Please note: This document contains only international law arguments against the sentencing of youth offenders to life without parole for which Human Rights Watch has relevant expertise. Therefore, attorneys should prepare a complete brief on this issue that includes a full analysis of state and federal law.

SUMMARY OF ARGUMENT

The Eighth Amendment jurisprudence of the United States requires courts to look to "evolving standards of decency" when determining if a particular punishment is cruel and unusual. Courts may consider the practices of other countries and international law when interpreting the meaning of "evolving standards of decency." Sentencing persons who were below the age of eighteen at the time of offense (hereinafter "youth offenders") to life without the possibility of parole (hereinafter "life without parole") is contrary to international law and the practices of almost every country in the world. In just three countries in the rest of the world: Israel, South Africa, and Tanzania – there are only one dozen youth offenders serving this sentence *in total*.

International law provisions that are binding on the United States also directly prohibit imposing the life without parole sentence on youth offenders. In fact, the prohibition has attained the status of customary international law because it is widely adhered to as law by governments throughout the world. Under the Supremacy Clause of the United States, this customary law norm should be considered and followed by the constituent states of the United States and the federal government. In combination with the other measurements of "evolving standards of decency" developed by state and federal courts, the sentence of life without the possibility of parole should be viewed as a violation of the prohibition against cruel [and/or] unusual punishment in the Constitution of [insert state name] and the Constitution of the United States.

ARGUMENT

I. LIFE WITHOUT PAROLE FOR YOUTH OFFENDERS IS CONTRARY TO EVOLVING STANDARDS OF DECENCY AS MEASURED BY THE PRACTICES OF OTHER COUNTRIES

A. In interpreting the Eighth Amendment of the U.S. Constitution, Courts May Refer to the Practices of Other Countries and to International Human Rights Law

In determining whether a particular punishment violates the prohibition against cruel and unusual punishment in the Eighth Amendment to the United States Constitution and [insert state prohibition language if appropriate, i.e. "cruel or unusual"] in the Constitution of [insert state name], courts must look to "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

The U.S. Supreme Court has decided that a court may refer "to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments." *Roper v. Simmons*, 125 S.Ct. 1183, 1198 (2005). *See also Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (examining international community's rejection of death penalty for persons with mental retardation); *Stanford v. Kentucky*, 492 U.S. 361, 370 n. 1(1989) (Scalia, J.) (stating that "the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so implicit in the concept of ordered liberty that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well"); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J., concurring) (noting global rejection of the death penalty for youth offenders age sixteen or younger); *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (finding a "virtual unanimity" within international community that denationalization constituted cruel and unusual punishment).

As these rulings make clear, courts have "consistently referred to foreign and international law as relevant to [their] assessment of evolving standards of decency." *Roper v. Simmons*, 125 S.Ct. 1183, 1215 (2005)(O'Connor, dissenting). Nothing about the case before this court calls for a deviation from that consistent, decades-old tradition. Therefore, this court should look to international law and practice when determining whether life without the possibility of parole is an appropriate sentence for an offender who was below the age of eighteen at the time of his or her crime.

B. Sentencing Youth Offenders to Life without Parole is Contrary to the Practice of Virtually all Countries

The domestic laws and practice of governments worldwide provide a clear measure of global adherence to the prohibition against sentencing youth offenders to life without parole. This near-unanimous international consensus justifies concluding that sentencing youth offenders to life without parole is contrary to "evolving standards of decency."

According to the two largest international human rights organizations in the world, Human Rights Watch and Amnesty International, only three countries currently have about one dozen inmates in total among them who are serving life without parole for crimes they committed before the age of eighteen. South Africa reportedly has four child offenders serving life without parole sentences,[1] Tanzania has one,[2] and there were between four and seven youth offenders sentenced to life in prison in Israel as of 2005.[3] The paucity of countries that sentence youth to life without parole is not due to their use of even harsher punishments (such as the death penalty). In fact, not one of the four countries with youth offenders serving the sentence imposes the juvenile death penalty. Moreover, between 1990 and 2004, only eight countries (including the United States) executed youth offenders.[4]

