Washington D.C., October 29, 2018

Ref.: Children and adults with disabilities at the “Judge Rotenberg Educational Center”,
United States of America

Dr. Paulo Abrão
Executive Secretary
Inter-American Commission on Human Rights
Washington D.C.

Disability Rights International (DRI), ("the petitioner") and TASH –disability rights advocacy organization formerly known as The Association for Persons with Severe Handicaps, the Mental Health Legal Advisors Committee and the Disability Law Center (DLC) (“the co-petitioners”), approach you and through you, the Honorable Inter-American Commission on Human Rights ("the Commission", "the Inter-American Commission" or "IACHR"), in order to request the Commission, based on Article 25 of its Rules of Procedure, to adopt precautionary measures in favor of the children and adults with disabilities who are detained at the Judge Rotenberg Educational Center (JRC), located in Canton, Massachusetts, United States of America, in order to avoid irreparable harm to their rights to life and personal integrity, enshrined in Articles 4 and 5 of the American Convention on Human Rights (“ACHR”).

Two UN Special Rapporteurs on Torture, Manfred Nowak in 2011 and Juan Mendez in 2013, have determined that the use of electric shocks (known as “aversive treatment”) at JRC on children and adults with disabilities constitutes torture and is in violation of the UN Convention against Torture. Despite calls from Juan Mendez to stop the use of electric shocks and other aversives, the United States of America has failed to protect the personal integrity of the children and adults who have suffered painful aversive “treatment” for years.

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Abbreviations

ACHR	American Convention on Human Rights
CAT	Convention Against Torture
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DRI	Disability Rights International
FDA	Food and Drug Administration
GED	Graduated Electronic Device
IACHR	Inter-American Commission on Human Rights
IAHRS	Inter-American Human Rights System
ICCPR	International Covenant on Civil and Political Rights
JRC	Judge Rotenberg Center
NYSPA Task Force	The New York State Psychological Association Task Force on Aversives Controls with Children

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I. INTRODUCTION

Disability Rights International respectfully submits this precautionary measure petition to the Honorable Inter-American Commission on Human Rights (hereinafter the "IACHR" or the "Commission") given the risk to life and personal integrity that children and adults with disabilities face in the Judge Rotenberg Educational Center (hereinafter the "JRC" or "the center") in Canton, Massachusetts, in the United States of America. The center has been known for its use of "aversive therapy" on people with disabilities which includes contingent skin shock, the use of restraints and the use of isolation rooms. These practices – particularly when used in people with disabilities and children – constitute cruel, inhuman and degrading treatment and torture.

In 2010, DRI published its report ***"Torture not Treatment" Electric Shock and Long-Term Restraint in the United States on Children and Adults with Disabilities at the Judge Rotenberg Center***, an Urgent Appeal to the United Nations Special Rapporteur on Torture in order for these abuses disguised as 'treatment' to be stopped.[1] In June 2010, Manfred Nowak, former UN Special Rapporteur on Torture, stated that what goes on at the JRC "is torture" and in 2013, Juan Mendez, then UN Special Rapporteur on Torture, determined that the use of electric shock on children with disabilities violates the UN Convention against torture.[2] However, to date the JRC continues using skin shock on children and adults with disabilities as a part of their "rehabilitation" programs.

Despite the overwhelming evidence of abuse at JRC, domestic remedies to end these abuses have failed (see Appendix 1). **In some cases, states have adopted regulations permitting the use of painful aversive therapy, and the courts have upheld such regulations which undermine the protection of children and adolescents at JRC from cruel and inhuman treatment or torture.[3]** Most recently, in June 2018, a Massachusetts Probate and Family Court judge ruled that the procedure consisting of administering electric shocks to children and adults with disabilities conformed to the "accepted standard of care."[4]

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1 Disability Rights International, *Torture not Treatment. Electric Shock and Long-Term Restraint in the United States on Children and Adults with Disabilities at the Judge Rotenberg Center (2010)*. Posted at https://www.driadvocacy.org/wp-content/uploads/USReportandUrgentAppeal.pdf. [here and after DRI report].

2 Katie Hinman and Kimberly Brown, *UN Calls Shock Treatment at Mass. School 'Torture'*, ABC News (June 30, 2010). Available at https://abcnews.go.com/Nightline/shock-therapy-massachussetts-school/story?id=11047334. (Last visited August 16, 2018) and Juan E. Méndez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment A/HRC/22/53/Add.4 (2013) p. 83.

3 DRI report, *supra* note 1, p. 2.

4 Order on Defendants' Motion Under Probate and Family Court Rule 60 and Mass. R. Civ.. P. 60(b)95) to Vacate Consent Decree, Judge Rotenberg Educational Center, et al., v. Commissioner of the Department of Developmental Services, et al., Bristol Division of the Probate and Family Court Department of Mass. No. 86E-0018 (June 20, 2018) from here onwards referred to Massachusetts Probate and Family Court Decision. See also Emily Shugerman, *Massachusetts school can continue using electric shocks on special needs*

The school remains the only facility in the US that is allowed to use electric shocks on children for behavioral purposes.

Petitioners dispute this justification for the infliction of severe physical and emotional pain on any individual confined under the authority of the state – let alone children or adults with disabilities who may be particularly at-risk of emotional trauma and who are especially powerless because of their detention. Under international law, the prohibition of torture is absolute and cannot be justified for any reason. In truth, the vast majority of mental health professionals believe that the use of aversive therapy is dangerous, results in emotional trauma, and is unnecessary – as more humane and effective methods of treatment exist. Whether or not a US court finds that any professional believes that a practice is beneficial, however, it cannot justify the infliction of severe pain for any purpose. The former UN Special Rapporteur on Torture, Juan Méndez, specifically called into question the doctrine of "medical necessity," stating that the infliction of severe pain could never be justified by therapeutic intent. DRI and our partners, therefore, request this Honorable Commission to grant precautionary measures to protect the life and integrity of children and adults who are at the JRC and to prohibit the intentional use of electric shock and all forms of aversive therapy that induce severe pain.

II. BACKGROUND AND CONTEXT

A. The Judge Rotenberg Educational Center

The Judge Rotenberg Educational Center (hereinafter the "JRC" or "the Center") -- formerly known as the Behavioral Research Institute, is a residential school in Canton, Massachusetts for children and adults with disabilities that have "behavioral problems." The Center was established in 1971 by the psychologist Matthew Israel. Over the years, the JCR has been controversial because of the methods it uses to "treat" people with disabilities.[5] The JRC uses "aversive therapy" consisting of associating behavior identified as undesirable with a punishing stimulus. At JRC, aversive therapy includes "skin shock treatment" where people with disabilities are given electric shocks to stop a certain behavior. Currently, the center has more than 240 students, of whom around 80 receive skin shock treatment.[6]

In the early days of the facility, most students were diagnosed with autism or intellectual disabilities and accompanying self-injurious behaviors. As of 2006, however, according to report by the NYSED Review Team, most students from New York State had diagnoses of post-traumatic stress disorder (PTSD), schizophrenia, attention deficit disorder (ADD), obsessive compulsive disorder (OCD) or bi-polar

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students, judge rules, Independent (July 3, 2018). Available at https://www.independent.co.uk/news/world/americas/electric-shock-therapy-school-special-needs-children-massachusetts-judge-rotenberg-center-canton-a8429736.html. (Last visited August 16, 2018).

