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Title/Style of Cause:	Douglas Christopher Thomas v. United States
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Decided by:	President: Jose Zalaquett; First Vice-President: Clare K. Roberts; Second Vice-President: Susana Villaran; Commissioner: Julio Prado Vallejo. Commission Member Prof. Robert K. Goldman, a national of the United States, did not take part in the discussion and voting on this case, in accordance with Article 17(2) of the Commission's Rules of Procedure.
Dated:	29 December 2003
Citation:	Thomas v. United States, Case 12.240, Inter-Am. C.H.R., Report No. 100/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003)
Represented by:	APPLICANT: Robert Lee
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I. SUMMARY

1. On January 4, 2000, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition dated the same date from Mr. Robert Lee of the Virginia Capital Representation Resource Center (hereinafter "the Petitioner") against the United States of America (hereinafter the "United States" or "the State"). The petition was filed on behalf of Douglas Christopher Thomas, a United States citizen incarcerated on death row in the state of Virginia who was at that time scheduled to be executed on Monday, January 10, 2000, and whose execution subsequently proceeded as scheduled. The petition alleges that Mr. Thomas has exhausted domestic remedies and therefore that the claims in his petition are admissible. The petition also alleges that the United States is responsible for violating Articles I, II, VII, and XXVI of the American Declaration of the Rights and Duties of Man (hereinafter "the Declaration"), as well as customary international law and a norm of jus cogens, based upon the fact that Mr. Thomas was 17-years-old when he was charged with committing a crime that led to his conviction for murder.

2. As of the date of this report, the State had not provided observations on either the admissibility or merits of the Petitioner's petition.

3. Owing to the exceptional circumstances of the case, the Commission decided to consider the admissibility of Mr. Thomas' petition together with the merits, in accordance with Article 37(3) of the Commission's Rules of Procedure.

4. Upon considering the petition, the Commission declared as admissible the claims presented on behalf of Mr. Thomas in respect of Articles I, II, VII and XXVI of the American Declaration. Concerning the merits of the petition, the Commission concluded that the State acted contrary to an international norm of jus cogens as encompassed in the right to life under Article I of the American Declaration by executing Mr. Thomas for a crime that he was found to have committed when he was 17 years of age, and recommended that the State provide Mr. Thomas' next of kin with an effective remedy which includes compensation. Finally, the Commission considered that the United States failed to act in accordance with its fundamental human rights obligations as a member of the Organization of American States by permitting Mr. Thomas' execution to proceed on January 10, 2000 notwithstanding the Commission's request that the State stay Mr. Thomas' execution pending the outcome of the proceedings before the Commission.

II. PROCESSING BEFORE THE COMMISSION

5. By note dated January 6, 2000, the Commission transmitted the pertinent parts of the petition to the State with a request for information with respect to the petition within 90 days as provided for in Article 34(5) of the Commission's former Regulations. In the same communication, the Commission requested that the United States stay Mr. Thomas' execution, at that time scheduled to take place on January 10, 2000, pending an investigation by the Commission of the alleged facts. In a note of the same date, the Commission also informed the Governor of the State of Virginia of the petition filed on Mr. Thomas' behalf and requested that the government of the state of Virginia take the necessary measures to stay Mr. Thomas' execution pending the Commission's investigation.

6. In a communication dated January 11, 2000, the State informed the Commission that the executive branch of the Federal government of the United States had no involvement in Mr. Thomas' case prior to receipt of the Commission's January 6, 2000 request for information, and confirmed that Mr. Thomas' execution was carried out by the State of Virginia on January 10, 2000 after the U.S. Supreme Court refused to grant a stay of execution. The State also indicated that it would prepare a full response to the Petitioner's communication, in consultation with knowledgeable state authorities, and that in the meantime it denied the allegations made in the petition and reserved the right to respond in full in accordance with the Commission's procedures.

7. By note dated May 11, 2000, the State requested an extension of time of 45 days within which to respond to the Petitioner's petition. In a communication dated May 15, 2000, the Commission granted the State's request and indicated that its observations in the case should be delivered within 45 days from the date of the Commission's correspondence.