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[1] South Africa State Party report to the CRC, CRC/C/51/Add.2, May, 22, 1999 at 514 (reporting four child offenders serving the sentence). See also Human Rights Watch and Amnesty International, *The Rest of Their Lives* (New York: Human Rights Watch/Amnesty International, 2005)(noting that "In April 2005, the governmental delegation from South Africa to the Commission on Human Rights confirmed in informal meetings with members of the organization Human Rights Advocates that these four youth offenders were in fact serving life without parole sentences. See e-mail correspondence to Human Rights Watch from Human Rights Advocates, Berkeley, California, September 7, 2005 (on file with Human Rights Watch). However, as part of the post-apartheid overhaul of the judicial system, juvenile justice procedures are under review, and a Child Justice Bill is currently under discussion in parliament. In line with the CRC, the Bill would outlaw life imprisonment for child offenders (see Article 72, available online at: http://www.pmg.org.za/bills/020808childjusticebill.htm, accessed on September 15, 2005.). Moreover, in November 2004, in *Brandt v S* (case 513/03, Supreme Court of Appeal) the South African Supreme Court held that minimum sentencing legislation should not apply to juveniles convicted of serious crimes.")).

[2] Human Rights Watch and Amnesty International, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* (New York: Human Rights Watch/Amnesty International, 2005) (citing to e-mail correspondence to Human Rights Watch from Erasmina Masawe, Volunteer Attorney, Legal and Human Rights Centre, Dar es Salaam, Tanzania (July 21, 2004 and July 30, 2004).

[3] See *Israel State Party report to the CRC*, CRC/C/8/Add.44, 27 February 2002, para. 1372 (stating that life imprisonment "has been imposed on three 17-year-olds who stabbed a bus passenger to death as part of the 'initiation rite' of a terrorist organization; and on a youth age 17 and 10 months who strangled his employer to death after she commented on his work and delayed payment of his salary for two days"). See also Human Rights Watch and Amnesty International, *The Rest of Their Lives* (New York: Human Rights Watch/Amnesty International, 2005) (noting that "since February 2002, Human Rights Watch has learned of three additional youth offenders who were all below age eighteen at the time of their offenses and have been sentenced to life: Shadi Ghawadreh, Youssef Qandil, and Anas Mussallmeh." Email to Human Rights Watch from Research Coordinator, Palestinian Section, Defense for Children International, September 10, 2005 (on file with Human Rights Watch). According to Israeli law, normally individuals sentenced to life would be eligible for a sentence commutation to thirty years upon a recommendation from the Ministry of Justice. See *Huk Shihror Al Tnai Mimasar*, Hatashsa 2001, Article 29. However, youth offenders sentenced by military courts under the Israeli *1945 Emergency Regulations* to life sentences for political and security crimes do not enjoy this privilege. See *Huk Shihror Al Tnai Mimasar*, Hatashsa 2001, Article 31. We have been unable to ascertain how many of the seven youth offenders sentenced to life in Israel are political or security prisoners—that is, those who would not be eligible for the thirty year sentence commutation. E-mail from Research Coordinator, Defense for Children International."); and *Israel State Party report to the CRC*, CRC/C/8/Add.44 para. 1372 (noting that no absolute prohibition on life sentences for youth exists in Israel, and the Supreme Court has the discretion to review each case on the merits and may impose a life sentence on a youth offender, which, in the views of one Israeli Supreme Court Justice, raises questions on the prohibition on life without parole sentences contained in the Convention on the Rights of the Child).

[4] These countries and the number of youth offenders executed are: Iran (8), Saudi Arabia (1), Nigeria (1), the Democratic Republic of Congo (1), Yemen (1), Pakistan (3), China (1), and the United States (19). See Amnesty International, *Children and the Death Penalty, Executions Worldwide Since 1990*, AI Index: ACT 50/007/2002, 25 Sept. 2002, p. 14; updated to June 6, 2004 by International Justice Project, US Juvenile Executions Since 1976, March 2004, available online at: http://www.internationaljusticeproject.org/juvStats.cfm, accessed on August 1, 2005. As

Throughout the world, thirteen countries in addition to the United States have laws that theoretically permit life sentences to be imposed on youth offenders, although it is not clear in all of these cases whether life means life, or whether parole remains a possibility. Youth can technically receive the sentence under the penal laws of Antigua and Barbuda, Australia, Brunei, Dominica, Kenya, Saint Vincent and the Grenadines, Solomon Islands, and Sri Lanka, but it seems that the sentence is rarely if ever used. Finally, in Burkina Faso and Cuba, the sentence seems to be possible for individuals above the age of sixteen, but Human Rights Watch and Amnesty International found no instances in which it had been imposed on such an individual.[5]

