Before the

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Henry Hill, et al.

vs.

The United States of America

Brief of Amici Curiae in Support of Petitioners

Presented on behalf of Human Rights Advocates, The Advocates for Human Rights, University of Minnesota Human Rights Center, University of San Francisco Center for Law and Global Justice, and Professor David S. Weissbrodt *by:*

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AMICUS BRIEF OF HUMAN RIGHTS ADVOCATES, THE ADVOCATES FOR HUMAN RIGHTS, UNIVERSITY OF MINNESOTA HUMAN RIGHTS CENTER, UNIVERSITY OF SAN FRANCISCO CENTER FOR GLOBAL LAW AND JUSTICE, AND PROFESSOR DAVID S. WEISSBRODT

STATEMENT OF *AMICI CURIAE*

Human Rights Advocates, The Advocates for Human Rights, University of Minnesota Human Rights Center, University of San Francisco Center for Law and Global Justice, and Professor David Weissbrodt ("*Amici*") respectfully submit this brief of *amici curiae* to the Commission in the case of *Henry Hill, et al. v. United States of America*, Case No. 12.866. The interests of *amici curiae* are described in detail in the Appendix.

Amici urge the Inter-American Commission on Human Rights to consider the international norms that prohibit the imposition of life without parole sentences on offenders who were under the age of 18 at the time of the commission of the crime both for interpreting the American Declaration of Rights and Duties of Man Articles II, VII and XXVI, as well as upholding the United States' treaty obligations. The United States is the only country in the world that does not comply with the norm against imposing life without parole sentences on juveniles under the age of 18. This is contrary to both a *jus cogens* norm that prohibits this sentence – well established by state practice – as well as determinations by treaty bodies reviewing treaties that the United States is party to.

SUMMARY OF ARGUMENT

Every other country in the world has rejected the practice of giving a sentence of life without parole to offenders who were under 18 at the time they committed a crime. Although a few countries technically permit the sentence, no known persons are actually serving the sentence outside the United States. In order to comply with international law, the few countries in which juveniles reportedly received such sentences in the past either have changed their laws

or given assurances that the juvenile offenders can, in fact, apply for parole. The universal prohibition against such a sentence outside of the United States reflects not just customary international law, but a peremptory, non-derogable, *jus cogens* norm of international law. In addition, a number of treaties, that the United States is party to prohibit the sentence as well.

ARGUMENT

I. INTERNATIONAL LAW PROHIBITS LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS

The practice of sentencing juvenile offenders to life imprisonment without the possibility of parole has been rejected by every nation in the world except the United States. Only the United States still imposes the sentence. Connie de la Vega et al., *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, 59-61 (Univ. of S.F. Sch. Of Law Ctr. For Law and Global Justice ed., 2012) (hereinafter *Cruel and Unusual*); Connie de la Vega & Michelle Leighton, *Sentencing our Children to Die in Prison,* 42 U.S.F. L. Rev. 983, 989-1007 (2008) (hereinafter "*Sentencing our Children to Die*"). Indeed, the prohibition against the sentence of life without parole for juveniles is part of customary international law, and the elevation of this norm to the status of *jus cogens* by the worldwide condemnation of this practice and the expectation for all nations to comply, should inform this Commission's interpretation of the American Declaration of the Rights and Duties of Man.[1] The consistency and uniformity of international law and opinion against the sentence should weigh heavily in the Commission's determination that the sentence violates specific provisions of the American Declaration, as well as other treaty obligations of the United States.

[1] As discussed below, imposition of this sentence by courts in Michigan and elsewhere in the country renders the United States out of compliance with its international treaty obligations.

A. The Prohibition Of Juvenile Life Without Parole Sentences Is *Jus Cogens*

Under article 53 of the Vienna Convention on the Law of Treaties, a *jus cogens* norm of international law is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, art. 53, 1155 U.N.T.S. 331, (May 23, 1969) (hereinafter "Vienna Convention").[2] The Inter-American Court of Human Rights has noted that, "[i]f a norm qualifies as *jus cogens*, that is a peremptory norm of international law, then a 'controlling executive or legislative act or judicial decision,' a contrary treaty, a reservation, or a persistent objection would not excuse U.S. violation of that norm." *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion, OC-18/03 (Inter-Am. Ct. H.R. Sept. 17, 2003) note 16 (citing Vienna Convention).

The doctrine of *jus cogens* focuses on the supremacy of certain international law norms in regulating state practice. Ian Brownlie, Principles of Public International Law 512–13 (Oxford 1990) (hereinafter "Brownlie"); *Barcelona Traction, Light and Power Company, Limited* (Belg. v. Spain), 1970 I.C.J. 4, at paras. 33–34 (Feb. 5).