8. In communications to the State and the Petitioner dated May 18, 2003, the Commission informed the parties that due to exceptional circumstances, and in accordance with Article 37(3) of its Rules of Procedure, it had opened a case in respect of the Petitioners' complaint, but had deferred its treatment of admissibility until the debate and decision on the merits of the matter. In addition, in accordance with Article 38(1) of the Commission's Rules, the Commission requested

that the Petitioner deliver any additional observations that he may have on the merits of the case within a period of two months from the date of receipt of the Commission's communication.

9. Subsequently, by note dated July 25, 2003, the Commission informed the State that, as of the date of the Commission's correspondence, it had not received any additional observations from the Petitioner. In the same note, the Commission requested that the State submit any additional observations that it had on the merits of the Petitioners' petition within a period of two months, in accordance with Article 38(1) of the Commission's Rules of Procedure.

10. As of the date of the present report, the Commission had not received any observations from the State on the admissibility or merits of the Petitioner's petition.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

11. According to the information provided by the Petitioner, in August 1991, Douglas Christopher Thomas, a United States national, pleaded guilty in the State of Virginia to the first-degree murder of J.B. Wiseman, was tried as an adult and found guilty of the capital murder of Kathy Wiseman, and was sentenced to death for the capital conviction and to 67 years in prison for the first-degree murder conviction. J.B. and Kathy Wiseman were the parents of Mr. Thomas' girlfriend, Jessica Wiseman, and were shot while they were asleep in their bed. Mr. Wiseman died immediately from the first shot, which hit him in the chest. Kathy Wiseman was struck on the side of her face. She got up from her bed and walked down the hall way to Jessica's room. While standing in the doorway to the room, she was shot a second time, which was immediately fatal. In sentencing Mr. Thomas to death for Mrs. Wiseman's murder, the jury found as an aggravating factor that his conduct in committing the murder was vile, horrible or inhuman. At the time of these crimes, Mr. Thomas was 17 years of age.

12. With regard to the admissibility of the petition, the Petitioner argues that Mr. Thomas has exhausted his domestic remedies on the issues raised before the Commission. In particular, the Petitioners claim that Mr. Thomas appealed to the Supreme Court of Virginia, which affirmed his conviction and sentence on June 5, 1992,[FN1] and that the U.S. Supreme Court denied his petition for a writ of certiorari on November 2, 1992.[FN2] On July 26, 1993, Mr. Thomas filed a petition for a writ of habeas corpus in the Virginia state court, and the Supreme Court of Virginia summarily dismissed his petition without a hearing on June 17, 1996. Mr. Thomas then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, which dismissed his petition on June 11, 1998.[FN3] The Fourth Circuit Court of Appeals affirmed the District Court decision and the U.S. Supreme Court denied his petition for a writ of certiorari on June 16, 1999.[FN4] At that point in his proceedings, Mr. Thomas was scheduled to be executed on June 16, 1999.

[FN1] Thomas v. Commonwealth, 244 Va. 1, 419 S.E. 2d 606 (1992).

[FN2] Thomas v. Virginia, 506 U.S. 958 (1992).

[FN3] Thomas v. Taylor, 170 F.3d 466 (4th Cir 1994).

[FN4] *Thomas v. Taylor*, 119 S. Ct. 2361 (June 14, 1999).

13. Following his first set of habeas corpus petitions, Mr. Thomas lodged a second petition for a writ of habeas corpus and petition for appeal with the Virginia Supreme Court. After staying his execution and expediting the argument of the case, on November 5, 1999 the Court denied the petition for a writ of habeas corpus and, by separate order, denied the petition for appeal. Mr. Thomas then filed a notice of intention to apply for a rehearing in each matter on November 12, 1999, following which the Virginia Attorney General triggered the statute mandating the setting of an execution date and requested a January 10, 2000 execution date, which the state circuit court granted. On December 3, 1999, Mr. Thomas filed his petition for a rehearing, and on December 27, 1999 filed a supplement to the petition for rehearing, a petition for a writ of habeas corpus, and an application for a stay of execution in the Virginia Supreme Court, all of which were ultimately denied. On January 10, 2000, following the lodging of the Petitioners' petition with the Commission, the U.S. Supreme Court denied Mr. Thomas' petition for a writ of certiorari in respect of these decisions. In his final petition for a writ of habeas corpus, Mr. Thomas raised claims similar to those presented to the Commission in the present petition, namely the contention that customary international law and a *jus cogens* norm binding on the United States bar the imposition of the death penalty on persons for crimes committed under the age of eighteen.[FN5]

[FN5] *Thomas v. Taylor*, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit (U.S. Supreme Court), Annex to Petitioner's Petition dated January 4, 2000.

