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Represented by: APPLICANTS: David Weissbrodt and Mary McClymont

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I. INTRODUCTION

A. Summary of the facts and the Petitioners' complaint

1. The Petitioners are James Terry Roach and Jay Pinkerton who were sentenced to death and executed in the United States for crimes which they were adjudged to have committed, and which they perpetrated before their eighteenth birthdays.
2. The Petitioners are represented by David Weissbrodt and Mary McClymont. The American Civil Liberties Union and the International Human Rights Law Group have co-sponsored the complaint. Amnesty International also filed a petition with the Commission alleging that the imminent execution of James Terry Roach, while lawful in the United States, is a violation of international law. Eighteen organizations have communicated to the Commission their support of the complaint.
3. James Terry Roach was convicted of the rape and murder of a fourteen year old girl and the murder of her seventeen year old boyfriend. Roach committed these crimes at the age of seventeen and was sentenced to death in the General Session Court, Richland County, South Carolina on 16 December 1977. Roach petitioned the United States Supreme Court for a writ of certiorari on three separate occasions. All petitions were denied. Roach also exhausted all appeals to the state and federal courts, and on 10 January 1986 he was executed.
4. Jay Pinkerton was convicted of murder and attempted rape which he committed at the age of seventeen. The death sentence was appealed to the Texas Supreme Court which affirmed the trial court's decision. The United States Supreme Court denied Pinkerton's writ of certiorari on 7 October 1985. Pinkerton was executed on 15 May 1986.
5. On 23 February 1987, the U.S. Supreme Court announced that it would decide in its next term the case of Thompson v. Oklahoma, thereby, for the first time, taking up the issue of the execution of juvenile offenders. The constitutional issue presented is whether the execution of a juvenile offender violates the U.S. Constitution's prohibition on cruel and unusual punishment.
6. In their complaint to the Commission, the petitioners allege that the United States has violated Article I (right to life), Article VII (special protection of children), and Article XXVI (prohibition against cruel, infamous or unusual punishment) of the American Declaration of the Rights and Duties of Man by executing persons for crimes committed before their eighteenth birthday. The Petitioners allege a violation of their right to life guaranteed under the American Declaration, as informed by customary international law, which prohibits the execution of persons who committed crimes under the age of eighteen.

B. Proceedings before the Commission

7. The petition on behalf of James Terry Roach was filed with the Commission on 4 December 1985 and registered as Case No. 9647 (United States). Jay Pinkerton's petition was registered with the Commission on 8 May 1986 following the setting of the date for his execution.
8. In both the case of Roach and of Pinkerton, the Commission cabled the United States Secretary of State, George P. Shultz, and the respective Governor of the Petitioner's state, requesting a stay of execution pending the Commission's examination and decision of Case No. 9647. The Commission stated in each telegram that its request for information did not prejudge the admissibility of the case in accordance with Article 34 of the Commission's Regulations.
9. Petitioner Roach had sought provisional relief measures under Article 29 of the Commission's Regulations. On 12 December l985, the Chairman of the Commission cabled Secretary of State, George P. Shultz, and South Carolina Governor, Richard W. Riley, requesting a stay of execution pending the Commission's examination of the case. The Chairman stated that granting such a stay of execution would "be in the spirit of major human rights instruments and the universal trend favorable to the abolition of the death penalty." The Commission also requested that the U.S. Government provide information concerning

the Petitioner's complaint.

10. On 23 December 1985 the Executive Secretary of the Commission cabled the United States Government with additional information relating to the date of Roach's execution scheduled for 10 January l986 and stressed the necessity of receiving a response by that date. The Commission also reiterated its previous request to stay the execution of the Petitioner. Another cable was sent to the Secretary of State with a stay of execution request on 6 January 1986.

11. On 9 January 1986 the U.S. State Department replied. It stated that: "Under the circumstances, with respect to the Commission's request that the execution be stayed pending consideration of the case, the United States is constrained to reply that the matter is now in the hands of authorities for the State of South Carolina and, under the U. S. federal system, there are no domestic legal grounds for executive intervention in the implementation of the sentence."

12. On 9 January 1986 the Secretary General of the Organization of American States cabled an appeal to the Governor of South Carolina to "follow the current tendency of almost all the countries in this hemisphere and to stay the execution."

13. On 9 January 1986, Governor Riley of South Carolina responded to the cables requesting a stay of execution by informing the Executive Secretary of his decision not to intervene in the case of James Terry Roach. The Governor stated that he had reviewed the case thoroughly and believed that the case had been "fairly litigated at the trial level and that all of his appeals in the courts have been given full and fair consideration." As a result, he found "no reason to intervene in the judicial process or to grant a request for clemency."

14. On 20 February 1986, the lawyers for the Petitioners filed a brief on Case 9647 with the Commission, setting forth their legal arguments pertaining to the case.

15. On 8 April 1986, the Petitioners requested that additional information compiled by Amnesty International on comparative national laws which proscribe the execution of persons under the age of eighteen around the world be incorporated by reference into the Petitioners' brief.

16. On 26 March 1986, the United States requested an extension of time until 28 August 1986 in order to respond fully to the issues raised by the Petitioners. The Commission at its 67th Session granted the U.S. Government an extension until 1 July 1986 in order to have a draft decision on the case before its next regular session.

17. On 9 May 1986, after having been informed by the Petitioners that Jay Pinkerton was to be executed on 15 May 1986, the Commission cabled the Secretary of State and Governor Mark White of Texas requesting a stay of execution in the case of Jay Pinkerton pending the Commission's examination and decision on Case 9647.

18. The U.S. Government responded on 14 May 1986. It stated that, as in the case of James Terry Roach, "the United States considers that U.S. domestic standards with respect to application of the death penalty are fully consistent with the principles stated in the Declaration," and given the U.S. federal system "there are no domestic legal grounds (...) for executive intervention in the implementation of Mr. Pinkerton's sentence." The Governor of Texas did not respond to the Commission's request for a stay of execution.

19. On 15 July 1986, the U.S. Government submitted its brief in response to petitioners' brief.

C. The final decision

20. This final decision was drawn up by the Commission in accordance with Article 53 of the Regulations of the Inter-American Commission on Human Rights. The text of this final decision was adopted by the Commission on 27 March 1987. The following members were present:

Gilda Russomano, President
Marco Tulio Bruni Celli
Oliver H. Jackman
Elsa Kelly
Luis Adolfo Siles

This final decision is now transmitted to the parties.
Bruce McColm, a U.S. national, chose not to participate in this decision, pursuant to Article 19 of the Commission's Regulations.
Marco Gerardo Monroy Cabra was not present at the Commission on that date.

II. THE FACTS

21. The facts of the present case are not in dispute between the parties.
22. In the present case, the Petitioners allege that the United States has denied them the internationally protected right to life by condemning them to death and executing them for crimes committed while under the age of eighteen. The issue presented is: Does the absence of a federal prohibition on the execution of juveniles offenders within U.S. domestic law violate the human rights standards applicable to the United States under the inter-American system?

A. James Terry Roach

23. Petitioner Roach was seventeen years old when he committed the rape and the murder of a fourteen year old girl and the murder of her seventeen year old boyfriend. Evidence revealed that Roach was borderline mentally retarded, with an I.Q. of between 75 and 80 and that he apparently suffered from Huntington's Chorea, an incurable brain disease. The psychological and medical evidence presented at the April l980 postconviction proceedings suggest Roach actually functioned at the mental age of twelve when the offense was committed. Roach had two codefendants. One was another youth of 16 who turned state's evidence and received life imprisonment. The other was J.C. Shaw, a twenty-two year old adult, who received the death sentence on 11 January 1985. Evidence showed Roach had been under the adult's influence when the offenses were committed.
24. Jurisdiction of the juvenile court in South Carolina is limited to those under seventeen years of age. Therefore, Roach was sentenced to death in adult criminal court in pursuance of South Carolina's death penalty statute which follows the Georgia statute upheld by the Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976). The South Carolina death penalty statute provides for a bifurcated trial which first considers the guilt or innocence of the defendant, and then upon conviction, a separate sentencing proceeding is conducted to determine whether the defendant is to be sentenced to life imprisonment or death. Roach pleaded guilty to the charges. At the sentencing hearing, the judge heard additional mitigating and aggravating evidence. At least one aggravating circumstance must be found beyond a reasonable doubt before the death sentence may be imposed. South Carolina law has seven statutory aggravating circumstances and nine statutory mitigating circumstances. Among the mitigating factors is that, "The defendant was below the age of l8 at the time of the crime." S.C. Code, 16-3-20 (C)(b)(9).
25. In considering the mitigating factors in the Roach case, the sentencing judge found that Roach had been under the domination of an adult during the commission of the crime. The judge also found that Roach's capacity to conform his conduct to the requirements of the law was substantially impaired, and that he was under the influence of extreme mental or emotional disturbance as he and his codefendants were "shooting up" drugs and drinking beer before the offense. Another mitigating factor was that Roach had no significant history of prior criminal activity involving the use of violence against another. Roach's mental retardation, anti-social personality disorder, and the fact that he was below the age of 18 at the time of the crime, were also considered by the judge in Roach's sentencing. Roach v. Martin, 757 F.2d 1463, 1468-69 (1985).
26. Nevertheless, the sentencing judge also found beyond a reasonable doubt three statutory aggravating circumstances: murder committed while in the commission of rape, murder committed while in the commission of kidnapping, and murder committed while in the commission of robbery. S.C. Code 16-3-20 (C)(a)(1)(a), (c), (e). The judge found the evidence in the case warranted the imposition of the death penalty after weighing both mitigating and aggravating circumstances.
27. This sentence was upheld on direct appeal by the South Carolina Supreme Court. State v. Shaw

(and Roach), 255 S.E. 2d 799, (1979). [FN1] South Carolina law provides for a mandatory review in the imposition of the death penalty. Roach was later denied post conviction relief by the state trial court and the appeal of this was denied by the State Supreme Court of South Carolina. Roach v. State, Memo Op. No. 81-MO-197 (S.C. July 17, 1981).