5 DRI report, *supra* note 1.
6 Massachusetts Probate and Family Court Decision *supra* note 4 par. 186.

disorder.[7] A number of students "have a history of abuse and abandonment."[8] Some adolescents have also arrived to JRC through the juvenile justice system and transfers from Rikers Island prison in New York.[9]

JRC's theory of behavior modification is that every human being responds to positive rewards or negative punishments and that *all* behavior can be manipulated through a combination of rewards and punishments.[10] JRC maintains that the same "treatment" based on reward and punishment works for anyone, justifying a "near-zero rejection policy" for admission.[11] As a result, JRC has stated that they "really pay relatively little attention to psychiatric diagnosis."[12] The implication of this approach is a highly unorthodox program for treatment and education. All residents, regardless of diagnosis or history, are subjected to the same behavior modification techniques of reward and punishment. The use of traditional psychological therapies and/or medication is virtually non-existent at JRC.[13] Psychotropic medications are rarely used.[14]

The "near-zero rejection" has allowed the facility to become what JRC calls a "hospital of the last resort" for children or adults with disabilities who simply have nowhere else to go.[15] The fact that JRC is the last stop for parents looking for a placement for their child may explain the fervent support for the program that some parents have expressed over the years. In other cases, however, JRC actively markets its programs by visiting families and giving them brochures and gifts to recruit new students.[16]

B. Abusive practices at JRC

i. Behavior modificationand "Aversive Treatments" at the JRC

Early on, punishments – known as aversives – were used at the JRC to control the behavior of people who were called severely "mentally retarded" and children with autism. Punishments included pinching, spatula spankings, water sprays, and muscle squeezes, forced inhalation of ammonia and helmets which battered the

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7 Business Reporter, *Electric Shock Torture at Judge Rotenberg Center*, Business Reporter (April 22, 2018). Available at https://businessreporter.net/torture-at-judge-rotenberg-center/. (Last visited August 16, 2018).
8 *Id*.
9 Jennifer Gonnerman*, Nagging? Zap. Swearing? Zap*., 32 MOTHER JONES, 36, 41 (Sept.-Oct. 2007).
10 The "rewards" used at JRC include "a contract store" where students can "pick rewards to purchase" based on points they earn in the program. DRI report, *supra* note 1.
11 Matthew L. Israel, *History of JRC, 1971 – 1985: Beginnings, Philosophy and Early Growth*. Available at http://judgerc.org/admissions.html (Last visited August 16, 2018).
12 *Id.*
13 *Id*.
14 Massachusetts Probate and Family Court Decision *supra* note 4 par. 176
15 DRI report, *supra* note 1, p. 7.
16 New York State Education Department Review Team, *Observations and Findings of Out-of-State Program Visitation Judge Rotenberg Educational Center 5* (June 9, 2006). Available at http://boston.com/news/daily/15/school_report.pdf [hereinafter "NYSED REVIEW TEAM"].

brain with inescapable white noise, and physical beatings.[17] In the late 1980s, JRC began using Self-Injurious Behavior Inhibiting System (SIBIS) machines on students, as an alternative to spanking, squeezing and pinching. The machine, developed in 1985, produced a 0.2 second electric shock of 2.02 milliamps on the arms or legs of the recipient, with the intention of stopping self-injurious behaviors in children with autism and other developmental disabilities. Controversial from the outset and shunned by advocates, the use of SIBIS was largely abandoned by most clinicians in the 1990's in favor of "positive-based" practices.[18]

> Over the years, JRC found that an individual who responds to low levels of electricity may become "adapted" to pain and "needs a stronger stimulation."[19] When the manufacturer of SIBIS refused JRC's request to provide them with a stronger and more painful electric shock machine, JRC developed its own mechanism for administering electric shock, the Graduated Electronic Decelerator (GED). The GED is a remotely controlled device that can be strapped to an individual's back or another part of the body with electrodes attached to the torso, arms, legs, hands and feet.[20] The GED administers 15.5 milliamps of electricity. A stronger version, the GED-4, subjects an individual to a shock of 45.5 milliamps. Both may be used up to 2.0 seconds. A psychologist who visited JRC on behalf of the New York State Department of Education stated: "The level of shock is unbelievable, very painful… No other class of citizen in the United States could be subjected to this. You could not do this to a convicted felon."[21] –The director of JRC, Dr. Matthew L. Israel himself describes the electric shock as "very painful."[22]

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17 See Jenifer McKim, Abuse claims persist for special needs school (October 29, 2018) Available at https://www.necir.org/2018/10/29/abuse-claims-persist-for-special-needs-school/. See also Matthew L. Israel, Use of Skin Shock as a Supplementary Aversive (2002). Available at http://www.judgerc.org/ (last visited August 16, 2018).

18 Sharon Lohrmann-O'Rourke & Perry A. Zirkel, *The Case Law on Aversive Interventions for Students with Disabilities*, 65 EXCEPTIONAL CHILDREN 101 (Fall 1998).

19 Matthew L. Israel, Frequently Asked Questions, "Supplementary aversives at JRC—13. How is an aversive defined and which aversives are considered acceptable?" Judge Rotenberg Center. Available at http://www.judgerc.org (last visited August 16, 2018)

20 The graduated electronic decelerator (GED) "is manufactured by JRC [and] consists of: (a) a remote control transmitter, which transmits an uniquely coded RF signal; (b) a receiver/stimulator, which receives a coded signal from the transmitter and generates a skin shock; (c) a battery pack; and (d) a set of electrodes, which are attached to participant's skin. Electrodes were either concentric (i.e., Tursky electrodes) or spread with two button electrodes separated by up to 6 in. […] Depending upon the severity of the individual's problem behaviors, each participant wore one to five sets of electrodes at the same time, with the shock being delivered to only one of the set of electrodes as a consequence for a particular behavior." W.M.W.J. van Oorsouw *et al.* "Side effects of contingent shock treatment" Published in Research in Developmental Disabilities (2007). Available at https://www.scribd.com/document/11119589/Side-Effects-Contingent

21 DRI interview with psychologist XXXXXX (date).

22 Paul Kix, *The Shocking Truth*, Boston Magazine Online 3 (2008), at 3. Available at https://www.paulkix.com/article/the-shocking-truth/ (Last visited August 16, 2018).

