.2, 26.1, G.A. Res. 40/33, annex, U.N. GAOR, 40th Sess., Supp. No. 53, at 207, 212 (1985) [hereinafter "Beijing Rules"]; U.N. Rules for the Protection of Juveniles Deprived of their

of these obligations: they require a special emphasis on rehabilitation for children in conflict with the law and they prohibit certain treatment or punishments. Each of these elements is essential in order to account for children's mental status, culpability, potential for rehabilitation, and other unique characteristics.

First, when it comes to children, States have heightened obligations under the general legal requirement that the essential aim of the penitentiary system must

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Liberty ¶¶ 3, 79, G.A. Res. 45/113, annex, U.N. GAOR, 45th Sess., Supp. No. 49(A), at 205, 209 (Dec. 14, 1990). Regional standards relating to the administration of the justice system and on deprivation of liberty explicitly incorporate these guarantees. For example, the preamble to the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas "tak[es] into account the principles and provisions enshrined in," among other instruments, the ICCPR, the Convention against Torture, the Convention on the Rights of the Child, the Beijing Rules, the U.N. Rules for the Protection of Juveniles Deprived of their Liberty, and other U.N. standards on deprivation of liberty. Organization of American States, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas pmbl., OEA/Ser/L/V/II.131, doc. 26 (Mar. 3-14, 2008). *See also* Organization of African Unity, African Charter on the Rights and Welfare of the Child art. 17(3), *adopted* July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999 ("essential aim of treatment of every child . . . shall be his or her reformation, re-integration into his or her family and social rehabilitation"); African Union, African Youth Charter art. 18(d), *adopted* July 2, 2006, http://www.au.int/en/sites/default/files/AFRICAN_YOUTH_CHARTER.pdf (viewed Mar. 7, 2014) ("induction programmes for imprisoned youth that are based on reformation, social rehabilitation and re-integration into family life"); African Charter on Human and Peoples' Rights art. 17; Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World, G.A. Res. 65/230, annex, ¶ 26, U.N. Doc. A/RES/65/213 (Apr. 1, 2011) ("We are convinced of the importance of preventing youth crime, supporting the rehabilitation of young offenders and their reintegration into society, protecting child victims and witnesses, including efforts to prevent their revictimization, and addressing the needs of children of prisoners."); Human Rights in the Administration of Justice, G.A. Res. 65/213, ¶ 15, U.N. Doc. A/RES/65/213 (Apr. 1, 2011) (stressing "the importance of including rehabilitation and reintegration strategies for former child offenders in juvenile justice policies, in particular through education programmes, with a view to their assuming a constructive role in society"); African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa princ. O(m) (Oct. 24, 2011) ("shall promote the child's rehabilitation"), http://www.achpr.org/instruments/fair-trial/ (viewed Mar. 7, 2014); Council of Europe, Committee of Ministers, Recommendation No. R(87)20 pmbl. (Sept. 17, 1987) ("the penal system for minors should continue to be characterised by its objective of education and social reintegration").

have rehabilitation as its primary aim.[21] The Committee on the Rights of the Child has stated that "in dealing with child offenders," objectives of criminal justice other than rehabilitation, such as repression and retribution, "must give way to rehabilitation and restorative justice objectives."[22] The Inter-American Commission has similarly stated that "traditional objectives of criminal justice," when it comes to children in conflict with the law, "must give way to reparation, rehabilitation and social reintegration of children and adolescents through the diversion of cases, or the use of other means of restorative justice."[23]

Second, certain treatment or punishments are incompatible with child status *per se* and thus constitute violations of the obligation to recognize and protect children. The Human Rights Committee has found that the requirement that States recognize and protect child status and provide children special measures of protection obligates States to prohibit corporal punishment. [24] Similarly, various international law authorities state that children in conflict with the law cannot be subjected to certain punishments. The Convention on the Rights of the Child explicitly prohibits sentences of death and sentences of life without the possibility of release.[25] The

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[21] ICCPR art. 10(3) ("The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.").

[22] U.N. Comm. Rts. of the Child, *General Comment No. 10,* ¶ 10 (noting also that "this can be done in concert with attention to effective public safety."). *See also* ICCPR art. 14(4); U.N. Hum. Rts. Comm., *General Comment No. 32*, ¶ 42 ("in the case of juvenile persons, procedures should take account of their age and the desirability of promoting their rehabilitation").

[23] Inter-Am. Comm'n H.R., Rapporteurship on the Rights of the Child, *Juvenile Justice and Human Rights in the Americas,* OEA/Ser.L/V/II, doc.78, ¶ 26 (July 13, 2011). *See also Cesar Alberto Mendoza et al. v. Argentina,* Case No. 12.651, ¶ 135-36.

