INTER-AMERICAN COURT OF HUMAN RIGHTS

Amicus Curiae Brief

Case No. 12,651
César Alberto Mendoza et al. (Perpetual Imprisonment and confinement of adolescents) Argentina

Presented by

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STATEMENT OF AMICI

Pursuant to Article 44 of the Rules of Procedure of this Honorable Inter-American Court of Human Rights (“the Court”), Columbia Law School’s Human Rights Institute, Human Rights Advocates and the University of San Francisco Center for Law and Global Justice (collectively the “Amici”) respectfully submit this brief of *amicus curiae* the Court in the case of *Cesar Alberto Mendoza et al. v. Argentina* (Case 12.651) to provide the international and regional human rights standards that apply to juvenile justice.

Columbia Law School’s Human Rights Institute (HRI), founded in 1998, serves as a crossroads for practitioners, scholars, and activists and as a focal point for Columbia Law School’s human rights curriculum, programs, and research. HRI leverages these academic resources into support for human rights in the United States and throughout the world. As part of its work to promote human rights in the United States, HRI, in conjunction with Columbia Law School’s Human Rights Clinic, is co-counsel in the case *In re Juveniles Sentences to Life Without Parole in the United States of America*, pending with the Inter-American Human Rights Commission (Case 12.866). To advance efforts to ensure that juvenile sentencing practices comply with human rights standards, HRI has also served as *amicus* in U.S. Supreme Court cases challenging juvenile life without parole.

Human Rights Advocates (HRA), a California non-profit corporation was founded in 1978 and has national and international membership. It endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. HRA has Special Consultative Status in the United Nations and has participated in meetings of its human rights bodies for almost thirty years, where it has addressed the issue of juvenile sentencing. HRA has participated in *amicus curiae* in cases involving sentencing of juveniles where international standards offer assistance in interpreting both state and federal law, including life without parole and the death penalty before it was held unconstitutional in *Roper v. Simmons*, 543 U.S. 551 (2005). HRA has also participated in cases filed before the Inter-American Commission on Human Rights involving death penalty for juveniles and adults.

The University of San Francisco (USF) Center for Law and Global Justice is a focal point for the USF School of Law’s commitment to international justice and legal education. The Center generates student internships around the globe, promotes the protection of human rights through litigation and advocacy and manages and participates in international rule of law programs in developing nations. The Center has advocated

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2 *Graham v. Florida*, 130 S.Ct. 2011 (2010). In this case, the Supreme Court struck down irreducible juvenile life sentences for individuals convicted of non-homicide related offenses that occurred when they were under the age of 18. In June of 2012, the Supreme Court struck down mandatory life sentences for juveniles as unconstitutional in the cases *Miller v. Alabama* and *Jackson v. Hobbs*, 132 S.Ct. 2455 (2012).

I. INTRODUCTION

*Amici* submit this brief to provide additional support and context regarding the international human rights standards that apply to the present case. This case offers an opportunity for the Court to set forth clear standards in the area of juvenile sentencing and signal that any juvenile life sentence, including one where there is a lengthy period before the possibility of review, contravenes international human rights standards.

This brief provides international and comparative standards that underscore the fundamental incompatibility of juvenile life sentences with international human rights laws and norms.

Of grave concern in and of themselves, the facts of this case demonstrate the need for the Court to provide clear guidance on juvenile sentencing to Argentina and to states within the region more broadly. There are a number of countries in the region whose juvenile sentences and detention practices are out of step with globally recognized human rights norms.

This case provides a timely and critical opportunity for the Court to issue a clear statement regarding a number of practices that continue in the Americas that have harmful and irrevocable consequences for youth who come into conflict with the law. Through its decision, the Court can emphasize the incompatibility of a number of juvenile sentencing laws and practices with human rights standards, particularly the American Convention on Human Rights (the American Convention) and the American Declaration on the Rights and Duties of Man (the American Declaration). Specifically, the Court should affirmatively denounce the use of any life sentences for juveniles, call for the elimination of juvenile sentences of extreme length, and clarify that any lengthy juvenile sentences without a mechanism for the realistic and regularized consideration of early release contravene the American Declaration, the American Convention, and fundamental human rights standards on juvenile justice.
II. ARGUMENT

A. THROUGHOUT THE REGION CHILDREN ARE SUBJECT TO SENTENCES THAT CONTRAVENE HUMAN RIGHTS STANDARDS GOVERNING JUVENILE JUSTICE

1. A Brief Review of Regional Legislation

As outlined further below, according to international law, and the Convention on the Rights of the Child (CRC) and the American Convention in particular, the detention of children is considered a measure of last resort that should be used for the shortest amount of time possible. A number of safeguards have been developed to ensure that when detention does occur, children are not deprived of an opportunity for rehabilitation and the chance to become productive members of society. The safeguards and the defining human rights principles of juvenile justice are based on the children’s vulnerability, cognitive development, and capacity for change.

