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In The  
Supreme Court of the United States

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TERRANCE JAMAR GRAHAM,  
*Petitioner,*

v.

STATE OF FLORIDA,  
*Respondent.*

JOE HARRIS SULLIVAN,  
*Petitioner,*

v.

STATE OF FLORIDA,  
*Respondent.*

————— ♦ —————  
ON PETITION FOR WRIT OF CERTIORARI TO THE  
DISTRICT COURT OF APPEAL OF FLORIDA  
THE FIRST DISTRICT  
————— ♦ —————

BRIEF OF SIXTEEN MEMBERS OF THE  
UNITED STATES HOUSE OF REPRESENTATIVES  
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT  
————— ♦ —————

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**TABLE OF CONTENTS**

	<b>Page</b>
Table of Contents.....	i
Table of Authorities.....	iv
Interest of the <i>Amici</i> .....	1
Summary of Argument.....	2
Argument.....	4
I.    Article 37 of the UN Convention on the Rights of the Child Is Not Binding on the United States Under the Theory of <i>Jus Cogens</i> .....	4
A.    The International <i>Amici</i> Inadequately Explain The Developing Theory of <i>Jus</i> <i>Cogens</i> .....	6
B.    There is No International Consensus    Regarding Juvenile Sentencing .....	14

1.	A number of nations reject the theory that they are prohibited as a matter of law from imposing the sentence of life in prison without parole.....	19
2.	The findings of the UN Committee on the Rights of the Child demonstrate widespread “violations” of Article 37.....	25
3.	Other significant violations of Article 37 are revealed by the UN Committee Reports .....	30
C.	Summary Re <i>Jus Cogens</i> and Customary International Law.....	38
II.	The United States is not in Violation of Any Binding Treaty Obligation by Sentencing Juveniles to Life in Prison .....	40

III. The Coerced Use of International Law Violates The Principle of Self-Determination.....	43
CONCLUSION .....	45

## TABLE OF AUTHORITIES

### Page(s)

### CASES

*Garza v. Lappin*,  
253 F.3d 918 (7th Cir. 2001) ..... 42

*Matar v. Dichter*,  
563 F.3d 9 (2d Cir. 2009)..... 11

*Medellín v. Texas*,  
552 U.S. \_\_\_, 128 S. Ct. 1346 (2008)..... 42

### NON-U.S. CASES

*Armed Activities on the Territory of the Congo*  
(*Democratic Republic of the Congo v. Rwanda*),  
45 I.L.M. 562,  
2006 WL 1667673 (ICJ 2006) ..... 9, 10

*Director of Public Prosecutions, KwaZulu-Natal v.*  
*P* 2006 (3) SA 515 (SCA); [2006]  
1 All SA 446 (SCA);  
2006 (1) SACR 243 (SCA) ..... 32

*M v. The State*, CCT 53/06 [2007]  
ZAAC 18 (Const. Ct. of S.A.)..... 33

### U.S. DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL PROVISIONS

The Declaration of Independence  
(U.S. 1776) ..... 43, 44

U.S. CONST. art. I Sect. 1..... 44

U.S. CONST. amend. VII ..... 15, 40, 41

U.S. CONST. amend. X ..... 44

## **NON-U.S. STATUTES**

Powers of Criminal Courts  
(Sentencing) Act (U.K., 2000)..... 34

## **TREATIES**

American Declaration on the Rights and  
Duties of Man,  
O.A.S. Res. XXX, Art. VII (1948) ..... 42

American Convention on Human Rights,  
O.A.S. Treaty Series No. 36,  
114 U.N.T.S. 123 (18 July 1978) ..... 42

International Convention on the  
Elimination of All Forms of  
Racial Discrimination,  
G.A. Res. 2106 (XX), Annex,  
20 U.N. GAOR Supp. (No. 14) at 47,  
U.N. Doc. A/6014,  
660 U.N.T.S. 195 (1966) ..... 5, 40

International Covenant on  
Civil and Political Rights,  
G.A. Res. 2200A, Art. 24(1),  
U.N. GAOR, 16th Sess., Supp. No. 16,  
U.N. Doc. A/6316,  
999 U.N.T.S. 171 (1966) ..... 6, 40

Statutes of the  
International Court of Justice,  
T.S. No. 993 (1945) ..... 16, 17

United Nations Convention Against  
Torture and Other Cruel, Inhuman, or  
Degrading Treatment or Punishment,  
G.A. Res. 39/46, U.N. GAOR, 39th Sess.,  
Supp. No. 51,  
U.N. Doc. A/39/51,  
1465 U.N.T.S. (1984) ..... 6, 40, 41

United Nations Convention on the  
Rights of the Child,  
G.A. Res. 61/146,  
1577 U.N.T.S. 3 (1989) ..... *passim*

Vienna Convention on the  
Law of Treaties,  
1155 U.N.T.S. 331 (May 23, 1969) ..... 5, 8, 12

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Anthony Aust, *Modern Treaty  
Law and Practice*,  
Cambridge University Press  
(2007 (2nd Edition)) ..... 21, 22

Ian Brownlie, *Principles of  
International Law*  
(Oxford University Press, Oxford)  
(7th ed. 2008) ..... *passim*

- Paul Tavernier,  
 “L’identification des règles fondamentales,  
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*The Fundamental Rules of the  
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 Jus Cogens and Obligations Erga Omnes*,  
 Christian Tomuschat and  
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 Fundamental Norms,” in  
*The Fundamental Rules of the  
 International Legal Order:  
 Jus Cogens and Obligations Erga Omnes*,  
 Christian Tomuschat and  
 Jean-Marc Thoussvenin (Eds.)  
 Martinus Nijhoff Publishers Leiden,  
 The Netherlands (2006)..... 13, 14, 45
- Wladyslaw Czaplinksi,  
 “*Jus Cogens* and the Law of Treaties” in  
*The Fundamental Rules of the  
 International Legal Order:  
 Jus Cogens and Obligations Erga Omnes*,  
 Christian Tomuschat and  
 Jean-Marc Thoussvenin (Eds.)  
 Martinus Nijhoff Publishers Leiden,  
 The Netherlands (2006)..... 7, 8

**OTHER AUTHORITIES**

Amnesty International and Human Rights Watch, <i>The Rest of Their Lives: Life Without Parole for Child Offenders in the United States</i> (2005) .....	20
Black's Law Dictionary (Rev. 4th ed. 1968).....	13
Black's Law Dictionary (8th ed. 2004).....	13
Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations from 2008 and 2009 CRC/C/BGD-URY .....	<i>passim</i>
Connie de la Vega & Michelle Leighton, <i>Sentencing our Children to Die in Prison</i> , 42 U.S.F.L. Rev. 983 (2008).....	19, 20
Yearbook of the International Law Commission, 1966, Vol. II.....	8, 12

## Interest of the *Amici*

The following members of the United States House of Representatives submit this brief as *amici curiae*: Rep. Thaddeus McCotter (AR), Rep. Doug Lamborn (CO), Rep. Pete Hoekstra (MI), Rep. John Fleming (LA), Rep. Trent Franks (AZ), Rep. Todd Akin (MO), Rep. Robert Latta (OH), Rep. Jim Jordan (OH), Rep. Todd Tiahrt (KS), Rep. Phil Gingery (GA), Rep. Cynthia Lummis (WY), Rep. Dan Burton (IN), Rep. Gus Bilirakis (FL), Rep. Mark Souder (IN), Rep. John Boozman (AR), and Rep. Rob Bishop (UT).<sup>1</sup>

Representatives McCotter and Lamborn are co-chairs of the House Sovereignty Caucus. Many, but not all, of the *amici* are members of this caucus.