14. Based upon these circumstances, the Petitioner argues that Mr. Thomas should be considered to have exhausted or that he would soon exhaust domestic remedies, because he had sought relief from his death sentence in the Virginia Supreme Court on three occasions and had a fourth petition pending. In addition, the Petitioner observes that Mr. Thomas' fourth and final petition for relief consisted solely of issues regarding the illegal death sentence he received for crimes committed when he was 17 years old. The Petitioner also notes that the Executive Branch of the United States Government had advised against Supreme Court review of the issue of the juvenile death penalty and that the U.S. Supreme Court declined to review this issue as recently as 1999 in the case of *Domingues v. Nevada*. [FN6]

[FN6] *Domingues v. Nevada*, 120 S. Ct. 396 (1999).

15. The Petitioner also indicates that the subject matter of their petition is not pending settlement pursuant to any other applicable procedure presented to an international governmental organization. Further, the Petitioner states that the petition was filed in a timely manner, as it was lodged within six months of the October 1, 2001 denial by the U.S. Supreme Court of Mr. Thomas' petition for a writ of certiorari.

16. With regard to the merits of their petition, the Petitioner contends that the State is in violation of Article I of the American Declaration because there is an international jus cogens norm prohibiting the death penalty for juvenile offenders.

17. The Petitioner argues in this connection that in its 1986 decision in the Case of James Terry Roach and Jay Pinkerton,[FN7] the Inter-American Commission found that there was a recognized norm of jus cogens that prohibits the execution of children, but did not make a dispositive ruling on the juvenile death penalty issue because the Commission found that there lacked consensus as to the age of the jus cogens norm. The Petitioner contends in this regard that a jus cogens norm is defined under Article 53 of the Vienna Convention on the Law of Treaties as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”[FN8] The Petitioner also argues that as the practices of nations grow and conform over the years, the Commission’s interpretation and application of the American Declaration can be adapted to these norms, and further, that treaty ratification is a practice of states that can lead to the growth of customary international law norms that are binding law.

[FN7] Case 9647, James Terry Roach and Jay Pinkerton (United States), Annual Report of the IACHR 1986-87.

[FN8] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 352, Article 53.

18. According to the Petitioner, the Commission can derive the existence of an international consensus as to the minimum age required for the jus cogens norm by examining the treaties of the world that prohibit the application of the death penalty to individuals who were under 18 years of age at the time of their crimes. These instruments include the International Covenant on Civil and Political Rights,[FN9] the U.N. Convention on the Rights of the Child,[FN10] the American Convention on Human Rights,[FN11] the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War,[FN12] and the First and Second Protocols Additional to the 1949 Geneva Conventions.[FN13]

[FN9] International Covenant on Civil and Political Rights, Dec. 19,1966, 999 U.N.T.S. 171, Article 6(5).

[FN10] United Nations on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. N° 49, at 167, U.N. Doc. A/44/49 (1989).

[FN11] American Convention on Human Rights, OAS Official Records, OEA/Ser.K/XVI/1.1, doc. 65 rev. 1 corr. 2 (1969), Article 4(5).

[FN12] Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, August 12, 1949, 75 U.N.T.S. 286, Art. 68.

[FN13] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered

into force Dec. 7, 1978, Article 77(5); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force Dec. 7, 1978, Article 6(4).

19. The Petitioner also refers to the work of major multinational organizations in establishing a universal jus cogens norm. In particular, he refers to resolutions and standards adopted by the United Nations Commission of Human Rights,[FN14] the United Nations Economic and Social Council,[FN15] and the United Nations Subcommission on the Promotion and Protection of Human Rights[FN16] that, according to the Petitioner, militate against the execution of individuals who were under 18 years of age at the time of their offense.

[FN14] The Question of the Death Penalty, Comm. on Hum Rts., 53rd Sess. Res. 1997/12 adopted April 3, 1997.

[FN15] Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, ECOSOC Res. 1984/50, U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84, May 15, 1984.

