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Children's Rights

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Amicus Curiae brief filed with the Supreme Court

Human Rights Watch joined 25 other institutions in filing an amicus brief before the US Supreme Court in the upcoming cases of *Miller v. Alabama* and*Jackson v. Arkansas*. Both involve offenders who were sentenced to life without the possibility of parole for crimes they committed when they were 14 years old. The United States is the only country in the world that sentences youth to life without the possibility of parole for offenses they committed before the age of 18. Universally accepted standards, including several treaties to which the US is a party, condemn such sentencing of youth. We argue that international practice, opinion, and treaty obligations support holding all life without parole sentences for juveniles unconstitutional.

AMICUS BRIEF ON BEHALF OF PETITIONERS MILLER AND JACKSON

STATEMENT OF INTEREST[1]

Amnesty International, the Amsterdam Bar Association, the Austrian Bar (sterreichischer Rechtsanwaltskammertag, RAK), the Barcelona Bar Association, the Bar Human Rights Committee of England and Wales, the Bar of Montreal,the Center for Constitutional Rights, Columbia Law School Human Rights Institute, the Czech Bar Association, the European Bars Federation/Fdration des Barreaux dEurope, the General Council of the Bar (GCB) of South Africa, the Hong Kong Bar Association, Human Rights Advocates, Human Rights Watch, the Japan Federation of Bar Associations, the Law Council of Australia, the Law Society of England and Wales, the Law Society of New South Wales, the New Zealand Law Society, the Norfolk Island Bar Association, the Norwegian Bar Association, the Portuguese Bar Association, the Swedish Bar Association, the Union Internationale des Avocats (UIA-International Association of Lawyers), the University of Minnesota Human Rights Center, and the University of San Francisco (USF) Center for Law and Global Justice hereby request that this Court consider the present brief pursuant to Supreme Court Rule 37.2(a) in support of Petitioners. The interests of amici are described in detail in the Appendix.

*Amici*urge the Court to consider international law and opinion, as well as foreign practice, when applying the Eighth Amendments clause prohibiting cruel and unusual punishments. International standards and practice prohibiting sentencing juvenile offenders to life in prison without the possibility of parole provide an important indicator of evolving standards of decency, which illuminate the contours of acceptable conduct under the Eighth Amendment. Treaties the United States is party to are relevant to this analysis. The United States is the only country in the world that does not comply with the norm against imposing life without possibility of parole sentences on offenders who are under the age of 18 at the time of the offense.[2]

Prohibiting the sentence imposed in these cases would bring the United States into alignment with one of the most widely accepted international human rights norms, and enhance compliance with treaty obligations. Formally recognizing the unconstitutionality of these sentences would uphold the Eighth Amendment principles that led this Court to strike down the death penalty for juveniles in *Roper v. Simmons*, 543 U.S. 551 (2005), and juvenile life sentences without parole for nonhomicide crimes in *Graham v. Florida*, 130 S. Ct. 2011 (2010).

SUMMARY OF ARGUMENT

International law and opinion have informed the law of the United States since the adoption of the Declaration of Independence. The Founders were greatly influenced by international legal and social thought; and throughout U.S. history, courts have referred to international standards when considering the constitutionality of certain practices. This is particularly true with respect to the Eighth Amendments cruel and unusual punishments clause. The point, as the Court explained in Graham, is not that the Eighth Amendment is governed by international law, but rather that as a matter of U.S. constitutional law, the Court must consider contemporary standards of decency, as informed by international (and foreign) law and practice. Thus, amici consider international law and practice with respect to sentencing of juvenile offenders to life without parole to be of particular relevance to this Court.

Virtually every other country in the world either has never engaged in or has rejected the sentencing of persons convicted of crimes

committed when they were under 18 to life without possibility of parole. The few countries in which juveniles were previously reported to be serving life sentences without parole have either changed their laws or explained that juvenile offenders can apply for parole.[3]

Universally accepted standards condemn sentencing juvenile offenders to life without the possibility of parole. All countries except the United States and Somalia are parties to the Convention on the Rights of the Child, which prohibits the sentence. Several treaties that the United States is party to have also been interpreted to prohibit the sentence.

This Court considered international law when holding that the juvenile death penalty violates the Eighth Amendment, *Roper*, 543 U.S. at 575-79, and again when it struck down life sentences without parole for offenders under 18 convicted of non-homicide crimes. *Graham*, 130 S. Ct. at 2033-34. Many of the international norms considered in *Roper*and *Graham*apply equally to any life without parole sentences applied to juvenile offenders, and those norms equally support overturning Mr. Miller and Mr. Jacksons sentences here.