The following comparison may be helpful in understanding the power of the 45.5 milliamp electrical force to which JRC residents are subjected, sometimes repeatedly over a short period of time:

> ***A stun gun [used by police] is a legal electrical self-defense device that puts out a high voltage and low amperage shock. To put things in perspective, one amp [or 1000 milliamps] will kill a person. Our stun gun will deliver 3-4 milliamps. However, most stun guns on the market are only 1-2 milliamps. –*** Definition of a Stun Gun[23]

In 2012 there was a public outcry regarding the use of electric shock on children and adults with disabilities when video surfaced of 18-year-old Andre McCollins receiving "more than two dozen electrical shocks while tied to a bed at the center in 2002… JRC claimed that it had significantly changed its procedures since then."[24] However, the electric shocks are still being given to children and adults.[25]

JRC's stated reason for the use of electric shocks is behavior modification and punishment.[26] Children and adults at JRC are routinely subject to electric shock, receiving multiple skin shocks on their legs, arms, hands, feet, fingers and torsos for behaviors such as getting out of their seats, making noises, swearing or not following staff directions.[27] The homemade electric shock devices are carried by students in backpacks with electrodes attached to their skin.[28] The electric shock is administered remotely by minimally trained staff – some with only two weeks of training.[29] Students never know when they will receive a jolt or where on their body they will be shocked. Children and adolescents are subjected to dozens of electric shocks over the course of a day.

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23 PHYSICS FACTBOOK, ELECTRIC CURRENT OF A STUN GUN. Available at http://hypertextbook.com/facts/2004/LukeWorkoff.shtml (Last visited August 17, 2018).

24 See https://videosift.com/news/video/Graphic-video-of-teen-being-shocked-played-in-court. See also Emily Shugerman, *Massachusetts school can continue using electric shocks on special needs students, judge rules*, Independent (July 3, 2018). Available at https://www.independent.co.uk/news/world/americas/electric-shock-therapy-school-special-needs-children-massachusetts-judge-rotenberg-center-canton-a8429736.html (Last visited August 17, 2018).

25 *Id.*

26 Matthew L. Israel, *supra* note 17.

27 *Id.* In 2012, Gregory Miller, a former staff at the JRC explained that the students receive shocks "for minor behaviors, such as closing eyes for 15 seconds while sitting at the desk, pulling apart a loose piece of thread, tearing an empty used paper cup, going to the bathroom in one's clothes after signing that they need to use the bathroom for over two hours, standing up and raising a hand to ask to go to the bathroom, blowing small bubbles in saliva between one's lips, and shocking a non-verbal nearly blind girl with cerebral palsy for making a moaning sound and for attempts to hold a staff's hand (her attempts to communicate and to be loved)." Available at https://www.change.org/p/massachusetts-representatives-please-stop-painful-electric-shocks-on-students-at-jrc-in-massachusetts (Last visited August 17, 2018).

28 *Id*.

29 NYSED Review Team, *supra* note 16, at 12.

The use of electric shock and restraints as treatment at JRC lacks evidenced-based proof of long-term efficacy or safety.[30] The New York State Psychological Association Task Force on Aversives Controls with Children ("NYSPA Task Force") reviewed the field of aversives in 2006 and expressed concern about the lack of "data from controlled and replicated research" supporting the use of many of the identified aversive behavioral interventions, particularly in this "school setting [the JRC]."[31] The NYSED found that given the "lack of peer reviewed research on the effectiveness and safety of the GED used at JRC, [the] Team has concerns regarding the long-term health and safety of the students, particularly those students who may receive multiple electric shocks as part of their behavior plans."[32]

The NYSPA Task Force, which reviewed the NYSED Review Team's report, raised particular concerns about the use of aversives at JRC without careful attention to the patient's diagnosis. They point out that for certain children – in particular abuse or trauma survivors – aversives can be particularly dangerous, psychologically abusive, and cruel.[33] Following the release of the NYSED Review Team's report on JRC in 2006, the NYSPA Task Force found that

> ***Some of the techniques described as 'aversive behavioral interventions' not only constitute corporal punishment, but are included in literature on torture techniques.[34]***

The NYSPA Task Force stated that "prohibitions on the use of techniques that essentially punish disabled students for symptoms of their disability have been promulgated by a variety of federal agencies and professional organizations."[35] The Task Force concluded that "aversive behavior interventions be prohibited, without exception, as part of a behavioral intervention plan."[36] Professional disability organizations like TASH, which includes many of the leading psychologists and behavior experts in the United States, have come out against *any* use of aversives.[37]

ii. Use of restraints

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30 NEW YORK STATE PSYCHOLOGICAL ASSOCIATION TASK FORCE, REPORT OF THE NEW YORK PSYCHOLOGICAL ASSOCIATION TASK FORCE ON AVERSIVE CONTROLS WITH CHILDREN 6 (August 22, 2006) [hereinafter NYSPA TASK FORCE].
31 *Id.* at 6.
32NYSED Review Team, *supra* note 16, at 16.
33 NYSPA Task Force, *supra* note 30, at 11.
34 *Id.*
35 NYSPA Task Force, *supra* note 16, at 1.
36 The New York Psychological Association leaves open the possibility that particular techniques of aversive intervention may be need if they are "medically necessary to protect the child from serious self-injurious or other-injurious behavior." *Id.* at 6.
37 The Alliance to Prevent Restraint, Aversive Interventions, and Seclusion (APRAIS) is a coalition of groups whose mission is "To seek the elimination of the use of seclusion, aversive interventions, and restraint to respond to or control the behavior of children and youth." TASH is a member of the Alliance. Available at http://aprais.tash.org/index.htm (last visited April 21, 2010).

JRC is also known for using physical restraints as a form of aversive treatment, sometimes simultaneously with electric shock.[38] The GED and restraints are sometimes combined because it is necessary to stop a person from ripping the GED pack off his or her body. Other times, physical restraints may be added to the use of the GED when the aversive power of electricity alone is not sufficient. As was once described on the JRC website, "[T]he safest way to do this is to use mechanical restraints to contain the student, in a prone position, on a flexible plastic restraint platform that has been specially designed for the purpose."[39] It is worth noting that, outside JRC, the use of "prone" (face down) restraints are widely considered to be inherently dangerous, and many states have banned any form of prone restraints in the mental health context.[40]

In 2009 DRI received information from a former patient, a mother, a former teacher at JRC, and an attorney who represented clients at JRC, that children at JRC are restrained for weeks and months at a time. According to DRI interviews with the mother of an adolescent and with the attorney representing the mother, one boy spent two years almost continually strapped to a chair.[41]

One student, who suffered from a seizure disorder and was labeled with a mild developmental disability, was sent to JRC from a public school system, after they could no longer handle his behaviors. He then spent seven years receiving a combination of shock and long-term restraint.[42]

> ***The first few months they put him in restraints. Then they said his [bad] behaviors escalated and he needed the GED. When he was in restraints, they put him in diapers – he was a teenager – he was never in diapers before and he always used a toilet. But they didn't want to untie him and let him use the bathroom. –*** DRI interview with mother of former student[43]

C. Alternatives to aversive therapy exist

There are non-dangerous approaches to the management of dangerous or disruptive behaviors that do not entail the infliction of pain. The National Disability Rights Network and TASH have outlined a wide variety of best practices used throughout the United States, demonstrating that realistic options exist for the treatment of the most severe disabilities.[44] One study examined a sample of five adults with developmental disabilities who had been subjected to an aversive