[FN16] The Death Penalty in Relation to Juvenile Offenders, United Nations Sub-Commission on the Promotion and Protection of Human Rights, Res. adopted August 24, 1999, U.N. Doc. E/CN.4/Sub.2/RES/1999/L.16 (24 August 1999).

20. Finally, the Petitioner argues that the Commission should look to the practice of nations to determine whether a jus cogens norm has been established. He claims in this regard that since 1990, only 6 states are known to have executed children who were under the age of 18 years at the time of their offense, Iran, Nigeria, Pakistan, Saudi Arabia, Yemen, and the United States.[FN17] Similarly, the Petitioner claims that states within the United States have recently followed the jus cogens prohibition by banning the execution of 16 year old offenders.[FN18]

[FN17] Petitioner's petition dated January 4, 2000, p. 13, citing Amnesty International, *Juveniles and the Death Penalty*, at 3-6 November 1998; *Fight the Death Penalty in the USA*, *Death Penalty for Juvenile Offenders* (January 26, 1999).

[FN18] Petitioner's petition of January 4, 2000, pp. 13-14, citing *Brennan v. Florida*, N° 90,279, 1999 Fla. LEXIS 1186, 1999 WL 506966 (Fla. Supreme Court, July 8, 1999) (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); Mont. Code Ann. § 45-5-102 (1999) (raising the minimum age of offenders in Montana who are eligible for the death penalty from 16 to 18 years). The Petitioners also note in this regard that for 22 years, between 1963 and 1985, the United States did not execute a child who was under the age of 18 at the time of the crime, that for 40 years, between 1959 and 1999, the United States did not execute a child who was 16 at the time of his crime, and that the United States government itself has set the minimum age requirement for the death penalty at 18.

21. In addition to arguing that the prohibition against executing persons who were under 18 years of age at the time of their offense is a norm of jus cogens, the Petitioner contends that the United States has failed to preempt the states regarding the juvenile death penalty, which in turn has led to a pattern of legislative arbitrariness throughout the United States that results in the arbitrary deprivation of life and inequality before the law contrary to Articles I and II of the Declaration. In this regard, the Petitioner cites the decision of this Commission in the case of Roach and Pinkerton in which it held, based upon the evidence presented in that case that the United States' failure to preempt the 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 Declaration.

22. The Petitioner asserts in this regard that at the time of filing their petition, the applicability of the death penalty to juvenile offenders across the United States was in complete disarray, with 8 states having specific statutes authorizing the death penalty for 16 years old offenders, five states setting the minimum age of 17, 15 states and the federal government setting the minimum age at 18, nine states having no age limit specified in their statutes, and 13 states prohibiting the death penalty all together.[FN19] The Petitioner also notes that under Virginia law, juveniles as young as 14 years of age could be convicted and sentenced as adults and that there is no exception in Virginia law for the death penalty.[FN20] The Petitioner therefore argues that since the Roach and Pinkerton decision, the United States has done nothing to bring uniformity to the state practice of executing juveniles, and therefore remains in violation of its obligations under Article I and II of the Declaration.

[FN19] Petitioner's petition dated January 4, 2000, p. 16.

[FN20] Id.

23. Finally, the Petitioner argues that the United States' reservation to Article 6(5) of the International Covenant on Civil and Political Rights is invalid because it violates both the express terms of the treaty and the object and purpose of the treaty, and because it contravenes a jus cogens norm. In this connection, the Petitioner notes that Article 6 of the Covenant is expressly included among those provisions of the Covenant from which no derogation may be taken, even in public emergencies. He also claims that the U.N. Human Rights Committee has declared the reservation by the United States to Article 6(5) to be invalid,[FN21] and that the reservation has also provoked direct objection from at least eleven other signatory countries similarly condemning it as invalid.[FN22]

[FN21] Petitioner's petition dated January 4, 2000, p. 18, citing Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comment of the Human Rights Committee, 53rd Sess., 1413th mtg., para. 14, at 4, U.N. Doc. CCPR/C/79/Add.50 (1995).

[FN22] Petitioner's petition dated January 4, 2000, pp. 18-19, citing Lawrence A. Grayer, Comment, A Paradox: Death Penalty Flourishes in U.S. While Declining Worldwide, 23 Denv. J. Intl. & Pol'y 555 (1995).