The community of nations rejects sentencing any juvenile offender to die in prison, whatever the offense. Allowing the practice to continue in the United States would be inconsistent with contemporary standards of decency and contrary to the Eighth Amendment. The appropriate remedy is to ensure that persons incarcerated for crimes committed when they were under the age of 18 have a meaningful opportunity to obtain release at the end of a term of years sentence or through parole consideration.

ARGUMENT

I. INTERNATIONAL PRACTICE, OPINION AND TREATY OBLIGATIONS SUPPORT HOLDING LIFE SENTENCES WITHOUT PAROLE FOR JUVENILES UNCONSTITUTIONAL

The United States is the only nation in the world that currently imposes life without parole sentences on juveniles. See Connie de la Vega and Michelle Leighton, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983 (2008). Most governments never allowed, expressly prohibit, or currently do not impose such sentences on children. Id. at 989-90. While a few countries other than the United States have statutory language that arguably permits sentencing juvenile offenders to life without parole, there is no known person to be serving such a sentence anywhere in the world other than the United States. Id. at p. 990.

Pursuant to *Graham v. Florida*and this Courts jurisprudence, the laws of other countries and international practice and opinion are relevant to the determination of whether a sentence is cruel and unusual under the United States Constitution.

Graham, 130 S. Ct. at 2033-34; see also *Roper*, 543 U.S. at 575-79. There is clear international consensus against sentencing a juvenile offender to die in prison, and of equal importance, the United States is party to human rights treaties that have been interpreted to prohibit life sentences for juvenile offenders. The Court should consider both of these factors in determining whether the sentences at issue violate the Eighth Amendment.

A. International Practice and Opinion Inform the Courts Eighth Amendment Analysis

The laws of the United States reflect the influence of laws and opinions of other members of the international community. Indeed, the Declaration of Independence itself speaks to the significance of other nations:

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of natures God entitle them, *a decent respect to the opinions of mankind*requires that they should declare the causes which impel them to the separation. The Declaration of Independence para. 1 (U.S. 1776) (emphasis added).

This Court has recognized that history and noted that:

For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729-30 (2004).

In urging courts to afford the requisite decent respect to the opinions of mankind Justice Blackmun has explained that:

[T]he early architects of our Nationunderstood that the customs ofnations the global opinions ofmankind would be binding upon thenewly forged union. John Jay, thefirst Chief Justice of the UnitedStates, observed . . . that the United States had, by taking a place amongthe nations of the earth, becomeamenable to the laws of nations. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 39 (1994) (citation and footnotes omitted).

Thomas Jefferson, drafter of the Declaration of Independence, had a keen appreciation for international opinion and law. He had a broad understanding of eighteenth century political thought, and was greatly influenced by European Enlightenment philosophers and their understanding of ancient Greek democracy and the Roman Republic. See Darren Staloff, *Hamilton, Adams, Jefferson: The Politics of Enlightenment and The American Founding*250-51 (2005).

John Adams too understood the need to select the best the world had to offer in order to create a better government, and he believed that international opinion should inform the new nations laws and institutions. See John Adams, *ADefence of the Constitutions of Government of theUnited States of America*, Preface, (1797), available athttp://www.constitution.org/jadams/ja1_00.htm (Da Capo Press Reprint ed., last visited Jan. 10, 2012).

Consistent with the approach of the Founders, this Court has recognized the relevance of international norms to the scope and content of societal norms and Constitutional rights. In *Roper*, this Court struck down juvenile death sentences, considering both the evolution of international law and practice in the global community as instructive for its interpretation of the Eighth Amendments prohibition of cruel and unusual punishments. *Roper*, 543 U.S. at 575-78.

In *Graham v. Florida*, the Court again recognized the value of the judgment of the worlds nations, citing foreign laws and international practice and opinion that prohibit life without parole for juveniles as evidence that demonstrates that the Courts rationale has respected reasoning to support it. *Graham*, 130 S. Ct. at 2034. The Court in *Graham*further recognized that the U.N. Convention on the Rights of the Child, ratified by every country except Somalia and the United States, explicitly prohibits juvenile LWOP sentences, that countries had taken measures to abolish the practice in order to comply with the Convention on the Rights of the Child, and that the provisions and status of the Convention on the Rights of the Child are evidence of international opinion. Id. at 2033-34. The Court found that the United States now stands alone in a world that has turned its face against life without parole sentences for juvenile non-homicide offenders. Id.at 2034, (quoting *Roper*, 543 U.S. at 577).

