Chapter 5
United States

The Surprising Role of the CRC in a Non-state-Party

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'[W]hile one should always be sceptical about the law's pretensions, one should never be cynical about the law's possibilities',
—Albie Sachs (2009)

Abstract The unlikely element of success in the US campaigns challenging the juvenile death penalty and extreme sentencing of children is the express recognition, by the US Supreme Court in two germinal cases, of the standards of the Convention on the Rights of the Child (CRC), the role of international human rights law, and the practices of other nations. Strategies to abolish the juvenile death penalty in the US included coalition-building, education, legislation and litigation. This campaign culminated in the 2005 *Roper v. Simmons* decision, which held that the execution of children (persons under the age of 18 years at the time of the crime) violated the Eighth Amendment prohibition against cruel and unusual punishment. Citing article 37 of the CRC, the *Roper* opinion included an extraordinary section elucidating the US global isolation in implementing the juvenile death penalty. Subsequent Supreme Court cases address the extreme sentencing of juvenile offenders to life without the possibility of parole (JLWOP). In *Graham v. Florida* (2010), the Court concluded that sentencing a child to JLWOP for a non-homicide felony is unconstitutional and reaffirmed the role of, and global support for, the CRC. *Miller v. Alabama* (2012) held that mandatory JLWOP sentences, which do not permit consideration of the age and circumstances of child offenders, are also unconstitutional.

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1 Juvenile Justice Developments, the CRC and the USA

Undreamed-of creativity, imagination and inspired implementation have been unleashed by the CRC[1] across the globe since its adoption 25 years ago. In unpredictable ways, this dynamism has sharply revealed the ethical paradoxes, social inequalities, conflicts and rich intellectual enterprise embedded in the transformative possibilities of juvenile justice. By engaging the anguishing dilemmas of crime and punishment, youthfulness and harm, accountability and consequences, and by insisting upon meaningful second chances for the marginalised and caged children in conflict with the law, the CRC and children's international human rights law have not only reignited the promise contained in the century-old invention of the juvenile court but transcended it. Now the possibilities of realising these rights by utilising the tools of litigation are blossoming in unexpected soil—including the recalcitrant United States.

The invention in 1899 of a distinctive court for children, a legal polity described as 'one of the most important social inventions of the modern period' (Rosenheim et al. 2002), spread like a prairie fire across the US and throughout the world. It involved a radical insistence: children should neither be crushed for their transgressions nor brutalised for a lack of access and opportunity; society, in sum, should not give up on its children.

The birth of the juvenile court was part and parcel of the ferment of urban, industrialising, immigrant America at the turn of the nineteenth century, and its midwives were the militant, determined women of Hull House. The terrain of these social reformers included four decades of campaigns for compulsory education as well as the abolition of child labour, the removal of children from adult jails and poorhouses, neighbourhood democracy, women's rights, the expansion of the public space, and opposition to war. Jane Addams, Julia Lathrop and Lucy Flowers, living in an impoverished immigrant neighbourhood in Chicago in 1899, invented both the world's first juvenile court and, at the height of World War I, during the International Congress of Women in The Hague, called for an International Court of Justice that would create a code of international law. Their vision entailed local and international courthouses—linked at conception. These were citadels where justice for the child, and peace rather than warfare, would be argued and might be done.

The juvenile court, laced with tension and paradox, emerged as part of this philosophical mosaic. Ninety years later, the CRC was adopted by the United Nations General Assembly, becoming the most rapidly ratified treaty in history (Todres et al. 2006; Cohen and Davidson 1990; Cohen 1998). It was the first treaty at the end of the Cold War, and thus the first to re-integrate civil and political rights with social and economic rights in an era of global technology and massive

[1] United Nations Office of the High Commissioner for Human Rights. Convention on the Rights of the Child. http://www.ohchr.org/en/professionalinterest/pages/crc.aspx. Accessed 27 January 2014.

inequities. Twenty-five years after its adoption, the values and standards of children's human rights, as developed by the CRC, its ambitious Committee and three Optional Protocols, have encircled the world, setting down roots in unlikely soil, rock and sand, and adapting to climates, faiths, cultures and a vast range of legal traditions.

Children may not be hit in schools or at home with impunity, girls may resist early marriage and complete secondary education, children may not be recruited or deployed as soldiers in armed conflict, newborns may survive childbirth free of HIV-AIDs, female children may live their girlhoods free of genital cutting and have rights as domestic workers, and all may live the ecstasy and anguish of adolescence without fear of the death penalty.

The rights of children to be heard, to participation, to a name and nationality, to connections with family, to freedom of association, speech, thought, conscience and religion, and their right to privacy—all are secured by law.