These members believe that sovereignty is the ability of a people to determine their own political and national destiny. Just as political power has been driven over the years from state to federal government, today influence is being stripped from our federal government and being granted to international institutions—diminishing the ability of “We the People” to govern our own affairs.

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution intended to fund its preparation or submission. Both the respondent and the petitioners have filed a blanket waiver in both cases.

These members intend to stand to protect and defend the rights of American citizens and the interests of American institutions from the increasing influence of international organizations and multilateral agreements. They also intend to promote policies and practices which protect U.S. self-determination, national security, free trade with free nations, and the advancement of constitutional principles. They are committed to defend American values from encroachment by international actors and provide a voice of opposition to transnational doctrine.

### **Summary of Argument**

Amnesty International and a number of other international *amici* have submitted a brief (hereinafter International *Amici*) which argues that the State of Florida is prohibited by certain international legal obligations from imposing a sentence of life in prison without parole (LWOP) on a juvenile. This brief is submitted in direct response to the International *Amici* and the limited arguments concerning international law made in the briefs of the petitioners and a small number of other *amici*.

The assertion that the United States is the only nation on earth that permits the sentencing of juveniles to life in prison without parole is false. Moreover, the International *Amici* have not given this Court a comprehensive or accurate description of the juvenile sentencing laws in other nations.

The *amici's* theory that the United States is bound to obey the provisions under Article 37 of the United Nations Convention on the Rights of the Child under the principle of *jus cogens* is without factual or legal foundation for at least three reasons:

- The *jus cogens* doctrine has no agreed elements or standards.
- *Jus cogens* has no application outside the invalidation of an offending treaty.
- The prohibition against juvenile life imprisonment does not satisfy the criteria for customary international law because there is no evidence that Article 37 reflects the general international practice of juvenile sentencing or that the other nations of the world feel legally compelled to obey its dictates.

The United States has taken reservations to the other treaties cited by the International *Amici* that render them inapposite to this case.

Finally, we respectfully suggest that the use of international law to attempt to govern the people of the United States violates both the letter and spirit of our Constitution as well as the recognized international human rights principle of self-determination.

## Argument

### I. **Article 37 of the UN Convention on the Rights of the Child Is Not Binding on the United States Under the Theory of *Jus Cogens***

The lead argument of the International *Amici* is that “the prohibition of juvenile life without parole is *jus cogens*” and is thus binding on the United States.<sup>2</sup> This assertion is predicated on an express prohibition contained in Article 37(a) of the United Nations Convention on the Rights of the Child (CRC).<sup>3</sup> All nations are parties to the CRC except for the United States and Somalia.<sup>4</sup>

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<sup>2</sup> Int’l *Amici* at 10.

<sup>3</sup> Article 37 contains two sections concerning sentencing of juvenile offenders.

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time

<sup>4</sup> Int’l *Amici* at 16, fn. 6.

The United States signed the CRC on February 16, 1995.<sup>5</sup> However, in the intervening 14 years, no President of the United States has submitted the CRC to the Senate for its advice and consent. Until the Senate ratifies the treaty, the United States is not a party and, by definition, is not bound by its provisions even in an international tribunal much less in the domestic courts of the United States. See, Vienna Convention on the Law of Treaties (VCLT),<sup>6</sup> Articles 24 (3) and 26. Article 26, which contains the most fundamental principle of international treaty law, *pacta sunt servanda* (agreements must be kept), is especially important. It provides that treaties are binding upon “parties.” The duty to obey treaties in good faith is a duty undertaken only by a party.

Even if the United States becomes a party to the CRC by ratification, it is not clear that any obligation contained in that treaty would be self-executing. The United States often takes reservations, declarations or understandings to human rights treaties ensuring that some or all provisions are to be construed as non-self-executing.<sup>7</sup>

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<sup>5</sup> United Nations Treaty Collection, Chap. IV, Human Rights No. 11.

<sup>6</sup> 1155 U.N.T.S. 331 (May 23, 1969)

<sup>7</sup> See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014, 660 U.N.T.S. 195 (1966) (Ratified: October 21, 1994), Declaration 1: “That the United States declares that the provisions of the Convention are not self-executing.” The United States declared Articles 1-27 of the International

The International *Amici* ignore these fundamental principles of international law. They contend that the United States is nonetheless bound to obey the provisions of Article 37 on the notion that it contains rules which are “*jus cogens*.” We will show that the sentencing standards in Article 37 cannot possibly be considered *jus cogens* for both factual and legal reasons.

**A. The International *Amici*  
Inadequately Explain The  
Developing Theory of *Jus Cogens***

The International *Amici* point to Article 53 of the VCLT for recognition of the principle called “*jus cogens*.” This article does nothing more than proclaim the invalidity of treaties which contain provisions that violate “peremptory norms.”<sup>8</sup> The

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Covenant on Civil and Political Rights (G.A. Res. 2200A, Art. 24(1), U.N. GAOR, 16th Sess., Supp. No. 16, U.N. Doc. A/6316,999 U.N.T.S. 171 (1966)) and Articles 1-16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (G.A. Res 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, 1465 U.N.T.S. 85 (1984)) to be non-self-executing.

<sup>8</sup> Article 53 reads:

*Treaties conflicting with a peremptory norm of general international law (“jus cogens”)*

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community

widely-used treatise by Professor Ian Brownlie,<sup>9</sup> cited by the International *Amici*,<sup>10</sup> notes that *jus cogens* is a theory of “rules, or rights or duties, on the international plane.”<sup>11</sup> *Jus cogens* principles “are rules of customary law which cannot be set aside by treaty or acquiescence. . . .”<sup>12</sup> The purpose of the doctrine of *jus cogens* is to create a rule invalidating offending treaties.

A treatise devoted to the subject of *jus cogens* suggests that the Hitler-Stalin Pact is a good example of a treaty that violates *jus cogens* although it notes that it is also “a good example of confusion and difficulties” associated with this theory.<sup>13</sup>

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of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

<sup>9</sup> Ian Brownlie, *Principles of International Law* (Oxford University Press, Oxford (2008 (7<sup>th</sup> ed.)). (Hereinafter “Brownlie”).

