

Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 62/02; Case 12.285
Session: Hundred and Sixteenth Regular Session (7 – 25 October 2002)
Title/Style of Cause: Michael Domingues v. United States
Doc. Type: Report
Decided by: President: Juan E. Mendez;
First Vice-President: Marta Altolaguirre;
Second Vice-President: Jose Zalaquett;
Commissioners: Julio Prado Vallejo, Clare K. Roberts, Susana Villaran.
Commission Member Professor Robert Goldman did not take part in the discussion and voting on this case, pursuant to Article 17(2) of the Commission's Rules of Procedure.

Dated: 22 October 2002
Citation: Domingues v. United States, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)
Represented by: APPLICANT: William A. Courson of the Magnus Hirschfield Center for Human Rights

Terms of Use: Your use of this document constitutes your consent to the Terms and Conditions found at www.worldcourts.com/index/eng/terms.htm

I. SUMMARY

1. On May 1, 2000 the Inter-American Commission on Human Rights (the "Commission") received a petition from Mr. William A. Courson of the Magnus Hirschfield Center for Human Rights against the United States of America (the "State," the "United States," or the "U.S."). The Petition was presented on behalf of Mr. Michael Domingues, who is incarcerated on death row in the State of Nevada. On December 8, 2000 the petition was supplemented by a second petition filed on behalf of Mr. Domingues by Mr. Mark Blaskey, Clark County Public Defender. It was subsequently agreed by Mr. Domingues, Mr. Courson and Mr. Blaskey that Mr. Blaskey would act as Mr. Domingues' sole representative in proceedings before the Commission (the "Petitioner").

2. The Petitioner states that Mr. Domingues had been convicted and sentenced to death in respect of two homicides that occurred in the state of Nevada in 1993. Mr. Domingues was 16 years old when the crimes were committed. The Petitioner further states that on November 1, 1999 the Supreme Court of the United States declined to review a ruling by the Supreme Court of the State of Nevada permitting the execution of a person convicted of a crime committed while a juvenile. As of the date of this report, no date for Mr. Domingues' execution had been scheduled.

3. The Petitioner alleges that Mr. Domingues has exhausted his domestic remedies and therefore that his petition is admissible. He also alleges that by sentencing Mr. Domingues to death for crimes committed while he was a juvenile, the State is in breach of Articles I (right to life), II (right to equality before law), VII (right to protection for mothers and children) and XXVI (right to due process of law) of the American Declaration of the Rights and Duties of Man (“the American Declaration”). More particularly, the Petitioner argues that the United States is in violation of Article I of the American Declaration because of an international jus cogens norm prohibiting the execution of juvenile offenders. The Petitioner also claims that the failure of the United States to preempt the pattern of legislative arbitrariness within the individual states of the U.S. in respect of the application of the death penalty to juvenile offenders has resulted in the arbitrary deprivation of life and inequality before the law. He states that on this basis, the U.S. is in violation of Articles I and II of the Declaration. Finally, the Petitioner complains that the application of the death sentence to Mr. Domingues would represent a breach of Article VII and XXVI of the Declaration.

4. As of the date of the adoption of the Commission’s preliminary report, the Commission had not received any information or observations from the State regarding Mr. Domingues’ petition.

5. In the present report, having examined the information and arguments provided by the parties, the Commission decided to admit the case in relation to Articles I, II, VII, and XXVI of the Declaration. In addition, after considering the merits of the case, the Commission concluded that the State has acted contrary to an international norm of jus cogens by sentencing Michael Domingues to the death penalty for a crime that he committed when he was 16 years of age. Consequently, should the State execute Mr. Domingues pursuant to this sentence, the Commission found that it will be responsible for a grave and irreparable violation of Mr. Domingues’ right to life under Article I of the American Declaration.

II. PROCEEDINGS BEFORE THE COMMISSION

A. Observations of the Parties

6. On May 30, 2000 the Commission decided to open Case N° 12.285 in relation to Mr. Domingues’ complaint, and by note of the same date transmitted the pertinent parts of the petition submitted by Mr. Courson to the State, with a request that the State deliver information that it considered pertinent to the complaint within 90 days as prescribed by the Commission’s Regulations. Also by note of the same date, the Commission informed Mr. Courson that Mr. Domingues’ petition had been transmitted to the State.

7. On December 8, 2000 the Commission received a further petition filed on behalf of Mr. Domingues from Mr. Mark S. Blaskey, Clark County Public Defender. On January 11, 2001 the Commission received written confirmation from Mr. Domingues that he is represented by Mr. Blaskey and that the petition of December 8, 2000 had been filed with Mr. Domingues’ full knowledge, authorization and consent. Mr. Domingues further indicated that he had not spoken to any other attorney or organization about filing a petition on his behalf and should any conflict

exist between petitions, he would wish the Commission to proceed with the petition filed by Mr. Blaskey.

8. By note dated January 25, 2001 the Commission informed Mr. Courson that the Commission had received a second petition on behalf of Mr. Domingues, together with a written statement from Mr. Domingues as outlined above. Following further communications between the Commission, Mr. Courson and Mr. Blaskey, on February 21, 2001 the Commission received a letter from Mr. Blaskey stating that he would act as sole representative for Mr. Domingues before the Commission and that Mr. Courson agreed with this arrangement. Enclosed with this letter was a communication from Mr. Courson confirming this agreement.

9. Accordingly, the Commission transmitted the pertinent parts of the supplementary petition filed by Mr. Blaskey to the State in a communication dated March 5, 2001, with a request that the State provide all the information relevant to the case within 30 days. As of the date of the Commission's preliminary report, the Commission had not received any observations from the State on Mr. Domingues' complaint.

B. Precautionary Measures

10. In its May 30, 2000 communication to the State, the Commission requested precautionary measures from the United States pursuant to Article 29(2) of the Commission's prior Regulations.[FN1] This request was made on the basis that if the State was to execute Mr. Domingues before the Commission had an opportunity to examine the allegations in his petition, his complaint would be rendered moot in terms of the availability of potential remedies and irreparable harm would be caused to Mr. Domingues. The Commission did not receive a response from the State to its request for precautionary measures.

[FN1] During its 109th special session in December 2000, the Commission approved the Rules of Procedure of the Inter-American Commission on Human Rights, which replaced the Commission's prior Regulations of April 8, 1980. Pursuant to Article 78 of the Commission's Rules of Procedure, the Rules entered into force on May 1, 2001. Article 29(2) of the Commission's prior Regulations has been replaced by Article 25(1) of the Rules of Procedure, which provides: "In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons."

C. Friendly Settlement

11. By communications dated August 22, 2001 to the Petitioner and to the State, the Commission placed itself at the disposal of the parties with a view to reaching a friendly settlement of the matter pursuant to Article 41 of the Commission's Rules of Procedure on the basis of respect for the human rights recognized in the American Convention, the American Declaration and other applicable instruments. The Commission also requested that the parties

provide the Commission with a response to the Commission's offer within 10 days, in default of which the Commission would continue with consideration of the matter.

12. In a communication dated August 29, 2001 and received by the Commission on September 4, 2001 the Petitioner informed the Commission that on Mr. Domingues' behalf he accepted the Commission's offer to facilitate a friendly settlement of the matter. By note dated September 6, 2001 the Commission transmitted the pertinent parts of the Petitioner's communication to the State and requested its observations within 10 days, in default of which the Commission would consider that a friendly settlement was not possible and continue with its consideration of the matter.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioner

1. Admissibility

13. The Petitioner contends that Mr. Domingues' complaints are admissible in accordance with the requirements of the Commission's Rules of Procedure. He states that Mr. Domingues filed a motion in the State trial court to correct an illegal sentence by arguing that Nevada State law is superseded by international law that prohibits the execution of juveniles, including the International Covenant on Civil and Political Rights (ICCPR), customary international law and jus cogens. The trial court denied the motion. In addition, Mr. Domingues has twice appealed his conviction and death sentence to the Nevada Supreme Court. On his second appeal, a majority of the Nevada Supreme Court concluded that a "reservation" to the ICCPR made by the U.S. Senate permitted Mr. Domingues' execution. Neither the Nevada Supreme Court nor the trial court discussed the issue of whether the reservation was valid, or whether the execution of juvenile offenders violated customary law of jus cogens. A writ of certiorari was filed to the U.S. Supreme Court alleging violations of the ICCPR, customary international law and jus cogens. On November 1, 1999 the U.S. Supreme Court denied the writ without discussion.

14. The Petitioner also claims that the legislative and executive branches of the United States government have likewise denied Mr. Domingues an effective remedy. He alleges in this respect that when the State ratified the ICCPR on June 8, 1992 the U.S. Senate placed a reservation on Article 6(5) which prohibits the imposition of capital punishment on children who are under 18 years of age when they commit their crime, thereby depriving Mr. Domingues of the protection of this provision of the treaty. The Petitioner also claims that in Mr. Domingues' certiorari proceeding before the U.S. Supreme Court, the Office of the Solicitor General, on behalf of the Executive Branch, did not argue that there was not a jus cogens norm prohibiting the execution of 16 year old offenders, but urged the U.S. Supreme Court not to hear the case in part on the basis that the United States had asserted a "persistent objection to the asserted legal obligation up to this point in international fora." [FN2]

[FN2] Petitioner's petition dated December 7, 2000, p. 5.

15. Consequently, the Petitioner argues that Mr. Domingues has been denied his right to a substantive appeal on these issues and has exhausted domestic remedies in accordance with Article 31 of the Commission's Rules of Procedure.

16. The Commission received the first petition on behalf of Mr. Domingues on May 1, 2000 within 6 months of the date of the final domestic judgment in the case. Consequently, it is contended that Mr. Domingues has complied with Article 32 of the Commission's Rules of Procedure.

2. Merits

17. With respect to the merits of the case, the Petitioner indicates that Mr. Domingues is a U.S. citizen who in August 1994 was tried and convicted by a jury in Nevada of one count of burglary, one count of robbery with the use of a deadly weapon, one count of first degree murder and one count of first degree murder with the use of a deadly weapon. Mr. Domingues was sentenced to death for each of the two murder convictions. The Petitioner argues that the imposition of the death penalty upon an offender who was aged sixteen years at the time of his crime is a breach of Articles I, II, VII and XXVI of the American Declaration for which the State must be held responsible.

18. With respect to Article I of the Declaration, the Petitioner argues that an international jus cogens norm exists which prohibits the death penalty for juvenile offenders below the age of 18 years. In presenting this argument, the Petitioners first emphasize that in the case of *Roach and Pinkerton v. United States*, which was the subject of a decision by this Commission in 1987, the United States recognized that a jus cogens norm prohibiting the execution of juvenile existed, but that insufficient international consensus existed as to the age of majority, a position with which the Commission ultimately concurred.[FN3]

[FN3] Petitioner's petition dated December 7, 2000 p. 9 citing *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Res. 3/87, 22 September 1987, Annual Report of the IACHR 1986-87, paras. 56, 57, 60.

19. In support of their contention that a norm of jus cogens has developed since the Commission's decision in *Roach and Pinkerton* prohibiting the execution of offenders who were under age 18 when they committed their crimes, the Petitioner cites numerous authorities, including international and regional treaties, United Nations resolutions and the domestic practice of states. The Petitioner relies in particular upon Article 6(5) of the International Covenant on Civil and Political Rights, which the United States ratified in 1992 but subject to a reservation by which the State purported to preserve the right to impose the death penalty on offenders under age 18.[FN4] The Petitioner also refers to the U.N. Convention on the Rights of the Child, Article 37(1) of which prohibits the imposition of capital punishment for offenses committed below 18 years of age. The Petitioner notes in particular that as of November 30, 1997 191 countries had ratified or acceded to the Convention with only two countries, the United

States and Somalia, having failed to become parties to the instrument. Additional treaties relied upon by the Petitioner in support of his argument include the American Convention on Human Rights, which the United States signed on June 1, 1977 and Article 4(5) of which prohibits the imposition of capital punishment upon persons who, at the time the crime was committed, were under 18 years of age, as well as the Fourth Geneva Convention of 1949, Article 68 of which provides that “the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offense.” The Petitioner notes in this respect that the United States ratified this treaty without opposition to the prohibition of juvenile executions.[FN5]

[FN4] Article 6(5) of the ICCPR prohibits the imposition of the death sentence for crimes committed by persons below eighteen years of age. The Petitioner contends that the United States’ reservation to Article 6(5) of the ICCPR is invalid under Article 19 of the Vienna Convention because it “is incompatible with the object and purpose of the treaty.”

[FN5] Petitioner’s petition dated December 7, 2000, p. 14.

20. Among the other authorities cited by the Petitioner are resolutions adopted by the U.N. Sub-Commission on the Promotion and Protection of Human Rights and the United Nations Commission on Human Rights in, respectively, 1999 and 1997 condemning the imposition of the death penalty on those who were under the age of 18 at the time the offense was committed.[FN6] Further, the Petitioner relies upon evidence of the domestic practice of states which he claims indicate, inter alia, that since 1990 only seven countries in the world are known to have executed children who were under the age of 18 at the time of their offense,[FN7] and that even states within the United States, including Florida and Montana, have recently followed the jus cogens prohibition by prohibiting the execution of 16 year old offenders.[FN8]

[FN6] Petitioner’s petition dated December 7, 2000, pp. 14-15, citing UN Doc. E/CN.4/Sub.2/1999/RES/4 (24 August 1999); Question of the Death Penalty, UN Hum. Rts. Comm. Res. 1997/12 adopted April 3, 1997.

[FN7] Petitioner’s petition dated December 7, 2000, p. 16, citing Amnesty International, *Juveniles and the Death Penalty*, at 3-6 November 1998; *Fight the Death Penalty in USA, Death Penalty for Juvenile Offenders* (Jan. 26, 1999) as indicating that since 1990, only the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, Yemen and the United States are known to have executed children who were under 18 years of age at the time of their offense.

[FN8] Petitioner’s petition dated December 7, 2000, p. 17 (indicating that on July 8, 1999, the Supreme Court of Florida ruled that the execution of a person who was 16 years old at the time of his crime violated the Florida Constitution and its prohibition against cruel and unusual punishment, and that on April 30, 1999, the Governor of Montana signed into effect a law that raised the minimum age of offenders who are eligible for the death penalty from 16 to 18 years); *Brennan v. Florida*, 754 So.2d 1 (Fla. July 8, 1999), rehearing denied October 21, 1999; Mont. Code Ann. §§ 45-2-102 (1999).

21. In addition and in the alternative, the Petitioner argues that the United States Government has failed to ensure that a uniform approach is taken towards the execution of juvenile offenders, thereby allowing a pattern of legislative arbitrariness to continue throughout the individual states. The Petitioner alleges that this failure results in the arbitrary deprivation of life and inequality before the law in breach of both Article I and Article II of the Declaration, as well as a violation of the right to special protection of children under Article VII of the Declaration. According to the Petitioner, by allowing the application of the death penalty upon a 16 year old offender to be determined by the location in which the crime was committed, U.S. policy results in the arbitrary deprivation of life and inequality before the law. In making this assertion, the Petitioner relies upon this Commission's decision in the Roach and Pinkerton case in which the Commission ruled that the United States' failure to preempt states on the issue of the juvenile death penalty resulted in the arbitrary deprivation of life and inequality before the law contrary to Articles I and II of the American Declaration.[FN9]

[FN9] Roach and Pinkerton v. United States, supra, para. 63.

22. The Petitioner also cites statistics indicating that as of the date of the petition, 8 U.S. states have specific statutes that authorize the death penalty for 16 year old offenders, 15 states and the federal government set the minimum age at 18, 9 states have no age limit specified in their statutes, and 13 states prohibit the death penalty altogether.[FN10] On this basis, the Petitioner argues that the United States has done nothing to bring uniformity to the state practice of executing juveniles, and moreover, that the United States has "directly undermined" the obligation it owes to the citizens of the United States under the American Declaration by ratifying the ICCPR with an invalid reservation to the prohibition of juvenile death penalties.[FN11]

[FN10] Petitioner's petition dated December 7, 2000, p. 20.

[FN11] Petitioner's petition dated December 7, 2000, pp. 21-26. The Petitioner argues, inter alia, that the State's reservation to Article 6(5) of the ICCPR is invalid as contrary to the object and purpose of the treaty and to a norm of jus cogens, and cites Articles 19 and 53 of the Vienna Convention on the Law of Treaties, an April 6, 1995 report of the U.N. Human Rights Committee finding the U.S. reservation to Article 6(5) to be incompatible with the object and purpose of the Covenant, and direct objections to the U.S. reservation lodged by at least eleven other signatory countries to the ICCPR).

