PETITION P-161-06

TO THE HONORABLE MEMBERS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES:

OBSERVATIONS ON THE RESPONSE OF THE UNITED STATES REGARDING JUVENILES SENTENCED TO LIFE IMPRISONMENT WITHOUT PAROLE AND SUPPLEMENTAL SUBMISSION IN SUPPORT OF PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF JUVENILES SENTENCED TO LIFE WITHOUT PAROLE IN THE UNITED STATES OF AMERICA

By the undersigned, appearing as petitioners and as counsel for the individual petitioners under the provisions of Article 23 of the Commission's Rules of Procedure:

Steven Macpherson Watt
Human Rights Working Group
American Civil Liberties Union
125 Broad Street
New York, NY 10004
T:(212) 519-7870
F:(212) 549-2651
E:swatt@aclu.org

Deborah LaBelle
Kary Moss
American Civil Liberties Union of Michigan
Juvenile Life Without Parole Initiative
221 N. Main St., Ste. 300
Ann Arbor, MI 48104
T: (734) 996.5620
F: (734) 769.2196.
E: deblabelle@aol.com

Caroline Bettinger- Lopez
Columbia Law School,
Human Rights Clinic
435 W. 116th Street
New York, NY 10027
T:(212) 854-8364
F:(212)854-3554
E:c.lopez@law.columbia.edu

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INTRODUCTION:

The United States government's reply to Petition 161.06, addressing sentencing of juveniles to life imprisonment without parole, raised concerns with the admissibility of the petition, based upon an assertion that the Petitioners had failed to exhaust their domestic remedies and/or the petition was untimely. (State's Response, II & III).

The State's reply also addresses the merits of the petition, while asserting that they lack sufficient, specific information regarding certain Petitioners. The State also asserts they did not receive Petitioners' Annex A providing details as to Petitioners. (State's Response, IV, IV(E)).

Petitioners, being advised that the United States is in receipt of Petitioners Annex A, submit these observations to address the admissibility arguments of the State, and provide additional information as to the thirty-two (32) Petitioners' ongoing conditions and treatment during their incarceration for life without opportunity for parole ("JLWOP").

Petitioners have demonstrated the admissibility of this petition and renew their request for a combined admissibility and merits hearing during this Commission's next session. Alternatively, should this Commission require further information before deciding on the merits, Petitioners request that this Commission hold an admissibility hearing during the next session.

I. PETITIONERS HAVE EXHAUSTED ALL AVAILABLE, ADEQUATE AND EFFECTIVE DOMESTIC REMEDIES, AND THEIR PETITION SHOULD THUS BE DEEMED ADMISSIBLE

The United States asserts that petitioners have failed to exhaust domestic remedies. Petitioners in response assert that because they have no reasonable chance of successfully obtaining appropriate redress in domestic courts, they meet one of the exceptions to the exhaustion requirement provided under Article 31(2)(a) of the Commission's Rules of

Procedure. Specifically, this Article provides that domestic remedies need not be exhausted where "the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated." Pursuant to this provision, the Commission has found that domestic remedies "must be (1) adequate, in the sense that they must be suitable to address an infringement of a legal right, and (2) effective, in that they must be capable of producing the result for which they were designed."[1]

The exhaustion requirement "refers to legal remedies that are *available, appropriate, and effective* for solving the presumed violation of human rights."[2] In interpreting these characteristics, the Commission has established that "when, for factual or for legal reason, domestic remedies are unavailable, the petitioners are exempted from the obligation of exhausting the same."[3] Petitioners need not, as the State's reply suggests, exhaust all theoretical avenues of redress. Rather, the Commission has found,

> [i]f the exercise of the domestic remedy is such that, on a *practical* basis, it is unavailable to the victim, there is certainly no obligation to exhaust it, regardless of how effective *in theory* the action may be for remedying the allegedly infringed legal situation.[4]

Likewise, in *Housel v. United States*, the Commission explained that the key question in an exhaustion determination is whether *de facto* remedies exist, not whether *de jure* remedies are theoretically available.[5] In *Housel*, petitioner alleged that his prolonged detention on death row constituted cruel and unusual punishment in violation of Article 26 of the American Declaration on the Rights and Duties of Man ("American Declaration"). The United States claimed that

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[1] *Gary Graham n.k.a Shaka Sankofa v. U.S.*, Case No. 11.193, Report 51/00, para. 55; *Tracey Lee Housel v. U.S.*, Pet. No. 129/02, Report 16/04 (February 27, 2004), para. 31; *Ramon Martinez Villareal v. United States*, Case 11.753, Report No. 108/00, para. 60, I/A Court H.R., *Velásquez Rodríguez*, Judgment of July 29, 1988, Ser. C. No. 4 (1988), paras. 64-66.
[2] *Elias Gattass Sahih*, Report No. 9/05, Inter-Amer. C.H.R., Petition No. 1/03, *at* 30 (2005).
[3] *Id.* (interpreting exhaustion requirements under Art. 46 of the American Convention on Human Rights).
[4] *Id*. (emphasis added). *See also*, European Court of Human Rights, *Akdivar and Others v. Turkey*, 1 BHRC 137, ¶66 (1996), (finding that "[t]he existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness").
[5] *Tracy Lee Housel v. U.S.*, Pet. No. 129/02, Report 16/04 (February 27, 2004).

because he had not raised that issue in domestic courts, he could not raise it before the Commission. The Commission rejected this position, explaining that:

> a petitioner may be excused from exhausting domestic remedies with respect to a claim where it is apparent from the record before it that any proceedings instituted on that claim *would have no reasonable prospect of success in light of prevailing jurisprudence of the state's highest courts*. In these circumstances, the Commission has considered that proceedings in which claims of this nature are raised would not be considered "effective" in accordance with general principles of international law.[6]

The European Court of Human Rights has also underscored the importance of applying the exhaustion requirement with due consideration for the particular facts and context of a case, and without excessive formalism and rigidity. In *Selmouni v. France*, the Court found that the application of the exhaustion requirement

> . . . must make due allowance for the context [and] must be applied with some degree of flexibility and without excessive formalism. . . . [T]he rule [] is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case.

The European Court went on to explain that an appropriate consideration of whether domestic remedies have been exhausted requires that the Court "take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants."[7]

Recently, the Commission has confirmed that it will also find domestic remedies exhausted where further domestic efforts by petitioners would be "futile". In *Isamu Carlos*

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[6] *Ibid*. at ¶. 36 (citing Case 11.193, Report 51/00, Gary Graham v. United States (Admissibility), Annual Report of the IACHR 2000, para. 60, citing Eur. Court H.R., De Wilde, Oomas and Versyp Cases, 10 June 1971, Publ. E.C.H.R. Ser. A, Vol.12, p. 34, paras. 37, 62; Eur. Court H.R., Avan Oosterwijck v. Belgium, Judgment (Preliminary Objections), November 6, 1980, Case Nº 7654/76, para. 37; Case 11.753, Report 108/00, Ramón Martinez Villareal v. United States (Admissibility), Annual Report of the IACHR 2000, para. 70).