<sup>10</sup> Int’l *Amici* at 11.

<sup>11</sup> Brownlie at 510.

<sup>12</sup> *Id.*

<sup>13</sup> Wladyslaw Czaplinksi, “*Jus Cogens* and the Law of Treaties” in *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Christian Tomuschat and Jean-Marc Thoussvenin (Eds.) Martinus Nijhoff Publishers Leiden, The Netherlands (2006), p. 84. (Hereinafter, *Jus Cogens* Treatise).

Although there is widespread agreement that the theory of *jus cogens* exists, there is little consensus as to which rules fall within the doctrine. No consensus exists as to the elements for judging a claim that some particular action violates *jus cogens*.

The International Law Commission (ILC), which drafted the VCLT, “was convinced that no catalogue of peremptory norms could be formulated.”<sup>14</sup> Its 1966 official commentary demonstrates some of the difficulties inherent in the theory of *jus cogens*:

The formulation of the article is not free from difficulty, since there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*.

...[T]he majority of the general rules of international law do not have that character....

It is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*.<sup>15</sup>

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<sup>14</sup> *Id.* at 87.

<sup>15</sup>Yearbook of the International Law Commission, 1966, Vol. 2, pp. 247-248

The *Jus Cogens* Treatise, *supra*, notes:

The concept of *jus cogens*, which was discussed at length for a long time during the sixties and the seventies in connection with the work of the International Law Commission on the law of treaties, has now been accepted almost unanimously. By contrast, this consensus disappears concerning the content of *jus cogens* and even its definitions.<sup>16</sup>

Even the brief of the International *Amici* acknowledges that “commentators may disagree on the exact scope of all *jus cogens* norms.”<sup>17</sup> However, these *amici* give this Court no objective basis for determining which claims qualify as *jus cogens*. Again, Brownlie says that “the proponent of a rule of *jus cogens* in relation to this article will have a considerable burden of proof.”<sup>18</sup>

The International *Amici* are asking this Court to blaze a trail on a theory that even the International Court of Justice has barely touched. In 2006, in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v.*

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<sup>16</sup> Paul Tavernier, “L’identification des règles fondamentales, un problème résolu?”, in *Jus Cogens Treatise*, p. 19.

<sup>17</sup> Int’l *Amici* at 13.

<sup>18</sup> Brownlie at 512.

*Rwanda*),<sup>19</sup> the ICJ acknowledged *jus cogens* but nonetheless refused to override a nation's lack of refusal to consent to the court's jurisdiction. Judge *Ad Hoc* Dugard's concurring opinion focused on *jus cogens*:

This is the first occasion on which the International Court of Justice has given its support to the notion of *jus cogens*. It is strange that the Court has taken so long to reach this point because it has shown no hesitation in recognizing the notion of obligation *erga omnes*, which together with *jus cogens* affirms the normative hierarchy of international law.<sup>20</sup>

*Armed Activities* involved acts of "killing, massacring, raping, throat-cutting, and crucifying...against more than 3,500,000 Congolese."<sup>21</sup> The Court was certain that these actions were violations of the norms of *jus cogens*.<sup>22</sup> Nonetheless, the ICJ dismissed the claims filed by the Republic of the Congo because Rwanda had not consented to the Court's jurisdiction.<sup>23</sup>

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<sup>19</sup> 45 I.L.M. 562, 2006 WL 1667673 (ICJ 2006).

<sup>20</sup> *Id.* at 610, Dugard, concurring, para. 4.

<sup>21</sup> *Id.* at 568, para. 11(d).

<sup>22</sup> *Id.* at 579, para 64.

<sup>23</sup> *Id.* at 579, para. 64-70.

Judge Dugard explained this limitation on the doctrine of *jus cogens*:

The approval given to *jus cogens* by the Court in the present Judgment is to be welcomed. However, the Judgment stresses that the scope of *jus cogens* is not unlimited and that the concept is not to be used as an instrument to overthrow accepted doctrines of international law.<sup>24</sup>

The rule of the ICJ is closely parallel to an accepted rule in the courts of the United States. *See, e.g., Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009) (“A claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity.”)

Article 53 of the VCLT describes *jus cogens* principles as those which permit no derogation. But even “non-derogable” principles have their limits, as Dugard noted.

This decision of the ICJ makes it plain that *jus cogens* principles are not always legally enforceable. The requirement of consent by a nation to the jurisdiction of the ICJ was held to be a higher value than the *jus cogens* principle against genocide. Rwanda did not consent to ICJ jurisdiction. The United States has not consented to the CRC. The necessity of our consent should not be overridden by this theory.

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<sup>24</sup> *Id.* at 610, Dugard, para. 6.

The confusion of the International *Amici* may arise from a misunderstanding of the term “no derogation.” Brownlie’s treatise reveals the meaning of this key concept, which is found in the commentary of the International Law Commission on the VCLT:

The Commission commentary makes it clear that by ‘derogation’ is meant the use of agreement (and presumably acquiescence as a form of agreement) to contract out of rules of general international law. Thus an agreement by a state to allow another state to stop and search its ships on the high seas is valid, but an agreement with a neighbouring state to carry out a joint operation against a racial group straddling the frontier which would constitute genocide if carried out, is void since the prohibition with which the treaty conflicts is a rule of *jus cogens*.<sup>25</sup>

Black’s Law Dictionary reveals the key meaning of the term “derogation:”

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<sup>25</sup> Brownlie at 511-512. The ILC’s official commentary provides: “the Commission concluded that in codifying the law of treaties it must start from the basis that to-day there are certain rules from which **States are not competent to derogate at all by a treaty arrangement**, and which may be changed only by another rule of the same character.” *Yearbook of the International Law Commission, 1966*, Vol. II, p. 247. (Emphasis added).

The partial repeal or abrogation of a law by a later act that limits its scope or impairs its utility and force (statutes in derogation of the common law).<sup>26</sup>

It is clear that the impact of this theory is limited to the law of treaties. “*Jus cogens* denominates rules whose effect is to make conflicting treaties void....”<sup>27</sup>

The United States has not entered into any treaty with another nation that obligates American courts to impose LWOP on juvenile felons. If there were such a treaty, then perhaps some court might invalidate the hypothetical “Mandatory LWOP Treaty” under the *jus cogens* theory. The laws of Florida are not treaties and thus may not be invalidated under this theory.

Even though there are no agreed standards for determining which principles are properly classified as *jus cogens*, the International *Amici* ask this Court to undertake what amounts to judicial lawmaking in a field riddled with vagueness. One scholar proclaims:

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<sup>26</sup> *Black’s Law Dictionary* (8<sup>th</sup> ed. 2004) (first definition). In the 1968 edition—a date that is contemporaneous with the drafting of the VCLT—this is the sole definition. *Black’s Law Dictionary* (Rev. 4<sup>th</sup> ed. 1968).