23. Finally, the Petitioner argues that the imposition of the death penalty upon Mr. Domingues represents a breach of its obligations under the U.N. Convention on the Rights of the Child and the American Declaration. The Petitioner acknowledges that the U.S. has not ratified the Children's Convention treaty but points out that 191 countries worldwide have ratified or acceded to the treaty and that the U.S. and Somalia are the only two countries in the world that have not.

24. The Petitioner also relies in this respect upon the obligations assumed by the U.S. under Article 18 of the Vienna Convention of the Law of Treaties by virtue of the fact that it has signed the Convention in February 1995. Article 18 provides that

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty, or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.[FN12]

[FN12] Vienna Convention on the Law of Treaties, UN Doc. A/CONF. 39/27 (1969), Article 18.

25. Therefore, by executing Mr. Domingues, the Petitioner claims that the United States would violate the object and purpose of the Convention on the Rights of the Child and would therefore be in breach of its international legal obligations.

B. Position of the State

26. As of the date of adoption of the Commission's preliminary report, the Commission had not received any observations or information from the State regarding Mr. Domingues' complaint.

IV. ANALYSIS

27. Before undertaking its analysis of the present case, the Commission wishes to clarify that in light of the exceptional circumstances of this matter as a death penalty case and the fact that the parties have had numerous opportunities to present observations on the admissibility and merits of the Petitioners' claims, and consistent with its past practice in petitions of this nature,[FN13] the Commission decided to consider the admissibility of the Petitioners' claims together with the merits.

[FN13] See e.g. Desmond McKenzie et al. v. Jamaica, Case 12.023, Annual Report of the IACHR 1999; Garza v. United States, supra.

28. Also in this connection, and in the absence of any observations from the State on the admissibility or merits of Mr. Domingues' case, the Commission wishes to underscore the significance of OAS member states' obligations to respond to the Commission's communications, including those pertaining to petitions that complain of human rights violations attributable to a member state. This obligation flows generally from member states' human rights

responsibilities as parties to the OAS Charter and other pertinent instruments, and specifically from the terms of Articles 19 and 20 of the Commission's Statute and Articles 30 and 38 of the Commission's Rules of Procedure.

29. Among the consequences that follow from a State's silence on the merits of a petition is the Commission's entitlement, as prescribed in Article 39 of its Rules of Procedure, to presume the facts alleged in the petition to be true as long as other evidence does not lead to a different conclusion. It is with this regulation in mind that the Commission will evaluate the Petitioner's allegations in the present case.

A. Commission's Competence

30. The Petitioner claims that the State has violated Mr. Domingues' rights under Article I (the Right to Life), Article II (the Right to equality before the law), Article VII (the Right to Protection for Children), and Article XXVI (the Right not to receive cruel and unusual punishment), under the American Declaration of the Rights and Duties of Man. The State is a member of the Organization of American States that is not a party to the American Convention on Human Rights as provided for in Article 20 of the Commission's Statute and deposited its instrument of ratification of the OAS Charter on June 19, 1951.[FN14] The events raised in the Petitioner's claim occurred subsequent to the State's ratification of the OAS Charter. The alleged victim is a natural person, and the Petitioner was authorized under Article 23 of the Commission's Rules of Procedure to lodge the petition on behalf of Mr. Domingues. The Commission is therefore competent to examine this petition.

[FN14] The Inter-American Court of Human Rights and this Commission have previously determined that the American Declaration of the Rights and Duties of Man is a source of international obligation for the United States and other OAS member states that are not parties to the American Convention on Human Rights, based upon Articles 3, 16, 51, 112, and 150 of the OAS Charter. See I/A Court H.R., Advisory Opinion OC-10/89 Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, July 14, 1989, Ser. A N° 10 (1989), paras. 35-45; Roach and Pinkerton v. United States, supra, paras. 46-49. See also Statute of the Inter-American Commission on Human Rights, Article 20.

B. Admissibility

31. With respect to the admissibility of Mr. Domingues' complaints, the information presented by the Petitioner indicates that Mr. Domingues has filed a motion in the State trial court to correct an "illegal sentence". The Court denied that motion and Mr. Domingues appealed to the Nevada Supreme Court, the highest court in the state. In reviewing the case, the Nevada Supreme Court examined only the single issue of whether Nevada law is superseded by an international treaty ratified by the United States that prohibits the execution of individuals who committed capital offenses while under the age of eighteen. The Court concluded that a reservation to the ICCPR made by the U.S. Senate purporting to reserve the right to execute

juvenile offenders despite the non-derogation provisions of the ICCPR permitted the execution of Mr. Domingues. The Nevada Supreme Court, like the trial court below, did not discuss the issues of whether the reservation was valid or whether the execution of children under eighteen years of age violated customary international law or jus cogens. Because both the trial court and the Nevada Supreme Court failed to issue a ruling on the merits, the Petitioner submits that Mr. Domingues has been denied his right to a substantive appeal.

32. Further, according to the record, on March 3, 1999 Mr. Domingues filed a petition for writ of certiorari to the U.S. Supreme Court alleging violations of the ICCPR, customary international law and jus cogens. On November 1, 1999 the U.S. Supreme Court denied Mr. Domingues' writ without discussion. The State has not alleged or otherwise established that Mr. Domingues failed to exhaust the domestic remedies available to him in the United States with respect to the issues raised before the Commission.

33. Based upon the information before it, the Commission finds that the claims of violations of Articles I, II, VII and XXVI of the American Declaration contained in the Petitioner's petition of December 20, 1999 are not inadmissible for failure to exhaust domestic remedies in accordance with Article 31(1) of the Commission's Rules of Procedure.[FN15]

[FN15] Article 31(1) of the Commission's Rules of Procedure provides: "In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law."

34. In addition, the record in this case indicates that a petition was lodged on Mr. Domingues' behalf on May 1, 2000 and therefore within 6 months of the denial of his writ of certiorari by the U.S. Supreme Court. The State has not contested the timeliness of Mr. Domingues' petition. The Commission therefore does not find the Petitioner's petition to be inadmissible for violation of the 6-month period under Article 32 of the Commission's Rules of Procedure.[FN16]

[FN16] Article 32 of the Commission's Rules of Procedure provides: "The Commission shall consider those petitions that are lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that exhausted domestic remedies."

35. There is no evidence on the record indicating that the subject matter of Mr. Domingues' complaint is pending in another international proceeding for settlement as provided for under Article 33(1)(a) of the Commission's Rules of Procedure.[FN17] Further, while the Commission has received two petitions in this case which essentially duplicate the same subject matter, Mr. Domingues has, consistent with the terms of Article 33(2)(b) of the Commission's Rules of Procedure,[FN18] authorized Mr. Blaskey as the author of the second petition to represent him for the purposes of the proceeding before the Commission, and the Commission has consolidated

the complaints on this basis. The State has not objected to the petition on grounds of duplication. The Petitioner's claims are therefore not inadmissible under Article 33(1)(a) of the Commission's Rules of Procedure.

[FN17] Article 33(1)(a) of the Commission's Rules of Procedure provides: "The Commission shall not consider a petition if its subject matter: a. is pending settlement pursuant to another procedure before an international governmental organization of which the State concerned is a member."

[FN18] Article 32(2)(b) of the Commission's Rules of Procedure provides: "However, the Commission shall not refrain from considering petitions referred to in paragraph 1 when: (b) the petitioner before the Commission or a family member is the alleged victim of the violation denounced and the petitioner before the other organization is a third party or a nongovernmental entity having no mandate from the former."

36. Finally, having reviewed the Parties' observations and other material on the record in this matter, and in the light of the heightened level of scrutiny that the Commission has traditionally applied in cases involving the implementation of capital punishment, the Commission considers that the Petitioner's petition is not manifestly groundless and contains facts that, if proven, tend to establish violations of Articles I, II, VII and XXVI of the American Declaration. Consequently, the Commission does not find Mr. Domingues' petition to be inadmissible under Article 34 of the Commission's Rules of Procedure.[FN19]

[FN19] Article 34 of the Commission's Rules of Procedure provides: "The Commission shall declare any petition or case inadmissible when: a. It does not state facts that tend to establish a violation of the rights referred to in Article 27 of these Rules of Procedure; b. the statements of the petitioner or of the State indicate that it is manifestly groundless or out of order; or c. supervening information or evidence presented to the Commission reveals that a matter is inadmissible or out of order."

37. In accordance with the foregoing analysis of the requirements of the applicable provisions of the Commission's Rules of Procedure, the Commission decides to declare as admissible the claims presented in the Petition before it with respect to Articles I, II, VII, and XXVI of the American Declaration, and to proceed to examine the merits of the complaint.

C. Merits

1. Standard of Review

38. Before addressing the merits of the present case, the Commission wishes to reaffirm and reiterate its well-established doctrine that a heightened level of scrutiny will be applied in deciding cases involving capital punishment. The right to life is widely-recognized as the supreme right of the human being, and the *conditio sine qua non* to the enjoyment of all other

rights. The Commission therefore considers that it has an enhanced obligation to ensure that any deprivation of life that an OAS member state proposes to perpetrate through the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration. This "heightened scrutiny test" is consistent with the restrictive approach taken by other international human rights authorities to the imposition of the death penalty,[FN20] and has been articulated and applied by the Commission in previous capital cases before it.[FN21]

[FN20] See e.g. I/A Court H.R., Advisory Opinion OC-16/99 (1 October 1999) "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law", para. 136 (finding that "[b]ecause execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result"); Baboheram-Adhin et al. V. Suriname, Communication Nos. 148-154/1983, adopted 4 April 1985, para. 14.3 (finding that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state.); Report by the U.N. Special Rapporteur on Extra-judicial Executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, UN Doc.E/CN.4/1995/61 (14 December 1994) (hereinafter "Ndiaye Report"), para. 378 (emphasizing that in capital cases, it is the application of the standards of fair trials to each and every case that needs to be ensured and, in case of indications to the contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life.).

[FN21] See e.g. IACHR, *Andrews v. United States*, Report 57/96, Annual Report of the IACHR 1997), paras. 170-171; IACHR, *Baptiste v. Grenada*, Report N° 38/00, Annual Report of the IACHR 1999, paras. 64-66; *McKenzie et al. v. Jamaica*, Report N° 41/00, Annual Report of the IACHR 1999, paras. 169-171.

39. The Commission further notes that the heightened scrutiny test applicable to death penalty cases is not precluded by the Commission's fourth instance formula. According to this formula, the Commission in principle will not review the judgments issued by domestic courts acting within their competence and with due judicial guarantees.[FN22] Where a possible violation of an individual's rights under applicable inter-American human rights instruments is involved, however, the Commission has consistently held that the fourth instance formula has no application.[FN23] The Commission will therefore review the allegations made by the Petitioner with a heightened level of scrutiny, to ensure that Mr. Domingues' rights under the American Declaration have been properly respected by the State.

[FN22] See IACHR, *Santiago Marzoni v. Argentina*, Report N° 39/96, Annual Report of the IACHR 1996, p. 76, paras. 48-52. See also IACHR, *Clifton Wright v. Jamaica*, Report N° 29/88, Annual Report of the IACHR 1987-88, p. 154.

[FN23] See e.g. *Marzioni v. Argentina*, supra; *Wright v. Jamaica*, Case, supra; *Baptiste v. Grenada*, supra, para. 65; *McKenzie et al. V. Jamaica*, supra, para. 170.

2. The Commission's Decision in *Roach and Pinkerton*

40. The Commission notes at the outset of its analysis that the Petitioner's arguments draw significantly upon the Commission's 1987 decision in the case of *Roach and Pinkerton* against the United States.[FN24] That case concerned two juvenile offenders, James Terry Roach and Jay Pinkerton, who were sentenced to death in the states of, respectively, South Carolina and Texas, for crimes committed when they were seventeen years of age. Both petitioners were subsequently executed by those states. In determining the complaint brought before it on behalf of the Mr. Roach and Mr. Pinkerton, the Commission considered whether the United States had in sentencing the two prisoners to death and subsequently allowing their executions acted contrary to a recognized norm of jus cogens or customary international law. While the Commission determined the existence of a jus cogens norm prohibiting the execution of children, it found that uncertainty existed as to the applicable age of majority under international law. The Commission specifically articulated the issue before it as follows:

[FN24] *Roach and Pinkerton v. United States*, supra.

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 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 US disputes the allegation that there exists consensus as regards the age of majority.[FN25]

[FN25] *Roach and Pinkerton v. United States*, supra, paras. 56, 57.

41. The Commission ultimately concluded that there did not exist at that time a norm of jus cogens or other customary international law prohibiting the execution of persons under 18 years of age:

The Commission is convinced by the US 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, thirteen states and the U.S. capital have abolished the death penalty entirely and nine retentionist states [FN26] have abolished it for offenders under the age of 18.[FN27]

[FN26] At the time of the Roach and Pinkerton case, these States were: California, Colorado, Connecticut, Illinois, Nebraska, New Jersey, New Mexico, Ohio and Tennessee.

[FN27] Roach and Pinkerton v. United States, supra, para. 60.

42. Accordingly, in determining the present complaint, the Commission must address whether the state of international law concerning the execution of individuals under the age of 18 has evolved since its decision in Roach and Pinkerton.

3. The American Declaration, Customary International Law and Norms of Jus Cogens

43. In addressing the claims raised by the Petitioner concerning the present status of rules governing the execution of minors under international law, it is first instructive to provide a brief overview of the categories of rules of international law pertinent to this analysis, namely customary international law and norms of jus cogens, as well as the principal means by which the contents of those rules are manifested.

44. In this connection, the Commission recalls that in interpreting and applying the Declaration, its provisions, including Articles I, VII and XXVI, should be considered in the context of the broader international and inter-American human rights systems, in the light of developments in the field of international human rights law since it was first composed.[FN28] Due regard should in this respect be given to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged[FN29] as well as developments in the corpus juris gentium of international human rights law over time and in present-day conditions.[FN30]

[FN28] See I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of July 14, 1989,

(Ser. A) N° 10 (1989), para. 37 (pointing out that in determining the legal status of the American Declaration, it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948). See also ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31 stating that “an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation”).

[FN29] The Inter-American Court of Human Rights has viewed with approval the Commission's practice of applying sources of international law in addition to the American Convention. In its Advisory Opinion interpreting the terms "other treaties" in Article 64 of the American Convention, the Court stated:

The Commission has properly invoked in some of its reports and resolutions "other treaties concerning the protection of human rights in the American states", regardless of their bilateral or multilateral character, or whether they have been adopted within the framework or under the auspices of the inter-American system.

See I/A Court H.R., Advisory Opinion OC-1/82 of September 24, 1982, "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Article 64 of the American Convention on Human Rights), (Ser. A) N° 1 at para. 43 (1982).

[FN30] Advisory Opinion OC-16/99, *supra*, para. 114, citing, *inter alia*, the decisions of the European Court of Human Rights in *Tyrer v. United Kingdom* (1978), *Marckx v. Belgium* (1979), and *Louizidou v. Turkey* (1995).

45. Developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may in turn be drawn from various sources of international law,[FN31] including the provisions of other international and regional human rights instruments[FN32] and customary international law,[FN33] including those customary norms considered to form a part of *jus cogens*. [FN34]

[FN31] Article 38(1) of the Statute of the International Court of Justice prescribes what are broadly considered to constitute the primary and secondary sources of international law, namely:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states ;
- b) international custom, as evidence of a general practice accepted as law ;
- c) the general principles of law recognized by civilized nations ;
- d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993, Art. 38(1).

[FN32] The Commission notes in this regard that the Inter-American Court of Human Rights has considered the U.N. Convention on the Rights of the Child to form part of the comprehensive corpus juris for the protection of the child that is appropriately used to establish the content and scope of the rights of the child under Article 19 of the American Convention on Human Rights. I/A Court H.R., *Villagran Morales et al. Case (The "Street Children" Case)*, Judgment of November 19, 1999 (Merits), Annual Report 1999, p. 665, para. 194. See also IACHR, Report on the Human Rights of Asylum Seekers in the Canadian Refugee Determination System, OEA/Ser.L/V/II.106 Doc 40, rev (February 28, 2000), para. 38 (confirming that while the Commission clearly does not apply the American Convention on Human Rights in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

[FN33] The Restatement of Foreign Relations Law of the United States defines customary international law as constituting those rules that result from a general and consistent practice of states followed by them from a sense of legal obligation. See Restatement of Foreign Relations Law of the United States (Third) § 102(2) (1987).