24. Further, the Petitioner argues that the United States' reservation is invalid as contrary to the object and purpose of the treaty, as the Covenant is a human rights treaty aimed at protecting people within the jurisdiction of states parties, and in which the right to life is the fundamental human right expressed throughout the Covenant. To the extent that the United States' reservation contravenes that condition under Article 6(5) of the Covenant that prohibits the execution of individuals who were under 18 years of age at the time of their offense, the Petitioner claims that it cannot be reconciled with the fundamental object and purpose of Article 6 specifically and the Covenant generally. In support of his argument, the Petitioner cites the conclusion by the United Nations Human Rights Committee in 1995 that the United States' reservation to Article 6(5) was incompatible with the object and purpose of the Covenant.[FN23] The Petitioner also refers to Article 53 of the Vienna Convention on the Law of Treaties according to which a treaty is void if, at the time of its conclusion, it conflicts with a peremptory form of international law, and asserts that if this provision prohibits a State from entering into a treaty that violates a norm of jus cogens, it follows that a State may not make a reservation to a provision of a treaty if that reservation violates jus cogens.

[FN23] Petitioner's petition dated January 4, 2000, pp. 20, citing Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comment of the Human Rights Committee, 53rd Sess., 1413th mtg., para. 14, at 4, U.N. Doc. CCPR/C/79/Add.50 (1995).

25. Based upon the foregoing submissions, the Petitioner contends that the petition is admissible, and that the State is responsible for violating Mr. Thomas' rights under Articles I, II, VII and XXVI of the American Declaration and a norm of jus cogens.

B. Position of the State

26. As indicated previously, despite the Commission's initial request for observations from the State dated January 6, 2000, its granting to the State on May 15, 2000 of a 45 day extension of time, and its July 25, 2003 requests for additional submissions from the State on the merits of the Petitioner's petition, as of the date of the present report the Commission has not received any observations from the United States in the admissibility or merits of the present case.

IV. ADMISSIBILITY

27. The Commission has considered the admissibility of the present complaint pursuant to Articles 30 and 34 of its Rules of Procedure and makes the following determinations.

A. Competence of the Commission *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

28. The Commission is competent to examine the petition in question. Under Article 23 of the Rules of Procedure of the Commission, the Petitioners are authorized to file complaints alleging violations of rights protected under the American Declaration. The alleged victim,

Douglas Christopher Thomas, was a person whose rights were protected under the American Declaration, the provisions of which the State is bound to respect in conformity with the OAS Charter, Article 20 of the Commission's Statute and Article 49 of the Commission's Rules of Procedure. The United States has been subject to the jurisdiction of the Commission since June 19, 1951, the date on which it deposited its instrument of ratification of the OAS Charter.

29. Inasmuch as the Petitioners have filed complaints alleging violation of Articles I, II, VII and XXVI of the American Declaration, the Commission is competent *ratione materiae* to examine the complaint.

30. The Commission is competent *ratione temporis* to examine the complaints because the petition alleges facts that occurred on and after August 26, 1991, the date on which Mr. Thomas is alleged to have been sentenced to death. The facts alleged, therefore, occurred subsequent to the date on which the United States' obligations under the American Declaration took effect.

31. Finally, the Commission is competent *ratione loci*, given that the petition indicates that the alleged victim was under the jurisdiction of the United States at the time the alleged events occurred, which reportedly took place within the territory of that State.

B. Duplication

32. There is no information on the record indicating that the subject matter of Mr. Thomas' complaint has been previously submitted to the Commission or before any other intergovernmental organization of which the United States is a member. The State has not contested the issue of duplication of procedures. The Commission therefore finds no bar to the admissibility of the Petitioner's claims under Article 33 of the Commission's Rules of Procedure.

C. Exhaustion of Domestic Remedies

33. Article 31(1) of the Commission's Rules of Procedure specifies that, in order to decide on the admissibility of a matter, the Commission must verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with generally recognized principles of international law. In accordance with Article 31(2) of the Commission's Rules, however, the requirement under Article 31(1) does not apply when, *inter alia*, the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them. The jurisprudence of the inter-American system also makes clear that the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, because the rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had an opportunity to remedy them by internal means. The requirement is thus considered a means of defense and, as such, waivable, even tacitly. Further, a waiver, once effected, is irrevocable.[FN24] In the face of such a waiver, the Commission is not obliged to consider any potential bars to the admissibility of a petitioner's claims that might have properly been raised by a state relating to the exhaustion of domestic remedies.