[FN1] First capital case reviewed under the current death penalty statutes.

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28. Petitioner also sought review of his case from the United States Supreme Court. He challenged as unconstitutional, among other issues, the imposition of the death penalty as being grossly disproportionate and offensive to contemporary standards of decency due to, among other factors, his age when the crime was committed. However, the Supreme Court denied the writ of certiorari. Roach v. State, 444 U.S. 1026, reh'g denied 444 U.S. 1104 (1980). He again raised the same issue of his age, as being one factor which resulted in the unconstitutionality of the imposition of the death penalty, in another petition for certiorari. This was denied on 25 January 1982. Roach v. South Carolina, 455 U.S. 927 (1982).

29. Roach brought a petition for a writ of habeas corpus in the U.S. District Court of South Carolina. This request was also denied. Roach v. Martin, Civil Action No. 81-1907-14 (May 11, 1984). He appealed this denial, raising again the issue of his age as being a factor prohibiting the imposition of the death penalty. The U.S. Court of Appeals for the Fourth Circuit affirmed the district courts denial of the writ. Roach v. Martin, 757 F.2d 1463 (4th Cir. 1983). His final appeal to the United States Supreme Court was denied on 7 October 1985, and the petition for rehearing was denied on 2 December 1985. See, Roach v. Aiken, No. 85-6155 (A-531). Petitioner Roach was executed in Columbia, South Carolina on 10 January 1986.

B. Jay Pinkerton

30. Petitioner Pinkerton was found guilty of murder in the course of burglary with the intent to commit rape. The crime was committed when he was seventeen years old. Petitioner at seventeen was also beyond the age limit of the jurisdiction of Texas juvenile courts (age 17) and was tried as an adult. He was sentenced to death in accordance with the Texas capital punishment statute which had been upheld by the Supreme Court. Jurek v. Texas, 428 U.S. 262 (1976).

31. The Texas death penalty statute currently provides for the imposition of the death sentence only for capital murders. A capital murder is the intentional or knowing killing of a person accompanied by one of five listed aggravating factors. These factors focus on the identity of the victim and the dangerousness of the actor's conduct. Pinkerton was convicted of intentionally committing murder in the course of committing burglary which is one of the statutory aggravating factors defining capital murder. Tex. Code Crim. Proc. Ann., art. 19.03 (a)(2).

32. Conviction of capital murder results in either a mandatory death sentence or life imprisonment. The jury at the sentencing hearing must find beyond a reasonable doubt that (1) the actor killed intentionally or knowingly; (2) he will probably commit other crimes of violence if not executed; and (3) the killing was unreasonable in response to the provocation, if any, of the deceased. To warrant the death sentence all twelve jury members must answer each of these issues affirmatively. The Supreme Court of the United States upheld this Texas statute in Jurek v. Texas, 428 U.S. 262 (1976), finding that the second question is interpreted to allow the defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show. Id. at 272. Therefore, although the statute does not specify age, this may be taken into consideration at the sentencing hearing. Texas law prohibits the imposition of the death penalty on anyone younger than seventeen when the capital felony was committed. Texas C.C.P., 8.07(e).

33. Pinkerton's statutorily provided review was taken to the Court of Criminal Appeals where his conviction and sentence were affirmed. Subsequent federal and state appeals were denied. The United

States Supreme Court denied certiorari on 7 October 1985. Pinkerton v. McCotter, 88 L.Ed. 2d 158 (1985). Jay Pinkerton was executed by the State of Texas on 15 May 1986.

III. SUBMISSIONS OF THE PARTIES

A. The Petitioners

34. The Petitioners allege that the imposition of the death penalty on James Terry Roach and Jay Pinkerton by United States courts for crimes committed before their eighteenth birthday violated the American Declaration of the Rights and Duties of Man. Specifically, Petitioners allege violations of Article I (right to life), Article VII (special protection of children), and Article XXVI (cruel, infamous or unusual punishment) of the American Declaration as informed by customary international law which prohibits the imposition of the death penalty for crimes committed by juveniles under eighteen.

35. The Petitioners state that the United States is subject to the jurisdiction of the Commission as a member State of the Organization of American States and is obligated, therefore, to observe the enumerated rights in the American Declaration.

36. The Petitioners' case meets the admissibility requirements of Article 37 of the Commission's Regulations as the Petitioners have exhausted all domestic remedies. United States courts, both federal and state, have failed to address Petitioners' claims that the imposition of the death penalty on juvenile offenders is constitutionally prohibited.

37. The Petitioners' complaint may be summarized as follows:

(a) Imposition of the death penalty on juveniles violates the American Declaration as informed by customary international law.

(b) The United States is legally bound by the American Declaration of the Rights and Duties of Man. The American Declaration should be interpreted according to the canons of the Vienna Convention on the Law of Treaties because the Convention represents a world-wide consensus on how international instruments should be construed.

(c) Articles 31 and 32 of the Vienna Convention set out the principal interpretative norms for treaties and other international instruments. According to Article 31 of the Vienna Convention, the terms of the American Declaration should be interpreted in accordance with their ordinary meaning and in light of the object and purpose of the instrument. Construing Articles I, VII and XXVI together and in accordance with their ordinary meaning, and in light of the object and purpose of the Declaration, these articles should be interpreted to prohibit the execution of persons who committed offenses under the age of 18.

(d) The U.S. Government is incorrect in asserting that the rights in the Declaration "must be interpreted in terms of the intentions of the member states at the time of the adoption of the Declaration, not in terms of changing norms of customary international law." This rigid and static approach to the interpretation of the Declaration is in conflict with the terms of the Declaration, the norms of the Vienna Convention, the normal approach which international bodies take to human rights instruments, the practice of the Commission, and the practice of the United States in its own domestic cases. The preamble to the American Declaration states, "The international protection of the rights of man should be the principal guide of an evolving American law...." (Emphasis added).

(e) In construing the terms of the American Declaration in light of its object and purpose, the Commission should pay particular attention to Article XXVI which forbids "cruel, infamous or unusual punishment." This is broader than the United States constitutional prohibition against cruel and unusual punishment. Juveniles are recognized as lacking in maturity and are most susceptible to various influences and psychological pressure. Killing a young person who has not had the chance to mature to adulthood is the "ultimate cruel punishment," therefore, Article XXVI should be interpreted as a prohibition against the execution of juveniles. Then, on its ordinary meaning and in light of the object and purpose of these articles, the United States is violating the American Declaration by executing juveniles.

(f) Article 31 of the Vienna Convention also looks to "relevant rules of international law" to help interpret treaties. Therefore, the Commission should take into account the customary international law

norm prohibiting the execution of juvenile offenders. This prohibition has obtained the status of customary international law. Pursuant to Article 38(1)(b) of the Statute of the International Court of Justice, "international custom, as evidence of a general practice accepted as law" is one of the sources of international law. Treaties are clearly evidence of State practice, especially if accompanied by opinio juris, or claims in the treaty or the travaux preparatoires indicating that a treaty provision is a restatement of pre-existing customary laws.

(g) The major human rights instruments such as the American Convention on Human Rights (Article 4(5)), the International Covenant on Civil and Political Rights (Article 6(5)), and the Fourth Geneva Convention prohibit the imposition of the death penalty on persons under eighteen years of age.

Article 4(5) of the American Convention reads: "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women." The fourth Geneva Convention states in Article 68, in relevant part:

In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence.

As of January 1є, 1986 there are 162 states parties to this Convention, including the United States. This Convention applies to periods of international armed conflict and Article 68 forbids the execution of civilians and military personnel no longer in combat, who committed offenses prior to the age of 18. If nearly all the nations of the world, including the United States, have agreed to such a norm for periods of international armed conflict, the norm protecting juvenile offenders from execution ought to apply with even greater force for periods of peace.