[FN34] See Vienna Convention on the Law of Treaties, UN Doc. A/CONF. 39/27 (1969), Article 53 (providing that "[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.”)

46. With respect to the rules of customary international law in particular, while these rules are of an inherently changeable nature and therefore cannot be the subject of a definitive or exhaustive enumeration, there nevertheless exists a broad consensus in respect of the component elements required to establish a norm of customary international law. These include:

- 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;
 - d) general acquiescence in the practice by other states.[FN35]
-

[FN35] Yearbook of the International Law Commission, 1950, II, 26, para. 11. See similarly Ian Brownlie, *Principles of Public International Law* (5th ed., 1998) at 5 (identifying four attributes of a rule of customary international law: duration; uniformity and consistency of practice; generality of practice; and *opinio juris et necessitatis*).

47. These elements in turn suggest that when considering the establishment of such a customary norm, regard must be had to evidence of state practice.[FN36] While the value of potential sources of evidence vary depending on the circumstances, state practice is generally interpreted to mean official governmental conduct which would include state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international and regional governmental organizations such as the United Nations and the Organization of American States and their organs, domestic policy statements, press releases and official manuals on legal questions.[FN37] In summary, state practice generally comprises any acts or statements by a state from which views about customary laws may be inferred.[FN38]

[FN36] See e.g. *Asylum Case*, ICJ Reports (1950), at 276-7 (stating that a part that relies on custom “must prove that this custom is established in such a manner that it has become binding on the other party [...] that the rule invoked [...] is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom ‘as evidence of a general practice accepted as law.’”).

[FN37] *Id.* See also J.L. Brierly, *The Law of Nations* (6th ed., 1963) at 61-62.

[FN38] Malcolm N. Shaw, *International Law* (4th ed., 1997) at 66.

48. Once established, a norm of international customary law binds all states with the exception of only those states that have persistently rejected the practice prior to its becoming law. While a certain practice does not require universal acceptance to become a norm of customary international law, a norm which has been accepted by the majority of States has no binding effect upon a State which has persistently rejected the practice upon which the norm is based.[FN39]

[FN39] See e.g. *Anglo-Norwegian Fisheries Case*, ICJ Reports (1951), p. 131 (recognizing the principle that a state may contract out of a custom in the process of formation); Brownlie, *supra*, at 10.

49. Turning to the rules which govern the establishment of rules of jus cogens, this Commission has previously defined the concept of jus cogens as having been derived from ancient law concepts of a “superior order of legal norms, which the laws of man or nations may not contravene” and as the “rules which have been accepted, either expressly by treaty or tacitly by custom, as being necessary to protect the public morality recognized by them.”[FN40] It has been said that the principal distinguishing feature of these norms is their “relative indelibility,” in that they constitute rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect.[FN41] More particularly, as customary international law rests on the consent of nations, a state that persistently objects to a norm of customary international law is not bound by that norm. Norms of jus cogens, on the other hand, derive their status from fundamental values held by the international community, as violations of such preemptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence.[FN42] Commonly cited examples of rules of customary law that have attained the status of jus cogens norms include genocide, slavery, forced disappearances and torture or other cruel, inhuman or degrading treatment or punishment.[FN43] It has been suggested that a reliable starting point in identifying those international legal proscriptions that have achieved jus cogens status is the list of rights that international human rights treaties render non-derogable.[FN44]

[FN40] IACHR, *Roach and Pinkerton v. United States*, Case 9647, Annual Report of the IACHR 1987, para. 55.

[FN41] Brownlie, *supra*, at 515. See also *Vienna Convention on the Law of Treaties*, *supra*, Articles 53, 64.

[FN42] See *Barcelona Traction Case (Second Phase)*, ICJ Reports (1970) 3 at 32, *sep. op.* Judge Ammoun (indicating that obligations of jus cogens “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.”). See similarly *East Timor Case*, ICJ Reports (1995) 90 at 102.

[FN43] See e.g. The Restatement of Foreign Relations Law of the United States, *supra*, § 702 and comment n (indicating that while not all human rights norms are peremptory norms (*jus cogens*), several norms can be identified as falling within this category, such that an international agreement that violates them is void, if they are practiced, encouraged, or condoned as a matter of state policy: genocide; slavery or slave trade; the murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and a consistent pattern of gross violations of internationally recognized human rights).

[FN44] See Richard Lillich, *Civil Rights, in Human Rights in International Law: Legal and Policy Issues* 115, 118, n. 17 (Theodor Meron ed., 1988).

50. Therefore, while based on the same evidentiary sources as a norm of customary international law, the standard for determining a principle of *jus cogens* is more rigorous, requiring evidence of recognition of the indelibility of the norm by the international community as a whole. This can occur where there is acceptance and recognition by a large majority of states, even if over dissent by a small number of states.[FN45]

[FN45] See e.g. The Restatement of Foreign Relations Law of the United States, *supra*, § 102 and report's note 6 (1986), citing Report of the Proceedings of the Committee of the Whole, May 21, 1968, UN Doc. A/Conf.39/11 at 471-72.

4. International Legal Status of the Execution of Juveniles

51. Article I of the Declaration provides that “[e]very human being has the right to life, liberty and the security of his person.”

52. The Commission notes that while Article I of the American Declaration does not explicitly refer to the issue of capital punishment, the Commission has in past decisions declined to interpret Article I of the Declaration as either prohibiting use of the death penalty *per se*, or conversely as exempting capital punishment from the Declaration's standards and protections altogether. Rather, in part by reference to the drafting history of the American Declaration as well as the terms of Article 4 of the American Convention on Human Rights, the Commission has found that Article I of the Declaration, while not precluding the death penalty altogether, prohibits its application when doing so would result in an arbitrary deprivation of life or would otherwise be rendered cruel, infamous or unusual punishment.[FN46]

[FN46] See e.g. *Roach and Pinkerton v. United States*, *supra*; *Andrews v. United States*, Report N° 57/96, Annual Report of the IACHR 1997.

53. As noted above, the Petitioner argues that in the light of developments since 1986, a norm of customary international law now exists which prevents the execution of offenders aged

16 or 17 years old at the time of their crime. The Petitioner submits that this norm has acquired the status of jus cogens.[FN47] Consequently, the Petitioner asks that the Commission's decision in the case of Roach and Pinkerton be reviewed and extended, so as to find that Article I of the Declaration prohibits Mr. Domingues' execution as an offender who committed his crime when he was under 18 years of age.

[FN47] The Commission notes that according to some U.S. courts, international law that has risen to the level of a jus cogens norm is legally binding on domestic courts. See *United States v. Mata-Ballesteros*, 71 F.3d 754 (9th Cir. 1995); *In Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2f 929 (D.C. Cir. 1988); *White v. Paulson*, 997 F. Supp. 1380 (E.D. Wash. 1998)

54. In addressing this issue, the Commission must therefore evaluate whether the provisions of the American Declaration, when interpreted in the context of pertinent developments in customary international law and the norms of jus cogens, prohibit the execution of individuals who committed their crime when they were under the age of 18. In so doing, it is appropriate for the Commission to take into account evidence of relevant state practice as disclosed by various sources, including recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of the United Nations and other international governmental organizations, and the domestic legislation and judicial decisions of states.

a. Treaties

55. Since 1987, several notable developments have occurred in relation to treaties that explicitly prohibit the execution of individuals who were under 18 years of age at the time of committing their offense. These developments include the coming into force of new international agreements as well as broadened ratifications of existing treaties.

56. Most significantly, on November 20, 1989 the U.N. General Assembly adopted the United Nations Convention on the Rights of the Child. Article 37(a) of the Convention provides that:

No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

57. The treaty subsequently entered into force on September 2, 1990, and as of September 2001 the Convention had 191 state parties with no explicit reservations taken to Article 37(a).[FN48] The United States signed the Convention in February 1995, but has not yet ratified the Convention, joining Somalia as the only two states that are not parties to this treaty. In the Commission's view, the extent of ratification of this instrument alone constitutes compelling evidence of a broad consensus on the part of the international community repudiating the execution of offenders under 18 years of age.

[FN48] UN Convention on the Rights of the Child, G.A. Res. 44/25, UN GAOR, 44th Sess., Supp. N° 49, at 167, UN Doc. A/44/49 (1989), reprinted in 28 I.L.M. 1448 (1989). See also United Nations Treaty Database, U.N. Convention on the Rights of the Child (last modified September 5, 2001), <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty29.asp>>.

58. The International Covenant on Civil and Political Rights (ICCPR) was adopted by the UN General Assembly in 1966 and entered into force in 1976. There are presently 64 signatories and 147 Parties to the ICCPR.[FN49] Since 1986, sixty-four countries have acceded to or ratified the Covenant,[FN50] including the United States in 1992.[FN51] Article 6(5) of the ICCPR, like Article 37(a) of the Convention on the Rights of the Child, provides that:

[FN49] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171. See also United Nations Treaty Database, International Covenant on Civil and Political Rights (last modified September 5, 2001), <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty29.asp>>.

[FN50] Albania (1991); Algeria (1989); Angola (1992); Armenia (1993); Azerbaijan (1992); Bangladesh (2000); Belize (1996); Benin (1992); Bosnia and Herzegovina (1993); Botswana (2000); Brazil (1992); Burkina Faso (1999); Burundi (1990); Cambodia (1992); Cape Verde (1993); Chad (1995); Cote d'Ivoire (1992); Croatia (1992); Czech Republic (1993); Dominica (1993); Equatorial Guinea (1987); Estonia (1991); Ethiopia (1993); Ghana (2000); Greece (1997); Grenada (1991); Guatemala (1992); Haiti (1991); Honduras (1997); Ireland (1989); Israel (1991); Kuwait (1996); Kyrgyzstan (1994); Latvia (1992); Lesotho (1992); Liechtenstein (1998); Lithuania (1991); Malawi (1993); Malta (1990); Monaco (1997); Mozambique (1993); Namibia (1994); Nepal (1991); Nigeria (1993); Paraguay (1992); Republic of Korea (1990); Republic of Moldova (1993); Seychelles (1992); Sierra Leone (1996); Slovakia (1993); Slovenia (1992); Somalia (1990); South Africa (1998); Switzerland (1992); Tajikistan (1999); Thailand (1996); The Former Yugoslav Republic of Macedonia (1994); Turkmenistan (1997); Uganda (1995); USA (1992); Uzbekistan (1995); Yemen (1987); Yugoslavia (2001); Zimbabwe (1991).

[FN51] In addition, China and Lao People's Democratic Republic signed the Covenant in 1988 and 2000 respectively.

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.

59. Of the states parties to this Convention, only the instruments of ratification of the U.S. and of accession by Thailand are presently accompanied by declarations or reservations in respect of Article 6(5). Thailand provided an interpretive declarations for Article 6(5) that reads as follows:

With respect to article 6, paragraph 5 of the Covenant, the Thai Penal Code enjoins, or in some cases allows much latitude for, the Court to take into account the offender's youth as a mitigating factor in handing down sentences. Whereas Section 74 of the code does not allow any kind of punishment levied upon any person below fourteen years of age, Section 75 of the same Code provides that whenever any person over fourteen years but not yet over seventeen years of age commits any act provided by the law to be an offence, the Court shall take into account the sense of responsibility and all other things concerning him in order to come to decision as to whether it is appropriate to pass judgment inflicting punishment on him or not. If the court does not deem it appropriate to pass judgment inflicting punishment, it shall proceed according to Section 74 (viz. to adopt other correction measures short of punishment) or if the court deems it appropriate to pass judgment inflicting punishment, it shall reduce the scale of punishment provided for such offence by one half. Section 76 of the same Code also states that whenever any person over seventeen years but not yet over twenty years of age, commits any act provided by the law to be an offence, the Court may, if it thinks fit, reduce the scale of the punishment provided for such offence by one third or one half. The reduction of the said scale will prevent the Court from passing any sentence of death. As a result, though in theory, sentence of death may be imposed for crimes committed by persons below eighteen years, but not below seventeen years of age, the Court always exercises its discretion under Section 75 to reduce the said scale of punishment, and in practice the death penalty has not been imposed upon any persons below eighteen years of age. Consequently, Thailand considers that in real terms it has already complied with the principles enshrined herein.

60. The effect of Thailand's declaration is therefore to clarify that despite the strict terms of its applicable legislation, in practice it does not execute juvenile offenders and therefore in real terms had already complied with Article 6(5) of the ICCPR.

61. For its part, the United States asserted the following reservation to Article 6(5) upon becoming a party to the ICCPR:

That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

62. It is noteworthy that this reservation provoked condemnation within the international community and prompted eleven European States Parties to file objections declaring the reservation to be invalid, a majority on the basis that it was inconsistent with the aims and purposes of the ICCPR as provided by Article 19(c) of the Vienna Convention on the Law of Treaties.[FN52] Moreover, in 1995 the U.N. Human Rights Committee declared this reservation to be contrary to the object and purpose of the ICCPR and recommended that the United States withdraw it.[FN53]

[FN52] Article 19(c) of the Vienna Convention on the Law of Treaties precludes a state from formulating reservations to a treaty when the reservation is "incompatible with the object and purpose of the treaty." The states objecting to the U.S. reservation to Article 6(5) of the ICCPR

include Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden, the pertinent objections of which read as follows:

Belgium: The Government of Belgium wishes to raise an objection to the reservation made by the United States of America regarding article 6, paragraph 5, of the Covenant, which prohibits the imposition of the sentence of death for crimes committed by persons below 18 years of age.

Denmark: In the opinion of Denmark, reservation (2) of the United States with respect to capital punishment for crimes committed by persons below eighteen years of age as well as reservation (3) with respect to article 7 constitute general derogations from articles 6 and 7, while according to article 4, para 2 of the Covenant such derogations are not permitted.

Finland: With regard to the reservations, understandings and declarations made by the United States of America:

As regards reservation (2) concerning article 6 of the Covenant, it is recalled that according to article 4(2), no restrictions of articles 6 and 7 of the Covenant are allowed for. In the view of the Government of Finland, the right to life is of fundamental importance in the Covenant and the said reservation therefore is incompatible with the object and purpose of the Covenant.

France: At the time of the ratification of [the said Covenant], the United States of America expressed a reservation relating to article 6, paragraph 5, of the Covenant, which prohibits the imposition of the death penalty for crimes committed by persons below 18 years of age. France considers that this United States reservation is not valid, inasmuch as it is incompatible with the object and purpose of the Convention.

Germany: The Government of the Federal Republic of Germany objects to the United States' reservation referring to article 6, paragraph 5 of the Covenant, which prohibits capital punishment for crimes committed by persons below eighteen years of age. The reservation referring to this provision is incompatible with the text as well as the object and purpose of article 6, which, as made clear by paragraph 2 of article 4, lays down the minimum standard for the protection of the right to life.

Italy: The Government of Italy, ..., objects to the reservation to art. 6 paragraph 5 which the United States of America included in its instrument of ratification. In the opinion of Italy reservations to the provisions contained in art. 6 are not permitted, as specified in art.4, para 2, of the Covenant. Therefore this reservation is null and void since it is incompatible with the object and the purpose of art. 6 of the Covenant.

Netherlands: The Government of the Kingdom of the Netherlands objects to the reservations with respect to capital punishment for crimes committed by persons below eighteen years of age, since it follows from the text and history of the Covenant that the said reservation is incompatible with the text, the object and purpose of article 6 of the Covenant, which according to article 4 lays down the minimum standard for the protection of the right to life.

Norway: With regard to reservations to articles 6 and 7 made by the United States of America: 1. In the view of the Government of Norway, the reservation (2) concerning capital punishment for crimes committed by persons below eighteen years of age is according to the text and history of the Covenant, incompatible with the object and purpose of article 6 of the Covenant. According to article 4 (2), no derogations from article 6 may be made, not even in times of public emergency. For these reasons the Government of Norway objects to this reservation.

Portugal: With regard to the reservations made by the United States of America: The Government of Portugal considers that the reservation made by the United States of America referring to article 6, paragraph 5 of the Covenant which prohibits capital punishment for crimes committed by persons below eighteen years of age is in compatible with article 6 which, as made

clear by paragraph 2 of article 4, lays down the minimum standard for the protection of the right to life.