In his concurrence, Justice Stevens reaffirmed the Courts reliance on international law for at least a century when interpreting the Eighth Amendments evolving standards of decency. *Graham*, 130 S. Ct. at 2036 (Stevens, J., concurring) (quoting *Weems v. United States*, 217 U.S. 349, 373378 (1910).). The rationale of *Graham*should apply equally to a life sentence without parole for a juvenile offender when the crime committed was a homicide.

In the past 50 years, this Courts jurisprudence on issues of cruel and unusual punishment has reflected evolving standards of decency in civilized society. The standards are not frozen in time, and the Court has consistently relied upon international law, practices and customs as part of the constitutional analysis.

Indeed, the very constitutional provision at issue in this case, the Eighth Amendments prohibition on cruel and unusual punishments inflicted, traces its origin directly to the laws of another nation. The phrase cruel and unusual is derived from the Anglo-American tradition of criminal justice and the principle it represents goes back to the Magna Carta. *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The term was taken directly from the English Declaration of Rights of 1688. Id.

In *Trop v. Dulles*, the Court expounded upon the role of the fundamental norms of dignity and civility in interpreting the Eighth Amendment. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Id. at 100. Recognizing that the text of the Eighth Amendment is not precise and its meaning is not static, the Court has underscored that it is both appropriate and necessary to look abroad to evolving standards of decency to determine which punishments are so disproportionate as to be cruel and unusual. Id. at 100-01. Thus, the Court noted that the civilized nations of the world are in virtual unanimity that statelessness [the punishment at issue in Trop] is not to be imposed as punishment for crime. Id. at 102.

In *Coker v. Georgia*, the Court again considered the climate of international opinion concerning the acceptability of a particular punishment. Coker, 433 U.S. at 596 n.10. In support of its conclusion that a death sentence for a rape conviction was cruel and unusual, the Court acknowledged that [it] is not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue. Id.

In *Enmund v. Florida*, the Court invoked *Coker*reiterating that international opinion is an additional consideration which is not irrelevant. *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (quoting *Coker*, 433 U.S. at 596 n.10). The Court went on to find the death penalty cruel and unusual punishment for felony murder. Id. at 798 The Court, citing foreign law, noted that 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. Id. The decision also reflects foreign practice, stating [i]t is also relevant that death sentences have not infrequently been commuted to terms of imprisonment on the grounds of the defendant's lack of premeditation and limited participation in the homicidal act. Id.

In *Thompson v. Oklahoma*, the Court recognized the relevance of the views expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western community when concluding that the Eighth and Fourteenth Amendments prohibited the execution of a defendant convicted of committing first degree murder when he was 15 years old. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988). The Court further referenced its own practice of looking outward in its Eighth Amendment analyses: [w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual. Id. at 830 n.31. More recently, in *Atkins v. Virginia*, the Court stated: within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Atkins v. Virginia*,536 U.S. 304, 316 n.21 (2002).

In *Roper v. Simmons*, the Court relied upon the evolving standards of decency reasoning applied in Trop and Thompson and looked to international law, practice and opinion to categorically prohibit juveniles from receiving the death penalty. *Roper*, 543 U.S. at 575-78 (Yet at least from the time of the Court's decision in Trop,the Court has referred 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.). In applying the Eighth Amendments prohibition on cruel and unusual punishment, the Court gave due deference to international treatment of juvenile offenders. It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. Id. at 578.

In *Graham v. Florida*, the Court, quoting *Roper*, explicitly reaffirmed the relevance of international practice and opinion: [The opinion of the world community, while not controlling our outcome,] provide[s] respected and significant confirmation for our own conclusions. *Graham*,130 S. Ct. at 2035 (quoting *Roper*, 543 U.S. at 578). Justice Stevens concurrence acknowledges that evolving standards of decency have played a central role in Eighth Amendment jurisprudence for decades and will continue to do so.

Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete. While Justice Thomas would apparently not rule out a death sentence for a $50 theft by a 7yearold, the Court wisely rejects his static approach to the law. Standards of decency have evolved since 1980. They will never stop doing so. *Graham*, 130 S. Ct. at 2036 (Stevens, J. concurring).[4]

The global consensus against the death penalty and life without parole sentences for juveniles informed the United States Supreme Courts decisions to strike down those sentencing practices as cruel and unusual punishments in *Roper*with respect to death penalty and in *Graham* with respect to JLWOP for non-homicide crimes. *Roper*, 543 U. S. at 578; *Graham*, 130 S. Ct. at 2033-2034. Similarly, international consensus regarding juvenile life without parole sentences for homicide offenses should inform the Courts analysis here.