<sup>27</sup> Stefan Kadelbach, “*Jus Cogens*, Obligations *Erga Omnes* and other Rules—The Identification of Fundamental Norms,” in *Jus Cogens* Treatise, p. 26.

Ultimately, the uncertainties surrounding the identification of the basic rules do not hamper their development in contemporary international law, and the vagueness resulting from this indeterminacy may even favour, in this field like in others, progress of the law.<sup>28</sup>

This Court should not embrace the role of a progressive change agent in the field of contemporary international law. In this nation, the political branches have the sole authority, subject to constitutional limitations, to enact new fundamental legal norms.

### **B. There is No International Consensus Regarding Juvenile Sentencing**

As we have seen, “the criteria which help to identify *jus cogens* norms are not entirely clear.”<sup>29</sup> The International *Amici* suggest three criteria, albeit without the benefit of any citation of authority.

A *jus cogens* norm must fulfill three basic requirements:

- 1) it is general or customary international law;

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<sup>28</sup> Tavernier, *supra*, at 20.

<sup>29</sup> Kadelbach, *supra*, at 28.

2) it is accepted by a large majority of states as non-derogable; and

3) it has not been modified by a new norm of the same status.<sup>30</sup>

Assuming *arguendo* that these criteria have some validity, it is apparent that the content of Article 37 of the Convention on the Rights of the Child simply cannot meet the first of these standards.<sup>31</sup>

The theory of customary international law is advanced in an attempt to convince this Court that the juvenile sentencing standards in Article 37 are binding on the United States. This theory is premised on a bold assertion that the United States is the only nation in the world that is out of compliance with this alleged standard of customary international law. A careful consideration of facts and law concerning the sentencing of juvenile offenders in other nations robs this argument of its alleged status as a principle of CIL. Moreover, the same evidence eliminates any reasonable possibility that this Court could legitimately view this factual assertion as a persuasive authority guiding its domestic interpretation of the Eighth Amendment. It is simply not true that America is the only nation

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<sup>30</sup> Int'l *Amici* at 13.

<sup>31</sup> We have already discussed the “no derogation” principle above. The third criterion is inapplicable. No one claims that a relevant *jus cogens* principle used to exist but that it has been supplanted.

in “violation” of the sentencing principles contained in Article 37.

The theory of customary international law has come to be grounded, at least in international tribunals, on Article 38(1) of the Statutes of the International Court of Justice. This Article codifies the sources of international law. Subsection (b) lists the relevant elements: “international custom, as evidence of a general practice accepted as law.”

Brownlie explains that “what is sought for is a general recognition among States of a certain practice as obligatory. Although occasionally the terms are used interchangeably, ‘custom’ and ‘usage’ are terms of art and have different meanings. A usage is a practice which does not reflect a legal obligation.”<sup>32</sup>

The relevant factors in ascertaining a rule of customary international law include duration, uniformity or consistency of the practice, generality of the practice, and *opinio juris et necessitatis*.<sup>33</sup>

The *opinio juris* element is most relevant to the matter at hand. This element is reflected in the requirement of Article 38 of the ICJ Statutes as “a general practice *accepted as law*.”<sup>34</sup> This element

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<sup>32</sup> Brownlie at 6. Internal quotation marks and citations omitted.

<sup>33</sup> Brownlie at 7-8.

<sup>34</sup> Brownlie at 8. (Emphasis in the original).

reflects “recognition by states of a certain practice as obligatory.”<sup>35</sup> The “practice of States recognizes a distinction between obligation and usage.”<sup>36</sup>

If Article 37 of the Convention on the Rights of the Child is to be considered a rule of customary international law then two things must be demonstrated to pass the *opinio juris* element:

- (a) it must be shown that the rules contained in that article are widely obeyed by the nations of the world with few exceptions, and
- (b) that the acts of obedience must be on the basis that the States believe they are legally obligated to do so.

The International *Amici* and both petitioners contend that “[o]nly the United States still imposes” LWOP.<sup>37</sup> Even if true, taken literally this statement is insufficient to establish a rule of customary international law. What must be proven is that all (or nearly all) of the other nations in the world follow this practice and that they follow this practice because they believe they are legally obligated to do so. The International *Amici* and others point to the fact that all the nations on earth, save the United States and Somalia, have ratified the UN Convention on the Rights of the Child. This treaty is

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Int’l *Amici* brief at 9.

the sole basis for the claim that other nations feel legally compelled to obey the sentencing standards of Article 37.

The CRC contains a comprehensive set of standards that purport to govern all facets of a child's life. There is a right to leisure contained in Article 31. If the mere adoption of a treaty by 193 nations is a sufficient ground to create a rule of *jus cogens* or customary international law, then the right to leisure clearly qualifies.

However, we will limit our review of the practice of States regarding the juvenile justice rules contained in Article 37—with particular emphasis on the standards for sentencing juvenile offenders. It will be clear that a number of nations reject the notion that they are legally obligated to obey the provisions of Article 37 including the prohibition of the sentence of life in prison without parole for juveniles. Moreover, it will be apparent that the actual practice of nations reveals that there is widespread non-compliance with the juvenile justice sentencing standards contained in the CRC. Thus, the CRC's sentencing standards cannot be considered a rule of customary international law because there is neither a general practice of obedience nor a widespread belief that nations are legally obligated to implement Article 37.

- 1. A number of nations reject the theory that they are prohibited as a matter of law from imposing the sentence of life in prison without parole**

The brief of the International *Amici* reveals an inconsistency in the theory that America is alone in allowing for LWOP sentences. The International *Amici* identify ten nations that “have laws that could permit the sentencing of child offenders to life without parole” but “there are no *known* cases where the sentence has been imposed.”<sup>38</sup> These ten are: Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka. Even if it is true that there are no known cases in these states—and the methodology for gathering this evidence is highly suspect<sup>39</sup>—any actual practice by these ten nations does not satisfy the second part of the *opinio juris* standard. They must refrain from imposing LWOP out of a belief of a mandatory legal obligation. If the laws of a nation permit LWOP, any refusal to employ that sentence arises from policy or other reasons, not a legal mandate.

The source for the allegation that “only the United States still imposes this penalty,” as well as the list of ten nations, is Connie de la Vega & Michelle Leighton, *Sentencing our Children to Die in*

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<sup>38</sup> Int’l *Amici* at 17. (Emphasis supplied.)

<sup>39</sup> *See, e.g.*, the use of emails “on file with counsel” to demonstrate sentencing practices. Int’l *Amici* at 36.