Spain: With regard to the reservations made by the United States of America: After careful consideration of the reservations made by the United States of America, Spain wishes to point out that pursuant to article 4, paragraph 2, of the Covenant, a State Party may not derogate from several basic articles, among them articles 6 and 7, including in time of public emergency which threatens the life of the nation. The Government of Spain takes the view that reservation (2) of the United States having regard to capital punishment for crimes committed by individuals under 18 years of age, in addition to reservation (3) having regard to article 7, constitute general derogations from articles 6 and 7, whereas, according to article 4, paragraph 2, of the Covenant, such derogations are not to be permitted. Therefore, and bearing in mind that articles 6 and 7 protect two of the most fundamental rights embodied in the Covenant, the Government of Spain considers that these reservations are incompatible with the object and purpose of the Covenant and, consequently, objects to them.

Sweden: A reservation by which a State modifies or excludes the application of the most fundamental provisions of the Covenant, or limits its responsibilities under that treaty by invoking general principles of national law, may cast doubts upon the commitment of the reserving State to the object and purpose of the Covenant. The reservations made by the United States of America include both reservations to essential and non-derogable provisions, and general references to national legislation. Reservations of this nature contribute to undermining the basis of international treaty law. All States Parties share a common interest in the respect for the object and purpose of the treaty to which they have chosen to become parties. Sweden therefore objects to the reservations made by the United States to: [...] article 6; cf. Reservation (2).

UN Treaty Database, ICCPR, *supra*.

[FN53] UNHRC, Comments on the United States of America, UN Doc. CCPR/C/79/Add.50 (1995). See also Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, U.N. Hum. Rts. Comm., 53d Sess., 1413th mtg, at para. 14, U.N. Doc. CCPR/C/79/Add.50 (1995).

63. Other international and regional human rights treaties that regulate the implementation of the death penalty have likewise witnessed an increase in states parties thereto since 1987. With regard to the inter-American human rights system in particular, Article 4 of the American Convention on Human Rights provides

Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age.

64. There are presently 24 state parties to the American Convention.[FN54] Since 1986, the following 5 OAS member states ratified or acceded to the Convention, none of which claimed reservations respecting the prohibition under Article 4(5) of the execution of juveniles: Brazil (1992); Chile (1990); Dominica (1993); Suriname (1987); Trinidad and Tobago (1991, which subsequently denounced the Convention in 1998). The United States signed the American Convention in 1977 but has never ratified the treaty. The Commission considers that this broad hemispheric adherence to the American Convention, including Article 4(5) thereof, constitutes

compelling evidence of a regional norm repudiating the application of the death penalty to persons under 18 years of age even amongst those states such as Guatemala, Jamaica and Grenada that, like the United States, have retained the death penalty.

[FN54] Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/I.4 rev.8 (22 May 2001), p. 48.

65. These international and regional developments have been accompanied by initiatives in both the inter-American and European systems to prohibit the application of the death penalty altogether. In 1990, for example, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty was approved by the OAS General Assembly at its twentieth regular session in Asuncion, Paraguay. Eight States have since signed and ratified the Protocol. Similarly, Protocol N° 6 to the European Convention on Human Rights concerning the Abolition of the Death Penalty abolishes the death penalty entirely except in times of war. The protocol came into force in March 1985 and presently has been ratified by 39 European States. Three states have signed but not yet ratified the Protocol and Turkey stands alone as the only member state of the Council of Europe which has not signed the protocol.

66. In the Commission's view, these developments in the corpus of international human rights law should also be viewed in light of corresponding provisions in the related field of international humanitarian law.[FN55] In this respect, the Fourth Geneva Convention of 1949 and related instruments prohibit the imposition of the death penalty upon juveniles in times of armed conflict or occupation.[FN56] Article 68, paragraph 4 of the Fourth Geneva Convention, which governs the application of penal laws to protected persons in situations of occupation, provides in part that

[FN55] See generally IACHR, *Juan Carlos Abella v. Argentina*, Case 11.137, Report N° 55/97, Annual Report of the IACHR 1997, para. 158 (recognizing that the American Convention, as well as other universal and regional human rights instruments, and the 1949 Geneva Conventions "share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity.").

[FN56] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, Article 68. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 U.N.T.S. 3, Art. 77(5) (providing that the "death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed."); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 1125 U.N.T.S. 609, Art. 6(4) (providing that the "death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence").

[i]n any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.

67. As of January 1, 1986, there were 162 state parties to the Fourth Geneva Convention, and as of 2001, the number of state parties had risen to 189.[FN57] This includes the United States, which ratified the Convention on August 2, 1955 absent any reservation to paragraph 4 of Article 68. On this point, the Commission can identify no appropriate justification for applying a more restrictive standard for the application of the death penalty to juveniles in times of occupation than in times of peace, relating as this protection does to the most basic and non-derogable protections for human life and dignity of adolescents that are common to both regimes of international law. As the International Committee of the Red Cross observed in its Commentary on Article 68, paragraph 4 of the Fourth Geneva Convention:

[FN57] International Committee of the Red Cross, International Humanitarian Law Database, Treaties, visited August 27, 2001, <<http://www.icrc.org/ihl>>.

The clause corresponds to similar provisions in the penal codes of many countries, and is based on the idea that a person who has not reached the age of eighteen years is not fully capable of sound judgment, does not always realize the significance of his actions and often acts under the influence of others, if not under constraint.[FN58]

[FN58] International Committee of the Red Cross, Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (J.S. Pictet ed., 1958), at 346-347.

68. The foregoing analysis therefore indicates that since 1987, and consistent with events prior to that date, there has been concordant and widespread development and ratification of treaties by which nearly all of the world states have recognized, without reservation, a norm prohibiting the execution of individuals who were under 18 years of age at the time of committing their offense.

b. United Nations Resolutions and Standards

69. The developments in treaty law discussed above have been accompanied by similar initiatives and practices on the part of United Nations bodies. Prior to the Commission's decision in Roach and Pinkerton, the Third Committee of the United Nations General Assembly in 1980 had already recognized Article 6 of the ICCPR as constituting a "minimum standard" for all U.N. members states and not just those that had ratified the ICCPR.[FN59] Consistent with this position, on August 24, 1999 the United Nations Sub-committee on the Promotion and Protection of Human Rights passed a resolution condemning the imposition of the death penalty on those who were under 18 at the time of their offence and calling upon countries that continued to execute juveniles to bring an end to the practice.[FN60] In addition, the 54th Session of the

United Nations Commission on Human Rights passed a resolution calling on States that maintained the death penalty to comply with the International Covenant by not imposing the death penalty for crimes committed by persons below eighteen years of age.[FN61]

[FN59] See 12 UN GAOR C.3 (819th mtg) at 287, UN Doc. A/C.3/SR.819.

[FN60] The Death Penalty, Pertaining in Relation to Juvenile Offenders, U.N. Sub-committee on the promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/RES/1999/4 (24 August 1999). See similarly The Death Penalty, Pertaining in Relation to Juvenile Offenders, U.N. Sub-committee on Promotion and Protection of Human Rights, 53rd Sess., Res. 2000/17, adopted August 17, 2000, UN Doc. E/CN.4/Sub.2/RES/2000/17 (2000).

[FN61] Question of the death penalty, UN Hum. Rts. Comm. Res. 1998/8, UN Doc. E/CN.4/RES/1998/8 (3 April 1998), para. 3(a) (urging that all states that still maintain the death penalty “to comply fully with their obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, notably not to impose the death penalty for any but the most serious crimes, not to impose it for crimes committed by persons below eighteen years of age, to exclude pregnant women from capital punishment and to ensure the right to seek pardon or commutation of sentence”).

70. Standards have also been adopted by the United Nations Economic and Social Council that forbid the execution of children who committed their crimes when they were under eighteen.[FN62] Those same standards have been endorsed by the General Assembly and the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders.[FN63] The United Nations Standard Minimum Rules for the Administration of Juvenile Justice likewise prohibits the execution of juvenile offenders.[FN64]

[FN62] Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC Res. 1984/50 (25 May 1984), Annex, para. 3 (providing that “[p]ersons below 18 years of age at the time of the commission of the crime shall not be sentenced to death”).

[FN63] See U.N.G.A. Res. 39/118 (14 December 1984); Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (26 August to 6 September 1985) UN Doc. A/ Conf.121/22 (1985) at 86-87.

[FN64] UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), G.A. Res 40/33, Nov 29, 1985, Annex, rule 17.2.

71. It is therefore apparent that the United Nations bodies responsible for human rights and criminal justice have consistently supported the norm expressed in international human rights agreements prohibiting the execution of offenders under the age of 18.

c. Domestic Practice of States

72. The articulation of an international norm proscribing the execution of juvenile offenders through international practice has been accompanied by the expression of a similar standard in

the domestic practice of states. In 1986, 46 countries had abolished the death penalty for traditional crimes, with the exception of certain crimes committed under military law or in time of war. Today, according to available statistics the number has more than doubled, with an additional 49 countries having abolished the death penalty during the intervening fifteen years for all but exceptional crimes. Moreover, a further 20 countries have not carried out any executions for ten years or more. It has been stated that the average annual rate at which countries have abolished the death penalty has increased from 1.5 (1965-1988) to 4 per year (1989-1995), or nearly three times as many.[FN65] According to statistics compiled by Amnesty International, a leading source of research and information concerning the global application of the death penalty, 109 countries have abolished the death penalty by law or in practice as of the year 2001.[FN66]

[FN65] Roger Hood, *The Death Penalty: A World-wide Perspective* (2nd ed., 1996), at 8.

[FN66] Amnesty International Website, Campaigns, Death Penalty, (last modified June 1, 2001), <<http://www.web.amnesty.org/rmp/dplibrary.nsf>>.

73. Also according to statistics compiled by Amnesty International, 115 states whose laws maintain the death penalty for some offences either have provisions in their laws which exclude the use of the death penalty against child offenders, or may be presumed to exclude such use by virtue of becoming parties to the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child or the American Convention on Human Rights without entering a reservation to the relevant articles of these treaties.[FN67] Since the beginning of 1994 at least 5 countries have changed their laws to eliminate the use of the death penalty against child offenders: Barbados, Pakistan, Yemen, Zimbabwe and China. [FN68]

[FN67] Amnesty International, *Children and the Death Penalty, Executions Worldwide since 1990*, AI Index 50/10/001111 (November 2000).

[FN68] *Crime Prevention and Criminal Justice: Capital Punishment and the Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, Report of the Secretary General, UNESCOR, Economic and Social Council, Subst. Sess., U.N. Doc. E/2000/3 (2000), para. 90.

74. A small minority of states persist in executing juvenile offenders. Since 1990, 7 countries are known to have executed prisoners who were under 18 years old at the time of the crime - Congo (Democratic Republic), Iran, Nigeria, Pakistan, Saudi Arabia, U.S. and Yemen.[FN69] A study of the worldwide executions of child offenders cite a total of 25 executions within that 10 year period. 14 of those executions were carried out by the United States of America, 6 were conducted in Iran and the remaining 5 nations carried out one execution each. Both Pakistan and Yemen are now reported to have abolished the death penalty for 16 and 17 year old offenders.[FN70] In the year 2000, only 3 countries carried out any juvenile executions: the U.S., the Democratic Republic of Congo and Iran. In 1999 juvenile executions took place only in Iran and the U.S. In 1998, the U.S. was alone in its execution of 3 juvenile offenders. Yemen's sole

execution took place in 1993, and Saudi Arabia's in 1992, with the consequence that since 1998, only three states, the U.S., Congo and Iran, have executed juvenile offenders sentenced to death.[FN71]

[FN69] Amnesty International, *Too young to vote, old enough to be executed – Texas set to kill another child offender*, AI Index: AMR 51/105/2001 (July 2001), p. 32.

[FN70] *Id.*, indicating that Yemen abolished the death penalty for 16 and 17 year old offenders in 1994 and Pakistan followed in 2000.

[FN71] *Id.* See also AI-index: ACT 50/002/2001 (April 2001).

75. As with adherence to regional treaties in the Western Hemisphere, it is pertinent to note that of the few states that have continued to execute juveniles, none but the United States are counted among the members of the inter-American system. In the Commission's view, this reinforces the existence of a particularly pervasive regional norm repudiating the application of the death penalty to persons under 18 years of age.

76. Domestic practice over the past 15 years therefore evidences a nearly unanimous and unqualified international trend toward prohibiting the execution of offenders under the age of 18 years. This trend crosses political and ideological lines and has nearly isolated the United States as the only country that continues to maintain the legality of the execution of 16 and 17 year old offenders, and then, as the following discussion indicates, only in certain state jurisdictions.

d. Practice of the United States

77. Within the United States, judicial determinations and legislative initiatives over the past 20 years have also demonstrated a trend towards lack of acceptance of the application of the death penalty to those offenders under the age of 18 years. At the time of the decision of the U.S. Supreme Court in the case *Thompson v. Oklahoma* in 1988, 36 states authorized the use of capital punishment and of those, 18 required that the defendant attain at least the age of 16 years at the time of his or her offense, while another 19 provided no minimum age for the imposition of the death penalty.[FN72] In the *Thompson* decision, the U.S. Supreme Court held that the execution of offenders under the age of sixteen years at the time of their crimes was prohibited by the Eighth Amendment to the United States Constitution.[FN73] In its analysis of that case, the Supreme Court concluded that it would "offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense," and cited in support of its conclusion the fact that

[FN72] *Thompson v. Oklahoma*, 487 U.S. 815, 823-831(1988).

[FN73] *Id.*

[r]elevant state statutes - particularly those of the 18 States that have expressly considered the question of a minimum age for imposition of the death penalty, and have uniformly required that

the defendant have attained at least the age of 16 at the time of the capital offense - support the conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense. That conclusion is also consistent with the views expressed by respected professional organizations, by other nations that share the Anglo-American heritage, and by the leading members of the Western European Community.[FN74]

[FN74] Id.

78. Moreover, since this initiative by the U.S. Supreme Court to establish a minimum age of 16 at which an offender may be executed in the United States, additional state jurisdictions have moved toward a higher standard. In 1999, for example, the Florida Supreme Court interpreted the Florida Constitution to prohibit the death penalty for sixteen-year-old offenders, ruling that the execution of a person who was 16 years old at the time of his crime violated the Florida Constitution and its prohibition against cruel and unusual punishment.[FN75] On April 30, 1999 a revision of Montana state law raised the minimum age of offenders who are eligible for the death penalty from 16 year to 18 years of age.

[FN75] *Brennan v Florida* 754 So. 2d 1 (Fla. July 8, 1999) following its decision in *Allen v The State* 636 So. 2d 494 (Fla. 1994).

79. Currently within the United States, 38 states and the federal military and civilian jurisdictions have statutes authorizing the death penalty for capital crimes. Of those jurisdictions, 16 have expressly chosen the age of 18 at the time of the crime as the minimum age for eligibility the death sentence,[FN76] compared to approximately 10 in 1986,[FN77] and 23 states allow the execution of those under 18, compared to 27 in 1986.[FN78] These statistics complement the international movement toward the establishment of 18 as the minimum age for the imposition of capital punishment. The Commission considers it significant in this respect that the U.S. federal government itself has considered 18 year to be the minimum age for the purposes of federal capital crimes.[FN79] As the U.S. government is the authority responsible for upholding that State's obligations under the American Declaration and other international instruments, the Commission considers the federal government's adoption of 18 as the minimum age for the application of the federal death penalty as a significant indication by the United States itself of the appropriate standard on this issue.

[FN76] These 16 jurisdictions include California, Colorado, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, Washington, Montana, and the Federal Government.

[FN77] *Roach and Pinkerton v. United States*, supra, para. 57.