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38 Matthew L. Israel, *supra* note 17.
39 *Id*.
40 See Massachusetts Department of Mental Health Inpatient Regulation 104 CMR 27.12(8)(c) and Massachusetts Department of Elementary and Secondary Education Regulation 603 CMR 46(1). See also GREGORY D. KUTZ, US GOVERNMENT ACCOUNTABILITY OFFICE, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS, GAO-09-719T 4 (2009).
41 DRI Interview (2009).
42 *Id.*
43 DRI Interview (2009).
44 https://member.tash.org/store/ListProducts.aspx?catid=436287

program of electric shock, mechanical restraints, and food deprivation. This study found that the same individuals could be served in the community over two years, with the same alleviation of symptoms, using only positive behavioral supports:

> ***The results are encouraging in demonstrating that punishment-based approaches can be terminated, alternative strategies can be substituted, and through a clinically responsive system of monitoring and decision-making, behavioral adjustment can be supported without having to resort to invasive forms of treatments***.[45]

III. GROUNDS FOR REQUEST OF PRECAUTIONARY MEASURES

Article 25 of the Rules of Procedure of this Commission establishes that the IACHR can issue precautionary measures in relation to or independently from a pending case before the Inter-American Human Rights System (IAHRS) whenever there is a grave and urgent situation that presents a risk of irreparable harm to persons or groups of persons, or to the object of a petition or case pending before the organs of the IAHRS. The IACHR has indicated that:

a. "serious situation" refers to the grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the Inter-American System;
b. "urgent situation" refers to a risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action; and
c. "irreparable harm" refers to injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.[46]

In this section we argue that the facts that motivate this request are of a serious and urgent nature that present a risk of irreparable harm to the victims.

A. Analysis of the standards of seriousness, urgency and irreparable damage

a. Seriousness and urgency

At the moment of analyzing the seriousness requirement, the Commission has established that the State has a reinforced position of guarantor with respect to "children in institutions in its charge, which obliges them to adopt special and reinforced measures, with greater care and responsibility, in accordance with the

45 Frank L. Bird & James K. Luiselli, "Positive behavioral support of adults with developmental disabilities: assessment of long-term adjustment and habilitation following restrictive treatment histories," 31 Journal of Behavior Therapy and Experimental Psychiatry 5, 7 (2000) at 18.

46 IACHR, Res.21/2018, Precautionary Measure No. 975-17, *Niños, niñas y adolescentes del Centro de Reparación Especializada de Administración Directa de Playa Ancha respecto de Chile*, March 15, 2018 para. 20.

principle of the best interests of the child."[47] According to this Commission, the State has "special obligations of regulation and supervision with respect to institutions,"[48] these obligations are accentuated taking into account "the large dimensions of the institutions and the high concentration of children, which constitute, generally, risk factors for their protection [...] and exposes them to structural violence. [49]

The State also has a responsibility of special protection towards children and adults with disabilities who are detained at an institution. The Inter-American Court of Human Rights has emphasized that persons with disabilities in institutions face greater vulnerability because the personnel in the institutions exercise "strong control or domain over the people who are subject to their custody."[50]

The fact that the victims in this case include children and adults with disabilities detained in an institution places them *prima facie* in a situation of special vulnerability. The facts alleged in the present application point to the existence of a situation of current risk and are likely to persist over time if immediate measures are not taken. Therefore, we consider that the requirements of seriousness and urgency are met.

b. Irreparable harm

Regarding the requirement of irreparability, the Commission has considered that this is fulfilled when there is a risk of violation to the rights to life and personal integrity, since "they constitute the maximum situation of irreparability."[51] In the present case, the children and adults at the JRC are at an imminent risk of suffering violations of their rights to personal integrity, as explained in the following section.

B. Elements of torture

In 2013 Juan Mendez, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez issued its report "Observations on communications transmitted to Governments and replies received" where it analyzed the "Alleged mistreatment with electric shock of children and young adults enrolled in the residential program of the Judge Rotenberg Center in Canton, Massachusetts." In its analysis, Méndez stated that:

> "a violation of the Convention against Torture may occur "***where the purpose or intention of the State's action or inaction was not to degrade, humiliate or punish the victim, but where this nevertheless was the result***." [In a previous report, the Rapporteur] calls into question the concept that medical necessity may ever be used to justify a treatment practice that induces severe emotional or

47 *Id.* at para. 22.
48 *Id.* at para. 23.
49 *Id.*
50 IACHR, Res. 50/2016, Precautionary Measure No. 701-16 *Asunto Vladimir Aranque Hainal respecto de Venezuela*, October 21, 2016, para. 15.
51 IACHR, supra note 46 at para. 29.

> physical pain, "***This is particularly the case when intrusive and irreversible, non-consensual treatments are performed on patients from marginalized groups, such as persons with disabilities, notwithstanding claims of good intentions or medical necessity.***"[52]

The Special Rapporteur reminded the State:

> "of his report to the 60th session of the General Assembly, in which he determined that ***any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment***, and that States cannot invoke provisions of domestic law to justify violations of their human rights obligations under international law, including the prohibition of corporal punishment. The Special Rapporteur also reiterates that in paragraph 5 of General Comment No. 20, the Human Rights Committee stated that ***the prohibition of torture and ill-treatment must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure***. Therefore and in the absence of evidence to the contrary, ***the Special Rapporteur determines that the rights of the students of the JRC subjected to Level III Aversive Interventions by means of electric shock and physical means of restraints have been violated under the UN Convention against Torture and other international standards***. The Special Rapporteur calls on the Government to ensure a prompt and impartial investigation into these continued practices. He calls on the Government to provide information on the Department of Justice's (DOJ) investigation into possible violations of civil rights laws and to take measures to ***prohibit the use of Level III Aversive Interventions for all students on a national level, including those students who had an existing court-approved treatment plan as of 1 September 2011 in Massachusetts***."[53]

The use of aversives at JRC violates international human rights law. Whether or not such "treatment" is narrowly defined as effective, international human rights law places limits on the amount of pain that can be inflicted on a person.[54] Indeed, there is reason to be concerned that these practices create risk of psychological trauma, marginalization, or alienation.[55] The State of Massachusetts, in its own

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52 A/HRC/22/53/Add.4 *supra* note 2. *Emphasis added*

53 *Id.*

54 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Oct. 21, 1994, art. 4(1), GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), ratified by the United States 21 Oct 1994 (hereinafter Convention against Torture).