*Prison*, 42 U.S.F.L. Rev. 983, 989-1007 (2008). This article claims that “135 counties have expressly rejected the sentence via their domestic legal commitments.” *Id.* at 989. It is important to check the source of this claim. The authors of the law review article cite a report entitled *The Rest of Their Lives*, written by Amnesty International and Human Rights Watch. Amnesty International is the lead amicus in the group of International *Amici*. *The Rest of their Lives* contains the following assertion: “At least 132 countries reject life without parole for child offenders **in domestic law or practice.**”<sup>40</sup>

There is no explanation of how the number 132 in the Amnesty report grew to 135 in the law review article. The more pertinent change is the change from “domestic law or practice” in the Amnesty International publication to “domestic legal commitments” in the law review article. There is a critical difference between *law* and *practice* in this context. This Court has not been given anything that remotely resembles a reliable count of nations with domestic legislation that actually prohibits the imposition of the sentence of LWOP. Without domestic legislation, the legal compulsion prong of the *opinio juris* standard is missing.

The International *Amici* claim to supply the missing proof of the legal-obligation criterion by reference to the fact that 193 nations have become parties to the CRC. The general rule of

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<sup>40</sup> Amnesty International and Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005) p. 5. Emphasis supplied.

international law on the domestic effect of treaty obligations does not support this proposition:

It should not be assumed that once a treaty has entered into force for a state it is then in force *in* that state; in other words, that it has become part of its law. The point is of particular importance for treaties which accord rights to individuals, such as human rights treaties, where the rights are intended to be exercised by them (and sometimes corporations). International law and domestic law (the law in force within a state; sometimes termed ‘municipal’, ‘internal’ or ‘national’ law) operate on different planes. International law is concerned with the rights and obligations of states and other international legal persons, such as international organisations. When a treaty provides for rights or obligations to be conferred on persons (legal or natural), they can usually be given effect *only* if they are made part of the domestic law of each party, and with provisions for their enforcement.<sup>41</sup>

In the United Kingdom “no provisions of a treaty can have effect in domestic law without legislation.” *Id.* at 189. Moreover, “treaties are not supreme law in the United Kingdom, even if they have been incorporated. Parliament, being the

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<sup>41</sup> Anthony Aust, *Modern Treaty Law and Practice* (Second Ed.) Cambridge University Press (2007), p. 178.

supreme body in the British Constitution, can enact legislation which is inconsistent with treaty obligations.” *Id.* at 192.

This Court has been given virtually no information on the domestic sentencing statutes of other nations and international law will not supply the missing link. Most nations are under no legal compulsion to give domestic effect to international treaties.

Not only have the International *Amici* failed to inform this Court of the domestic impact of the CRC in the party states, they have also failed to inform this Court of the significant number of nations that have taken reservations to the CRC which impact the nature of their undertaking even in international law.

### **Reservations to the CRC**

The following nations have taken a general reservation to the entire Convention on the Rights of the Child, which naturally implicates their duty to obey (even as a matter of international law) the provisions of Article 37.

The following States have taken a reservation to the CRC to the effect that if the CRC conflicts with Sharia Law then Sharia law will prevail: Afghanistan, Iran, Iraq, Jordan, Kuwait, Maldives, Mauritania, Syrian Arab Republic, and United Arab Emirates.<sup>42</sup>

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<sup>42</sup> United Nations Treaty Collection, Chapter IV, No. 11, 1577 U.N.T.S. 3. All reservations may be found at

In a similar vein, Djibouti says that it “shall not consider itself bound by any provisions or articles that are incompatible with its religion and its traditional values.”<sup>43</sup>

Additionally, there are a number of reservations concerning Article 37 itself. Australia, Canada, Iceland, Japan, New Zealand, Switzerland, and the United Kingdom have taken reservations to Article 37(c) which provides:

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances....

Most of these Article 37(c) reservations deal with the duty to segregate juvenile offenders from adult offenders.<sup>44</sup>

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[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

Singapore's reservation 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 freedoms of others; or

(c) the judicious application of corporal punishment in the best interest of the child.<sup>45</sup>

The relevant reservation for the Netherlands reads:

The Kingdom of the Netherlands accepts the provisions of article 37 (c) of the Convention with the reservation that these provisions shall not prevent the application of adult penal law to children of sixteen years and older,

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<sup>45</sup> *Id.*

provided that certain criteria laid down by law have been met.<sup>46</sup>

This is especially significant because, as we demonstrate *infra*, in the Netherlands “application of adult penal law” includes the possibility of the imposition of the sentence of life without parole. Thus, insofar as the reservation is concerned, the Netherlands has entered into the CRC with the understanding that it may sentence 16 and 17 year-olds to life in prison without parole if it chooses to do so as a matter of domestic policy.

**2. The findings of the UN Committee on the Rights of the Child demonstrate widespread “violations” of Article 37**

To sustain the argument that Article 37 has become a rule of customary international law it is also necessary for the International *Amici* to demonstrate that the actual practice of states reflects overwhelming obedience to its dictates.

Article 44 of the CRC requires every state party to submit compliance reports within two years of the entry into force of the treaty for that state and every five years thereafter. After the submission of the reports from the states, the Committee on the Rights of the Child issues “Concluding Observations” which detail the findings relative to that state’s compliance with the duties under the CRC.

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<sup>46</sup> *Id.*

It is important to review the findings of the Committee with respect to compliance with the dictates of Article 37. We segregate the findings into two categories: (a) violations regarding the use of the death penalty and life in prison without parole, and (b) other violations of Article 37 concerning the administration of juvenile justice. As will be apparent, insofar as the Committee is concerned, a nation violates the CRC if it either employs LWOP or allows for its use in its domestic law.

**Findings by the Committee on the  
Rights of the Child**

**Juvenile Death Penalty and LWOP**

Niger

Concerning Niger, in June of 2009, the CRC Committee “urged” this state to:

Take immediate steps to halt and abolish by law imposition of death penalty and life sentence for crimes committed by persons under 18.<sup>47</sup>

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<sup>47</sup> Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: Niger, CRC/C/NER/CO/2, 18 June 2009, para. 81. (All such reports hereafter called “CRC Report”.) For the ease of the Court’s research, we strongly recommend <http://tb.ohchr.org/default.aspx> as the best source for UN reports.

## The Netherlands

On March 27, 2009, the CRC Committee said:

The Committee reiterates its concern that there is an increasing use of pre-trial detention for juveniles in the Netherlands, that there is still a possibility of 16 and 17 year-olds being tried under adult criminal law, and that 16 and 17 year olds can be convicted to life imprisonment in the Netherlands Antilles.<sup>48</sup>

Additionally, the Committee said: “The Committee recommends that the State party: Eliminate life imprisonment sentence of children.”<sup>49</sup>

As previously noted, the Netherlands continues to maintain its reservation to the CRC which permits it to try and sentence 16 and 17 year-olds as adults, including the possibility of LWOP.<sup>50</sup>

## Belize

The Committee’s 2005 report for Belize makes the following pertinent comments:

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<sup>48</sup> CRC Report: The Netherlands, CRC/C/NLD/CO/3, 27 March 2009, para. 77.

<sup>49</sup> *Id.* at para. 78

<sup>50</sup> CRC Report: Netherlands, CRC/C/NLD/3, 23 July 2008, Aruba page 106 (Para. 96) or Netherlands page 19 (para. 95)

As regards life imprisonment of children without provision for parole, [the State should] bring its domestic laws into full conformity with the provisions and principles of the Convention.