[FN78] Five states have chosen age seventeen as the minimum age, Georgia, New Hampshire, North Carolina, Texas, and Florida. The other eighteen death penalty jurisdictions use age sixteen as the minimum age, either through an express age prescribed by statute or by court

ruling. See *The Juvenile Death Penalty Today: Death sentences and executions for juvenile crimes, January 1, 1973 – December 31, 2000* by Victor L. Streib Professor of Law The Claude W. Pettit College of Law Ohio Northern University Ada, Ohio 45810-1599 (last modified February 2001), <<http://www.law.onu.edu/faculty/streib/juvdeath.htm>>. See also *United States v. Burns* [2001] 1 S.C.R. 283, para. 93 (Can.) [FN79] 18 U.S.C. § 3591 (1994).

e. Related Developments Regarding the Age of Majority

80. The Commission notes that the emergence of 18 as the minimum age for the execution of offenders is consistent with developments in other fields of international law addressing the age of majority for the imposition of serious and potentially fatal obligations and responsibilities. The Commission notes in particular the establishment of 18 as the minimum age for individuals to take direct part in hostilities as members of their state's armed forces. In this respect, the Optional Protocol to the Convention on the Rights of the Child respecting the involvement of children in armed conflicts, which was adopted and opened for signature, ratification and accession on May 25, 2000,[FN80] provides in Article I that the age of 18 years represents a threshold below which special protection is required:

[FN80] G.A. Res. A/RES/54/263. At present, the Protocol has 4 state parties and 76 signatories.

Article 1

State parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

81. The United States signed the Optional Protocol on September 7, 2000, and while it has not yet ratified the Protocol or the underlying Convention, both the President of the United States[FN81] and the U.S. Congress expressed support for the rule prescribed in Article I, with Congress encouraging the United States delegation "not to block the drafting of an optional protocol to the Convention on the Rights of the Child that would establish 18 as the minimum age for participation in armed conflict." [FN82]

[FN81] See U.S. Department of State publication, Office of the Press Secretary, The White House, Remarks by the President at Protocol Orders signing ceremony at the United Nations, New York, July 5 2000 (quoting U.S. President Clinton's comments on Article I of the Protocol as follows:

The Optional Protocol on Children in Armed Conflict sets a clear and a high standard: No one under 18 may ever be drafted by any army in any country. Its signatories will do everything feasible to keep even volunteers from taking a direct part in hostilities before they are 18. They will make it a crime for any non-governmental force to use children under 18 in war.[...] Every American citizen should support these protocols. They represent a worldwide consensus on basic

values -- values every citizen of our country shares. [...] I am grateful for the opportunity America has had to take a leading role in negotiating these agreements, and to be among the first nations to sign them. [...] I pledge my best efforts to see that we are also leaders in implementing them.).

[FN82] Appropriation for the Department of Defense for Fiscal Year 1999, Section 8128(a) of the Conference Report Accompanying H.R. 4103, § B(4).

82. Support for this standard has also been expressed by the OAS General Assembly, which by resolution dated June 5, 2000 noted that more than 300,000 children under 18 years of age were at that time participating in armed conflicts worldwide. In light of this statistic, the General Assembly called upon member states to consider signing and ratifying the Optional Protocol to the United Nations Convention on the Rights of the Child regarding the participation of children in armed conflicts.[FN83] Similar standards have been recognized internationally and within the United States itself in connection with areas of societal participation, such as the right to vote, in which the attainment of the age of 18 is considered a minimum and necessary prerequisite.[FN84]

[FN83] See Resolution of the General Assembly of OAS of June 5, 2000 AG/RES. 1709 (XXX-O/00).

[FN84] See e.g. Inter-Parliamentary Union, *Electoral Systems: A World-Wide Comparative Study*, Geneva 1993 (reviewing the electoral systems of 150 of the world's 186 sovereign states and noting that

[t]he right to vote supposes that electors should have reached an age at which they are able to express an opinion on political matters, as a rule coinciding with the age of legal majority [...] the norm today is eighteen years; an overwhelming majority of 109 states has opted for this minimum age limit, with most other States having a slightly higher limit (19-21 years). The lowest limit 16 years – is practiced in four countries: Brazil, Cuba, Iran and Nicaragua.).

See also U.S. Const., Amend. XXVI (providing that “The right of citizens of the United States, who are 18 years of age or older, to vote shall not be denied or abridged by the United States or any State on account of age.”); *Stanford v. Kentucky*, 492 U.S. 361 (1989), dissenting opinions of Justices Brennan, Marshall, Blackman, and Stevens (observing that in the United States:

Legislative determinations distinguishing juveniles from adults abound. These age-based classifications reveal much about how our society regards juveniles as a class, and about societal beliefs regarding adolescent levels of responsibility [...] The participation of juveniles in a substantial number of activities open to adults is either barred completely or significantly restricted by legislation [...] No State has lowered its voting age below 18 years [...] Nor does any State permit a person under 18 to serve on a jury [...] Only four States ever permit persons below 18 to marry without parental consent [...] Thirty-seven States have specific enactments requiring that a patient have attained 18 before she may validly consent to medical treatment [...] Thirty-four States require parental consent before a person below 18 may drive a motor car [...] Legislation in 42 States prohibits those under 18 from purchasing pornographic materials [...] Where gambling is legal, adolescents under 18 are generally not permitted to participate in it, in some or all of its forms [...] In these and a host of other ways, minors are treated differently from adults in our laws, which reflects the simple truth derived from communal experience that

juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life.).

83. Accordingly, a finding that an international norm has emerged establishing 18 as the minimum age at which an individual is liable to face the ultimate punishment of death is, in the Commission's view, entirely consistent with corresponding developments relating to obligations of an equivalent or lesser nature, such as participating in armed conflict or electing political leaders. Indeed, it is difficult to rationalize, much less justify, why a lesser standard should apply in the implementation of capital punishment. This is particularly evident given the broadly-recognized international obligation of states to provide enhanced protection to children, which includes ensuring the well-being of juvenile offenders and endeavor their rehabilitation. These obligations are reflected in Article 19 of the American Convention[FN85] and Article VII of the American Declaration[FN86] and, as interpreted by the Inter-American Court of Human Rights, require that "when the State apparatus has to intervene in offenses committed by minors, it should make substantial efforts to guarantee their rehabilitation in order to 'allow them to play a constructive and productive role in society.'"[FN87]

[FN85] Article 19 of the American Convention provides: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state."

[FN86] Article VII of the American Declaration provides: "All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid."

[FN87] I/A Court H.R., Villagran Morales and others ("Street Children") Case, Judgment of November 19, 1999, Annual Report 1999, para. 197. See similarly IACHR, Argentina v. X & Y, Case N° 10.506, Annual Report of the IACHR 1996; Eur. Court H.R., T. v. United Kingdom, Judgment of December 16, 1999; UN Standard Minimum Rules for the Administration of Juvenile Justice, *supra*, Rule 17.

f. Conclusion

84. In the Commission's view, the evidence canvassed above clearly illustrates that by persisting in the practice of executing offenders under age 18, the U.S. stands alone amongst the traditional developed world nations and those of the inter-American system, and has also become increasingly isolated within the entire global community. The overwhelming evidence of global state practice as set out above displays a consistency and generality amongst world states indicating that the world community considers the execution of offenders aged below 18 years at the time of their offence to be inconsistent with prevailing standards of decency. The Commission is therefore of the view that a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime.

85. Moreover, the Commission is satisfied, based upon the information before it, that this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*, a development anticipated by the Commission in its Roach and Pinkerton decision.

As noted above, nearly every nation state has rejected the imposition of capital punishment to individuals under the age of 18. They have done so through ratification of the ICCPR, U.N. Convention on the Rights of the Child, and the American Convention on Human Rights, treaties in which this proscription is recognized as non-derogable, as well as through corresponding amendments to their domestic laws. The acceptance of this norm crosses political and ideological boundaries and efforts to detract from this standard have been vigorously condemned by members of the international community as impermissible under contemporary human rights standards. Indeed, it may be said that the United States itself, rather than persistently objecting to the standard, has in several significant respects recognized the propriety of this norm by, for example, prescribing the age of 18 as the federal standard for the application of capital punishment and by ratifying the Fourth Geneva Convention without reservation to this standard. On this basis, the Commission considers that the United States is bound by a norm of jus cogens not to impose capital punishment on individuals who committed their crimes when they had not yet reached 18 years of age. As a jus cogens norm, this proscription binds the community of States, including the United States. The norm cannot be validly derogated from, whether by treaty or by the objection of a state, persistent or otherwise.

86. Interpreting the terms of the American Declaration in light of this norm of jus cogens, the Commission therefore concludes in the present case that the United States has failed to respect the life, liberty and security of the person of Michael Domingues by sentencing him to death for crimes that he committed when he was 16 years of age, contrary to Article I of the American Declaration.

87. As a further consequence of this determination, the Commission finds that the United States will be responsible for a further grave and irreparable violation of Mr. Domingues' right to life under Article I of the American Declaration if he is executed for crimes that he committed when he was 16 years of age.

V. PROCEEDINGS SUBSEQUENT TO REPORT 116/01

88. On October 15, 2001 the Commission adopted Report 116/01 pursuant to Article 43 of its Rules of Procedure, setting forth its analysis of the record, findings and recommendations in this matter.

89. Report 116/01 was transmitted to the State on October 19, 2001 with a request that the State provide information as to the measures it had taken to comply with the recommendations set forth in the report within a period of two months, in accordance with Article 43(2) of the Commission's Rules. Contemporaneously, in a communication dated October 18, 2001 and received by the Commission on October 19, 2001, the United States delivered to the Commission its response to the petition.

90. By communication dated December 17, 2001 and received by the Commission on December 19, 2001 the State delivered a response to the Commission's October 19, 2001 request for information. In its reply, the State relied upon and reiterated the arguments contained in its October 18, 2001 observations, and also provided additional submissions in respect of the Commission's preliminary merits report in which it did not accept the Commission's conclusions

and recommendations and requested that the Commission “withdraw” its report. This response was followed by a communication dated June 25, 2002 and received by the Commission on June 27, 2002 in which the State provided “supplemental observations” to the Commission’s report.

91. Prior to addressing the State’s response in further detail, the Commission wishes to make the following observations concerning several procedural aspects of the matter before it. The Commission first emphasizes the obligation of member states to participate in the Commission’s contentious procedures in good faith and in a timely manner, in compliance with the Commission’s authority under Article 20(b) of its Statute to, inter alia, examine communications submitted to it and any other available information and to address the government of any member state not a Party to the Convention for information deemed pertinent by the Commission. In the present case, despite having been provided with communications respecting Mr. Domingues’ complaint in May 2000, January 2001, August 2001 and September 2001, the State did not respond to the Commission’s communications until October 19, 2001 16 months after the Commission’s initial notification and after the Commission adopted its preliminary merits report. Such a delay in providing any response to the Commission is, in its view, plainly inadequate, particularly in a proceeding of this nature concerning the situation of a person under sentence of death.

92. One of the consequences of a State’s prolonged delay in providing information on a complaint is the possibility that the Commission may decide upon the matter absent representations from the State, which, as matters transpired, occurred in the present case. In this connection, the Commission wishes to emphasize that once a preliminary merits report is adopted and transmitted to the state concerned in accordance with Article 43(2) of the Commission’s Rules of Procedure, all that remains is for the state to indicate what measures have been adopted to comply with the Commission’s recommendations.[FN88] At this stage of the process, the parties have had a full opportunity to submit their observations, the admissibility and merits phases of the process are completed, and the Commission has rendered its decision. Therefore, while a state may provide its views on the factual and legal conclusions reached by the Commission in its preliminary report, it is not for a state at this point to reiterate its previous arguments, or to raise new arguments, concerning the admissibility or merits of the complaint before the Commission, nor is the Commission obliged to consider any such submissions prior to adopting its final report on the matter.

[FN88] Article 43(2) of the Commission’s Rules of Procedure provides: “If [the Commission] establishes one or more violations, it shall prepare a preliminary report with the proposals and recommendations it deems pertinent and shall transmit it to the State in question. In so doing, it shall set a deadline by which the State in question must report on the measures adopted to comply with the recommendations. The State shall not be authorized to publish the report until the Commission adopts a decision in this respect.” [emphasis added]

93. The Commission is also cognizant, however, of the significance of the legal issues raised in this case, for the victim concerned and for inter-American human rights jurisprudence more generally. Therefore, without detracting from the fundamental procedural considerations noted

above, the Commission has decided to summarize the State's response and to provide observations on certain aspects thereof. In this regard, the United States has objected to the Commission's findings on several grounds. In summary, the State argued that the petition was inadmissible on the basis of duplication. In addition and in the alternative, the State contended that the evidence considered by the Commission did not support its conclusion that there exists a customary or jus cogens prohibition on the execution of juvenile offenders.

94. More specifically, the United States argued that the petition fails to satisfy the criteria for admissibility under Article 33(b) of the Commission's Rules of Procedure[FN89] because its "subject matter essentially duplicates a petition pending or already examined and settled by the Commission." The State pointed out in this regard that in its findings in the 1987 Case of Jay Pinkerton and James Terry Roach,[FN90] the Commission previously examined the precise question presented in the present petition and found that while there was a jus cogens norm prohibiting the execution of children, there did not exist a norm of customary international law establishing 18 to be the minimum age for the imposition of the death penalty. Accordingly, the State submitted that the petition should be dismissed under Article 33 of the Commission's Rules.

[FN89] Article 33(1)(b) of the Commission's Rules of Procedure provides: "1. The Commission shall not consider a petition if its subject matter: (b) essentially duplicates a petition pending or already examined and settled by the Commission or by another international governmental organization of which the State concerned is a member."

[FN90] Case 9647, Resolution N° 3/87, Case of Jay Pinkerton and James Terry Roach (United States), Annual Report of the IACHR 1986-87.

95. The United States also contended that neither the state practice identified by, nor the legal standards cited in the Commission's report, are sufficient to establish either a customary or jus cogens prohibition of the execution of juvenile offenders. In support of its position, the State asserted that the Commission's reliance upon the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child as evidence of State practice is misplaced, because the negotiating histories of each of the conventions indicates that the inclusion of the provision concerning the juvenile death penalty was not based upon custom nor even by consensus.[FN91] The State also suggested that these treaties are not informative of the interpretation and application of the American Declaration because they are subsequent to the Declaration and are only binding on the states parties to them.[FN92] In any event, the State contended that it is "common knowledge" that many States ratify treaties but fail to implement the obligations that they have assumed under those instruments.[FN93] This, according to the State, provides an additional reason why reference to treaty provisions prohibiting the use of the death penalty is not sufficient to establish state practice sufficient for customary international law.

[FN91] The State cites in this regard authorities indicating that Article 4(5) of the American Convention on Human Rights was approved with only a two-vote margin, with 40% of the

assembled States abstaining from voting in favor of the provision, that Article 6(5) of the International Covenant on Civil and Political Rights was adopted by fifty-three votes to five with fourteen abstentions, and that Article 37 of the Convention on the Rights of the Child was adopted with the express understanding that states retained the right to ratify the Convention with a reservation to that article. The State also asserts that Article 68 of the Fourth Geneva Convention by its terms only applies to international armed conflicts and therefore cannot be considered a demonstration of custom in time of peace.

[FN92] State's observations of December 17, 2001 p. 4, citing Case of Roach and Pinkerton, supra, Dissenting Opinion of Dr. Marco Gerardo Monroy Cabra, para. 6.

[FN93] The State relies in this connection upon the sixth quinquennial report of the UN Secretary General on capital punishment, indicating that there were "at least 14 countries which have ratified the Convention on the Rights of the Child without reservation but, as far as is known, have not amended their laws to exclude the imposition of the death penalty on persons who committed the capital offense when under 18 years of age." Sixth quinquennial report of the Secretary General on capital punishment, reported in UN Doc. E/2000/3 (March 31, 2000), at p. 21.

96. Further, the United States suggested that UN organs have through their negotiating processes recognized that there is no customary international law prohibition on the execution of juvenile offenders. The State noted in particular that the 1998 UN Commission on Human Rights Resolution cited in the Commission's report was adopted by a vote of 26 to 3 with 12 abstentions and with 51 states, including non-Commission members, signing a statement "disassociating" themselves from that decision. The State also referred to a similar text adopted in 2001 by a vote of 27 to 18 with 7 abstentions and 61 states disassociating themselves from the resolution. In addition, the State referred to a decision of the UN Human Rights Commission during its 2001 session adopting two resolutions by consensus which called upon all states in which the death penalty has not been abolished to "comply with their obligations as assumed under relevant provisions of international human rights instruments, including in particular articles 37 and 40 of the Convention on the Rights of the Child and articles 6 and 14 of the International Covenant on Civil and Political Rights." [FN94] According to the State, these resolutions were adopted rather than a draft decision proposed by the UN Subcommission on the Promotion and Protection of Human Rights that would have "confirm[ed]" that international law "clearly establishes that imposition of the death penalty on persons aged under 18 at the time of the offense is in contravention of customary international law." [FN95]

[FN94] State's observations of December 17, 2001, p. 5, citing UN Human Rights Commission Resolution 2001/45 (Apr. 23) (Extrajudicial, summary or arbitrary executions); CHR Res. 2001/75 (Apr. 25) (Rights of the Child).