The continuing failure of US executive and legislative bodies to ratify the CRC[2] cannot be understood without reference to the long, contested, sordid, and continuing struggle over racism. In fact, the domestic struggle over ratification of treaties was highlighted at the founding of the United Nations and the adoption of the Universal Declaration of Rights.[3] Justice for children, the recognition of children as persons, with both rights and special protection needs, has historically and intrinsically been bound to the abolition of slavery and to challenging white supremacy in the US.

Twice in the past century, the radical reframing of justice for the child closely shadowed the forward lurch of social struggle by and legal emancipation of African Americans. It was in the Reconstruction era immediately following the Emancipation, and again in the civil rights crucible of the 1960s, that US courts first addressed and then re-visited the issue of children's rights. For if an African American is a person under the Fourteenth Amendment to the US Constitution, what about immigrants, what about women, and what about the child?

At the founding of the juvenile court, property relationships in the ownership of enslaved human beings (backed by culture, tradition, religion, law, habit and practice so as to seem 'natural') were being eroded even though children had been the exclusive legal property of adult males for centuries—subject to their physical terror, torture, exploitation and sale. Agitation about the rights of incarcerated children gained momentum in the Reconstruction years, a period in which legal arguments and court opinions in Illinois closely linked abolition and anti-slavery

[2] In 1995 President Clinton signed the CRC on the occasion of the death of James Grant, the director of UNICEF, but never referred the treaty to the US Senate for ratification. Subsequent US Presidents have followed suit, and the CRC has never been debated or taken up by the US Senate. Numerous US legal entities, including the American Bar Association, have adopted resolutions urging US ratification. Fierce opposition to the CRC, citing phantom fears and characterizations of the Convention as diminishing the role of parents and the family, continue to hold ratification in limbo. US Department of State. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. http://www.state.gov/j/drl/rls/c35136.htm. Accessed 27 Jan 2014. See also Cohen and Bitensky (1996).

[3] See, for example, Anderson (2003).

concepts with a lively debate on the nature of childhood. Justice for the child was rekindled in the heat of the Black Freedom Movement, when, in 1967, the US Supreme Court [*In re Gault*][4] first acknowledged children as constitutional persons and rights-bearers.

However, since the CRC came into force across the world, justice for the US child has become thoroughly racialised, in a new form of Jim Crow enslavement (W. Haywood Burns Institute 2008; The Annie E. Casey Foundation 2008a, b). Both national and state-wide data confirm that the children arrested, charged, detained, tried, transferred to adult criminal court, convicted and then incarcerated are disproportionately young people of colour: African Americans and Latinos (W. Haywood Burns Institute 2014; Annie E. Casey Foundation 2013a, b).[5] Youth of colour are arrested in and expelled from schools, seized for gang 'affiliation', stopped and frisked, disproportionately charged with drug possession or sale, and live in neighbourhoods isolated from the dominant community of resources, opportunity and wealth (The Annie E. Casey Foundation 2013b). Meanwhile white children have largely disappeared from the public juvenile justice system, directed instead to private systems of hospitalisation, mental health and drug treatment institutions, or offered restitution remedies such as financial compensation and public service rather than court prosecution, stigmatization, incarceration, punishment and pain.

Today it is global human rights law that has created a unique, comprehensive body of children's law, with powerful rights to be free from discrimination; now, sadly and ironically, international law has codified and is developing children's rights with the formal, tumultuous and elastic participation of virtually every nation in the world *except* the United States.

President Clinton signed the CRC in 1995, but the US Senate has failed even to debate or vote to ratify it. However, in 2002, during the Bush administration, the US ratified the two optional protocols to the CRC, the Optional Protocol on the Involvement of Children in Armed Conflict, and the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (American Civil Liberties Union 2014). These Optional Protocols provided (specifically for the US) that they might be ratified without ratification of the underlying treaty. Subsequently, the US has periodically reported to the Committee on the Rights of the Child on progress toward implementing both Protocols, sent substantial delegations to Geneva to appear before the Committee, and responded to its concluding observations. As with other treaties, domestic and international non-governmental organisations have submitted shadow reports to the CRC Committee critical of the gaps in US compliance. This relatively uncontroversial development merely highlights the unique nature of America's failure to ratify the CRC itself.

Much has been written about that failure. In part, within the US the CRC led to a highly vocal, although specifically restricted, attack on the Convention as a

[4] *In re Gault,* 387 US 1 (1967).

[5] See W. Haywood Burns Institute (2014) for an extraordinary interactive research tool that offers state-by-state statistics on racial and ethnic disparities in US juvenile justice. See also National Council on Crime and Delinquency (2007).

violation of parental and religious rights.[6] But despite substantial US participation in their drafting (Van Bueren 1998),[7] the US's continuing hostility to ratifying other treaties such as the Rome Treaty on the International Criminal Court, the Convention on the Rights of Persons with Disability, and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), illuminates a longstanding antagonism to treaties, which are perceived as infringements on US sovereignty that present Constitutional obstacles to matters of federalism, states' rights, and issues of jurisdiction. At the most extreme, there are assertions that the CRC provisions would supersede all existing state and federal laws.