(h) In addition, approximately two-thirds of the nations of the world have either abolished the death penalty or have prohibited it for juveniles by adhering to these human rights instruments. Whereas the European "Convention for the Protection of Human Rights and Fundamental Freedoms" (1950), in Article 2 allowed the death penalty, an evolving abolitionist philosophy is reflected in Protocol No. 6 which states "the death penalty shall be abolished. No one shall be condemned to such penalty or executed."

Petitioners point out that the travaux preparatoires of these Conventions demonstrate that these prohibitions against juvenile executions are in fact codifications of customary international law as can be derived from the debates during the drafting of the provisions of these Conventions.

(i) As further evidence of State practice, in terms of actually carrying out the death sentence, Petitioners submit evidence, compiled by Amnesty International, to the effect that since 1979, although 80 nations of the world have executed over 11,000 persons, only six persons who committed offenses under 18 were executed by four nations, including the United States.

In the United States, the laws of various jurisdictions which permit the use of the death penalty nonetheless recognize the uniqueness of juvenile offenders and at least 21 states set a minimum age for imposition of the death penalty. Therefore, although the data is incomplete, available information shows that national laws, as well as the practice of states not to execute minors, further demonstrate the existence of a customary law norm prohibiting execution of offenders who committed capital crimes as juveniles.

(j) The Commission should not rely on the travaux preparatoires of the American Declaration as the U.S. Government argues. The United States relies for support on the deletion of language pertaining to capital punishment from the Inter American Juridical Committee's draft. The original Article I reads as follows:

Every person has the right to life, including the fetus ("los que estan por nacer") and the terminally ill, the insane, and mentally retarded.

Capital punishment shall only be applied in cases in which pre-existing law has established it for exceptionally grave crimes.

The original second sentence of Article I concerning capital punishment was dropped in the subsequent and final drafts. Like the capital punishment language, the latter half of the first sentence was also deleted in subsequent and final drafts. The present version of Article I reads:

Every human being has the right to life, liberty and the security of his person.

The deletion of the capital punishment language can no more be interpreted to infer that the drafters

necessarily meant to authorize widely its use than can the deletion of the clause in the first sentence be interpreted to mean that the insane, terminally ill, or mentally retarded were no longer afforded the right to life. Instead, the deletion of the capital punishment language could be read to mean that the drafters were simply unable or unwilling to delineate each and every instance when capital punishment would be prohibited as they did not want to authorize it necessarily in every context.

(k) Finally, there is a limit on any State's ability to regulate a matter, such as capital punishment, if the result will violate international law. Domestic legislation of member states cannot validate conflict with international obligations; a state cannot invoke its contrary domestic law as justification for its failure to abide by an agreement. The United States argument that at the time of the drafting of the Declaration the death penalty was widely practiced and could not generally be considered cruel or unusual is irrelevant. Petitioners argue that "[H]uman rights instruments. . . are drafted to improve the human rights situation and not certainly to reconfirm any alleged right of nature to continue violating human rights."

(l) The petitioners request that the Commission find that the United States has violated the American Declaration, as interpreted in the light of customary international law, by having executed Petitioners Roach and Pinkerton for offenses they committed while under the age of eighteen. Petitioners also request the Commission to recommend that a moratorium be imposed on the execution of other juvenile offenders in the United States.

B. The Government

38. The U.S. Government considers that the absence of a prohibition on the execution of juvenile offenders within United States domestic law is not inconsistent with human rights standards applicable to the United States. The Commission must look to the American Declaration for the relevant standards as the United States is not a party to the American Convention. The argument may be summarized as follows:

(a) The American Declaration is silent on the issue of capital punishment as Article I simply states, "Every human being has the right to life, liberty and the security of his person." From the drafting history of the Declaration, there is evidence that Article I was not meant to affect the legislative discretion of the American states with respect to capital punishment. A Declaration that does not expressly limit the circumstances under which the death penalty may be imposed may not be interpreted as foreclosing the reasonable discretion of the American states to determine for themselves the minimum age at which imposition of the death penalty is appropriate.

(b) The drafters considered and declined to adopt any specific standards on the issue of capital punishment. The reference to capital punishment prohibiting it except for exceptional crimes was deleted in the final draft. The debate surrounding Article I demonstrates that a standard on capital punishment could not be devised due to the diversity of State legislation in the hemisphere. Therefore, the States are able to legislate within their own discretion on the issue of capital punishment.

(c) Only Article I is at issue because if no standard on capital punishment was incorporated into the American Declaration, then a prohibition against the execution of juveniles could not be "silently subsumed" within the other rights. Article VII on the special protection and care of women and children was not contemplated to extend to juveniles convicted of serious crimes. There is no official record of the drafters' intentions but the use of the word "children" was not meant to refer to juveniles nearing their eighteenth year.

There is also no official record of the drafters' intentions with regard to the prohibition against "cruel, infamous or unusual punishment" of Article XXVI. However, at the time of the drafting the death penalty was widely practiced and therefore, could not be considered cruel or unusual.

None of the three articles of the Declaration cited by petitioners addresses the death penalty or establishes any particular age of majority. The U.S. Government believes that the Declaration is deliberately silent on the issue of capital punishment. Therefore, there purposely is no limitation on the legislative prerogative of the American States regarding the imposition of the death sentence.

(d) The Vienna Convention should not be relied on to interpret the American Declaration as the Declaration is not a treaty and it is not binding on the United States. The U.S. Government does not agree with the Commission's holding in Case No. 2141 (United States) that the Declaration acquired binding force with the adoption of the revised OAS Charter. Res. 23/81, OAS/Ser. L/V/II.52, Doc. 48. Mar. 6, 1981. The Declaration was not drafted with the intent to create legal obligations, therefore the Commission should take special care "where the intentions of the drafters are manifest with respect to any particular article," not to overturn that meaning.

Even assuming the Vienna Convention could be applied to the Declaration, the Petitioners have not shown the "clear meaning" of Articles I, VII, or XXVI. Each is "ambiguous" with respect to the prohibition of the death penalty on juveniles. Therefore, recourse to the travaux preparatoires is necessary.

(e) The petitioners request that the Commission look to the American Convention and other international instruments to "interpret" the Declaration as encompassing the standard of Article 4(5). This requires the Commission to go far beyond its interpretative powers. Specific standards in the American Convention, such as the prohibition against the execution of those who committed crimes under eighteen years of age, are binding only on those parties to the Convention. These standards were not accepted by the United States.

(f) The three human rights instruments mentioned by petitioners are irrelevant to the Commission's consideration of the case. The United States is not a party to the International Covenant nor the American Convention, and standards cannot be imposed by "interpretation" on a State which is not a party. See, Case No. 2141 (United States). In addition, the United States delegate at the drafting of the American Convention pointed out that the United States had problems with Article 4(5)'s arbitrary age limit of 18 conflicting with its federal structure.

(g) Petitioners are also incorrect in stating that Article 4(5) of the American Convention is declaratory of customary international law. The age of majority for purposes of imposing the death penalty is not a matter of uniform state practice. Some countries desired a specific age limit while others wanted reference only to "minors" or "juveniles" during the drafting of the International Covenant's Article 6(5), demonstrating that they were not codifying an already existing binding norm. Instead, this was a specific standard intended to create uniformity where none existed.

At the same time, there is no evidence of opinio juris. Even the states which have enacted prohibitions against the execution of those who committed crimes before their eighteenth birthday did not do so out of any sense of legal obligation. Since the American Convention and the International Covenant have been enacted, any changes in state legislation cannot be viewed as evidence of a generally applicable customary rule of law. "Relevant rules of law" must exist apart from any conventional or treaty standards. "Simply because states in the U.S. or other nations have chosen eighteen as the age of majority does not impose an obligation that other states must choose the exact same age."

(h) The U.S. Government does not acknowledge the existence of a customary international law norm which prohibits the execution of juveniles. To establish a norm of customary law there must be "extensive and virtually uniform" state practice and second, evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The rule must be recognized as a legal obligation based on the custom or practice of states. In this case, there is neither the uniformity of state practice, nor the required opinio juris to regard the standard as a binding norm of customary international law.

(i) The U.S. Government further maintains that it has dissented from such a standard. It abstained from participating in the debate and vote on the draft International Covenant, and submitted it to the U.S. Senate with reservations. The United States also opposed Article 4(5) of the American Convention, and when president Carter signed the American Convention he proposed the Senate advice and consent to ratification of the treaty be accompanied by a reservation stating that "United States adherence to Article 4 is subject to the Constitution and other law of the United States". Four Treaties Pertaining to Human Rights, Message from the President of the United States, S. Doc. No. Exec. C, D, E, 8F, at xii, 95th Cong., 2d Sess (1978).

The U.S. Government concludes its brief by stating that "There is no basis in international law for

applying to the United States a standard taken from treaties to which it is not a party and which it has indicated it will not accept when it becomes a treaty."

(j) The U.S. Government requests the Commission to hold that the recent executions are not inconsistent with the American Declaration.

