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# EXECUTION OF JUVENILE OFFENDERS BY THE UNITED STATES VIOLATES INTERNATIONAL HUMAN RIGHTS LAW

David Weissbrodt\*

## INTRODUCTION

On March 27, 1987, for the first time in its twenty-seven year history, the Inter-American Commission of Human Rights (Commission) found the United States in violation of international human rights law.<sup>1</sup> The Commission is both a consultative organ of the Organization of American States (OAS), and the principal international human rights institution in the Western Hemisphere. The Commission is charged with promoting the observance and protection of human rights in member states.<sup>2</sup> To carry out its mandate, the Commission examines communications alleging human rights violations of member states.<sup>3</sup> When

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\* Professor of Law, University of Minnesota. The author wishes to express his gratitude to Teresa O'Toole and Ruth Gaube — both of the University of Minnesota Law School, class of 1989 — for their assistance in the preparation of this article.

1. Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987); see Cerna & Young, *The Inter-American Commission on Human Rights and the Death Penalty*, 34 FED. B. NEWS & J. 398, 399-400 (1987) (describing the Inter-American Commission and the Roach case); *Inter-American Commission on Human Rights (IACHR), Washington: Application of Death Penalty on Juveniles in the U.S./ Violation of Human Rights Obligation Within the Inter-American System*, 8 HUM. RTS. L.J. 345 (1987) (including commentary by Dinah Shelton).

2. Statute of the Inter-American Commission on Human Rights, art. 1(1), reprinted in HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 147, OEA/ser. L./V/II.65, doc. 6 (1985) [hereinafter Commission Statute]. The Commission derives its authority from the Charter of the Organization of American States (OAS) and the American Convention on Human Rights. Charter of the OAS, Apr. 30, 1948, arts. 51, 112, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3; Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, 721 U.N.T.S. 324; American Convention on Human Rights, Nov. 22, 1969, arts. 33-51, OAS Treaty Series No. 36, OEA/ser. L./V/II.23, doc. 21 rev. 2 [hereinafter American Convention].

3. Commission Statute, *supra* note 2, art. 20. As a prerequisite for the Commission to admit a communication, all domestic remedies must have been invoked and exhausted. Regulations of the Inter-American Commission on Human Rights, approved Apr. 8, 1980, amended Mar. 7, 1985, art. 37, reprinted in HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 117, OEA/ser. L./V/II.65, doc. 6 (1985) [hereinafter Regulations of the Commission].

The Commission monitors those human rights obligations contained in the American Convention, *supra* note 2, and the American Declaration of the Rights and Duties of Man, May 2, 1948, by the Ninth International Conference of American States, Bogota, Colombia, reprinted in HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN

the Commission finds a violation, it makes recommendations for improving the observance of human rights obligations to the government concerned.<sup>4</sup>

The Commission considered petitions brought on behalf of two young offenders sentenced to death for crimes committed while under the age of eighteen and decided that the United States violated international law by permitting the executions. The petitioners asked the Commission to decide whether the failure of the United States to prevent these executions violated the right to life and the prohibition of cruel, inhuman, and unusual punishments guaranteed by the American Declaration of the Rights and Duties of Man.<sup>5</sup> Two United States lawyers filed a petition with the Commission on behalf of James Terry Roach<sup>6</sup> after the United States Supreme Court refused three times to hear Roach's appeal for review of his death sentence.<sup>7</sup> Amnesty International also filed a petition in the case, alleging that international law forbids the execution of offenders for crimes committed while under the age of eighteen.<sup>8</sup>

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RIGHTS IN THE INTER-AMERICAN SYSTEM 19, OEA/ser. L./V/II.60, doc. 28 rev. 1 (1983) [hereinafter American Declaration]. Commission Statute, *supra* note 2, art. 1(2). The United States is not a party to the American Convention, *see infra* note 40 (noting that the United States has not ratified the convention); therefore, the Commission based its decision in Case 9647 on United States violations of the American Declaration. Case 9647, paras. 44-49, INTER-AM C.H.R. 147, 164-66, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

4. Commission Statute, *supra* note 2, art. 20. In addition to examining individual communications alleging human rights violations, the Commission provides consultative services to OAS members regarding their human rights obligations, submits an annual report of its activities to the OAS General Assembly, and conducts on-site observations with the consent of member states. *Id.* art. 18.

5. American Declaration, *supra* note 3, arts. I, XXVI. Petitioners also relied on article VII of the American Declaration, which provides that protection will be specially afforded to children. *Id.* art. VII.

6. The lawyers filing the petition were Mary McClymont, a member of the Washington, D.C. Bar, and the present writer. The American Civil Liberties Union and the International Human Rights Law Group co-sponsored the initial complaint. Case 9647, para. 2, INTER-AM. C.H.R. 147, 148, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The lawyers chose to present the *Roach* case to the Commission because Roach's original lawyers, after exhausting all remedies under United States law, requested that the present author and his colleague Mary McClymont, petition the Commission on behalf of Roach. In addition, it is important to note that Roach, a mentally-retarded juvenile who was accompanied in the crime by a mentally-competent adult, constituted a more sympathetic defendant than the average juvenile sentenced to death. *See infra* notes 21-33 and accompanying text (discussing the procedural history of the *Roach* Case).

7. *Roach v. Martin*, 474 U.S. 865, *reh'g denied*, 474 U.S. 1014 (1985), *stay denied sub nom. Roach v. Aiken*, 474 U.S. 1039 (1986). The impending execution of the second petitioner, Jay Pinkerton, for a murder he committed at age 17, was registered with the Commission on May 8, 1986. Case 9647, para. 7, INTER-AM. C.H.R. 147, 149, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

8. Case 9647, para. 2, INTER-AM. C.H.R. 147, 148, OEA/ser. L./V/II.71, doc. 9

The petitioners drew international attention to the *Roach* case<sup>9</sup> and sought to influence the legislatures, courts, and executives of those twenty-five states in the United States that still impose the death sentence for offenses committed by persons under eighteen.<sup>10</sup> The ensuing publicity over the *Roach* case echoed as far as the United States Supreme Court.<sup>11</sup> After refusing for years to consider the validity of death sentences for juvenile offenders,<sup>12</sup> the United States Supreme Court granted a petition for certiorari in *Thompson v. Oklahoma* on February 23, 1987.<sup>13</sup> In that case, the Supreme Court will determine whether a sentence of death for a crime committed by a juvenile constitutes cruel and unusual punishment under the eighth amendment to the United States Constitution.<sup>14</sup>

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rev. 1 (1987).

9. Eighteen international human rights and legal organizations indicated to the Commission their support of the complaint against the United States. Case 9647, para. 2, INTER-AM. C.H.R. 147, 148, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The petitioners requested the assistance of the Special Rapporteur on Summary or Arbitrary Executions of the United Nations Commission on Human Rights. This request brought increased attention to Roach's predicament. See Weissbrodt, *The Three "Theme" Special Rapporteurs of the U.N. Commission on Human Rights*, 80 AM. J. INT'L L. 685, 691 (1986) (noting that the Special Rapporteur issued a public appeal for Roach's life prior to Roach's execution in January, 1986).

10. Brief of Petitioner at 45, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). Death penalty statutes in 25 of the 36 states that retain capital punishment set the minimum age for its application at less than 18, or set no age minimum at all. V. Streib, Minimum Statutory Ages for the Death Penalty (Apr. 1987) (unpublished memorandum). This memorandum and others referred to *infra* are updates of the data compiled in an earlier article by Professor Victor L. Streib, Cleveland-Marshall College of Law, Cleveland State University. See Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed Under Age Eighteen*, 36 OKLA. L. REV. 613 (1983) (listing earlier versions of the statistics).

11. See McCarthy, *Executing Very Young Children*, Wash. Post, Dec. 28, 1985, § A, at 17, col. 2. (discussing, in general, the execution of juvenile offenders in the United States and, in particular, Roach's impending execution and his appeal to the Commission). Roach's execution was also the subject of *Nightline* (ABC television broadcast, Jan. 9, 1986).

12. Until it granted the petition for certiorari in *Thompson v. Oklahoma*, 107 S. Ct. 1284 (1987), *vacated*, 56 U.S.L.W. 4892 (U.S. Jun. 29, 1988) the Supreme Court had declined to resolve the issue of imposition of death sentences for juvenile offenders. *Pinkerton v. McCotter*, 474 U.S. 865, *reh'g denied*, 474 U.S. 990 (1985), *cert. denied, reh'g denied, stay denied*, 476 U.S. 1109 (1986); see *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (declining to reach the issue of execution of juvenile offenders and subsequently deciding the case on other grounds).

13. *Thompson v. Oklahoma*, 107 S. Ct. 1284 (1987), *vacated*, 56 U.S.L.W. 4892 (U.S. Jun. 29, 1988).

14. See *Thompson v. State*, 724 P.2d 780, 784 (Okla. Crim. App. 1986), *vacated sub nom. Thompson v. Oklahoma*, 56 U.S.L.W. 7892 (U.S. Jun. 29, 1988) (outlining appellant's argument that, because Thompson was only 15 at the time he committed the murder, imposition of the death penalty would violate the eighth amendment prohibition against cruel and unusual punishment).

The grant of certiorari in the *Thompson* case completely changed the political posture of the *Roach* case as it stood before the Commission. Individual jurisdictions in the United States, now awaiting the decision of the Supreme Court on the juvenile execution issue, had little reason to be influenced by the findings of the Commission in *Roach*. Nevertheless, the change in the attitude of the Supreme Court gave the Commission an excellent opportunity to influence the outcome of the

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[Ed. Note: Since this Article was written, the Supreme Court has rendered a decision in *Thompson*. *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988). In *Thompson*, a plurality of four justices — Stevens, Marshall, Brennan, and Blackmun — held that execution of juveniles who were under 16 years of age at the time of their offense violated the prohibition against cruel and unusual punishment in the eighth amendment to the United States Constitution. *Id.* at 2700. In reaching this decision, the plurality relied on (1) state statutes which denied juveniles under 16 various privileges and responsibilities granted to adults, (2) a minimum age of 16 in those states statutes which set such a minimum age for the death penalty, (3) international consensus against executing juveniles, and (4) the infrequent application of the death penalty in the United States. On the basis of this evidence the plurality concluded that United States society holds juveniles under age 16 to different standards than adults — at least with regard to the death penalty. *Id.* at 2692-98. The plurality also noted that the execution of juveniles would not aid the social purposes of retribution and deterrence underlying imposition of the death penalty because juveniles are considered less culpable than adults and because states so infrequently apply the death penalty to juveniles. *Id.* at 2699-700.]

Justice O'Connor concurred in the judgment, but disagreed with the plurality's conclusion that a societal consensus exists which forbids application of the death penalty to juveniles under age 16 at the time of their offense. *Id.* at 2709-10. In questioning the existence of such a societal consensus, she pointed to the presence of both state and federal statutes that allow the execution of juveniles under 16 at the time of their offense. *Id.* at 2708. Rather than presume a consensus in such uncertain circumstances, Justice O'Connor preferred to leave the determination of a minimum age for the death penalty to the individual legislatures. *Id.* at 2709. Nevertheless, she noted that the Oklahoma statute in question and others like it specified no minimum age, producing a risk that the legislatures passing such statutes either failed to realize they could apply to juveniles or failed to give the question of juvenile execution the special care and deliberation the Court has required of decisions leading to the death penalty. *Id.* at 2710-11. In view of this ambiguity and the evidence of consensus as to a minimum age for the death penalty, Justice O'Connor concluded that juveniles under the age of 16 at the time of their offense cannot be executed under statutes which do not specify a minimum age for the death penalty. *Id.* at 2711. Justice Scalia wrote the dissent for himself, Chief Justice Rehnquist, and Justice White. Justice Scalia questioned whether there existed a national consensus against executing juveniles under the age of 16 and criticized the use of international standards for interpreting the eighth amendment. *Id.* at 2711, 2716 n.4. Justice Kennedy did not take part in the consideration or decision of this case.