Apart from the four countries that actually engage in the practice of sentencing youth offenders to life without parole (Israel, South Africa, Tanzania, and the United States), the rest of the world is united in its condemnation of the sentence. For example, not one of the original fifteen member states of the European Union allows youth offenders to be sentenced to life without parole.[6] Many countries, particularly in Europe and Latin America, do not have life without parole as a sentencing option for any offender, youth or adult. Other countries have specifically prohibited the sentence. On the African continent, thirty-one countries prohibit life without parole for youth in their penal laws.[7]

The laws of the United Kingdom are of particular relevance to an assessment of global law and practice on sentencing. State and federal courts in the United States often look to the practice of the United Kingdom with particular scrutiny because of its historic ties with the United States. *See, e.g.*, *Enmund v. Florida*, 458 U.S. 782, at 796-797 (1982) (observing "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe."); *Elledge v. Florida*, 525 U.S. 944 (U.S. 1998) (concluding "[t]wenty-three years under sentence of death is unusual -- whether one takes as a measuring rod current practice or the practice in this country and in England at the time our Constitution was written."). Such reference to the United Kingdom is particularly relevant here because most state prohibitions and certainly the federal prohibition against cruel and unusual punishment in the United States were modeled on the English Declaration of Rights of 1689, which provided: "[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusuall Punishments inflicted." 1 W. & M., ch. 2 §10, in 3 Eng. Stat. at Large 441 (1770). In addition, thirteen of the countries that allow for the life without parole sentence can trace their historical ties to the United Kingdom and the early twentieth century English tradition of sentencing "for the duration of Her Majesty's pleasure." Yet the source of this tradition, the United Kingdom itself, abolished the technical possibility of a life without parole sentence for youth offenders after a seminal decision by the European Court of Human Rights in 1996.[8]

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this court is undoubtedly aware, the U.S. Supreme Court found the juvenile death penalty unconstitutional in 2005, thereby ending this practice in the United States. *See Roper v. Simmons*, 125 S.Ct. 1183 (2005).

[5] See *Burkina Faso State Party report to the CRC*, CRC/C/65/Add.18, February 13, 2002 at 406, 445. See also Human Rights Watch and Amnesty International, *The Rest of Their Lives* (New York: Human Rights Watch/Amnesty International, 2005) (noting that "Under Cuban law, an individual above age sixteen may be sentenced to 'privacion perpetua' (a life without parole sentence); however, under the Cuban Codigo Penal, children age seventeen *may* have their sentences reduced by one-half. Because this provision is discretionary, it appears to be technically possible for a youth above sixteen to receive the sentence. See Codigo Penal de Cuba, Art. 17.1 ('En el caso de personas de más de 16 años de edad y menos de 18, los límites mínimos y máximos de las sanciones pueden ser reducidos hasta la mitad, y con respecto a los de 18 a 20, hasta en un tercio.") ("In the case of persons older than sixteen years of age and younger than eighteen, the minimum and maximum punishments may be reduced by half, and with respect to those between eighteen and twenty, by one third.'")).

[6] The original fifteen members of the EU are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom.

[7] These countries are Algeria, Angola, Benin, Botswana, Burundi, Cameroon, Cape Verde, Chad, Cote d'Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Guinea, Guinea-Bissau, Lesotho, Liberia, Libya, Madagascar, Mali, Mauritius, Morocco, Mozambique, Namibia, Niger, Rwanda, Sao Tome and Principe, Togo, Tunisia, Uganda, and Zimbabwe.

[8] See *Hussain and Prem Singh v. United Kingdom*, 22 EHRR 1 (1996) (holding that "for the duration of Her Majesty's Pleasure" did not authorize wholly punitive life long detention because it invoked the protection of Articles 3 and 5(4) of the European Convention of Human Rights, which required changes in the character, personality and mental state of the young offender to be considered after a term of years during mandatory and repeated parole reviews.).