[7] European Court of Human Rights, *Selmouni v. France*, (2000) 29 EHRR 403, 435. *See also Baumann v. France*, (2002) 34 EHRR 44, 1055.

Shibayama et al. v. United States,[8] the government claimed that petitioners had not pursued all available domestic remedies at the time of their petition because additional avenues of appeal were available to them before a U.S. federal court. The Commission noted that "[p]etitioners have pursued some, but not all, of the domestic remedies potentially pertinent to the claims raised before the Commission"[9] and that "the information available calls into question the possibility that further proceedings [...] might reasonably be successful." [10] However, the Commission found that "individuals similarly situated to the Petitioners had raised [domestic] claims unsuccessfully" before appellate courts and were denied review by the U.S. Supreme Court.[11] The Commission therefore held that "additional remedies pursued by the Petitioners would not be effective within the meaning of applicable principles of international law and therefore that their claims are not barred from consideration under Article 31.1 of its Rules of Procedure."[12]

In determining whether remedies have been exhausted, this Commission has also given weight to efforts made by petitioners to pursue remedies in domestic forums, and the receptivity of appellate courts to individuals bringing similar claims. In *John Elliott v. United States*,[13] petitioner was sentenced to death in Texas for murder, and claimed that the extended period he spent on death row had resulted in him being subject to "death row syndrome" in violation of article 26 of the American Declaration which prohibits "cruel, infamous or unusual punishment". The Commission noted that the petitioner "pursued numerous domestic avenues of redress since his conviction and sentencing to death,"[14] but found "that any available domestic proceedings

[8] Isamu Carlos Shibayama, et al. v. U.S., Report 26/06, Petition 434-03.
[9] *Ibid.* at para. 49.
[10] Ibid.
[11] *Ibid.* at para. 51.
[12] *Ibid.* at para. 52 (Rules of Procedure of the Inter-American Commission of Human Rights Art. 31(1) requiring exhaustion of domestic remedies).
[13] *John Elliott v. United States*, Report No. 68/04, Petition 28/03 (2004).
[14] *Ibid.* at para. 34.

would provide no reasonable prospect of success"[15] based in part on petitioner's showing that the U.S. Supreme Court had "consistently refused to consider the issue."[16] The Commission found the petition admissible.[17]

Here, Petitioners' claims have no reasonable prospect of success before domestic courts. Petitioners here have pursued multiple avenues of redress before domestic forums[18] and any remaining procedures offer no likelihood of success. Equivalent claims to those raised by Petitioners have been definitively rejected in precedential Michigan state court rulings.[19] Moreover, as discussed in more detail below, the U.S. Supreme Court has given strong indications that it currently considers juvenile life without parole sentences to be constitutional. Clearly, any further efforts by Petitioners to exhaust additional domestic legal remedies would be futile.

In its reply, however, the Government argues that *Roper v. Simmons*, the 2005 Supreme Court decision striking down the death penalty for juveniles, may give Petitioners' claims renewed prospects for success in domestic forums, and that Petitioners should therefore raise their claims before domestic courts rather than the Commission.[20] The State further argues that even if there is no reasonable prospect of success, the likelihood of an adverse ruling is insufficient to demonstrate the futility exception to exhaustion under Article 31.[21] Petitioners

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[15] *Ibid*. at para. 37.
[16] *Ibid*. at para. 35.
[17] *Ibid*. at para. 4. *See also Garifuna Community of "Triunfo De La Cruz" and its Members v. Honduras,* Report 29/06, Pet. 906-03, para. 49 (2006) ("considering the many remedies attempted by the alleged victims in the present case, the Commission finds that the exceptions in Article 46.2, subparagraphs a and b of the Convention are applicable, thereby rendering inapplicable the requirements of the Convention on exhaustion of internal remedies.").
[18] *See* Pet. pp. 46-48.
[19] Once an equivalent claim has been raised and ruled upon in a Michigan appellate court, all subsequent appellant panels are bound by the earlier ruling. MCR 7.215(J)(1) ("a panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court of Appeals as provided in this rule."). As set forth in more detail below, the Michigan Courts had rejected any argument for an effective legal remedy by Petitioners prior to their sentencing and consistently reaffirmed these rulings.
[20] U.S. Government Response Brief (hereinafter, "Response Brief") at 3-4.
[21] Response Brief at 4-5.

disagree with this analysis.

The standard for assessing exhaustion is one of a *realistic assessment*, not, as the Government asserts, a theoretical possibility. Moreover, the onus is on the Government to demonstrate the availability of an adequate remedy by citing to actual success on a claim such as the one raised by Petitioners.[22]

As detailed below, under U.S. law, there was in fact no realistic, adequate, or effective remedy to Petitioners at the time they committed their crimes that would have afforded them substantive review of their status as juveniles. Thus, any claim based on such grounds would have been highly unlikely to succeed.[23]

The Government's suggestion that the Supreme Court may, at some unknown point in the future, grant certiorari (review) on the issue of JLWOP and thereafter hold it unconstitutional, is not an ordinary remedy, and the remote possibility that the Court will exercise review renders it an ineffective remedy for Petitioners. Not only is the granting of certiorari in the Supreme Court discretionary; the exercise of the Court's discretion makes the granting of certiorari highly unlikely. For example, in the 2005 term the Court granted certiorari in only 9% of the petitions made to it.[24]

Moreover, requiring the present Petitioners to file cases in Michigan state courts, or petitions for review before the U.S. Supreme Court, would "not have offered [them] better chances of success" since neither they nor other individuals with similar claims have been

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[22] *See*, for example, the analogous ruling of the European Court of Human Rights in *V v. United Kingdom* (2000) 30 EHRR 121 (1999); *See also Selmouni v. France*, 29 EHRR 403 (2000) (the relevant inquiry is whether there is an available practical remedy, not a procedural hypothetical remedy.).

[23] *Selmouni v. France*, 29 EHRR 403, 437 (2000) ("the remedy available to the applicant was not . . . an ordinary remedy sufficient to afford him redress in respect of the violations he alleged."); *See also, Baumann v.* France, 34 EHRR 44,k para. 45 (2002) (noting that a remedy is exhausted when it is "de facto" ineffective.).