Shortly after deciding *Thompson*, the Court granted certiorari in two more juvenile death penalty cases. The defendant in one of these cases, *Wilkins v. Missouri*, was 16 years old at the time of his offense. *Wilkins v. Missouri*, 736 F.2d 409, 415 (Mo. 1987), cert. granted, 57 U.S.L.W. 3026 (U.S. July 19, 1988) (No. 87-6026). The defendant in the other case, *High v. Zant*, was 17 years old at the time of his offense. *High v. Zant*, 819 F.2d 988, 993 (11th Cir. 1987), cert. granted, 57 U.S.L.W. 3026 (U.S. July 19, 1988) (No. 87-5666).]

*Thompson* case. The Commission could have decided that executing juveniles is cruel, infamous, or unusual punishment, and as such constitutes a violation of the guarantee to the right to life of the American Declaration.<sup>15</sup> Such a decision would have strengthened the argument that the execution of juveniles constitutes cruel and unusual punishment under the United States Constitution. Unfortunately, the Commission's opinion promulgated in the *Roach* case suffers from flawed reasoning and incorrect applications of international law. Thus, the opinion is unlikely to provide meaningful guidance for the Supreme Court. Read least favorably, the opinion may be interpreted as stating that a federal system of criminal justice violates international law. A more generous interpretation of the opinion is that, in light of the guarantee of the American Declaration to the right to life, and the peremptory international norm forbidding the execution of children, it would be an arbitrary deprivation of life and inequality before the law to permit the execution of juveniles to depend on the location of the offense.<sup>16</sup> The Commission thus based its decision on a perceived flaw in the federal criminal justice system of the United States,<sup>17</sup> and thereby squandered its opportunity to influence the Supreme Court. Consequently, the *Roach* opinion will provide only limited aid to the now approximately thirty young United States citizens sentenced to death for offenses committed before they reached eighteen.<sup>18</sup> In addition, the *Roach* decision is unlikely to influence the development of an international human rights norm against the execution of juvenile offenders.

The Commission missed its opportunity to help change United States law and to develop international law partly because its analysis went

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15. American Declaration, *supra* note 3, arts. I, XXVI.

16. Case 9647, paras. 63-65, INTER-AM. C.H.R. 147, 173, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987); American Declaration, *supra* note 3, arts. I, II.

17. Case 9647, para. 63, INTER-AM. C.H.R. 147, 173, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

For the federal Government of the United States to leave the issue of the application of the death penalty to juveniles to the discretion of State officials results in a patchwork scheme of legislation which makes the severity of the punishment dependent, not primarily, on the nature of the crime committed, but on the location, where it was committed.

*Id.*

18. See V. Streib, Persons on Death Row as of May 1, 1987, for Crimes Committed While Under Age Eighteen (Nov. 1987) (unpublished memorandum).

Amnesty International's *amicus curiae* brief in *Thompson* supports the conclusion that the decision in *Roach* will be of limited aid to other United States citizens sentenced to death for crimes committed before they reached 18 because the brief mentions the *Roach* decision only in a footnote. Brief for *Amicus Curiae* Amnesty International in Support of Petitioner at 32 n.22, *Thompson v. State*, 107 S. Ct. 1284 (1987), *vacated sub nom.* *Thompson v. Oklahoma*, 56 U.S.L.W. 4892 (U.S. Jun. 29, 1988) (No. 87-5666).

far beyond the arguments of the parties to the case and raised issues that were not adequately considered. Whether the execution of Roach violated the non-discrimination provision (Article II) of the American Declaration was an issue that was neither briefed nor argued by the parties.<sup>19</sup> The Commission nevertheless gave this issue considerable weight in the promulgation of its opinion. The Commission also based its decision in part on an issue related to the transfer of juvenile offenders for trial as adults, which was not presented in the facts before it.<sup>20</sup>

This article outlines the arguments of the petitioner in *Roach*, and the response of the State Department for the United States. It then analyzes the bases for the decision of the Commission and explores the international human rights issues raised by imposition of the death penalty on juveniles. Finally, it proposes an approach for the Commission to use in the future to improve its decision-making process and to avoid unfortunate decisions such as the one issued in *Roach*.

## I. HISTORY OF CASE 9647

Petitioner James Terry Roach was charged with being involved with an adult and another youth in the rape and murder of a fourteen-year-old girl, and the murder and armed robbery of her seventeen-year-old boyfriend.<sup>21</sup> The other youth turned state's evidence and received a sentence of life imprisonment. The dominant adult pleaded guilty, and led Roach to plead guilty as well. Although he was chronologically seventeen at the time of his trial, Roach's mental age was only twelve because he was mentally retarded.<sup>22</sup> Nevertheless, the trial court sentenced him to death on December 16, 1977.

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19. Brief of Petitioner at 39-43, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The complaint against the United States alleged violations of the guarantee to the right to life of the American Declaration (Article I), its guarantee of special protection for children (Article VII), and its prohibition of cruel, infamous, and unusual punishments (Article XXVI). *Id.* at 34.

20. See S.C. CODE ANN. §§ 20-7-390, 400 (Law. Co-op. 1985) (stating that any child, 17 years of age or older, alleged to have violated the law prior to reaching the age of 17 shall be treated as a child and all others shall be treated as adults); TEX. REV. CIV. STAT. ANN. art. 2338-1, §§ 3, 5 (Vernon 1971) (limiting juvenile court jurisdiction to those under seventeen). The issue of discretionary transfer of juveniles for trial in adult criminal courts was not relevant in either Roach's or Pinkerton's case; neither petitioner could have been tried in juvenile court, because each was 17 years old at the time of his offense. Case 9647, para. 57, INTER-AM. C.H.R. 147, 171, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The Commission, nevertheless, focused its discussion on the transfer of juveniles to be tried as adults. *Id.*

21. *Roach v. Martin*, 757 F.2d 1463, 1468 (4th Cir. 1985).

22. Case 9647, para. 23, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

After the South Carolina Supreme Court upheld this sentence,<sup>23</sup> the United States Supreme Court denied Roach's first petition for certiorari.<sup>24</sup> Upon denial of certiorari, Roach applied for, and was denied, post-conviction relief in the South Carolina trial court. The South Carolina Supreme Court dismissed the appeal of this denial.<sup>25</sup> The United States Supreme Court again refused to review the decisions of the South Carolina courts.<sup>26</sup> Subsequently, Roach petitioned the United States District Court of South Carolina for a writ of habeas corpus, but the petition was denied.<sup>27</sup> The United States Court of Appeals for the Fourth Circuit affirmed the denial of the district court,<sup>28</sup> and Roach unsuccessfully sought certiorari from the United States Supreme Court for the third time.<sup>29</sup> Having exhausted his domestic remedies, Roach's attorneys brought his case before the Commission.<sup>30</sup>

The Commission, pending its review of Roach's petition, sought to preserve the status quo and requested a stay of execution from United States Secretary of State George Shultz and South Carolina Governor Richard Riley.<sup>31</sup> International dignitaries, including the Secretary General of the United Nations, also sought relief for Roach.<sup>32</sup> Despite these pleas for clemency, Roach was executed on January 10, 1986.<sup>33</sup> The Commission, in a vote of five members to one, held that the United States violated the American Declaration of the Rights and Duties of Man through its executions of Roach and a second juvenile offender,

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23. *State v. Shaw (and Roach)*, 273 S.C. 194, 194, 255 S.E.2d 799, 799 (1979).

24. *Roach v. State*, 444 U.S. 1026, *reh'g denied*, 444 U.S. 1104 (1980).

25. *Roach v. State*, Mem. Op. No. 81-MO-197 (S.C. July 17, 1981).

26. *Roach v. South Carolina*, 455 U.S. 927 (1982).

27. *Roach v. Martin*, Civil Action No. 81-1907-14 (May 11, 1984).

28. *Roach v. Martin*, 757 F.2d 1463 (4th Cir. 1985).

29. *Roach v. Martin*, 474 U.S. 865, *reh'g denied*, 474 U.S. 1014 (1985), *stay denied sub nom. Roach v. Aiken*, 474 U.S. 1039 (1986).

30. See Regulations of the Commission, *supra* note 3, art. 37 (articulating that petitioners must exhaust their domestic remedies before bringing cases to the Commission).

31. See *id.* art. 29 (authorizing provisional relief in execution cases). The State Department, in response to the request of the Commission, claimed that no domestic legal ground allowed federal executive intervention in the implementation of Roach's sentence by South Carolina. Case 9647, para. 3, INTER-AM. C.H.R. 147, 149, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). Governor Riley stated that he would not intervene. See Espy, *Executioner Prepares to Kill a Man For a Juvenile Crime*, Minneapolis Star & Tribune, Jan. 9, 1986 (discussing the *Roach* case, and the history of juvenile execution in the United States).

32. Brief of Petitioner at 6, Case 9647, INTER-AM. C.H.R., 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

33. Case 9647, para. 3, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The requests from the Commission to Secretary of State Shultz and to Texas Governor Mark White for a stay of petitioner Pinkerton's execution were similarly unavailing. *Id.* at para. 7. Pinkerton was put to death on May 15, 1986. *Id.* at para. 4.



Pinkerton.<sup>34</sup> The Commission member from the United States did not participate in the discussion or decision of the *Roach* case.<sup>35</sup>

## II. ARGUMENTS OF PETITIONER

Petitioners in Case 9647 first asked the Commission to reaffirm its previous holding that the American Declaration is binding on the United States.<sup>36</sup> They sought a declaration that the executions of Roach and Pinkerton for offenses committed while under the age of eighteen violated the American Declaration as interpreted in light of customary international law.<sup>37</sup> Petitioners asserted that the Commission should use international human rights treaties and the practice of almost all of the nations in the world to inform the American Declaration's provisions. Petitioners asked the Commission to confirm the existence of a rule of customary international law prohibiting the execution of juveniles.<sup>38</sup>

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34. *Id.* at paras. 63-65.

35. See Regulations of the Commission, *supra* note 3, art. 19(2)(a) (providing that a Commission member need not participate in decisions of cases brought against his or her own state). The United States requested that the Commission reconsider the case. Request for Reconsideration of Resolution No. 3/87, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The Commission denied the request on 21 September 1987, stating:

In the opinion of the Commission its decision does not undermine the structures of U.S. federalism, however, federalism cannot be used as a shield to prevent compliance with a State's international obligations. The decision of the Commission does not require that the U.S. nationalize its criminal code, rather it guarantees the protection of the most fundamental right —the right to life. The Commission finds that the failure of the federal government to preempt the states in this area has resulted in the arbitrary deprivation of the right to life given the widespread disparity in sentences which have been handed down for the same crimes. Consequently, the non-discrimination principle of the right to equality clause (Article II) of the American Declaration, in the Commission's opinion, does compel a uniformity in sentencing within the nation State when deprivation of the right to life is involved.

The Reasons of the Commission for not Modifying its Decision, Case 9647, INTER-AM. C.H.R., slip. op. at 1 (Sept. 21, 1987).

36. See Case 2141, para. 16, INTER-AM. C.H.R. 25, 33, OEA/ser. L./V/II.54, doc. 9 rev. 1 (1981), reprinted in 2 HUM. RTS. L.J. 110, 112 (1981) (stating that OAS human rights instruments, including the American Declaration, are binding on the United States).

