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Title/Style of Cause:	Toronto Markkey Patterson v. United States
Doc. Type:	Report
Decided by:	President: Clare K. Roberts; First Vice-President: Susana Villaran; Second Vice-President: Paulo Sergio Pinheiro; Commissioners: Evelio Fernandez Arevalos, Jose Zalaquett, Freddy Gutierrez, Florentin Melendez.
Dated:	7 March 2005
Citation:	Patterson v. United States, Case 12.439, Inter-Am. C.H.R., Report No. 25/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
Represented by:	APPLICANT: J. Gary Hart
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I. SUMMARY

1. On June 3, 2002, the Inter-American Commission on Human Rights (hereinafter the “Commission”) received a petition dated May 29, 2002 from J. Gary Hart, an attorney in Austin, Texas (hereinafter the “Petitioner”) against the United States of America (hereinafter the “United States” or the “State”). The petition was filed on behalf of Toronto Markkey Patterson, an African American youth who was at the time incarcerated on death row in the State of Texas. The petition alleges that the United States is responsible for violations of Articles I, II, VII, and XXVI of the American Declaration of the Rights and Duties of Man (hereinafter the “Declaration”) on the basis that Mr. Patterson was 17 years old at the time of the offense for which he had been sentenced to death and that a jus cogens norm of international law prohibits the execution of an individual who was under the age of 18 at the time of commission of his or her crime. Despite precautionary measures adopted by the Commission on June 10, 2002, requesting that the State stay his execution pending the outcome of the proceedings before the Commission, Mr. Patterson’s execution was carried out on August 28, 2002.

2. The State has opposed the petition on the basis that the petition fails to state facts that tend to establish a violation of the American Declaration and that it essentially duplicates a petition pending or already examined and settled by the Commission.

3. Owing to the exceptional circumstances of the case, the Commission decided to consider the admissibility of Mr. Patterson’s 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. Patterson in respect of Articles I, II, VII and XXVI of the American Declaration. Concerning the merits of the Petitioners' claims, the Commission concluded that the State acted contrary to a international norm of jus cogens as encompassed in the right to life under Article I of the Americas Declaration by executing Mr. Patterson for a crime that he was found to have committed when he was 17 years of age, and recommended that the State provide Mr. Patterson's next of kin with an effective remedy, which includes compensation. The Commission also 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. Patterson's execution to proceed on August 28, 2002 notwithstanding the Commission's request that the State stay his execution pending the outcome of the proceedings before the Commission.

II. PROCESSING BEFORE THE COMMISSION

5. By note dated June 10, 2002, the Commission transmitted the pertinent parts of the petition to the State with a request for information within two months as provided for in Article 30(3) of the Commission's Rules of Procedure. In the same communication, pursuant to Article 25(1) of its Rules of Procedure, the Commission requested that the United States take the measures necessary to preserve Mr. Patterson's life pending the Commission's investigation of the allegations in his petition.

6. By letter dated June 12, 2002, the State acknowledged receipt of the

Commission's June 10, 2002 request for precautionary measures and indicated that the request had been forwarded to the Attorney General of Texas. By communication dated June 17, 2002, the Commission transmitted the State's June 12, 2002 communication to the Petitioners.

7. The Commission subsequently received information that Mr. Patterson's execution remained scheduled to take place on August 28, 2002. Consequently, in a note dated August 26, 2002, the Commission reiterated to the United States its June 10, 2002 request for precautionary measures to preserve Mr. Patterson's life pending the Commission's investigation of the allegations in his petition. On August 28, 2002, the Commission received information that Mr. Patterson's execution had been carried out as scheduled.

8. In a note dated September 23, 2002, the State provided the Commission with its response to Mr. Patterson's petition. By communication dated September 25, 2002, the Commission transmitted the State's response to the Petitioner with a request for responding observations within 30 days.

9. By notes to the State and to the Petitioner dated January 13, 2004, the Commission informed the parties that, due to exceptional circumstances, and in accordance with Article 37(3) of the Commission's Rules of Procedure, the Commission had decided to open a case with respect to the Petitioner's complaint but had deferred its treatment of admissibility until the debate and decision on the merits of the matter. In the same communication, the Commission

requested that the Petitioner submit any additional observations on the merits of the case within a period of two months, in accordance with Article 38(1) of the Commission's Rules.