[24] *Harvard Law Review*, Vol 120:372, p. 380, November 2006, Table II(B) Cases Granted Review, *available at* http://www.harvardlawreview.org/issues/120/nov06/statistics06.pdf.

successful to date in challenging their JLWOP sentences.[25]

A. Petitioners' Attempts To Obtain Domestic Remedies Would Be Futile.

1. U.S. Supreme Court and Futility

The sole contention of the Government, supporting their argument that Petitioners have an adequate remedy before domestic courts, is that *Roper v. Simmons*[26] may provide some avenue for relief and that therefore domestic remedies have not been exhausted. As a threshold matter, the *Roper* decision, and the Court's earlier ruling in *Atkins v. Virginia*[27], deal exclusively with the death penalty, not JLWOP sentences. The rationale of *Roper* is premised on the Court's consideration that "the death penalty is the most severe punishment" and that therefore "the Eighth Amendment applies to it with special force."[28] Indeed, the Court explicitly did not limit imposition of other penalties – such as life without parole sentences – on juveniles.[29] In abolishing juvenile death sentences, the Supreme Court actually noted that JLWOP sentences could continue to serve the deterrent effect that the death penalty had served.[30] The Court then vacated the defendant's death sentence and *affirmed* his sentence of life imprisonment without possibility of parole.[31] In no uncertain terms, the U.S. Supreme Court in *Roper* signaled its clear acceptance of the practice of JLWOP.

Moreover, the crucial factual predicate underlying *Roper* is not present in Petitioners'

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[25] *Baumann v. France*, 34 EHRR 44, para. 46 (2002) ("The applicant cannot be criticised for not having had recourse to legal remedies which would have been directed essentially to the same end and would in any case not have offered better chances of success.").
[26] *Roper v. Simmons*, 543 U.S. 551 (2005).
[27] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[28] *Roper*, 543 U.S. at 568.
[29] *Roper*, 543 U.S. at 573-74 ("When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.").
[30] *Id.* at 572 (dismissing the argument that the juvenile death penalty is necessary to deter juveniles from committing crimes, and instead offering that "[t]o the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.").
[31] *Id.* at 560.

claims. The Court in *Roper* recognized, in light of the fact that "30 States prohibit the juvenile death penalty",[32] that an emerging consensus existed among the U.S. states that the execution of juveniles is sufficiently "cruel and unusual" so as to violate the U.S. Constitution's Eighth Amendment prohibition of cruel and unusual punishment.[33] In *Roper*, the fact that 30 states prohibited the use of the juvenile death penalty was essential in finding it unconstitutional, as this indicated a national consensus on the "evolving standards of decency."

Unfortunately, such a consensus among U.S. states does not exist with regard to JLWOP. In contrast with the juvenile death penalty, currently 42 states and the federal government *allow* JLWOP sentencing, making it impossible for Petitioners to satisfy the "unusualness" component of the Eighth Amendment or to demonstrate a national consensus against such sentences. The Government's reliance on *Roper*, therefore, does not demonstrate that Petitioners have an effective domestic remedy that they failed to exhaust.[34]

Subsequent to *Roper*, a number of courts have rejected constitutional challenges to JLWOP sentences. Further, the Supreme Court's recent denials of certiorari in taking up the issue of JLWOP sentencing and the broader legal context both in Michigan and other U.S. states demonstrates that "any proceedings instituted" to challenge the sentence "would have no reasonable prospect of success in light of prevailing jurisprudence" of the highest courts at both state and federal forums.

Both before and after Petitioners were sentenced, the U.S. Supreme Court had repeatedly

[32] *Roper*, 543 U.S. at 564.
[33] *Id.* at 568.
[34]The exhaustion requirement certainly does not require waiting for the Eighth Amendment's "evolving standards of decency" to catch up with international law regarding the appropriate standards for the punishment of juveniles. Government Response at 4, quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

declined to review JLWOP cases from both state[35] and federal courts,[36] and held that life without parole sentences for adults are constitutional.[37] And, in December 2007, the Supreme Court, again, denied certiorari to consider the constitutionality of JLWOP sentences in *Craig v. Louisiana*, reaffirming Petitioners' argument that attempts to exhaust would be futile.[38]

In his petition, Craig sought review of his life without parole sentence, arguing that "[t]he principles underlying the decision in *Roper v. Simmons,* bolstered by continuing scientific research and the great weight of international law, point to the illegality of the juvenile life without parole sentence under the Eighth Amendment."[39] Craig also argued that the sentence violated the Supremacy Clause of the Constitution because the United States is a party to the ICCPR, and under the ICCPR, criminal trials of juveniles should take into account their age and the desirability of promoting their rehabilitation.[40]

The Louisiana appellate court rejected both arguments, and specifically noted that the U.S. Supreme Court considered the ICCPR in *Roper* and nevertheless reached a decision upholding a JLWOP sentence.[41] The state court also emphasized that the ICCPR is a "non-self-executing" treaty, meaning that it does not give individuals a right to sue the government in U.S. courts for violations of the treaty's provisions, and noted that in any event, the United States specifically reserved on its right to impose capital punishment on juveniles when it ratified the treaty.[42] Thus, the Louisiana appellate court held that the JLWOP sentence imposed was not constitutionally excessive and was not grossly disproportionate to the severity of the offense.

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[35] *State v. Massey*, 60 Wash.App. 131 (1990), review denied by 115 Wash.2d 1021 (1990), cert denied by 499 U.S. 960 (1991); *State v. Lee*, 148 N.C.App. 518 (2002), appeal dismissed by 335 N.C. 498, cert. denied sub nom *Lee v. North Carolina*, 537 U.S. 955 (2002); *State v. Standard*, 351 S.C. 199 (2002), cert. denied by 537 U.S. 1195 (2003).
[36] *Rice v. Cooper*, 148 F.3d 747 (7th Cir. 1998), cert. denied 526 U.S. 1160 (1999).
[37] *Harmelin v. Michigan*, 501 U.S. 957 (1991).
[38] *Craig v. Louisiana*, 944 So. 2d 660 (La. Ct. App. 2006), cert. denied 128 S. Ct. 714 (2007). The Louisiana Supreme Court also denied cert to hear the case (*State v. Craig*, 959 So. 2d 518 (2007)).
[39] *Craig v. Louisiana*, 944 So. 2d 660 (La. Ct. App. 2006), cert. denied 128 S. Ct. 714 (2007).
[40] Id.
[41] Id.
[42] Id. at 663.

The U.S. Supreme Court's subsequent denial of certiorari in *Craig v. Louisiana* to address the scope of *Roper* and the application of international standards to juvenile sentencing practices demonstrates a *de facto* unavailability of domestic remedies from the highest court in the United States, and confirms the futility of attempts to exhaust domestic remedies at this time.