37. Brief of Petitioner at 45-46, Case 9647, INTER-AM C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The American Declaration acquired binding force on OAS member states through articles 3(j), 16, 51(e), 112 and 150 of the OAS Charter. Case 2141, para. 16, INTER-AM. C.H.R., OEA/ser. L./V/II.52, doc. 48 (1981). Numerous international treaties, resolutions, and declarations reflect the international consensus against juvenile execution. See N. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 186 (1987) (arguing in favor of a consensus against juvenile execution).

38. Brief for Petitioner at 21, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/

The complaint against the United States alleged that the execution of persons for crimes committed before they reached eighteen violated the guarantee of the American Declaration to the right to life, the provision affording special protection for children, and the prohibition of cruel, infamous, or unusual punishments.<sup>39</sup> Petitioners claimed that the ordinary meaning of the terms of the relevant articles, in their context and in light of their object and purpose, required the United States to prevent the execution of persons for crimes committed while under the age of eighteen.<sup>40</sup>

Petitioners asked the Commission to use customary international law in interpreting the American Declaration. Customary international law qualifies as a principal source of interpretation, under the interpretive norms of the Vienna Convention on the Law of Treaties, because it falls within the "relevant rules of international law applicable in the relations between the parties."<sup>41</sup> Widespread state practice can reveal a customary norm of international law where *opinio juris* also exists. Evidence that the norm has been accepted as giving rise to an international legal obligation constitutes *opinio juris*.<sup>42</sup> Petitioners noted that

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II.71, doc. 9 rev. 1 (1984).

39. See American Declaration, *supra* note 3, arts. I, VII, and XXVI (guaranteeing the right to life, providing special protection for children, and prohibiting cruel, infamous, or unusual punishment).

40. Brief of Petitioner at 14-20, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The American Declaration itself does not address the issue of capital punishment. Case 9647, para. 44, INTER-AM. C.H.R. 147, 164, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The OAS American Convention on Human Rights specifically forbids states that are parties to the Convention to impose capital punishment on persons under the age of 18. American Convention, *supra* note 2, art. 4, para. 5. The United States has not ratified this agreement, however; thus the Commission could not find the United States in violation of it. Case 9647, para. 47, INTER-AM. C.H.R. 147, 165, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987); Case 2141, para. 31, INTER-AM. C.H.R. 25, 43, OEA/ser. L./V/II.54, doc. 9 rev. 1 (1981); see also American Convention, *supra* note 2, art. 4, para. 5 (prohibiting imposition of the death penalty on persons who were under 18 years of age when they committed the crime). But see *infra* notes 82-83, and accompanying text (outlining the arguments of the United States Department of State against reliance upon the American Declaration arts. I, VII, and XXVI).

41. See M. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 268 (1985) (pointing out that the Vienna Conference did not reject the use of customary international law for interpretation under Vienna Convention, art. 31, para. 3(3)).

42. See Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 31-35, 53 (1974) (explaining that the creation of customary rules requires *opinio juris*); see Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. CIN. L. REV. 655, 671 (1983) (stating that *opinio juris* distinguishes practices that a state considers binding legal obligations from practices that the state may discontinue without breaching international law).

treaties comprise a part of state practice,<sup>43</sup> and cited three major international human rights treaties that explicitly prohibit imposing the death penalty on persons under eighteen.<sup>44</sup> Although the United States has ratified only the Geneva Convention, it has signed the other two treaties.<sup>45</sup> These treaties have been broadly accepted throughout the world.<sup>46</sup> The greater the number of parties to a treaty, the greater the inference that it rises to the level of customary international law.<sup>47</sup> Additionally, these treaties allow no derogation from their prohibitions against imposing the death penalty on juveniles.<sup>48</sup> Petitioners alleged

43. Brief of Petitioner at 22, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987) (citing Akehurst, *supra* note 42, at 53).

44. See American Convention, *supra* note 2, art. 4, para. 5 (forbidding states to impose the death penalty on persons under 18 years old). International Covenant on Civil and Political Rights, art. 6, para. 5, *opened for signature* Dec. 19, 1966, Annex to G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 53, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 [hereinafter International Covenant on Civil and Political Rights], *reprinted in* 6 I.L.M. 360 (1967) (prohibiting the death sentence for anyone under 18 years of age); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365, 75 U.N.T.S. 287, 330 [hereinafter Fourth Geneva Convention] (prohibiting the death penalty for protected persons under the age of 18 at the time of the offense).

45. Brief of Petitioner at 26, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). Petitioners noted that the Commission previously had used the American Convention to interpret the American Declaration with respect to governments that had not yet ratified the Convention. *Id.* at 30 (citing INTER-AM. C.H.R., REPORT ON THE STATUS OF HUMAN RIGHTS IN CHILE: FINDINGS OF "ON-THE-SPOT" OBSERVATIONS IN THE REPUBLIC OF CHILE 2-4, JULY 22-AUGUST 2, 1984, OEA/ser. L./V/II.34, doc. 21 1 (1974)).

46. Nineteen American States have ratified the American Convention and three others have signed it. INTER-AM. C.H.R., HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/ser. L./V/II.65, doc. 6 rev. 63 (1985). Eighty-six nations have ratified the International Covenant on Civil and Political Rights and nine others have signed it. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL OF THE U.N., U.N. Doc. ST/LEG./SER. E.3 124 (1985), *updated through* June 30, 1986, in RESERVATIONS, DECLARATIONS, NOTIFICATIONS, AND OBJECTIONS RELATING TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE OPTIONAL PROTOCOL THERETO, U.N. Doc. CCPR/C/2/Rev. 1, at 6-8 (1987), *updated through* March 1987 in Brief for *Amicus Curiae* Amnesty International in Support of Petitioner at 28, *Thompson v. Oklahoma*, 724 P.2d 780 (Okla. Crim. App.), *vacated*, 56 U.S.L.W. 4892 (U.S. Jun. 29, 1988). One hundred sixty-five nations have ratified the Geneva Convention as of December 31, 1986. *States Parties to the Geneva Convention of 12 August 1949*, 1987 INT'L REV. RED CROSS 111.

47. See *North Sea Continental Shelf Cases* (W. Ger. v. Den.) (W. Ger. v. Neth.) 1969 I.C.J. 3, 42 (Judgment of Feb. 20) (stating that very widespread and representative participation in a convention might suffice to show a general rule of international law).

48. See American Convention, *supra* note 2, art. 27, para. 2 (allowing no derogation from the prohibition on the death penalty for persons under 18 years of age); International Covenant on Civil and Political Rights, *supra* note 44, art. 4, para. 2 (prohibiting derogation from the article 6, paragraph 5 prohibition on the imposition of the death penalty on persons under 18 years of age).

that these treaty provisions actually represented codifications of an already existing binding norm, citing the *travaux préparatoires* of the documents.<sup>49</sup>

Petitioners offered national laws abolishing the death penalty as further evidence of a customary norm prohibiting juvenile executions.<sup>50</sup> Thirty-two nations have completely abolished the death penalty. Eighteen others apply it only for exceptional crimes, such as crimes committed under military law or during wartime.<sup>51</sup> Forty-one of the countries that retain the death penalty have statutory provisions exempting juveniles from its application.<sup>52</sup> In practice, the execution of persons for crimes committed while under the age of eighteen is extremely rare.<sup>53</sup> Petitioners also noted that seven jurisdictions within the United States set eighteen as the minimum age for application of the death penalty, while another twelve consider age as a mitigating factor in sentencing.<sup>54</sup> Additionally, both the American Bar Association and the American Law Institute oppose execution of persons for crimes committed under the age of eighteen.<sup>55</sup>

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49. Brief of Petitioner at 27, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). Petitioners also cited a United Nations General Assembly resolution which recognized that article 6 of the International Covenant on Civil and Political Rights constitutes a "minimum standard" for all Member States, not just ratifying states. *Id.* at 28; see Hartman, *supra* note 42, at 672 n.64 (arguing that article 6 was the codification of an existing and binding norm); see also G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980) (urging member states to respect as a minimum standard article 6 of the International Convention on Civil and Political Rights). Brief of Petitioner at 32-35, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

50. Brief of Petitioner at 32-35, Case 9647, INTER-AM. C.H.R. 147, OEA ser. L./V/II.71, doc. 9 rev. 1 (1987).

51. Amnesty International, *The Death Penalty, List of Abolitionist and Retentionist Countries*, A.I. Index ACT 5/14/1985 (August 1987) [hereinafter *Amnesty International*].

52. Hartman, *supra* note 42, at 666 n.44.

53. Brief of Petitioner at 34, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). "Amnesty International has collected data showing that, since 1979, although 80 nations of the world have executed over 11,000 persons, only six persons who committed offenses under 18 were executed by only four nations, including the United States." *Id.*

54. *Id.* at 33 n.67 (citing V. Streib, *Minimum Statutory Ages for the Death Penalty* (Oct. 1, 1985) (unpublished memorandum)). See Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 526-27 (1987) (discussing juveniles and the death penalty).

55. Brief of Petitioner at 33, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). See MODEL PENAL CODE § 210.6(1)(d) (Proposed Official Draft, 1962) (excluding the death sentence for persons under 18 years of age at the time of the crime); MODEL PENAL CODE 133 (Official Draft and Revised Comments 1980) (noting that the death penalty will never apply to a juvenile who committed murder); AMERICAN BAR ASSOCIATION REPORT NO. 117A (approved August, 1983)

Petitioners concluded that approximately two-thirds of the nations of the world reject the execution of juveniles.<sup>56</sup> Many nations have done so either through ratification of the International Covenant on Civil and Political Rights, or the American Convention, or both. Many nations have abolished the death penalty totally, allow it for exceptional crimes only, or exempt juveniles from the death penalty.<sup>57</sup> Petitioners asked the Commission to find that the prohibition against juvenile executions had acquired the status of customary law, which the Commission should use to interpret and inform the American Declaration.<sup>58</sup>

The Vienna Convention on the Law of Treaties calls for the petitioners' suggested method of interpretation. Article 31(1) provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in the light of its object and purpose."<sup>59</sup> In addition, article 31(3)(c) requires consideration of any relevant rules of international law applicable to the parties.<sup>60</sup>

Although the United States has not yet ratified the Vienna Convention, the State Department noted in its Letter of Submittal to the President that "the [Vienna] Convention is already generally recognized as the authoritative guide to current treaty law and practice."<sup>61</sup> Additionally, the Inter-American Court of Human Rights previously used the Vienna Convention as its sole guide for construing the American Convention on Human Rights. Petitioners noted that article 18(a) of the Vienna Convention requires states to refrain from acts that would de-

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(opposing the death penalty for minors).

56. Brief of Petitioner at 35, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

57. *Id.* at 35-36.

58. *Id.* at 9; see Vienna Convention on the Law of Treaties, arts. 31(3), 31(3)(c), opened for signature May 23, 1969, U.N. Doc. A/CONF 39/27, reprinted in 8 I.L.M. 679, 691-92 (1969), entered into force Jan. 27, 1980 [hereinafter Vienna Convention] (stating that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context, in light of the object and purpose of the treaty, and that any relevant rules of international law applicable to the parties should be taken into account).

59. *In re Viviana Gallardo*, INTER-AM. C.H.R., Op. G 101/81 (1981), para. 20, reprinted in Annual Report of the INTER-AM. C.H.R. 12, OEA/ser. P/AG/doc. 1510/82 (1982) (holding that the American Convention must be read in accordance with the principles of treaty interpretation of the Vienna Convention, article 31(1), which states that provisions of a treaty must be read in accordance with their ordinary meaning in their context and in light of the treaty's object and purpose).