55 New York Psychological Association Task Force, "Report of the New York Psychological Association Task Force on Aversive Controls with Children," 6 (August 22, 2006) hereinafter NY Psychological Association Task Force. Also, the National Disability Rights Network has documented the widespread use of restraints and seclusion in schools throughout the United

regulations governing the use of Level III aversives at JRC that include electric shock and restraint, defines these type of aversives "a significant risk of physical or psychological harm to the individual."[56] Victims that have managed to leave JRC have spoken out about the anxiety, sleeping problems, and trauma that the shocks, the use of restrains, and isolation rooms caused on them.[57]

Further the infliction of pain may stop a person from engaging in a specific behavior while being subject to a course of aversive treatment but aversive treatment cannot treat an underlying emotional disorder or intellectual disability. A review of the research found that "the implementation of punishment-based procedures, including those that incorporate noxious stimulation, do not guarantee long-term reductive effects in the treatment of severe disorders."[58] The alleviation of symptoms only takes place while aversives are in place, leaving a person subject to this painful treatment over a long period of time.[59]

The use of electric shock, the seclusion and the long-term restraints to control and punish the behavior of children and adults with disabilities violate Article 5 (right to humane treatment) of the American Convention on Human Rights (ACHR) and the UN Convention against Torture (CAT).[60] The United States ratified the Convention against Torture in 1994. In addition, the United States ratified the International Covenant on Civil and Political Rights (ICCPR).[61] Article 7 of the ICCPR prohibits torture, as well as cruel, inhuman or degrading treatment or punishment (also known as ill-treatment).[62]

Under the Convention against Torture, it is the obligation of States Parties to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[63] Under the ICCPR, States Parties have an obligation to ensure enforcement of international human rights law even if a practice is governed by state law in a federal system.[64] The obligation to enforce international human rights law includes the obligation to ensure that private actors (such as private schools or hospitals regulated/funded by the government) do not

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States which has resulted in physical injuries, emotional trauma and even deaths.

56 115 Code Mass. Regs. s. 5.14 (3) (d) (1995)

57 Jen Adventures TV, *The Judge Rotenberg Center- Torture of Disabled Children and Adults #StopTheShock.* YouTube. Available at https://youtu.be/PO_J0J9c1bQ. (Last visited August 17, 2018).

58 Frank L. Bird & James K. Luiselli, "Positive behavioral support of adults with developmental disabilities: assessment of long-term adjustment and habilitation following restrictive treatment histories," 31 Journal of Behavior Therapy and Experimental Psychiatry 5, 7 (2000).

59 DRI Report, *supra* note 1.

60 Convention Against Torture, *supra* note 54.

61 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966) [hereinafter Covenant on Civil and Political Rights]. The United States ratified the treaty on June 8, 1992.

62 *Id*. at art. 7.

63 Convention against Torture, *supra* note 54, at art. 2(1).

64 Covenant on Civil and Political Rights, *supra* note 61, at art. 50 ("The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.").

perpetrate torture under government authority.[65] In recognition of the seriousness of torture and the need to ensure that such practices are prevented, the Convention against Torture requires States Parties "to ensure that all acts of torture are offences under its criminal law."[66]

DRI argues that the severe infliction of pain perpetrated against children or adults with disabilities at JRC rises to the level of torture or ill-treatment prohibited by the UN Convention against Torture. No population is more powerless and vulnerable than children with disabilities whose parents have consented on their behalf to treatment and who are subject to restraints and electric shock within an institution. Former Special Rapporteur on Torture, Manfred Nowak, agreed that the skin shock:

> ***Is inflicted in a situation where the victim is powerless, a child in a restrained chair being then subjected to electric shocks, how much [more] powerless can you be?[67]***

To rise to the level of torture, an act must meet each of the four criteria identified in article 1 of the UN Convention against Torture. Some practices documented at JRC meet each of these elements of torture because (1) the pain and suffering inflicted is severe; (2) this pain is inflicted intentionally; (3) the infliction of pain is for a purpose that is coercive or discriminatory; and (4) these practices are conducted with the consent or acquiescence of public officials.[68] The practices documented at JRC meet each of these elements of torture as we argue below.

i. Pain is severe

The prohibition against torture under international human rights law applies only to pain and suffering that is "severe". Such pain can be physical or mental. The Istanbul Protocol considers the electric shocks to be a form of torture, where "[e]lectric current is transmitted through electrodes placed on any part of the body."[69] According to the UN Committee against Torture, "the use of electro-muscular disruption devices can result in severe pain amounting to torture and in certain cases can even be lethal."[70]

In analyzing whether a practice of inflicting pain rises to the level of severity that would constitute torture, human rights bodies will consider all "the circumstances of the case, including the existence of a disability."[71] The subjective experience of the

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65 MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 54 (2008).

66 Convention against Torture, *supra* note 54, at art. 4(1).

67 Katie Hinman and Kimberly Brown, *supra* note 2.

68 Convention against Torture, *supra* note 54, at art. 1(1).

69 U.N., *Istanbul Protocol. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, entered into force in 1999, para. 212.

70 CAT, *Concluding observations of the Committee against Torture Austria*, CAT/C/AUT/CO/4-5 Austria (May 20, 2019), para. 17.

71 Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General, U.N. GAOR, 63rd Sess., Provisional Agenda Item 67(a), ¶ 69, U.N. Doc.

victim is critical to understanding what pain might cause the emotional terror and physical suffering that rise to the level of torture. The powerlessness and vulnerability of children or adults with mental disabilities who are held in detention and subject to treatment against their will are all factors that contribute to suffering.[72] As the former UN Special Rapporteur on Torture, Manfred Nowak, has explained:

> *All purposes listed in Article 1 CAT (Convention against Torture) …refer to a situation where the victim of torture is a detainee or a person "at least under the factual power or control of the person inflicting the pain or suffering," and where the perpetrator uses this unequal and powerful situation to achieve a certain effect, such as extraction of information, intimidation, or punishment.*[73]

Children and adults with disabilities at the JRC are subject to a combination of many types of painful practices at once. JRC uses electric "shocks, shock chairs, 4-point restraint boards with shock, shock holsters, shackles, food deprivation, mock attacks, social isolation and helmets."[74] The subjects of these practices, who lack any control over their lives, are also isolated from friends and family. The isolation of an individual and the prohibition of human contact are also factors that have been found to cause "persistent and unjustified suffering which amounts to torture."[75] Taken together, the subjective experience of pain and suffering for a child or adult with a disability reach the threshold of "severe pain."[76]

ii. Pain is inflicted intentionally

The definition of torture under the UN Convention against Torture requires that pain or suffering be inflicted intentionally. When the United States ratified the UN Convention against Torture, it adopted an explicit understanding that "in order to constitute torture, an act must be specifically intended to inflict severe physical or mental suffering."[77] Negligent conduct alone cannot rise to the level of torture, though it may constitute inhuman and degrading treatment also prohibited by the UN Convention against Torture.[78] A practice might not constitute torture in the narrowest sense of the term if it is an "unintended side-effect" of the treatment.[79] The practices of electric shock and long-term restraints at JRC, however, fit within

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A/63/175 (July 28, 2008), at ¶ 47.

72 Manfred Nowak, What Practices Constitute Torture?: US and UN Standards, 28 Hum. Rts. Q. 809, 832 (2006).

73 *Id.*

74 DRI Report, *supra* note 1.

75 MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 54 (2008), at 71, *citing* UN Doc. A/56/44 Sections 42-43.

76 DRI Report, *supra* note 1, at 24.

77 MANFRED NOWAK & ELIZABETH MACARTHUR, *supra* note 75, at 73-74, *citing* the U.S. reservations, declarations, and understandings, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

78 Torture and other cruel, inhuman and degrading treatment or punishment, *supra* note 7171, at ¶49.

the definition because they are inflicted systematically and specifically to induce pain and inflict punishment. Pain is not the incidental side-effect of the practices perpetrated against children or adults at JRC – it is exactly what is intended.