B. International Practice and Opinion Reject Sentences of Life Without Parole For Juvenile Offenders, Regardless of the Offense

Foreign law and practice, and international agreements, including treaties to which the U.S. is a party, reflect a global consensus that life without parole sentences should be prohibited, regardless of the crime, if the offender was under the age of 18 at the time the crime occurred.

1. Foreign Law and Practice Do Not Allow Juvenile Life Without Parole Sentences

As international human rights law has developed and gained broader acceptance, most countries have followed suit, eliminating sentencing practices that contravene human rights principles. But there is nothing new or revolutionary about recognizing the impermissibility of sentencing juvenile offenders to life without parole. Indeed, very few countries have *ever*imposed life sentences on juvenile offenders. *Sentencing our Children to Die*, *supra*, at 989-1007. Most governments (unlike the United States) have either never allowed, expressly prohibited, or in practice do not impose such sentences on juvenile offenders. *Sentencing our Children to Die*, *supra*, at 989-90.

Consistent with international law, practice and opinion, 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 Dnkel & Barbara Stado-Kawecka, *Juvenile Imprisonment and Placement in Institutions for Deprivation of LibertyComparative Aspects*, Juvenile Justice Systems in EuropeCurrent Situation and ReformDevelopments 1772 (2010)).

The range of permissible sentences varies by country: the maximum sentence in Portugal is three years (including for murder); the maximum in Switzerland is four years (including for murder); it is five in the Czech Republic; 10 in Estonia, Germany and Slovenia; and up to 20 in Greece and Romania. Id.[5]In England and Wales, a person under 21 cannot receive a whole life tariff, the equivalent of an LWOP sentence, because Schedule 21, 1 and 269(4) of the Criminal Justice Act 2003 restricts such sentences to persons aged 21 or older.[6]In the Netherlands and Scotland, there is the (theoretical) possibility of life imprisonment *with*the possibility for parole, restricted to juveniles at least 16 years in age. Id. But in none of those countries do the courts impose sentences of life *without*parole on juvenile offenders.

Other than the United States, some of the few countries that previously allowed JLWOP sentences have since ended the practice in accordance with their international human rights law obligations. *Sentencing our Children to Die, supra*, at 996-1004. Tanzania has committed to allow parole for the one under-18 offender potentially serving the sentence and to clarify its laws to prohibit the punishment. Id. at 996-99. Israel has clarified that parole consideration is available to juveniles serving the sentence, and South Africa has clarified that such sentences are not permitted. Id. at 999-1004. That the few countries that potentially had juvenile offenders serving a life without parole sentence have clarified that they allow for parole hearings in accordance with the international legal norms is further evidence that the sentence is not permitted under any circumstances.

Of the ten countries identified in 2007 as having laws that could permit the sentencing of juvenile offenders to life without parole (other than the United States)Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lankathere are no known cases where the sentence has been imposed. Id. at 990.[7]The majority of nations do not apply juvenile life without parole sentences because such sentences violate the principles of child development and protection established through national standards and international human rights law. Id. at 989. Courts in other countries often refer to the treaty obligations in cases involving human rights. *See, e.g.*Corte Suprema de Justicia de la Nacin [CSJN] [National Supreme Court of Justice], Dec. 7, 2005, Maldonado, Daniel Enrique / recurso de hecho, Fallos (M-1022- XXXIX) (Arg.), *available at* http://www.mpf.jusbaires.gov.ar/wpcontent/uploads/csjn-maldonado-daniel-... (overturning life sentence of 14 year old offender for violating the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and the Convention Against Torture as well as Argentinean laws); *Fangupo v. Rex; Fa'ooa v. Rex, supra,* (Tonga) (citing Convention Against Torture as basis for overturning sentence of judicial whipping).

Even in the United States, the sentence was not used on a large scale until the 1990s when 40 states passed laws making it easier to try juveniles as adults. See P. Griffin, et al*., Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions Foreword* (National Center forJuvenile Justice 1998)www.ncjrs.org/pdffiles/172836.pdf. Before the1990s, the sentence was imposed relativelyinfrequently anywhere. The Sentencing Project,*Juvenile Life Without Parole: Trends in Sentence Use Over Time* (May 2010), http://www.sentencingproject.org/doc/publications/jj_JLWOPTrends.pdf. As of 2008, the United States was the only nation where juveniles served life sentences without the possibility of parole.