60. Vienna Convention, *supra* note 58, art. 31, para. 3(c).

61. S. Exec. Doc. L, 92d Cong., 1st Sess. 1 (1971); see RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Part III introductory note (Tent. Draft No. 6, 1985) (stating that the State Department and United States courts recognize the Vienna Convention as authority).

feat the object and purpose of a treaty during the period between signing and ratifying the treaty.<sup>62</sup> Petitioners argued that this provision of the Vienna Convention precluded the United States from allowing the execution of persons for offenses committed while under eighteen. The United States has signed but not ratified both the American Convention and the International Covenant on Civil and Political Rights.<sup>63</sup>

Petitioners also cited the Vienna Convention in support of their argument that the Commission should not rely on the *travaux préparatoires* of the American Declaration in interpreting its right-to-life provision, as the United States had urged.<sup>64</sup> Petitioners noted that article 32 of the Vienna Convention provides for consultation of an agreement's *travaux préparatoires* only after exploring the means of interpretation under article 31. Article 32 then allows use of *travaux préparatoires* only to confirm the meaning revealed by the article 31 interpretation, or to determine the meaning of the text if the article 31 interpretation leaves the meaning ambiguous, obscure, or leads to a manifestly absurd or unreasonable result.<sup>65</sup> Petitioners asserted that the Commission could not resort to this supplemental means of interpretation. They contended that the primary means of interpretation under article 31, including the use of customary international law, made the language in the American Declaration clear.<sup>66</sup> The petitioners noted that consultation of the *travaux* does not clarify the meaning of the Declaration, but permits differing interpretations of the Declaration's stand on capital punishment.<sup>67</sup>

In response to the assertion of the United States that the federal government had no power to delay South Carolina's execution of

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62. Brief of Petitioner at 26 n.50, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

63. By signing the American Convention, the United States accepts the responsibility to refrain from acts calculated to frustrate the objects of the treaty. Vienna Convention, *supra* note 58, art. 18, (requiring a state to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty or . . . expressed its consent to be bound by the treaty . . .").

64. Brief of Petitioner at 36, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). *But see infra* notes 73-74, 82-86 and accompanying text (outlining the arguments of the United States in favor of use of the *travaux préparatoires* to interpret the right-to-life provision).

65. Brief of Petitioner at 36, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987); *see* Vienna Convention, *supra* note 58, art. 32 (stating that supplementary means of interpretation, including *travaux préparatoires*, may confirm the meaning resulting from primary interpretation under article 31, or may determine the meaning when the interpretation under article 31 leaves the meaning obscure or ambiguous or leads to a manifestly absurd result).

66. Brief of Petitioner at 38, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

67. *Id.* at 41.

Roach,<sup>68</sup> petitioners suggested that any appeal from a federal official would have helped persuade the governor of South Carolina to issue a reprieve pending the decision of the Commission.<sup>69</sup> Petitioners added that if the Commission interpreted the American Declaration to forbid the execution of persons for juvenile offenses its interpretation would be especially persuasive to state courts, federal courts, and state government officials; an interpretation of an agreement of the United States by an international body authorized to interpret it is binding on the United States and its courts and agencies.<sup>70</sup>

### III. RESPONSE OF THE STATE DEPARTMENT FOR THE UNITED STATES

The United States denied the existence of a prohibition against juvenile executions, both within the American Declaration and as a norm of customary international law.<sup>71</sup> The United States, questioning whether the Declaration had binding force, also disputed the applicability of the Vienna Convention to interpret the American Declaration.<sup>72</sup> The United States argued that, even if the Vienna Convention did apply to the American Declaration, the *travaux préparatoires* of the Declaration showed that its drafters failed to agree on any limitation on the use of the death penalty.<sup>73</sup> Similarly, the United States argued that, even if customary international law prohibited juvenile executions, the United States had dissented from such a norm, and therefore was not bound by it.<sup>74</sup>

The United States claimed that the silence of the American Declaration on the issue of the death penalty constituted a deliberate choice on the part of the drafters. The Commission therefore could not interpret the Declaration to prohibit juvenile executions.<sup>75</sup> The United States al-

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68. See *supra* note 31 (noting the claim of the State Department that the Executive lacked legal authority to intervene in the implementation of Roach's sentences).

69. Brief of Petitioner at 45, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

70. *Id.*; see RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 reporter's note 5 (Tent. Draft No. 6, 1985) (citing Matter of International Bank for Reconstruction and Development, 17 F.C.C. 450, 461 (1953) for the proposition that an interpretation of an agreement of the United States by an international body authorized by the agreement to interpret it is binding on the United States and its courts and agencies).

71. Memorandum of the United States, at 3, 17, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

72. *Id.* at 6 n.6.

73. *Id.* at 3-4.

74. *Id.* at 17-19.

75. Case 9647, paras. 38(a), (b), INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71,

leged that the drafters of the American Declaration deleted language limiting the use of capital punishment from the original version of the right-to-life article<sup>76</sup> because they intended to leave the issue of the death penalty to the discretion of individual nations.<sup>77</sup>

The United States also attacked petitioners' reliance on the articles of the American Declaration that protect children and forbid cruel, infamous, or unusual punishments to support a prohibition against juvenile executions.<sup>78</sup> Noting that both the American Convention and the International Covenant on Civil and Political Rights treat the death penalty only under their right-to-life articles, the United States claimed that capital punishment was not cruel, infamous, or unusual punishment under article XXVI because of the diverse death penalty legislation in force at the time of its adoption.<sup>79</sup>

The United States further disagreed with petitioners' definition of "children" in the article of the Declaration that affords special protection to children as meaning persons under eighteen.<sup>80</sup> While acknowledging that one meaning of "children" is "minors," or persons who have not come of age, the United States argued that varying state practice regarding the age of majority precluded using the provision of the

doc. 9 rev. 1 (1987) (outlining arguments of the United States concerning silence of the American Declaration on the issue of the death penalty).

76. See United States Reply at 1-2, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987) (citing *Novena Conferencia Internacional Americana, 5 Acta y Documentos* 449 for the proposition that the original version of article I of the American Declaration limited imposition of the death penalty. The original version of article I limited the death penalty to cases in which a preexisting law established such a penalty for exceptionally grave crimes. *Id.* The United States alleged that the variety of legislation on capital punishment in the hemisphere prevented agreement on a common statement of principle. *Id.* at 3. This caused the drafters to delete any references to the death penalty from the final version of the right-to-life article. *Id.*

77. See United States Reply at 3, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987) (noting the variety of legislation regarding capital punishment among individual states).

78. Memorandum of the United States at 4-6, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

79. Brief of Petitioner at 42 n.80, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). Petitioners countered this argument with evidence that the death penalty for juveniles was rare and unusual. *Id.* Petitioners also attacked the reasoning of the United States:

[I]t is clear that numerous examples could be found of legislation and practice existing at the adoption of the Declaration which could be seen as violating rights drafted into the Declaration. Normal international practice seeks to bring restrictive national legislation into conformity with international human rights aspirations and not the reverse.

*Id.* at 42 (quoting Shelton, *Abortion and the Right to Life in the Inter-American System: The Case of 'Baby Boy'*, 2 HUM. RTS. L.J. 309, 314 (1981)).

80. Memorandum of the United States at 5, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).



Declaration that protects children to establish eighteen as the minimum age for imposition of the death penalty.<sup>81</sup>

Additionally, the United States opposed petitioners' argument that the Commission should interpret the American Declaration only according to article 31 of the Vienna Convention.<sup>82</sup> The United States denied that the language of the relevant articles was unambiguous, and claimed that consultation of the *travaux préparatoires* therefore was appropriate.<sup>83</sup> The United States opposed the use of the American Convention and the International Covenant on Civil and Political Rights to interpret the American Declaration on two grounds. First, the United States disputed the power of the Commission to apply provisions of the Convention and the Covenant to a state not a party to these agreements.<sup>84</sup> The United States then denied petitioners' contention that the Convention's prohibition of executions for crimes committed by persons under eighteen codified a norm of customary international law. The United States argued that the purpose of article 4(5) of the Convention was rather to create uniformity where none previously had existed.<sup>85</sup>

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81. *Id.* The United States noted that the drafters of the International Covenant on Civil and Political Rights specifically distinguished "children" from "persons under eighteen," considering "children" as a more flexible definition, and not equivalent to any particular age. *Id.* at n.5 (quoting 12 U.N. GAOR Annex C.3 (Agenda Item 33, addendum part 1) at 10-11, 13 U.N. Doc. A/2764 (1957)).

82. *Id.* at 6; see *supra* notes 52-57 and accompanying text (outlining petitioners' argument that most nations refrain from executing individuals under 18).

83. Memorandum of the United States at 6, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). Additionally, the United States denied that the Vienna Convention applied to the American Declaration at all, disputing the Commission's earlier finding that the Declaration acquired binding force with the adoption of the revised OAS Charter. *Id.* at n.6; see Case 2141, para. 16, INTER-AM. C.H.R. 25, 38, OEA/ser. L./V/II.54, doc. 9 rev. 1 (1981) (noting that the OAS Charter acquired binding force as a result of the Protocol of Buenos Aires).

84. Memorandum of the United States at 7-8, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The United States relied on language used in Case 2141: "it would be impossible to impose upon . . . any . . . Member State of the OAS, by means of 'interpretation,' an international obligation based upon a treaty that such State has not duly accepted or ratified." Case 2141, para. 31, INTER-AM. C.H.R. 25, 43, OEA/ser. L./V/II.54, doc. 9 rev. 1 (1981). Petitioners noted that this language was *obiter dictum*, however, because it was unnecessary to the decision in Case 2141. Brief of Petitioner at 30, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). This language also ignores article 18 of the Vienna Convention on the Law of Treaties. See *supra* notes 61-63 (noting that a State, between the signing and ratifying of a treaty, must refrain from acts that defeat the object and purpose of the treaty).

85. Case 9647, para. 38(g), INTER-AM. C.H.R. 147, 159, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The United States noted that one delegate to the Conference at which the American Convention was drafted suggested replacing the specific minimum age in article 4, para. 5 with a reference to "minors," and that the United States proposed deleting the article altogether. Memorandum of the United States at 10, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987) (quoting

Similarly, the United States claimed that the purpose of the prohibition of juvenile executions in the International Covenants was to impose a norm not universally accepted at the time of its drafting.<sup>86</sup>

Moreover, the United States denied that a customary norm prohibiting the use of the death penalty on minors who had committed crimes had developed since the drafting of the International Covenant and the American Convention.<sup>87</sup> The United States contended that the age of majority for purposes of imposing the death penalty was not a matter of uniform state practice. Furthermore, it denied the existence of *opinio juris* required to establish a customary norm of international law.<sup>88</sup> The United States alleged that any changes in legislation undertaken after a state ratified either the American Convention or the International Covenant could not be taken as evidence of a belief that a customary international legal obligation existed.<sup>89</sup>

In addition, the United States asserted that it had dissented from the minimum age standard stated in the American Convention and the International Covenant. The United States delegate abstained from participation in either the debate or the vote on the draft Covenant, and

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Inter-American Specialized Conference on Human Rights, Annotations on the Draft Inter-American Convention on Protection of Human Rights, OEA/ser. K./XVI/1.1, doc. 40 corr. 1, at 2-3 (1969)). Based on its comments contained in the *travaux préparatoires*, the United States delegation appeared concerned only that setting specific age limits on the exercise of the death penalty did not adequately take into account the "already apparent" trend toward gradual abolition of the death penalty. See T. BUERGENTHAL & R. NORRIS, *Observations and Proposed Amendments to the Draft of the Inter-American Convention on Protection of Human Rights*, in 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM (T. Buergenthal & R. Norris, eds. 1983) Booklet No. 14, at 152 [hereinafter T. Buergenthal & R. Norris] (noting that every human being has the inherent right to life).