IV. ADMISSIBILITY

39. In denying Roach's and Pinkerton's appeals for a writ of certiorari, the U.S. Supreme Court deliberately decided not to review the issue of the constitutionality of the execution of juvenile offenders. As pointed out in Petitioners' brief, Justice Brennan in his dissent stated that the Roach case afforded "an opportunity to address the important question whether an accused may...be sentenced to death for a capital offense he committed while a juvenile." Since the U.S. Supreme Court chose not to address the question the Commission finds that the Petitioners had no further domestic remedies to exhaust.

40. In spite of the fact that the U.S. Supreme Court has not addressed the issue of the constitutionality of applying the death penalty to juvenile offenders, it has established certain trial and sentencing standards for state death penalty cases. A review of the evolution of these Supreme Court standards is relevant here.

A. The United States Supreme Court and the death penalty

41. In the United States, since the 19th century the courts have moved away from mandatory death sentences, as such a system fails to take into account the individual and his circumstances. However, by 1972 the United States Supreme Court found that the courts had moved so far from a mandatory system that unlimited discretion had been given to the judge or jury to decide who received the death penalty. In Furman v. Georgia, 408 U.S. 238 (1972), the Court held that such unguided discretion created arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. While the Furman decision did not hold that the death penalty, per se, violates the Eighth Amendment, it, in effect, suspended executions and made federal and state death penalty statutes inoperative until new laws were drafted which would comply with the Constitution in light of Furman v. Georgia. The execution of Gary Gilmore on January 17, 1977 was the first execution since June 2, 1967. In the decade since Gilmore there have been more than 60 executions. In the decade 1976-1986 over 3,000 people have been sentenced to death in the United States. Between 1963 and 1985 the U.S. did not execute a criminal who was under the age of 18 at the time of the crime. Since then three have been executed.

After Furman many states enacted new death penalty statutes. In 1976, the Court began to examine the post-Furman statutes and in Gregg v. Georgia, 428 U.S. 153 (1976), it addresses the question avoided in Furman, namely, is the imposition of the death penalty per se unconstitutional? The Court in Gregg stated that it was not unconstitutional, and began to set out guidelines for imposition of the death penalty.

a) The U.S. Supreme Court held in Gregg v. Georgia that the Eighth Amendment, which has been interpreted in a flexible manner to accord with "evolving standards of decency," prohibits the death penalty if it is grossly disproportionate to the crime or if it is imposed arbitrarily or capriciously. The Court, however, upheld the Georgia statute in Gregg because it was carefully drafted to ensure that the sentencing authority was given adequate information and guidance. The Georgia statute provides for a bifurcated trial in which the jury first determines the defendant's guilt or innocence. At the sentencing hearing, the jury then considers any mitigating and/or aggravating circumstances in the case. Before the death penalty could be imposed the jury had to find that one or more statutory aggravating factors existed beyond a reasonable doubt and that such factors were not outweighed by mitigating factors.

b) In two companion cases, the Court upheld the death penalty statutes of Florida and Texas which provide that the judge or the jury is given specific and detailed guidance to assist them in deciding whether to impose the death sentence or life imprisonment. Proffit v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). Each statute guides and focuses the sentencing authority's objective

consideration of the particular circumstances of the offense and the offender.

c) The standards necessary to guide the jury or judge in sentencing have focused on the nature and circumstances of the crime and the character and record of the defendant. Aggravating circumstances may include such issues as whether the murder was committed by a convict or if the murder was atrocious or heinous. Special attention has been given by the Supreme Court to the mitigating factors. In Lockett v. Ohio, 438 U.S. 586 (1978), the Court struck down the Ohio death penalty statute which only specified three factors to be considered in the mitigation of the defendant's sentence. The Court found that the Eighth and Fourteenth Amendments require that the sentencer, "not be precluded from considering as a mitigating factor, any aspect of the defendant's record or character and any of the circumstances of the offense...." Id. at 604. In that case, the sentencing judge had been precluded by the Ohio statute from considering as mitigating factors: the defendant's lack of a prior criminal record; the fact that she was twenty-one; her lack of specific intent to cause death; and her relatively minor part in the crime.

d) In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court added that the states must consider the background and mental and emotional development of the defendant as mitigating factors. The defendant in Eddings had committed a murder at the age of sixteen. The Court had granted the writ of certiorari on the question of whether, in the light of contemporary standards, the Eighth Amendment forbids the execution of a defendant who was under eighteen at the time of the offense. The Court, however, declined to address that issue. It decided the case instead in light of Lockett v. Ohio, vacating the death sentence because it had been imposed without the type of individualized consideration of mitigating factors required by the Constitution. The Court's reversal of the death sentence evidences the importance the Court attaches to mitigating evidence in determining fair and just sentencing. The trial judge had refused to take into account the defendant's unhappy childhood and unique emotional disturbances. The Court's consideration of the mitigating evidence in the case emphasized the defendant's youth, his "serious emotional problems," his severe lack of the "care, concern and paternal attention that children deserve," and his "neglectful, sometimes even violent, family background."

B. The juvenile justice system in the United States

42. The U.S. criminal justice system, since the beginning of the twentieth century, has treated children differently than adults. Reformers in the U.S. wished to abolish the harsh adult procedures and sentences applied to children who had committed crimes. The belief was that children should be treated and rehabilitated and therefore should not be subjected to the "harshness" and "rigidity" of the adult criminal law. (See, In re Gault, 387 U.S. 1, 15-16 (1967).)

a) Every state in the United States has juvenile courts. The maximum age over which a juvenile court has jurisdiction is set by the state legislature. The age limits vary for juvenile jurisdiction, but most states set the limit between sixteen and eighteen. The focus in juvenile court is on the child's condition, not his guilt. Therefore, the purpose of a separate juvenile justice system is to rehabilitate children and to make social services available to help them. Punishment in juvenile court is not stressed; the maximum sentence which can be imposed is institutional confinement until the child reaches twenty-one years of age.

b) Sometimes a juvenile court may have jurisdiction but it may waive its right to hear a case. The case is then brought before an adult criminal court. In some states the prosecutor may have the discretion of choosing which court to file in, but in most states the juvenile judge has the discretion of deciding whether to transfer a case or not. In some cases the juvenile may benefit from being transferred to criminal court. He is entitled to all the constitutional protections of an adult, such as the right to a jury trial and perhaps the ability to post bond if the jurisdiction provides such measures. Juries may be more sympathetic to a youth in criminal court. Nevertheless, because transfer to criminal court subjects the accused juvenile to adult punishments, the transfer process has been recognized as a critically important stage in juvenile court proceedings. (See, Kent v. United States, 383 U.S. 541 (1966).)

c) There is little statutory guidance as to which children should be transferred for trial in adult criminal court. The juvenile court judge is given a great deal of discretion in determining who stays

within the family court's jurisdiction. Since Kent, many states have adopted objective criteria by statute to be used in waiving juvenile jurisdiction. The two most common criteria used are the age of the youth and the nature of the offense.
d) Many states set a minimum age at which a child cannot be transferred out of juvenile court jurisdiction. The exact age limit varies from state to state, from l3 years of age in Mississippi to l6 years in California.
e) The nature of the alleged offense and the accused's prior history of criminal activity are also often used at a transfer hearing. For extremely serious crimes such as murder, rape and aggravated assault, states will rarely retain juvenile court jurisdiction. Such crimes are often used as objective criteria to determine that the child is not amenable to treatment within the juvenile system. Some states allow only for discretionary transfer if the juvenile is accused of a felony (e.g., Colorado). Other states such as Pennsylvania and Massachusetts have mandatory transfer provisions which are triggered if a child over fourteen years has allegedly committed murder.
f) Some U.S. states have no death penalty laws in force, others prohibit the death penalty for juveniles. Fourteen states as of l985, specifically mention age as a mitigating factor in their death penalty statutes. Indiana, however, allows for the transfer of a l0 year old in certain cases to adult criminal court. Indiana does not specify age as a mitigating factor in its death penalty statute, but it may be considered under "any other circumstances appropriate for consideration." Ind. Code Ann. 35-50-2-9. Therefore, in Indiana it is possible that a ten year old could receive the death penalty and be executed.

V. OPINION OF THE COMMISSION

A. Point at issue

43. The question presented by the petitioners in the present case is whether the absence of a federal prohibition within U.S. domestic law on the execution of persons who committed serious crimes under the age of 18 is inconsistent with human rights standards applicable to the United States under the inter-American system.
Crimes in the United States fall under either state or federal jurisdiction. A defendant may be tried in federal court if he is charged with the commission of a crime under federal law, or he may appeal to a federal court from a state court under certain circumstances. A great deal of autonomy has been left to the states in prescribing the appropriate punishment for criminal conduct. However, all punishment must be in conformity with the United States Constitution as interpreted by the Supreme Court.