This brief focuses on the use of juvenile life sentences, both where there is no opportunity for parole and where a youth must serve a lengthy term before an opportunity for parole review arises, noting concerns about indefinite sentences as well. Each type of sentence is permissible under the laws of one or more OAS member countries. By allowing these sentences, states have greatly diminished -- and in some cases, eliminated -- the possibility of juvenile rehabilitation and reintegration and ignored fundamental human rights principles.

a. Argentine Life Sentences

We will not describe Argentine juvenile justice laws at length, but refer back to the Inter-American Commission’s report for details on the domestic legal standards. The Argentine laws at issue permit the sentencing of children to life in prison, with no possibility of review or parole for 20 years (actually 35 in light of changes in domestic law). Under this system, a juvenile convicted of committing crimes that occurred when he was under the age of 18 can be subject to an adult criminal justice system and receive the same sentence as adults. Juveniles receive sentences where the possibility of release is not reviewed on a regular basis by a court to determine whether they have

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3 IACHR, Report No. 172/10, César Alberto Mendoza et al. (Juveniles Sentenced to Life Time Imprisonment) (Case 12.651), Nov. 2, 2010.
4 Under reforms of the Penal Code, enacted in 2004, juveniles can serve 35 years before their sentence is reviewed. See Law 25,892, published on May 26, 2004.
5 See Article 4 of Decree-Law 22,278; Article 13 of the National Penal Code; and Article 80 of the National Penal Code; see also Inter-American Commission on Human Rights, Juvenile Justice and Human Rights in the Americas (July 2011), ¶ 88 (“Decree-Law 22,278 retains a system in which juvenile offenders are sentenced and/or released according to the provisions of the adult criminal justice system. This means that minors can receive the maximum penalties allowed under Article 80 of the Argentine Penal Code, namely imprisonment and confinement for life.”). ¶ 88 (observing that Law 22, 278 “provides that juvenile offenders are to begin to serve their sentence once they turn 18 years of age, the States’ obligation to afford special measures where juvenile justice is concerned is not based on the age at which the sentence will be served, but rather on the age at which the crime was committed.”).
been rehabilitated or if release would be appropriate. As a result of the extensive period of time before the possibility of review for parole, it is clear that juvenile sentences are not assessed to ensure they are as short as necessary to achieve the aims of rehabilitation. Furthermore, as petitioners’ case demonstrates, there is no indication that the sentences at issue aim to reintegrate and rehabilitate youth. Instead, they subject children to harsh sentences that fail to account for their age, culpability, and stage of development.  

b. Juvenile Life Without Parole Sentences in the United States of America

While the present case deals with the situation in Argentina, it is relevant to the United States as well because under current U.S. law, juveniles can receive life sentences with no possibility for review. A decision that underscores that all forms of juvenile sentences should be eliminated, and that articulates the need for realistic and regular reviews, could have a positive impact on the development of juvenile justice practices in the United States and other countries of the region as well.

In the United States, a range of juvenile sentencing and detention practices violate fundamental children’s rights. Juveniles can still be sentenced to life in prison without the possibility of parole (JLWOP). While recent cases make positive developments regarding the applicability of JLWOP, U.S. jurisprudence is still restrictive and continue to allow these sentences to be imposed. A recent U.S. Supreme Court decision, Miller v. Alabama, struck down laws that require JLWOP sentences without an individual determination; however, according to the Supreme Court, JLWOP can still be imposed on a discretionary basis for homicide-related crimes. And while JLWOP sentences in non-homicide crimes were found unconstitutional in the Graham decision in 2010, Graham did not address the full range of sentencing and detention practices implicated by juvenile life without parole sentences in the United States.

In Graham, the U.S. Supreme Court indicated that juvenile sentences for non-homicide crimes should offer “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” However, in cases brought since Graham, judges continue to apply penalties that amount to the functional equivalent of a sentence for one’s natural life without robust review mechanisms. Indeed, within the United States, juveniles are still subject to sentences that violate international standards for juvenile justice, and juveniles convicted of non-homicide crimes have received

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6 As a result of changes to Argentine law since petitioners’ domestic cases, juveniles sentenced for certain categories of crimes, may not receive the possibility of review. The law does not distinguish between adults and juveniles on its face, and thus life sentences without parole are theoretically permissible. See Law 25, 892, 26 May 2004
7 This is particularly true regarding the United States, which has not ratified the American Convention, restricting access to this Court.
8 This includes laws that permit juveniles to receive sentences of discretionary life without the possibility of parole, the sentencing of juveniles to adult prisons, and harsh conditions of detention.
9 Miller, 132 S.Ct. at 2475.
10 Graham, 130 S.Ct. at 2030.
sentences of 50-100 years\textsuperscript{11} and up to 241 years in at least one case.\textsuperscript{12} Additionally concerning, lower courts throughout the United States have inconsistently ruled on the retroactive applicability of the \textit{Graham} decision and juveniles convicted of non-homicide crimes continue to serve JLWOP sentences.\textsuperscript{13} The 2012 \textit{Miller} decision has placed some restrictions on the use of juvenile life without parole sentences for non-homicide crimes, but the sentence is still permissible.

In early 2012 it was estimated that approximately 2,500 juveniles were serving life without parole sentences\textsuperscript{14} and approximately 79 of these individuals were serving JLWOP for crimes committed when the youth were 13 or 14 years of age.\textsuperscript{15} A case arguing that JLWOP sentences and related detention practices violate human rights norms is currently pending against the United States at the Inter-American Commission;\textsuperscript{16} however, U.S. failure to ratify the American Convention and to submit to the jurisdiction of the Court will prevent the facts related to the 32 petitioners in that case from ever coming before this Court.\textsuperscript{17}

c. The Normative Situation in Other Countries in the Region

While the United States is the only known country that applies the sentence of JLWOP, there are other countries in the region where the possibility of receiving a life sentence with no opportunity for release exists.\textsuperscript{18} These include Belize, where life imprisonment without provision of parole is available according to several domestic laws\textsuperscript{19} (though the government has indicated that in practice this means juveniles serve

\textsuperscript{11} See, e.g., \textit{Thomas v. State}, 2011 WL 6847814, No. 1D10-1613, at *1 (Fla. Dist. CR. App. Dec. 30, 2011) (court of appeals in the state of Florida reducing a juvenile sentence to two concurrent 50 year terms); \textit{Bunch v. Smith}, No. 10-3426, 2012 WL 2608484, at *5 (6th Cir. July 6, 2012) (the court upheld a fixed term sentence of 89 years imposed on a juvenile in a non-homicide crime, noting that doing so was permissible even though the sentence was the “functional equivalent of life without parole”).