The Committee is deeply concerned about the fact that children as young as 9 years of age can be sentenced to life imprisonment without provision for parole.<sup>51</sup>

The following additional nations have been urged by the Committee<sup>52</sup> to conform their juvenile sentencing laws because they permit the use of the death penalty, LWOP, or life in prison for juvenile offenders:

- Bangladesh (reports of implementation of death penalty for those under 18 and LWOP for those under 15)<sup>53</sup>
- Burkina Faso (death penalty and LWOP)<sup>54</sup>

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<sup>51</sup> CRC Report: Belize, CRC/C/15/Add.252, 31 March 2005, para. 70-71.

<sup>52</sup> We have used the most recent year for each nation listed. If the report is over five years old it is an indication that the nation is out of compliance with its reporting obligation. See, fn. 53 re Guatemala which uses its two most recent reports.

<sup>53</sup> CRC Report: Bangladesh, CRC/C/BGD/CO/4, 26 June 2009, para. 92.

- China (life imprisonment)<sup>55</sup>
- Dominica (LWOP)<sup>56</sup>
- Gambia (death penalty and LWOP)<sup>57</sup>
- Guatemala (death penalty and LWOP)<sup>58</sup>
- Jamaica (life imprisonment)<sup>59</sup>
- Japan (life imprisonment)<sup>60</sup>

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<sup>54</sup> CRC Report:Burkina Faso, CRC/C/15/Add.193,9 October 2002, para. 60.

<sup>55</sup> CRC Report: China CRC/C/CHN/CO/2, 24 November 2005, para. 89

<sup>56</sup> CRC Report: Dominica, CRC/C/15/Add.238, 30 June 2004, para 46: “The Committee is concerned at the lack of juvenile courts and at the fact that children may be sentenced to a penalty at the “President’s pleasure”, to life imprisonment and to whipping in private.”

<sup>57</sup> CRC Report: Gambia, CRC/C/15/Add.165, 6 November 2001, para. 68.

<sup>58</sup> CRC Report: Guatemala, CRC/C/15/Add.58, 7 June 1996, para. 47. Guatemala’s most recent report in 2001 reads: “The Committee expresses its serious concern that its previous recommendation encouraging the reform of the juvenile justice system to ensure full compatibility with the principles and provisions of the Convention has not been implemented....” CRC/C/15/Add.154, 9 July 2001, para. 56.

<sup>59</sup> CRC Report: Jamaica, CRC/C/15/Add.210, 4 July 2003, 57(b).

<sup>60</sup> CRC Report: Japan, CRC/C/15/Add.231, 26 February 2004, para. 53.

- Liberia (death penalty and LWOP)<sup>61</sup>
- Saint Lucia (LWOP)<sup>62</sup>
- Saudi Arabia (possibility of death penalty)<sup>63</sup>
- Trinidad and Tobago (life imprisonment)<sup>64</sup>

### **3. Other significant violations of Article 37 are revealed by the UN Committee Reports**

The report on Kenya in 2007 objects to the treatment of juveniles in detention. “[D]espite a clear prohibition in the legislation, reports of torture, cruel, inhuman and degrading treatment indicate that it still occurs.”<sup>65</sup> Other concerns include “shooting at children,” “rapes of girls by law enforcement agents” that were not investigated, and only “limited progress in achieving a functioning juvenile justice system outside the capital.” Significantly, “although the death penalty is

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<sup>61</sup> CRC Report: Liberia, CRC/C/15/Add.236, 1 July 2004, para. 68.

<sup>62</sup> CRC Report: Saint Lucia, CRC/C/15/Add.258, 21 September 2005, para. 72.

<sup>63</sup> CRC Report: Saudi Arabia, CRC/C/SAU/CO/2 17, March 2006, para. 32.

<sup>64</sup> CRC Report: Trinidad and Tobago, CRC/C/TTO/CO/2, 17 March 2006, para. 73.

<sup>65</sup> CRC Report: Kenya, CRC/C/KEN/CO/2, 19 June 2007, para. 32.

outlawed for children, according to some reports children are still being sentenced to death.”<sup>66</sup>

Concerning Uruguay in 2007:

The Committee is concerned over the high number of children deprived of liberty and over reports indicating cases of torture and degrading treatment by law enforcement officials of children while held in detention.<sup>67</sup>

Uruguay was also admonished to create a juvenile justice system.<sup>68</sup>

The report on Bulgaria in 2008 expressed concern over the numerous reports of children being ill-treated or tortured while in detention. Again, this nation was admonished to create an adequate system of juvenile justice.<sup>69</sup>

### **France, Italy, Germany, and United Kingdom**

The International *Amici* focus special attention on these four western European nations in an attempt to demonstrate that the United States is out of compliance with their practices. However, the

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<sup>66</sup> *Id.* at para. 32 and 67.

<sup>67</sup> CRC Report: Uruguay, CRC/C/URY/CO/2, 5 July 2007, para. 34.

<sup>68</sup> *Id.* at para. 67.

<sup>69</sup> CRC Report: Bulgaria, CRC/C/BGR/CO/2, 23 June 2008, para. 28 and 69(d).

proof they offer actually takes an interesting twist when the balance of Article 37's rules for juvenile sentencing is considered:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time....

A decision of the Supreme Court of Appeal of South Africa demonstrates the extreme nature of these requirements from Article 37. *Director of Public Prosecutions, KwaZulu-Natal v. P* 2006 (3) SA 515 (SCA); [2006] 1 All SA 446 (SCA); 2006 (1) SACR 243 (SCA).

The Constitutional Court of South Africa wrote a summary of this decision:

[A] twelve year old girl had paid two men to suffocate and then slit the throat of her grandmother, with whom she lived, after she had drugged her. For this act she had furnished the murderers with articles from the deceased's house and offered herself sexually to them. The trial Court had imposed a correctional supervision order, and the State had appealed to the Supreme Court of Appeal. After emphasising the significance of the United Nations Convention on the

Rights of the Child (the CRC) and section 28 of the Constitution, the Supreme Court of Appeal partially upheld the appeal, concluding that correctional supervision on its own was not severe enough. It held that a sentence of seven years' imprisonment, entirely suspended on condition of P's compliance with a rigorous regime of correctional supervision, was more appropriate. In *P* it was held at para 19 that the Constitution and the international instruments did not forbid incarceration of children in certain circumstances, but merely required that the "child be detained only for the shortest period of time" and that the child be "kept separately from detained persons over the age of 18 years." The Supreme Court of Appeal noted that it was not inconceivable that some of the courts may be confronted with cases which required detention.<sup>70</sup>

The United Kingdom, Germany, France and Italy do not live up to the standard of Article 37(b) of the CRC. Detention may only be for cases of last resort and only for the shortest period of time possible in the interest of the child. A gruesome murder was not enough to warrant any jail time at all under the CRC, according to the South African courts.