[FN24] I/A Court H.R., Loayza Tamayo Case, Preliminary Objections, Judgment of January 31, 1996, Series C No. 25, para. 40.

34. In the present case, the State has failed to provide any observations or information respecting the admissibility of Mr. Thomas' claims, and has thereby implicitly or tacitly waived its right to object to the admissibility of the claims in the petition based upon the exhaustion of domestic remedies requirement. Moreover, the record before the Commission indicates that Mr. Thomas pursued appeals[FN25] and post-conviction proceedings before the state courts and the U.S. federal courts,[FN26] including two habeas corpus proceedings in the state courts. In the course of his second state habeas corpus petition, Mr. Thomas raised the *jus cogens* issue brought before this Commission, namely the contention that customary international law and a *jus cogens* norm binding on the United States bars the imposition of the death penalty on persons for crimes committed under the age of eighteen.[FN27] This proceeding, like the previous proceedings, was ultimately unsuccessful, with the U.S. Supreme Court denying certiorari on January 10, 2000, and Mr. Thomas was executed on the same day.

[FN25] See *Thomas v. Commonwealth*, 244 Va. 1, 419 S.E. 2d 606 (1992); *Thomas v. Virginia*, 506 U.S. 958 (1992).

[FN26] See *Thomas v. Taylor*, 170 F.3d 466 (4th Cir 1994); *Thomas v. Taylor*, 119 S. Ct. 2361 (June 14, 1999).

[FN27] See *Thomas v. Warden*, No. 991284 (Virginia S.C.) (petition for writ of habeas corpus); *Thomas v. Commonwealth*, No. 991284 (Virginia S.C.) (petition for appeal of denial of petition for writ of *coram nobis*).

35. Accordingly, based upon the information before it, the Commission considers that Mr. Thomas' petition is admissible under the terms of Article 31 of the Commission's Rules of Procedure.

D. Timeliness of the Petition

36. Pursuant to Article 32(1) of the Commission's Rules of Procedure, the Commission must refrain from taking up petitions that are lodged after the six month period following the date on which the complaining party has been notified of the final ruling, in cases where the remedies under domestic law have been exhausted. In the present case, the Petitioners' petition was lodged on January 5, 2000 and therefore not beyond the date of the denial by the U.S. Supreme Court of Mr. Thomas' petition for a writ of certiorari on January 10, 2000. The State has not specifically contested the timeliness of the Petitioners' petition. Consequently, the Commission concludes that the Petitioners' petition is not barred from consideration under Article 32 of the Commission's Rules of Procedure.

E. Colorable Claim

37. The Commission has outlined in Part III of this Report the substantive allegations of the Petitioner, to which the State has not responded. After carefully reviewing the information and arguments on the record in light of the heightened scrutiny test applied by the Commission in capital punishment cases,[FN28] and without prejudging the merits of the matter, the Commission considers that the petition states facts that tend to establish a violation of rights under the American Declaration and is not manifestly groundless or out of order. Accordingly, the Commission concludes that the Petitioners' petition should not be declared inadmissible under Article 34 of the Commission's Rules of Procedure.

[FN28] According to the Commission's established jurisprudence, it will review and decide capital punishment cases with a heightened level of scrutiny, to ensure that any deprivation of life that occurs through the application of the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments. See Report No. 57/96 (Andrews v. United States), Annual Report of the IACHR 1997, paras. 170-171; Report No. 38/00 (Baptiste v. Grenada), Annual Report of the IACHR 1999, paras. 64-66; Report No. 41/00 (McKenzie et al. v. Jamaica), Annual Report of the IACHR 1999, paras. 169-171.

F. Conclusions on Admissibility

38. In accordance with the foregoing analysis of the requirements of Articles 30 to 34 of the Commission's Rules of Procedure, and without prejudging the merits of the matter, the Commission decides to declare as admissible the claims presented on behalf of Mr. Thomas in respect of Articles I, II, VII, and XXVI of the American Declaration and continue with the analysis of the merits of the case.