10. On January 23, 2004, the Commission received additional observations from the Petitioners. In a communication dated January 26, 2004, the Commission transmitted the pertinent parts of the Petitioner's January 23, 2004 observations to the State, and as of the date of the present report, the Commission has not received a response from the State to the Commission's corresponding request for information.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

11. According to the information provided by the Petitioner, Toronto Markkey Patterson, an African American youth, was convicted on November 21, 1995 of the June 6, 1995 murder of a child under six years of age and subsequently sentenced to death.

12. With regard to the admissibility of the petition, the Petitioner argues that Mr. Patterson has exhausted the domestic remedies with regard to the alleged violations of Articles I, II, VII and XVII of the Declaration. These proceedings are summarized in the Petitioners May 29, 2002 petition,[FN1] and are as follows:

- a. Subsequent to his conviction, Mr. Patterson's conviction and sentence were upheld by the Texas Court of Criminal Appeals. [FN2]
- b. On September 9, 1997, Mr. Patterson filed a writ of habeas corpus in the Texas Court of Criminal Appeals, which was denied on February 3, 1999.
- c. Although Mr. Patterson's execution was scheduled for February 24, 2000, on December 16, 1999, the Federal District Court for the Northern District of Texas granted a stay of execution, in order to allow Mr. Patterson the time to file a Federal habeas corpus action.
- d. Mr. Patterson filed a second writ for state habeas corpus relief, which was dismissed by the Texas Court of Criminal Appeals as an abuse of the writ on May 3, 2000.
- e. On October 4, 2000, Mr. Patterson filed a federal request for habeas corpus in the federal district court. On August 20, 2001, this request was denied by the court.
- f. Mr. Patterson appealed this decision to the Fifth Circuit Court of Appeals, and this appeal was dismissed on February 26, 2002.
- g. Subsequently, on March 20, 2002, the state trial court scheduled Mr. Patterson's execution for August 28, 2002.
- h. On April 29, 2002, Mr. Patterson filed a petition for a writ of certiorari to the U.S. Supreme Court. On June 28, 2002, the Court denied this request.

[FN1] Petitioner's petition of May 29, 2002, at 2.

[FN2] Patterson v. State, N° 72, 282 (Tex. Crim. App. Jan. 13, 1999, unpublished).

13. In addition and in the alternative, the Petitioner submits that Mr. Patterson should be excused from exhausting the domestic remedies with regard to the jus cogens argument, on the basis that domestic courts have consistently refused to grant relief to offenders who were under the age of 18 at the time of their crimes.[FN3]

[FN3] Petitioners' petition of May 29, 2002, p. 3, citing *Beazley v. Johnson*, 242 F.3d 248 (5th Cir. 2001) and *Beazley v. Cockrell*, 122 S. Ct. 239 (2001).

14. With regard to the merits of the petition, the Petitioner argues that the prohibition against executing juvenile offenders constitutes a peremptory norm as defined under Article 53 of the Vienna Convention on the Law of Treaties, namely "a norm accepted and recognized by the international community of States 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." [FN4] The Petitioner also contends that in order to attain the status of a peremptory norm, a norm must meet four requirements: (1) it is general international law; (2) it is accepted by a large majority of states; (3) it is immune from derogation; and (4) it has not been modified by a new norm of the same status.[FN5]

[FN4] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 352, Art. 53.

[FN5] Petitioners' petition of May 29, 2002, p. 5.