86. Memorandum of the United States at 9, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The specific age restriction in article 6(5) of the International Covenant was adopted by a vote of 21 to 19, with 28 abstentions. *Id.* at 13.

87. *Id.* at 14.

88. *Id.* at 14-15. The United States claimed that petitioners had failed to show that those states that have adopted 18 as the minimum age for imposition of the death penalty did so from a sense of international legal obligation. *Id.* It argued, instead, that the proliferation of state laws accepting this norm reflected only domestic policy decisions. *Id.* at 15.

89. *Id.* at 15-16. The United States relied on the North Sea Continental Shelf Cases (W. Ger. v. Den.) (W. Ger. v. Neth.), 1969 I.C.J. 3, 43-44 (Judgment of Feb. 20):

[O]ver half the States concerned . . . were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favor of the equidistance principle.

*Id.* at 16 (quoting North Sea Continental Shelf Cases (W. Ger. v. Den.) (W. Ger. v. Neth.), 1969 I.C.J. 3, 43 (Judgment of Feb. 20)).

President Carter proposed a reservation to the articles that set eighteen as the minimum age for application of the death penalty when submitting the International Covenant and the American Convention to the Senate for advice and consent.<sup>90</sup> The United States concluded that "[t]here is no basis in international law for applying to the United States a standard taken from treaties to which it is not a party and that it has indicated it will not accept when it becomes a party."<sup>91</sup>

#### IV. OPINION OF THE COMMISSION

After summarizing the facts of the case and the submissions of the parties, the Commission proceeded with the substance of its opinion. The Commission stated that the sole issue was "whether the absence of a federal prohibition within United States domestic law on the execution of juveniles who committed serious crimes under the age of eighteen was inconsistent with human rights standards applicable to the United States under the Inter-American system."<sup>92</sup>

The Commission first reaffirmed its previous holding that the American Declaration was binding on the United States as a member state of the OAS.<sup>93</sup> The Commission also noted that, with respect to OAS member states not parties to the American Convention, the human rights which the Commission exists to protect and promote are those set forth in the American Declaration.<sup>94</sup> The American Declaration is silent on the issue of capital punishment; consequently, the Commission

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90. *Id.* at 17-18. See Four Treaties Pertaining to Human Rights, Message from the President of the United States, S. Exec. Doc. C, D, E, & F, 95th Cong., 2d Sess. xii, xvii (1978). The proposed reservation to the International Covenant stated: "The United States reserves the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment." Memorandum of the United States at 18, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The proposed reservation to the American Convention stated: "United States adherence to Article 4 is subject to the Constitution and other law of the United States." *Id.*

91. Memorandum of the United States at 18-19, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

92. Case 9647, para. 43, INTER-AM. C.H.R. 147, 164, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). Petitioners had not claimed that the absence of such legislation was itself a violation of the international obligations of the United States. Brief of Petitioner at 43-44, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). Rather, they claimed that the failure of the United States to intercede on behalf of Roach and Pinkerton violated its obligation to protect human rights within its borders. *Id.* at 44.

93. Case 9647, para. 48, INTER-AM. C.H.R. 147, 166, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987); Case 2141, para. 16, INTER-AM. C.H.R. 25, 38, OEA/ser. L./V/II.54, doc. 9 rev. 1 (1981).

94. Case 9647, para. 49, INTER-AM. C.H.R. 147, 166, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

turned to the question of the existence of a norm of customary international law prohibiting imposition of the death penalty on persons for crimes committed before they reach the age of eighteen.<sup>95</sup>

The Commission listed the elements of a norm of customary international law, and summarized the variety of state practices within the United States regarding the age at which juvenile offenders may be tried as adults and subjected to the death penalty.<sup>96</sup> It then found that there is no current customary norm of international law establishing eighteen as the minimum age for the imposition of the death penalty.<sup>97</sup> The Commission, however, did not completely adopt the argument of the United States against the existence of a norm. As a result of the number of states ratifying international agreements establishing eighteen as the minimum age for imposition of the death penalty, the Commission found an "emerging" norm.<sup>98</sup>

In any case, the Commission stated that such a rule "does not bind States which protest the norm."<sup>99</sup> The Commission decided that such a norm, if it existed, could not bind the United States, because of the proposed reservations of the United States government to articles 4 and 5 of the American Convention.<sup>100</sup>

The Commission then observed that a customary norm of international law can bind a state that had protested it only if the norm has acquired the status of *jus cogens*.<sup>101</sup> The Commission considered this issue although the petitioners had not argued it, and concluded that "in

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95. *Id.* at para. 50. Although the Commission did not explicitly mention the Vienna Convention, it apparently followed petitioners' suggestion that it should interpret the American Declaration according to the canons of interpretation of the Vienna Convention. See *infra* note 140 (noting that the Commission used the canons of interpretation of the Vienna Convention).

96. Case 9647, para 58, INTER-AM. C.H.R. 147, 171, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). Thirteen states and the District of Columbia have abolished the death penalty entirely. *Id.* Eleven states that retain the death penalty require a minimum age of 18 for its application. V. Streib, Minimum Statutory Ages for the Death Penalty, (April 28, 1987) (unpublished memorandum), para. 3. Nineteen additional states consider age as a mitigating factor in sentencing. *Id.* at para. 5.

97. Case 9647, para. 60, INTER-AM. C.H.R. 147, 172, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

98. *Id.* It is unclear why the Commission found it necessary to note this emerging norm, because it went on to state that it did not consider the age question dispositive of the issue before it. *Id.* at para. 61.

99. *Id.* at para. 52.

100. *Id.* at paras. 53-54.

101. *Id.* at para. 54. The Commission quoted from the Vienna Convention definition of *jus cogens*: "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.* at para. 54 n.1 (quoting article 53 of the Vienna Convention).

the member States of the OAS there is recognized a norm of *jus cogens* which prohibits the State execution of children."<sup>102</sup>

The Commission did not find that the executions of Roach and Pinkerton violated this peremptory norm, however, because it could not discern agreement as to the age of majority for the purposes of the new *jus cogens* norm. Instead, the Commission discussed what it perceived as the principal problem of the case: differing state practices within the United States regarding the transfer of juveniles to criminal courts for trial, and possible punishment, as adults.<sup>103</sup> In so doing, the Commission again acted *sua sponte*, raising an issue and implicating an article of the American Declaration that petitioners had not argued.<sup>104</sup> Additionally, the facts of the *Roach* and *Pinkerton* cases did not present this issue.<sup>105</sup>

The Commission ultimately held that the United States had, indeed, violated the American Declaration. It did not so hold specifically because the United States had failed to prevent the executions of Roach and Pinkerton, nor even because the American Declaration forbade their executions *per se*. Rather, the Commission based its decision on the variety of individual state practices within the United States respecting the death penalty:

The Commission finds that the diversity of state practice in the United States . . . results in very different sentences for the commission of the same crime . . . . Under the present system of laws in the United States, a hypothetical sixteen year old who commits a capital offense in Virginia may potentially be subject to the death penalty, whereas if the same individual commits the same offense on the other side of the Memorial Bridge, in Washington, D.C., where the death penalty has been abolished for adults as well as for juveniles, the sentence will not be death.<sup>106</sup>

The Commission then stated its holding:

The failure of the federal government to preempt the states as regards this most fundamental right — the right to life — results in a pattern of legislative arbitrariness throughout the United States which results in the arbitrary deprivation of life and inequality before the law, contrary to Articles I and II of the Ameri-

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102. *Id.* at para. 56.

103. *Id.* at para. 57.

104. See American Declaration, *supra* note 3, (guaranteeing the right to equality before the law). Petitioners alleged that the United States had violated articles I, VII, and XXVI. Case 9647, para. 6, INTER-AM. C.H.R. 147, 148, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

105. See *supra* note 20 (noting that neither Roach nor Pinkerton was transferred from a juvenile court for trial as an adult, because each was beyond juvenile court jurisdiction at the time of his offense).

106. Case 9647, para. 62, INTER-AM. C.H.R. 147, 172, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

can Declaration of the Rights and Duties of Man, respectively.<sup>107</sup>

The Commission thus based its finding that the United States had violated the American Declaration on an article that petitioners never suggested had been violated, and on an issue that neither petitioners nor the United States had been given the opportunity to argue.

## V. ISSUES RAISED BY THE COMMISSION'S OPINION

The Commission's holding raises two issues: the binding character of the American Declaration with respect to the United States, and the legality of a federal government leaving the administration of criminal justice to the discretion of its constituent states. The rest of the discussion in the opinion is *obiter dicta*, because it is unnecessary for the Commission's holding. These *dicta* nonetheless raise additional issues: the existence of a customary international norm fixing eighteen as the minimum age for the death penalty, and its role in the interpretation of the American Declaration; the status of the United States as an objector to such a norm; and the existence of a peremptory international norm prohibiting the execution of children.

### A. THE AMERICAN DECLARATION IS BINDING ON THE UNITED STATES

Perhaps the most encouraging element of the opinion of the Commission is its reaffirmation of the binding character of the American Declaration on OAS member states.<sup>108</sup> The American Declaration was not initially promulgated as a treaty.<sup>109</sup> It is generally accepted, however, that the Protocol of Buenos Aires, which revised the OAS Charter, incorporated the Declaration by reference.<sup>110</sup> Although the Commission previously had held that the American Declaration is binding on the United States, the *Roach* case marks the first time the Commission has found the United States in violation of the Declaration.<sup>111</sup> Additionally,

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107. *Id.* at para. 63.

108. *See id.* at paras. 46-48 (noting that the United States, as a member of the OAS, must follow the American Declaration). This reaffirmation was unanimous, because even the Commission member who dissented from the *Roach* decision stated that the American Declaration was binding on the United States. *Id.* at 5 (dissenting opinion of Dr. Marco Gerardo Monroy Cabra).

109. M. MONROY CABRA, *LOS DERECHOS HUMANOS* 103 (1980).

110. Shelton, *supra* note 80, at 312-33. Thomas Buergenthal propounded this view initially in 1975. Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AM. J. INT'L L. 828, 833-36 (1975).

111. *See* Shelton, *supra* note 79, at 310, 313 (noting that although the Commission held, in Case 2141, para. 16, INTER-AM. C.H.R. 25, 38, OEA/ser. L./V/II.54, doc. 9 rev. 1 (1981), that the American Declaration had acquired binding force through

the United States is gradually accepting the binding nature of the American Declaration. The United States disputed the American Declaration's binding character in a footnote of its submission to the Commission,<sup>112</sup> and very briefly in its unsuccessful petition for reconsideration in *Roach*, although it has not formally and strenuously objected to that aspect of the *Roach* decision, as it did in the decision in Case 2141.<sup>113</sup>

#### B. MEANING OF THE ROACH DECISION FOR FEDERAL STATES

The substantive holding of the Commission was that the United States, by allowing individual states to adopt varying legislation with respect to the death penalty, denied Roach and Pinkerton equality before the law. Article II of the American Declaration states: "All persons are equal before the law and have the rights and duties established in this declaration, without distinction as to race, sex, language, creed or any other factor."

The decision of the Commission, finding a violation of article II, may imply that the United States federal system of criminal justice violates international law. This broad holding is impractical, if not absurd, with respect to United States law. The holding also makes no sense in international law. Although the American Declaration has no federal clause, other international agreements have recognized, implicitly and explicitly, the legitimacy of federal systems of government.<sup>114</sup> The federal clause of the American Convention specifically leaves enforcement of its provisions to the constituent members of federal states:

"With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention."<sup>115</sup>

The American Convention thus acknowledges that a federal system of

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amendments to the OAS Charter, the Commission found that the United States had committed no violation).