These opposition claims are not accurate. All human rights treaties ratified by the US include a 'non-self-executing' clause; that is, the treaty is not binding without specific state and federal enabling legislation. In addition, US Constitutional law states that no branch of the government can have powers conferred on it by treaty that have not been conferred by the Constitution. While it is accurate to say that significant areas of family law, education law, child protection and juvenile justice law are regulated by state law, CRC ratification would not expand federal jurisdiction. Typically, US treaty ratifications contain a set of reservations, understandings and declarations (RUDs) that include a 'federalism' clause leaving treaty implementation largely to the states.[8]

Despite the US's formal isolation on the issue of ratification, the CRC and its associated protocols and case law have flourished beyond what their drafters anticipated. The CRC embodies both the radical innovations of the juvenile-court founders and the child-rights revolution of the 1960s; added to this is the fresh notion of the full human rights of children and adolescents.

2 The *Roper v. Simmons* Judgment

Litigation addressing the human rights of children, based on the standards and values of the CRC, has accelerated across Europe, Latin American, Africa and India. Yet who would have imagined litigation involving the CRC in the United

[6] See, for example, ParentalRights.org, which singles out the CRC's disapproval of parental corporal punishment and the right of the child under the CRC to choose and practice a religion as examples that diminish 'parental rights'. ParentalRights.org. Twenty things you need to know about the United Nations Convention on the Rights of the Child. http://www.parentalrights.org/index.asp?Type=B_BASIC&SEC={550447B1-E2C1-4B55-87F1-610A9E601E45}&DE=Type=B_BASIC&SEC={550447B1-E2C1-4B55-87F1-610A9E601E45}&DE=. Accessed 27 January 2014.

[7] See also Office of the United Nations High Commissioner for Human Rights (2007). Legislative history of the Convention on the Rights of the Child, Volume 1. http://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf. Accessed 27 January 2014; Office of the United Nations High Commissioner for Human Rights (2007). Legislative history of the Convention on the Rights of the Child, Volume 2. http://www.ohchr.org/Documents/Publications/LegislativeHistorycrc2en.pdf. Accessed 27 January 2014.

[8] See a careful discussion of these issues by the US Child Rights Campaign. Questions & answers about the CRC. http://www.childrightscampaign.org/the-facts/questions-a-answers-about-the-crc. Accessed 27 January 2014.

States—one of only two nations *not* to have ratified the treaty? The story we know all too well centres on the US's global isolation in the matter of children's human rights. What is astonishing, however, are the innovative, grudging, messy and determined ways in which this aspect of US exceptionalism is cracking open, transforming itself, putting down fresh roots, and growing tendrils.

No-one could have predicted that the US Supreme Court would first write five lyrical pages about international human rights law in a case about children's rights.[9] None would have imagined that key breakthrough-decisions about children's constitutional rights would emerge in the cases of adolescents accused and convicted of murder. Few recognised that an unfunded and ragtag network of human rights advocates and youth justice litigators would abolish the juvenile death penalty in the US, move on to attack extreme sentencing of youth, and—in the process—begin to shake the cornerstones of such settled law (and notable violations of human rights law) as felony murder, transfer or waiver of children to adult criminal courts, mandatory sentencing of youth, the incarceration of children in adult prisons, and imprisonment until death without meaningful, periodic review.

That story could begin with Paula Cooper. In ninth grade at the age of fifteen, Paula led three other girls from Gary, Indiana's Lew Wallace High School into the home of a 78-year-old grandmother and bible teacher, Ruth Pelke, intending to rob an empty house. Instead, when Mrs Pelke invited them into her home, the girls hit her over the head and stabbed her dozens of times with a 12-inch knife. They stole about $10 and drove away in her car.

Although the three other girls received sentences ranging from 25 to 60 years in prison, Paula Cooper was transferred to adult criminal court, pled guilty in 1986 and was sentenced to death in Indiana's electric chair. She became the only female child on death row in the US. An international campaign to save her life garnered support in Italy and across Europe, and Pope John Paul II appealed for clemency.

In 1989, after the US Supreme Court concluded in *Thompson v. Oklahoma*[10] that executing a person under the age of 16 was unconstitutional, the Indiana Supreme Court ruled that Paula's death sentence was unconstitutional since she was 15 at the time of the crime. Her sentence was commuted to 60 years, the highest sentence then available in Indiana. It should be noted that this commutation of sentence took place in the same year the United Nations adopted the CRC.