15. According to the Petitioner, the prohibition against the execution of persons who were under 18 years of age at the time of their offense meets the requirements of a norm of jus cogens. First, he states that the prohibition constitutes general international law, as reflected in numerous treaties, declarations and pronouncements by international bodies [FN6] as well as the laws of the vast majority of nations, including those of the inter-American system.[FN7] In this regard, the Petitioner also points out that in 1987, the Commission found that there was a jus cogens norm proscribing the execution of children among the OAS member states.[FN8]

[FN6] Petitioners' petition of May 29, 2002, pp. 5-8, citing, inter alia, the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; 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); the Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, Aug. 12, 1949, 75 U.N.T.S. 286, the American Convention on Human Rights, OAS Official Records, OEA/Ser.K/XVI/1.1, doc. 65 rev. 1 corr. 2 (1969), United Nations Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, annex, 40 U.N. GAOR Supp. (N° 53) a 207, U.N., Doc. E/1984/84 (1984), The Question of the Death Penalty, Comm. on Hum Rts., 57th Sess. Res. 2001/68 adopted April 25, 2001, The Death Penalty in Relation to Juvenile Offenders, United Nations Sub-Commission on the Promotion and Protection of Human Rights,

53rd Sess. Res. 2000/17, adopted August 17, 2000, U.N. Doc. E/CN.4/Sub.2/RES/2000/17 (2000).

[FN7] Petitioners' petition of May 29, 2002, p. 5, noting that Article 4(5) of the American Convention prohibits the death penalty for persons under the age of 18 at the time the crime was committed, that the United States is the only OAS member state that has signed but not ratified the American Convention, and that of the 25 member states that have ratified the American Convention, only Barbados made a reservation to Article 4(5) but has subsequently established 18 as the minimum age for capital punishment. See Crime Prevention and Criminal Justice: Capital Punishment and the Implementation of the Safeguards Guaranteeing Protection the Rights of those Facing the Death Penalty, Report of the Secretary General, U.N. ESCOR, Economic and Social Council, Subst. Sess., U.N. Doc. E/2000/3, para. 90 (2000).

[FN8] Petitioners' petition of May 29, 2002, p. 5, citing *Pinkerton & Roach v. United States*, Res. 3-87, Case 9647, Annual Report of the Inter-Am C.H.R. 147, OEA/Ser.L/V/II.71 doc. 9 rev.1 (1987).

16. In addition, the Petitioner contends that the prohibition against executing persons who were under 18 years of age at the time of their offense is accepted by all states except one and is therefore accepted by a "very large majority of States, even if over dissent by 'a very small number' of states." The Petitioner notes in particular that the United States is the only state in the OAS that currently imposes the death penalty for persons under the age of 18 and is the only country in the world that has not accepted the international norm against the execution of juvenile offenders. The Petitioner asserts in this connection that almost every nation has ratified the UN Convention on the Rights of the Child, with the sole exceptions of the United States and Somalia,[FN9] and that the Convention has been the catalyst that has prompted many countries in the past ten years to change their laws raising the eligibility for the death penalty to 18.[FN10] The Petitioner also claims that only 6 states parties to the Convention on the Rights of the Child, the Democratic Republic of the Congo, Iran, Nigeria, Pakistan, Saudi Arabia and Yemen, have executed juvenile offenders since 1991, but have also changed their laws or denied that executions of juvenile offenders have taken place.[FN11] The Petitioner adds that even if it is the case that verifiable executions took place not only in the United States but also in Iran and the Democratic Republic of the Congo, this should not be considered to deprive the norm of its peremptory status, as other norms considered to fall within this category, such as torture, have also been demonstrably violated by states.[FN12]

[FN9] Petitioners' petition of May 29, 2002, p. 9, citing Status of the Convention on the Rights of the Child, Report of the Secretary General, U.N. ESCOR, Hum, Rts. Comm. 54th Sess., Agenda Item 20, para. 2, U.N. Doc. E/CN.4/1988/99 (1997).

[FN10] Petitioners' petition of May 29, 2002, p. 10, citing Crime Prevention and Criminal Justice, *supra*, at 21, para. 90.