Global consensus against the sentence has become increasingly cohesive and firm. As described below, countries around the world have adapted their legislation to prohibit the sentence. Intergovernmental bodies are also unequivocal. In April 2004, the Commission on Human Rights adopted a resolution "urg[ing] States to ensure that under their legislation and practice neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age."[9]

II. THE SENTENCE OF LIFE WITHOUT PAROLE FOR YOUTH IS CONTRARY TO A NORM OF CUSTOMARY INTERNATIONAL LAW, WHICH IS BINDING ON STATES

A. The Prohibition against Sentencing Youth Offenders to Life without Parole is a Norm of Customary Law

The international rejection of life without parole for youth offenders is so overwhelming that the prohibition has attained the status of customary international law. Once a rule of customary international law is established, the rule becomes binding even on countries that have not formally agreed to it.[10] As set forth more fully below, under domestic U.S. law, customary international law is binding on the government of the United States and its constituent states. *See The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (concluding that U.S. courts are "bound by the law of nations, which is part of the law of the land."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 866 (2d Cir. 1980) (stating that "[t]he law of nations . . . became a part of the common law of the United States upon the adoption of the Constitution.").

Establishing a rule of customary international law requires two elements: first, widespread and consistent governmental practice and second, a sense of legal obligation, or *opinio juris* accompanying the practice.[11] See generally *United States v. Smith*, 18 U.S. (5 Wheat.) (1820) (Story, J.); *Restatement 3d of the Foreign Relations Law of the U.S.*, '102 (2). Each of these two elements exist for the global prohibition against sentencing youth offenders to life without parole.[12] As described above, governmental practice is both widespread and consistent: only three states in addition to the United States continue to sentence youth to life without parole.

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[9] Commission on Human Rights, Human Rights in the Administration of Justice, in particular juvenile justice, E.CN.4/2004/L.66 April 15, 2004, para. 11.

[10] In the face of this global consensus, the U.S. government cannot claim that it is free of its customary law obligations by virtue of being a persistent objector. A persistent objector is a state that has consistently and expressly protested the rule during the rule's inception and development and, consequently, can claim the right not to be bound by the rule. John Currie, *Public International Law*, (2001), p.176; Hugh Thirlway, "The Sources of International Law", in *International Law* (Malcolm Evans, Ed. 2003), p.117. One commentator notes that "The state must, from the rule's inception, consistently maintain its objection without exception. Even a single lapse will be fatal to the state's claim of persistent objector status." John Currie, *Public International Law*, (2001) p.164. Once a rule has become established as customary international law, a persistent objector might not be able to maintain the ability to opt out. Mark Villiger, *Customary International Law and Treaties*, (1997), p. 35.

[11] The International Court of Justice (ICJ) has described the *opinio juris* requirement as follows: "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it." International Court of Justice, Judgment, *North Sea Continental Shelf*, para. 77 (Feb. 20, 1969).

[12] Others have concluded that the prohibition on juvenile life without parole sentences is a rule of customary international law. See Human Rights Advocates, Submission to the Sixty-First Session of the Commission on Human Rights, *The Death Penalty and Life Imprisonment without the Possibility of Release for Youth Offenders who were Under the Age of 18 at the time of the Offense*, Spring 2005, http://www.humanrightsadvocates.org/images/Juvenile%20Sentences.doc (retrieved August 3, 2005). Several international treaty bodies reiterate the prohibition in their general comments and annual resolutions on a regular basis. See, e.g. Commission on Human Rights, *Human Rights in the Administration of Justice, in particular juvenile justice*, 2004/43; Report on the Twenty-Fifth session of the Committee on the rights of the Child, September / October 2000, CRC/C/100, p. 130; European Union, Memorandum on the Death Penalty, http://www.eurunion.org/legislat/DeathPenalty/eumemorandum.htm (retrieved August 1, 2005) (stating that "The United Nations Convention on the Rights of the Child prohibits sentencing minors both to death and also to imprisonment for life without the possibility of release. These are juvenile justice standards of paramount relevance and the EU urges the USA to ratify the Convention.").

In addition, the International Court of Justice has said that "a very widespread and representative participation in [a] convention might suffice of itself" to evidence the attainment of customary international law, provided it includes participation from "States whose interests were specially affected."[13] The Convention on the Rights of the Child (CRC), which specifically prohibits sentencing youth to life sentences without parole, enjoys widespread and representative participation from the world's governments. Article 37(a) of the CRC states:

> Neither capital punishment *nor life imprisonment without possibility of release* shall be imposed for offences committed by persons below eighteen years of age.