\textsuperscript{15} Brief for Petitioners, \textit{Jackson v. Hobbs}, n. 57.

\textsuperscript{16} See supra n. 1.

\textsuperscript{17} \textit{Id.} Nevertheless, any guidance provided in the present case will inform the applicable \textit{corpus juris}.

\textsuperscript{18} The data included here is drawn from the IACHR’s 2011 report on Juvenile Justice in the Americas as well as USF, \textit{Cruel and Unusual}.

18-20 years without the option of parole). In Antigua and Barbuda, Barbados, Cuba, and Dominica and St. Vincent and the Grenadines, a juvenile life sentence without parole is likewise possible. St. Lucian and Jamaican law also allow juveniles to receive a sentence of life imprisonment.

Lacking clarity on appropriate sentences, a number of OAS member states have also permitted indefinite sentences, where juveniles are detained until they either reach a certain age or are determined “rehabilitated.” In countries such as the Bahamas, discretionary sentences continue to apply, so while reviews may occur, both sentencing and the possibility of relief are discretionary. While not considered life sentences, these practices have the potential to be applied arbitrarily and to contravene the principles of juvenile justice recognized by this Court and discussed further below. This case is an opportunity to articulate clear standards on the use of sentencing practices that may be applied in an arbitrary and discretionary manner, in contravention of human rights standards.

Precise guidelines on acceptable sentencing, including the need for time limited sentences and robust and regular review mechanisms will help define appropriate

21 See Laws of Antigua and Barbuda, Ch. 229, Art. 3 (permitting detention “as long as the governor-general directs”); see also Comm. on the Rights of the Child, Consideration of Reports Submitted by Antigua and Barbuda, Initial Reports of State Parties, UN Doc. CRC/C/28/Add.22, Dec. 9, 2003, ¶ 286; see also Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Antigua and Barbuda, UN Doc. CRC/C/15/Add.247, Nov. 3, 2004, ¶ 68 (noting the possibility of life imprisonment for murder). In Barbados, juveniles serve “at Her Majesty’s Pleasure” and include life imprisonment. See Barbados’ Juvenile Offender’s Act, Art. 14; In Dominica, sentences are meted out “at the President’s Pleasure.” See Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Dominica, UN Doc. CRC/C/15/Add.238, June 30, 2004, ¶ 46. In St. Vincent and the Grenadines, the relevant statutes are the Juveniles Act and Criminal Code. See Juveniles Act. Ch. 168, sec. 3; Criminal Code Ch. 124, sec. 12; see also Comm. on the Rights of the Child, Consideration of Reports Submitted by Vincent and the Grenadines, Initial Reports of State Parties, UN Doc. CRC/C/28/Add.18, Oct. 10, 2001, ¶ 128 (juveniles under age 16 that are convicted of murder are “liable to be sentenced to be detained for life.”). The relevant portion of the Cuban Penal Code is Art. 30.1.
23 IACHR, Juvenile Justice, ¶ 12.
24 For the Bahamas, see Section 14 of the Penal Code of the Bahamas [2001] (those under the age of 18 who commit murder are “to be detained during Her Majesty’s pleasure” under “such conditions as the Governor-General may direct”); see also Children and Young Persons, Ch. 97, sec. 41 (which further indicates that such sentences are reviewed every three years).
25 IACHR, Juvenile Justice, ¶ 12
practices for the number of countries in the region that continue to have laws on the books permitting juvenile life sentences that are inconsistent with an approach that provides for regular review, including JLWOP. A decision from this Court can also address the use of discretionary and arbitrary juvenile sentencing practices more generally.

The articulation of clear standards will also inform national policies that impose quite lengthy sentences on juveniles. In Peru, anti-terrorism laws allow juvenile sentences with a 25 year minimum.26 This harsh sentence is reserved for 16-18 year olds if they are prosecuted under anti-terrorism laws27 (under other circumstances, the maximum is six years).28 In Honduras and El Salvador, juveniles can receive sentences of 20 years respectively if considered mara29 (the maximums are otherwise eight and seven years, respectively).30 In Costa Rica, Chile, and Panama, children can receive sentences of a decade or greater.31 In Bolivia, 17 and 18 year olds are subject to adult sentences.32 Finally, within the United States, minimum sentences can include mandatory sentences of 99 years for certain crimes,33 and juveniles have received sentences ranging up to 241 years and life.34

The present case is an opportunity for the Court to build on Advisory Opinion 1735 and the Inter-American Commission’s recommendations to clearly establish that special protections of the juvenile justice system should be expanded.36 This would be an important step toward eliminating national sentencing laws and detention schemes that treat juveniles as if they were adults, ignoring fundamental human rights principles. Indeed, recent reporting by the Inter-American Commission raises a number of concerns, including that a number of OAS member states try children as adults37 and