[FN11] Petitioners' petition of May 29, 2002, pp. 10-11, citing Amnesty International, *The United States of America: Too Young to Vote, Old Enough to be Executed*, AI Index: AMR 51/105/2001, July 2001; Amnesty International Press Release (June 7, 2001 (Yemen)); Amnesty International (Irish Division) Press Release (Dec. 13, 2001) (Pakistan); Summary Record of the

6th Meeting of the Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess. , August 4, 2000, E/CN.4/Sub.2/2000/SR.6, para. 39 (2000) (Nigeria); Summary Record of the 53rd Meeting of the Commission on Human Rights, 56th Sess. , April 17, 2000, E/CN.4/2000/SR.53, paras. 88 and 92 (2000) (Saudi Arabia); Amnesty International, Children and the Death Penalty: Executions Worldwide Since 1990, ACT 50/10/2000; UN Press Release, Commission on Human Rights Starts Debate of Specific Groups and Individuals, April 11, 2001 (Iran); Amnesty International, Dem. Republic of Congo, Killing Human Decency, AI Index: AFR 62/11/00, May 31, 2000 at 12.

[FN12] Petitioners' petition of May 29, 2002, p. 13, citing Amnesty International Report 2001, Annual Summaries 2001, AI Index: POL 10/006/2001 (finding that in 2001, 125 states violated the prohibition against torture).

17. Further, the Petitioner claims that the prohibition against executing persons who were under 18 years of age at the time of their offense is a non-derogable norm. In this regard, the Petitioner refers to the International Covenant on Civil and Political Rights, which provides that there shall be no derogation from Article 6, including Article 6(5) prohibiting the imposition of the death penalty for crimes committed by persons below 18 years of age. Finally, the Petitioner states that the prohibition of the juvenile death penalty has been universally accepted by all but one country.

18. Based upon the above submissions, the Petitioners argue that there is no question that the prohibition against the execution of persons who were under 18 at the time of the offense has attained the status of a universal jus cogens norm and therefore constitutes a gross violation of the right to life under Article I of the American Declaration, the equality provision of Article II of the Declaration, the right to special protection of children under Article VII of the Declaration, and the prohibition against cruel, infamous or unusual punishment under Article XXVI of the Declaration.

B. Position of the State

19. In its September 23, 2002 response to the Petitioners' petition, the United States requests that the Commission declare the petition inadmissible under Articles 34(a)-(b) and 33 of the Commission's Rules of Procedure, on the grounds that it does not state facts that tend to establish a violation of the American Declaration, is manifestly groundless or out of order, and essentially duplicates a petition already examined and settled by the Commission, namely the petition in the Case of Jay Pinkerton and James Terry Roach.[FN13] In support of these arguments, the State indicates that it has previously fully briefed the juvenile death penalty issue and relies upon its October 18, 2001 response to the petition in Case N° 12.185 (Michael Domingues),[FN14] its December 17, 2001 observations on the Commission's October 15, 2001 preliminary merits report in the same matter, as well as its June 25, 2002 supplemental observations to the Commission's October 15, 2002 final merits report in that case.[FN15]

[FN13] Jay Pinkerton and James Terry Roach, Case No 9647, Inter-Am Comm. H.R. 1987.

[FN14] Case N° 12.185, Report N° 62/02, Michael Domingues v. United States, Annual Report of the IACHR 2002.

[FN15] See Observations of the United States Government on the Report of the Inter-American Commission on Human Rights made on October 15, 2002 in case N° 12.185 (Michael Domingues), at <http://www.cidh.org/Respuestas/USA.12185.htm>.

20. The United States has first argued that the petition fails to satisfy the criteria for admissibility under Article 33(b) of the Commission's Rules of Procedure[FN16] because its "subject matter essentially duplicates a petition pending or already examined and settled by the Commission," namely the 1987 Case of Jay Pinkerton and James Terry Roach,[FN17] in which the Commission 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.

[FN16] 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."

[FN17] Case 9647, Resolution N° 3/87, Case of Jay Pinkerton and James Terry Roach (United States), Annual Report of the IACHR 1986-87.

21. The United States has also contended that neither the state practice identified by the Petitioners, nor the legal standards cited in their observations, were sufficient to establish either a customary or *jus cogens* prohibition of the execution of juvenile offenders. In support of its position, the State has asserted that 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, in part 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 or on consensus,[FN18] and because they were adopted subsequent to the American Declaration.[FN19] The State also argues in this connection that its reservation to Article 6(5) of the ICCPR is valid and effective as a matter of international law, and that the status of Article 6 of the ICCPR as a non-derogable right has no correlation with the centrality of that right to the treaty and therefore does not preclude a state from entering a reservation to Article 6.