The CRC has been accepted all but universally: as of 2005, 192 out of a total of 194 countries are parties. Notably, none of the state parties to the treaty has registered a reservation to the CRC's prohibition on life imprisonment without release for youth offenders.[14] The United States and Somalia are the only two countries in the world that have not ratified the CRC, although both have signed it.[15] Somalia is incapable of ratifying the treaty because it lacks a functioning central government.[16] Therefore, the United States stands alone as an aberration among nations: it is the only government in the world with the capacity to ratify the treaty that has failed to do so. Nevertheless, as a signatory to the CRC, the United States may not take actions that would defeat the convention's object and purpose.[17] The near-universal adherence to the CRC evidences widespread and consistent acceptance of the prohibition on life without parole sentencing for youth.

The second requirement of customary international law, known as *opinio juris*, is also met because of the significant number of countries that have taken direct action to ban life without parole for youth in their jurisdictions. At the time of the CRC's passage, the laws of numerous countries already prohibited the

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[13] International Court of Justice, Judgment, *North Sea Continental Shelf*, paras. 73-4 (Feb. 20, 1969) (finding that "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.").

[14] United Nations Treaty Collection Database, http://untreaty.un.org/ (retrieved July 16, 2004). Malaysia registered a reservation to art. 37(a) as follows: ""The Government of Malaysia . . . declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia." Id. The government of Myanmar made a broad objection to Article 37, which it later withdrew after other states protested. Id. The government of Singapore has maintained a declaration regarding Article 37. However, the declaration does not address the prohibition on life imprisonment without parole. Singapore's declaration reads: "The Republic of Singapore considers that articles 19 and 37 of the Convention do not prohibit – (a) the application of any prevailing measures prescribed by law for maintaining law and order in the Republic of Singapore; (b) measures and restrictions which are prescribed by law and which are necessary in the interests of national security, public safety, public order, the protection of public health or the protection of the rights and freedom of others; or (c) the judicious application of corporal punishment in the best interest of the child." A number of states have interpreted the declaration as a reservation and objected to it as contrary to the object and purpose of the Convention. See UN Treaty Collection Database (Germany: Sept. 4, 1996: Belgium: Sept. 26, 1996; Italy: Oct. 4, 1996; The Netherlands: Nov. 6, 1996; Norway: Nov. 29, 1996; Finland: Nov. 25, 1996; Portugal: Dec. 3, 1996; Sweden: Aug. 1997). In the *Roper* decision, the United States Supreme Court took special note of the fact that no state party to the Convention on the Rights of the Child made a reservation to the prohibition against the juvenile death penalty contained in Article 37. *Roper v. Simmons*, 125 S.Ct. 1183, 1199 (2005).

[15] The United States signed the Convention on the Rights of the Child on February 16, 1995 and Somalia signed on May 2, 2002.

[16] The World Fact Book of the United States Central Intelligence Agency lists Somalia's type of government as "no permanent national government; transitional, parliamentary federal government." According to the United Nations' agency for children, UNICEF, Somalia is currently unable to ratify the CRC because it lacks a recognized government. See UNICEF, "Frequently Asked Questions," http://www.unicef.org/crc/faq.htm#009 (retrieved July 19, 2004).

[17] See Vienna Convention on the Law of Treaties, art. 18, *concluded* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). Although the United States has signed but not ratified the Vienna Convention on the Law of Treaties, it regards this convention as "the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st sess. (1971), p. 1; Theodor Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination," *American Journal of International Law*, vol. 79 (1985), p.283. The U.S. government has also accepted that it is bound by customary international law not to defeat a treaty's object and purpose. See e.g. "Albright Says U.S. Bound by Nuke Pact; Sends Letters to Nations Despite Senate Vote," *Washington Times*, (November 2, 1999), p. A1 (describing the Clinton administration's acceptance of obligations under the Comprehensive Test Ban Treaty despite the Senate's failure to ratify).

equivalent of life without parole for juvenile offenders. These included: Algeria,[18] Benin,[19] Cameroon,[20] Niger,[21] and Rwanda.[22]