This Commission has defined the concept of *jus cogens* as a "superior order of legal norms, which the laws of man or nations may not contravene." Inter-American Commission on Human Rights, *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 913 (2002) at para. 49. Thus, norms of *jus cogens* "bind the international community as a whole, irrespective of protest, recognition or acquiescence." *Id.*

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[2] Although the United States has not ratified the Vienna Convention, it nonetheless accepts the treaty's principles as binding law—i.e., part of United States law. *See, e.g.*, Restatement § 102; Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?* 32 U.S.F. L. Rev. 735, 754, 759-62 (1998) (explaining that United States is bound by *jus cogens*).

As the Commission stated in the *Domingues* case, "a norm of *jus cogens* may emerge by several means, including state practice as well as through treaty provisions that are viewed as being of a peremptory nature." *Id.* at para. 106.

> Where an instrument is widely ratified or endorsed by members of the international community and speaks to the legality of certain actions, the provisions of that instrument might themselves properly be considered as evidence of *opinion [sic] juris*. Human rights treaties are particularly significant in this respect, as they are widely regarded as recognizing and building upon rights that already exist by reason of the attributes of the human personality and which therefore may not be abrogated by any state.

Id. at para. 107.

Having surveyed the relevant legal instruments in the *Domingues* case, the Commission recognized a *jus cogens* norm prohibiting the death penalty for juvenile offenses, applicable to all states, including the United States, notwithstanding that the United States had not ratified the Convention on the Rights of the Child, which expressly and specifically bans the juvenile death penalty. *Id.* at para. 112.[3] As explained below, a similar analysis confirms the existence of a *jus cogens* norm prohibiting life without parole sentences for juvenile offenses.

The Restatement (Third) of the Foreign Relations Law of the United States, which explicates the content and status of international law *as United States law*—i.e., as applied by courts in the United States—is in conformity with this standard. Restatement (Third) of the Foreign Relations Law of the United States § 102, cmt. k (hereinafter "Restatement"). *Jus cogens* norms are originally derived from treaties and/or state practice, comprising customary international law (which the Restatement describes as resulting "from a general and consistent practice of states followed by them from a sense of legal obligation," Restatement § 102(2)).

[3] The Commission reached this conclusion despite recognizing that the United States had ratified the International Covenant on Civil and Political Rights with a reservation to Article 6 with respect to the prohibition of the imposition of the death penalty on offenders younger than 18 at the time of the crime. Paras. 19 and 62.

However, unlike general customary law, *jus cogens,* also called peremptory norms, have attained a higher status in international law such that the global community of nations expects *all* states to comply, and none to derogate, regardless of consent, express or implied.

According to the Restatement, *jus cogens* "rules prevail over and invalidate international agreements and other rules of international law in conflict with them." *Id.*, cmt. k. The Ninth Circuit Court of Appeals in the United States (one step below the United States Supreme Court) has explained that:

> While *jus cogens* and customary international law are related, they differ in one important respect. Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm, see Restatement § 102 Comment d, just as a state that is not party to an international agreement is not bound by the terms of that agreement .... In contrast, *jus cogens* "embraces customary laws considered binding on all nations" and "is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations," [citations omitted].

Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992) (recognizing torture as *jus cogens* violation).

A *jus cogens* norm is said to be established where there is acceptance and recognition by a "large majority" of states, even if over dissent by a very small number of states. Restatement §102 & rptr. n. 6 (citing Report of the Proceedings of the Committee of the Whole, at 471-72, U.N. Doc.A/Conf. 39/11 (1968)). Thus it is clear, that the jurisprudence in the United States is in agreement with the internationally accepted definition and effect of *jus cogens* norms. Although the internal law of the United States would not excuse violation of international law, that the United States recognizes the generally accepted definition and role of *jus cogens* reinforces its applicability in this case involving the justice system of a state of the United States.

As a matter of international law, a *jus cogens* norm must fulfill three basic requirements: 1) it is general or customary international law; 2) it is accepted by a large majority of states as non-derogable; and 3) it has not been modified by a new norm of the same status. The prohibition against life without parole sentences for offenders under the age of 18 when they committed their crime satisfies these requirements. Thus, the prohibition is *jus cogens,* and the United States has an international legal obligation to comply.

1. The Prohibition is General or Customary International Law

General or customary international law requires widespread, constant, and uniform state practice compelled by a sense of legal obligation over a sufficiently long time period, notwithstanding a few uncertainties or contradictions in practice during this time. *Anglo-Norwegian Fisheries* (U.K. v. Nor.), 1951 I.C.J. 117, 138–39 (Jan. 18) (discussing general international law applicable to delimitation of Norwegian fisheries zone)*; Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, para. 186 (June 27) (to deduce existence of customary rules, it is "sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule").

Furthermore, "a very widespread and representative participation in [a] convention might suffice of itself" to evidence the attainment of customary international law, provided it included participation from "States whose interests were specially affected." *North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, paras. 73–74 (Feb. 20) ("although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question,

short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved"). This definition is accepted by most legal scholars in and outside the United States. *See, e.g.*, Restatement § 102; Henry J. Steiner, Philip Alston & Ryan Goodman, International Human Rights in Context 74-78 (Oxford 2008).