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<sup>70</sup> *M v. The State*, CCT 53/06 [2007] ZAAC 18 (Const. Ct. of S.A.), at p. 7. FN8.

The International *Amici* indicate that the maximum penalty in Germany for a juvenile offender is 10 years.<sup>71</sup> Italy's maximum penalty of 24 years, as indicated by the International *Amici*.<sup>72</sup> France, we are told by these *amici*, imposes a maximum of 16 to 20 years in prison for "juveniles under age 16."<sup>73</sup> This is an intriguing assertion. It leads one to wonder what the maximum penalty is for juveniles over the age of 16. The *amici* do not resolve this mystery in their brief.

It is clear that each of these nations is in violation of the juvenile sentencing standards of Article 37(b). These nations are not sentencing for the shortest period of time possible and only in cases of last resort. In fact, in its most recent report on the United Kingdom, the CRC Committee held the nation to be out of compliance with the CRC's rules on juvenile sentencing. "The number of children deprived of liberty is high, which indicates that detention is not always applied as a measure of last resort."<sup>74</sup>

In Great Britain, juvenile murderers are sentenced under the following provision (Powers of Criminal Courts (Sentencing) Act (U.K., 2000), c. 6, Section 90):

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<sup>71</sup> Int'l *Amici* at 16.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> CRC Report: United Kingdom, CRC/C/GBR/CO/4, 20 October 2008, para. 39, 77, 78

Where a person convicted of murder appears to the court to have been aged under 18 at the time the offence was committed, the court shall (notwithstanding anything in this or any other Act) sentence him to be detained during Her Majesty's pleasure.

This would appear to violate Article 37. The CRC committee entered a "concluding observation" regarding Nigeria in 1996 which reveals the violation:

The Committee is also concerned that the provisions of national legislation by which a child may be detained "at Her Majesty's Pleasure" may permit the indiscriminate sentencing of children for indeterminate periods.<sup>75</sup>

The evidence derived from the Committee's reports in 2008-2009 indicates that it believes that virtually every nation that was reviewed in that period was in violation of Article 37's rules on juvenile sentencing.

In 2008 and 2009, the following nations were urged to ensure that their sentencing laws reflected the principle that "children are held in detention only as a last resort": France,<sup>76</sup> Niger,<sup>77</sup>

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<sup>75</sup> CRC Report: Nigeria, CRC/C/15/Add.61, 30 October 1996, para. 21.

<sup>76</sup> CRC Report: France, CRC/C/FRA/CO/4, 11 June 2009, para. 97.

Mauritania,<sup>78</sup> Democratic Republic of Korea,<sup>79</sup> Malawi,<sup>80</sup> the Netherlands,<sup>81</sup> Moldova,<sup>82</sup> Chad,<sup>83</sup> Democratic Republic of the Congo,<sup>84</sup> United Kingdom,<sup>85</sup> Bhutan,<sup>86</sup> Djibouti,<sup>87</sup> Bulgaria,<sup>88</sup>

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<sup>77</sup> CRC Report: Niger, CRC/C/NER/CO/2, 18 June 2009, para. 81.

<sup>78</sup> CRC Report: Mauritania, CRC/C/MRT/CO/2, 17 June 2009, para. 82.

<sup>79</sup> CRC Report: Democratic Republic of Korea, CRC/C/PRK/CO/4, para. 35.

<sup>80</sup> CRC Report: Malawi, CRC/C/MWI/CO/2, 27 March 2009, para. 76.

<sup>81</sup> CRC Report: The Netherlands, CRC/C/NLD/CO/3, 27 March 2009, para. 78.

<sup>82</sup> CRC Report: Moldova, CRC/C/MDA/CO/3, 20 February 2009, para. 73.

<sup>83</sup> CRC Report: Chad, CRC/C/TCD/CO/2, 12 February 2009, para. 86.

<sup>84</sup> CRC Report: Democratic Republic of the Congo, CRC/C/COD/CO/2, 10 February 2009, para. 93.

<sup>85</sup> CRC Report: United Kingdom, CRC/C/GBR/CO/4, 20 October 2008, para. 39, 77, 78.

<sup>86</sup> CRC Report: Bhutan, CRC/C/BTN/CO/2, 8 October 2008, para. 71.

<sup>87</sup> CRC Report: Djibouti, CRC/C/C/DJI/CO/2, 7 October 2008, para. 73.

<sup>88</sup> CRC Report: Bulgaria, CRC/C/BGR/CO/2/ 23 June 2008, para. 69.

Eritrea,<sup>89</sup> Georgia,<sup>90</sup> Sierra Leone,<sup>91</sup> Timor-Leste,<sup>92</sup> and Dominican Republic.<sup>93</sup> Some of these reports appear to be in the nature of admonition; others, like the one for the United Kingdom, are clear findings of present violations.

This is 18 of 24 countries reviewed in this two-year period. Sweden and Bangladesh were criticized for other sentencing violations. Bangladesh was chastised for the use of the death penalty and LWOP.<sup>94</sup> Sweden was condemned for the use of solitary confinement for juvenile offenders.<sup>95</sup> And the remaining four nations—Slovenia,<sup>96</sup> Tunisia,<sup>97</sup>

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<sup>89</sup> CRC Report: Eritrea, CRC/C/ERI/CO/3, 23 June 2008, para. 78.

<sup>90</sup> CRC Report: Georgia, CRC/C/GEO/CO/3, 23 June 2008, para. 71.

<sup>91</sup> CRC Report: Sierra Leone, CRC/C/SLE/CO/2, 20 June 2008, para. 77.

<sup>92</sup> CRC Report: Timor-Leste, CRC/C/TLS/CO/1, 14 February 2008, para. 75.

<sup>93</sup> CRC Report: Dominican Republic, CRC/C/DOM/CO/2, 11 February 2008, para. 87.

<sup>94</sup> See, fn. 48 and accompanying text.

<sup>95</sup> CRC Report: Sweden, CRC/C/SWE/CO/4, 12 June 2009, para. 70.

<sup>96</sup> CRC Report: Slovenia, CRC/C/OPSC/SVN/CO/1, 23 July 2009.

<sup>97</sup> CRC Report: Tunisia, CRC/C/OPAC/TUN/CO/1, 6 February 2009.

Lithuania,<sup>98</sup> and Serbia<sup>99</sup>—were all reporting to the CRC for the first time.

Thus, in 2008-2009 every single nation was admonished regarding the practice of sentencing juvenile offenders—save for the four nations that were reviewed in truncated initial reports. The evidence from the United Nations itself reveals that compliance with the CRC's juvenile sentencing standards is the rare exception and not the rule.