Furthermore, after the treaty's entry into force in 1990, large numbers of states subsequently enacted policies and legislation to bring their laws in conformity with Article 37(a). For example, Egypt's 1996 Children's Code, which was intended to bring national legislation in line with the CRC, includes a prohibition on life imprisonment for juveniles.[23] Mali's 2002 Child Protection Ordinance does not allow sentences above eighteen years to be imposed on persons who commit crimes while under the age of eighteen.[24] Cape Verde's Constitution of 1992 prohibits life imprisonment or imprisonment of an indefinite duration for anyone[25] and Sao Tome and Principe's 1990 Constitution prohibits life imprisonment of minors.[26] Eritrea's 2002 Transitional Penal Code prohibits life imprisonment of juveniles.[27] In 2003, Morocco increased the age of majority from sixteen to eighteen in the Penal Code and Criminal Procedure Code, which ensured that the pre-existing prohibition on life sentences for minors covered all persons who committed crimes while under the age of eighteen.[28] Tunisia adopted Act No. 95-93 on November 9, 1995, which amended the Criminal Code to automatically reduce life sentences to ten years for persons under the age of eighteen.[29] These legal reforms after ratification of the CRC demonstrate that states view themselves as legally obligated to respect the prohibition on life without parole sentencing for youth.

Even the United States has evidenced a sense of legal obligation when it comes to the principles embodied in the CRC.[30] When Ambassador Madeline Albright, as the U.S. Permanent Representative to the U.N., signed the CRC on behalf of the United States in 1995, she declared:

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[18] Prohibited by the Penal Code, art. 50 (Ordinance 66-156 of June 8, 1966). U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Algeria*, CRC/C/28/Add.4, para. 56 (Feb. 23, 1996).

[19] Life imprisonment for minors was prohibited by Ordinance No. 69-23/PR/MJL, art. 32 (July 10, 1969) which also established the age of the majority in criminal law as 18. U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Benin*, CRC/C/3/Add.52, para. 99 (July 4, 1997).

[20] Life imprisonment is automatically mitigated to imprisonment for 2-10 years by the Penal Code, Art. 80 (Act No. 65/LF/24 of 12 Nov. 1965). U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Cameroon*, CRC/C/28/Add.16, para. 225-26 (April 4, 2000).

[21] Life sentences are automatically reduced to 10-30 years under the Criminal Code, Art. 47 (S. 371). U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Niger*, CRC/C/3/Add.29/Rev.1, para. 371 (Dec. 28, 2000).

[22] Life sentences of juveniles are automatically reduced to 15-20 years under the Rwandan Penal Code. U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Rwanda*, CRC/C/70/Add.22, p. 31, para. 92 (Oct. 8, 2002).

[23] Government of Egypt, Children's Code, Art. 111, 112 (1996) (source: E-mail and phone conversation with Clarisa Bencomo, CRD on July 22, 2004). Egypt ratified the CRC on Feb. 5, 1990. Treaty Body Database.

[24] Ordonnance N°02-062/P-RM Du 05 Juin 2002 portant code de protection del'enfant, *available at* http://www.justicemali.org/doc107.htm. Mali signed the CRC on Sep. 20, 1990. Treaty Body Database.

[25] Constitution of Cape Verde, Art. 31 (1992), ("There shall not be, in any circumstances, penalty depriving of liberty, or security measure of a permanent character or with an unlimited or indefinite duration") *available at* http://confinder.richmond.edu/CapeVerde.htm. The Constitution was revised again in 1999 but this language was maintained. Constitution of Cape Verde, Art. 32 (1992), *available at* http://www.parlamento.cv/constituicao/const00.htm. Cape Verde acceded to the CRC on June 4, 1992 1992. Treaty Body Database.

[26] U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Sao Tome and Principe*, CRC/C/8/Add.43, para. 63, 369 (March 4, 2003). Sao Tome and Principe acceded to the CRC on May 14, 1991. Treaty Body Database.