[FN18] 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.

[FN19] 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.

22. Further, the United States has suggested that UN organs have through their negotiating processes recognized that there is no customary international law prohibition on the execution of juvenile offenders.[FN20] The State cited in this regard 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",[FN21] without invoking any customary norms in making this appeal for state compliance.

[FN20] 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). According to the State, these two resolutions were adopted by consensus and 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." The State also indicates that these resolutions were adopted over an alternative resolution that would have recognized as prohibited under customary international law the execution of persons who were under 18 years of age at the time of their offense. UN Doc. E/CN.4/2001/2 at 14.

[FN21] 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/>>.

23. The State has argued that there exists no general and consistent state practice based on opinio juris sufficient to establish a customary international legal prohibition of the execution of juvenile offenders. The State contends in this regard that there is no uniform state practice regarding the execution of juvenile offenders. Further, the State has emphasized that opinio juris is a necessary element of customary international law and that the domestic practice of states alone is not sufficient, such that it must be demonstrated 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.[FN22]

[FN22] 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).

24. In addition, the State has contested the 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 contends in particular that judicial and legislative authorities cited, such as the 1988 U.S. Supreme Court decision in *Thompson v. Oklahoma* and the legislative amendments in Florida and Montana do not support the existence of a customary international norm prohibiting the execution of persons under 18 years of age, and 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.”

25. The State also disputes any reliance that may be placed upon the Optional Protocol to the Convention on the Rights of the Child Concerning Children in Armed Conflict, in part because 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,” and therefore does not prohibit in its entirety the involvement of juveniles in armed conflict and cannot be considered a related international legal development that supports an absolute prohibition on the execution of juvenile offenders.[FN23]

[FN23] 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).

26. Further and in the alternative, the United States has argued that it is not bound by any international norm prohibiting the execution of juvenile offenders, because 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.[FN24] Correspondingly, the State contends 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 by such a rule.

[FN24] 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).

27. Finally, the State has contended that there exists no jus cogens prohibition on the execution of juvenile offenders, as the precise nature and scope of the concept of jus cogens is a much disputed topic, and that there is no support for the contention that the alleged prohibition of imposing a sentence of death on an offender who is under 18 years of age has similar force to the norms that have most commonly been cited as jus cogens prohibitions, such as piracy and genocide.

III. ADMISSIBILITY

28. 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*

29. The Commission considers that it 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, Toronto Markkey Patterson, 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.[FN25]

[FN25] Article 20 of the Statute of the IACHR provides that, in respect of those OAS member states that are not parties to the American Convention on Human Rights, the Commission may examine communications submitted to it and any other available information, to address the government of such states for information deemed pertinent by the Commission, and to make recommendations to such states, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights. See also Charter of the Organization of American States, Arts. 3, 16, 51, 112, 150; Rules of Procedure of the Inter-American Commission on Human Rights, Arts. 49, 50; I/A. Court H.R., Advisory Opinion OC-10/8 "Interpretation of the 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; I/A Comm. H.R., James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, paras. 46-49.

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

31. The Commission is competent *ratione temporis* to examine the complaints because the petition alleges facts that occurred on and after November 21, 1995, when Mr. Patterson was sentenced to death. The facts alleged, therefore, occurred subsequent to the date on which the United States' obligations under the American Declaration took effect.

32. Finally, the Commission is competent *ratione loci*, given that the petition 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

33. The Petitioner has indicated that the subject matter of Mr. Patterson's complaint is not pending settlement pursuant to any other applicable procedure presented to an international government organization.

34. The State, on the other hand, has objected to the admissibility of the petition on the ground of duplication. It claims that in the Roach and Pinkerton Case, the Commission addressed the same issue as that contained in the present complaint, and concluded 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.

35. The Commission has previously considered that a prohibited instance of duplication under the Commission's procedures involves, in principle, the same person, the same legal claims and guarantees, and the same facts adduced in support thereof.[FN26] 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, will not in principle be barred by the prohibition of duplication of claims.[FN27]

[FN26] See e.g. Case 11.827, Report N° 96/98, Peter Blaine (Jamaica), Annual Report of the IACHR 1998, para. 43.