Ten years after Cooper's death sentence, her attorney Professor Victor Streib (an academic and attorney who, amongst other things, litigated juvenile death-penalty cases in a lifelong pursuit to abolish the juvenile death penalty) and I co-chaired a workshop at the Conference on Wrongful Conviction and the Death Penalty at Northwestern University School of Law. Its convener, Professor

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[9] The US Supreme Court referred to the European Court of Human Rights decision of *Dudgeon v. United Kingdom* in *Lawrence v. Texas,* 539 US 558, 573 (2003). But it is in *Roper* v. *Simmons* that the Court first develops an argument about the relevance of international law, standards and practice to the interpretation of US Constitutional law. *Roper v. Simmons*, 543 US 551 (2005).

[10] *Thompson v. Oklahoma,* 487 U.S. 815 (1988).

Lawrence Marshall, agreed to add a panel on children and the death penalty, naming it 'Another Kind of Innocence'.

Unexpectedly, 60 people attended the workshop, and an informal network to abolish the juvenile death penalty in the US was born when, months later, the Children and Family Justice Center at Northwestern University School of Law called a small invitation-only meeting. It took this tiny volunteer network[11] 6 years to organise a broad coalition, train lawyers to litigate appeals of children's death sentences, and contest every juvenile execution date with international clemency campaigns, promote legislative abolition in at least five additional states, and conduct an educational campaign about why the juvenile death penalty was barbaric, unconstitutional and a violation of human rights. The network was scrambling to prepare for a Supreme Court litigation challenge. It came—as it often does—before the network was fully prepared, in the form of *Roper v. Simmons*.[12]

Christopher Simmons was 17 years old when he and a friend broke into the home of Shirley Crook in 1983. The boys beat her, tied her with electrical cords and duct tape, put her in the trunk of a car, and threw her into the Meramec River in St. Louis County, Missouri, where she drowned. The lads bragged about their adventure the next day in school. Simmons, violently abused by his stepfather as a child, had no previous criminal record. At his trial in adult criminal court (Grisso and Schwartz 2000), his defence lawyer presented no information about his background, immaturity, or the circumstances of the crime, and the jury and judge considered his youthfulness an aggravating factor, not a mitigating one.

Because there was a story to tell which was broader than the necessarily focused, Eighth Amendment legal argument of the *Roper v. Simmons* brief, the network created an *amicus* brief strategy as a part of the litigation strategy. The team solicited briefs as *Amicus Curiae* from various coalition partners.[13] For example, there was an *amicus* brief about why children are distinct from adults, one signed by an array of educational, child welfare, health-care and family-advocacy organisations. There was, likewise, an *amicus* by the American Medical Association and the American Psychological Association elaborating on the

[11] The network included the (then) ABA Juvenile Defender Center led by Patricia Puritz; the Children and Family Justice Center; Steven Drizin; Stephen Harper; Anne James; Victor Streib; Randolph Stone; Connie de la Vega; Walter Long; the National Coalition to Abolish the Death Penalty; and a slew of remarkable *pro bono* attorneys.

[12] *Roper v. Simmons*, 543 U.S. 551 (2005).

[13] See *amici curiae* in support of respondent in *Roper v. Simmons*: Juvenile Law Center, Children and Family Justice Center, Center on Children and Families, Child Welfare League of America, Children's Defense Fund, Children's Law Center of Los Angeles, National Association of Counsel for Children et al., http://www.sentencingproject.org/doc/publications/sl_amicus-jdp.pdf; American Medical Association, http://www.ama-assn.org/ama1/pub/upload/mm/395/roper-v-simmons.pdf; American Psychological Association, http://www.apa.org/about/offices/ogc/amicus/roper.pdf; The Bar of England and Wales, http://www.njdc.info/njdc_members/images/pdfs/roper_amicus.pdf; Jimmy Carter, Mikhail Gorbachev, Oscar Arias, Lech Walesa, Adolfo Perez Esquivel, Dalai Lama et al., http://www.cartercenter.org/documents/nondatabase/nobel%20amicus%20brief%20on%20simmons.pdf; Murder Victims' Families for Reconciliation, http://www.njdc.info/pdf/death_penalty/mvfr.pdf. Accessed 27 January 2014.

research on behavioural and developmental differences between children and adults. There was an *amicus* brief by the Bar Associations of England and Wales, and another by Nobel Peace Prize winners, both pointing to international and human rights standards; and there was a powerful *amicus* brief by murder-victim families against the death penalty.

In the landmark 2005 *Roper v. Simmon*s decision abolishing the death penalty as a criminal sentence for juvenile offenders, Justice Kennedy for the 5–4 US Supreme Court majority[14] wrestled with the question of when and whether the execution of juvenile offenders amounted to cruel and unusual punishment pursuant to the Eighth Amendment to the US Constitution.[15] (The court had previously held that this Amendment prohibited the execution of the mentally retarded in *Atkins v. Virginia.*[16]).