[27] U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Eritrea*, CRC/C/41/Add.12, para. 74 (December 23, 2002). Eritrea ratified the CRC on Aug. 3, 1994. Treaty Body Database

[28] U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Morocco*, CRC/C/93/Add.3, para. 234-35 (Feb. 12, 2003) (indicating that such revisions were currently pending); U.N. Committee on the Rights of the Child, *Summary Record of the 882nd Meeting*, CRC/C/SR.882, para. 58 (July 16, 2003); U.N. Committee on the Rights of the Child, *Concluding Observations: Morocco*, CRC/C/15/Add.211, para 3, 72 (July 10, 2003) (confirming that the revisions referred in the text had been passed into law). Morocco ratified the CRC on June 21, 1993. Treaty Body Database.

[29] U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Tunisia*, CRC/C/83/Add.1, para. 25 (Oct. 30, 2001). This became Art. 43 of the Criminal Code. *Id.*

[30] The U.S. Supreme Court Justice Antonin Scalia, in his dissent in the *Roper* case, implied that adherence to the CRC's prohibition on sentencing youth to life without parole would be necessary if the United States is "truly going to get in line with the international community." See *Roper v. Simmons*, 125 S.Ct. 1183, 1226 (2005) (Scalia, J. dissenting).

> The convention is a comprehensive statement of international concern about the importance of improving the lives of the most vulnerable among us, our children. Its purpose is to increase awareness with the intention of ending the many abuses committed against children around the world. . . .United States participation in the Convention reflects the deep and long-standing commitment of the American people.[31]

The United States has reaffirmed this commitment on subsequent occasions. For example, in 1999 Ambassador Betty King, U.S. Representative on the U.N. Economic and Social Council stated:

> Although the United States has not ratified the Convention on the Rights of the Child, our actions to protect and defend children both at home and abroad clearly demonstrate our commitment to the welfare of children. The international community can remain assured that we, as a nation, stand ready to assist in any way we can to enhance and protect the human rights of children wherever they may be.[32]

Certain provisions in the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, have also contributed to the worldwide *opinio juris* against life without parole sentencing of youth.[33] Article 10(3) requires the separation of youth offenders from adults and the provision of treatment appropriate to their age and legal status. Article 14(4), which was co-sponsored by the United States,[34] mandates that criminal procedures for youth charged with crimes "take account of the age and the desirability of promoting their rehabilitation."[35] The ICCPR requires states to respond to the offenses youth commit by focusing on positive measures and education rather than punishment alone.[36]

When the United States ratified the ICCPR, it attached a limiting reservation that stipulates:

> That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, 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.[37]

The history of this reservation indicates that it was intended to permit—on an exceptional basis—the trial of youth as adults and the incarceration of youth and adults in the same prison facilities. The United States, as a co-sponsor of Article 14, was keenly aware of the breadth and scope of its language. There is

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[31] "Remarks by Ambassador Madeline K. Albright, United States Permanent Representative to the United Nations on the Occasion of the Signing of the U.N. Convention on the Rights of the Child," U.S. Press Release, (February 16, 1995).

[32] Statement by Ambassador Betty King, United States Representative on the Economic and Social Council, to the Plenary of the 54th Session of the General Assembly on the Tenth Anniversary of the Convention on the Rights of the Child, November 11, 1999, http://www.un.int/usa/99_112.htm, (retrieved July 22, 2005).

[33] The Human Rights Committee has interpreted the ICCPR's provisions on youth offenders to apply to all persons under the age of eighteen. Human Rights Committee, General Comment no. 1, Forty-fourth Session (1992), para. 13, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.7, p. 155.

[34] The United States co-sponsored this provision together with Great Britain and India and it was adopted unanimously. See Marc Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, (1987), p. 307.

[35] The ICCPR contains three additional provisions related to juvenile justice. Article 6(5) prohibits imposing the death penalty on persons who committed crimes while under the age of eighteen. Article 10(2), subparagraph b, mandates the separation of accused youth from adults and the swift adjudication of their cases. Article 14(1) provides an exception for cases involving youth to the general requirement that judgments be made public.

[36] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, (1993), p. 266.

[37] United Nations Treaty Collection, International Covenant on Civil and Political Rights, United States of America: Reservations, para. 5 (emphasis added).

nothing in its reservation to suggest that the United States sought to reserve the right to sentence youth as harshly as adults who commit similar crimes.