[FN27] *Id.*, para. 45.

36. In the present case, the record indicates that Mr. Patterson has not previously lodged a complaint with the Commission, raising the legality of his death sentence under the American Declaration or otherwise. As this petition cannot be said to involve the same parties as those in the Roach and Pinkerton Case, the Commission finds no bar to the admissibility of the Petitioners' claims under Article 33 of the Commission's Rules of Procedure.[FN28]

[FN28] See similarly Case N° 12.285, Report N° 62/02, Michael Domingues (United States), Annual Report of the IACHR 2002, para. 102.

C. Exhaustion of Domestic Remedies

37. 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. The jurisprudence of the inter-American system makes clear, however, 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. According to the Inter-American Court, the requirement is thus considered a means of defense and, as such, waivable, even tacitly. Further, a waiver, once effected, is irrevocable.[FN29] 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.

[FN29] I/A Court H.R., Loayza Tamayo Case, Preliminary Objections, Judgment of January 31, 1996, Series C N° 25, para. 40.

38. In the present case, the State has failed to provide any observations or information respecting the exhaustion of domestic remedies in respect of Mr. Patterson's 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.

39. Moreover, it is apparent from the Petitioner's Observations that Mr. Patterson pursued available remedies in the U.S. courts, including a direct appeal and habeas corpus petitions before state and federal courts, and that Mr. Patterson was executed on August 28, 2002.

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

D. Timeliness of the Petition

41. 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 Petitioner's petition was lodged on June 3, 2002 and prior to the U.S. Supreme Court's August 28, 2002 denial of Mr. Patterson's petition for a writ of certiorari. Moreover, the State has not specifically contested the timeliness

of the complaint. Consequently, the Commission concludes that the Petitioner's petition is not barred from consideration under Article 32 of the Commission's Rules of Procedure.

E. Colorable Claim

42. The Commission has outlined in Part III of this Report the substantive allegations of the Petitioners, as well as the State's responses to those allegations. After carefully reviewing the information and arguments provided by the parties in light of the heightened scrutiny test applied by the Commission in capital punishment cases^[FN30] and the Commission's existing jurisprudence on the issues raised,^[FN31] and without prejudging the merits of the matter, the Commission considers that the petition states facts that tend to establish a violation of rights protected under Article I of the American Declaration. Accordingly, the Commission concludes that the Petitioners' petition is admissible under the terms of Article 34 of the Commission's Rules of Procedure in respect of the violation of Article I of the American Declaration alleged in the petition.

[FN30] 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 N° 57/96 (Andrews v. United States), Annual Report of the IACHR 1997, paras. 170-171; Report N° 38/00 (Baptiste v. Grenada), Annual Report of the IACHR 1999, paras. 64-66; Report N° 41/00 (McKenzie et al. v. Jamaica), Annual Report of the IACHR 1999, paras. 169-171.

[FN31] See, e.g. James Terry Roach and Jay Pinkerton Case, *supra*; Case 12.285, Report 62/02, Michael Domingues v. United States, Annual Report of the IACHR 2002.

F. Conclusions on Admissibility

43. 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. Patterson in respect of Article I of the American Declaration and continue with the analysis of the merits of the case.

V. MERITS

44. The Petitioners contend that the United States is responsible for violating Article I of the American Declaration, due to the fact that Mr. Patterson was 17-years-old at the time of the crime for which he was convicted and sentenced to death. The Petitioners argue in this connection that the prohibition constitutes general international law, as reflected in numerous treaties, declarations and pronouncements by international bodies as well as the laws of the vast majority of nations, including those of the inter-American system. For its part, the United States relied upon the arguments it submitted in the recent case of Michael Domingues v. United States before this Commission to the effect that a prohibition of this nature does not exist.

45. The Commission recalls that in its recent decisions in *Michael Domingues v. United States*^[FN32] and *Napoleon Beazley v. United States*^[FN33], 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,^[FN34] domestic practice of states, and the practice of the United States. Based upon these developments, the Commission concluded as follows:

[FN32] *Michael Domingues Case*, *supra*.