The unavailability of remedies was more recently confirmed in 2008 when the U.S. Supreme Court denied certiorari to hear *Pittman v. South Carolina,* a case involving the conviction of boy who was 12 years old at the time of the incident.[43] Pittman was sentenced to the shortest sentence possible under the mandatory minimum sentencing guidelines in South Carolina: two concurrent terms of thirty years imprisonment.[44] On appeal, Pittman argued that the trial court erred in not taking into consideration his youth in terms of the admissibility of his confession and sentence. Pittman's arguments that his child status should have been considered were rejected by the highest state court in South Carolina, given "the nature of the criminal acts of which Appellant was convicted."[45] The state court also held that "we do not believe that evolving standards of decency in our society dictate that it is cruel and unusual to sentence a twelve-year-old convicted of double murder to a thirty-year prison term."[46]

In denying certiorari, the Supreme Court demonstrated that it will not consider the severity of JLWOP sentencing as it relates to emerging evidence concerning the cognitive capacity and physiology of children in relation to the crimes and continues to refuse recognition of a child's right to special protection. Prior to this, the Supreme Court declined to hear any cases challenging automatic waiver statutes that permit automatic transfers from juvenile to adult court, based on age, offense, or prior record without consideration of child status at any stage of

[43] 128 S. Ct. 1872 (April 14, 2008).
[44] *State v. Pittman*, 373 S.C. 527, 544 (2007).
[45] *Id.* at 563.
[46] *Id.* at 564.

the proceedings.[47]

Therefore, the government's contention that the "evolving standards of decency" test and the *Roper* decision preclude exemption from the exhaustion obligation is clearly erroneous. Petitioners are barred from obtaining an effective and appropriate remedy in domestic courts and thus fall within the exception from the exhaustion requirement of Art. 31(2)(a).

2. Michigan State Law And Futility

Michigan state courts also do not provide an effective remedy for any of the Petitioners. Any efforts Petitioners could theoretically make to pursue state judicial challenges would therefore be futile.[48] The five Petitioners, whose facts are set forth in detail in the petition, represent the range of circumstances under which juveniles have been sentenced to life without possibility of parole in Michigan. Damion Todd was 17 in 1986 when he committed the offense for which he was convicted. At 17, he was considered an adult and charged, tried, sentenced and incarcerated without consideration of his child status.

Henry Hill was 16 in 1980 and his I.Q. showed his capacity at a third grade/9 year old level.[49] He was ordered to be tried in adult court, under the law which required a judge to rule on whether he was an adult or juvenile, and sentenced as an adult to a mandatory life sentence.

Barbara Hernandez and Kevin Boyd were 16 years old in 1990 and 1994 when they were tried as adults under the new automatic waiver law, which went into effect in 1988. The law allowed the judge at sentencing to choose between the adult sentence of life without parole or juvenile detention until 21. Both were sentenced and incarcerated as adults. Patrick McLemore and all twenty-seven Petitioners listed in the Annex were tried, sentenced and incarcerated under

[47] *U.S. v. Bland*, 412 U.S. 909 (1973); *Quinones v. U.S.*, 516 F.2d 1309 (1st Cir. 1975), *cert. denied*, 423 U.S. 852 (1975); *Cox v. U.S.*, 473 F.2d 334, 336 (4th Cir. 1973), *cert. denied*, 414 U.S. 869 (1973).
[48] *See Sergio Schiavini & Maria Teresa Schnack de Schiavini v. Argentina*, Report 5/02, Petition 12.080, para. 45 (2002) ("Convention provides that this provision will not apply when there are no local remedies to be exhausted, whether because of factual circumstances or points of law.").
[49] Petition, p. 11-12

the current law passed in 1996. There is no consideration of their child status at any time. They were charged, tried, sentenced and incarcerated as adults. There are now 321 individuals in Michigan prisons serving the sentence of life without possibility of parole for crimes committed under the age of eighteen. All of the challenges to the laws under which Petitioners are incarcerated have been rejected.

In 1976, prior to **any** of the Petitioners receiving their mandatory life without possibility of parole sentences, the Michigan Supreme Court determined, in a case challenging a mandatory life without parole sentence for an adult convicted of felony murder, that "[a] mandatory life sentence without possibility of parole for this crime does not shock the conscience."[50] This reasoning was extended to the JLWOP context in 1996, where the Michigan Court of Appeals considered the constitutionality of the imposition of a life without parole sentence for a juvenile and concluded, following *Hall*, that "it is not cruel or unusual punishment to sentence a juvenile to life imprisonment without the possibility of parole".[51] Subsequently, Michigan state courts have repeatedly rejected appeals that characterize mandatory life sentences for juveniles as cruel or unusual punishment and have refused to recognize a child's legal right to special protection, thus making any future challenges on these issues futile.[52] Petitioners' and other individuals' attempts to challenge *Hall's* application to children have all been rejected,[53] and the Michigan Supreme Court has consistently denied review.

Petitioner Matthew Bentley, age 14 at the time of his crime, attempted to appeal his life sentence after Michigan passed the statute. He argued that the imposition of a mandatory life

[50] *People v. Hall*, 396 Mich. 650; 24 N.W.2d 377 (1976).
[51] *People v. Launsburry*, 217 Mich. App. 358, 464 (Mich. App. 1996), appeal and rehearing denied, 454 Mich. 883 (1997).
[52] *People v. Jarrett*, 1996 WL 33360697 (Mich. App.), appeal denied 454 Mich. 921 (1997); *People v. Bentley*, 2000 WL 33519653 (Mich. App. 2000), appeal denied 463 Mich. 993 (2001).
[53] See *People v. Launsberry*, 217 Mich.App. 358, 551 N.W.2d 460 (Mich.App. 1996), appeal and rehearing denied 454 Mich. 883 (1997) (extending the rationale of *People v. Hall* to juveniles and sanctioning the imposition of life without possibility of parole sentencing).

sentence without the possibility of parole constituted cruel or unusual punishment and that the mandatory sentence – as applied to minors – violates due process. However, the Michigan Court of Appeals rejected all of his arguments, noting these issues had been previously decided. The Michigan Supreme Court refused to review the decision.[54] Michigan state courts also do not recognize a child's right to special protection, thereby rendering a due process claim in state court futile. The lack of such a right means that states have complete discretion in formulating their procedures and standards for waiving juveniles into adult courts. Consequently, in the face of due process challenges, Michigan courts have repeatedly upheld Michigan automatic waiver laws without consideration of child status at any stage of the proceedings.[55] In light of these precedents, further challenges to Michigan's automatic waiver scheme by the individual Petitioners would be futile.

Michigan state courts have consistently rejected challenges to the constitutionality of JLWOP sentences. As recently as six months before the Petition in this case was filed, in *People v. Crossley*,[56] the Michigan Supreme Court denied an appeal of an appellate court decision rejecting such a challenge by one of the Petitioners, Vincent Crossley. Crossley had argued on appeal that his life sentence constituted cruel or unusual punishment under the state Constitution and, in addition, that his sentence was disproportionate to the severity of the crime committed. This ruling by the state's highest court and others noted herein are precedential in nature and thus render similar challenges by any other Petitioners futile.