The prohibition against sentencing child offenders to life without parole meets these criteria. It is a treaty rule and customary practice, followed by all countries as a legal obligation, except the United States. There is near-universal ratification of the U.N. Convention on the Rights of the Child ("CRC") which, in article 37, expressly prohibits the sentence for juveniles along with the death penalty.[4] This is because imposing such sentences on juvenile offenders contravenes society's notion of fairness and the shared legal responsibility to protect and promote child development. The Committee on the Rights of the Child, the UN treaty body that monitors compliance with the CRC, has noted that customary international law recognizes that the special characteristics of children should be considered when imposing sentences in the criminal justice system. Committee on the Rights of the Child, Children's Rights in Juvenile Justice, General Comment No. 10, paras. 10-11, U.N. Doc CRC/C/GC/10 (2007). Indeed, the LWOP sentence penalizes child offenders more than adults because the child, by virtue of young age, will likely serve a longer sentence than an adult for the same crime.

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[4] The United States, Somalia, and South Sudan are the only three countries not party to the CRC. *See* OHCHR, Status of the Principal International Human Rights Treaties, *at* http://www.unhchr.ch/pdf/report.pdf. Lacking a functioning government, Somalia could not feasibly have ratified the CRC, *see, e.g.*, U.S. Department of State report on Somalia, http://www.state.gov/r/pa/ei/bgn/2863.htm. South Sudan has only recently become a sovereign state and has not yet ratified any treaties. This leaves the United States as the only country that could have but has not ratified the treaty, and even the United States has signed it.

Moreover, all functioning states besides the United States comply with the legal obligation, including those whose interests are specially affected. In evaluating state practice, "it is appropriate for the Commission to take into account evidence of relevant state practice as disclosed by various sources, including recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of the United Nations and other international governmental organizations, and the domestic legislation and judicial decisions of states." *Michael Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, doc. 5 rev. 1 (2002), at 913, para. 54. Very few states ever used life without parole sentences on juvenile offenders and the few that did have either abolished it or have stopped using it. *Sentencing our Children to Die, supra*, at 989. As a result, the United States is now responsible for 100% of all child offenders serving this sentence.

While the CRC entered into force in 1992, very few countries have *ever* imposed life sentences on child offenders. *Sentencing our Children to Die, supra*, at 989-1007. Of particular relevance are the laws in the States in the Americas that have reduced sentences for juvenile offenders. For example: in Brazil the maximum sentence for juvenile offenders is 3 years (Estatuto da Criança e do Adolescente, art. 121, http://www.planalto.gov.br/ccivil_03/leis/l8069.htm); in Chile, the maximum sentence for offenders under 16 is 5 years, and for those between 16 and 18, the maximum is 10 years (Ley No. 20.084, art.18, http://www.leychile.cl/Navegar?idNorma=244803); in Colombia offenders aged 14-18 get a maximum of 8 years for the worst crimes (Código de la Infancia y de la Adolescencia (2012), art.187, http://www.icbf.gov.co/portal/page/portal/PortalICBF/Especiales/SRPA/ClyA-Ley-1098-de-2006.pdf); in Mexico the sentence is 1-5 years for offenders aged 14 and 15 and 2-7 years for

offenders aged 16 and 17 (Ley Federal de Justicia Para Adolescentes, art. 121, http://www.diputados.gob.mx/LeyesBiblio/ref/ltmi/LTMI_abro_27dic12.pdf); in Venezuela offenders under14 can get a maximum of 2 years, and those 15-18 a maximum of 5 years (Ley Orgánica para la Protección de Niños, Niñas, y Adolescentes, Art. 628, http://www.defensoria.gob.ve/dp/index.php/leyes-ninos-ninas-y-adolescentes/1347).[5]

In Canada, abhorrence of the practice is so strong that the highest court in Quebec refused a juvenile offender's extradition to Florida based on the possibility that he would be subject to a juvenile life without parole sentence. *See Fowler v. Canada* (Ministre de la Justice), (2011) QCCA 1076 (Que.). The Court concluded that extradition to a jurisdiction that would permit the sentence "would be inconsistent with the principles recognized by Canada in the [Youth Criminal Justice Act] and would shock the conscience of Canadians." *Id.* ¶ 17. The Court explained:

> [T]he inevitability of life imprisonment without eligibility for parole upon conviction cannot be reconciled with Canada's firm determination, in the framework of the YCJA, to establish an appropriate balance with respect to the need to hold youth accountable for their criminal actions, while ensuring that they are rehabilitated and reintegrated into the community, in their own interest and in the interest of society as a whole. *Id.*

Argentina's law that permitted life sentences where juveniles were not allowed to apply for parole for 20 years was held to be a violation of the American Convention on Human Rights by the Inter-American Court of Human Rights. *Mendoza et al. v. Argentina,* Judgment, Inter-Amer. Ct. H.R. (Ser. C) No. 260 (May 14, 2013). The Court ruled that the sentence violated Article 19 (special measures of protection for children), Article 7(3) (freedom from arbitrary sentences), Article 5 (right to humane treatment), Article 8 (right to a fair trial), and Article 25