V. MERITS

39. The Petitioner contends that the United States is responsible for violations of Articles I and II of the American Declaration, due to the fact that Mr. Thomas was seventeen years old at the time of the crime for which he was convicted and sentenced to death. The Petitioner relies in this regard upon the Commission's decision in the case of Roach and Pinkerton v. United States, in which the Commission found that there was a recognized norm of jus cogens that prohibits the execution of children, but did not make a dispositive ruling on the juveniles death penalty issue because the Commission found that there lacked consensus as to the age of the jus cogens norm. The Petitioner also argues that sufficient international developments have occurred since the Commission's 1986 Roach and Pinkerton decision to establish 18 as the age of the jus cogens norm.

40. The Commission recalls that in its recent decision in the case of Michael Domingues v. United States,[FN29] it found that the state of international law had evolved since the Commission's determination in 1987 of the case of Roach and Pinkerton, so as to prohibit as a jus cogens norm the execution of persons who were under 18 years of age at the time of their crimes. In reaching this conclusion, the Commission canvassed international legal and political developments and state practice over the 14 year period between the period of 1987 and 2001

concerning the execution of juveniles. This evidence included the promulgation and ratification of treaties, United Nations resolutions and standards, domestic practice of states, and the practice of the United States. Based upon these developments, the Commission concluded as follows:

[FN29] Michael Domingues v. United States, Case 12.285, Report 62/02, Annual Report of the IACHR 2002, available on the IACHR web site at <http://www.cidh.org/annualrep/2002eng/USA.12285.htm>.

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.[FN30]

[FN30] *Id.*, paras. 84, 85.

41. In the present case, Mr. Thomas was executed by the state of Virginia on January 10, 2000, 21 months prior to the Commission's preliminary report in the Domingues Case. A

preponderance of the evidence canvassed by the Commission in the Domingues Case related to international and state practice manifested before Mr. Thomas' execution on January 10, 2000.[FN31] The Commission therefore adopts for the purposes of this report its findings in the Domingues Case, and concludes that at the time of Mr. Thomas' execution, the United States was likewise bound by a norm of jus cogens prohibiting the carrying out of the death penalty on individuals who committed their crimes when they had not yet reached 18 years of age.

[FN31] The Commission relied, for example, upon the fact that 191 states had ratified the UN Convention on the Rights of the Child as of September 2001. Of these, only one succeeded to the Convention subsequent to January 2000, Serbia and Montenegro on March 12, 2001.

42. Consequently, the Commission finds that by executing Mr. Thomas for a crime that he was found to have committed when he was 17 years of age, the United States is responsible for violating Mr. Thomas' right to life under Article I of the American Declaration.

43. In light of the Commission's finding that Mr. Thomas' execution was prohibited due to his age at the time he is alleged to have committed the crime in question, the Commission does not consider it necessary to address whether his execution may also have conflicted with the rights protected under the American Declaration by reason of the disparate application of the juvenile death penalty by U.S. states or the permissibility of the reservation taken by the United States to Article 6(5) of the International Covenant on Civil and Political Rights.

44. Finally, the Commission considers it important to address the United States' failure to comply with the Commission's January 6, 2000 request that it stay Mr. Thomas' execution pending the processing of his complaint. In this connection, the Commission has previously observed that its ability to effectively investigate and determine capital cases has frequently been undermined when states have scheduled and carried out the execution of condemned persons, despite the fact that those individuals have proceedings pending before the Commission.

45. To prevent this unacceptable situation, the Commission requests precautionary measures from states in capital cases to stay a condemned prisoner's execution until it has had an opportunity to investigate his or her claims. The Commission has expressed the view in this regard that OAS member states, by creating the Commission and mandating it through the OAS Charter and its Statute to promote the observance and protection of human rights of the American peoples, have implicitly undertaken to implement measures of this nature where they are essential to preserving that mandate. As the Commission has emphasized on numerous occasions, it is beyond question that the failure of an OAS member state to preserve a condemned prisoner's life pending review of his or her complaint undermines the efficacy of the Commission's process, deprives condemned persons of their right to petition in the inter-American human rights system, and results in serious and irreparable harm to those individuals. For these reasons, the Commission has determined that a member state disregards its fundamental human rights obligations under the OAS Charter and related instruments when it fails to implement precautionary measures issued by the Commission in these circumstances.[FN32]