The former UN Special Rapporteur on Torture, Manfred Nowak, has made clear that the stated intent of a health care professional to cure a person of his or her illness or disability is no defense for a practice that meets the other elements of torture. "This is particularly relevant in the context of medical treatment of persons with disabilities," says Nowak, "where serious violations and discrimination against persons with disabilities may be masked as 'good intentions' on the part of health professionals."[80]

iii. Pain is inflicted for a prohibited purpose

For a practice to constitute torture, it must have a purpose prohibited by article 1(1) of the UN Convention against Torture. Nowak has described the purpose requirement as "the most decisive criterion which distinguishes torture from cruel or inhuman treatment." The requirement of a prohibited purpose is probably the main reason why abuses in a medical context are not usually thought of as torture – since the stated purpose is to ameliorate a condition or illness. At JRC, clearly the intentional infliction of severe pain is for the purpose of coercing individuals to end behaviors deemed by JRC medical authorities to be improper.

It is important to note that under international law, a prohibited purpose need not be an improper purpose. A practice may constitute torture even if it is an effective way of modifying behavior for individuals with disabilities. Article 1(1) of the UN Convention against Torture lists examples of prohibited purposes. The "common denominator" of this list, according to Nowak, includes:

- extracting a confession
- obtaining from the victim or third person information
- punishment
- intimidation and coercion
- discrimination[81]

What links these prohibited purposes is "where the perpetrator uses the unequal and powerful situation to achieve a certain effect."[82] Despite the supposedly therapeutic purpose of placement at JRC, the authorities admit that their treatment is *explicitly meant as punishment* to achieve the purpose of extinguishing an unwanted behavior or disability. The mechanism of treatment is intimidation and coercion. For these reasons alone, the intentional infliction of severe pain at JRC meets the definition established in article 1(1) of the UN Convention against Torture.

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79 Manfred Nowak & Elizabeth McArthur, *supra* note 65, at 76, *citing* Herman Burgers & Hans Danelius, The United Nations Convention against Torture: Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 119 (2008).

80 Torture and other cruel, inhuman and degrading treatment or punishment, *supra* note 7171, at ¶49.

81 Manfred Nowak & Elizabeth McArthur, *supra* note 6565, at 75.

82 *Id.* at 75-76.

The treatment at JRC is explicitly used to coerce children and adults with disabilities to end their negative behaviors. Coercion, mainly through electric shock but also through the physical force of restraints, is the mechanism by which aversive treatment operates. One of the reasons that torture is considered more serious than inhuman and degrading treatment is that, when there is a purpose, authorities have a motivation to continue to increase the level of pain they induce. When low level pain is not sufficient to bring about an intended result, JRC uses higher and higher levels of pain. The threat of pain is also used to intimidate. Among students who are emotionally disabled and have the cognitive ability to understand what lies ahead, JRC's website at one point stated that the threat of electric shock is enough to bring about the end of negative behaviors.[83] In this regard, the Inter-American Court of Human Rights has said that "creating a threatening situation or threatening an individual with torture may, in some circumstances, constitute inhumane treatment."[84]

The most widely overlooked prong of the definition of torture is discrimination. Even if the purpose of a practice were otherwise considered legitimate, the infliction of pain based on disability cannot be justified. As Nowak has stated, "the requirement of intent in article 1 of the UN Convention against Torture can be effectively implied where a person has been discriminated against on the basis of disability."[85] The use of electric shock or long-term restraint is never tolerated on individuals without disabilities. The NYSPA Task Force points out, for example, that New York's proposed regulation

> For disabled students would constitute corporal punishment if employed as interventions for non-disabled students .... The implications of regulations that selectively permit the use of corporal punishment with disabled youth but not nondisabled youth are both obvious and disturbing, regardless of whether one calls it "corporal punishment" or "aversive behavioral intervention."[86]

The NYSPA Task Force also says that "[d]isturbingly, some of the 'techniques' listed sound eerily similar to recent reports about methods for interrogation of suspected terrorists that have been labeled as 'torture' and widely condemned by human rights organizations."[87] This point is strongly reinforced upon closer examination to similar practices widely understood to constitute torture or ill-treatment. What is being justified as beneficial "treatment" for people with disabilities is widely

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83 Matthew L. Israel, *supra* note 17. (scroll to "Mere Announcement of Court Approval to Use GED as an Effective Intervention.")

84 Case of the 19 Tradesmen. Judgment of July 5, 2004. Series C No. 109, para. 149; Case of the "Street Children" (Villagrán Morales et al.). Judgment of November 19, 1999. Series C No. 63, para. 165; and Case of the "Juvenile Reeducation Institute", para. 167. *See also* the European Court of Human Rights, Campbell and Cosans, judgment of 25 February 1982, Series A, no. 48, p. 12, § 26.

85 Torture and other cruel, inhuman and degrading treatment or punishment, *supra* note 7171, at ¶ 49.

86 NYSPA Task Force, *supra* note 30, at 6.

87 *Id.* at 5.

understood to be psychologically damaging when perpetrated against non-disabled individuals.[88] And people at JRC, to extent that they may be more likely than the general population to have suffered trauma, might be more rather than less susceptible to the risks of this "treatment."

iv. Acquiescence of a public official or other person acting in an official capacity

International human rights law requires some form of state action to identify a practice as torture.[89] It has been established that governments can be held responsible for actions taken at private hospitals, psychiatric facilities or other institutions that detain individuals for treatment under government authority.[90] The UN Special Rapporteur on Torture has stated that "the prohibition against torture related not only to public officials, such as law enforcement agents in the strictest sense, but may apply to doctors, health professionals, and social workers, including those working in private hospitals."[91] It is, therefore, the obligation of the government "to prevent, investigate, prosecute and punish such non-State or private actors."[92]

JRC is licensed and certified by agencies of state government and receives state and federal funding, and it provides services that are sanctioned and regulated by the government. It is the obligation of the US federal government to protect children and adults with disabilities from torture or ill treatment by outlawing the use of electric shock and long-term restraints as a form of treatment.

Since 2013, the Government of Massachusetts has been trying to ban the electric shock treatment without success. In 2016, the Food and Drug Administration (FDA) said that "these devices [GED and GED 4] are dangerous and a risk to public health -- and we believe they should not be used."[93] It has also "proposed a set of regulations to ban the practice [the use of electric shocks at JRC], but has yet to sign off on them."[94] However, in June 2018, the Massachusetts Probate and Family Court ruled against the Massachusetts Department of Developmental Services

88 AMNESTY INTERNATIONAL, ARMING THE TORTURERS, ACT 40/004/1997 2 (March 4, 1997).

89 MANFRED NOWAK & ELIZABETH MCARTHUR, *supra* note 6565, at 229; *see also* DINAH L. SHELTON, REGIONAL PROTECTION OF HUMAN RIGHTS 311 (2008).

90 UN Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 9, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). A*vailable at*: http://www.unhcr.org/refworld/docid/47ac78ce2.html (Last visited August 17, 2018).