[5] For a list of all countries, *see* Connie de la Vega, Amanda Solter, Soo-Ryun Kwon, and Dana Marie Isaac, Cruel and Unusual: U.S. Sentencing Practices in a Global Context, Appendix pages 74-90 (2012), *available at* http://www.usfca.edu/law/clji/criminalsentencing

(right to judicial protection). Thus, the Court rejected a sentencing scheme less harsh than the Michigan system at issue here, because it: (a) did not take into account the specific circumstances of each child;[6] (b) failed to comply with the required purpose of social reintegration of child prisoners; (c) was disproportionate as a matter of law; and (d) deprived child offenders of due process. *Id. A fortiori*, the harsher sentencing system at issue here falls short of the requirements of American Convention.

Consistent with these principles of international law, an irreducible sentence of life imprisonment is not imposed on a child in any country in Europe. The majority of European countries do not allow any type of life sentences for juvenile offenders. *See* Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?* 23 Fed. Sentencing Rptr., No. 1 at 39-48 (Oct. 2010). Generally, throughout Europe, the maximum sentence for juvenile offenders is ten years, though this may increase up to 15 years in cases that involve a very serious crime. *Id.* (citing Frieder Dünkel & Barbara Stańdo-Kawecka, Juvenile Imprisonment and Placement in Institutions for Deprivation of Liberty — Comparative Aspects, Juvenile Justice Systems in Europe — Current Situation and Reform Developments 1772 (2010)). The range of permissible maximum sentences allowed varies by country: Switzerland is four years (including for murder); the Czech Republic is ten years, *see* CRUEL AND UNUSUAL, *supra,* at 77; and Estonia, Germany and Slovenia allow up to 10 years, *see id.* at 78 (Estonia), 79 (Germany), and 87 (Slovenia). In England and Wales, a person under 21 cannot receive a whole life tariff, the equivalent of a life without parole sentence, because Schedule 21, ¶ 1 and § 269(4) of the Criminal Justice Act 2003 restricts such sentences to persons aged 21 or older. In the

[6] The Court in *Mendoza* clarified that international law requires special measures of protection that require juvenile sentences: (i) are imposed only as a last resort and for "as short as possible"; (ii) are for a specified term of years; and (iii) include mechanisms for periodic review. *Mendoza v. Argentina,* Inter-Amer. Ct. H.R. (Ser. C) No. 260, ¶ 162.

Netherlands, there is the (theoretical) possibility of life imprisonment with the possibility for parole, restricted to juveniles at least 16 years in age. *See id.* at 84. But in none of these countries do the courts impose sentences of life without parole on juvenile offenders. *See id.* at 48 (noting that there "are no known cases of the sentence being imposed" (citation omitted)).

These laws have been in place for long periods of time in many countries. For example, in Germany, the maximum sentence for youth under 18 for any crime of 10 years has been in place since 1923 (Arts. 5, 17 & 18 of the Jugendgerichtsgesetz (JGG), Juvenile Justice Act, German penal code of 1923, consolidated version of 12/17/2008, www.gesetze-im-internet.de/bundesrecht/jgg/gesamt.pdf); and in France the law specifying a sentence of 16 to 20 years for juveniles under age 16 has been in place since 1945 (Arts. 2 & 20-2, Ordonnance of 2 Feb. 1945, http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069158&dateTexte=20090701).

Nearly all governments either have expressly prohibited, never allowed, or do not impose such sentences on child offenders, because it violates the principles of child development and protection established through national standards and international human rights law, including regional human rights instruments such as the treaties of the Inter-American human rights system. *Sentencing our Children to Die, supra*, at 989-90. While eight countries have been identified as having laws that could allow a JLWOP sentence (Antigua and Barbuda, Argentina, Australia, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka) there are no known cases outside the United States where the sentence has been imposed. Cruel and Unusual, *supra* at 61.

Even in the United States, the sentence was not used on a large scale until the 1990s when crime reached record levels. *See* P. Griffin, et al., Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions, National Center for Juvenile Justice (1998), www.ncjrs.org/pdffiles/172836.pdf. Before 1992, the sentence had rarely been imposed. Jonathan E. Cruz, *Juvenile Waivers and the Effects of Proposition 21*, 1 Law & Soc'y Rev. 29, 38 (2002). Thus, the norm prohibiting the juvenile life without parole sentence is widespread, consistent and uniform—and it predates formal codification in the CRC. As such, it plainly satisfies the standard for general or customary international law.