[24] *See, e.g.*, U.N. Hum. Rts. Comm., *Concluding Observations of the Human Rights Committee: The Kyrgyz Republic*, U.N. Doc. No. CCPR/CO/69/KGZ, ¶ 19 (July 24, 2000) ("The Committee is concerned about . . . the problem of mistreatment of children in some education institutions, [and] cruel punishment . . . The State party must urgently address these issues so as to ensure the special protection to which children are entitled under article 24 of the Covenant. Specifically, corporal punishment must be prohibited.").

[25] Convention on the Rights of the Child art. 37(a) ("Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age"); U.N. Comm. Rts. of the Child, *General Comment No. 10,* ¶ 77. *See also, e.g.*, ICCPR art. 6(5); U.N. Comm'n on H.R., *Rights of the Child*, Human Rights Res. 2005/44, ¶ 27(c), U.N. Doc. E/CN.4/RES/2005/44 (Apr. 19, 2005) (noting prohibition on life imprisonment without possibility of release). The Inter-American

Committee on the Rights of the Child has observed that life imprisonment makes it difficult, if not impossible, to achieve the rehabilitative aims of the juvenile justice system and has recommended the abolition of all forms of life imprisonment for children.[26]

These above-referenced consequences of child status have clear implications for the sentence of life without parole for children in the Americas. As the Inter-American Court has observed, "the measure that should be ordered as a result of the perpetration of an offense must have the objective of the child's reintegration into society."[27]

Similarly, the Inter-American Commission has emphasized that as a fundamental element of juvenile sentencing, "children and adolescents must be treated in a manner that serves to preserve and cultivate their dignity, the objective of juvenile justice and *the State's special obligations to respect and guarantee their rights*, so that all forms of corporal punishment, or any punishment that violates their personal integrity and thwarts their reintegration as constructive members of society, are to be eliminated."[28]

The statements of United Nations treaty bodies and human rights experts demonstrate that the norm of customary international law obligating States to recognize and protect child status has clear and definite content.[29] States must provide children with special measures of protection, applying human rights protections, such as the requirement that the primary goal of the penal law focus on rehabilitation, in a way that takes into account children's status as minors—and that certain treatment or punishments be forbidden as inconsistent with child

Commission has similarly stated that sentences of children in conflict with the law must have an upper limit. Inter-Am. Comm'n H.R., Rapporteurship Rts. of the Child, *Juvenile Justice and Human Rights in the Americas* ¶ 360.

[26] U.N. Comm. Rts. of the Child, *General Comment No. 10,* ¶ 77.

[27] *Case of Mendoza et al. v. Argentina,* Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260, ¶ 165 (May 14, 2013).

[28] Inter-Am. Comm'n H.R., Rapporteurship on the Rights of the Child, *Juvenile Justice and Human Rights in the Americas* ¶ 363 (emphasis added).

[29] For a detailed discussion of customary international law in this area generally and of the norm against the sentence of life without parole in particular, see Brief for Amnesty International et al. as Amici Curiae Supporting Petitioners at 15-17, *Graham v. Florida*, 130 S.Ct. 2011 (2010) (Nos. 08-7412, 08-7621).

status. The sentence of life without the possibility of parole for children therefore violates the norm of customary international law obligating States to recognize and protect child status both alone an in the context of regional human rights protections.

IV. LIFE WITHOUT PAROLE SENTENCES FOR CHILDREN VIOLATE THE NORM OF CUSTOMARY INTERNATIONAL LAW PROHIBITING TORTURE OR CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

A. The customary international law norm prohibiting torture and other ill-treatment

The American Declaration's guarantee of personal security[30] includes the right to humane treatment and personal integrity, a right that incorporates protections against torture and other forms of ill-treatment.[31] In addition, the prohibition on torture and other forms of cruel, inhuman, or degrading treatment or punishment is explicitly proclaimed in the Universal Declaration of Human Rights[32] and is provided for in the ICCPR and the Convention against Torture, treaties ratified by the United States, as well as in the American Convention on Human Rights; the Inter-American Convention to Prevent and Punish Torture; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (the Convention of Belém do Pará); and the Convention on the Rights of the

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[30] American Declaration art. I.

[31] *See, e.g.*, *Ovelario Tames v. Brazil,* Case 11.516, Inter-Am. Comm'n H.R., Report No. 60/99, OEA/Ser. L/V/II.102 Doc. 6 rev. ¶ 39 (1998).

[32] Universal Declaration of Human Rights art. 5.