112. Memorandum of the United States at 6 n.6, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

113. Telephone interview with Christina Cerna, Commission Counsel (July 23, 1987). Following the decision in Case 2141, the United States Department of State sent a letter of protest to the Commission, claiming that the American Declaration did not apply to the United States. *Id.*

114. See International Covenant on Civil and Political Rights, *supra* note 44, art. 50 (noting that "[t]he provisions of the present covenant shall extend to all parts of federal states without any limitations or exceptions").

115. American Convention, *supra* note 2, art. 28(2).

government is not, in itself, contrary to international law.

Even if the holding of the Commission indicates that the United States should use the eighth amendment as a federal means of abolishing the death penalty for juveniles, the decision is unlikely to influence the United States Supreme Court in its resolution of the *Thompson* case.<sup>116</sup> The Commission found that the failure of the United States to establish a uniform minimum age at which a state may subject juvenile offenders to the death penalty leads to arbitrary deprivation of life and inequality before the law. The Supreme Court will probably not find the Commission's rationale persuasive because of its traditional respect for the substantive criminal laws of individual states.<sup>117</sup>

Under the United States Constitution, all powers not delegated to the federal government are reserved to the states.<sup>118</sup> Among those reserved powers is the so-called "police power," or the power of a state to enact legislation providing for the welfare of persons and property within its boundaries.<sup>119</sup> Historically, the United States Supreme Court has been unwilling to interfere with states' exercise of this power, striking down a state law only if it violates the United States Constitution.<sup>120</sup> The Court frequently has held that criminal justice is almost entirely within the power of individual states.<sup>121</sup> For these reasons, the Court probably will not find the Commission's decision in *Roach* useful in interpreting the eighth amendment when it decides *Thompson*.<sup>122</sup>

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116. See *supra* notes 17-18 and accompanying text (stating that the opinion of the Commission in the *Roach* case will have little impact on the United States Supreme Court due to flawed reasoning and incorrect application of international law in the opinion).

117. See *Addington v. Texas*, 441 U.S. 418, 431 (1979) (noting that "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold").

118. U.S. CONST. amend. X.

119. See *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (acknowledging that the "police power" resides in state governments).

120. See *Patterson v. New York*, 432 U.S. 197, 201 (1977) (noting that law enforcement is the prerogative of state governments and therefore the Court should not "lightly" intrude upon the authority of the states in this area).

121. See *Williams v. Illinois*, 399 U.S. 235, 241 (1970) (allowing that states have wide latitude in fixing punishment for state crimes); *Knapp v. Schweitzer*, 357 U.S. 371, 375 (1958) (stating that "the bulk of authority to legislate on what may be compendiously described as criminal justice, which in other nations belongs to the central government, is under our system the responsibility of the individual States"); *Argersinger v. Hamlin*, 407 U.S. 25, 38 (1972) (declaring that the classification of crimes is a state matter).

122. Petitioner *Thompson* alleges that his execution for a crime committed at the age of fifteen would constitute a violation of the eighth amendment to the United States Constitution. *Thompson v. State*, 724 P.2d 780, 785 (Okla. Crim. App. 1986), *vacated sub nom.* *Thompson v. Oklahoma*, 56 U.S.L.W. 4892 (U.S. Jun. 29, 1988) (No. 87-5666). The eighth amendment prohibits the infliction of cruel and unusual



The unnecessary reliance of the Commission on the non-discrimination article of the American Declaration is unfortunate, because the decision in favor of Roach would have carried persuasive weight had it been based on the ground urged by petitioners. The Supreme Court might have looked to the decision of the Commission for guidance in interpreting the eighth amendment had the Commission found that the executions of Roach and Pinkerton violated a customary norm of international law. International law can influence the Supreme Court in either of two ways. International standards can aid in the interpretation of the Constitution or international custom, and agreements can become United States law through article VI of the Constitution.<sup>123</sup>

### 1. *The Use of International Law to Interpret the Constitution*

International standards are now an established aspect of eighth amendment analysis, particularly regarding limits on the use of executions as a penalty. In *Enmund v. Florida*,<sup>124</sup> the United States Supreme Court used the "climate of international opinion" as one basis for finding that imposition of the death penalty on a defendant who had not intended to kill was cruel and unusual punishment.<sup>125</sup> In *Coker v. Georgia*,<sup>126</sup> the Court found a Georgia death penalty for rape to be cruel and unusual punishment, noting that only three major nations still applied the death penalty for rape.<sup>127</sup>

### 2. *International Law as Binding on the States*

In addition to using international law to inform provisions of the Constitution, the Supreme Court also has long recognized that international law is part of United States law.<sup>128</sup> Treaties to which the United States is a party become binding on the states through the supremacy clause of the Constitution.<sup>129</sup> Had the Commission found that the

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punishments. U.S. CONST. amend. VIII.

123. U.S. CONST. art. VI, cl. 2.

124. *Enmund v. Florida*, 458 U.S. 782, 796 (1982).

125. *Id.* at 796 n.22.

126. *Coker v. Georgia*, 433 U.S. 584, 596 (1977).

127. *Id.* at 596 n.10. *See also* *Trop v. Dulles*, 356 U.S. 86, 102-3 (1958) (taking cognizance of the practices of other nations in the Court's determination that denaturalization as punishment for desertion violates the eighth amendment); *see generally* Hartman, *supra* note 42 (declaring that the Court is legally bound by the law of nations).

128. *See* *The Paquete Habana*, 175 U.S. 677, 700 (1900) (asserting that international law is part of United States law); *The Nereide*, 13 U.S. (9 Cranch.) 388, 422 (1815) (declaring that the Court is legally bound by the law of nations).

129. U.S. CONST. art. VI, cl. 2.

American Declaration prohibited the death penalty for crimes committed by persons under eighteen, the Supreme Court might have found its decision binding on the state of Oklahoma in Thompson's case.<sup>130</sup>

A customary norm of international law could also prevent Thompson's execution.<sup>131</sup> In addition to the custom and practice of nations,<sup>132</sup> the Supreme Court will look at the decisions of international tribunals to determine international law in the absence of a treaty.<sup>133</sup> The Commission regrettably has lost its opportunity to be of significant aid to both the Supreme Court and petitioner Thompson by basing its decision on the lack of a federal legislative or judicial prohibition of juvenile executions.<sup>134</sup>

As the broad and narrow readings of the opinion of the Commission demonstrate, its holding calls into question the legality under the American Declaration of any death penalty, and even of any federal system of criminal justice. One interpretation of the opinion indicates

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130. See *supra* notes 114-15 and accompanying text (explaining that, according to the Commission, the United States violates the American Declaration because of the diversity of state practices regarding capital punishment). See also Buergethal, *supra* note 110, at 835 (arguing that the human rights provisions of the American Declaration derive their normative character from the OAS Charter).

131. See RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 131(1) (Tent. Draft. No. 6, 1985) (asserting that international law is supreme over the law of the several states of the United States).

132. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (observing that international law is part of United States law and that when there is no treaty, executive or legislative act, or judicial decision to guide the Court, the Court looks to international law and custom).

133. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 132(1) (Tent. Draft No. 6, 1985) (stating that "[i]nternational law is determined and interpreted in the United States by reference to the sources of international law cited in § 102, and the evidence of international law indicated in § 103, with particular attention to the decisions of international tribunals" (emphasis added)). Cf. *Filartiga v. Pena-Irala*, 630 F.2d 876, 882-84 (2d Cir. 1980) (relying in part on the resolutions of public international bodies to find a norm prohibiting torture).

134. The finding of the Commission that no customary norm exists establishing 18 as the minimum age for imposition of the death penalty actually could damage Thompson's case. Both Amnesty International and the International Human Rights Law Group have filed briefs *amicus curiae* arguing that Thompson's execution would violate international law. See Brief for *Amicus Curiae* Amnesty International in Support of Petitioner at 18, *Thompson v. Oklahoma*, cert. granted, 107 S. Ct. 1284 (1987), vacated, 56 U.S.L.W. 4892 (U.S. Jun. 29, 1988) (arguing that execution of Thompson would violate international law); Brief for *Amicus Curiae* International Human Rights Law Group in Support of Petitioner at 18, *Thompson v. Oklahoma*, cert. granted, 107 S. Ct. 1284 (1987), vacated, 56 U.S.L.W. 4892 (U.S. Jun. 29, 1988) (arguing that there is an internationally recognized legal standard prohibiting the execution of juvenile offenders); Brief for *Amicus Curiae* International Human Rights Law Group in Support of Petitioner at 6, *Thompson v. Oklahoma*, cert. granted, 107 S. Ct. 1284 (1987), vacated, 56 U.S.L.W. 4892 (U.S. Jun. 29, 1988) (declaring that customary international law forbids the execution of juvenile offenders).

that any death penalty applied in a federal system denies equality before the law, if even one other jurisdiction within the same federal state has abolished the death penalty. Carried to its logical limit, the Commission's holding can be interpreted to mean that variation in criminal laws of *any* kind among the various jurisdictions of a federal state violates the non-discrimination article of the American Declaration. In addition to creating confusion regarding the significance of *Roach* to federal states, the Commission's decision gives no guidance to states with other domestic systems of government.<sup>135</sup>

### C. THE USE OF CUSTOM TO INTERPRET THE AMERICAN DECLARATION

Before reaching its holding, the Commission discussed in *dicta* petitioners' contention that an international norm of customary law forbidding application of the death penalty to persons under eighteen should be used to inform and interpret the American Declaration.<sup>136</sup> Petitioners argued that the American Declaration should be interpreted according to the canons of interpretation of the Vienna Convention,<sup>137</sup> which provide that customary international law should be used to interpret a treaty.<sup>138</sup>

If the American Declaration was incorporated into the OAS Charter by the Protocol of Buenos Aires,<sup>139</sup> it is a treaty, and the use of the Vienna Convention canons of interpretation is therefore appropriate. The United States disputed the binding force of the American Declaration, however, noting that none of the articles of the revised OAS Charter cited as incorporating the American Declaration does so ex-

135. Of the twenty OAS member states that retain the death penalty, only Argentina, Brazil and Mexico are federal states. See Amnesty International, *supra* note 51, at 2 (listing the three countries as retentionist). The laws of these countries provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances such as wartime. Brief for *Amicus Curiae* Amnesty International in Support of Petitioner at appendix, *Thompson v. Oklahoma*, cert. granted, 107 S. Ct. 1284 (1987), vacated, 56 U.S.L.W. 4892 (U.S. Jun. 29, 1988) (listing abolitionist and retentionist countries as of April 1987).

136. Case 9647, paras. 44-54, INTER-AM. C.H.R. 147, 164-68, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

137. See *supra* notes 59-67 and accompanying text (discussing petitioners' contention that the Vienna Convention on the Law of Treaties dictates the finding that the prohibition of the execution of persons under 18 has acquired the status of customary international law).

138. See Vienna Convention, *supra* note 58, art. 31(3)(c) (stating that nations should use relevant rules of international law to interpret treaties).