26 Id. at ¶ 369.
27 Id.
29 IACHR, Juvenile Justice, ¶ 129 (noting the U.N. Human Rights Council’s Working Group on Arbitrary Detention’s concern about Honduras’ use of 12-20 year sentences based on gang membership); id. at ¶ 369.
30 USF, Cruel and Unusual, 78 (citing Ley Penal Juvenil, Art. 15); Id. at 79 (citing Colective de Derechos de Infancia y Adolescencia, Sentencias a Prisión Perpetua a Personas Menores de 18 Años).
31 Id. at 77 (citing Ley de Justicia Penal Juvenil [Juvenile Justice Law], art. 131 and Ley N° 20.084, art. 18); Id at 85.
32 Id. at 76 (citing Código de Niño, Niña y Adolescente [Children and Adolescent Code], art. 251; Constitution, art. 23; Penal Code, art. 27(1)).
34 See USF, Cruel and Unusual, 60.
35 See IACHR, The Rights of the Child in the Inter-American Human Rights System *(2d Ed.), ¶ 193 ("From a general perspective, it is noted that OC -17 contains considerations which are relevant and substantive, but which at the same time, owing to their generality, can become ambiguous. However, OC-17 marks a milestone in the development of regional jurisprudence in children’s matters, because it places the item on the region’s agenda and establishes parameters that open the way for an interesting and encouraging process of development in the protection of the human rights of children in the region.").", available at http://www.cidh.org/countryrep/infancia2eng/Infancia2Cap2.3.eng.htm#_ftnref11.
36 IACHR, Juvenile Justice, ¶ 44 (suggesting that special protections regarding incarceration in separate facilities should apply to individuals until they are young adults (age 21)).
37 See IACHR, Juvenile Justice, ¶¶ 39-44 (discussing the United States and Argentina).
regularly detain children in adult facilities, including children age 15 (and perhaps younger).  

B. THE AMERICAN CONVENTION, AMERICAN DECLARATION, AND THIS COURT’S JURISPRUDENCE REQUIRE STATES TO ADOPT SPECIAL PROTECTIONS FOR CHILDREN

The American Convention and the American Declaration clearly establish that juveniles are entitled to have their human rights respected, but also go further to provide for special protections for youth, based on their stage of development, age, and capacity for change. Such special measures, called for in Article 19 of the American Convention, are of great importance in the context of juvenile detention, where children in the prime of development are deprived of their liberty. This Court has articulated the duty of states to “adopt positive measures to fully ensure effective exercise of the rights of the child” and emphasized that to protect these rights, states must respect children’s dignity and “foster their development.” As this Court has also noted, children must receive special treatment as a response to the reality that they are differently situated than adults. The need for special measures derives “from the specific situation of children, taking into account their weakness, immaturity or inexperience.”

C. INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW AND PRINCIPLES SHOULD INFORM THIS COURT’S ANALYSIS

1. International Human Rights Agreements Are a Source of Law to Establish the Scope and Content of Special Protections and Related Rules and Guidelines Should Inform the Court’s Analysis

The international corpus juris on the rights of children and adolescents develops the concept of special protections for youth. It also provides greater clarity and specificity to the principles that inform juvenile justice. Human rights agreements

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38 Id. at ¶¶ 412-421 (discussing, in particular, Belize, Belize, Nicaragua, the United States, Antigua and Barbuda); Id. at ¶¶ 430-31 (discussing Argentina and Canadian practices on transferring juveniles to adult facilities).
40 See, e.g., expert testimony of Sofia, Aug. 30, 2012 in the present case.
41 Advisory Opinion OC-17/02, ¶¶ 56, 91; see also IACHR, Michael Domingues v. United States, Judgment of October 22, 2002, No. 62/02, ¶ 83 (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”).
42 IACHR, Written and oral interventions related to Advisory Opinion OC-17/02; Advisory Opinion OC-17/02, ¶ 96.
43 Id. at ¶ 60.
further offer standards to which domestic sentencing and detention practices should apply.

The U.N. Convention on the Rights of the Child (CRC), ratified by all but one OAS member state, is a key source of the universal standards that apply to juvenile sentencing, but its provisions are complemented by the International Covenant on Civil and Political Rights (ICCPR), and a number of U.N. promulgated rules and guidelines. These include the Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines); United Nations Rules on the Protection of Children and Juveniles Deprived of their Liberty (Havana Rules) and the Guidelines for Action on Children in the Criminal Justice System. Indeed this Court has recognized the need to apply the CRC and the American Convention together as these treaties, standards, rules and guidelines provide a complementary framework of international law human rights applicable to children. Likewise, the decisions of the Committee on the Rights of the Child are a valuable guide for interpreting the rules of the American Convention, given that they comprise part of the relevant corpus juris. The Court has looked to these standards and cited U.N. rules in its decisions regarding treatment of youth.

2. European Regional Law, Standards, and Practice Should Inform the Court’s Analysis

European standards provide additional guidance on the treatment youth should be accorded in the criminal justice system. The European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, as well as rules and recommendations by the Council of Europe, should therefore be considered in cases that address juvenile sentencing and detention and are sources that should inform the decision in this case. This Court has previously cited the jurisprudence of the European Court as persuasive authority on a range of issues concerning juvenile justice, including the nature of criminal proceedings and detention conditions. Similarly, the Court has

49 See Advisory Opinion OC-17/02, ¶ 134.
invoked Council of Europe recommendations in its opinions dealing with juveniles who come in conflict with the law.\textsuperscript{51}

D. INTERNATIONAL STANDARDS GOVERNING JUVENILE JUSTICE

1. Juveniles Should Receive Special Protections
   a. International Treaties and Guidelines

A child’s right to special measures of protection is found in a number of human rights treaties and international agreements and builds on the basic principle of the CRC that the best interests of the child is of primary importance in all decisions relating to youth.\textsuperscript{52} The ICCPR also reflects this principle, stating that “[e]very child shall have . . . the right to such measures of special protection as are required by his status as a minor.”\textsuperscript{53} The Human Rights Committee has emphasized that “[i]n enunciating a right, some provisions of the Covenant expressly indicate to States measures to be adopted with a view to affording minors greater protection than adults.”\textsuperscript{54}