Child, among other treaties.[33] The prohibition of torture and other ill-treatment is also reaffirmed in numerous international and regional standards.[34]

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[33] *See* ICCPR art. 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); American Convention art. 5(2); Inter-American Convention to Prevent and Punish Torture, *adopted* Dec. 9, 1985, O.A.S.T.S. No. 67 (entered into force Feb. 28, 1987); Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women art. 4(c), *adopted* June 9, 1994, 1438 U.N.T.S. 63 [hereinafter "Convention of Belém do Pará"] (entered into force Mar. 5, 1995); Convention on the Rights of the Child arts. 37(a), 19(1). *See also* African Charter on Human and Peoples' Rights art. 5; Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, *opened for signature* Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222 [hereinafter "European Convention"] (entered into force Sept. 3, 1953), as amended by Protocol Nos. 3, 5, and 8 which entered into force on Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, respectively; European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, *opened for signature* Nov. 26, 1987, E.T.S. No. 126 (entered into force Feb. 2, 1989).

[34] *See, e.g.,* United Nations Standard Minimum Rules for the Treatment of Prisoners rules 31 and 33, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1955, and approved by the Economic and Social Council, Res. 663 C (XXIV) (July 31, 1957) and Res. 2076 (LXII) (May 13, 1977) ("Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences"; "Instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints."); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment princ. 6, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988) ("No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment."); Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, G.A. Res. 3452(XXX), U.N. Doc. A/RES/30/3452 (Dec. 9, 1975) ("Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights"); U.N. Rules for the Protection of Juveniles Deprived of Their Liberty rule 66 ("All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned"); U.N. Guidelines for the Prevention of Juvenile Delinquency art. 54, G.A. Res. 45/112, U.N. Doc. A/RES/45/112 (Dec. 14, 1990) [hereinafter "Riyadh Guidelines"] ("No child or young person should be subjected to harsh or degrading correction or punishment

The prohibition has been recognized as part of customary international law, binding on all states.[35] The prohibition of torture has risen to the level of a peremptory, or *jus cogens,* norm, one that prevails over conflicting treaty prohibitions or other sources of law.[36]

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measures at , in schools or in any other institutions"); Code of Conduct for Law Enforcement Officials art. 5, G.A. Res. 34/169, annex, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 17, 1979) ("No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment."); Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment princ. 2, G.A. Res. 37/194, U.N. Doc. A/RES/37/194 (Dec. 18, 1982) ("It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment."); Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa [hereinafter "Robben Island Guidelines"], http://www1.umn.edu/humanrts/instree/RobbenIslandGuidelines.pdf (viewed Mar. 7, 2014).

[35] For authority on the prohibition against torture as a matter of customary international law, see, e.g., U.N. Comm. against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties* ¶ 1, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

[36] *See Case of Caesar v. Trinidad and Tobago,* Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 70 (Mar. 11, 2005); *Case of Tibi v. Ecuador,* Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 143 (Sept. 7, 2004) ("There is an international legal system that absolutely forbids all forms of torture, both physical and psychological, and this system is now part of *ius cogens*"); U.N. Economic and Social Council, Commission on Human Rights, 42d sess., agenda item 10(a), *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report by the Special Rapporteur, Mr. P. Kooijmans, Appointed Pursuant to Commission on Human Rights Resolution 1985/33,* ¶ 3, U.N. Doc. E/CN.4/1986/15 (1986) ("[T]he prohibition of torture can be considered to belong to the rules of *jus cogens*. If ever a phenomenon was outlawed unreservedly and unconditionally it is torture."). *See also* Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 EUR. J. INT'L L. 98-99 (2004). On *jus cogens* generally, see LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL

There are no exceptions to the prohibition of torture and other ill-treatment: torture and other forms of cruel, inhuman, or degrading treatment or punishment are strictly prohibited under international law, always and everywhere.[37] The right to be free from torture and other ill-treatment is among the rights from which States may never derogate, not "even for the asserted purpose of preserving the life of the nation."[38] In fact, States must take special precautions during times of public emergency to ensure protection from torture and other forms of cruel, inhuman or degrading treatment or punishment.[39]

B. The scope of the prohibition against ill-treatment

The Convention against Torture and the Inter-American Convention to Prevent and Punish Torture define torture, but these treaties do not define what is meant by other forms of cruel, inhuman, and degrading treatment. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the U.N. General Assembly in 1988, note:

LAW (1988); CHRISTOS L. ROZAKIS, THE CONCEPT OF *JUS COGENS* IN THE LAW OF TREATIES (1976); ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (2009).

[37] *See Case of Fleury et al. v. Haiti,* Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 236, ¶ 70; *Case of the Gómez Paquiyauri Brothers v. Peru,* Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 111 (July 8, 2004); *Case of Maritza Urrutia v. Guatemala,* Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 89 (Nov. 27, 2003); *Case of Cantoral Benavides v. Peru,* Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 96 (Aug. 18, 2000); U.N. Comm. against Torture, *General Comment No. 2,* ¶ 5.