2. There is Universal Acceptance that the Prohibition is Non-Derogable and Applies to All States

Whether a rule of international law has achieved peremptory status depends on whether nations agree that the rule is legally binding on *all* states, not just those that express consent. *See* Dinah Shelton, *Normative Hierarchy in International Law*, 100 Am. J. Int'l L. 291, 323 (2006); Brownlie, *supra,* at 512–13. It is therefore important to evaluate the legal expectations of the community of nations and their practice in conformity with those expectations. Treaties and UN resolutions can provide evidence of such expectations. Rosalyn Higgins, Problems and Process: International Law and How We Use It 22 (Oxford 1994).

In its 2003 advisory opinion on the Juridical Condition and Rights of Undocumented Migrants, the Inter-American Court of Human Rights relied on the existence of 19 treaties and 14 soft-law instruments that address the principle of non-discrimination and equal protection under the law in reaching its conclusion that those principles qualify as *jus cogens* norms. Inter-Am. Ct. Hum. Rts., Juridical Condition and Rights of Undocumented Migrants (Advisory Opinion), 17 September 2003 (Series A, No. 18), at para. 86 fn. 33 (listing instruments). As the Court explained, the "fact that the principle of equality and non-discrimination is regulated in so

many international instruments is evidence that there is a universal obligation to respect and guarantee the human rights arising from that general basic principal." *Id.* at para. 86.

The prohibition against JLWOP satisfies the same criteria for universality. Virtually all nations have reconfirmed their expectation that every country comply with the prohibition: treaty bodies have clarified that the sentence is prohibited by law, even for the United States; the community of nations has condemned the practice and called for its abolition by any nation that would continue its use; and all other countries that had used the sentence have stopped.

In early 2007, the Committee on the Rights of the Child reiterated that CRC article 37 prohibits the juvenile death penalty and life without parole in a General Comment. General Comment No. 10, at para 27. The prohibition has also been recognized as an obligation under the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXXI), 999 U.N.T.S. 171 (Dec. 16, 1966) (hereinafter "ICCPR"). In relation to articles 7 (cruel and unusual punishment) and 24 (treatment of children), the Human Rights Committee, which administers the ICCPR, "is of the view that sentencing children to life sentence without parole is of itself not in compliance with article 24 (1) of the Covenant. (articles 7 and 24)." U.N. Human Rights Comm., Comments on the United States of America, U.N. Doc. CCPR/C/SR 2395 at para 34 (2006) (hereinafter "Comments on the United States").

Prohibition of the juvenile death penalty and juvenile sentences of life without parole is also required to ensure the rights to humane treatment, dignity and personal liberty of children that are codified in the *corpus juris* of the Organization of American States, of which the United States is a member. *See* American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, Art. VII (1948) (establishing right of "all children . . . to special protection, care and aid");

American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, art. 19 (18 July 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"); *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R., doc. 5 rev. 1, at 913, para. 83 (2002) (Art. 19 of American Convention and Art. VII of American Declaration reflect "the broadly-recognized international obligation of states to provide enhanced protection to children"); *Juridical Conditions and Human Rights of the Child,* Inter-Am. Ct. H.R., Advisory Opinion OC-17/02, Ser. A. No. 17, para. 37 (Aug. 2002) ("Deprivation of liberty of children shall be applied as a measure of last resort and for the minimum necessary period, and shall be limited to strictly exceptional cases.").

Beyond the rule's clarity in treaty law, a near-universal consensus has coalesced over the past twenty years, and even accelerated since 2006, that the sentence is legally impermissible. Myriad United Nations resolutions have passed by consensus or, upon vote, by every country represented except the United States. Consistent with these findings by treaty bodies, every year since 2006, in its annual Rights of the Child resolution, the United Nations General Assembly has called for immediate abrogation of the sentencing of juveniles to life without parole by law and practice in any country still applying the penalty. Rights of the Child, G.A. Res. 67/152, ¶ 20, U.N. Doc. A/RES/67/152 (Dec. 20, 2012); Rights of the Child, G.A. Res. 66/141, ¶ 19, U.N. Doc. A/RES/66/141, (Dec. 19, 2011); Rights of the Child, G.A. Res. 65/197, ¶ 17 U.N. Doc. A/RES/65/197 (Dec. 21, 2010); Rights of the Child, G.A. Res. 64/146, ¶ 15, U.N. Doc. A/RES/64/146 (Dec. 18, 2009); Rights of the Child, G.A. Res. 63/241, ¶ 43, U.N. Doc. A/RES/63/241 (December 24, 2008); Rights of the Child, G.A. Res. 62/141, ¶ 36(a), U.N. Doc.

A/RES/62/141 (December 18, 2007); Rights of the Child, G.A. Res. 61/146, ¶ 31(a), U.N. Doc. A/RES/61/146 (December 19, 2006).