2. International Human Rights Treaties and Institutions Reflect a Global Consensus Against Juvenile Life Without Parole Sentences

International agreements and resolutions reflect that the community of nations rejects sentencing juveniles to life without parole regardless of the crime committed. *See, e.g., Graham*, 130 S. Ct. at 2033-34. The Convention onthe Rights of the Child, the most widely ratifiedhuman rights treaty, specifically condemns thispractice. As noted in *Graham*, Article 37(a) of theConvention on the Rights of the Child, prohibitsthe imposition of life imprisonment withoutpossibility of release . . . for offences committed bypersons below eighteen years of age. *Graham*, 130

S. Ct. at 2034 (citation omitted).[8]Article 37(b) of the Convention further provides that imprisonment be used only as a measure of last resort for juvenile offenders, and for the shortest appropriate time. U.N. Convention on the Rights of the Child, GA Res. 44/25, annex, 171, U.N. Doc. A/RES/44/25 (Nov. 20, 1989). Neither of those treaty provisions distinguishes between homicide and non-homicide

offenses. Because Petitioners Miller and Jacksons sentences allow no possibility of release and are not the shortest appropriate time available, they are inconsistent with the Convention on the Rights of the Child and the international practice and opinion it reflects.

The significance of offender age in criminal sentencing is further highlighted by the fact that Article 37 sets a specific age (below 18 years of age) in relation to sentences of life without parole, in contrast with other rights which in Article 1 defers to domestic laws for the age of majority. In early 2007, the authoritative Committee on the Rights of the Child, which oversees the Convention, reiterated that article 37 prohibits the death penalty and life without parole for offenders under eighteen years of age at the time of the offense. *See* Comm. Rts. Child, Children's Rights in Juvenile Justice, General Comment No. 10 78, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).[9]

The prohibition on 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. See American Declaration of the Rights and Duties of Man, art. VII (establishing the right of all children . . . to special protection, care and aid); American Convention on Human Rights, art. 19 (Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state); *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, doc. 5 rev. 1 83 Inter-Am. C.H.R. (2002) (Art. 19 of the American Convention and Art. VII of the American Declaration reflect the broadly-recognized international obligation of states to provide enhanced protection to children); *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 (Ser. A.) No. 17 103 Inter-Am. Ct. H. R. (Aug. 28, 2002) (measures that involve deprivation of liberty must be exceptional).

Beyond the rules clarity in treaty law, a near universal consensus has coalesced over the past seventeen years that the sentence must be legally abolished, and the consensus has been repeatedly affirmed in recent years. Myriad United Nations resolutions adopted by consensus or upon vote, with the support of every country represented except the United States, call for abolition of the juvenile death penalty and life sentences without parole. Since 2009, however, *even the United States*has joined the consensus against the use of this sentence in votes on resolutions at the General Assembly.

Every year since 2006, in its annual Rights of the Child resolution, the United Nations General Assembly has called for immediate abrogation of the juvenile LWOP sentence by law and practice in any country still applying the penalty. From 2006- 2008, the United States cast the lone dissenting vote. For example, on December 19, 2006, the General Assembly resolved by a vote of 185 to one (the United States) that nations should abolish by law, as soon as possible, the death penalty and life imprisonment without possibility of release for those under the age of 18 years at the time of the commission of the offence. Rights of the Child, G.A. Res. 61/146 31(a), U.N. Doc. A/Res/61/146 (Dec. 19, 2006). The General Assembly adopted a similar resolution by a vote of 183 countries to one (the United States) in December of 2007, Rights of the Child, G.A. Res. 62/141 36(a), U.N. Doc. A/RES/62/141 (Dec. 18, 2007), and again in 2008 (the United States was the only vote against). Rights of the Child, G.A. Res. 63/241 43(a), U.N. Doc. A/RES/63/241 (Dec. 24, 2008).

In 2009 and 2010, the General Assembly affirmed the earlier resolutions, including the directive to abolish juvenile life without parole sentences, by a full consensus without a dissenting vote from the United States. Rights of the Child, G.A. Res. 64/146 15, U.N. Doc. A/RES/64/146 (Dec. 18, 2009), and Rights of the Child, G.A. Res. 65/197 17, U.N. Doc. A/RES/65/197 (Dec. 21, 2010). In 2010, the General Assembly adopted a resolution on the administration of justice specifically requesting that countries abolish the death penalty and life imprisonment without the possibility of release for offenders under eighteen years of age. The resolution on the administration of justice passed by consensus, without a dissenting vote from the United States. Human rights in the administration of justice, G.A. Res. 65/213 16, U.N. Doc. A/RES/65/213 (Dec. 21, 2010).[10]