The severity of placing juveniles in prison and the potential harmful effects account for the number of standards developed to ensure respect for the human rights of children in detention. The CRC, the primary treaty on the rights of children, explicitly provides this in article 37(c): “[e]very child deprived of liberty shall be treated . . . in a manner which takes into account the needs of persons his or her age.” A number of additional U.N. guidelines also require that juvenile justice systems emphasize the well-being of juveniles and highlight that the treatment of a child should balance the circumstances of the offender and the offense.\textsuperscript{55}

As articulated below, two fundamental components of special measures for children in conflict with the law are (1) that detention should be used as a last resort and for the shortest possible duration and (2) that the ultimate aim of detention should be

\textsuperscript{51} Advisory Opinion OC-17/02, n. 118.
\textsuperscript{54} Human Rights Comm., General Comment No. 17: Rights of the Child (Art. 24), CCPR/04/07/1989 ¶ 2. (1989) [hereinafter General Comment 17].
\textsuperscript{55} The Beijing Rules. Rule 5.1 concerning the “Aims of Juvenile Justice” provides “The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.” Rule 14.2 requires that court and other proceedings concerning a juvenile offender “be conducive to the best interests of the juvenile,” and Rule 17 provides that any disposition by a competent authority shall be guided by the principle of proportion – consideration of “the needs of the juvenile as well as [the needs of society]” (Rule 17.1(a)) and that “the well-being of the juvenile shall be the guiding factor in the consideration of her or his case” (Rule 17.1(d)); see also Advisory Opinion OC-17/2002, ¶ 61 (“it is necessary to weigh not only the requirement of special measures, but also the specific characteristics of the situation of the child.”).
reintegration and rehabilitation rather than retribution. The foundational idea behind special measures – that children and adults should be treaty differently – is further emphasized by the ICCPR and the CRC, which recognize that juveniles should be placed in separate facilities than adults, different criminal procedures should apply to children, and that conditions of confinement should be age appropriate.\(^{56}\)

**b. European Standards**

European regional law and guidelines affirm the right of juveniles to special measures of protection in the criminal justice setting. In recognition of the vulnerability of juveniles, the European Court has interpreted the European Convention to allow for juveniles to be treated differently in criminal proceedings and sentencing. Protections extend from tailoring courtroom procedures to minimize stigmatization and confusion for those charged with committing a crime,\(^{57}\) to, where possible, avoiding extended detention.\(^{58}\) Similarly, in line with the right to a fair trial, the Council of Europe has recommended taking special measures to protect the privacy of juvenile offenders during criminal proceedings.\(^{59}\)

**2. Non-Custodial Measures Should Be Used as Alternatives to Detention**

**a. International Treaties and Guidelines**

The right to special protections demands that states exhaust alternative measures before resorting to the incarceration of a juvenile. Article 40 of the CRC explicitly provides that, in lieu of detention, states ought to consider “a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care.\(^{56}\)

\(^{56}\) See International Covenant on Civil and Political Rights. G.A. res 2200A (XXXI), 999 U.N.T.S. 171 (1966) [hereinafter ICCPR], Art. 10(2)(b) (“[a]ccused juvenile persons shall be separated from adults”); Art. 10(3) (“Juvenile offenders shall be segregated from adults and accorded treatment appropriate to their age and legal status.”); Art. 14(4) (juvenile criminal procedure shall “take account of their age”); Human Rights Comm., General Comment No. 21 concerning humane treatment of persons deprived of liberty (Art. 10) : CPPR/04/10/1992 (1992) [hereinafter General Comment 21], ¶ 13 (juveniles should be separated and treated differently from adults “with the aim of furthering their reformation and rehabilitation.”); General Comment 17 ¶ 2 (“convicted juvenile offenders shall be subject to a penitentiary system that involves segregation from adults and is appropriate to their age and legal status”); CRC, Art. 37(c) (“every child deprived of liberty shall be treated . . . in a manner which takes into account the needs of persons of his or her age.”); CRC, Art. 40(3) (requiring States Parties to establish “laws, procedures, authorities and institutions specifically applicable to children” accused or recognized as violating the penal law); See also American Convention, Art. 5(5) (requiring that minors be separated from adults and “brought before specialized tribunals . . . so that they may be treated in accordance with their status as minors.”).


\(^{59}\) See Recommendation no. R 87(20) of the Committee of Ministers of the Council of Europe on social reactions to juvenile delinquency, adopted on 17 September 1987, at the 410th meeting of the Ministers’ Deputies; see also the European Convention on Human Rights, Art. 6(1).
shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." General Comment 10 of the Committee on the Rights of the Child affirms that “compliance with [the] CRC” requires that states structure their juvenile justice systems to “promote… the use of alternative measures, such as diversion and restorative justice, will provide States parties with possibilities to respond to children in conflict with the law in an effective manner serving not only the best interests of these children, but also the short- and long-term interest of the society at large.” The Riyadh Guidelines underscore this principle, stressing the need for states to seek alternatives to incarceration whenever possible.

b. European Standards

Alternative measures also align with the stated goal of the European guidelines to promote education, re-integration, and to the extent possible, the abolition of “imprisonment for minors.” As the European guidelines on juvenile delinquency state, alternative measures can “allow [for] greater opportunities for social integration through education, vocational training” and other means. For this reason, the European Ministers of Justice recently adopted a resolution emphasizing the importance of developing alternatives to incarceration for juvenile.

3. Juvenile Detention Must Be a Measure of Last Resort and for the Shortest Appropriate Time

a. International Treaties and Guidelines

A core principle of international law is that the detention of children should be “used only as a measure of last resort,” reflecting that children are different than adults and should be treated accordingly in all aspects of criminal justice. The CRC establishes this principle in treaty law, but it informs the relevant corpus juris: the Beijing Rules, the Riyadh Guidelines, the Havana Rules, and the Guidelines for Action on Children.