From 2006-2008, the United States cast the lone dissenting vote, while more than 180 other countries voted in favor of the resolutions. *Id.* From 2009 to 2012, the General Assembly affirmed the earlier resolutions, including the directive to abolish juvenile life without parole sentences, by *consensus* without taking a formal vote. Rights of the Child, G.A. Res. 67/152, U.N. Doc. A/RES/67/152 ¶ 20 (Dec. 20, 2012); Rights of the Child, G.A. Res. 66/141, U.N. Doc. A/RES/66/141 ¶ 19 (Dec. 19, 2011); Rights of the Child, G.A. Res. 65/197, U.N. Doc. A/RES/65/197 ¶ 17 (Dec. 21, 2010); Rights of the Child, G.A. Res. 64/146, U.N. Doc. A/RES/64/146 ¶ 15 (Dec. 18, 2009). Thus, the United States did not vote against, or otherwise disagree with, any of those resolutions.

These resolutions were based on previously established standards for juvenile delinquency set forth by the General Assembly. In 1985, the General Assembly adopted the "United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules"). The Beijing Rules advised countries to aim "at avoiding incarceration in the case of juveniles unless there is no other appropriate response that will protect the public safety." G.A. Res. 40/33, U.N. Doc. A/RES/40/33 (November 29, 1985). The General Assembly reaffirmed the "Beijing Rules" in 1990 with the "United Nations Rules for the Protection of Juveniles Deprived of Their Liberty." This resolution announced that the "[d]eprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release." G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (December 14, 1990). It also explained that personal

circumstances surrounding a juvenile should determine the level and type of care that the juvenile will receive. *Id.*

In the same year, the General Assembly released the "United Nations Guidelines for the Prevention of Juvenile Delinquency" (the "Riyadh Guidelines"), which further explained appropriate treatment for juvenile delinquents. It stated that "[t]he institutionalization of young persons should be a measure of last resort and for the minimum necessary period, and the best interests of the young person should be of paramount importance." G.A. Res. 45/112, ¶ 46, U.N. Doc. A/RES/45/112 (December 14, 1990). The resolution also clarified that no juvenile should be subjected to harsh or degrading correction or punishment. *Id.*

The adoption of the resolutions by the General Assembly followed a decade of resolutions on the issue of juvenile sentencing by the U.N. Commission on Human Rights. Sentencing Our Children to Die, *supra* at 1017-18, n.182 (listing the resolutions from 1996 – 2004). The Commission emphasized the need for countries to comply with the principle that depriving juveniles of their liberty should only be a measure of last resort and for the shortest appropriate time. *Id.* In 2005, its last year of existence, the Commission further called for the abolition of juvenile LWOP sentences. Rights of the Child, Comm'n on Human Rights Res. 2005/44, U.N. Doc. E/CN.4/RES/2005/44, ¶ 27(c) (Apr. 19, 2005).

The Human Rights Council, which replaced the Commission on Human Rights in 2005, included the prohibition of juvenile life without parole sentences in its first substantive resolution on the rights of the child. Rights of the Child, H.R.C. Res. 29 ¶ 30(a), U.N. Doc. A/HRC//RES/7/29 ¶ 30(a) (Mar. 28, 2008). In 2009, the Council again urged "States to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment without the possibility of release is imposed for offences committed by persons under 18 years of

age." Human rights in the administration of justice, in particular of children and juvenile justice, H.R.C. Res. 10/2 ¶ 11, U.N. Doc. A/HRC/RES/10/2 ¶ 11 (Mar. 25, 2009); *see also* Rights of the Child, H.R.C. Res. 19/37 ¶ 51, U.N. Doc. A/HRC/RES/19/37 ¶ 51 (Mar. 23, 2012) (calling "upon States to abolish by law and in practice, as soon as possible, the death penalty and life imprisonment without the possibility of release for those under 18 years of age at the time of the offence.").

These resolutions followed many years of other pronouncements calling for limited juvenile incarceration. In 1985, for example, the General Assembly adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, reiterating that confinement shall be imposed only after careful consideration and for the shortest period possible. Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, 40 U.N. GAOR Supp. No. 53, at 207, U.N. Doc. A/40/53, Rule 17.1(b) (Nov. 29, 1985). In 1990, the General Assembly passed two other resolutions in support. *See* U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113, Rule 2 (Dec. 14, 1990) (emphasizing imprisonment as a last resort and for the shortest time possible); United Nations Guidelines for the Prevention of Juvenile Delinquency, G.A. Res. 45/112, U.N. Doc. A/RES/45/112, para. 46, (Dec. 14, 1990).

Moreover, as noted above, all other countries that had maintained a JLWOP sentence have ended the practice in accordance with their treaty and international human rights obligations. *Sentencing our Children to Die, supra*, at 996-1004 (e.g., Tanzania committed to allow parole for the one person potentially serving the sentence and to clarify its laws to prohibit it; Israel clarified that parole petitions may be reviewed by its High Court; and South Africa clarified that such sentences are not permitted). That the few remaining countries besides the United States that

potentially had juvenile offenders serving such a sentence clarified that they allow for parole hearings in accordance with the international legal norm is further evidence that countries agree no derogation is permitted, even where their domestic law may technically authorize the sentence. All nations are expected to respect the norm, regardless of objection (even persistent) by a particular country.[7] Restatement § 102 & cmt. k.