In its first substantive resolution on the Rights of the Child, the recently created United Nations Human Rights Council included the prohibition of juvenile life without parole sentences, Rights of the Child, H.R.C. Res. 29 30(a), U.N. Doc. A/HRC/7/RES/29 (Mar. 28, 2008), along with the prohibition of the death penalty for offenders under the age of 18 at the time of the crime.[11]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. 2 11, U.N. Doc. A/HRC/10/29 (Mar. 25, 2009). In 2005, the U.N. Commission on Human Rights (predecessor to the U.N. Human Rights Council) called specifically for governments to prohibit juvenile LWOP sentences along with the juvenile death penalty. Rights of the Child, Commn on Human Rights Res. 2005/44 27(c), U.N. Doc. E/CN.4/2005/135 (April 19, 2005).[12]

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. U.N. Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), G.A. Res. 40/33, annex, Rule 17(b), U.N. Doc. A/RES/40/33 (Nov. 25, 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, annex, Rule 2, U.N. Doc. A/RES/45/113 (Dec. 14, 1990) (emphasizing imprisonment as a last resort and for the shortest time possible); U.N. Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), G.A. Res. 45/112, annex, 46, U.N. Doc. A/RES/45/112 (Dec. 14, 1990).

Because the two sentences at issue here are out of step with international law, practice and opinion, there is compelling support to find that this sentencing practice is cruel and unusual. As the Court found in *Graham*, the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it. *Graham*,130 S. Ct. at 2034. Further, in the inquiry of whether a punishment is cruel and unusual, the overwhelming weight of international opinion against life without parole for non homicide offenses committed by juveniles provide[s] respected and significant confirmation for our own conclusions. Id. (quoting *Roper*, 543 U.S. at 578). The weight of global law, practice and opinion against life without parole for any under-18 offender, regardless of offense, similarly supports the conclusion that such a sentence is unconstitutional.

C. United States Treaty Obligations Are Relevant to Eighth Amendment Analysis

The United States is a party to several treaties that have been interpreted by their oversight bodies, and recognized by states parties, to prohibit juvenile life without parole sentences. As a treaty party, the United States has assumed international legal obligations that should inform the Court's Eighth Amendment analysis. And under the Constitution, the states of the United States must uphold these treaty obligations. U.S. Const. art. VI, cl. 2.

Treaties relevant to the Court's analysis include: (1) the International Covenant on Civil and Political Rights, *opened for signature*Dec. 16, 1966, 999 U.N.T.S 171 (entered into force Mar. 23, 1976) (*ratified by the United States*, S. Treaty Doc. No. 95-20 (April 22, 1992)); (2) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), *opened for signature*Dec. 10, 1984, 1465 U.N.T.S. 85 (*entered into force*June 26, 1987) (*ratified by the United States*, S. Treaty Doc No. 100-20 (Oct. 27, 1990)); and (3) the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature*Dec. 21, 1965, 660 U.N.T.S. 195 (*entered into force*Jan. 4, 1969) (*ratified by the United States*, S. Treaty Doc. No. 95-18 (Oct. 21, 1994)). Inratifying these treaties, Congress stated, theUnited States understands that this Covenantshall be implemented by the Federal Governmentto the extent that it exercises legislative **and**judicial jurisdiction over the matters coveredtherein, **and** otherwise by the state **and** localgovernments. 138 CONG. REC. S4781 (daily ed.Apr. 2, 1992) (for the International Covenant onCivil and Political Rights) (bold in original); *see* also140 CONG. REC. S7634-02 (daily ed. June 24,1994) (same understanding regarding theConvention on the Elimination of All Forms ofRacial Discrimination); 136 CONG. REC. S17486-01(daily ed. Oct. 27, 1990) (same understanding forthe Convention Against Torture).

The prohibition on juvenile life without parole sentences has been recognized as an obligation of the International Covenant on Civil and Political Rights. In relation to articles 7 (cruel and unusual punishment) and 24 (treatment of children), the Human Rights Committee, the body established under the treaty to monitor compliance and provide interpretation, has stated that it 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). Human Rights Comm., Comments on the United States of America 34, U.N. Doc. CCPR/C/USA/CO/3 2395 (Sept. 15, 2006) (hereinafter Comments on the United States). Further, the Human Rights Committee determined that a 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. Concluding Observations of the Human Rights Committee: United States of America 14, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006). Article 14(4) of the Covenant further requires that criminal procedures for juvenile persons should take into account their age and desirability of promoting their rehabilitation. International Covenant on Civil and Political Rights, art. 14(4).