Using an analysis in *Roper* which recognised that children (youth under the age of 18) are different from adults, the court, citing current behavioural research, identified three areas that distinguished youth from adults:

- the inability to anticipate future consequences;
- the tendency to succumb to peer pressure; and
- the future possibility of being able to reflect on the consequences of their actions.

This common knowledge of adolescent behaviour, reinforced by contemporary behavioural and developmental research, led the *Roper* court to conclude that children are 'categorically less culpable'[17] than adults, even when their crimes were of the most serious kind. Because of this lesser culpability, and because the child has the possibility of developing into a moral person, 'the state cannot extinguish his life and his potential to attain a mature understanding of his humanity'[18]—and because 30 states had rejected that sentence for children—the death penalty for youth amounted to cruel and unusual punishment, in violation of the Eighth Amendment.

As a consequence of the *Roper* decision, 72 juvenile offenders (the majority of whom were African American and Latino men) were removed from death row and their sentences converted into life in prison without the possibility of parole.

Most astoundingly perhaps, the majority of *Roper* justices discussed the US's international isolation on the question of the juvenile death penalty, citing article

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[14] Justice Kennedy delivered the opinion, in which Justices Stevens, Souter, Ginsburg and Breyer joined. Justice Stevens filed a concurring opinion in which Justice Ginsburg joined. Justice O'Conner filed a dissenting opinion. Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist and Justice Thomas joined.

[15] 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' US Constitution. Amendment 8.

[16] *Atkins v. Virginia,* 536 US 304 (2002).

[17] *Roper v. Simmons*, 543 US 551, 563 (2005).

[18] *Roper v. Simmons*, 543 US 551, 570 (2005).

37 of the CRC prohibiting the execution of children. The judgment noted that every country in the world, save the US and Somalia, had ratified the CRC and that no ratifying country entered a reservation to article 37's prohibition of the execution of juvenile offenders.[19]

Next, *Roper* cited the only seven countries other than the US that had executed juvenile offenders since 1990, noting that each had since then either abolished capital punishment for juveniles or made public disavowals of the practice: 'In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.'[20]

The *Roper* judgment discussed the Anglo-Saxon origins of the Eighth Amendment language and theory in the laws of the United Kingdom, and the historic ties between the US and the UK, noting that the UK had abolished the juvenile death penalty decades before international covenants prohibited it. 'In the 56 years that have passed since the United Kingdom abolished the juvenile death penalty,' the Court observed, 'the weight of authority against it there, and in the international community, has become well established.'[21] It added: 'It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.'[22] The Court wrote: 'The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusion.'[23]

Forcefully and lyrically, *Roper* concludes: 'It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.'[24]

The opinion of the world community *does* provide respected and significant confirmation; acknowledgement of the express affirmation of certain fundamental rights by other nations and peoples *simply underscores* the centrality of those same rights within our own heritage of freedom. This germinal breakthrough in the integration of international law with US Constitutional law and criminal practice (and with our heritage of freedom), both theoretical and concrete, is a continuing accomplishment of children's rights lawyers. Its consequences and possibilities still lie before us.

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[19] The Court also noted parallel prohibitions in other significant international covenants, citing the International Convention on Civil and Political Rights (ratified by the US), the American Convention on Human Rights (not ratified by the US), and the African Charter on the Rights and Welfare of the Child.

[20] *Roper v. Simmons,* 543 US 551, 573 (2005).

[21] *Roper v. Simmons,* 543 US 551, 574 (2005).

[22] *Roper v. Simmons,* 543 US 551, 574(2005).

[23] *Roper v. Simmons,* 543 US 551, 574 (2005).

[24] *Roper v. Simmons,* 543 US 551, 575 (2005).

3 Life Sentence Without Parole

Within months after *Roper,* the Illinois Coalition for the Fair Sentencing of Children was formed[25] and Michigan published its first state-wide report (American Civil Liberties Union 2006) on the sentence of juvenile life without possibility of parole (JLWOP). Human Rights Watch and Amnesty International, in a rare display of unity, release a joint report on the 2,500 people in jail in the US who were sentenced to JLWOP for crimes committed as children (Amnesty International and Human Rights Watch 2005). The next campaign was born.

Again virtually alone in the world, the US imprisoned over 2,500 child offenders who are *sentenced to die in prison*. No matter whom they became in prison, no matter what the family-member victims of the crime want, no matter that the prisoner now has matured and represents no threat to public safety, these juvenile offenders (now natural life prisoners) may not ever even *argue* for their release.