### C. Summary Re *Jus Cogens* and Customary International Law

The United States is not the only nation in the world that allows or practices sentencing juveniles to life without parole. At least 23 nations allow LWOP or life imprisonment when we combine the ten nations revealed in the brief of the International *Amici* with those revealed by the reports of the UN Committee on the Rights of the Child. These include the Netherlands, Japan, Australia, Argentina, and China. Belize allows children as young as nine to be sentenced to life without parole. Other nations continue to practice the juvenile death penalty.

Moreover, the *amici* have simply failed to supply this Court with reliable data to determine the actual sentencing laws of any nation other than France, Italy, Germany, and the United Kingdom. Yet these four nations are also in violation of the

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<sup>98</sup> CRC Report: Lithuania, CRC/C/OPSC/LTU/CO/1, 16 October 2008.

<sup>99</sup> CRC Report: Serbia, CRC/C/SRB/CO/1, 20 June 2008.

standards of Article 37 relative to juvenile sentencing—the United Kingdom being formally castigated for this violation in its 2008 review by the U.N. Committee.

*Jus cogens* has no clear application outside the context of invalidating a treaty that violates some peremptory norm—if it can be finally determined how to recognize such a norm. Moreover, the theory that Article 37’s sentencing rules comprise a rule of customary international law fails on both of the *opinio juris* factors. There has been no showing that the practice of States demonstrates widespread compliance with the sentencing standards of Article 37—in fact, the opposite has been demonstrated. And there is no proof that any nation, other than South Africa, feels legally obligated to impose the radical sentencing standards contained in the CRC.

The theory that the sentencing requirements of the CRC are mandatory upon this nation despite our refusal to ratify this treaty is without factual or legal foundation. Moreover, the argument of the International *Amici* that “the uniformity and consistency of international law and practice should inform this Court’s Eight Amendment Analysis” simply cannot be sustained because the record of international law and practice is neither uniform nor consistent.

## II. The United States is not in Violation of Any Binding Treaty Obligation by Sentencing Juveniles to Life in Prison

The International *Amici* contend that the United States is in violation of “several human rights treaties” to which it is a party. Brief at 24. They initially point to three treaties: International Covenant on Civil and Political Rights (ICCPR)<sup>100</sup>, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>101</sup> (Torture Convention), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>102</sup> This argument is without merit.

Both the ICCPR and the Torture Convention contain similar reservations:

ICCPR:

That the United States considers itself bound by article 7 to the extent that “cruel, inhuman or degrading treatment or punishment” means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or

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<sup>100</sup> 999 U.N.T.S. 171 (1966), ratified by the United States on June 8, 1992.

<sup>101</sup> 1465 U.N.T.S. 113 (1987), ratified by the United States on Oct. 21, 1994.

<sup>102</sup> 660 U.N.T.S. 195 (1966), ratified by the United States on Oct. 21, 1994.

Fourteenth Amendments to the Constitution of the United States.<sup>103</sup>

Torture Convention:

That the United States considers itself bound by the obligation under article 16 to prevent “cruel, inhuman or degrading treatment or punishment”, only insofar as the term “cruel, inhuman or degrading treatment or punishment” means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.<sup>104</sup>

Accordingly, these treaties add nothing to this case. We have not agreed to anything in international law beyond obedience to our own Constitution. This Court need not plumb the depths of international law on these treaties because we have not agreed to adhere to any standard not already imposed by the Constitution.

With regard to the CERD treaty, the Senate made the following reservation: “[T]he United States declares that the provisions of the Convention are not self-executing.”<sup>105</sup>

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<sup>103</sup> United Nations Treaty Collection, Chapter IV, No. 4.

<sup>104</sup> United Nations Treaty Collection, Chapter IV, No. 9.

<sup>105</sup> United Nations Treaty Collection, Chapter IV No. 2.

This Court recently said: “A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force.” *Medellín v. Texas*, 552 U.S. \_\_\_, 128 S. Ct. 1346, 1351 (2008).

Accordingly, the CERD treaty has no application in this case concerning the domestic law of the United States.

Finally, the International *Amici* contend that the United States is in violation of the “*corpus juris* of the Organization of American States of which the United States is a member.”<sup>106</sup> Whatever implications can be drawn from the *corpus juris*, the United States is not a party to any O.A.S. treaty that has even arguable pertinence. The American Declaration of the Rights and Duties of Man, cited by these *amici*, is not a treaty. The Seventh Circuit made this plain:

Similarly, the American Declaration of the Rights and Duties of Man, on which the Inter-American Commission relied, is merely an aspirational document that, in itself, creates no directly enforceable rights.

*Garza v. Lappin*, 253 F.3d 918, 823 (7<sup>th</sup> Cir. 2001).

The International *Amici* also cite the American Convention on Human Rights, which is an actual treaty. They fail to note, however, that the

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<sup>106</sup> Int’l *Amici* at 19.

United States is not a party.<sup>107</sup> This nation is not bound by a treaty that it has not joined.

### **III. The Coerced Use of International Law Violates The Principle of Self-Determination**

The International *Amici* implore this Court to follow the example of the Declaration of Independence in reaching its decision. With this idea, we fully agree. However, we respectfully suggest that the International *Amici* radically misunderstand the meaning of the Declaration and its applicability to this case.

The International *Amici* attempt to make much of Jefferson's phrase: "a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation." This does not mean, as the *amici* suggest, that the Declaration's signers employed international law to reach their decision to throw off the shackles of bondage. The whole point of the Declaration was that the American people were finished with the idea of being governed by others from across the sea.

The preceding phrase is the most pertinent. The United States were to "assume among the powers of the earth, the *separate and equal* station to which the Laws of Nature and Nature's God entitle them."

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<sup>107</sup> Brownlie at 571. See also, *Treaties in Force as of January 1, 2009*, United States Department of State.

The basis for our independence was not international law but natural law. And the fundamental purpose of the document was to tell the other nations of the world that we were separate from them and equal to them. Good diplomatic sense says that we would explain our actions to other nations. However, this document stands for the exact opposite of the proposition that America should be governed by the laws and rules of other nations.

It is nearly unthinkable that an array of international organizations would file a brief in this Court arguing that the United States is bound by the Convention on the Rights of the Child, a treaty that it has not agreed to, on the basis of the cumulative effect of the laws of the rest of the world. But the unthinkable becomes bizarre when these *amici* claim that the Declaration of Independence supports this proposition.

We respectfully suggest that the International *Amici* are asking this Court to take action that would violate one of the most fundamental principles of international law. “The right of peoples to self-determination” is one of the principles that most commentators agree falls within the doctrine of *jus cogens*.<sup>108</sup>

The coerced use of international law on an unwilling nation is in itself a violation of a peremptory norm of human rights. Article I Section 1 and the 10th Amendment of our Constitution

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<sup>108</sup> Kadelbach, *supra* at 27. Brownlie at 511.

contain the most important principles. All law-making power for the American people rests in the Congress of the United States, the several states, or the people themselves.

### CONCLUSION

For the foregoing reasons the decisions below should be affirmed.

Respectfully submitted this 21st day of  
September, 2009.

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