B. The international obligation of the United States under the American Declaration

44. The American Declaration is silent on the issue of capital punishment. Article I of the American Declaration reads as follows:
Every human being has the right to life, liberty and the security of his person.
45. The American Convention on Human Rights, on the other hand, refers specifically to capital punishment in five of its provisions. Article 4 of the American Convention, which protects the right to life, reads as follows:

Article 4. Right to Life
1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

46. The international obligation of the United States of America, as a member of the Organization of American States (OAS), under the jurisdiction of the Inter-American Commission on Human Rights is governed by the Charter of the OAS (Bogota, 1948), as amended by the Protocol of Buenos Aires on 27 February 1967, ratified by the United States on 23 April 1968.
47. The United States is a member State of the Organization of American States, but is not a State party to the American Convention on Human Rights, and, therefore, cannot be found to be in violation of Article 4(5) of the Convention, since as the Commission stated in Case 2141 (United States), para. 31: "it would be impossible to impose upon the United States Government or that of any other State member of the OAS, by means of 'interpretation,' an international obligation based upon a treaty that such State has not duly accepted or ratified." [FN2]

[FN2] Case 2141 (United States) Res. 23/81 of 6 March 1981 OAS/Ser.L/V/II.52, doc. 48, para. 16 (1981) in 1980-1981 Annual Report of the Inter-American Commission on Human Rights OEA/Ser.L/V/II.54, doc. 9, rev. 1 (16 October 1981) at 25 et seq., and also in OAS, Inter-American Commission on Human Rights, Ten Years of Activities, 1971-1981 (1982) at 186 et seq.

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48. As a consequence of articles 3 j, 16, 51 e, 112 and 150 of the Charter, the provisions of other instruments of the OAS on human rights acquired binding force. [FN3]. Those instruments, approved with the vote of the U.S. Government, are the following:

- American Declaration of the Rights and Duties of Man (Bogota, 1948)
- Statute and Regulations of the IACHR

[FN3] See, Thomas Buergenthal "The Revised OAS Charter and the Protection of Human Rights," 69 AJIL 828 (1975) and Case 2141 (supra).

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49. The Statute provides that, for the purpose of such instruments, the IACHR is the organ of the OAS entrusted with the competence to promote the observance of and respect for human rights. For the purpose of the Statute, human rights are understood to be the rights set forth in the American Declaration in relation to States not parties to the American Convention on Human Rights (San Jose, 1969).

C. The Petitioners' argument

50. The central violation denounced in the petition concerns a violation of the right to life, Article I of the Declaration, which states: "Every human being has the right to life..." Since the Declaration is silent on the issue of capital punishment, Petitioners, in connection with Article I, seek an affirmative response to the question: Is there a norm of customary international law which prohibits the imposition of the death penalty on persons who committed capital crimes before completing eighteen years of age?
51. The elements of a norm of customary international law are the following: [FN4]
a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;

b) a continuation or repetition of the practice over a considerable period of time;
c) a conception that the practice is required by or consistent with prevailing international law; and
d) general acquiescence in the practice by other states.

[FN4] See, Yearbook of the International Law Commission, 1950, II, 26, para. 11.

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52. The evidence of a customary rule of international law requires evidence of widespread state practice. Article 38 of the Statute of the International Court of Justice (I.C.J.) defines "international custom, as evidence of a general practice accepted as law." The customary rule, however, does not bind States which protest the norm.
In the Fisheries Case (United Kingdom v. Norway) the I.C.J. found that although the ...ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of law. [FN5]

[FN5] Fisheries Case, (UK/Norway) Judgment of December 18, 1951: I.C.J. Reports 1951, p. 116 at 131.

How many states need to engage in the state practice for it to acquire the authority of a customary norm has never been definitively established, but it is clear that while a universal practice is not necessary, the practice must be common and widespread.
53. The U.S. Government, in December 1977, transmitted the American Convention on Human Rights, inter alia, to the U.S. Senate for advice and consent to ratification subject to specified reservations. As regards the issue in question, the U.S. Government proposed reservations to Articles 4 and 5 which were presented as follows:
Article 4 deals with the right to life generally, and includes provisions on capital punishment. Many of the provisions of Article 4 are not in accord with United States law and policy, or deal with matters in which the law is unsettled. The Senate may wish to enter a reservation as follows: "United States adherence to Article 4 is subject to the Constitution and other law of the United States."
[Article [5)], [p]aragraph 5 requires that minors subject to criminal proceedings are to be separated from adults and brought before specialized tribunals as speedily as possible. (...) With respect to paragraph (5), the law reserves the right to try minors as adults in certain cases and there is no present intent to revise these laws. The following statement is recommended:
"The United States (...) with respect to paragraph (5), reserves the right in appropriate cases to subject minors to procedures and penalties applicable to adults." [FN6]

[FN6] U.S. Department of State Publication 8961, General Foreign Policy Series 310, Letters of Transmittal and Submittal, with suggested reservations, understandings, and declarations (November 1978).

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54. Since the United States has protested the norm, it would not be applicable to the United States should it be held to exist. For a norm of customary international law to be binding on a State which has protested the norm, it must have acquired the status of jus cogens. [FN7] Petitioners do not argue that a rule prohibiting the execution of juvenile offenders has acquired the authority of jus cogens, a peremptory norm of international law from which no derogation is permitted. The Commission, however, is not a

judicial body and is not limited to considering only the submissions presented by the parties to a dispute.

[FN7] Theconcept of jus cogens is included in Article 53 of the Vienna Convention on the Law of Treaties which states: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

D. General principles applicable to the present case

55. The concept of jus cogens is derived from ancient law concepts of a "superior order" of legal norms, which the laws of man or nations may not contravene. The norms of jus cogens have been described by publicists as comprising "international public policy." They are "rules which have been accepted, either expressly by treaty or tacitly by custom, as being necessary to protect the public interest of the society of States or to maintain the standards of public morality recognized by them." [FN8]

[FN8] See, Sir Ian Sinclair: The Vienna Convention on the Law of Treaties, Manchester U. Press, (1973) at 208.

According to Ian Brownlie, the major distinguishing feature of rules of jus cogens is their "relative indelibility." Brownlie suggests certain examples of jus cogens such as: "the prohibition of aggressive war, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy." [FN9]

[FN9] See, Ian Brownlie: Principles of Public International Law, Clarendon Press, Oxford (1979) at 513.

Since the acceptance of norms of jus cogens is still subject to some debate in some sectors, it might be argued that the International Court of Justice did not consider the prohibition against genocide, for example, to be a norm of jus cogens. It has been argued, [FN10] however, that the World Court has made "indirect references" to the concept of jus cogens, without actually calling it such by name, in the advisory opinion on the Reservations to the Genocide Convention case, in which the Court stated:
...that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.

[FN10] See, Sinclair, op. cit, (supra) at 210.

The rule prohibiting genocide would be binding on States not parties to the Genocide Convention, even if derived only from customary international law, without having acquired the status of jus cogens, but it achieves the status of jus cogens precisely because it is the kind of rule that it would shock the conscience of mankind and the standards of public morality for a State to protest.
The International Court of Justice, in a later case, categorized the prohibition of genocide as an obligation erga omnes. Whereas the ICJ does not make reference to the concept jus cogens, it has been suggested

[FN11] that the examples given of obligations erga omnes are examples of what the ICJ would consider to be norms of jus cogens. The following distinction between obligations of a State vis-a-vis the international community (erga omnes) and vis-a-vis another State is taken from the judgment in the Barcelona Traction case:

[FN11] Sinclair makes this argument, op. cit. at 212.

In these circumstances it is logical that the Court should first address itself to what was originally presented as the subject-matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.
When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.
Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.
Obligations the performance of which is the subject of diplomatic protection are not of the same category. [FN12]

[FN12] Barcelona Traction, Light and Power Company, Ltd., Judgment, I.C.J.: Reports 1970, at 32.

As to whether "the principles and rules concerning the basic rights of the human person" is intended to mean that all codified human rights provisions contained in international treaties are embraced by the concept of jus cogens is an issue that is both controversial and beyond the scope of the matter presented for the Commission to decide.
56. The Commission finds that in the member States of the OAS there is recognized a norm of jus cogens which prohibits the State execution of children. This norm is accepted by all the States of the inter-American system, including the United States. The response of the U.S. Government to the petition in this case affirms that "[A]ll states, moreover, have juvenile justice systems; none permits its juvenile courts to impose the death penalty." [FN13]

[FN13] Case 9647: Response of the U.S. Government dated July 15, 1986, at 2.