Again, international law prohibits this sentence for child offenders (art. 37 of the CRC). Again, human rights standards provide for meaningful, periodic reviews of youth sentences. Again, the proportion of youth of colour sentenced to JLWOP sentences is blatantly, racially and ethnically disproportionate. The national Campaign for the Fair Sentencing of Youth[26] was established to focus and coordinate state and national efforts to challenge this unconstitutional human-rights violation. Bryan Stevenson and the Equal Justice Initiative[27] began to campaign and litigate on behalf of very young children (12–15 years of age) sentenced to JLWOP.

Two years after the *Roper* judgment, the UN Committee on the Rights of the Child published its General Comment No. 10: Children's Rights in Juvenile Justice (2007).[28] The objectives of the General Comment are to encourage States parties to develop and implement a comprehensive juvenile justice policy; to provide guidance and recommendations for implementing all the provisions in articles 37 and 40 of the CRC; and to promote the integration in national policy of international standards. In addition to clarifying that the core juvenile justice international law and standards are that incarceration should be *only* a 'last resort' and 'for the shortest appropriate period of time', the General Comment discusses the reasons for the prohibition of JLWOP sentences for crimes committed by persons under 18 years of age.

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[25] The Illinois Campaign began interviewing the (then) 103 JLWOP prisoners in its state, and would write a report: The Illinois Coalition for the Fair Sentencing of Children (2008). Categorically less culpable. http://webcast-law.uchicago.edu/pdfs/00544_Juvenile_Justice_Book_3_10.pdf. Accessed 27 January 2014. See also reports on California, Connecticut, Florida, Massachusetts, Michigan, Mississippi, and Washington: The Campaign for the Fair Sentencing of Youth. State specific reports. http://fairsentencingofyouth.org/state-specific-reports-2. Accessed 27 January 2014.

[26] The Campaign for the Fair Sentencing of Youth. http://fairsentencingofyouth.org. Accessed 27 January 2014.

[27] Equal Justice Initiative. http://www.eji.org. Accessed 27 January 2014.

[28] Committee on the Rights of the Child (2007). Children's rights in juvenile justice. http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf. Accessed 27 January 2014.

One of the challenges of working in a country that has more than 2,500 prisoners serving sentences of juvenile life without parole is to determine what constitutes the abolition of JLWOP. Most would agree that 60, 70 or 80 years-to-life sentences are not acceptable for a child and amount to "virtual" life without the possibility of parole. What, then, are the key elements that human rights' standards offer in the way of guidelines and clarity?

First, General Comment No. 10 states: 'The Committee wishes to emphasize that the reaction to an offense should always be proportional not only to the circumstances and the gravity of the offense, but also to the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long-term needs of the society… In the case of children, the needs of public safety and sanctions must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration.'[29]

Second, General Comment No. 10 directly addresses 'No Life imprisonment without parole', elaborating on the brief prohibition in article 37 of the CRC: 'For all sentences imposed on children the possibility of release should be realistic and regularly considered.' Further, life sentences for children are not permitted. This indicates that sentences at or beyond life expectancy are not acceptable, and that regular review (i.e. more than once or twice, and beginning within a reasonable period after incarceration) is required. The Comment points out that the child's right to 'periodic review' is provided by article 25 of the CRC, which addresses the rights of children who are placed for the purpose of care, protection or treatment. Further, those States parties that do sentence children to life imprisonment with the possibility of release must comply with the provisions of article 40(1) of the CRC, which requires that the imprisoned child must 'receive education, treatment and care aiming at his/her release, reintegration and ability to assume a constructive role in society'.

Thus, in 2006 I found myself driving to Pontiac prison to interview one of the 103 JLWOP prisoners, Mark Clements. The thin legal file explained little about the crime or the prisoner, and what it said was disquieting. Mr Clements, then incarcerated for 26 years and described as retarded, was convicted of quadruple homicides at the age of 16 and given a mandatory sentence of JLWOP.

We entered the attorney/client visiting room fully unprepared for Mark, an all-too typical underestimation of the fierce determination, self-education and humanity of prisoners. He had a stack of papers and files that rose above his head. Mark knew everything about the Illinois Coalition and its goals, ran a weekly radio show in the prison, and was deeply knowledgeable about his case and his circumstances. He was an astonishing advocate for his own freedom. There were no witnesses and no material evidence against him—just his own 16-year-old confession, extracted under police interrogation and torture during the scandalous Area Two Chicago police torture cases, in which at least 120 African American men were tortured by police over a twenty-year period on Chicago's Southside (Taylor 2012).

[29] Committee on the Rights of the Child (2007). Children's rights in juvenile justice, p. 20. http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf. Accessed 27 January 2014.

This 16-year-old was convicted of starting an arson fire in which four people died. No-one else was charged in the crime, and there was no forensic or testimonial evidence, except his own confession. Mark was automatically tried as an adult in criminal court. He repudiated his confession at his trial, but was sentenced to four life sentences plus 30 years in the state penitentiary.