[FN95] Id. citing UN Doc. E/CN.4/2001/2 at 14.

97. In its communication of June 25, 2002 the State supplemented its observations in this regard by reference to the UN General Assembly's May 10, 2002 outcome document following its Special Session on Children, in which the General Assembly "called upon governments that

had not abolished the death penalty“ to comply with the obligations they have assumed under relevant provisions of international human rights instruments.”[FN96] In the State’s view, by not invoking any customary norms in making an appeal for state compliance and only referring to the conventional international law commitments under the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights, the General Assembly implicitly rejected the notion that there is also a customary international law against capital punishment for juvenile offenders.

[FN96] State’s observations dated June 25, 2002, referring to United Nations Special Session on Children, “A World Fit for Children,” Plan of Action, para. 44(8), available at <[http : // www . unicef.org/specialsession/](http://www.unicef.org/specialsession/)>.

98. The State argued further that, in focussing on the domestic practice of states, the Commission’s report ignored *opinio juris* as a necessary element of customary international law. The State complained that the report fails to establish that states have discontinued the process of executing juvenile offenders out of a sense of legal obligation rather than, for example, out of courtesy, fairness or morality.[FN97]

[FN97] State’s observations of December 17, 2001, p. 6, citing Ian Brownlie, *Principles of Public International Law* (5th ed., 1998), at 7; *Restatement of the Foreign Relations Law of the United States* (Third), § 102(2).

99. Exception was also taken by the State to the Commission’s suggestion that United States practice demonstrates a trend toward the lack of acceptance of the application of the death penalty to those under 18 years of age. The State contended that the Commission’s reliance on the 1988 U.S. Supreme Court decision in *Thompson v. Oklahoma* fails to acknowledge that the same Court subsequently found in the 1989 case of *Stanford v. Kentucky* that the imposition of capital punishment on an individual for a crime committed at the age of 16 or 17 did not violate evolving standards of decency and therefore did not constitute cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution. The United States also asserted that the legislative and judicial decisions in Florida and Montana referred to by the Commission in its report were not based upon a rule of customary law prohibiting the death penalty with respect to offenders under 18 years of age. Moreover, the State disputed any relevance that the Commission placed on the different minimum age limits for the death penalty in different states, or on the fact that the U.S. federal government itself has considered 18 to be the minimum age for the purpose of federal capital crimes, for the reason that U.S. domestic courts have discounted the pertinence of these factors in determining the permissibility of the execution of juvenile offenders under U.S. law.[FN98] The State also noted that certain federal law, namely the U.S. Uniform Code of Military Justice, “permits the use of capital punishment for crimes committed by members of the military under the age of 18 for the crimes specified therein.”

[FN98] State’s observations of December 17, 2001, pp. 6-7, citing *United States v. Wheeler*, 435 U.S. 313 (1978) (opining that under a federal system, states are expected to have different laws because “[e]ach has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses”); *Stanford v. Kentucky*, 492 U.S. 361 (finding that the US Anti-Drug Abuse Act of 1988 “does not embody a judgment by the federal legislature that no murder is heinous enough to warrant the execution of a youthful offender, but merely that the narrow class of offense it defines is not.”).

100. The final evidentiary issue disputed by the State is the Commission’s reliance on the Optional Protocol to the Convention on the Rights of the Child Concerning Children in Armed Conflict. The State argued in this regard that the Commission has misconstrued the Protocol because the binding declaration that states parties are obligated to deposit upon ratification requires them to affirm their agreement to raise the minimum age for voluntary recruitment into their national armed forces from the current international standards of 15 years and hence expressly authorizes the voluntary recruitment of individuals aged 16 or 17. The State also indicated that the Article 1 of the Protocol requires states parties to take “all feasible measures” to ensure that members of their armed forces under the age of 18 do not take a “direct part in hostilities.” This, according to the State, recognizes that in exceptional circumstances it will not be feasible for a commander to withhold or remove a soldier under the age of 18 from taking a direct part in hostilities. The State therefore contends that the Optional Protocol does not prohibit in its entirety the involvement of juveniles in armed conflict and therefore cannot be considered a related international legal development that supports an absolute prohibition on the execution of juvenile offenders.[FN99] In any event, the State argued that the Optional Protocol addresses the use of children in armed conflict and not the execution of persons under 18 years of age and therefore has no probative value in attempts to establish a norm of international law prohibiting the execution of juvenile offenders.

[FN99] In support of its position, the State cites the instrument of ratification of the Protocol deposited with the UN by the United Kingdom, which states that “article 1 of the Optional Protocol would not exclude the deployment of members of its armed forces under the age of 18 to take a direct part in hostilities where: (a) there is a genuine military need to deploy their unit or ship to an area in which hostilities are taking place; and (b) by reason of the nature and urgency of the situation: (i) it is not practicable to withdraw such persons before deployment; or (ii) to do so would undermine the operational effectiveness of their ship or unit, and thereby put at risk the successful completion of the military mission and/or safety of other personnel.”. *Multilateral Treaties deposited with the Secretary General, Vol. I, p. 299, Optional Protocol to the Convention on the Rights of the Child Concerning Children in Armed Conflict, Declaration of the United Kingdom of Great Britain and Northern Ireland (status as at 31 Dec. 2000).*

101. As its final ground of objection, the United States argued that it is not bound by any international norm prohibiting the execution of juvenile offenders. Specifically, the United States contends that it has consistently asserted its right to execute juvenile offenders, by making reservations to treaties, filing briefs before national and international tribunals, and making

public statements,[FN100] and correspondingly that even if a norm of customary international law establishing 18 to be the minimum age for the imposition of the death penalty had evolved since the Commission's decision in the Roach and Pinkerton Case, the United States is not bound to such a rule. The State also asserted that because the Commission did not find evidence of customary international law that would prohibit the imposition of the death penalty for juvenile offenders in the Roach and Pinkerton Decision 15 years ago, to find now that there exists a jus cogens norm is both inconsistent and implausible. The State claimed in this regard that the only argument presented in favor of this finding in the Commission's report is the assertion that the execution of Mr. Domingues would "shock the conscience of humankind." The State considered this assertion to be "specious at best," and argued to the contrary that the "acts of Mr. Domingues should shock the consciousness of humankind, not the punishment those acts have earned him." [FN101]

[FN100] State's observations of December 17, 2001, p. 11, citing the US reservation to Article 6(5) of the International Covenant on Civil and Political Rights, taken after the Roach and Pinkerton decision, United Nations Multilateral Treaties Deposited with the Secretary General: Status as at 31 December 2000, UN Doc. ST/LEG/SER.E/19 (2001); Vienna Convention on the Law of Treaties, 1155 UNTS 332, 333, Art. 20(4)(b) .

[FN101] State's observations of December 17, 2001, pp. 12 (describing the crimes committed by Mr. Domingues as follows: "On October 22, 1993, sixteen-year-old Michael Domingues brutally murdered Arjin Chanel Pechpo and her four-year-old son, Jonathan Smith. After the victims arrived home, where Domingues was waiting for them, Domingues threatened Pechpo with a gun then tied her up with a cord which he used to strangle her. He ordered her little boy to take off his pants and get into the bathtub with his mother's dead body. When an attempt at electrocuting the four-year-old failed, Domingues stabbed Jonathan with a knife multiple times, killing him. After the murders, Domingues then bragged about killing Pechpo for her car, gave items he had stolen from Pechpo as gifts to friends, and used the victim's credit card. Domingues v. Nevada, 112 Nev. 683, 917 P.2d 1364, 112 Nev 683; 917 P.2d 1364 (1996).

102. Several points in the State's response warrant comment by the Commission. As to the State's objection to the admissibility of the petition on the ground of duplication, the Commission has previously considered that a prohibited instance of duplication under Article 47(d) of the American Convention, which essentially replicates the criteria under Article 33(1)(b) of the Commission's Rules of Procedure, involves, in principle, the same person, the same legal claims and guarantees, and the same facts adduced in support thereof.[FN102] Accordingly, claims brought in respect of different victims, or brought regarding the same individual but concerning facts and guarantees not previously presented and which are not reformulations, do not raise issues with respect to res judicata and will not in principle be barred by the prohibition of duplication of claims.[FN103] In the present case, Mr. Domingues has not previously lodged a complaint with the Commission, raising the legality of his death sentence under the American Declaration or otherwise. Consequently, his petition cannot be considered inadmissible for duplication of claims.

[FN102] See e.g. Case 11.827, Report No. 96/98, Peter Blaine (Jamaica), Annual Report of the IACHR 1998, para. 43.

[FN103] *Id.*, para. 45.

103. The State has also asserted that it is “inconsistent” and “implausible” for the Commission to conclude that the prohibition of execution of juveniles violates a norm of jus cogens 15 years its decision in *Roach and Pinkerton*. As indicated in the present report, and as the State itself recognized in its response, the Commission determined in its 1987 resolution in the *Roach and Pinkerton* case that the prohibition against the execution of children constituted at that time a norm of jus cogens. The principal issue before the Commission in the present case was therefore whether it could now be said that the norm has since evolved to delimit the age of 18 as the defining age of a child for this norm. Based upon the formidable evidence of international developments on this question since 1987, the Commission concluded that it had.[FN104]

[FN104] That human rights treaties are living instruments whose interpretation must consider changes over time and present-day conditions is well-accepted. I/A Court H.R., Advisory Opinion OC-16/99 of October 1, 1999, *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, (Ser. A) N° 16 (1999); Eur. Court H.R., *Louizidou v. Turkey*, Judgment on Preliminary Objections, 23 March 1995, Ser. A N° 310, p. 26, para. 71; I/A Court H.R., Advisory Opinion OC-10/89 of July 14, 1989, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, (Ser. A) N° 10 (1989), para. 37 (pointing out that in determining the legal status of the American Declaration, it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948); ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31 stating that “an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation”). Indeed, a similar approach to the interpretation of civil liberties under the US Constitution was recently confirmed in the June 20, 2002 decision of the US Supreme Court in the case *Atkins v. Virginia*, in which that Court overturned its 1989 decision in *Penry v. Lynaugh* by finding the development over the 13 year period of sufficient consensus among the American public, legislators, scholars and judges that the execution of mentally retarded criminals constitutes cruel and unusual punishment. *Atkins v. Virginia*, No. 008452, June 20, 2002 (USSC).

104. The State’s objections to the Commission’s reliance upon treaties inside and outside of the inter-American system as evidence of the emergence of a customary norm are also misguided. It is well-established that other treaties concerning the protection of human rights in the American states may be invoked by the supervisory bodies of the inter-American human rights system, regardless of the bilateral or multilateral character of those treaties, or whether they have been adopted within the framework or under the auspices of the inter-American

system.[FN105] Such treaties form part of the *corpus juris gentium* of international human rights law within which states' current international obligations are to be interpreted.[FN106] The norms of a treaty can be considered to crystallize new principles or rules of customary law.[FN107] It is also possible for a new rule of customary international law to form, even over a short period of time, on the basis of what was originally a purely conventional rule, provided that the elements for establishing custom are present.[FN108]

[FN105] I/A Court H.R., "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Article 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82, September 24, 1982, Ser. A N° 1 (1982), para. 43.

[FN106] Advisory Opinion OC-16/99, *supra*, para. 114.

[FN107] *Military and Paramilitary Activities in and against Nicaragua (Nic. V. US) (Merits)*, 1986 ICJ Rep. 14, 92-6 (June 27). See also Brownlie, *supra*, at 13.

[FN108] *North Sea Continental Shelf Case (FRG/Den.; FRG/Neth.)* 1969 ICJ Rep. 3, 43-44 (Feb. 20).

105. In the present case, the State has not contested the fact that since 1987 the Convention of the Rights of the Child was adopted by the UN General Assembly, ratified by all but two states, and signed by the United States without reservation as to the prohibition of executing juvenile offenders. Overwhelming international acceptance of the principles and standards of the International Covenant on Civil and Political Rights was similarly amplified through 64 additional ratifications of or accessions to that instrument, bringing the total number of states parties to 147. Both of these instruments prescribe as part of the nonderogable right to life, which itself has been regarded by this Commission as a norm of *jus cogens*,[FN109] a clear and unambiguous prohibition against the execution of persons who were under the age of 18 at the time of their crimes, to which no state but the United States has purported to claim a reservation. Notwithstanding views that may have been asserted by certain states when these treaty provisions were negotiated, the fact remains that nearly all world states, abolitionist and retentionist alike, have through the acts of ratification or accession accepted this proscription unconditionally. And while the United States may rely upon a historical disconnect between the ratification and implementation of treaty provisions by states, the United States itself points out that according information compiled in 2000 by the United Nations,[FN110] all but 14 of the 191 states parties to the Children's Convention have enacted laws that conform with Article 37(a), and between 1994 and 1998 only four states, including the United States, are reported to have executed at least one person who was under the age of 18 at the time of their offense. State practice has therefore been remarkably consistent with these underlying international obligations.[FN111]

[FN109] See e.g. Case 11.436, Report N° 47/96, *Victims of the Tugboat "13 de marzo" v. Cuba*, Annual Report of the IACHR 1996, para. 79.

[FN110] State's observations of December 17, 2001, p. 7, n. 3, citing Sixth quinquennial report of the Secretary General on capital punishment, reported in UN Doc. E/2000/3 (March 31, 2000), at p. 21.

[FN111] It is also due to the overwhelming ratification of the Convention on the Rights of the Child that little guidance can be drawn from references in United Nations Human Rights Commission resolutions to treaty rather than customary law obligations. While the United State relies upon this as evidence of a recognition by states that there is no customary international law prohibition on the execution of juvenile offenders, UN member states may equally have omitted references to customary international law for reasons of superfluity in light of fact that nearly all states are in fact bound to these obligations by treaty.

106. The State's assertions concerning evidence of opinio juris fail to consider several factors relating to the nature and development of jus cogens norms as well as the manner in which the opinio juris of states may be evidenced and expressed. The Commission notes in this regard that evidence of opinio juris may not always be necessary to determine the existence of a jus cogens norm. More particularly, a norm of jus cogens may emerge by several means, including state practice as well as through treaty provisions that are viewed as being of a peremptory nature. Genocide may be considered an example of a norm of the latter character, whereby the 1948 Genocide Convention[FN112] articulated the definition of genocide as an international crime and coincidentally encapsulated the international community's view that the prohibition of genocide constituted a peremptory norm of international law from which no derogation is permitted, by proclaiming in no uncertain terms that "genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world." [FN113] In these circumstances, evidence of opinio juris through state practice followed out of a sense of legal obligation is not necessarily a prerequisite to the existence of a norm of jus cogens. In the context of the present case, the Commission has long considered that the international prohibition against the execution of children has attained the status of a peremptory norm. Through this report, the Commission has also considered that the international community has defined the age for the purposes of this norm as 18, based to a significant extent upon the UN Convention on the Rights of the Child and other treaty provisions prescribing this as an absolute standard. In these circumstances, evidence of opinio juris beyond the widely accepted and absolute prohibition under the Children's Convention, the International Covenant on Civil and Political Rights and other pertinent sources of international law of the execution of offenders under 18 years of age may not be essential in order to preclude the United States from exempting itself from this norm.

[FN112] Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force January 12, 1951.

[FN113] Id., Preamble.

107. To the extent that evidence of opinio juris may be pertinent to the emergence of a jus cogens norm through practice, namely where it is demonstrated that states have followed a given practice not only out of a sense of legal obligation but out of recognition that the resulting obligation is of a peremptory nature, the United State's position fails more broadly to take into account the particular role that treaties and other international instruments may play in this connection. Where an instrument is widely ratified or endorsed by members of the international

community and speaks to the legality of certain actions, the provisions of that instrument might themselves properly be considered as evidence of opinion juris.[FN114] Human rights treaties are particularly significant in this respect, as they are widely regarded as recognizing and building upon rights that already exist by reason of the attributes of the human personality and which therefore may not be abrogated by any state.[FN115] Further, by these instruments, states are deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction.[FN116]

[FN114] See generally Anthony D’Amato, *The Concept of Custom in International Law* 49 (1971).