139. See *supra* notes 110-11 and accompanying text (noting that while the American Declaration was not initially promulgated as a treaty, it is generally accepted that the Protocol of Buenos Aires incorporated the Declaration by reference).

licitly.<sup>140</sup> The Commission's apparent use of the Vienna Convention to interpret the American Declaration, and its reaffirmation of the binding force of the Declaration, suggest that the American Declaration has acquired treaty status. The United States has acknowledged that the Vienna Convention is generally recognized as authoritative on treaty law and practice; consequently, it seems correct to use custom to interpret the Declaration. Although the Commission did not specifically mention the Vienna Convention, it appeared to apply the analysis suggested by petitioners.<sup>141</sup> The *Roach* opinion marks the Commission's first use, albeit in *dicta*, of these canons of interpretation.<sup>142</sup>

#### D. EXISTENCE OF A NORM EXEMPTING THOSE UNDER EIGHTEEN FROM THE DEATH PENALTY

Although the Commission used the approach of the Vienna Convention to interpret the American Declaration, it failed to find that customary international law established eighteen as the minimum age for imposition of the death penalty. The Commission reached four almost contradictory conclusions with respect to this issue:

[1]The Commission finds that in the member States of the OAS there is recognized a norm of *jus cogens* which prohibits the State execution of children.<sup>143</sup>

[2]The Commission is convinced by the U.S. Government's argument that there does not now exist a norm of customary international law establishing eighteen to be the minimum age for imposition of the death penalty.<sup>144</sup>

[3] Nonetheless, . . . the norm is emerging.<sup>145</sup>

[4]Since the United States has protested the norm, it would not be applicable to

140. Memorandum of the United States at 6 n.6, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

141. See Case 9647, para. 50, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987) (recapping petitioners' argument that there is a norm of customary international law that prohibits the imposition of the death penalty on persons under 18 years of age). Additionally, the dissenting opinion states that the Commission used the Vienna Convention's canons of interpretation. *Id.* at 175 (dissenting opinion of Dr. Marco Gerardo Monroy Cabra). The dissent states that this use was improper because the American Declaration is not a public treaty. *Id.* The dissenter repeats the error the Commission made in Case 2141 by seeking to interpret the American Declaration using only the *travaux préparatoires*. See *id.* at 4-5 (arguing that the American Declaration does not regulate the death penalty because it does not mention the death penalty); see also Shelton, *supra* note 80, at 310 (summarizing the facts of Case 2141).

142. See Shelton, *supra* note 79, at 313 (criticizing the Commission's faulty analysis in Case 2141 based on a discussion of the *travaux préparatoires* of the Declaration, and attributing it to the Commission's disregard of the canons of interpretation of the Vienna Convention).

143. Case 9647, para. 56, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

144. *Id.* at para. 60.

145. *Id.*

the United States should it be held to exist.<sup>146</sup>

The Commission's failure to develop any rationale for three of the four findings<sup>147</sup> aggravates the confusing quality of these conclusions.

The Commission found that the increasing numbers of states ratifying the American Convention and the International Covenant on Civil and Political Rights indicate an emerging norm.<sup>148</sup> Otherwise, the Commission failed to analyze the arguments for or against a customary international norm. The Commission simply stated several conflicting conclusions without reasoning.

The Commission apparently did not consider the Fourth Geneva Convention, another international instrument that forbids the execution of juveniles. Most of the nations of the world have ratified the Fourth Geneva Convention.<sup>149</sup> The Geneva Conventions, of course, apply principally to periods of international armed conflict. Article 68 of the Fourth Convention states: "In any case, the death penalty may not be pronounced on a [civilian or member of the military no longer in combat] who was under eighteen years of age at the time of the offense."<sup>150</sup> If a protection against juvenile executions is universally recognized in the turmoil of war, such a protection should clearly be accepted for peacetime situations. That nearly all the nations of the world have agreed to such a norm in periods of international armed conflict could have provided the Commission with persuasive evidence of the existence, rather than merely the emerging status, of a similar norm applicable to peacetime.<sup>151</sup> The Commission thereby may have been overly cautious when it stated that a customary norm establishing eighteen as

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146. *Id.* at para. 54.

147. 147. The Commission outlined its analysis supporting its conclusion that a *jus cogens* norm prohibits the execution of children, *id.* at para. 55. It provided, however, only conclusory statements to bolster its other findings regarding a customary norm forbidding juvenile executions; for example, "[T]he customary rule, however, does not bind States which protest the norm." *Id.* at para. 51.

148. *Id.* at para. 60.

149. One hundred sixty-five nations had ratified the Geneva Conventions as of December 31, 1986. International Committee of the Red Cross, *States Parties to the Geneva Conventions of 12 August 1949*, 1987 INT'L REV. RED CROSS 110, 111.

150. Fourth Geneva Convention, *supra* note 44, art. 68.

151. See 1 RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (Tent. Draft No. 6, 1985) (stating that "[i]nternational agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted"). *Cf.* North Sea Continental Shelf, (W. Ger. v. Den.) (W. Ger. v. Neth.), 1969 I.C.J. 3, 42 (Judgment of Feb. 20) (stating that "[w]ith respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that . . . a very widespread and representative participation in the convention might suffice of itself . . .").

the minimum age for imposition of the death penalty was only emerging, and not yet in force.<sup>152</sup> The Commission's apparent compromise between the positions argued by petitioners and the United States is *dictum* in any case.<sup>153</sup>

#### E. THE STATUS OF THE UNITED STATES AS AN OBJECTOR TO A CUSTOMARY NORM

Instead of caution, the Commission displayed ignorance of established international law in its assertion that a customary rule of international law does not bind a state that protests it.<sup>154</sup> International law provides that a state may prevent itself from becoming bound by a rule of customary law if it maintains explicit, disciplined and consistent opposition to the rule.<sup>155</sup> The Commission's opinion held the United States exempt from any customary norm fixing eighteen as the minimum age for the death penalty with the following language: "[s]ince the United States has protested the norm, it would not be applicable to the United States should it be held to exist." The Commission did not apply the persistent objector principle; indeed, it never even used the term "persistent objector."

The Commission noted only that the United States Department of State had proposed a reservation to the articles of the American Convention exempting those under eighteen from the death penalty when submitting the document to the United States Senate for advice and

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152. The International Court of Justice, in a recent case, stated that the Geneva Conventions represent, in some respects, no more than the expression of fundamental principles of humanitarian law. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (Judgment of June 27) cited in Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 352 (1987).

153. The Commission itself noted that its finding of an emerging norm establishing 18 as the minimum age at which the death penalty may be applied was not dispositive of the issue before it. Case 9647, para. 61, INTER-AM. C.H.R. 147, 172, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The dissenter on the Commission, although analyzing the issue of the existence of a customary norm more thoroughly than the majority, concluded that no such norm existed. *Id.* at 177-80 (dissenting opinion of Dr. Marco Gerardo Monroy Cabra). The dissenter would require unanimous ratification of a treaty provision, or near-universal, long-standing, state practice, in order to find that an international customary norm exists. *Id.* at 178.

154. See Case 9647, para. 52, INTER-AM. C.H.R. 147, 167, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987) (asserting that customary international law does not bind states that protest the existence of that norm).

155. *Norwegian Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116, 131 (Dec. 18); Schachter, *Nature and Process of Legal Development in International Society*, in *STRUCTURE AND PROCESS OF INTERNATIONAL LAW*, 745, 779 (R. MacDonald & D. Johnston eds. 1983) [hereinafter Schachter]; Stein, *The Approach of the Different Drummer: The Principle of Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 479 (1985).

consent to ratification.<sup>156</sup> The Commission found these proposed reservations to be sufficient protest to exempt the United States from a customary international rule forbidding application of the death penalty for crimes committed by persons under eighteen.<sup>157</sup> Had the Commission instead applied the analysis required by the persistent objector principle, it would have found that United States opposition to a norm establishing eighteen as the minimum age for imposition of the death penalty has been equivocal at best, and that the United States does not qualify as a persistent objector to such a norm.<sup>158</sup>

The first appearance of a prohibition of juvenile execution (i.e. those under eighteen) in an international agreement was article 68, paragraph 4 of the Fourth Geneva Convention.<sup>159</sup> The United States signed and ratified this agreement without asserting any opposition to article 68, paragraph 4. To qualify as a persistent objector to a customary international norm, a state must show that it expressed open dissent to the rule during the formation of the rule.<sup>160</sup> In addition, such dissent must be consistent throughout the development of the rule.<sup>161</sup> As re-

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156. Case 9647, para. 53, INTER-AM. C.H.R. 147, 167, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987); Letters of Transmittal and Submittal, with suggested reservations, understandings, and declarations November 1978 in BUREAU OF PUBLIC AFFAIRS, GENERAL FOREIGN POLICY SERIES 310, U.S. DEP'T OF STATE, PUB. NO. 8961, SELECTED DOCUMENTS, HUMAN RIGHTS (1980) (transmitting proposed reservation of the American Declaration from the United States Department of State to the United States Senate).

157. Case 9647, paras. 53-54, INTER-AM. C.H.R. 147, 167-68, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The reservations were merely proposals internally transmitted from the executive to the legislative branch of the United States. *Id.* The United States has not yet ratified the American Convention. *Id.* The United States has therefore not officially communicated this protest to the international community.

158. See (Response of the Department of State to the "Critique of Reservations to the International Human Rights Covenants" by the Lawyers Committee for International Human Rights), *International Human Rights Treaties; Hearing before the Comm. on Foreign Relations*, 96th Cong., 1st Sess. 1, 55 (1979) (denying that the State Department was attempting to perpetuate the right to execute minors). When proposing its reservations to articles 4 and 5 of the American Convention, the State Department specifically denied that it sought to preserve a right to execute juveniles. *Id.* Additionally, the United States declined to participate in the debates concerning the drafting of the limitation of the death penalty contained in the International Covenant on Civil and Political Rights. Hartman, *supra* note 42, at 684. The United States representative eventually voted in favor of adoption of the International Covenant without expressing concern over its prohibition of juvenile executions. V. BITE, *THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS TREATIES: A SUMMARY OF PROVISIONS AND STATUS IN THE RATIFICATION PROCESS* 17 [hereinafter V. BITE] (Foreign Affairs and National Defense Division, Congressional Research Service Report No. 83-175 F. 1983).

159. Fourth Geneva Convention, *supra* note 44, art. 68.

160. Schachter, *supra* note 155, at 779.

161. Norwegian Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Judgment of Dec. 18).

cently as 1969, the United States acquiesced in the drafting of article 4(5) of the American Convention, which forbids application of the death penalty to persons under eighteen.<sup>162</sup> The United States delegation to the drafting conference actually made a statement supporting the development of a norm abolishing the death penalty in its recommendation to remove the specific age limit in article 4(5):

The proscription of capital punishment within arbitrary age limits presents various difficulties in law, and *fails to take account of the general trend, already apparent, for the gradual abolition of the death penalty* . . . For this reason we believe the text will be *stronger and more effective* if this paragraph is deleted.<sup>163</sup>

The Commission failed to note the less than consistent nature of United States protest of a customary norm prohibiting juvenile executions, apparently because of its ignorance of the persistent objector principle. No international body or legal scholar previously has considered that a state's single, internal protest of a norm of international law is sufficient to exempt that state from the binding force of the norm.<sup>164</sup> The Commission's discussion of the effect of United States protest of a customary norm is *dictum* that ignores both the applicable law and the relevant facts.

#### F. THE EXISTENCE OF A *JUS COGENS* NORM FORBIDDING THE EXECUTION OF CHILDREN

The Commission's erroneous analysis of the status of the United States under a customary international norm forbidding juvenile executions forced it to use the doctrine of *jus cogens* to find that the United States could not execute children. The Commission found that the international law norm forbidding execution of children has acquired the authority of *jus cogens*, a norm whose compelling character overrides even treaties.<sup>165</sup> A *jus cogens* norm is a peremptory rule of interna-

162. V. BITE, *supra* note 158, at 17. The United States eventually voted in favor of the American Convention, and President Carter signed the Convention on June 1, 1977, without any comment regarding the provision prohibiting juvenile executions. *Id.*

163. T. Buergenthal & R. Norris, *supra* note 85, Booklet no. 14, at 152 (emphasis added).

164. See RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 comment d (Tent. Draft No. 6, 1985) (noting that dissent and consequent exemption from a principle that became general customary law historically has been rare). Cf. Norwegian Fisheries Case (U.K. v. Nor.), 1951 I.C.J. Rep. 116 (Judgment of Dec. 18) (holding that Norway had successfully dissented from a customary norm by actually maintaining a four-mile territorial sea, although a three-mile zone was generally accepted).