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57. The Commission finds that this case arises, not because of doubt concerning the existence of an

international norm as to the prohibition of the execution of children but because the United States disputes the allegation that there exists consensus as regards the age of majority. Specifically, what needs to be examined is the United States law and practice, as adopted by different states, to transfer adolescents charged with heinous crimes to adult criminal courts where they are tried and may be sentenced as adults. [FN14]

[FN14] The Commission is not unaware of the serious problems posed by juvenile crime in the United States. According to FBI statistics, 1,311 juveniles were arrested for murder in the U.S. in 1985 which represents almost 10% of all homicide arrests. Most of those arrested were 16 or 17 years of age. (See, Newsweek: "Children who kill" November 24, 1986). Officials at the National Center for Juvenile Justice in Pittsburgh have reported that from 1978-1983 the fastest growing areas in juvenile crime were among younger age groups (i.e. 10 to 13 year olds) which are being referred to juvenile courts at rates of increase up to 38% for 12 year olds. (See, Peter Applebome: "Juvenile Crime: The Offenders are Younger and the Offenses More Serious" New York Times, February 3, 1987). None of the juvenile offenders currently on death row committed the crime for which s/he was sentenced to death under the age of 15. (See, Tom Seligson: "Are They Too Young to Die?" The Washington Post Magazine, October 19, 1986).

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58. Since the federal Government of the United States has not preempted this issue, under the U.S. constitutional system the individual states are free to exercise their discretion as to whether or not to allow capital punishment in their states and to determine the minimum age at which a juvenile may be transferred to an adult criminal court where the death penalty may be imposed. Thirteen states and the U.S. capital have abolished the death penalty entirely. [FN15]. As regards the other states which have enacted death penalty statutes since the Furman decision, these states have adopted death penalty statutes which either l) prohibit the execution of persons who committed capital crimes under the age of eighteen, or 2) allow for juveniles to be transferred to adult criminal courts where they may be sentenced to the death penalty. It is the discretion and practice of this second group of states which has become the subject of our analysis. Whereas approximately ten retentionist states have now enacted legislation barring the execution of under-18 offenders, a hodge-podge of legislation characterizes the other states which allow transfer of juvenile offenders to adult courts from age 17 to as young as age 10, and some states have no specific minimum age. The Indiana state statute (supra) which allows a ten year old to be judged before an adult criminal court and potentially sentenced to death shocks this Commission.

[FN15] These include: Alaska, the District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia and Wisconsin.

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59. The juvenile justice system was established in the United States at the turn of the century as a result of reformist efforts to mitigate the harshness of the adult criminal justice system. Under common law, children under the age of seven were conclusively presumed to have no criminal capacity and for children from age seven to fourteen, the presumption was rebuttable and the child could be convicted of a crime and executed. [FN16] By a long series of statutory changes this age has been steadily increased, and the age of criminal incapacity is now set at 14 in most states. Consequently a child below the statutory age may be prosecuted by an adult criminal court but would not be adjudged responsible for a crime, the child would be adjudged a juvenile delinquent.

[FN16] The execution of juvenile offenders is not a new phenomenon. During the first thirty years of the juvenile justice system in the United States (1900-1930) seventy-seven persons were executed for crimes

committed while under the age of eighteen. See, Victor L. Streib: "Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed while Under Age Eighteen" 36 Oklahoma Law Review 613 (1983).
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60. The Commission is convinced by the U.S. Government's argument that there does not now exist a norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty. Nonetheless, in light of the increasing numbers of States which are ratifying the American Convention on Human Rights and the United Nations Covenant on Civil and Political Rights, and modifying their domestic legislation in conformity with these instruments, the norm is emerging. As mentioned above, thirteen states and the U.S. capital have abolished the death penalty entirely and nine retentionist states [FN17] have abolished it for offenders under the age of 18.

[FN17] These states are: California, Colorado, Connecticut, Illinois, Nebraska, New Jersey, New Mexico, Ohio, and Tennessee.
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61. The Commission, however, does not find the age question dispositive of the issue before it, which is whether the absence of a federal prohibition within U.S. domestic law on the execution of juveniles, who committed serious crimes under the age of 18, is in violation of the American Declaration.

62. The Commission finds that the diversity of state practice in the U.S.--reflected in the fact that some states have abolished the death penalty, while others allow a potential threshold limit of applicability as low as 10 years of age--results in very different sentences for the commission of the same crime. The deprivation by the State of an offender's life should not be made subject to the fortuitous element of where the crime took place. Under the present system of laws in the United States, a hypothetical sixteen year old who commits a capital offense in Virginia may potentially be subject to the death penalty, whereas if the same individual commits the same offense on the other side of the Memorial Bridge, in Washington, D.C., where the death penalty has been abolished for adults as well as for juveniles, the sentence will not be death.

63. For the federal Government of the United States to leave the issue of the application of the death penalty to juveniles to the discretion of state officials results in a patchwork scheme of legislation which makes the severity of the punishment dependent, not, primarily, on the nature of the crime committed, but on the location where it was committed. Ceding to state legislatures the determination of whether a juvenile may be executed is not of the same category as granting states the discretion to determine the age of majority for purposes of purchasing alcoholic beverages or consenting to matrimony. The failure of the federal government to preempt the states as regards this most fundamental right--the right to life--results in a pattern of legislative arbitrariness throughout the United States which results in the arbitrary deprivation of life and inequality before the law, contrary to Articles I and II of the American Declaration of the Rights and Duties of Man, respectively.

CONCLUSION

64. The Commission concludes, by 5 votes to 1, that the United States Government violated Article I (right to life) of the American Declaration of the Rights and Duties of Man in executing James Terry Roach and Jay Pinkerton.

65. The Commission concludes, by 5 votes to 1 that the United States Government violated Article II (right to equality before the law) of the American Declaration of the Rights and Duties of Man in executing James Terry Roach and Jay Pinkerton.

DISSENTING OPINION OF DR. MARCO GERARDO MONROY CABRA,

MEMBER OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Before explaining the reasons for my dissenting opinion, I must first make some general observations. In this Case No. 9647, there is no discussion as regards the facts that are accepted by the United States Government, and which are that James Terry Roach and Jay Pinkerton were sentenced to death and executed in the United States for crimes for which they were tried and which they committed before the age of 18. However, since the United States is not a State Party to the American Convention on Human Rights, Article 20 of the Statute of the Inter-American Commission on Human Rights, approved through Resolution No. 447, applies. That resolution, which was adopted by the OAS General Assembly on October 31, 1979, establishes the following as falling within the competence of the Commission: "b) to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights". With regard to the principle of human rights that should be applied: "2. For the purposes of the present Statute, human rights are understood to be: (a) The rights set forth in the American Convention on Human Rights, in relation to the States parties thereto; (b) The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states." This means that since the United States is not a State Party to the American Convention, the question of whether or not a human rights violation has occurred with respect to the petitioners must be examined in the light of the American Declaration of the Rights and Duties of Man. I should also note that this case was processed in accordance with Chapter III "Petitions concerning States that are not Parties to the American Convention on Human Rights" (Art. 48 through 50) of the current Regulations of the Inter-American Commission on Human Rights, approved by the Commission at its meeting on April 8, 1980 during the 49th regular session.

The task therefore is to determine whether the sentences handed down by the United States courts violated articles l and 2 of the American Declaration of the Rights and Duties of Man by imposing the death penalty on persons who committed capital crimes while under 18 years of age. To interpret the 1948 American Declaration of the Rights and Duties of Man, the Inter-American Commission on Human Rights referred, in its majority decision, to customary international law and to jus cogens. I must therefore refer to these aspects.

It must, however, be made clear that the aim is not to use this case to determine generally whether or not U.S. laws on the death penalty violate customary international law, since the Commission is not empowered to issue advisory opinions; rather it must only interpret the American Declaration of the Rights and Duties of Man, for which it can refer to general international law. The Commission has said that in this case "the only point at issue is whether the absence of a federal prohibition within U.S. domestic law on the execution of juveniles who committed serious crimes under the age of 18 is inconsistent with human rights standards applicable to the United States under the inter-American system"?. In my view, this is not the problem. The case consists of examining whether or not the human rights of petitioners James Terry Roach and Jay Pinkerton were violated, under the terms of the 1948 American Declaration of the Rights and Duties of Man. This is an individual case that was processed by the Commission according to the Regulations in effect for States not Parties to the American Convention on Human Rights, and therefore, there is no reason to address the matter of compatibility between U.S. federal or state legislation and general international law. This aspect does not lie within the sphere of competence of the Commission, which could not make general observations and recommendations when ruling on a case, especially since it does not have judicial functions.

In light of the foregoing, I wish to explain the legal reasons that influenced my decision not to join in the Commission's majority decision:

1. THE US APPLICATION OF THE DEATH PENALTY TO JUVENILES DOES NOT VIOLATE THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

Article l of the American Declaration of the Rights and Duties of Man approved by the IX International Conference of American States held in Bogota from March 30 through May 2, 1948, and included in the Final Act of the Conference states: "Every human being has the right to life, liberty and the security of his person." This article makes no reference, either explicitly or implicitly, to prohibition of the death penalty with respect to minors. The draft of the Inter-American Juridical Committee included the following as Article l: "Every person has the right to life. This right extends to the right to life of incurables, imbeciles and the insane.