3. There is No Other Peremptory Norm Modifying the Prohibition of Juvenile Life Without Parole Sentences

"[A] peremptory norm is subject to modification only by a subsequent norm of international law having the same character." Vienna Convention, art. 53. There is no other norm that contradicts the current norm prohibiting JLWOP sentences. Rather, as discussed above, the trend is to the contrary, as governments call for abolition of the challenged sentence in law and deed. The prohibition against JLWOP thus satisfies the three requirements for *jus cogens* status.

B. The United States has Treaty Obligations that Prohibit Juvenile Life Without Parole Sentences

It is well established that in interpreting and applying legal instruments that are part of the Inter-American human rights system, the Commission should consider those instruments "in the light of developments in the field of international human rights law since it was first composed." Inter-American Commission on Human Rights, *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 913 (2002) at para. 44. This includes giving "due regard" to other relevant rules of international law applicable to the

[7] *Amici* do not imply that the United States has been a persistent objector, since that doctrine—which may apply in the context of customary international law—requires that a state object clearly, consistently, and affirmatively both as the norm is in its formative stages and continually as it develops. Jonathan I. Charney, *Universal International Law*, 87 Am. J. Int'l L. 529, 537 (1993). The United States did not start objecting until this past decade, well past the norm's formative stage, and its recent participation in consensus resolutions at the UN General Assembly signals recognition of the norm in any event. Moreover, in the context of *jus cogens*, there is no exception for persistent objectors.

state against which a complaint has been filed, as well as "developments in the corpus juris gentium of international human rights law." *Id.* Thus, in the *Domingues* case, the Commission rejected an objection by the United States to the Commission's reliance on treaties inside and outside the Inter-American system in establishing the content of applicable legal norms. *Id.* at para. 104 ("It is well-established that other treaties concerning the protection of human rights in the American states may be invoked by the supervisory bodies of the inter-American system, regardless of the bilateral or multilateral character of those treaties, or whether they have been adopted within the framework or under the auspices of the inter-American system.").

The United States is party to several other human rights treaties that bear on its legal obligation not to allow JLWOP sentences: the ICCPR, *supra*; the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 113, *entered into force,* June 26, 1987, ratified by the United States, Oct. 21, 1994, and the Convention on the Elimination of Racial Discrimination, 660 U.N.T.S. 195, *entered into force,* Jan. 4, 1969, ratified by the United States, Oct. 21, 1994 (hereinafter "CERD").

The treaty bodies that monitor compliance with these treaties all have raised concerns about and/or found the United States specifically out of compliance with its obligations in allowing life without parole sentences for juveniles. Michigan, like other states, has an obligation to ensure that its criminal punishments comply with and help the United States meet its international treaty obligations. Under the United States Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Constitution, Article VI, Cl.2.

In 2006, the Human Rights Committee, oversight authority for the ICCPR, determined that allowing a juvenile life without parole sentence contravenes article 24(1), which states that

every child shall have "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," and article 7, which prohibits cruel and unusual punishment. The Human Rights Committee concluded that the United States should ensure that no child offender be given the sentence. Comments on the United States, *supra,* para. 34.

The Committee noted the reservation of the United States to other articles in the treaty which states that:

> The United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14.

See Office of the United Nations High Comm'r for Human Rights, ICCPR, http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm. This did not prevent the Committee from finding the United States out of compliance with article 24(1) (noted above), and from registering its concern that, in practice, the application of the sentence was not imposed only in "exceptional circumstances." *Id.*

The United States currently has more than 2,500 juvenile offenders serving the sentence. Many of those are for convictions that could not be deemed the worst crimes: an estimated 26% of juvenile offenders are serving JLWOP for felony murder, in which the juvenile was not the person who killed the murder victim. Human Rights Watch/Amnesty International, *The Rest of Their Lives*, at 27 (2005), http://www.hrw.org/en/reports/2005/10/11/rest-their-lives-0; and 2009 Update Report, http://www.hrw.org/sites/default/files/related_material/JLWOP_Table_May_7_2009.pdf.

For example, in California, the most populous state in the United States, in 45 percent of cases surveyed by Human Rights Watch, youth sentenced to life without parole were convicted for their role in aiding and abetting or participating in a felony. Human Rights Watch, *When I*

Die, They'll Send Me Home: Youth Sentenced to Life without Parole in California, at 21 (Jan. 2008), http://www.hrw.org/reports/2008/us0108/. A significant number of those cases involved an attempted crime gone awry—a tragically botched robbery attempt, for example—rather than premeditated murder. Other youths were given the sentence for lesser crimes, as exemplified most poignantly by the cases of petitioners in this case.

As is noted in Petitioner's Merit brief in this case, 362 juvenile offenders are serving life without parole sentences in Michigan. Petitioner Hill was convicted for aiding and abetting in a murder when he was 16, not for being the actual person who killed the victim. A number of the other petitioners in this case were convicted of felony murder and not for being the person who actually killed someone.