[FN115] See e.g. American Declaration, Preamble (recognizing that “the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality”). See also *The International Bill of Rights* 12 (Louis Henkin ed. 1981) (stating that “[i]nternational human rights instruments do not legislate human rights; they ‘recognize’ them and build upon their recognition”).

[FN116] I/A Court H.R., *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82, *supra*, para, 29. In this same advisory opinion, the Inter-American Court observed that the distinct nature of human rights treaties may give rise to an enhanced risk that the application of traditional rules governing treaty interpretation, including Article 20(4) of the Vienna Convention on the Law of Treaties, may lead to manifestly unreasonable results that undermine the object and purpose of human rights instruments. Viewed from this perspective, the State’s apparent suggestion that the objections of states to the United States’ reservation to Article 6(5) of the ICCPR are pertinent only to the extent that those states explicitly indicate that they do not recognize the ICCPR as being in force between itself and the United States in accordance with Article 20(4)(b) of the Vienna Convention is clearly misguided – the essence of the obligations concerned are binding unilateral commitments by states not to violate the human rights of individuals within their jurisdiction, and it is therefore not reasonable to predicate the value of objections to reservations taken to those rights upon the applicability or non-applicability of those rights as between states parties to the instruments. *Id.*, paras. 29-35.

108. That States have denounced the execution of juveniles out of a sense of legal obligation is also born out in the nature of the specific prohibition at issue, which instructs states as to the manner in which they may and may not apply their domestic criminal law so as to deprive individuals of their most fundamental right, their right to life. It is difficult to conceive of more compelling evidence of states’ views as to the legally binding nature of international prescriptions than the amendment of their domestic criminal laws to comply with those obligations.[FN117] As was apparent from the evidence canvassed by the Commission in its merits decision in this matter, therefore, state measures in eradicating the juvenile death penalty may properly be considered to have been undertaken out of a sense of legal obligation to respect fundamental human rights.

[FN117] J.L. Brierly, *The Law of Nations* 61 (6th ed., 1963) (citing acts of state legislatures and state courts as particularly important sources of evidence of customary international law). It is also telling that many states, upon ratifying the ICCPR and CRC, explicitly pointed out the manner in which their domestic law conformed with this requirement. See e.g. UN Treaty Database, ICCPR, *supra*, Interpretive Declaration of Thailand concerning Article 6(5) on its Accession to the International Covenant on Civil and Political Rights.

109. Finally, as to the State's attempt to discount related developments in other areas of international law and practice, including the treatment of children in armed conflict, the Commission reiterates its contrary view that these initiatives are pertinent to the issues presently under consideration as they, like the international prohibition of the juvenile death penalty, are motivated by a common precept, namely the widely accepted view that age 18 is the threshold that society has generally drawn at which a person may reasonably be assumed able to make and bear responsibility for their judgments, including and in particular those by which they may forfeit their lives.[FN118] To deprive individuals of their lives based upon acts taken by them before they reached the age of 18 is therefore regarded by the international community as a disproportionate punishment that violates contemporary standards of humanity and decency and is therefore prohibited in all circumstances.

[FN118] The proscription against executing juvenile offenders, like the initiative to establish 18 as the age at which individuals may be compelled or allowed to take up arms, has been recognized as the consequence of the broadly-held assumption that persons under the age of 18, no matter their individual capacities, are unable to appreciate fully the nature of their actions, or the extent of their own responsibility. See e.g. William A. Schabas, *The Abolition of the Death Penalty under International Law* 122 (2d ed.); Ilene Cohn & Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict* 168 (1997) ; International Committee of the Red Cross, *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (J.S. Pictet ed., 1958), at 346-347.

110. Based upon the State's response, the Commission concludes that no measures have been taken to comply with the Commission's recommendations. On this basis, and having considered the State's observations, the Commission has decided to ratify its conclusions and reiterate its recommendations, as set forth below.

VI. CONCLUSIONS

111. The Commission, based upon the foregoing considerations of fact and law, and in light of the response of the State to Report 116/01, hereby ratifies the following conclusions.

112. The Commission, based upon the foregoing considerations of fact and law, hereby concludes that the State has acted contrary to a international norm of jus cogens as reflected in Article I of the America Declaration by sentencing Michael Domingues to the death penalty for crimes that he committed when he was 16 years of age. Consequently, should the State execute

Mr. Domingues pursuant to this sentence, it will be responsible for a grave and irreparable violation of Mr. Domingues' right to life under Article I of the American Declaration.

VII. RECOMMENDATIONS

113. In accordance with the analysis and conclusions in the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE FOLLOWING RECOMMENDATIONS TO THE UNITED STATES:

1. Provide Michael Domingues with an effective remedy, which includes commutation of sentence.
2. Review its laws, procedures and practices to ensure that capital punishment is not imposed upon persons who, at the time their crime was committed, were under 18 years of age.

VIII. NOTIFICATION AND PUBLICATION

114. In light of the above, and given the exceptional circumstances of the present case, where the victim remains under imminent threat of execution pursuant to a death sentence that the Commission has determined to be invalid and where the State has clearly indicated its intention not to comply with the Commission's recommendations concerning violations of the American Declaration of the Rights and Duties of Man, the Commission has decided pursuant to Article 45(2) and (3) of its Rules of Procedure to set no further time period prior to publication for the parties to present information on compliance with the recommendations, to transmit this Report to the State and to the Petitioner's representatives, to make this Report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the United States with respect to the above recommendations until they have been complied with by the United States.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the twenty-second day of the month of October, 2002. (Signed): Juan E. Méndez, President; Marta Altolaguirre, First Vice-President; José Zalaquett, Second Vice-President; Julio Prado Vallejo, Clare K. Roberts and Susana Villar[ian Commissioners.

CONCURRING OPINION OF COMMISSIONER HÉLIO BICUDO[FN119]

[FN119] When the preliminary merits report in this matter was approved pursuant to Article 43 of the Commission's Rules of Procedure, the Commission's composition included Prof. Hélio Bicudo, who at that time adopted a separate opinion. Accordingly, Prof. Bicudo's separate opinion has been included with the final report in this case approved under Article 45 of the Commission's Rules, even though Prof. Bicudo's term as a Commission Member expired on December 31, 2001.

1. Although I endorse the findings, reasoning and motives of my fellow commissioners in this report, I would like to take the matter further and express my understanding concerning the lawfulness of the death penalty in the inter-American system.
2. The American Declaration of the Rights and Duties of Man (hereinafter "American Declaration"), approved at the Ninth International American Conference, which took place in Santa Fe de Bogotá in May and June of 1948, affirms that "Every human being has the right to life, liberty and the security of his person" (Article I) and, moreover, that "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" (Article II).
3. Article 4 of the American Convention on Human Rights (hereinafter "American Convention"), approved on November 22, 1969 in San Jose, Costa Rica, states that "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."
4. At the same time, the American Convention, by including the right to personal integrity in the civil and political rights framework, affirms that "No one shall be subjected to torture or to cruel, inhumane, or degrading punishment or treatment."
5. However, death penalty is provided for in the American Convention in its original version. Article 4, Section 2 allows the death penalty to be applied by member states only for the most serious crimes.
6. There is a contradiction among the aforementioned articles which repudiate torture, cruel, inhumane or degrading punishment or treatment.
7. The American Declaration considers life to be a fundamental right, and the American Convention condemns torture or the imposition of cruel, inhumane or degrading punishment or treatment. The elimination of a life could be deemed torture or cruel, inhumane or degrading punishment or treatment.
8. It seems that the tolerance expressed in Article 4, Section 2 of the American Convention reveals the sole adoption of a political position of conciliation between all member states in order to approve a more general article, the one about the right to life.
9. Before analyzing what it means for some States to retain the death penalty as a part of their legal systems, it is important to note that the Inter-American Convention to Prevent and Punish Torture, signed in Cartagena de Indias, Colombia, on December 9th, 1985, describes the meaning of torture as follows: "Torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose" (Article 2).
10. Notice that this article addresses torture as a personal punishment or penalty in all circumstances.

11. The death penalty brings immeasurable suffering to the individual. Is it possible to imagine the anguish that the individual feels when he/she is informed of the verdict? Or the moments leading up to the actual execution? Would it be possible to evaluate the suffering of those who wait on death row for execution, in some cases for several years? In the United States, fifteen, sixteen or seventeen year-old minors, who committed homicide and subsequently received the death penalty, wait for fifteen years or longer for their execution. Is it possible to imagine a fate worse than remaining between hope and despair until the day of execution?

12. The OAS member states, by adopting the Convention on Forced Disappearance of Persons, reaffirms that “the true meaning of American solidarity and good neighborliness can be none other than that of consolidating in the Hemisphere, in the framework of democratic institutions, a system of individual freedom and social justice based on respect for essential human rights.”

13. It is important to mention that in 1998 and 1999, the United States was the only country in the world known for executing minors under 18 years of age. To that extent, it is important to note that the United States has accepted the International Covenant on Civil and Political Rights since September 1992, Article 6(5) of which establishes that the death penalty cannot be imposed on minors under 18 years old or on pregnant women. The U.S. Senate opted to express its reservation to this section at the moment of its ratification but currently there is an international consensus opposed to that reservation based on Article 19(c) of the Vienna Convention on the Law of Treaties. This Convention gives the State the possibility to formulate reservations, but these reservations cannot be incompatible with the object and purpose of the treaty.

14. In June 2000, Shaka Sankofa, formerly known as Gary Graham, was convicted in the State of Texas for a crime he committed when he was 17 years old. He was executed after waiting 19 years on death row, although the Inter-American Commission on Human Rights (hereinafter “IACHR” or “Commission”) had formally presented requests to the American government to suspend the act until the case was decided by the Commission. There were serious doubts regarding whether Shaka Sankofa had really committed the crime. The U.S. Government did not respond to the Commission’s recommendation but could not escape from the jurisdiction of the IACHR on the protection of human rights, according to the American Declaration. The Commission thus sent out a press release condemning the U.S. decision, since it was not in accordance with the inter-American system of protection of human rights.[FN120]

[FN120] Press Release N° 9/00, Washington, D.C. June 28, 2000:

“The Inter-American Commission on Human Rights deplores the execution of Shaka Sankofa, formerly known as Gary Graham, in the state of Texas on June 22, 2000. Mr. Sankofa was executed, despite formal requests by the Commission for the United States to ensure a suspension of Mr. Sankofa's execution pending the determination of a complaint lodged on his behalf before the Commission.

In 1993, the Commission received a complaint on behalf of Mr. Sankofa, alleging that the United States, as a Member State of the Organization of American States, had violated Mr. Sankofa's human rights under the American Declaration of the Rights and Duties of Man, including his

right to life under Article I of that instrument. In particular, it was contended that Mr. Sankofa was sentenced to death for a crime that he was alleged to have committed when he was 17 years of age, that he was innocent of that crime, and that he had been subjected to legal proceedings that did not comply with international due process standards.

On August 11, 1993, the Commission opened Case N° 11.193 in respect of Mr. Sankofa's complaint. Following a hearing on the matter on October 4, 1993, the Commission transmitted to the United States on October 27, 1993 a formal request for precautionary measures under Article 29(2) of the Commission's Regulations, asking that the United States ensure that Mr. Sankofa's death sentence was not carried out, in light of his pending case before the Commission. At that time, Mr. Sankofa's execution, which had previously been scheduled for August 17, 1993, was postponed pending the completion of domestic judicial procedures.

In February 2000, the Commission was informed that Mr. Sankofa's domestic proceedings were nearly completed, and that the issuance of a new warrant of execution was imminent. Accordingly, in a February 4, 2000 letter to the United States, the Commission reiterated its October 1993 request for precautionary measures. Subsequently, in May 2000, the Commission received information that Mr. Sankofa's petition before the U.S. Supreme Court had been dismissed and that his execution was scheduled for June 22, 2000. Accordingly, on June 15, 2000, during its 107th Period of Sessions, the Commission adopted Report N° 51/00, in which it found Mr. Sankofa's petition to be admissible and decided that it would proceed to examine the merits of his case. Also in this report, the Commission again reiterated its request that the United States suspend Mr. Sankofa's death sentence pending the Commission's final determination of his case.

By communication dated June 21, 2000, the United States acknowledged the receipt of the Commission's February 4, 2000 communication and indicated that it had forwarded the same to the Governor and Attorney General of Texas. On June 22, 2000, however, the Commission received information that the Texas Board of Pardons and Paroles declined to recommend that Mr. Sankofa be granted a reprieve, commutation or pardon, and that his execution was to proceed on the evening of June 22, 2000. Consequently, by communication of the same date, the Commission requested that the United States provide an urgent response to its previous request for precautionary measures. Regrettably, the United States did not respond to the Commission's June 22, 2000 request, and Mr. Sankofa's execution proceeded as scheduled.

The Commission is gravely concerned that, despite the fact that Mr. Sankofa's case had been admitted for consideration by a competent international human rights body, the United States failed to respect the Commission's requests to preserve Mr. Sankofa's life so that his case could be properly and effectively reviewed in the context of the United States' international human rights obligations. In light of the irreparable damage caused by such circumstances, the Commission calls upon the United States and other OAS Member States to comply with the Commission's requests for precautionary measures, particularly in those cases involving the most fundamental right to life.”

15. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter "Convention of Belem do Pará"), approved in Belem do Pará, Brazil, on June 9, 1994, does not allow the imposition of the death penalty on women. Article 3 states “Every woman has the right to be free from violence in both the public and private spheres” and Article 4 states that “Every woman has the right to have her life respected”.

Regarding the duties of States, the Convention of Belem do Pará establishes that States should “refrain from engaging in any act or practice of violence against women and ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation”. Therefore, if every woman has the right to life, and the right to be free from violence, and the State is denied the practice of violence against women, it seems that the Convention of Belem do Pará prohibits the application of the death penalty to women. There is no discrimination against men or children. It cannot be argued that it is “positive discrimination” or “affirmative action”, because it only serves to preserve the inherent rights of the individual. For instance, pregnant women or women with children are entitled to rights based solely on the fact of their exclusive female condition. Thus, the same rights cannot be extended to men. Positive discrimination is usually applied to bring about equality, through temporary and proportional measures, to groups of people that experience de facto inequality. There is no inequality between men and women with regard to the right to life. In any case, the imposition of the death penalty is not a proportional measure, as we will see later on. When it comes to common rights—such as the right to life—we cannot argue positive discrimination. All persons are equal before the law. The prohibition of the death penalty for women was based on both the female condition and the human condition.

16. Article 24 of the American Convention affirms that all persons are equal before the law, and consequently, they are entitled, without discrimination, to equal protection of the law. Although that Convention does not define discrimination, the IACHR understands that discrimination includes distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life (Manual on the Preparation of Reports on Human Rights, International Covenant on Civil and Political Rights, Article 26.)

17. It is also important to note that Article 37(a) of the Convention on the Rights of the Child prohibits the imposition of the death penalty on minors under 18 years of age.

18. The above-mentioned Convention is considered a universal legal instrument in the area of human rights. (Only the United States and Somalia have failed to ratify it.)

19. Article 37 of the Convention on the Rights of Child states: “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”

20. Although the U.S. has not ratified the Convention on the Rights of the Child, it became a signatory to the Convention in February 1995, and has thus accepted its legal obligations. Article 18 of the Vienna Convention on the Law of Treaties establishes that the States that have signed a treaty, but not ratified it, shall refrain from engaging in any act that is contrary to its purpose until it has decided to announce its intention of not becoming part of that treaty. Despite the fact that the U.S. has not ratified the Convention, the U.S. State Department has already recognized that the Vienna Convention on the Law of Treaties serves as a precedent for international treaty proceedings. The U.S. State Department considers the Convention a declaration of customary

law based on the Vienna Convention on the Law of Treaties, which establishes the importance of treaties as sources of international law as well as a method of peaceful development and cooperation between nations, no matter what their Constitutions and social systems entail.

21. As mentioned above, the imposition of the death penalty against women is not a case in which positive discrimination could be applied because Article 37(a) of the Convention on the Rights of the Child aims to preserve rights that are created not only for children but for all human beings.

22. If that is the case, then Article 4 of the American Convention has lost its previous meaning. Therefore States that have signed and ratified it as well as other international instruments cannot impose the death penalty upon any person, regardless of gender or any other personal condition.