[38] Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights princ. 58, U.N. Doc. E/CN.4/1985/4, annex (1984). *See* ICCPR art. 4. In addition, the Human Rights Committee notes that "no justification or extenuating circumstances may be invoked to excuse a violation of article 7 [the prohibition of torture and cruel treatment or punishment] for any reasons, including those based on an order from a superior officer or public authority." U.N. Hum. Rts. Comm., *General Comment No. 20: Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment* ¶ 3 (Sept. 29, 1989), *in Report of the Human Rights Committee*, U.N. GAOR, 44th Sess., Supp. No. 40, U.N. Doc. A/44/40 (1989). *Accord* U.N. Comm. against Torture, *General Comment No. 2,* ¶ 26.

[39] Siracusa Principles princ. 59.

> The term “cruel, inhuman or degrading treatment or punishment” should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.[40]

In the *Celebici* case, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia defined inhuman or cruel treatment as “an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, that causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.”[41]

In general, the Committee against Torture and the Human Rights Committee have avoided drawing sharp distinctions between torture and other forms of prohibited ill-treatment. The Committee against Torture notes that “[i]n practice, the definitional threshold between ill-treatment and torture is often not clear.”[42] These committees instead simply note violations of the prohibition of torture and other cruel, inhuman, and degrading treatment or punishment taken as a whole.

To the extent that it is useful to distinguish between acts of torture and other forms of cruel, inhuman, and degrading treatment, the Inter-American Court and Commission have looked in part to the distinctions developed in the jurisprudence of the European Court of Human Rights.[43] In *Gómez Paquiyauri Brothers v Peru*, the Inter-American Court indicated that the “analysis of the gravity of the acts that

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[40] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment princ. 6 n. 1. Similarly, the Code of Conduct for Law Enforcement Officials, adopted by the U.N. General Assembly in 1979, observes: “The term ‘cruel, inhuman or degrading treatment or punishment’ has not been defined by the General Assembly but should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental.” Code of Conduct for Law Enforcement Officials art. 5 cmt. c.

[41] *Prosecutor v. Delalic et al. (Celebici case),* Case No. IT-96-21-T, Judgment, ¶ 552 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

[42] U.N. Comm. against Torture, *General Comment No. 2,* ¶ 3.

[43] *See, e.g.*, *Luis Lizardo Cabrera v. Dominican Republic,* Case No. 10.832, Inter-Am. Comm’n H.R., Report No. 35/96, ¶ 76 (Feb. 17, 1998); *Loayza Tamayo v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 57 (Sept. 17, 1997); *Caesar v. Trinidad and Tobago*, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 69.

may constitute cruel, inhumane or degrading treatment or torture, is relative and depends on all the circumstances of the case, such as duration of the treatment, its physical and mental effects and, in some cases, the sex, age, and health of the victim, among others."[44]

An analysis of ill-treatment under the Convention against Torture can further examine whether the acts at issue are inflicted for a purpose such as those listed in article 1 of the Convention against Torture. As then-United Nations Special Rapporteur on Torture Manfred Nowak emphasized, "[a]cts which fall short of this definition [of torture], particularly acts without the elements of intent or acts not carried out for the specific purposes outlined, may comprise [cruel, inhuman, and degrading treatment] under article 16 of the Convention."[45]

Finally, as the Inter-American Court observed in *Mendoza v. Argentina,* the prohibition against torture and other ill-treatment "refers not only to the means of punishment, but also to the proportionality of the punishment."[46] The Court went on to observe that "punishments considered radically disproportionate, such as

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[44] *Gómez Paquiyauri Brothers v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 113.

[45] U.N. Economic and Social Council, Commission on Human Rights, 62d sess., provisional agenda item 11(a), U.N. Doc. E/CN.4/2006/6, ¶ 35 (2005). Nowak has also suggested that "the powerlessness of the victim" is another factor that distinguishes torture from other forms of cruel, inhuman, and degrading treatment. He writes that "a thorough analysis of the *travaux préparatoires* of articles 1 and 16 of CAT as well as a systematic interpretation of both provisions in light of the practice of the Committee against Torture leads one to conclude that the decisive criteria for distinguishing torture from CIDT may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted, as argued by the European Court of Human Rights and many scholars." *Id.* ¶ 39. Nevertheless, Sir Nigel Rodley, himself a former U.N. Special Rapporteur on Torture, notes that the term "powerlessness" "is not found in the relevant instruments or jurisprudence" and cautions that "there is a risk of misinterpretation in so far as someone under the 'effective physical control' of authorities might be said not to be entirely 'powerless' where, for instance, he or she is suspected to have information that investigators may believe is urgently needed to save lives and where the detainee therefore in some sense has a degree of 'power' over his captors." NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 119 n.193 (3d ed. 2011).