The government's argument that this Commission should find Petitioners' claims inadmissible because of the possibility that U.S. law may change at some future date, has previously been explicitly rejected by this Commission. In *Ramón Martínez Villareal v. United*

[54] *People v. Bentley*, 2000 WL 33519653 (Mich. App. 2000), appeal denied 463 Mich. 993 (2001).
[55] *Conat*, 238 Mich.App. 134 (1999); *Bentley* 2000 WL 33519653 1, appeal denied 463 Mich. 993 (2001); *People v. Espie*, 2002 WL 875163 (Mich. App., 2002), appeal denied 467 Mich. 881 (2002); 672 N.W.2d 857 (Mich. 2002).
[56] 2006 Mich. App. LEXIS 562 (Mich. App. 2006), appeal denied 2006 Mich. LEXIS 1755 (Mich., Aug. 29, 2006).

States, the petitioner was sentenced to death by a court in Florida after his conviction on two counts of murder and one count of burglary.[57] The government argued that the petitioner had failed to exhaust his domestic remedies because motions were pending in the Florida Supreme Court to re-open petitioner's case. In finding the case admissible, the Commission focused on the likelihood of success, finding that the potential additional avenues of redress were "of an exceptional nature".[58] Significantly, the Commission found that the fact that such avenues of redress, "even if successful, will not provide [petitioner] with the relief [he] seek[s]," because that potential redress would not repair the harm done to the petitioner in the process.[59] The European Court of Human Rights has likewise held that a petitioner need not await the outcome of a case pending before domestic courts that could potentially provide an avenue of redress for the petitioner, if it is unlikely the petitioner will be able to obtain redress based on the case law *at the time he or she files his or her petition.*

As in *Villareal*, the government argues here that not all Petitioners have exhausted their opportunities to pursue habeas relief.[60] While many Petitioners have in fact filed habeas petitions, for those who have not filed or who are currently involved in the process, even in the rare circumstance where review might be granted, the relief afforded will not provide Petitioners with the redress they seek in this petition.

In addition, even theoretical avenues of domestic redress for the current Petitioners will not remedy the harm they have already experienced in the intervening years where they were denied the protections, services, and sentencing considerations they deserved as a consequence

[57] *Ramón Martínez Villareal v. United States*, Report 108/00, Case 11.753, (2000) ("the State has confirmed . . . that arguments that a condemned prisoner has suffered unduly from delays in his or her case cannot be grounded in U.S. law . . . the Commission finds that any proceedings raising these claims before domestic courts would appear to have no reasonable prospect of success, would not be effective in accordance with general principles of international law, and accordingly need not be exhausted in accordance with Article 37 of the Commission's Regulations.").
[58] *Id.* at para. 65.
[59] *Id.* ("they will not repair the prejudice caused during [petitioner's] trial and sentencing proceedings").
[60] Kevin Boyd, Henry Hill and Damion Todd have exhausted all of their collateral habeas corpus remedies.

of their child status. Ironically, in support of this argument, the United States cites *Velásquez Rodríguez*[61], a case in which the Inter-American Court noted in relation to the exhaustion issue that "senseless formalit[ies]" need not be pursued.[62]

3. The United States: Federal And State Courts

Outside of Michigan, rulings by other state courts and lower federal courts reveal a general legal and political context in which domestic remedies for challenges to JLWOP sentences are unavailable. These courts' decisions demonstrate that there is presently no reasonable prospect of success for Petitioners in any domestic forum:

- *Culpepper v. McDonough* (Florida, 2007)[63]: *Roper* does not extend to a 14-year old child who received a mandatory life without parole sentence, and *Roper* does not create a "new constitutional right" as the *Roper* decision is to be narrowly construed to include capital cases involving death sentences for minors;

- *State v. Bunch* (Ohio, 2008)[64]: Upholding an 89-year sentence of a juvenile, since *Roper* does not support the conclusion that for a juvenile, a term of life in prison without the possibility of parole was unconstitutional;

- *State v. Goins* (Ohio, 2008)[65]: An 84-year sentence of a juvenile did not violate the prohibition of cruel and unusual punishment contained in the Eighth Amendment or in Article 1, Section 9 of the Ohio Constitution;

- *State v. Williams* (South Carolina, 2008):[66] Upholding a life sentence without parole for a juvenile who could not prove that evolving standards of decency precluded his punishment, or that the sentence was disproportionate to the crime;

- *Graham v. State* (Florida, 2008)[67]: Neither state nor federal courts have ever considered the imposition of a life sentence on a juvenile to be unlawful or "unusual," as defined by the Eighth Amendment;

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[61] *Velasquez Rodriguez* case, Judgment of July 29, 1988 (Inter-American Court).
[62] *Ibid.* at para. 68. The court in *Velasquez Rodriguez* noted that "If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable." *Ibid.* at para. 64. It is manifestly unreasonable to require petitioners to remain in custody erroneously and in violation of their rights for an unknown period of time while they pursue remedies foreclosed to them.
[63] 2007 U.S. Dist. LEXIS 50866 (M.D. Fla.) (2007).
[64] 2008 Ohio 2340 (Ohio Ct. App. 2008).
[65] 2008 Ohio 3369 (Ohio Ct. App. 2008).
[66] 2008 S.C. App. LEXIS 172 (Ct. App. S.C. 2008)
[67] 982 So. 2d 43 (Fl. Ct. App. 2008), rehearing denied, *Graham v. State*, 2008 Fla. App. LEXIS 8917 (Fla. Dist. Ct. App. 1st Dist., May 16, 2008).

- *People v. Demirdjian* (California, 2006)[68]: Life sentence was not excessive punishment under the Eighth Amendment and Article 1, Section 17 of the California Constitution, because there is no categorical prohibition against imposition of a life term on juveniles who commit special circumstance murder.

The above case law shows that the relevant facts considered under the "evolving standards of decency" test have not altered since *Roper* and that there is currently no national trend toward abolition of JLWOP sentences. The Government's assertion that the "evolving standards of decency" test and *Roper* preclude Petitioners from being exempted from the exhaustion of domestic remedies requirement is clearly erroneous. Here, Petitioners have been and continue to be unable to attain an effective and appropriate remedy in domestic courts and thus fall within the Art. 31(2)(a) exception to the exhaustion requirement.

II. THIS PETITION IS TIMELY

According to Article 32(1) of the Commission's Rules of Procedure, a petition must ordinarily be filed within six months of "the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies." However, Article 32(2) provides that where "exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case."