[FN32] See Case 12.243, Report N° 52/01, Juan Raul Garza v. United States, Annual Report of the IACHR 2000, para. 117; IACHR, Fifth Report on the Situation of Human Rights in Guatemala, Doc. OEA/Ser.L/V/II.111 doc.21 rev. (6 April 2001), paras. 71, 72. See similarly International Court of Justice, Case Concerning the Vienna Convention on Consular Relations (Germany v. United States of America), Request for the Indication of Provisional Measures, Order of 3 March 1999, I.C.J. General List, No. 104, paras. 22-28; United Nations Human Rights Committee, Dante Piandiong and others v. The Philippines, Communication No. 869/1999, U.N. Doc. CCPR/C/70/D/869.1999 (19 October 1999), paras. 5.1-5.4; Eur. Court H.R., Affaire Mamatkulov et Abdurasulovic c. Turkey, Reqs. Nos. 46827/99, 46951/99 (6 February 2003), paras. 104-107.

46. In the present case, Mr. Thomas' execution was carried out, notwithstanding the fact that he had lodged a petition with the inter-American human rights system and the Commission's had requested a stay of his execution. By permitting Mr. Thomas' execution to proceed in these circumstances, the Commission considers that the United States undermined the efficacy of its process to fully address Mr. Thomas' complaint, deprived Mr. Thomas of his right to petition effectively in the inter-American human rights system, and caused Mr. Thomas serious and irreparable harm, and consequently failed to act in accordance with its fundamental human rights obligations as a member of the Organization of American States. The Commission views the State's omissions in this regard as extremely grave and calls upon the United States to take all steps necessary to comply with the Commission's requests for precautionary measures in other present and future complaints before the inter-American system.

VI. PROCEEDINGS SUBSEQUENT TO REPORT 52/03

47. The Commission examined this case in the course of its 118th regular session and on October 9, 2003 adopted Report N° 52/03 pursuant to Article 43(2) of the Commission's Rules of Procedure.

48. By note dated October 29, 2003, the Commission transmitted Report N° 52/03 to the State, and requested that the Government of the United States inform the Commission within two months as to the measures adopted to comply the recommendations made to resolve the situation denounced.

49. The Commission did not receive a response from the State to its request for information within the time period specified in its October 29, 2003 note.

VII. CONCLUSIONS

50. The Commission, based on the foregoing considerations of fact and law, and in the absence of a response from the State to Report N° 52/03, ratifies the following conclusions.

51. The Commission hereby concludes that the Petitioners' claims are admissible as to the alleged violations of Articles I, II, VII and XXVI of the American Declaration.

52. The Commission also hereby concludes that the State has acted contrary to an international norm of jus cogens as reflected in Article I of the American Declaration by sentencing Douglas Christopher Thomas to the death penalty for crimes that he committed when he was 17 years of age, and executing him pursuant to that sentence.

VIII. RECOMMENDATIONS

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

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS HEREBY REITERATES ITS RECOMMENDATIONS TO THE UNITED STATES THAT IT

1. Provide the next-of-kin of Douglas Christopher Thomas with an effective remedy, which includes compensation.
2. Review its laws, procedures and practices to ensure that capital punishment is not imposed upon persons who, at the time his or her crime was committed, were under 18 years of age.

IX. NOTIFICATION AND PUBLICATION

54. In light of the above, and given the exceptional circumstances of the present case, where the determined violations concern the application of laws that permit the execution of persons under 18 years of age and where the State has not informed the Commission of any measures adopted to comply with its recommendations,[FN33] 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,[FN34] 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.

[FN33] In this regard, the response of the United States to the Commission's decision in the Case of Michael Domingues, Case 11.753, can be found on the Commission's web site at www.cidh.org. In its response, the United States disagreed with the Commission's conclusion as to the existence of a norm of jus cogens prohibiting the execution of persons who were under the age of 18 at the time of their offense and declined to implement the Commission's recommendations.

[FN34] See similarly Domingues Case, *supra*, para. 114; Case 11.753, Report 52/02, Ramón Martínez Villareal v. U.S., Annual Report of the IACHR 2002, para. 102.

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Approved on the 29th day of the month of December, 2003. José Zalaquett, President; Clare Roberts, First Vice-President; Susana Villarán, Second Vice-President; Julio Prado Vallejo, Commissioner.