Driving back to our office at record speed, we called an attorney at the law firm of Skadden Arps, Tim Nelson, who agreed to take Mark's case; he worked with Mark and undertook an extensive (and costly) investigation of the 26-year-old crime. Ultimately, because the Cook County state's attorneys' office was unwilling to dismiss all the charges against him, and despite the lack of any credible evidence, Mark accepted a plea to a single homicide in exchange for time served. He stipulated to the facts that were in evidence, admitting to no crime in the plea agreement.

Mark Clements was released from prison on August 18, 2009, an example of how children incarcerated with no hope of freedom do grow, mature and come into their own full humanity and grace. His case raises urgent Constitutional and human rights issues of competent counsel, trying children in adult criminal courts, police interrogation of youth and false confessions (Drizin and Leo 2004; Tepfer et al. 2010), and mandatory sentencing of children, the latter to be taken up by the U.S Supreme Court after his release.

Just months after Mark was freed, two JLWOP cases were granted *certiorari* by the US Supreme Court, the first such JLWOP-sentenced cases to be reviewed by the US's highest court. Both concerned *non-homicide* juvenile offenders in Florida.[30] *Graham v. Florida*[31] involved a 16-year-old convicted of armed burglary who had accepted a plea agreement with probation. When Terrance Graham subsequently violated his probation by committing another armed burglary, the trial judge revoked his probation and sentenced him to life without parole. In *Graham*, the US Supreme Court again clarified, strengthened and expanded the boundaries of the Eighth Amendment regarding the sentencing of children, this time in non-homicide cases (Levick et al. 2012). Again, the Court reaffirmed the link between the CRC and international law and the Eight Amendment: 'An offender's age is relevant to the Eighth Amendment and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.'

The Supreme Court, moreover, goes deeply into the nature of childhood:

> The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential… life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope… maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.[32]

[30] The second Florida case granted *certiorari* was subsequently dismissed on procedural grounds. *Sullivan v. Florida*, No. 08-7621, slip opinion (US 2010). http://www.supremecourt.gov/opinions/09pdf/08-7621.pdf. Accessed 27 January 2014.

[31] *Graham v. Florida,* No. 08-7412, slip opinion at p. 22 (US 2010). http://www.supremecourt.gov/opinions/09pdf/08-7412modified.pdf. Accessed 27 January 2014.

[32] *Graham v. Florida*, No. 08-7412, slip opinion at p. 28 (US 2010). http://www.supremecourt.gov/opinions/09pdf/08-7412modified.pdf. Accessed 27 January 2014.

Age is relevant. In the US this raises vital questions about the legality of prosecutorial waiver of children to adult criminal courts, mandatory (statutory) waiver or transfer, and mandatory sentencing (the latter becomes clear in the third child criminal sentencing case decided in this decade, *Miller v. Alabama*, discussed below).

The *Graham* court concluded that neither a judge nor jury can make final judgment *at the time of sentencing* about what kind of a person this youth will become as an adult. '[F]rom a moral standpoint,' the Court observed, 'it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.' Since maturation could take some years of reflection and character development, it is necessary to have meaningful sentencing reviews in order to assess what kind of person that child offender has become.

In *Graham,* the Kennedy majority discussed the differences between those who *themselves* kill another and all others who may also be charged (in the US) with felony murder. In fact, *Graham* shifts the line by describing youth who are convicted of felony murder as having a 'twice-diminished culpability' due to their age as children and lesser role as non-shooters (Keller 2012). This freshly-opened window on the constitutionality of felony murder sentences for children—a murder crime almost unique to the US—could have an enormous impact on the lengthy prison terms of those convicted in the US. For example, approximately one-quarter of the 2,500 youth serving JLWOP sentences were convicted of felony murder.

Significantly, *Graham* forcefully reiterates the role of international law and standards articulated in the *Roper* judgment: 'The United States adheres to a sentencing practice rejected the world over.' While the judgments of other nations and international opinion are neither controlling nor dispositive to the meaning of the Eighth Amendment,

> the climate of international opinion concerning the acceptability of a particular punishment is also 'not irrelevant'.… The Court has looked beyond our Nation's borders for support for its independent conclusion that a punishment is cruel and unusual … Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question.[33]

Note that this reaffirmation of the *Roper* analysis takes place after sustained, explicit criticism of Justice Kennedy, personally, for citing 'the law of other countries' in *Roper*.[34] Yet, here in *Graham* 5 years later, the judgment directly refutes that criticism: 'The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual.' In that inquiry, 'the overwhelming weight of international opinion against [life without parole for non-homicide offenses committed by juveniles] provide[s] respected and significant confirmation

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[33] *Graham v. Florida,* No. 08-7412, slip opinion at p. 30 (US 2010). http://www.supremecourt.gov/opinions/09pdf/08-7412modified.pdf. Accessed 27 January 2014.