The Committee Against Torture, the body established for oversight by the Convention Against Torture, in evaluating the United States compliance with that treaty, 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 34, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

Most recently, in 2008, the Committee on the Elimination of Racial Discrimination, the oversight body for Convention on the Elimination of Racial Discrimination, found the juvenile without parole sentence incompatible with Article 5(a) of the Convention on the Elimination of Racial Discrimination because the sentence is applied disproportionately to youth of color, amounting to pervasive discrimination that the United States has failed to address. CERD, Concluding Observations of CERD on the United States 21, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008). The Committee referred to the concerns raised by the Human Rights Committee and Committee Against Torture on the United States practice of sentencing juveniles to life without parole and added its own conclusion:

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. *Id.*

In light of the U.S. Constitution and U.S. treaty obligations, this Court should consider the views of the treaty oversight bodies in determining whether a life sentence without parole for any under-18 offender violates the Eighth Amendment prohibition against cruel and unusual punishments.[13]

CONCLUSION

As in *Roper* and *Graham*, this Court should consider the laws, practices and opinions of other nations and international agreements in interpreting and applying the Eighth Amendment. This Court should find these same principles, which have been applied to universally condemn in international law and practice the sentencing of juveniles to life in prison without parole, instructive in interpreting the Eighth Amendment here. Further, it should consider the provisions of treaties to which the United States is a party. For the reasons stated above, the sentences of Mr. Miller and Mr. Jackson should be overturned.

Respectfully submitted,

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Human Rights Advocates
Human Rights Watch
Japan Federation of Bar Associations
Law Council of Australia
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Law Society of New South Wales
New Zealand Law Society
Norfolk Island Bar Association
Norwegian Bar Association
Portuguese Bar Association
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[1]Counsel of record received timely notice of the intent to file this brief. Letters from all counsel consenting to its filing have been filed with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than amici curiae, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

[2]Life without possibility of parole sentences are sometimes referred to by the acronym "LWOP." Similarly, juvenile life without the possibility of parole sentences are sometimes referred to as "JLWOP."

[3]There is one case in Argentina that has raised questions about whether someone might be serving such a life sentence, but the sentence appears to be based on crimes committed as a juvenile and as an adult, and the sentence is otherwise subject to challenge under the laws of Argentina. (Communications with Argentinean Counsel for Sal Cristian Roldn Cajal, emails on file with counsel for amici). Mr. Cajal's case is included in a petition pending before the Inter-American Court of Human Rights challenging life sentences with parole. See *Case No. 12,651, Csar Alberto Mendoza, et al. (Perpetual imprisonment and confinement of adolescents),* Inter-Am. Ct. H.R., submitted June 17, 2011. As this Court has recognized in other cases, a small number of outlier jurisdictions does not detract from the importance of foreign and international opinion and practice. *E.g., Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (that only 3 of 60 nations retain death penalty for rape "not irrelevant" to constitutional analysis); *Roper*, 543 U.S. at 578 (non-unanimous but widespread adherence to norm informs contemporary standards of decency).

[4]Justice Thomas asserted that some countries laws permit LWOP sentences Id. at 2053 n.12 (Thomas, J., dissenting), but as the very source he relied on explains, courts in those countries have not sentenced juvenile offenders to life without parolefor homicide or non-homicide offenses. See Child Rights International Network, Connie de la Vega, et. al., Human Rights Advocates, Statement on Juvenile Sentencing to Human Rights Council, 10th Sess. (Nov. 3, 2009), available at http://www.crin.org/resources/infodetail.asp?ID=19806 (Currently, there is no evidence of any country, besides the United States, with juvenile offenders sentenced to life without the possibility of release.); see also Response to amicus briefs of Sixteen Members of Congress, the State of Florida, and Solidarity Center with respect to international law before the U.S. Supreme Court Graham v. Florida (08- 7412) and Sullivan v. Florida (08-7621) (Oct. 13, 2009), available at www.usfca.edu/law/docs/jlwop/graham/.

[5]This is applicable only in cases where the sentence for an adult offender would be life imprisonment.

[6]See Schedule 21, 1 and 269(4) of the Criminal Justice Act 2003, c.44.