[46] *Mendoza v. Argentina*, Inter-Am. Ct. H.R. (ser. C) No. 260, ¶ 174.

those that can be described as atrocious fall within the sphere of application of . . . the prohibition of torture and cruel, inhuman and degrading treatment."[47]

C. Sentences of life without parole for juvenile offenders constitute ill-treatment

The jurisprudence of the Inter-American system recognises that the prohibition against torture and other ill-treatment must be understood in relation to the circumstances of the individuals who are affected by the acts in question.

In particular, factors such as age, lack of maturity, and the incomplete emotional development of a child under the age of 18 are relevant to the analysis of whether an act or series of acts violates the prohibition on torture and other forms of cruel, inhuman, or degrading treatment or punishment. The Inter-American Commission established in the case of *Jailton Neri da Fonseca v. Brazil* that "in the case of children the highest standard must be applied in determining the degree of suffering, taking into account factors such as age, sex, the effect of the tension and fear experienced, the status of the victim's health, and his maturity, for instance."[48] Along the same lines, the Inter-American Court has determined, in relation to the right to personal integrity, that in assessing the treatment of children, it applies "the highest standard in determining the seriousness of actions that violate their right to humane treatment."[49]

Moreover, the Inter-American Court has indicated that the definition of torture is subject to continual reevaluation in light of current conditions and evolving standards of decency.[50] This logic applies with equal force to other forms of ill-

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[47] *Id.* (citing *Case of Harkins and Edwards v. United Kingdom,* App. Nos. 9146/07, 32650/07, ¶ 132 (Eur. Ct. H.R. Jan. 17, 2012)).

[48] *Jailton Neri da Fonseca v. Brazil,* Case 11.634, Inter-Am. Comm'n H.R., Report No. 33/04 (Mar. 11, 2004).

[49] *Gómez-Paquiyauri Brothers v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 170. *See also Case of the "Juvenile Reeducation Institute" v. Paraguay,* Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 162 (Sept. 2, 2004) ("The standard applied to classify treatment or punishment as cruel, inhuman or degrading must be higher in the case of children.").

[50] *See Cantoral Benavides v. Peru,* Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 99 (citing *Selmouni v. France,* App. No. 25803/94, Judgment ¶ 101 (Eur. Ct. H.R. July 28, 1999)) ("The European Court has pointed out recently that certain acts that were classified in the past as inhuman or degrading treatment, but not as torture, may be classified differently in the

treatment.[51] Such continual reassessment is consistent with the State's more general obligations to respect the inherent dignity of the human person, as proclaimed in the American Declaration and the University Declaration of Human Rights and set forth in article 10 of the ICCPR.[52]

With regard to the length of sentence and the necessity of periodic review, the European Court of Human Rights has indicated that article 3 (the prohibition of torture and inhuman or degrading treatment or punishment) of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) may be infringed in cases where the equivalent of a parole hearing is not available within a relatively short period of time. Although it did not find a violation of article 3 in the specific case it examined, which involved a sentence of six years in total, it noted that the assessment of the severity of treatment must take into account the requirement in the Convention on the Rights of the Child that the detention of a child "shall be used only as a measure of last resort and for the shortest appropriate period of time" and the recommendation in the Beijing Rules that "[r]estrictions on the personal liberty of the juvenile shall . . . be limited to the possible minimum."[53]

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future, that is, as torture, since the growing demand for the protection of fundamental rights and freedoms must be accompanied by a more vigorous response in dealing with infractions of the basic values of democratic societies.").

[51] More generally, as the Inter-American Commission has stated, the American Declaration and other human rights instruments "must be regarded as 'living instruments' and must be interpreted 'in the light of present-day conditions.'" Inter-Am. Comm'n H.R., Rapporteurship Rts. of the Child, *Juvenile Justice and Human Rights in the Americas,* ¶ 49 (citing *Tyrer v. United Kingdom,* App. No. 5856/72, Judgment ¶ 31 (Eur. Ct. H.R. Apr. 25, 1978).

[52] *See* American Declaration pmbl. ("All men are born free and equal, in dignity and in rights"); Universal Declaration of Human Rights pmbl. (recognising "the inherent dignity and of the equal and inalienable rights of all members of the human family"), art. 1 ("All human beings are born free and equal in dignity and rights."); ICCPR art. 10(1) ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."). As Manfred Nowak, the former UN Special Rapporteur against Torture, has noted, "the requirement of humane treatment pursuant to Art. 10 [of the ICCPR] goes beyond the mere prohibition of inhuman treatment under Art. 7 with regard to the extent of the necessary 'respect for the inherent dignity of the human person.'" NOWAK, CCPR COMMENTARY 250.