91 Torture and other cruel, inhuman or degrading treatment or punishment, *supra* note 7171, at ¶ 51. Also, in the case of *Ximenes Lopes*, the Inter-American Court of Human Rights found a private psychiatric hospital liable under international law. Ximenes Lopes v. Brazil, Inter-Am. Ct. H.R. (ser. C) Case No. 149 (July 4, 2006).

92 *Id.*

93 Mike Beaudet, *Protests hit Canton school over shocks to disabled students*, WCVB (June 11, 2018). Available at http://www.wcvb.com/article/protests-hit-canton-school-over-shocks-to-disabled-students/21274159 (Last visited August 17, 2018).

94 Julie Spitzer, *BeckersHospitalReview – Shock therapy protesters arrested outside HHS secretary's home*, ADPT (June 12, 2018). Available at http://adapt.org/beckershospitalreview-shock-therapy-protesters-arrested-outside-hhs-secretarys-home/ (Last visited August 17, 2018).

(DDS), concluding that DDS had failed to demonstrate that the practices at JRC "does not conform to the accepted standard of care for treating individuals with intellectual and developmental disabilities,"[95] so the uses of electric shock and long-term restraints on children and adults for behavioral purposes are still allowed at JRC.

C. Lack of informed consent

The Special Rapporteur on torture has reiterated that the use of electroshocks for persons with mental and intellectual disabilities "cannot be considered as an acceptable medical practice and may constitute torture or ill-treatment."[96] International human rights law does recognize that severe pain and suffering may be induced, at times, for "a fully justified medical treatment." This exception does not apply, however, for "medical treatments of an intrusive or irreversible nature, when they lack a therapeutic purpose, or aim at correcting or alleviating a disability. [Such practices] may constitute torture and ill-treatment if enforced or administered ***without the free and informed consent of the person concerned***."[97]

The electric shock and long-term restraints are indeed intrusive, and they may create irreversible psychological trauma. The electric shock and long-term restraints used at JRC do not "cure" an ailment; they merely aim at curtailing a behavior. A large percentage of patients subjected to these methods are left in the institutions and some continue to receive aversives for years. In practice, the most severe forms of pain are inflicted upon children and adults at JRC without their consent; rather, consent to the infliction of severe pain and suffering is given by parents, guardians and the court.

There is no informed consent at the JRC for the admission of the patient; instead, parents or guardians consent to placement at JRC.[98] Once there, JRC must seek a court hearing to request permission to use electric shock on residents. Referred to as a "substituted judgment" proceeding, the court determines whether the child or adult is competent to make decisions regarding extraordinary treatment and, if not, whether the individual would have chosen to receive such skin shocks if he or she were competent.[99] The court rarely denies approval.[100] In other words, the legal

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95 Massachusetts Probate and Family Court Decision *supra* note 4 par. 4. Elyse Johnson, Judge Permits Electric Shock Therapy On Students With Special Needs Or Disabilities, Tech Times (July 2, 2018). Available at https://www.techtimes.com/articles/231583/20180702/judge-permits-electric-shock-therapy-on-students-with-special-needs-or-disabilities.htm (Last visited August 17, 2018).

96 Torture and other cruel, inhuman and degrading treatment or punishment, *supra* note 7171, at ¶ 61.

97 *Id.* at 47.

98 Matthew L. Israel, Frequently Asked Questions, "Supplementary aversives at JRC—13. How is an aversive defined and which aversives are considered acceptable?" Judge Rotenberg Center, available at http://www.judgerc.org/.

99 *Behavior Research Institute v. Mary Kay Leonard* (Settlement Agreement), No. 86E-0018-GI (Mass. Super. Ct. Dept. of Trial Ct. and the Prob. Ct. and Fam. Ct. Dept. of the Trial Ct. Oct. 10, 1995).

100 DRI report, *supra* note 1 at 9.

fiction of "consent" for this treatment is determined by the "substituted judgment" court procedure.

D. Torture against children with disabilities

All children but especially children with disabilities have special protections under international law. The ACHR on its article 19 recognizes that "[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." In its preamble, the Convention on the Rights of the Child (CRC) states that every child "needs special safeguards and care". The CRC also protects children against any kind of torture and mistreatment.

The Convention on the Rights of Persons with Disabilities (CRPD) was created with the following purpose: "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[101] It protects persons with disabilities against torture or cruel, inhuman or degrading treatment or punishments. Establishing that in "all actions concerning children with disabilities the best interests of the child shall be a primary consideration."[102]

While the United States has signed the ACHR, it has never ratified it. Similarly, in 2009 it signed the CRPD, nonetheless, it has yet to ratify it. The same occurred with the CRC which the U.S. signed but has not yet ratified. While this situation may be a significant obstacle that prevents the full protection of children and children with disabilities who live in the United States, it should not present a limitation on the enforcement of the protection against torture. The United States has ratified both the ICCPR and CAT, and the protection against torture is accepted as a core element of customary international law.

The fact that the United States has not ratified the ACHR does not limit it from its broader international responsibilities and legal obligations. Neither should it excuse the United States from not protecting children from any act that violates their rights. The Inter-American Court of Human Rights establishes that "[t]he regulatory principle of the norm of the rights of the child is based on the dignity of the human being."[103]

E. The Danger of Institutionalization

The term institutionalization "is used to describe a person with a disability who has been confined to an institution, often against their will, and deprived of the ability to make decisions about their lives."[104] The most common conception of an institution

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101 UN Convention on the Rights of Persons with Disabilities (CRPD), Dec. 13, 2006, G.A. Res. 61/106, U.N. Doc. A/RES/106, entered into force May 3, 2008, signed by the United States 30 July 2009, art. 1.

102 *Id.*

103 I/A Court H.R., Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No.17. Para. 56.

104 Harvard University, Health and Human Rights Resource Guide (2013). Available at https://cdn2.sph.harvard.edu/wp-content/uploads/sites/25/2014/03/HHRRG-master.pdf (Last

is a large long-term residential building. However, "an institution is any place in which people who have been labelled as having a disability are isolated, segregated and/or congregated. An institution is any place in which people do not have or are not allowed to exercise control over their lives and day to day decisions."[105] According to UNICEF and the IACHR:

> "[I]n the Americas, as in all regions of the world, children and adolescents in residential institutions are exposed to structural violence derived from the conditions in which many of these institutions operate. Violence in the institutions is the result of a number of factors associated with the normal operation of these institutions, such as […] the implementation of disciplinary or control measures that involve violence, the use of force or treatments that, themselves, constitute a form of violence, such as unnecessary psychiatric medications, among others."[106]

The dangerousness of institutions has two main consequences: 1) children and persons with disabilities detained in them are at risk of suffering irreversible damage to their mental and physical and psychological wellbeing[107] and 2) they are disproportionately more likely to suffer abuse. In relation to the first factor, the psychosocial deprivation inherent to institutions has been shown to deeply impact the emotional, cognitive,[108] psychological and physical[109] development of a child and "lead to lifelong problems in learning, behavior, and health."[110]

There is growing evidence that shows that the institutionalization of children and persons with disabilities poses a great risk to their mental and physical integrity.