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60 CRC, Art. 40(3)(b).
62 Riyadh Guidelines, Rule 58
63 Recommendation No. R(87)20, Preamble.
64 Id. at Rule 14.
66 CRC, art. 37(b). This Court has articulated the same principle in Advisory Opinion 17/02, ¶ 103 (highlighting that “measures that involve deprivation of liberty must be exceptional”).
67 Beijing Rules.
68 Riyadh Guidelines.
in the Criminal Justice System. Rule 17 of the Beijing Rules (the guiding principles of adjudication and disposition related to juvenile justice systems) states, in particular, that “[r]estrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum.” The Riyadh Guidelines likewise affirm that “[t]he institutionalization of young persons should be a measure of last resort and for the minimum necessary period, and the best interests of the young person should be of paramount importance.” 

The CRC also establishes that juvenile sentences must be for the shortest appropriate period of time and places an absolute prohibition on life without parole sentences for anyone who is found to have committed a crime before the age of 18, recognizing that such a sentence is fundamentally inconsistent with the human rights principles that guide juvenile justice. The U.N. Human Rights Commission and U.N. Human Rights Council have also issued resolutions on the Rights of the Child, again underscoring that children should be placed in prison for the shortest appropriate time and affirming the prohibition of JLWOP. In 2006, in the specific context of a review of the United States, the Human Rights Committee stated that juvenile life without parole sentences are incompatible with article 24(1) of the ICCPR. More specifically, in relation to Argentina, during the 2008 Universal Periodic Review process, the Argentine Government supported the recommendation to adopt a penal system that meets the recommendations of the Committee on the Rights of the Child, the Beijing Rules and The Riyadh Guidelines, and accordingly, to prohibit the sentencing of children under 18 years of age to life imprisonment, in accordance with paragraph a of Article 37 of the Convention on the Rights of the Child. This position reflects the

71 Riyadh Guidelines, Rule 46.
72 See Havana Rules, Rule 2 (“Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.”).
73 General Comment 10, ¶ 77.
ICCPR’s requirements that juveniles in detention receive treatment that is “appropriate to their age and legal status.”

b. European Standards

European law and guidelines also highlight that juveniles should only be detained as a measure of last resort and for the shortest length of time possible. The European Rules for juvenile offenders subject to sanctions and measures (The 2008 European Rules) state unequivocally that juveniles deprived of liberty should be provided with, at a minimum, “the possibility of early release.” The appended commentary expands on this recommendation, explaining that “[t]his means that there should be legal provisions defining the preconditions for early release such as the minimum time a juvenile has to serve before being considered for early release.” Such schemes, the commentary suggests, are important because they have a record of contributing to the overall goal of re-integration. They also provide a means to ensure that juvenile sentences are limited to a discrete length and imposed only for a legitimate purpose. The European Court has further underscored the importance of these principles, going so far as to say that they should be considered in assessing whether the detention of a juvenile rises to the level of inhuman and degrading treatment under Article 3 of the European Convention.

Consistent with international law, no European countries allow children to receive an irreducible sentence of life imprisonment and the majority of European countries do not allow any type of life sentences for juvenile offenders. 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.

77 See ICCPR, Art. 10(3) (“Juvenile offenders shall be segregated from adults and accorded treatment appropriate to their age and legal status.”); General Comment No. 21 ¶ 13 (same); Human Rights Comm., General Comment No. 17, ¶ 2 (“juvenile offenders shall be subject to a penitentiary system that involves segregation from adults and is appropriate to their age and legal status”).
79 Id.
80 Commentary to the European Rules for juvenile offenders subject to sanctions or measures, Document CM(2008) 128 addendum 1, Rule III(E)(49)(2).
81 Id.
82 2008 European Rules, , Rule I(A)(3)
85 Id. (citing Frieder Dünkel & Barbara Stańdo-Kawecka, Juvenile Imprisonment and Placement in Institutions for Deprivation of Liberty--Comparative Aspects, Juvenile Justice Systems in Europe and Reform Developments 1772 (F. Dünkel et al. eds., 2010). Sentences vary across Europe. In Portugal, for example, the maximum sentence is 3 years, including for murder. In Switzerland it is four years, including for murder. In Romania, the maximum sentence is 20 years. However, in England a Wales a person under 21 cannot receive a whole life sentence without the possibility of parole. See USF, Cruel and Unusual, 89 (Schedule 21, ¶ 1 and § 269(4) of the Criminal Justice Act 2003 (a whole life
4. The Aim of Juvenile Detention is Reintegration and Rehabilitation

a. International Treaties and Guidelines

The right to special protections requires that States that incarcerate minors make every effort to ensure their rehabilitation. Invoking the Beijing Rules, this Court has held that, “[w]hen the State apparatus has to intervene in offenses committed by minors, it should make substantial efforts to guarantee their rehabilitation in order to ‘allow them to play a constructive and productive role in society.’”

The right to rehabilitation is also reflected in international law. Article 40 of the CRC requires states to promote reintegration of juveniles convicted of crimes. General Comment 10 offers further guidance, indicating that in the event that any juveniles serve a life sentence, they “should receive education, treatment, and care aiming at his/her possible release.”