Capital punishment may only be applied in cases in which it has been prescribed by pre-existing law for crimes of exceptional gravity." After discussion, the IX Conference decided to omit any reference to the death penalty and to change the wording proposed by the Inter-American Juridical Committee. Article 1, therefore, was drafted in its present form, making no reference to the death penalty. A close look at the preparatory work leads to the unmistakable conclusion that the States participating in the IX International Conference of American States in Bogota in 1948 did not wish to preclude the death penalty since, otherwise, they would have agreed on its prohibition and, consequently, approve the text by the Inter-American Juridical Committee, which confined its application to crimes of exceptional gravity. An interpretation of Article 1 in the light of its current meaning, while taking into account the preparatory work recorded in the Proceedings of the Conference, the specific deletion of the provision concerning the death penalty would allow one to conclude that the American Declaration of the Rights and Duties of Man did not regulate the matter of the death penalty, and of course, far less did it include any provision on the general or specific proscription of its application in the case of juveniles. One might therefore conclude, with regard to this first aspect, that if the American Declaration of the Rights and Duties of Man remained silent on the death penalty and did not approve the draft that included it, the United States can establish the death penalty without violating Article l or any other standard in the aforecited American Declaration of the Rights and Duties of Man.

2. IN THIS CASE, IT IS NOT POSSIBLE TO APPLY TREATIES NOT IN EFFECT FOR THE UNITED STATES

The United States is a member of the Organization of American States (OAS) since it ratified the OAS Charter amended by the 1967 Protocol of Buenos Aires when it deposited the instrument of ratification on April 23, 1968. As the Charter establishes, the Inter-American Commission on Human Rights is an organ of the OAS. The United States is bound by the Statute and the Regulations of the Inter-American Commission on Human Rights. The United States is also bound by the American Declaration of the Rights and Duties of Man, which as has been seen, does not prohibit the death penalty and remains silent on this matter. But the United States has not ratified the 1969 American Convention on Human Rights, "Pact of San Jose, Costa Rica", and therefore, is not bound by Article 4.5, which states: "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women."

In December of 1977, the United States Government sent the American Convention on Human Rights to the Senate for its approval and subsequent ratification. At the same time, it suggested making certain "reservations". With regard to Articles 4 and 5, it proposed the following reservations. "Article 4 deals with the right to life generally, and includes provisions on capital punishment. Many of the provisions of Article 4 are not in accord with United States law and policy, or deal with matters in which the law is still unsettled. The Senate may wish to enter a reservation as follows: 'United States adherence to Article 4 is subject to the Constitution and other law of the United States.'"

Article 5, "[P]aragraph (5) requires that minors subject to criminal proceedings are to be separated from adults and brought before specialized tribunals as speedily as possible." "With respect to paragraph 5, the law reserves the right to try minors as adults in certain cases and there is no present intent to revise these laws. The following statement is recommended: 'The United States... with respect to paragraph 5, reserves the right in appropriate cases to subject minors to procedures and penalties applicable to adults'" (United States State Department, publication 8961, General Foreign Policy Series 310, November 1978). This means that articles 4 and 5 cannot be applied to the United States, since it has stated specifically that even if it ratified the Convention, it would make reservations on those provisions.

Treaties do not engender obligations for third states without their consent. The United States Government is therefore not obliged to comply with the provisions of Article 4.5 of the American Convention on Human Rights. Also, the United States has not ratified the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by the United Nations General Assembly on December 16, 1966 in its resolution 2200 A (XXI), and which entered into effect on March 23, 1976. Under these conditions, the United States is not obliged to comply with the provisions of Article 6.5 of that Covenant, which states: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."

The United States is only bound by the Fourth Geneva Convention, which states in its Article 68: "In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence." However, this treaty applies only in international conflicts, and therefore, cannot be applied for the execution of juveniles in the United States in times of normalcy and in the absence of an international conflict.

IN CONCLUSION - Neither the American Convention on Human Rights (Article 4 [5]), nor the International Covenant on Civil and Political Rights (Art 6 [5]), nor the Fourth Geneva Convention (Art. 68) is applicable to the pronouncement of the death penalty with respect to minors under 18 in the United States.

3. THERE IS NO EXISTING RULE IN CUSTOMARY INTERNATIONAL LAW PROHIBITING THE IMPOSITION OF THE DEATH PENALTY WITH RESPECT TO JUVENILES

Article 38 of the Statute of the International Court of Justice lists as a source of international law: "(b) international custom, as evidence of a general practice accepted as law". Max Sorensen states the following (Manual of Public International Law, St. Martin's Press, New York, 1968, page 130): "This formula has been criticized often because it reverses the logical order of events; in practice, in order to prove the existence of a customary rule, it is necessary to show that there exists a 'general practice' which conforms to the rule and which is 'accepted as law'. Custom is the direct product of the necessities of international life. It arises when states acquire the habit of adopting, with respect to a given situation, and whenever that situation recurs, a given attitude to which legal significance is attributed."

Ch. Rousseau, Professor of international law (Derecho Internacional Pъblico Profundizado, La Ley, Buenos Aires, 1966, pages 96-97) lists three characteristics of custom: "a) It is above all the expression of a common practice, resulting from precedents, in other words, from the repetition of conclusive acts; b) Second, custom presents itself as an obligatory practice, that is to say, it must be accepted as law, as corresponding to a legal need. In the absence of this psychological element, there would be no customary rule but rather a purely nonbinding custom or practice of international courtesy; c) Finally, international custom is a practice that evolves".

A generalized and uniform practice does not suffice; of vital importance is the opinio juris. In the judgment on the North Sea Continental Shelf Case, the International Court of Justice said the following

on the requirement of the subjective element and opinio juris: "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty." (I.C.J. Reports, 1969, page 44). According to Professor of international law, Eduardo Jimenez de Arechaga, (El Derecho Internacional Contemporaneo, Publishers: Tecnos, Madrid, 1980, pages 19 et seq), customary law, which finds its expression in treaties, can operate in three different ways: the text of the treaty can simply declare a customary rule that existed previously; it can give concrete expression to a rule that is developing in statu nascendi; or, the provision of a treaty can convert de lege ferenda to a subsequent state practice after a process of consolidation whereupon it converts to custom. In other cases, the custom can derive from the consensus of states in adopting United Nations General Assembly resolutions, as in the case of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, or the 1963 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, or Resolution 1514 on the Granting of Independence to Colonial Countries and Peoples, etc.

According to Sorensen (op cit. p. 133), it is not possible to speak of a custom as general if its observance is confined to a particular group of states. This means that an essential requirement concerning custom is that it should derive from the community of States as a whole. Sorensen notes that: "A custom cannot be transformed into a rule of law if it encounters opposition of a proportion of the states comprising the international community or, as the case may be, the region or group within which it is in operation. For in such a case the requisite is not forthcoming" (op cit p. 135). This implies that the opposition of a number of states thwarts the formation of a general customary rule.

The application of the foregoing principles to Case 9647 shows, in my view, the nonexistence of a general rule of customary law prohibiting the application of the death penalty on persons who committed capital crimes under 18 years of age. This conclusion is drawn from the following analysis:

The fact that prohibition of the death penalty with respect to juveniles under 18 years of age appears in the American Convention on Human Rights (Article 4.5), in the International Covenant on Civilian and Political Rights (Article 6.5) and in the Fourth Geneva Convention (Art. 68) does not mean that these treaties have declared an existing custom or have crystallized or reflected a custom. The only thing that can be accepted is the generating effect de lege ferenda, which can lead to the development of the custom if state practice in the matter is consolidated. With regard to the prohibition of the death penalty, there is no uniformity in the laws of states, since some allow it and others prohibit it; further, some prohibit the death penalty in the case of minors, and others accept it or remain silent on the subject. It is possible that with time, the practice of States will lead to the emergence of the custom in the instant case, but at present, it is not an international custom.

The practice and the laws of states with regard to the death penalty in general and in relation to minors show variations and discrepancies. Ultimately, one sees a lack of continuity, and contrary to the Commission's mistaken view, it is not possible to find standard and constant application of it practiced with the intent of producing legal effects. There is no proof to the effect that all states worldwide feel bound by an obligatory rule of customary law prohibiting the death penalty with respect to juveniles under 18 years of age given the fact that the laws of the states are not even uniform as regards the age at which an individual is punishable.

In fact, there is no evidence of opinio juris, that is to say, demonstration of state practice that has led to non application of the death penalty with respect to minors under 18 years of age, or that this has been a practice for a long time.

Moreover, one must bear in mind that not only has the United States not given its consent to the development of the so-called custom; but rather it has not been proven that uniformity exists, not even with respect to the abolition of the death penalty. In the matter of the Barcelona Traction case, the International Court of Justice said that "a body of rules could only have developed with the consent of the parties concerned. The difficulties encountered have been reflected in the evolution of the law on the subject." (I.C.J. Reports, 1970, page 48, par. 89). Nor can one speak in terms of local American custom, since the American Convention on Human Rights has only been ratified by 19 of the 32 states in the Americas, an indication that there is no standard practice in the Americas regarding the prohibition of the death penalty, and even less so with regard to juveniles. The International Covenant on Civil and Political Rights has not yet been ratified by all states worldwide, and the Fourth Geneva Convention (art. 68), which has received 162 ratifications, only applies to international armed conflicts, and consequently, cannot be considered to be a demonstration of a custom in time of peace.