[53] *See T. v. United Kingdom,* App. No. 24724/94, Judgment ¶ 96 (Eur. Ct. H.R. Dec. 16, 1999) (citing Convention on the Rights of the Child art. 37; Beijing Rules rule 17.1(b)). The European Court further noted that "it cannot be excluded, particularly in relation to a

The European Court reinforced this analysis in a more recent decision involving the possibility of life sentences upon extradition for crimes committed by two adults, aged 19 and 20, in which it signalled that it would have found a violation of article 3 if the individuals had been under the age of 18. Assessing the situation of the 20-year-old offender, the Court noted, "Although he was twenty years of age at the time of the alleged offence, he was not a minor. Article 37(a) of the United Nations Convention on the Rights of the Child demonstrates an international consensus against the imposition of life imprisonment without parole on a young defendant who is under the age of eighteen. It would support the view that a sentence imposed on such a defendant would be grossly disproportionate."[54]

Indeed, even for individuals who are adults at the time of the crimes for which they are convicted, there are substantial grounds to conclude that sentences of life without parole are not consistent with international standards. As a member of the Human Rights Committee, Rajsoomer Lallah, observed in a concurring opinion in a case involving a 75-year term of imprisonment, "Article 10(3) [of the ICCPR] requires that the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Both reformation and social rehabilitation assume that a prisoner will be released during his expected lifetime. Would the commuted sentence meet this requirement?"[55]

Along similar lines, the Committee on the Rights of the Child has observed that all forms of life imprisonment of a child, even those that provide for periodic review and the possibility of earlier release, "make it very difficult, if not impossible, to achieve the aims of juvenile justice"—which include that the child receive education, treatment, and care aiming at release, reintegration, and the ability to assume a constructive role in society. Accordingly, the Committee on the Rights of the Child strongly recommends the abolition of all forms of life imprisonment, not

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child as young as the applicant at the time of his conviction, that an unjustifiable and persistent failure to fix a tariff, leaving the detainee in uncertainty over many years as to his future, might also give rise to an issue under Article 3." *Id.* ¶ 99.

[54] *See Harkins and Edwards v. United Kingdom,* App. Nos. 9146/07, 32650/07, Judgment ¶ 139 (Eur. Ct. H.R. Jan. 17, 2012).

[55] U.N. Hum. Rts. Comm., *Teesdale v. Trinidad and Tobago,* Communication No. 677/1996, U.N. Doc. CCPR/C/74/D/677/1996 (Apr. 15, 2002) (individual opinion of Rajsoomer Lallah, concurring).

simply those that are imposed without possibility of release, for offences committed by persons under 18 years of age.[56]

The differences between children and adults, "in their physical and psychological development, and in their emotional and educational needs . . . require a different treatment for children."[57] For these reasons, the Inter-American Commission has observed that "the traditional objectives of criminal justice—namely, repression and punishment—must give way to reparation, rehabilitation and social reintegration of children and adolescents through the diversion of cases, or the use of other means of restorative justice . . . with as little recourse as possible to adjudication and precautionary measures or punishments involving the deprivation of liberty."[58] In particular, the Commission has concluded that it "does not believe that retribution is an appropriate element in a juvenile justice system, if the aims of reintegration and rehabilitation are to be fully utilized."[59]

As set forth in the previous section, the foundational principles of juvenile justice are manifestly violated when juvenile offenders are sentenced to life without parole. Moreover, such sentences increase the risk that juvenile offenders will be subjected to violence,[60] in violation of the State's "specific obligation to protect [juvenile offenders] from attacks by third parties, including other inmates."[61]

Taking all of these factors into account, the Inter-American Court found in *Mendoza v. Argentina* that "life imprisonment and reclusion for life are not proportionate to the purpose of the criminal sanction of minors."[62] The Court concluded that the

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[56] U.N. Comm. Rts. of the Child, *General Comment No. 10,* ¶ 77.

[57] *Id.* at ¶ 10.

[58] Inter-Am. Comm'n H.R., Rapporteurship Rts. of the Child, *Juvenile Justice and Human Rights in the Americas,* ¶ 26.

[59] *Id.* ¶ 59.

[60] *See generally* PAULO SÉRGIO PINHEIRO, INDEPENDENT EXPERT FOR THE UNITED NATIONS SECRETARY-GENERAL'S STUDY ON VIOLENCE AGAINST CHILDREN, WORLD REPORT ON VIOLENCE AGAINST CHILDREN 196-200 (2006).

[61] *Minors in Detention (Honduras)*, Case No. 11.491, ¶ 136.

[62] *Mendoza v. Argentina,* Inter-Am. Ct. H.R. (ser. C) No. 260, ¶ 175.

combination of "the disproportionality of the sentences imposed" and the "extreme psychological impact" they caused amounted to cruel and inhuman treatment.[63]

As the Inter-American Court has observed, certain forms of punishment "reflect[] an institutionalization of violence" and, even though they are "permitted by the law, ordered by the State's judges and carried out by its prison authorities," constitute sanctions that are incompatible with international norms.[64] Sentences of life without possibility of release are one such punishment. They constitute *per se* violations the prohibition on torture and other cruel, inhuman, and degrading treatment or punishment because of the mental and physical suffering they impose on juvenile offenders.