[FN33] Case 12.412, Report 53/03, *Napoleon Beazley v. United States*, Annual Report of the IACHR 2003. See similarly Case 11.193, Report 97/03, *Gary Graham/Shaka Sankofa*, Annual Report of the IACHR 2003; Case 12.240, Report 100/03, *Douglas Christopher Thomas v. United States*, Annual Report of the IACHR 2003.

[FN34] Pertinent United Nations instruments in this respect include the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), G.A. Res. 40/33, annex, 40 U.N. GAOR Supp. (Nº 53) at 207, U.N. Doc. A/40/53 (1985), Principle 17.2, which provides that "[c]apital punishment shall not be imposed for any crime committed by juveniles."

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.[FN35]

[FN35] Id., paras. 84, 85.

46. In the present case, Mr. Patterson was executed by the state of Texas on August 28, 2002, more than 9 months following the Commission's October 15, 2001 preliminary report in the Domingues Case. The Commission therefore adopts for the purposes of this report its findings in the Domingues case, and concludes that at the time of Mr. Patterson's 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.

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

48. Finally, the Commission considers it important to address the United States' failure to comply with the Commission's June 10, 2002 request for precautionary measures to preserve Mr. Patterson's life pending the Commission's investigation of the allegations in his petition, which the Commission reiterated on August 26, 2002. 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.

49. 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.[FN36]

[FN36] 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, N° 104, paras. 22-28; United Nations Human Rights Committee, Dante Piandiong and others v. The Philippines, Communication N° 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.

50. In the present case, Mr. Patterson's execution was carried out, notwithstanding the fact that he had lodged a petition with the inter-American human rights system and the Commission had requested precautionary measures from the State to stay Mr. Patterson's execution. By permitting Mr. Patterson's execution to proceed in these circumstances, the Commission considers that the United States undermined the efficacy of its process to fully address Mr. Patterson's complaint, deprived Mr. Patterson of his right to petition effectively in the inter-American human rights system, and caused Mr. Patterson 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 81/04

51. The Commission examined this case in the course of its 121st regular session and on October 20, 2004 adopted Report N° 81/04 pursuant to Article 43(2) of the Commission's Rules of Procedure.

52. By note dated November 5, 2004, the Commission transmitted Report N° 81/04 to the State, and requested that the Government of the United States inform the Commission within one month as to the measures adopted to comply the recommendations made to resolve the situation denounced.

53. The Commission did not receive a response from the State to its request for information within the time period specified in its November 5, 2004 note. At the same time, the Commission observes that on March 1, 2005, during the Commission's 122nd regular period of sessions, the United States Supreme Court decided the case of *Roper v. Simmons*,[FN37] in which a majority of the Court held that the Eighth and Fourteenth Amendments to the U.S. Constitution forbid the

imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. In reaching this conclusion, the Court observed that

[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. See Brief for Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae 10-11. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.[FN38]

[FN37] United States Supreme Court, *Roper v. Simmons*, Case N° 03-633 (March 1, 2005, 543 U.S. __ (2005).

[FN38] *Id.*, at 24.

54. Through this decision, the Commission understands that the Supreme Court has effectively abolished the juvenile death penalty in the United States. The Commission commends this development, which it considers has given effect to the Commission's numerous decisions, including the present report, in which it has held that international law precludes the United States from imposing the death penalty on individuals who committed their crimes when they had not yet reached 18 years of age.

VII. CONCLUSIONS

55. The Commission, based on the foregoing considerations of fact and law, and in the absence of a response from the State to Report N° 81/04, ratifies the following conclusions.

56. The Petitioner's claims are admissible as to the alleged violations of Article I of the American Declaration.

57. The State has acted contrary to an international norm of jus cogens as reflected in Article I of the American Declaration by sentencing Toronto Markkey Patterson 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

58. 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 Toronto Markkey Patterson 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

59. In light of the above, and given the exceptional circumstances of the present case, 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,[FN39] 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.

[FN39] 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; Case 12.412, Report 101/03, Napoleon Beazley v. U.S., Annual Report of the IACHR 2003, para. 61.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 7th day of the month of March, 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez and Florentín Meléndez, Commissioners.