23. The issue will be examined under legal hermeneutics of positive law. International law presupposes [normative] dispositions that are above [the] State [law]. As set forth by the illustrious Italian jurist, Norberto Bobbio, universalism—which international law attempts to embody—reappears today, specially after the end of WWII and the creation of the UN, no longer as a belief in an eternal natural law [order], but as the will to constitute, in the end, a single body of positive law of the social and historical development (as natural law and the state of nature). He also ponders that the idea of the single global State is the final limit of the idea of the contemporary juridical universalism, that is the establishment of a universal positive law (Cf. *Teoria do Ordenamento Jurídico*, Universidade de Brasília, 1991, p. 164).

24. In the present case, we cannot allow a previous law with the same content of a new law to supersede the new law. That would be considered as antinomy, and therefore it has to be solved. What are the rules that should prevail? There is no doubt that they are incompatible. But how could we solve the problem?

25. According to Mr. Bobbio, the criteria to solve an antinomy are the following: a) chronological criteria, b) hierarchical criteria, c) specialty criteria.[FN121]

[FN121] Op.cit 2, p.92.

26. According to the chronological criteria the new law prevails over the previous law—*lex posteriori derogat priori*. According to the hierarchy criteria, international law prevails over national law. Lastly, the specialty criteria could also apply in this case, since it is a specific law with a specific purpose.

27. It is impossible to argue that death penalty as described in the Section 2 of Article 4 of the American Convention is a specific law as opposed to general law of the right to life. It is also not possible to accept the idea that death penalty is considered a particular penalty that does not entail a violation of right to life or torture or any other cruel or inhumane treatment.

28. The Inter-American Court of Human Rights affirms that the imposition of restrictions on the death penalty should be effected by setting up a limit through an irreversible and gradual process, which would be applied both in countries that have not abolished the death penalty and in those that have done so. (Advisory Opinion – OC-3/83)

29. The Court also understands that the American Convention is progressive to the extent that, without deciding to abolish the death penalty, it adopts certain measures to limit it and diminish its application until it is no longer applicable.

30. It is worth reviewing the preparatory work of the American Convention that illustrates the interpretation of Article 4. The proposal to outlaw the death penalty made by several delegations did not receive any opposing vote, despite the fact that the majority of votes had not been reached. The development of negotiations in the Conference can be reviewed in the following declaration presented before the Plenary Session of Completion and signed by 14 of 19 participants (Argentina, Costa Rica, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela):

“The delegations that sign below, participants of the Specialized Inter-American Conference on Human Rights, taking into consideration the highly prevailing feeling, expressed in the course of the debates on the abolishment of the death penalty, in accordance with the purest humanistic traditions of our peoples, solemnly declare our firm aspiration of seeing the application of the death penalty in the American context eradicated as of now, and our indeclinable purpose of effecting all possible efforts so that, in the short term, an additional protocol to the American Convention on Human Rights 'Pact of San Jose, Costa Rica' might be adopted, consecrating the definitive abolition of the death penalty, and putting America once more in the forefront of the protection of fundamental human rights.” (author’s translation from the original in Spanish, Acts and documents, OAS/Ser. K-XVI-I2, Washington – DC, 1973, hereafter Acts and Documents, repr. 1978, Spanish version, p. 161, 195, 296 and 449/441).

31. In agreement with these assertions, the Commission’s Rapporteur made clear, on this article, his firm tendency towards the abolition of this penalty. (Acts and documents, supra, n.296)

32. Moreover, the rule of law (Estado de derecho) implies, when punishment is imposed, the knowledge of what the penalty actually means. When the purpose of the punishment applied is not only retribution, but the recuperation or rehabilitation of the convict, he or she knows what will happen in his or her future. If the punishment is purely retributive, as in a sentence imposing imprisonment for life, the convict still envisages his future. But if the convict is sentenced to death, the State does not point to what the elimination of his being will bring him. Science, with all its developments, has not managed, up to now, to unveil the after-death: future life, with prize or punishment? Pure and simple elimination?

33. In this sense, the rule of law forbids the imposition of a penalty whose consequences cannot be unveiled.

34. In truth, all punishment enacted by the legislator constitutes species of sanctions, distributed according to a rational scale that attempts to take into consideration a series of factors specific to each hypothesis of unlawfulness.

35. The right and obligation to punish which belongs to the State expresses itself in a variety of figures and measures, according to gradual solutions, measurable in money or in amounts of time. This gradual order is essential to criminal justice, for it would not be realized without a superior criterion of equality and proportionality in the distribution of punishment, for transgressors would then receive more than their just deserts.

36. With the imposition of the death penalty, however, the aforementioned serial harmony is abruptly and violently shattered; one jumps from the temporal sphere into the non-time of death.

37. With what objective criterion or with what rational measure (for ratio means reason and measure) does one shift from a penalty of 30 years imprisonment or a life sentence to a death penalty? Where and how is proportion maintained? What is the scale that ensures proportionality?

38. It could be argued that there is also a qualitative difference between a fine and detention, but the calculus of the former can be reduced to chronological criteria, being determined, for instance, in terms of work days lost, so that it has a meaning of punishment and suffering to the perpetrator, linked to his patrimonial situation. In any circumstance, these are rational criteria of convenience, susceptible to contrast with experience, that govern the passage from one type of punishment to the other, whereas the notion of “proportion” is submerged in face of death.

39. Summing up, the option for the death penalty is of such order that, as Simmel affirmed, it emphasizes all contents of the human life, and it could be said that it is inseparable from a halo of enigma and mystery, of shadows that cannot be dissipated by the light of reason: to attempt to fit it into the scheme of penal solutions is equal to depriving it from its essential meaning to reduce it to the violent physical degradation of a body (quoted by Miguel Reale, in *O Direito como experiencia*).

40. Hence, the conclusion of the eminent philosopher and jurist Miguel Reale: Analyzed according to its semantic values, the concept of punishment and the concept of death are logically and ontologically impossible to reconcile and that, therefore the “death penalty” is a “*contradictio in terminis*” (cf. *O Direito como Experiencia*, 2nd edition, Saraiva, Sao Paulo, Brasil)

41. The jurist Hector Faundez Ledesma writes on this topic: “as the rights consecrated in the Convention are minimum rights, it cannot restrict their exercise in a larger measure than the one permitted by other international instruments. Therefore, any other international obligation assumed by the State in other international instruments on human rights is of utmost importance, and its coexistence with the obligations derived from the Convention must be taken into consideration insofar as it might be more favorable to the individual.”

42. “The same understanding”, continues the jurist, “is extensive to any other conventional provision that protects the individual in a more favorable way, be it contained in a bilateral or multilateral treaty, and independently of its main purpose” (El Sistema Interamericano de Protección de los Derechos Humanos, 1996, pp. 92-93).

43. Moreover, Article 29(b) of the American Convention establishes, in the same line of thought, that no disposition of the Convention may be interpreted in the sense of “restricting the enjoyment or exercise of any right or freedom recognized by the virtue of the laws of any State Party”. In this sense, it is opportune to refer to the IACHR report on Suriname, and the Advisory Opinions 8 and 9 (of the Inter-American Court on Human Rights, 1987).

44. On this opportunity, the IACHR affirmed that the prohibition of imposing the death penalty in cases where the offender was a minor at the time of the crime was an emerging principle of international law. Twelve years later there is no doubt that this principle is totally consolidated. The ratification of the Convention on the Rights of the Child by 192 States, where the death penalty of minor offenders is prohibited, is a irrefutable proof of the consolidation of the principle (Cf. Report presented by Amnesty International to the IACHR, in Washington, on March 5th, 1999).

45. It is true that the Universal Declaration on Human Rights does not refer specifically to the prohibition of the death penalty, but consecrates in its Article 3 the right of every person to his life, liberty and security (the same provision can be found on Article I of the American Declaration of the Rights and Duties of Man). Adopted by the General Assembly of the United Nations in 1948, under the guise of a recommendatory resolution, the Universal Declaration is held—by many important scholars—to be a part of the body of international customary law and a binding norm (*jus cogens*)—as defined in Article 53 of the Vienna Convention on the Law of Treaties. *Mutatis Mutandi*, it would be lawful to affirm that the Convention on the Rights of the Child, by reason of its breadth and binding character, must also be observed by the only two States that have not ratified it, as has already been said, and has been recognized by the Department of State of the United States of America.

46. It is convenient to observe, furthermore, that the European Court of Human Rights, in its decision in the *Soering Case*—Jens Soering, born in Germany, in detention in England and submitted to an extradition procedure on behalf of the government of the United States pending charges of murder committed in Virginia, a State that punishes this crime with the death penalty—made opportune comments regarding Article 3 of the European Convention, which establishes the interdiction of torture, inhuman, cruel or degrading treatment or punishment. The Court considered that the request could not be granted unless the person subject to extradition would be guaranteed his or her rights under Article 3 of the Convention (cf. *Jurisprudence de la Cour europeenne des droits de l’homme*, 6th ed. 1998, Sirey, Paris, pp. 18 and ff.).

47. The Court concluded that the extradition to a country that applied the death penalty did not constitute a breach of the right to life or to the right to personal integrity since the death penalty is not, in itself, explicitly prohibited by the European Convention. Nonetheless, the possibility that the condemned could spend years waiting for the moment—totally unpredictable, by the way—of the execution of the punishment, the so called “death row syndrome”, was

considered by the Court as constituting a cruel treatment and, therefore, a breach of the right to personal integrity.

48. It is, doubtlessly, an ambiguity: if there is a delay in imposing the penalty, there is violation of the right; if the sentence is carried out immediately, the State's action will not be considered a breach of the fundamental right to life.

49. This decision gives rise to the conclusion that little by little, the traditional vision, the positivistic application of the law, is being abandoned. Instead of a literal interpretation of the texts in discussion, a teleological hermeneutics is searched, in this case, of the European Convention, to achieve the major conclusion that the death penalty should not be permitted in any hypothesis.

50. Therefore, the absolute prohibition, in the European Convention, of the practice of torture or of inhuman or degrading treatment or punishment shows that Article 3, referred to above, proclaims one of the fundamental values of democratic societies. The judgment underlines that provisions in the same sense can be found in the International Covenant on Civil and Political Rights of 1966, and in the American Convention on Human Rights of 1969, protecting, in all its extension and depth, the right of the human person. The Court concludes that it is an internationally approved norm.

51. It is true that the concept of inhuman or degrading treatment or punishment depends upon a whole set of circumstances. It is not for any other reason that one should have utmost care to ensure the fair balance between the requirements of the communities' general interest and the higher imperatives of the protection of the fundamental rights of the individual, that take form in the principles inherent to the European Convention taken as a whole.

52. Amnesty International has affirmed that the evolution of the norms in Western Europe concerning the death penalty leads to the conclusion that it is an inhuman punishment, within the meaning of Article 3 of the European Convention. It is in this sense that the judgment of the court in the Soering case should be understood.

53. For its part, the Inter-American Court on Human rights has already affirmed that "The right to life and the guarantee and respect thereof by States cannot be conceived in a restrictive manner. That right does not merely imply that no person may be arbitrarily deprived of his or her life (negative obligation). It also demands of the States that they take all appropriate measures to protect and preserve it (positive obligation)." (Cf. Repertorio de Jurisprudencia del Sistema Interamericano de Derechos humanos, 1998, Washington College of Law, American University, 1/102)

54. It was for the same reason that the European Court, in the aforementioned Soering decision, considered that "Certainly, the Convention is a living instrument which ... must be interpreted in the light of present-day conditions"; and, in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 (art. 3), "the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field" (par. 102).

55. In fact, to determine whether the death penalty, because of current modifications of both domestic and international law, constitutes a treatment prohibited by Article 3, it is necessary to take into consideration the principles that govern the interpretation of that Convention. In this case, both in the European Convention and in the American Convention, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment” (Article 3 of the European Convention); “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.” (Article 5(2) of the American Convention on Human Rights).

56. In the same line of thought, in the case between Ireland and the United Kingdom, the European Court had already decided that “The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (...) Article 3 (Art. 3) makes no provision for exceptions (...)the only relevant concepts are "torture" and "inhuman or degrading treatment", to the exclusion of "inhuman or degrading punishment".(par. 163-164)

57. More recently, in its Advisory Opinion OC-16, of October 1st, 1999, requested by Mexico, the Inter-American Court of Human Rights considered it opportune to state that, as regards the right to information about consular assistance, as part of the due process guarantees, that “in a previous examination of Article 4 of the American Convention, the Court observed that the application and imposition of capital punishment are governed by the principle that "no one shall be arbitrarily deprived of his life." Both Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the Convention require strict observance of legal procedure and limit application of this penalty to "the most serious crimes." In both instruments, therefore, there is a marked tendency toward restricting application of the death penalty and ultimately abolishing it. (par. 134)

58. It is reasonable to ask what is still lacking for the universal elimination of the death penalty? Simply the total recognition of the rights emanated from the treaties.

59. In support of this idea, we find the concurring vote, in the above-mentioned Advisory Opinion requested by Mexico, of Judge Cançado Trindade, wherein relevant assertions are made concerning the hermeneutics of law in face of the new protection demands.

60. In his concurring vote, the illustrious international legal scholar and current President of the Court (1999/2001) underlines that “The very emergence and consolidation of the corpus juris of the International Law of Human Rights are due to the reaction of the universal juridical conscience to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law (el Derecho) came to the encounter of the human being, the ultimate addressee of its norms of protection.” (Concurring vote, par.4)

61. The author of the concurring vote also warns that “In the same sense the case-law of the two international tribunals of human rights in operation to date has oriented itself, as it could not have been otherwise, since human rights treaties are, in fact, living instruments, which accompany the evolution of times and of the social milieu in which the protected rights are exercised” (ibid, par. 10)

62. In this sense the European Court on Human Rights, in its *Tyrer vs. United Kingdom Case* (1978), when determining the unlawfulness of physical punishment applied to teenagers in the Isle of Man, affirmed that the European Convention on Human Rights is “a living instrument which ... must be interpreted in the light of present-day conditions”.

63. Finally, with the demystification of the postulates of the voluntarist legal positivism, it has become clear that the answer to the problem of the basis and the validity of general international law can only be found in the universal legal consciousness, from the affirmation of an idea of objective justice.

64. Furthermore, in a meeting of representatives of the human rights treaty bodies, it was emphasized that conventional procedures are part of a broad international system of human rights protection, which has—as a basic postulate—the indivisibility of human rights (civil, political, economic, social and cultural). To ensure in practice the universalization of human rights, the meeting recommended the universal ratification, up to the year 2000, of the six core human rights treaties of the United Nations (the two International Covenants of 1966; the conventions on the elimination of racial discrimination and discrimination against women; the UN Convention against Torture; and the Convention on the Rights of the Child), of the three regional conventions on human rights (European, American and African), and the ILO Conventions that concern basic human rights. The representatives at the meeting warned that the non-compliance by the states in respect of their obligation to ratify constituted a breach of conventional international obligations and that the invocation of state immunity, in this context, would result in a “double standard” that would punish the States that duly complied with their obligations. (Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol 1, Fabris Ed. 1997, pp. 199-200)

65. Article 27 of the Vienna Convention on the Law of Treaties of 1969 forbids the invocation of domestic law to justify the non-compliance of an international obligation. Moreover, according to Article 31 of the Vienna Convention: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”. It follows also that, according to the doctrine of “*effet utile*”, the interpreter must not deny any term of a normative provision its value in the text: no provision can be interpreted as not having been written.

66. In effect, the Inter-American Court, in its Advisory opinion OC-14/94, has held that: “Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions [Greco-Bulgarian “Communities”, Advisory Opinion, 1930, P.C.I.J., Series B, N° 17, p.32; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, N° 44, p. 24; Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, N° 46, p. 167; and, I.C.J. Pleadings, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Case of the PLO Mission) (1988) 12, at 31-2, para. 47].” (par. 35)

67. In view of the considerations presented here, it can be said that the norm of article 4, section 2 of the American Convention has been superseded by the aforementioned conventional provisions, following the best hermeneutic of the International Law of Human Rights, with the result that it is prohibitive, for domestic law—even if older than the American Convention—to apply cruel punishment, such as the death penalty.

68. This result also follows from the principle of the International Law of Human Rights that all action must have as its basic goal the protection of victims.

69. In light of these considerations, provisions such as Article 4(2) of the American Convention on Human Rights should be disregarded, in favor of legal instruments that better protect the interests of the victims of violations of human rights.

Done and signed by the Inter-American Commission on Human Rights, in the city of Washington, D.C., the 15th day of the month of October, 2001. (Signed): Hélio Bicudo.