V. LIFE WITHOUT PAROLE SENTENCES FOR CHILDREN VIOLATE THE NORM OF CUSTOMARY INTERNATIONAL LAW PROHIBITING ARBITRARY DETENTION

As a protection of the right to liberty and security of person, the norm of customary international law prohibiting arbitrary detention is among the oldest constraints on State power. One of the welcome consequences of the recognition of the rights of the child in international law has been the development of the particular content of the prohibition of arbitrary detention with regard to children.

The modern history of the prohibition of arbitrary detention in international human rights law began with its inclusion in article 9 of the Universal Declaration of Human Rights.[65] There is broad recognition that the prohibition constitutes a norm of customary international law.[66] Perhaps the best evidence of its crystallization as

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[63] *Id.* ¶ 183.

[64] *See Caesar v. Trinidad and Tobago*, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 73 (concluding that corporal punishment by flogging was such a sanction).

[65] Universal Declaration of Human Rights art. 9 ("No one shall be subjected to arbitrary arrest, detention, or exile").

[66] *See, e.g.*, Restatement (Third) of Foreign Relations Law § 702 (1987) ("A state violates international law if, as a matter of policy, it practices, encourages, or condones . . . prolonged arbitrary detention . . . ."). A comment by the drafters of the Restatement states that the term "arbitrary detention" extends to all detentions that are "incompatible with principles of justice or with the dignity of the human person." *Id.* at cmt. h (quoting

customary international law is its inclusion in every major relevant international and regional human rights convention.[67] This prohibition is explicitly recognized in both the American Convention and American Declaration.[68] The special application of the customary international law prohibition against arbitrary detention to the detention of children is reflected further by its inclusion in the Convention on the Rights of the Child[69]—the most ratified international human rights treaty.

International authorities are in broad agreement with regard to the content of the customary international law prohibition against arbitrary detention: the prohibition does not simply preclude detentions that are "against the law"; the prohibition extends to detentions that are disproportionate in the prevailing circumstances,[70]

Statement of U.S. Delegation, U.N. GAOR, 13th Sess., U.N. Doc. A/C.3/SR.863, at 137 (1958)).

[67] ICCPR art. 9(1) (including the prohibition as non-derogable: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."). *See also* American Declaration art. XXV ("No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law."); European Convention art. 5 ("Everyone has the right to liberty and security of person."); American Convention art. 7(3) ("No one shall be subject to arbitrary arrest or imprisonment."); African Charter on Human and Peoples' Rights art. 6 ("No one may be arbitrarily arrested or detained.").

[68] American Declaration art. XXV ("No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law."); American Convention art. 7(3) ("No one shall be subject to arbitrary arrest or imprisonment.").

[69] Convention on the Rights of the Child art. 37(c) ("No child shall be deprived of his or her liberty unlawfully or arbitrarily."); U.N. Comm. Rts. of the Child, *General Comment No. 10*, ¶ 79.

[70] *See, e.g.,* U.N. Hum. Rts. Comm., *Draft General Comment No. 35 (Article 9): Liberty and Security of Person* ¶ 13, U.N. Doc. CCPR/C/107/R3 (Jan. 28, 2013) ("The notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law.") (citing U.N. Hum. Rts. Comm., *Gorji-Dinka v. Cameroon,* Communication No. 1134/2002, ¶ 5.1, U.N. Doc. CCPR/C/83/D/1134/2002 (May 10, 2005)). Note that the Human Rights Committee has primarily considered the issue of disproportionality and arbitrariness in the context of pre-trial detention. *See* U.N. Hum. Rts. Comm. *Abasi v. Algeria*, Communication No. 1172/2003, ¶ 8.4, U.N. Doc. CCPR/C/89/D/1172/2003 (June 21, 2007); U.N. Hum. Rts. Comm., *van Alphen v. The Netherlands*, Communication No. 305/1988, ¶ 5.6, U.N. Doc. CCPR/C/39/D/305/1988 (Aug. 15, 1990).

including in the context of sentencing.[71] Inter-American law and practice also recognizes that disproportionality in sentencing generally can violate the prohibition on arbitrary detention. [72]

State obligations to treat children differently, and the differences between children and adults, make life without parole sentences disproportionate. As the Committee on the Rights of the Child has noted, the "physical and psychological development . . . [as well as] emotional and educational needs . . . require a different treatment for children."[73] These differences between children and adults make certain punishments, including life without parole, particularly harsh for children—and therefore disproportionate and arbitrary.[74]