The Committee Against Torture, the official oversight body for the Convention Against Torture, in evaluating the United States' compliance, found that life imprisonment of children "could constitute cruel, inhuman or degrading treatment or punishment," in violation of the treaty. Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, at para. 36, U.N. Doc. CAT/USA/CO/2 (July 25, 2006).

Moreover, in 2008, the Committee on the Elimination of Racial Discrimination, the oversight body for the CERD, found the sentence incompatible with Article 5(a) of the CERD, particularly because the sentence is applied disproportionately to youth of color and the United States has done nothing to reduce what has become pervasive discrimination. The Committee referred to both the Human Rights Committee and Committee Against Torture's reports on the United States, noting the concern raised in regard to the sentence, and stated:

> In light of the disproportionate imposition of life imprisonment without parole on young offenders – including children – belonging to racial, ethnic and national

> minorities, the Committee considers that the persistence of such sentencing is incompatible with article 5 (a) of the Convention. The Committee therefore recommends that the State party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.

CERD, *Concluding Observations of the United States*, at para. 21, U.N. Doc. CERD/C/USA/CO/6 (Feb. 6, 2008).

The disproportionate use of this sentence is well documented. In a Human Rights Watch survey of 25 states, the rate of black youth per capita serving life without parole sentences was ten times higher than that of white youth and much higher in some states, such as California where the rate of black youth per capita serving the sentence is 18 times higher than white youth. Human Rights Watch, Submission to the Committee on the Elimination of Racial Discrimination, at 21-22 (Feb. 2008), http://www.hrw.org/en/node/62449/section/2. Youth of color in some jurisdictions receive more than 90% of the LWOP sentences given. *Sentencing our Children to Die, supra*, at 993-95. As the Inter-American Court recognized in its advisory opinion on the Juridical Condition and Rights of Undocumented Migrants, the principle of non-discrimination and equality (equal and effective protection) before the law qualifies as a *jus cogens* norm. Inter-Am. Ct. Hum. Rts., Juridical Condition and Rights of Undocumented Migrants (Advisory Opinion), 17 September 2003 (Series A, No. 18), at paras. 86, 97-102.

II. CONCLUSION

For the foregoing reasons, the Commission should recognize the existence of a *jus cogens* norm that prohibits the imposition of JLWOP sentences, and it should direct the United States of America to prohibit and discontinue such sentences.

Respectfully Submitted,

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APPENDIX

Human Rights Advocates, a California non-profit corporation, founded in 1978, with national and international membership, endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. Human Rights Advocates has Special Consultative Status in the United Nations and has participated in meetings of its human rights bodies for over 30 years, where it has addressed the issue of juvenile sentencing. Human Rights Advocates has participated as *amicus curiae* in cases before the United States Supreme Court involving individual and group rights where international standards offer assistance in interpreting both state and federal law in the United States. Those cases have included juvenile criminal sentencing: *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

The Advocates for Human Rights is a non-governmental, non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, today The Advocates for Human Rights engages more than 800 active volunteers annually to document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights has a strong interest in ensuring that the United States construe its authority to detain persons in a way that is consistent with international human rights standards and to adhere to the United States' non-derogable obligations.

University of Minnesota Human Rights Center (HRC) is dedicated to the advancement of the fundamental rights guaranteed by national and international law. The HRC seeks to ensure that all persons receive the full panoply of rights accorded to them by national and international law regardless of nationality or immigrant status. The HRC maintains one of the

largest human rights collections in the United States (http://www.umn.edu/humanrts). In addition, the Co-Director of the HRC served from 1996-2003 as a member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights and thus has expertise in regard to the human rights applicable in this matter.

University of San Francisco (USF) Center for Law and Global Justice is a focal point for USF School of Law's commitment to international justice and legal education with a global perspective. The Center generates student externships around the globe, protects and enforces human rights through litigation and advocacy, manages and participates in international rule of law programs in developing nations, develops partnerships with world-class foreign law schools, provides a forum for student scholarship, and nurtures an environment where student-organized conferences and international speakers explore topics relating to global justice. For over seven years the Center has been working on projects addressing the sentencing of juvenile offenders.

David S. Weissbrodt is the Regents Professor and Fredrikson & Byron Professor of Law at the University of Minnesota Law School. He is the Co-Director of the University of Minnesota Human Rights Center. Weissbrodt has also established the University of Minnesota Human Rights Library (http://www.umn.edu/humanrts). In 1996-2003 Weissbrodt served as a member of the U.N. Sub-Commission on the Promotion and Protection of Human Rights and in 2001-02 he was elected chairperson of the Sub-Commission. He was designated the U.N. Special Rapporteur on the rights of non-citizens from 2000-03. He has written 20 books and over two hundred articles focusing principally on international human rights law, immigration law, and torts.