The Commission long has recognized that continued violations of rights make petitions

[68] 44 Cal. App. 4th 10 (Cal. Ct. App, 2d App. Dist., Div. Four 2006), hearing denied, *People v. Demirdjian*, 2006 Cal. App. LEXIS 1995 (Cal. App. 2d Dist., Nov. 13, 2006), review denied, *People v. Demirdjian*, 2007 Cal. LEXIS 601 (Cal., Jan. 24, 2007).

timely even beyond six months from the initial violation.[69] In *Christian Daniel Dominguez Domenichetti v. Argentina*, for example, the Commission found that the six-month rule does not apply "where the allegations concern a continuing situation -- where the rights of the victim are allegedly affected on an ongoing basis."[70]

Where, as here, exhaustion of domestic remedies would be futile and/or the violation of rights under the American Declaration is ongoing, Article 32(2) is applicable, and the petition need not comply with the six-month rule for filing of petitions.[71] Rather Petitioners need only bring their Petition "within a reasonable period of time" under the circumstances.[72] The government erroneously asserts that supposed prior awareness by petitioners' counsel, the ACLU, of "the Commission and its work" has a bearing on the timeliness determination under Article 32. Not surprisingly, the government fails to cite any authority for this inapposite proposition.

A. Violation of Petitioners' Rights Are Ongoing and Exacerbated by Cruel or Degrading Treatment Because of Their Age and the Nature of Their Sentences

As described *infra*, in the instant case, Petitioners' rights are violated on a daily basis.[73] Petitioners are challenging a Michigan statutory scheme that (1) continues to confine them in prison, (2) denies them the opportunity for parole, and (3) denies them any opportunity to have

[69] *See, e.g.*, *María Emilia González, et al v. Argentina*, Pet. No. 618/01, Report 15/06 (March 2, 2006) (finding petition timely where proceedings were on-going, but government had failed to clarify facts that would allow effective prosecution of open proceedings); *Sergio Schiavini and Maria Teresa Schnack de Shiavini*, Report 5/02, Petition 12.080 (2002) (noting continuing violation alleged and finding petition timely); *Ricardo Manuel Semoza Di Carlo v. Peru*, Report 84/01, Case 12.078, para. 25 (2001) (finding failure to enforce a final judgment to be an on-going violation and that therefore petition was timely filed); *Eugenio Sandoval v. Argentina*, Report No. 16/06, Petition 619-01, para. 72 (2006) (finding petition timely where petitioner alleged a continuing violation because had not received sufficiently specific information as to whether her father's death was an accident or homicide); *Guatemala Case*, Report 28/98, Case 11.625, para. 29 (1998) ("[g]iven the nature of the claims raised, which concern the ongoing effects of legislation which remains in force, the six-months rule creates no bar to the admissibility of this case under the circumstances.").

[70] Pet. No. 11.819, Rep. No. 51/03 ¶48.

[71] *See* Petitioners' argument concerning futility, *supra*, and Petitioners' argument concerning ongoing violations, *infra*.

[72] IACHR Rules of Procedure Art. 32(2).

[73] Pet. at 46.

their child status at the time they committed their crimes taken into consideration. Moreover, the twin deprivations – of being a child incarcerated in an adult prison serving a non-parolable life sentence– have been exacerbated by the consequential failure to provide rehabilitation opportunities, education, or adequate health services.

One of the most prevalent problems for Petitioners serving life without parole sentences is that they are being denied education and rehabilitative programming opportunities because of their non-parolable status. Due to their age at the time of their arrest the majority of Petitioners had completed only an eighth grade education at the time of their incarceration.[74] Many of the Petitioners also had learning disabilities which interfered with their prior education.[75] Petitioners clearly stand to benefit from additional education (and oftentimes, special education). Yet as described below, Petitioners consistently report that their requests for educational services fall on deaf ears or are explicitly rejected because they are "lifers."

Education is not only important for the Petitioners' cognitive development. A GED (General Educational Development test) is a prerequisite for inmates in Michigan prisons who seek employment or other vocational programming in prison. Yet many petitioners have been denied access to GED educational programs. As a result, Petitioners are unable to earn money through prison employment or gain skills through vocational programming. They become cognitively, financially, educationally, and socially disempowered.

Several anecdotes from Petitioners illustrate the pervasiveness of the denial of essential educational and vocational programs. Ahmad Williams laughed as he told us that he took [Alcoholics and Narcotics Anonymous] class even though he didn't need it, just to have

[74]More than half of the petitioners were arrested prior to completing the ninth grade. Lamarr Haywood, Cedric King, Patrick McLemore, Juan Nunez and Ahmad Williams had not finished eighth grade before they were arrested and sentenced to a life of imprisonment without the possibility of parole.

[75] Matthew Bentley, Kevin Boyd, Cornelius Copeland, John Espie, Lonnell Haywood, Cedric King, Eric Latimer, Patrick McLemore, Tyrone Reyes, Kevin Robinson, Marlon Walker, Oliver Webb and Johnny Williams were either diagnosed with learning disabilities or enrolled in Special Education classes prior to their arrest and subsequent to incarceration.

something to keep his mind active.[76] When asked about the most difficult challenge in prison, Juan says, "Being able to adapt to an element where there are no counselors to guide you or programs in order for you to get therapy, you have to be within 2 years of your release. They don't try to reform us with any help in here."[77]

Petitioner Oliver Webb has consistently been denied educational or rehabilitative services by prison officials at Brooks Correctional Facility. When asked about the counseling and programs he has attended, Petitioner Webb says, "I sent a kite for all of these [rehabilitative programs] and I was told I had too much time for them."[78]

- Petitioners Cedric King, and Eric Latimer were denied access to any G.E.D. classes due to the length of their sentence. They are continually placed at the back of the list behind other inmates who are within 2 years of their first "out date." Chavez Hall, who has been incarcerated for nine years is now taking GED classes, but has not been given the opportunity to take the test, was told "prisons don't like paying for us [LWOP inmates] to take tests."
- Petitioners Matthew Bentley, Maurice Black, Kevin Boyd, Maurice Ferrell, Mark Gonzalez, Lonnell Haywood, Barbara Hernandez, Christopher Hynes, Juan Nunez, Sharon Patterson, Damion Todd, TJ Tremble, Marlon Walker, Oliver Webb, and Ahmad Williams have been able to obtain their GEDs by self-study, but have been denied all further educational opportunities.
- Petitioners Matthew Bentley, Maurice Black, Kevin Boyd, Larketa Collier, Cornelius Copeland, Maurice Ferrell, Mark Gonzalez, Lamar Haywood, Cedric King, Patrick McLemore, Tyrone Reyes, Kevin Robinson, Damion Todd, Marlon Walker, Oliver

[76] From interview with Ahmad Williams in 11/14/2008.
[77] "Life Offense and Conviction Detail Questionnaire" completed by Juan Nunez.
[78] A "kite" is prison slang for any type of written correspondence. Inmates will send "kites" to prison officials to request programs or services. Webb's reference to "too much time" refers to his life without parole sentence.

Webb, Elliott Whittington, Ahmad Williams, Leon Williams, Johnny Williams, have been denied rehabilitative programs since their incarceration because of their LWOP sentence.