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[71] JOSEPH AND CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 363 ("Therefore, a gaol term must not be totally disproportionate to the severity of the crime committed. Punishment must fit the crime.") (citing U.N. Hum. Rts. Comm., *A v. Australia*, Communication No. 560/1993, ¶ 522, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997); U.N. Hum. Rts. Comm., *Fernando v. Sri Lanka*, Communication No. 1189/03, U.N. Doc CCPR/C/83/D/1189/2003 (May 10, 2005); and U.N. Hum. Rts. Comm., *Dissanayake v. Sri Lanka*, Communication No. 1373/05, U.N. Doc. CCPR/C/93/D/1373/2005 (Aug. 4, 2008)); NOWAK, CCPR COMMENTARY 172 (stating that at the time of the drafting of the ICCPR, Nowak writes that a majority of the delegates "stressed that its meaning went beyond [unlawful] and contained elements of injustice, unpredictability, unreasonableness, capriciousness and *unproportionality*, as well as the Anglo-American principle of due process of law." (emphasis added)).

[72] As the Inter-American Court and Commission have emphasized, "The principle of proportionality as a control on arbitrary restrictions constitutes a three-stage test to determine if the restriction could be considered as 'necessary in a democratic society.' After examining the appropriateness and the necessity of the measure, at the proportionality phase, there must be a check as to whether 'the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the purpose sought.'" Inter-Am. Comm'n H.R., Rapporteurship Rts. of the Child, *Juvenile Justice and Human Rights in the Americas* ¶ 352 n. 258 (citing *Case of Tristan Donoso v. Panama,* Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 56 (Jan. 27, 2009), and *Case of Chaparro-Álvarez and Logo-Íñiquez v. Ecuador,* Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No 170, ¶ 93 (Nov. 21, 2007)).

[73] U.N. Comm. Rts. of the Child, *General Comment No. 10* ¶ 10.

[74] *See Mendoza v. Argentina,* Inter-Am. Ct. H.R. (ser. C) No. 260, ¶¶ 161,163-64. For a discussion of the disproportionality of life without parole sentences under U.S. Constitutional law, see *Graham v. Florida*, 130 S.Ct. 2011 (2010).

The U.N. Working Group on Arbitrary Detention has also described deprivations of liberty as arbitrary when they are so violative of basic human rights as to be against the law. The Working Group has stated that, "[w]hen the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character," among other situations.[75]

Indeed, international authorities are unanimous that periodic review and the possibility of release are required elements of any non-arbitrary deprivations of liberty of children. The Inter-American Commission has stated that "the principles that must guide and delimit the use of penalties of incarceration . . . in the case of children [are that *all* deprivations of liberty] should be used only as a last resort, and must be proportional to the crime, last as short a time as possible *and be subject to periodic review."*[76] The Committee on the Rights of the Child has specified that "the possibility of release should be realistic and regularly considered."[77]

International law requires that States provide children special protection from arbitrary deprivations of liberty. The norm of customary international law prohibiting arbitrary detention is clear in prohibiting as arbitrary those detentions that are disproportionate, given the circumstances, including in light of the characteristics of the detainee and, in sentencing, the nature of the offense. Life without parole sentences of children, in light of the developmental characteristics and diminished culpability of children, are disproportionate.

The norm also clearly prohibits as arbitrary those detentions which so violate basic human rights so as to be against the law. Because juvenile life without parole sentences violate a range of fundamental human rights of children, frustrate the rehabilitative purpose of the juvenile justice system, and provide no realistic

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[75] U.N. Wkg. Gp. on Arbitrary Detention, *Deliberation No. 9 Concerning the Definition and Scope of Arbitrary Deprivation of Liberty Under Customary International Law* ¶ 38(c), *in* U.N. Hum. Rts. Council, 22d sess., agenda item 3, *Report of the Working Group on Arbitrary Detention,* U.N. Doc. A/HRC/22/44 (Dec. 24, 2012).

[76] Inter-Am. Comm'n H.R., Rapporteurship Rts. of the Child, *Juvenile Justice and Human Rights in the Americas* ¶ 336 (emphasis added).

[77] U.N. Comm. Rts. of the Child, *General Comment No. 10,* ¶ 77.

prospect of release or review, they also constitute arbitrary detention in this second respect.

The sentence of life without parole therefore violates the norm of customary international law that prohibits the arbitrary detention of children as a matter of international law and when interpreted through regional human rights obligations.

VI. CONCLUSION

For the foregoing reasons, we respectfully request that the Commission explicitly recognize that the sentence of life without parole for children violates the three norms of customary international law analyzed above. These norms constitute the evolving *corpus juris* of international law and are therefore relevant to the Commission's analysis of international and regional human rights law and standards in this case. We urge the Commission to find that those norms and obligations prohibit sentencing children to life without parole.

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