On the contrary, the reservation's plain language and drafting history show that the United States sought to reserve the ability in "exceptional circumstance" to try youth in adult courts and to require some of them to serve their sentences in adult prison. According to the United States Senate Committee on Foreign Relations, the reservation was included because, at times, juveniles were not separated from adults in prison due to their criminal backgrounds or the nature of their offenses.[38] In other words, the reservation is *not about* the length or severity of sentences, only about the need to sometimes try youth as adults and incarcerate them in adult prisons.

B. Customary Law is binding Law for the State of [insert state name]

Customary international law norms are binding of their own force on the federal and state governments of the United States. As such, the prohibition on life without parole sentences for youth should be viewed as binding on the state of [insert state name]. Constituent state sovereignty and principles of federalism cannot defeat the applicability of treaty law to the state of [insert state name]. The Supremacy Clause of the U.S. Constitution states:

> 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, anything in the Constitution or Law of any State to the contrary notwithstanding. U.S. Constitution, Article VI, clause 2.

The customary law prohibition against sentencing youth to life without parole is also binding on the states of the United States because of the Supremacy Clause:

> International agreements of the United States other than treaties *and customary international law*, while not mentioned explicitly in the Supremacy Clause, are also federal law and as such *are supreme over State law* (emphasis added, internal citations omitted). The Restatement (Third) of Foreign Relations Law of the United States, § 111, comment d.

Accordingly, the constituent states of the United States must uphold a treaty of the United States, such as the ICCPR, which as discussed above contains provisions prohibiting treating youth offenders just like adults when imposing a criminal sentence. *See Asakura v. City of Seattle*, 265 U.S. 332 (1924) (holding that a treaty made under the authority of the United States stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States, and "operate[s] of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts."). *See also Maiorano v. Baltimore & Ohio R. R. Co.*, 213 U. S. 268, 272, (1888); Baldwin *v. Franks*, 120 U.S. 678, (1887); *Head Money Cases*, 112 U. S. 580, 598 (1884); *Chew Heong v. United States*, 112 U. S. 536, 540 (1884); *Foster v. Neilson*, 2 Pet. 253, 314 (1829).

International law is also binding as a regulator of statutory interpretation in the United States. When interpreting statutes, state and federal courts have long recognized that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often

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[38] United States, *Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, 31 I.L.M. 645, 651 (1992) ("Although current domestic practice is generally in compliance with these provisions, there are instances in which juveniles are not separated from adults, for example because of the juvenile's criminal history or the nature of the offense. In addition, the military justice system in the United States does not guarantee special treatment for those under 18.").

as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900). *See also Boos v. Barry*, 485 U.S. 312, 323 (1988) (United States has "a vital interest in complying with international law"); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (deciding that a statute ought never to be construed to violate the law of nations if any other possible construction remains); *Restatement (Third) of the Foreign Relations Law of the United States* § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

State sentencing laws in particular, as well as state and federal Constitutions, must be construed in harmony with international treaty and customary law. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-15 (1993) (quoting *Charming Betsy* and labeling the principle a "canon of statutory construction"); *Servin v. State*, 117 Nev. 775, 795-796 (Nev. 2001) (reviewing state juvenile death penalty statute and finding that "customary international law is federal law and supercedes state law that is inconsistent."); *State v. Martini*, 160 N.J. 248, 274 (N.J. 1999) (rejecting argument that juvenile death penalty is contrary to international human rights or customary law, but implicitly accepting that such laws are binding on state courts).

Therefore, both treaty law and customary law are the law of every state and "form[] the basis for the exercise of judicial authority by State courts, and [are] cognizable in cases in State courts, in the same way as other United States law." *See The Restatement (Third),* § 111, comment d. As such, any final decision by the highest court of a constituent state on the validity or repugnance of a state Constitution or statute based on international treaty or customary law is subject to review by the United States Supreme Court under 28 U.S.C. § 1257. *Id.*

CONCLUSION

"Evolving standards of decency" as measured by the practices of other countries and international treaty and customary law prohibit the sentencing of youth offenders to life without parole. As an arbiter of the meaning of the Eighth Amendment and of the [insert state name] constitution, this court should carefully consider whether fundamental principles embraced by the rest of the world should be adhered to by the United States. Most, if not all, other countries of the world now prohibit sentencing under-eighteen offenders to life without parole. International law and practice rejects the sentence of life without parole for youth offenders as unduly harsh and contrary to worldwide standards of decency.