In addition to the frustrations they encounter from being deprived of educational and rehabilitative opportunities, many Petitioners have described the general inhumanity they feel because of their life sentences. Petitioner Ahmad Williams describes a common feeling in his words: "We are all just animals in Michigan."[79] Petitioner Matthew Bentley describes his life since his incarceration at 14 in 1997: "Everyday a guy [in prison] feels emasculated; you have to hold onto the little bit of pride that you have. You feel like they try to emasculate you . . . I'm in prison, but I'm still a man."[80]

Moreover, Petitioners report strong racial tensions in the Michigan prisons, among both guards and inmates. Many report being called racial slurs by corrections officers, and feel that inmates are treated differently on the basis of their race. Extreme racial tension divides the inmates from one another, and causes violence and fear within the facilities. Petitioner Kevin Boyd says: "It does not matter whether you like it or not. If you want to survive, you pick a side."[81]

Mental health services to address these juveniles' complex issues are scarce. The Petitioners have gone through adolescence in prison with little, if any, counseling, support or health services. "I feel like the only thing [mental health treatment in] prison is concerned about with a person like myself is whether or not I am going to kill myself, because of the time I have,"

[79] Interview with Ahmad Williams on November 13, 2008.
[80] Interview with Matthew Bentley on November 13, 2008.
[81] Interview with Kevin Boyd on November 14, 2008

says Chavez Hall.[82] Seeking help for psychological issues can also come with severe costs. "Having emotional problems [mental health issues], you get ostracized by staff and inmates alike. I am in a prison within a prison," says Petitioner Barbara Hernandez.

Physical illness and health problems are neglected for long periods of time within the prison system. In general, it was reported that inmates receive no response to medical "kites," and that there is no preventative treatment. Inmates also wait long periods of time for treatment and medication, often to the point where conditions become life threatening. One of many examples is Petitioner Marlon Walker, who came down with the flu. His illness lasted over three weeks, and he lost 15 pounds. He was coughing up fluids and made frequent requests to see a doctor. Still, his request was not honored. He received no medication and no medical attention.[83]

The Commission has indicated that it will be especially receptive to petitions where full exhaustion of theoretical remedies would decrease the Commission's ability to provide redress. In the instant petition, Petitioners' ability to obtain redress for the harm they have suffered decreases in inverse proportion to their time incarcerated. Petitioners by now may be incarcerated beyond the time that would be justified had their juvenile status been considered.[84]

The Commission has also excused petitioners from exhausting domestic remedies when exhaustion would require pursuing lengthy domestic procedures that result in undue delays in the provision of justice at both the domestic and international levels. In *Valbuena v. Colombia*,[85] petitioners were family members of two men who had been abducted by paramilitary forces in Colombia. The government had failed to diligently pursue investigations into the abductions, but claimed that domestic remedies had not been exhausted because an investigation had recently

[82] From 'Life Offense and Conviction Detail Questionnaire' completed by Chavez Hall.
[83] Interview with Marlon Walker on November 13, 2008.
[84] Pet. at 25 "Incarceration for the Shortest Duration".
[85] Carlos Alberto Valbuena and Luis Alfonso Hamburger Diaz Granados v. Colombia, Report 87/06, Petition 668-05 (2006).

been opened by another unit of the prosecutor's office. The court noted that such investigations are time-sensitive, and that the probability of justice being served diminishes over time.[86] It therefore reiterated its position that "the rule on prior exhaustion of domestic remedies must not stop or delay international remedies to help the victims, so that such remedies become useless."[87]

Here, Petitioners' pursuit of theoretical domestic remedies that have an extremely low likelihood of success would only result in prolonging the denial of justice. Moreover, as in *Valbuena,* the utility of potential international remedies that this Commission could provide decreases as time passes. Petitioners continue to be denied essential rehabilitative services, such as mental health care, counseling, and education; in part, because of the combination of their child status and non-parolable life sentences. Petitioners are further harmed the longer they are denied rehabilitative services.[88] With each passing day, Petitioners' potential to start down a path of rehabilitation decreases.[89] Requiring additional years of futile domestic procedures would further harm Petitioners, and limit the Commission's ability to redress the continuing violations of their rights.

III. ALTERNATIVELY, EXHAUSTION OF REMEDIES AND TIMELINESS SHOULD BE JOINED TO THE MERITS

In certain cases, where there is substantial interplay between the effective availability to of domestic remedies and the substantive human rights violations alleged in the merits of a case, the Commission may choose to join the issue of exhaustion with its consideration on the merits. The Commission has found that where "there is a close connection between the question of

[86] *Ibid.* at para. 25 ("The IACHR notes that, as a general rule, a criminal investigation must be conducted promptly, so as to protect the interests of the victims, preserve the evidence and even safeguard the rights of any person regarded as a suspect in the investigation.").
[87] *See also Christian Daniel Dominguez Domenichetti v. Argentina*, Report No. 51/03, Inter-Amer. C.H.R., Petition 11.819 (2003) ("The rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless [alleged] victim ineffective.").
[88] Pet. at 26 "Right to Rehabilitation".
[89] Pet. at 27.

exhaustion of domestic remedies; the timeliness of the petition's submission; and the violations alleged on the merits of the petition pertaining to the non-availability of processes to the victims to assert their claims," it will join its consideration of exhaustion of domestic remedies and the timeliness of the petition to the merits of the case, and determine the petition admissible.[90]

In *John Doe et al. v. Canada*,[91] a petition was brought on behalf of three immigrants, nationals of Malaysia, Pakistan and Albania, claiming that a Canadian immigration policy violated their fair trial rights under the American Declaration. The policy required that refugee claimants arriving in Canada via the U.S. be immediately returned to the U.S. and given a date to return for their asylum interview, without any assurances from the U.S. that they would be able to return to Canada for the interview. The Commission found that the questions of whether Canada provided a domestic forum for immigrants to claim a violation of their fair trial rights and whether there was an adequate process for these individuals to assert their status as refugees were closely bound with the question of whether the men had exhausted remedies. With this set of guiding questions, the Commission admitted the petition and joined the question of exhaustion of remedies to the merits of the complaint.

Likewise, in *Da Silva v. Brazil*,[92] petitioners alleged violations of the American Declaration on behalf of an individual killed by the Brazilian military police. Petitioners alleged that the Brazilian government had failed to conduct an adequate investigation into the death. Because this claim cast into doubt the effectiveness of domestic remedies, the Commission joined exhaustion to the merits, stating:

> [W]hen some exceptions to the rule of non-exhaustion of domestic remedies are evoked, such as the ineffectiveness of such remedies, or the non-existence of due process, it is alleged that the petitioner is not required to pursue such remedies and the State is indirectly implicated in another violation of obligations assumed

[90] *John Doe et al v. Canada*, Pet. No. 554/04, Report No. 121/06, para. 62-63 (2006).
[91] *Id*.
[92] *Diniz Bento Da Silva v. Brazil*, Report 23/02, Case 11.517 (2002).