[34] *Roper v. Simmons*, 543 US 551, 571 (2005).

for our own conclusions' (De le Vega and Leighton 2008).[35] The legal standard being cited is not enforceable, the behaviour not 'prohibited'; but the standard is noted with approval by the six justice majority in *Graham*, and followed.

Providing further clarification, the Court notes that it 'has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is *inconsistent with basic principles of decency* demonstrates that the Court's rationale has respected reasoning to support it.'

Not prohibiting, not binding, not controlling, not dispositive … however, it is worth looking to the climate of international opinion, the global consensus, the judgment of the world's nations, to basic principles of decency, as support for our own independent conclusions, to confirm our own Eight Amendment jurisprudence.

This is an artful, dizzying process of harmonising international standards and US Eighth Amendment jurisprudence regarding children.

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So, let us return to a different aspect of the case of Paula Cooper. You will remember that she murdered Ruth Pelke in 1984 at the age of 15. The victims' grandson, Bill Pelke, originally supported the death penalty for Paula Cooper. A Vietnam veteran and a Gary, Indiana, steelworker for two decades, he rethought his position after realising his grandmother herself would have forgiven Paula. He began corresponding with her, then visiting her, then campaigning for her life, and then, for the next 22 years, her release. He has created a non-profit organisation called *Journey of Hope: From Violence to Healing*.[36] 'Paula has changed,' he says. 'She's not the same person that committed that terrible crime in 1985.' In July 2013 Paula Cooper walked out of prison and into the arms of family and friends, and Bill Pelke welcomed her to the free world on the day of her release.

4 Some Concluding Remarks

These transformative US Supreme Court judgments—along with an important third case which does not refer to the CRC or international human rights law, *Miller v. Alabama*[37]—came about through a complex and multifaceted strategy of

[35] See also The Center for Law and Global Justice. http://www.usfca.edu/law/jlwop/other_nations. Accessed 27 January 2014.

[36] Journey of Hope. http://www.journeyofhope.org. Accessed 27 January 2014.

[37] See also, *Miller v. Alabama*, No. 10-9646, slip opinion (US 2012). http://www.supremecourt.gov/opinions/11pdf/10-9646.pdf. Accessed 27 January 2014. *Miller* extends the *Roper* and *Graham* reasoning to JLWOP defendants convicted of homicide. *Miller* holds that mandatory sentencing of youth to JLWOP (80 % of JLWOP sentences) violates the Eighth Amendment because such sentencing fails to take into account the youthfulness of the defendant, his potential for growth and development, and the circumstances of the crime.

education, coalition-building, communication and legislative campaigns that included, and ultimately relied upon, litigation.

Litigation alone would not have taught the coalitions how to reframe the issues (for example, by describing JLWOP as 'children sentenced to die in prison'), how to locate extreme sentencing of children in an historical context, and how to engender broad support for the remedy. But preparation for litigation remedies was fundamental to and enhanced by every stage of the overall strategy.

The integration of international standards into national policy and law, and the adoption of human rights law, principles and values into a nation's legal and constitutional framework is neither a mechanical act nor a drafting matter that can be left to the technicians.

In the realm of youth sentencing, bringing human rights standards and law into a constitutional and common law regime requires an imaginative, interpretive and creative series of gestures; it demands some of the growth, chaos, luck, conflict, inspiration, accident, and transcendent mutuality of any dynamic relationship.

Implementing children's international legal rights through litigation is a dynamic work in progress, not a frozen idea limited forever by the constraints, biases and perspectives of the CRC drafters. The three Optional Protocols of the CRC, over a period of 25 years, correct a major fault (the lower age of children in armed conflict) and add new specificity. The Third Optional Protocol opens a door for administrative litigation filled with creative possibility. Children's human rights law is a set of norms already undergoing growth and modification, adapting to fresh challenges, emerging realities, and resolving sometimes contending rights.

In this landscape of law reform—in coordination with education, coalition-building, communication, and legislation—litigation uniquely provides an explicit set of facts on behalf of a specific petitioner or class. Imagine, for example, litigation that benefits children with disabilities, or children crossing borders who are separated from their families, or children carrying out the worst forms of child labour. This chapter illustrates the unlikely progress that has been made in litigating for the human rights of children in conflict with the law in the very country that has most conspicuously failed to ratify the CRC.

Litigation demands choices, nuance and resolution; litigation invites us to revisit core ethical values, standards and principles in the tumultuous and messy world of courtroom trials, appeals, post-conviction remedies, and class action lawsuits involving real children and families. Litigation may compel a nation or private entity to act on behalf of a child's rights or to cease behaviours that violate them; it may also set us back. But it is a powerful instrument for illuminating issues and for specific justice, as part of an expansive and multifaceted campaign to bring tangible rights and resources home to children.

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