IN CONCLUSION - It was not proven that a widespread and uniform practice exists on the part of states, or the opinio juris or conviction that that practice has become obligatory because of the existence of a norm prohibiting the death penalty with respect to minors under 18 years of age. This custom does not derive from state practice, or from the provisions of public treaties that have not been ratified by all states. One cannot therefore consider that there is consensus on this matter.

4. PROHIBITION OF THE DEATH PENALTY WITH RESPECT TO MINORS UNDER 18 YEARS OF AGE IS NOT A NORM OF JUS COGENS

Article 53 of the Vienna Convention on the Law of Treaties defines jus cogens as a "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

In its reference to reservations on genocide (May 28, 1951), the I.C.J. said that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." The Shucking opinion in 1934 relies on ius cogens (C.D.L. Report, 80).

The following appeared as examples of jus cogens at the Vienna Conference on the Law of Treaties: a) Treaty concerning a case of the illegitimate use of force in violation of the principles of the Charter; b) Treaty concerning the perpetration of any other criminal act in international law; and c) Treaty to prohibit the perpetration or tolerance of such acts as the slave trade, piracy and genocide in the suppression of which every State is obliged to cooperate. While human rights standards constitute principles of jus cogens, as we have said in our publication on human rights (Los Derechos Humanos, Marco Gerardo Monroy Cabra, Edit. Temis, 1980), the prohibition of the death penalty with respect to juveniles under 18 years of age is not in the nature of a norm of jus cogens. Indeed, it has not been proven that uniformity exists, since not all states prohibit the death penalty and not all States prohibit the pronouncement of it with respect to minors under 18 years of age. While there is undoubtedly a tendency towards abolishing the death penalty, it cannot be said that the prohibition of the death penalty for minors under 18 years of age is a norm that has been accepted by the international community as a whole, and consequently, a norm of jus cogens has not been created. The prohibition of the death penalty with respect to minors under 18 years of age cannot be compared with the cases cited at the Vienna Conference, such as the

prohibition of piracy or slavery or the white slave trade or racial discrimination or the prohibition of genocide, since in all these cases, all states prohibit them. Such is not the case here. The death penalty is still recognized by a considerable number of States. One cannot speak in terms of the existence of a norm of jus cogens in effect for the OAS member States since the American Convention on Human Rights, which prohibits the execution of minors under 18 years of age, has only been ratified by 19 States. Also, there are reservations on the matter of the death penalty and it is not a norm that has been accepted by the 32 American states, and far less by all states worldwide. By virtue of this fact, it is therefore not a general imperative norm. One need hardly point out that there can be no " American jus cogens" or "Africani jus cogens", etc. Rather, one must be in the presence of an imperative norm that has gained acceptance in the international community "as a whole", as the Vienna Convention on the Law of Treaties states in its Article 53.

Not even in the United States is there a rule setting age 18 as the minimum age for imposition of the death penalty, and to date, the Supreme Court of Justice has not declared such application unconstitutional. The punishable age is not uniform among states since some set it at age 16, others at 17, and others at 18. This means that there is no standard legislation among states as regards the minimum punishable age or the minimum age for imposition of the death penalty.

IN CONCLUSION - It cannot be inferred from either the practice of states, or from international jurisprudence, or from doctrine, or from the laws of the states that a norm of jus cogens prohibiting the imposition of the death penalty with respect to minors under 18 years of age has come into existence. While human rights standards are of jus cogens, specifically the prohibition of the death penalty and its application to minors under 18 years of age do not constitute an imperative norm of general international law since it has not been accepted by all states that make up the international legal community.

5. THERE HAS BEEN NO VIOLATION OF ARTICLE 2 OF THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

Article 2 of the American Declaration of the Rights and Duties of Man states: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."

I do not consider the imposition of the death penalty with respect to minors under 18 years of age to constitute a violation of Article 2 of the American Declaration of the Rights and Duties of Man, because there is no federal law in the United States establishing such a prohibition and the laws of the States are not uniform in this matter. We are not discussing here the arbitrary deprivation of life because there is no federal law in the United States setting the death penalty for minors under 18 years of age; neither is there any prohibition in conventional international law applicable to the United States, nor in customary international either, as previously demonstrated.

6. INTERPRETATION OF THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN DONE BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The Commission used the Vienna Convention on the Law of Treaties in order to interpret the American Declaration of the Rights and Duties of Man, which is a mistake since the Declaration is not a public treaty, not having gone through the necessary stages for the adoption, authentication, manifestation of consent to abide by the treaty, entry into force, registry and publication of any international treaty. Also, in interpreting the Declaration, the Commission did not attribute any value to the preparatory work leading upt to the American Declaration of the Rights and Duties of Man contained in the Proceedings of the IX International Conference of American States held in Bogota in 1948. If this background had been taken into account, it would have concluded that there was a consensus to delete any reference to the

death penalty from Article 1 in view of the differences that existed among the States on this matter.

The Commission interpreted Article XXVI of the Declaration prohibiting the imposition of "cruel, infamous or unusual punishment," as though this provision prohibited the execution of minors, when this conclusion cannot be drawn from the background and discussions concerning the American Declaration of the Rights and Duties of Man recorded in the Proceedings of the IX International Conference of American States in Bogota. Furthermore, given the fact that some American states applied the death penalty in 1948, it cannot be said that at that time it was considered cruel, infamous or unusual punishment.

To interpret the 1948 American Declaration of the Rights and Duties of Man, the Commission resorted to an analysis of customary international law, but it has already been ascertained that the petitioners have not proven that such a custom exists.

The American Declaration of the Rights and Duties of Man cannot be interpreted in the light of the provisions of the American Convention on Human Rights, the International Covenant on Civil and Political Rights and other treaties on human rights because these treaties are subsequent to the aforecited Declaration and are only binding for States Parties to them.

The erroneous interpretation of the 1948 American Declaration of the Rights and Duties of Man led the Commission to conclude that the Declaration prohibits the death penalty with respect to minors under 18 years of age when this conclusion cannot be drawn from either the letter or spirit of the Declaration.

In interpreting the American Declaration of the Rights and Duties of Man issued in 1948, the Commission could hardly use the practice of states as it stands in 1987, customary international law in effect today, the current notion of jus cogens, when the truth is that when drafting that Declaration, the States were not in agreement on prohibiting the death penalty as is apparent from the fact that the pertinent reference was deleted from the Inter-American Juridical Committee's draft. The only point that the Commission should have studied was whether the rights of James Terry Roach and Jay Pinkerton had been disregarded, under the terms of the American Declaration of the Rights and Duties of Man. It was not relevant to analyze whether or not the absence of a federal law in the United States establishing that prohibition of the death penalty with respect to minors violated customary international law, because the Commission is not an international tribunal, or whether U.S. legislation is in conflict with with jus cogens, because this was not requested by the petitioners and is beyond the purview of the Commission. In this case, it could only apply the American Declaration of the Rights and Duties of Man because it is the sole international human rights instrument that is binding on the United States.

But even if one were to accept that the Commission could resort to customary international law or to jus cogens to interpret the Declaration, one cannot conclude that the United States violated articles 1 and 2 of that Declaration or any norm of general customary international law, since no violation in this regard has been proven in this case.

7. CONCLUSIONS

The following conclusions can be drawn from the foregoing: a) the imposition of the death penalty by state courts in the United States with respect to minors under 18 years of age does not violate articles 1 and 2 of the American Declaration of the Rights and Duties of Man; b) the imposition of the death penalty with respect to minors under 18 years of age does not violate customary international law since there is no custom in this matter, and c) the prohibition of the death penalty with respect to minors under 18 years of age is not a norm of jus cogens since it has not been accepted by the international community as a whole.

In accordance with the foregoing, the Inter-American Commission on Human Rights should have exonerated the United States from the charges levied against it by the petitioners.

It is thus that I substantiate my dissenting vote as regards the decision adopted by the Inter-American Commission on Human Rights.

(signed) MARCO GERARDO MONROY CABRA
Member of the Inter-American Commission on Human Rights

The United States requested reconsideration of Case No. 9647. During the 71st period of sessions the Commission received the request for reconsideration, which it granted, and by a majority vote, decided not to modify its decision. In a separate publication, the Commission will present the text of the U.S. Government's request for reconsideration, the observations of the petitioners, the reasons of the Commission for not modifying its decision, and the separate opinion of Dr. Monroy Cabra. Ambassador Elsa D. Kelly did not participate at this meeting. Mr. Bruce McColm, pursuant to Article 19 of the Commission's Regulations, did not participate in this matter.