> under the Convention. In such circumstances, the question of domestic remedies can be equated with the substance of the case. . . . [T]he relationship between the judgment on applicability of the rule and the need for timely international action in the absence of effective domestic remedies may frequently advise consideration of questions regarding that rule together with the substance of the claim, to prevent preliminary objection procedures from delaying the process unnecessarily.[93]

Similarly, in *Roberto Romeno Ramos v. United States*,[94] petitioner was sentenced to death for murder by a court in Texas. Petitioner claimed, in part, that State-appointed counsel for him at the trial and appellate level was inadequate and that he was denied due process. The Commission found the petition admissible because:

> [g]iven the interplay between the effective availability to Mr. Moreno Ramos of domestic procedures and one of the substantive human rights violations alleged in the merits of the case, namely the competence of Mr. Moreno Ramos' trial representation, the Commission considers that the question of the prior exhaustion of these remedies must be taken up with the merits of the case. Accordingly, the Commission will join this aspect of the exhaustion of domestic remedies question to the merits of the case.[95]

Here, Petitioners allege a failure in Michigan's laws and procedures to consider their child status in imposing a mandatory life without possibility of parole sentence in adult prisons.[96] As a result, Petitioners suffer ongoing harm, including lack of rehabilitative assistance and exposure to adult inmates as children, which interferes with effective remedies. Petitioners' rights are violated in part because the process by which they were tried did not sufficiently consider their child status.

Thus, there is substantial interplay between Petitioners' access to due process in domestic

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[93] *Id.* at para. 26, fn. 3 (quoting *Velásquez Rodríguez Case*, Preliminary Objections, IACtHR, Judgment of June 26, 1987, paras. 91, 93); *See also 120 Cuban Nationals and 8 Haitian Nationals Detained in the Bahamas*, Report 6/02, Petition 12.071 (2002) (joining exhaustion with merits where question of no process for immigrants to assert claims); *Rafael Ferrer-Mazorra et al. v. United States*, Report 51/01, Case 9903 (joining where claim that review plan did not constitute adequate mechanism for reviewing detentions)..

[94] *Roberto Romeno Ramos v. United States*, Report No. 61/03, Petition P4446/02 (2003).

[95] *Ibid*. at para. 63. *See also Prinz v. Austria*, (2001) 31 EHRR 12, para. 29-30 (joining exhaustion of remedies question to merits where petitioner claimed failure to be present at his hearing violated his rights and government claimed non-exhaustion of remedies because petitioner could have requested to be present.)

[96] Pet. at 9-11.

forums, and the violations of their substantive rights, especially since they are not provided the opportunity to have their child status taken into account. Thus, the Commission may, if it so chooses, join the issues of exhaustion of remedies and timeliness to its consideration of the merits of the case.

IV. CONCLUSION

In its review of the United States report to the U.N. Human Rights Committee on U.S. compliance with the International Covenant on Civil and Political Rights (ICCPR) (*see* Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, 2006), the Committee expressed concern that 2,225 youth offenders were currently serving life without parole sentences. Michigan now leads the states in t he number of children serving this sentence. In its Concluding Observations, the committee noted that while the U.S. reservation to the ICCPR asserts only the right to "treat juveniles as adults in exceptional circumstances," it remained concerned by information that the "treatment of children as adults I not only applied in exceptional circumstances." As detailed in the Petition and observations in response to the State's reply, this sentence is being regularly, routinely and mandatorily applied in Michigan.

The U.N. Committee Against Torture expressed concern about "the large number of children sentenced to life imprisonment" in the United States in its Conclusions and Recommendations of the Committee Against Torture, United States of America U.N. Doc. CAT/C/USA/CO/2, ¶34 (2006).

The Human Rights Committee stated that in its view "sentencing children to life sentence without parole is of itself not in compliance with article 24(1) of the Covenant." The

Committee's instructions to the United States required that the United States "ensure that no such child offender is sentenced to life imprisonment without parole, and should adopt all appropriate measures to review the situation of persons already serving such sentence." (HRC Concluding Observations ¶34).

The Committee Against Torture similarly instructed the U.S. to "address the question of sentences of life imprisonment of children, as these could constitute cruel, inhuman or degrading treatment or punishment." (CAT Conclusions and Recommendations ¶34).

The United Nations General Assembly recognized the importance of eliminating life without parole sentences for juveniles in ensuring a child protection perspective across the human rights agenda and called upon all States to abolish life imprisonment without possibility of release for those below the age of 18 years at the time of the commission of the offense. (G.A. Res., ¶31, U.N. Doc. A/C.3/61/L.6/Rev.1 (Nov. 17, 2006)). This issue also played prominently in advocates submissions on U.S. compliance with the CERD treaty. The resolution passed by 185 to 1 with the only opposing vote cast by the United States.[97]

In February of 2008, the United States Human Rights Network Working Group on Juvenile Justice published a report titled, "Children in Conflict with the Law: Juvenile Justice & The U.S. Failure to Comply with Obligations Under the Convention for the Elimination of All Forms of Racial Discrimination" (CERD).

The CERD committee in its "Concluding Observations" found the current practice of JLWOP as it is practiced in the United States to be a clear violation of the Convention on the

[97] General Assembly Resolution 61/146, "Promotion and protection of the rights of children," Para. 31(a), (19 Dec. 2006).

Elimination of All Forms of Racial Discrimination.[98] Echoing the concerns of previous human rights bodies, the Committee said:

> "In light of the disproportionate imposition of life imprisonment without parole on young offenders – including children – belonging to racial, ethnic and national minorities, the Committee considers that the persistence of such sentencing is incompatible with article 5 (a) of the Convention. The Committee therefore recommends that the State party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences."[99]

This finding is equally applicable to Petitioners, 72% of whom are children of color reflective of the ratio of children of color serving this sentence in Michigan.

The practice of sentencing children to die in prison is considered unacceptable across the world. The international community has reached a consensus (as the previous brief has noted). Nevertheless, the United States continues the practice and human rights committees and assemblies continue to decry the practice and call for its end. The Inter American Commission should call for the same thing.

[98] CERD Committee Report on the U.S. CERD/C/USA/CO/6; *See also* USHRN Working Group on Juvenile Justice, "Children in Conflict with the Law: Juvenile Justice & The U.S. Failure to Comply with Obligations Under the Convention for the Elimination of All Forms of Racial Discrimination," (Feb, 2008); Human Rights Watch, "The Rest of their Lives: Life Without Parole for Youth Offenders in the United States in 2008." (May 2008), at 7, http://www.hrw.org/backgrounder/2008/us1005/us1005execsum.pdf (Last visited on, Nov. 11, 2008).
[99] *Id.*, at para 21.