[7]Additional research clarifies that life sentence in Belize means 18-20 years without parole. Second Periodic Report by Belize to the Committee on the Rights of the Child 85, U.N. Doc. CRC/C/65/Add.29 (July 13, 2004). In Brunei, while an offender under 18 may be detained during His Majesty the Sultan and Yang Di-Pertuans pleasure, the statute also provides that the child or young person (ages 14-18) may be released at any time and the case must be reviewed at least once a year. Children and Young Persons Order 2006, Section 45(1), (3), and (5). Five additional countries have been identified as having similar ambiguous statutory language Zambia, Sierra Leone, Fiji, Tonga and the Bahamas but there is no evidence that any of these countries in fact imposes JLWOP. Each of these countries is party to the Convention on the Rights of the Child. While the penal codes in these jurisdictions have ambiguous language regarding JLWOP, the wording of the statutes suggests that there remains some mechanisms for review of life sentences or for potential release. Section 25(1) of the Fijian Penal Code specifies that the court shall sentence such person to be detained during the Governor-General's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Governor-General may direct, and whilst so detained shall be deemed to be in legal custody, providing discretion in the sentencing. Tongan Penal Code Section 91(2) notes that [e]very person who attempts to commit murder shall be liable to imprisonment for life or any less period, and Tongan Courts have looked to human rights instruments regarding the validity of punishments. See Fangupo v. Rex; Fa'ooa v. Rex [2010] TOCA 17; AC 34 of 2009; AC 36 of 2009 (147 2010) (Tonga) (overturning sentence of judicial whipping because contrary to Tonga's international legal obligations under the Convention Against Torture). Chapter 97 section 41 of the Penal Code of the Bahamas provides that those under the age of 18 are to be detained during Her Majesty's pleasure; if so sentenced he shall notwithstanding anything in the other provisions of this Act, suggesting that a later review of the sentence is possible. Additionally, in Sierra Leone, section 216 of the Criminal Procedures Acts specifies that the juvenile should be confined to a chosen place as may be directed by the president and for a stated period of time until a juveniles reformation and transformation is guaranteed. Although this does not prohibit JLWOP, it does suggest that there is evaluation of juveniles during incarceration and upon rehabilitation the potential for release. Finally, the Penal Code Act of Zambia Section 25(2) notes that the court shall sentence him to be detained during the Presidents pleasure; and when so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct. This, in conjunction with subsection (3), which states that the presiding Judge shall forward to the President a copy of the notes of evidence taken at the trial, with a report in

writing signed by him containing such recommendation or observations on the case as he may think fit to make indicates that some discretion remains after the juvenile has been sentenced.

[8]Because all countries in the world, aside from the United States and Somalia, are parties to the Convention, the practice of nations in this regard is arguably done pursuant to their legal obligations. In light of the practice and overwhelming authority prohibiting the sentence, the standard at a minimum may be considered as customary international law. See North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.) , 1969 I.C.J. 3, 42 71 (Feb. 20) (recognizing passage of treaty rule into the general corpus of international law as one of the recognized methods by which new rules of customary international law may be formed).

[9]Specifically, the Committee has recommended that parties abolish all forms of life imprisonment for offences committed by persons under the age of eighteen. For all sentences imposed upon children the possibility of release should be realistic and regularly considered. Id. 77 (emphasis added). General Comments constitute the authoritative interpretation of the Committee on the Rights of the Child, established by the Convention to administer the treaty. See http://www2.ohchr.org/english/bodies/crc/comments.htm. The prohibition of juvenile life without parole sentences has also been recognized as an obligation under treaties that the United States is party to. See, section C below.

[10]The texts of the 2011 General Assembly resolutions are not yet available online.

[11]The Commission on Human Rights was replaced by the Human Rights Council in 2005. The Human Rights Committee remains. Like the Commission, the Council is made up of government delegates.

[12]As in the UN General Assembly, members of the Commission on Human Rights acted as representatives of their governments, which means that a Commission resolution reflected government opinion. The resolution calling for abolition of juvenile life without parole sentences emerged from a series of pronouncements from the Commission, from 1997 through 2004, emphasizing the need for the global community 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, i.e., the opposite of an inflexible sentence that requires imprisonment for a juvenile offenders whole life. *Sentencing Our Children to Die*, supra, at 1017-18 & n. 182.

[13]In considering the treaties for the purpose of interpreting the Eighth Amendment, the Court need not address the issue of whether the treaty provisions are self-executing or the validity of the non selfexecuting declarations the United States submitted in connection with ratifying some of the treaties. For background and legislative history of the declarations, see Connie de la Vega, Civil Rights During the 1990s: New Treaty Law Could Help Immensely, 65 Cinn. L. Rev. 423, 456-62 (1997). This Court has applied treaty provisions in defensive postures without considering whether they are self-executing. See United States v. Rauscher, 119 U.S. 407, 430 (1886); United States v. Alvarez-Machain, 504 U.S. 655, 669- 70 (1992) (rev'd on other grounds, Sosa, 542 U.S. at 692).

[14]Research assistance was provided by Professor Julian Killingly, Birmingham City University School of Law and Solicitor of the Supreme Court (UK) and his students; Mark George, Queens Counsel; and Hannah L. Gorman, Solicitor of the Supreme Court (United Kingdom); staff at the Law Society of England and Wales; Fellows and students at the University of San Francisco School of Law; and staff at Sheppard Mullin Richter & Hampton LLP.