Article 10 of the ICCPR likewise establishes that incarcerated juveniles must receive special treatment aimed at their reintegration in society. Specifically, detention tariff or life without parole is only available to persons over age 21)). See Dirk van Zyl Smit. In England and Wales, a juvenile sentence of detention at “Her Majesty’s pleasure” is currently required under law for a murder conviction where the juvenile involved was between the age of 10 and 18. In this type of sentence, a judge imposes a tariff (a period of years) and then a discretionary indeterminate sentence may be applied (known as the license period). It is this indeterminate sentence that must be reviewed at regular intervals. Typically, when sentencing juveniles, a judge must apply a tariff that is half of what would be applied to an adult for the same crime. See University of San Francisco School of Law, The Law of Other Nations: 2012 Updated Practices of Other Countries, http://www.usfca.edu/law/jlwop/other_nations/ [hereinafter Updated Practices]; see also Brief for Amnesty International as Amicus Curiae in Graham v. Florida, 38-39 (2009). Such sentencing schemes recognize that juveniles are entitled to different treatment than adults and reflect that juvenile sentences have “a measure of leniency in view of the age of the offender at the time of the offence.” See USF, Updated Practices (quoting R v. Secretary of State for the Home Department, ex parte Venables (1998) A.C. 407 HL at 521).

I/A Court H.R., The “Street Children” Case, ¶ 197. Article 5 of the American Convention holds that, “Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.” The Beijing Rules state that the objectives of institutional treatment must be to “provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society.” Beijing Rules, Rule 26.1.

CRC, Art. 40 (children convicted of crimes must “be treated in a manner . . . which takes into account the child's age and the desirability of promoting the child’s reintegration and the child's assuming a constructive role in society.”).

General Comment 10, ¶ 77; see also id. at ¶ 23 (“Children in conflict with the law, including child recidivists, have the right to be treated in ways that promote their reintegration and the child’s assuming a constructive role in society (art. 40 (1) of CRC). . . . It is, therefore, necessary - as part of a comprehensive policy for juvenile justice - to develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed. These should include care, guidance and supervision, counselling, probation, foster care, educational and training programmes, and other alternatives to institutional care (art. 40 (4)).”).

ICPPR, Art. 10(3) (“The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”); The Human Rights Committee’s General Comment 21 echoes the rehabilitative goal stating that juveniles should be separated and treated
facilities should be age appropriate and “foster reformation and social rehabilitation.” Article 14(4) of the ICCPR also requires that judicial procedures “take account of [juveniles’] age and the desirability of promoting their rehabilitation.” The U.N. Rules developed to guide juvenile justice practices also highlight that punitive or retributive sanctions are inappropriate for children. To ensure rehabilitation and reintegration, these rules call for “care, protection, and education.” The need for special facilities that foster these aims is likewise emphasized.

All detained children have a right to measures that promote their ability to develop and play a constructive role in society upon release. Given the framework of rehabilitation, the Committee on the Rights of the Child has praised countries that take steps to apply special protections to young adults until they reach the age of 21.

b. European Standards

European guidelines support the principle that juvenile sanctions should be aimed at rehabilitation. Council recommendations developed to guide European prison rules emphasize that “[a]ll detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.” The recommendations note that “[p]articular attention shall be paid to the education of differently from adults “with the aim of furthering their reformation and rehabilitation.” See General Comment 21, ¶ 13.

90 General Comment 17, ¶ 2.
91 Bejing Rules, Commentary on Rule 17.1(b) (“implies that strictly punitive approaches are not appropriate. Whereas in adult cases, and possibly also in cases of severe offences by juveniles, just desert and retributive sanctions might be considered to have some merit, in juvenile cases such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the young person.”); see also The United Nations Standard Minimum Rules for Non-custodial Measures [hereinafter the Tokyo Rules], adopted by United Nations General Assembly Resolution 45/110 of December 14, 1990, address in Rule 8.1 the importance of taking into account the “rehabilitative needs of the offender.” 92 Beijing Rules, Rule 26 (“The objectives of institutional treatment should be to “provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society.”); Havana Rules, Rule 12 (“Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.”); Id. at Rule 79 (“All juveniles should benefit from arrangements designed to assist them in returning to society, family life, education or employment after release. Procedures, including early release, and special courses should be devised to this end.”).
93 See Havana Rules, Rule 32 (“The design of detention facilities for juveniles and the physical environment should be in keeping with the rehabilitative aim of residential treatment, with due regard to the need of the juvenile for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure-time activities.”).
94 See Comm. on the Rights of the Child, General Comment 10, ¶ 38 (“The Committee notes with appreciation that some States parties allow for the application of the rules and regulations of juveniles justice to persons aged 18 and older, usually till the age of 21, either as a general rule or by way of exception.”).
young prisoners.” The 2008 European Rules stress the importance of such attention, counseling that “the sanctions or measures that may be imposed on juveniles, as well as the manner of their implementation, shall be specified by law and based on the principles of social integration and education and of the prevention of re-offending.” At the core of this approach is the recognition that the personality of a juvenile can evolve. As explained in the commentary on these rules, a commitment to the aim of social integration thus does not permit long-term or life sentences aimed solely at protecting society from the youthful offender, nor ones that do not give these juveniles a chance at release after a reasonable period of detention.

5. To Achieve the Aims of Juvenile Justice, Review Should Be Realistic and Regularly Considered

a. International Treaties and Guidelines

Article 25 of the CRC and the Committee on the Rights of the Child, the body that interprets the CRC, underscore the need for periodic and meaningful opportunities for release for juveniles. The Convention provides that all children are entitled to a “periodic review” of their treatment and the Committee has more precisely stated that the “possibility of release should be realistic and regularly considered.” In this regard, the Committee has emphasized to States Parties that do allow the sentence of life without the possibility of release or parole,

that this sanction must fully comply with and strive for the realization of the aims of juvenile justice enshrined in article 40 (1) of CRC. This means inter alia that the child sentenced to this imprisonment should receive education, treatment, and care aiming at his/her release, reintegration and ability to assume a constructive role in society. This also requires a regular review of the child’s development and progress in order to decide on his/her possible release. Given the likelihood that a life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release, the Committee strongly recommends the States parties to abolish all forms of life imprisonment for offences committed by persons under the age of 18.