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visited August 17, 2018).

105 *Id.*

106 UNICEF, CIDH, OEA, *The Right of Boys and girls to a family Alternative Care. Ending Institutionalization in the Americas,* (2013), OEA/Ser.L/V/II. Doc 54/1 (2013), para. 306.

107 World Health Organization, Europe. "*Better health, better lives: children and young people with intellectual disabilities and their families. Transfer care from institutions to the community".* EUR/51298/17/PP/3, (November 2010). p. 5 http://www.euro.who.int/__data/assets/pdf_file/0008/126566/e94426.pdf (Last visited August 17, 2018).

108 Kroupina, Totem, Patrick, Johnson, *Associations between physical growth and general cognitive functioning in international adoptees from Eastern Europe at 30 months post-arrival* (2015), p.2. Available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4644626/pdf/11689_2015_Article_9132.pdf (Last visited August 18, 2018).

109 National Scientific Council on the Developing Child, *The Science of Neglect: The Persistent Absence of Responsive Care Disrupts the Developing Brain,* (2012). p. 5 http://developingchild.harvard.edu/wp-content/uploads/2012/05/The-Science-of-Neglect-The-Persistent-Absence-of-Responsive-Care-Disrupts-the-Developing-Brain.pdf (Last visited August 18, 2018).

110 *Id.* at 4. *See also* World Health Organization, Europe, *Better health, better lives: children and young people with intellectual disabilities and their families. Transfer care from institutions to the community,* EUR/51298/17/PP/3, (November 2010). p. 5. Available at http://www.euro.who.int/__data/assets/pdf_file/0008/126566/e94426.pdf (Last visited August 18, 2018).

Former UN Special Rapporteur on the Right to Health, Paul Hunt, identified institutional placement as a threat to the right to health.[111] "Within institutions, persons with disabilities are often held in seclusion or solitary confinement as a form of control or medical treatment, although this cannot be justified for therapeutic reasons, or as a form of punishment."[112]

F. Identification of the alleged victims

The following precautionary measures request seeks to protect the life and integrity of all children and adults who are detained at the JRC.

IV. REQUESTS

Given the gravity of the aforementioned facts and the urgent and grave risk of irreparable harm if protection measures are not adopted as a matter of urgency, we respectfully request the Illustrious Inter-American Commission on Human Rights to:

FIRST. Consider the submission of this request for precautionary measures as presented in compliance with the requirements established in Article 25 of the Rules of the Illustrious Commission.

SECOND. Adopt precautionary measures in favor of the children and adults who are detained at the JRC and require that the United States of America agrees to:

- Ban all regulations that permit the use of any form of aversive therapy that inflicts severe pain for any reason, including the infliction of pain-inducing electric shock for treatment, prolonged restraints, and other forms of behavioral control;
- Stop behavior modification practices such as electric shocks, restraints, and seclusion as "treatment" of any kind, including the use of aversive "treatments" at the JRC
- Ensure that the JRC does not perpetrate torture or inhuman or degrading treatment of any kind under government authority
- Sign the set of regulations that were proposed in 2016 by the FDA that ban the use of electric shocks at JRC; the device that delivers electric shock should be specifically labeled as dangerous and an implement of torture that should be banned under any circumstance;
- Make sure that no local or federal funds are allocated to the JRC so long as the practices identified above are permitted or practiced at the facility.

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111 Economic, Social and Cultural Rights, Report of the Special Rapporteur, Paul Hunt, submitted in accordance with Commission resolution 2002/31, doc. E/CN.4/2003/58, para. 90-93, (Feb 13, 2003). Available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/109/82/PDF/G0310982.pdf?OpenElement.

112 Torture and other cruel, inhuman or degrading treatment or punishment, *supra* note 71 at para. 58.

APPENDIX I

Several lawsuits have been filed and actions have been taken by activists, survivors and family members to put an end to the electric shocks at the JRC. The most relevant facts regarding the JRC case are described below:

- 1985. The Massachusetts Office for Children (OFC), alleged that the facility's use of "aversive therapies" like spankings, muscle squeezes, pinching, and "restrained timeouts" violated state regulations. The OFC demanded that the facility show cause why it should not be shut down or otherwise sanctioned. The Center responded by filing a class action in state court on behalf of itself, its students, and its students' parents. It claimed that the OFC had engaged

in bad-faith regulatory actions that violated the students' due-process rights as well as the state's Administrative Procedures Act.

- June 1986, the state superior court (Judge Ernest Rotenberg) granted a preliminary injunction barring the OFC from revoking the Center's license to provide services. The court held that prohibiting the Center from practicing "aversive therapies" would seriously inhibit its program and harm the students. The preliminary injunction was upheld on appeal. A few months later, the two parties entered into a settlement agreement, which Judge Rotenberg approved in January 1987. The agreement allowed for "aversive procedures" at the Center only when authorized "as part of a court-ordered 'substituted judgment' treatment plan for an individual client." A court-appointed monitor oversaw all court-approved individualized aversive plans and reported regularly to the court. The monitor also had authority to arbitrate any disputes arising under the agreement. The settlement agreement was only supposed to last for one year, but in July 1988, Judge Rotenberg extended it "until further order."
- In 1993, the Center brought a contempt action against the Massachusetts Department of Mental Retardation (which had replaced the OFC in supervising the Center) for alleged violation of the settlement agreement. The Center claimed that the Department acted in bad faith by refusing to grant the Center's request for recertification to use certain "aversive procedures." The Center also claimed that the Department had refused to arbitrate disputes as required by the decree and attempted to disrupt the Center's relationships with funding agencies and clients.
- After a bench trial in 1995, the Court (Judge Elizabeth LaStaiti) found the Department of Mental Retardation in contempt and appointed a receiver to manage the agency in all its dealings with the Judge Rotenberg Center. The receivership was in place from 1996 until 2006. During that time, the Department of Mental Retardation cooperated with the receiver in issuing licenses and certifications to the Judge Rotenberg Center. The Department also met with the receiver and Center to resolve any disputes.
- 2003. The receiver recommended returning regulatory authority over the Center to the state Office of Child Care Services, a sub-agency of the Department of Disability Services (DDS), which had succeeded the Department of Mental Retardation. In 2006, the receivership officially ended.
- 2006. The most common type of aversive intervention used by the Center was a graduate electronic decelerator, a device that administered an electric shock to the student's skin. The DDS classified this device as a Level III intervention.
- 2011. The DDS banned all Level III interventions at facilities it oversaw. The agency allowed some exceptions for people who had existing court-approved treatment plans which included the use of such interventions.
- But the Judge Rotenberg Center claimed that the settlement agreement gave it affirmative rights to use aversive techniques in perpetuity and excused it from complying with the new regulation. So, in February 2013, DDS moved to vacate the consent decree, which would allow it to regulate the Center in the same way it regulates every other similar facility.

- In June 2018, a Massachusetts Probate and Family Court judge ruled that the procedure consisting of administering electric shocks to children and adults with disabilities conformed to the "accepted standard of care."[113]

113 Massachusetts Probate and Family Court Decision *supra* note 4.