The Beijing Rules and the Havana Rules likewise affirm that provisions should be made for conditional release “to the greatest possible extent, and . . . granted at the earliest possible time.” The Beijing Rules note too that upon such release, juveniles

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96 Id. at Rule II(28)(3).
97 2008 European Rules, Rule I(A)(2).
98 Commentary to 2008 European Rules, Rule I(A)(2).
99 Id.
100 General Comment 10, ¶ 77 (“For all sentences imposed upon children the possibility of release should be realistic and regularly considered. In this regard, the Committee refers to article 25 of the CRC providing the right to periodic review for all children placed for the care, protection or treatment.”).
101 Id.
“shall be assisted and supervised by an appropriate authority and shall receive full support by the community.”

b. **European Standards**

According to European law and guidelines, juvenile sentences should be subject to a robust review mechanism. To ensure that juvenile detention is for a discrete length and legitimate purpose, the commentary to the 2008 European Rules explains that a youth offender should have “realistic prospects for reintegration into society.”

The European Court has interpreted the European Convention to require protections in juvenile sentencing, including limits on the length of time that can elapse before a review occurs as well as procedural safeguards for such reviews.

The Court has asserted a need for timely review in the context of indeterminate juvenile sentences. In the *Hussain* case, the Court found that to justify the ongoing detention of a juvenile serving “Her Majesty’s pleasure”, an assessment of the ongoing need for detention, including a review of individual characteristics was necessary. The European Court has also indicated that a violation of Article 3 (preventing “torture, inhuman or degrading treatment or punishment”) could arise if review is not available in a timely manner. In *T. v. UK*, the Court found that where six years of the juvenile sentence at issue had passed, there was no violation of Article 3. The Court, however, cited the language from both the Convention on the Rights of the Child and the Beijing Rules to note that compliance with Article 3 requires limiting juvenile detention to the “possible minimum.”

The European Court has also read Article 5(4) of the European Convention to require procedural safeguards in the mechanisms designed to evaluate the lawfulness of juvenile detention. In the context of juveniles, where individual circumstances such as maturity are implicated, periodic review must incorporate the procedural safeguards necessary to assess character development. These safeguards include the right to...
review by an impartial body capable of granting the request for release, legal representation, and an opportunity to testify. 110

E. LENGTHY JUVENILE SENTENCES WITHOUT REGULAR AND MEANINGFUL REVIEWS VIOLATE HUMAN RIGHTS STANDARDS

Lengthy juvenile sentences that exclude a realistic and regular opportunity for review violate basic human rights norms. While the text of the CRC does not explicitly condemn juvenile life sentences, these sentences contravene the spirit and intent behind the treaty and the numerous human rights protections developed to protect children deprived of their liberty, which should be read together. The Committee on the Rights of the Child has confirmed this in General Comment 10, which calls on states to abolish all forms of life imprisonment for juveniles, because “life imprisonment of a child makes it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release.” 111

While potentially complying with the strict text of the CRC, Argentina’s life sentences set juveniles on a path that virtually eliminates the ability to rehabilitate or reintegrate. A reading of the CRC, in concert with General Comments on the treaty and international human rights standards, counsels toward such a finding. Instead of promoting rehabilitation, these sentences subject children to the harsh penalty of life in prison, with no possibility of release until at least 20 years (more than the amount of time they lived before the crime for which they are sentenced took place) and cannot be read to comport with CRC standard that release should take place at “the earliest possible time.” Like all juvenile life sentences, such sentences fail to ensure children receive special protections recognized under human rights law because they treat children like adults, despite the overwhelming evidence that they are mentally, physically, and emotionally different.

The longer a child is left in jail, the less opportunity there is for effective reintegraion. Long-term imprisonment can have serious negative effects on the well-being of an inmate, from increasing the likelihood he or she will reoffend112 to crippling the inmate with debilitating social deficits.113 These harmful effects are exacerbated where juveniles are treated like adults or serving time in adult prisons, which is documented to take place in countries including Argentina (where transfers often take place when a child turns 18) and the United States (where juveniles may be sentenced

110 Id. at ¶¶ 57-61.
111 General Comment 10, ¶ 77 (emphasis added).
and go directly to adult facilities at ages as young as 13. These practices are in clear violation of the standards laid out in the American Convention, the CRC and the ICCPR as well as the U.N. guidelines and rules and European standards discussed above.

As juvenile detention aims to rehabilitate, it is essential that children be monitored consistently to assess their development and progress to determine whether release is appropriate. Where laws allow for the mere possibility of review but fail to require regularized and frequent reviews, there is no opportunity to determine whether a sentence is for the shortest appropriate time. Indeed, the principle of “periodic review,” reflected in the CRC, and read together with the CRC Committee’s call for “regular” review, as well as the relevant international and European standards reflect that there should be an opportunity for early release of a juvenile rather than sentences that require youth to carry out a full sentence for life.

For the reasons stated above, children’s human rights are violated in a system such as where children are serving life sentences without the real possibility for a periodic and regular review of their sentence by an independent body or otherwise treated like adults in the criminal justice system.

IV. CONCLUSION

Sentencing practices in a number of OAS countries violate the American Declaration and the American Convention as well as the CRC, ICCPR, and a number of U.N. guidelines as well as the principles articulated in Europe. The Court should thus call on states to (1) end the use of life sentences for juveniles in all their forms and (2) eliminate lengthy juvenile sentences and (3) implement procedures for the realistic and regular review of juvenile sentences to ensure they are for the shortest appropriate time.

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