165. Case 9647, para. 56, INTER-AM. C.H.R. 147, 170, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The Commission did not define "children" in its opinion. The Commission found no customary norm establishing 18 as the minimum age for application of



tional law that prevails over any conflicting international rule or agreement.<sup>166</sup> A *jus cogens* norm permits no derogation, and can be modified only by a subsequent international law norm of the same character.<sup>167</sup>

The concept of *jus cogens* is of relatively recent origin, although it is incorporated in the Vienna Convention on the Law of Treaties.<sup>168</sup> Its content is disputed, and thus far only the principles of the United Nations Charter prohibiting the use of force are generally agreed to be *jus cogens*.<sup>169</sup> The International Court of Justice appeared to find that a peremptory norm of international law establishes the inviolability of envoys and embassies in its judgment concerning Iranian treatment of the United States diplomatic and consular staff in Tehran.<sup>170</sup> Commentators have suggested that prohibitions against genocide, slavery, and racial discrimination also have acquired *jus cogens* status.<sup>171</sup>

The petitioners neither suggested nor refuted the Commission's finding that a rule of *jus cogens* prohibits the execution of children.<sup>172</sup>

the death penalty and it did not equate "children" with all those under the age of 18. *Id.* at para. 57. In contrast to the Commission's view, the United Nations Draft Convention on the Rights of the Child defines "child" as "every human being to the age of 18 years unless, under the law of his State, he has attained his age of majority earlier." Report of the Working Group on a Draft Convention on the Rights of the Child, 42 U.N. ESCOR Commission on Human Rights (Agenda Item 13) art. 1, U.N. Doc. E/CN.4/1986/39 (1986). The Draft Convention also forbids application of the death penalty to those who were under 18 at the time of their offense. *Id.* art. 19, para. 2(b).

166. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 comment k (Tent. Draft No. 6, 1985).

167. *Id.*

168. Vienna Convention, *supra* note 58, arts. 53, 64.

169. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporter's note 6 (Tent. Draft No. 6, 1985).

170. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 31, 41 (Judgment of May 24).

Whatever extenuation of the responsibility to be attached to the conduct of the Iranian authorities may be found in the offence felt by them because of the admission of the Shah to the United States could not affect the imperative character of the legal obligations incumbent upon the Iranian Government which is not altered by a state of diplomatic tension between the two countries.

*Id.* at 41.

See also *id.* at 42 (citing United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1979 I.C.J. 19, 19 (Interim Order of Dec. 15) (stating that "there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose")).

171. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporter's note 6 (Tent. Draft No. 6, 1985); I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 (1979).

172. Case 9647, para. 54, INTER-AM. C.H.R. 147, 168, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The Commission noted this fact but stated that, as a non-judicial body, it was not limited to considering only the submissions presented by the parties to a dispute. *Id.*

Moreover, after declaring the existence of a *jus cogens* norm forbidding the execution of children, the Commission declined to apply the norm to the execution of Roach. Had the Commission found, instead, that the prohibition against executing juveniles was a customary, though not peremptory, rule of international law, its decision would have accorded more closely with the applicable precedents, with petitioners' arguments, and with the practice of nations.<sup>173</sup>

## VI. UNITED STATES COMPLIANCE WITH THE ROACH DECISION

Even though the Commission failed to hold execution of juvenile offenders violative of the American Declaration, the United States government could still choose to abolish juvenile executions if it corrects the discriminatory state practice that the Commission held violates the American Declaration. Federal establishment of a uniform prohibition against juvenile execution could constitutionally occur in several ways. The Supreme Court, of course, could rule that the execution of persons for capital offenses committed while under eighteen constitutes cruel and unusual punishment in violation of the eighth amendment. Even if the Supreme Court decides in *Thompson* that imposition of the death penalty for those under eighteen who commit crime does not violate the eighth amendment, Congress has the legal authority to ensure United States compliance with the decision of the Commission. Under the enforcement section of the fourteenth amendment, Congress has the power to enact legislation forbidding the execution of juveniles.<sup>174</sup> Congress also could encourage individual states to enact such legislation if it makes the receipt of federal funds contingent on the states' excluding juveniles from the death penalty.<sup>175</sup> If the Supreme Court decides against *Thompson*, Congress, for political reasons, will probably not at-

173. MANUAL OF PUBLIC INTERNATIONAL LAW § 3.14 (M. Sorenson ed. 1968). International law recognizes the existence of regional custom, a norm whose observance and validity is limited to a particular group of states. *Id.* No international body or legal scholar, however, has previously suggested the existence of a doctrine of regional *jus cogens*. *Id.* The Commission held that the *jus cogens* norm against execution of children existed among the member states of the OAS, but failed to fully address this question. Case 9647, para. 56, INTER-AM. C.H.R. 147, 170, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987). The dissenting opinion, issued more than a month after the decision of the Commission, states that there can be no such "American *jus cogens*." *Id.* at 14 (dissenting opinion of Dr. Marco Gerardo Monroy Cabra).

174. See U.S. CONST. amend. XIV, § 5 (stating that "the Congress shall have the power to enforce, by appropriate legislation, the provisions of this article").

175. See U.S. CONST. art. I, § 8, cl. 1 (stating that "the Congress shall have the power to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States . . .").

tempt to reverse that decision through legislation.<sup>176</sup>

#### A. THE ENFORCEMENT SECTION OF THE FOURTEENTH AMENDMENT

Under section five of the fourteenth amendment, Congress may create legislation to protect any class of citizens denied due process or equal protection under the laws of the United States.<sup>177</sup> The Supreme Court will uphold legislation enacted under this broad power only if the legislation is "plainly adapted to [the] end" of enforcing the equal protection clause, and is "consistent with the letter and spirit of the Constitution."<sup>178</sup> Congress could find, under the fourteenth amendment, that the punishment of execution violates juveniles' due process rights to fundamental fairness and their rights to equal protection under the laws. Although minors share in the benefits and protections of the Constitution,<sup>179</sup> they are not legally equal to adults. Application of the death penalty to juveniles violates the guarantees of due process and equal protection because the state imposes restraints on juveniles, but at the same time the state may subject juveniles to adult penalties.<sup>180</sup> Congress could combat this discrimination using its power under section five of the fourteenth amendment. The enactment of federal legislation forbidding the execution of juveniles would result in United States compliance with the Commission's decision in *Roach*.

#### B. THE CONGRESSIONAL SPENDING POWER

Congress also could pass legislation encouraging individual states to

176. See Nathanson, *Congressional Power to Contradict the Supreme Court's Constitutional Decisions: Accommodation of Rights in Conflict*, 27 WM. & MARY L. REV. 331, 339 n.48 (1986) (noting that Congress generally has avoided constitutional confrontations with the Supreme Court, and that legislative proposals hostile to the Court's constitutional decisions most often have not passed). But cf. *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987) (upholding the death sentence of a Georgia black man convicted of killing a white police officer in spite of statistical data showing that killers of whites in Georgia received the death penalty approximately eleven times as often as killers of blacks). The *McCleskey* decision received strong media criticism. *Injustice? Never Mind, Court Says*, The Atlanta Const., Apr. 24, 1987, at 22-A, col. 1. The decision has prompted a Congressional effort to pass legislation forbidding racially disproportionate capital sentencing. Memorandum from Pat Rengell, Amnesty International USA, to David Weissbrodt (July 24, 1987).

177. U.S. CONST. amend. XIV, § 5.

178. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (quoting standards laid out in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)); *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966) (quoting standards laid out in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

179. *In re Gault*, 387 U.S. 1, 13 (1967).

180. Comment, *Eddings v. Oklahoma: A Stay of Execution for Juveniles*, 9 NEW ENG. J. CRIM. & CIV. CONFINEMENT 407, 423 (1983).

conform their laws to the *Roach* decision. Congress can, and often has, used its spending power<sup>181</sup> to further national policies by making grant money to states conditional upon the fulfillment of those policies.<sup>182</sup> Congress may place conditions on federal grant money if the expenditures benefit society at large;<sup>183</sup> if conditioned grants are within national power and policy;<sup>184</sup> if the condition is directed to the attainment of a lawful end, for which the nation and state may cooperate;<sup>185</sup> and if the condition placed on a grant does not result in coercing a state to accept it without a choice.<sup>186</sup> Using its spending power, Congress could encourage individual state compliance with the *Roach* decision if it makes federal grant money to state criminal justice systems conditional on the states' observing eighteen as the minimum age for application of the death penalty. Such legislation would further the goal of United States compliance with international legal obligations without removing from the states the choice of retaining current laws and foregoing federal aid.

## VII. LESSONS OF *ROACH*

The errors the Commission made in its opinion in *Roach* arose mainly when it strayed from the issues that the parties argued. Although the Commission has been criticized in the past for being too closely bound by the arguments before it,<sup>187</sup> the Commission's independence in *Roach* carried it too far afield. Although the Commission stated that, as a non-judicial body,<sup>188</sup> it was not limited to considering only the submissions of the parties,<sup>189</sup> the Commission's opinion might

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181. U.S. CONST. art. I, § 8, cl. 1.

182. See *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) (stating that the federal government may impose reasonable conditions of federal interest).

183. *United States v. Butler*, 297 U.S. 1, 65 (1936).

184. *Steward Machine Co. v. Davis*, 301 U.S. 548, 586 (1937).

185. *Id.* at 593.

186. *Id.* at 589-90. The Court recently upheld such use of the congressional spending power. *South Dakota v. Dole*, 107 S. Ct. 2793 (1987) (upholding 23 U.S.C. § 158, which authorizes the Secretary of Transportation to withhold five percent of federal highway funds otherwise allocable to the states from any state that sets its legal drinking age below twenty-one). *Id.* at 2796.

187. See Shelton, *supra* note 79, at 313, 315 (criticizing the failure of the Commission to examine the objectives and purposes of international agreements).

188. Regulations of the Commission, *supra* note 3, art. 1. The Commission's primary purpose is to promote the observance and defense of human rights. *Id.* Its procedures for deciding petitions, however, create an adversarial hearing process. Aguilar, *Procedimiento que Debe Aplicar La Comisión Interamericana de Derechos Humanos en el Examen de las Peticiones o Comunicaciones Individuales sobre Preguntas Violaciones de Derechos Humanos*, in ORGANIZATION OF AMERICAN STATES, HUMAN RIGHTS IN THE AMERICAS 199, 211 (1984) [hereinafter Aguilar].

189. Case 9647, para. 54, INTER-AM. C.H.R. 147, 167, OEA/ser. L./V/II.71, doc.

have been better-reasoned if the parties had prepared briefs on the issues the Commission raised independently. The Commission may consider elements of proof from sources other than the parties in reaching its decision.<sup>190</sup> The Commission may even initiate an investigation on its own motion, without a complaint placed before it.<sup>191</sup> When relatively sophisticated parties fully argue their positions to the Commission, however, it should avail itself of the views of the parties.<sup>192</sup> Whether or not the Commission is a judicial body, it performs an adjudicative function, and should use sound decision-making procedures.

Decision-makers who reach beyond the arguments put before them should at least bring any new line of thinking that is likely to bear on their decision to the parties' attention for comment.<sup>193</sup> When the Commission, or any decision-making body, notices an issue that the parties to a dispute did not raise, it should call the issue to the parties' attention by requesting supplemental briefing. This procedure will help ensure fairness to the parties.<sup>194</sup>

Deciding cases on issues that the parties did not raise, or on points only cursorily briefed and argued, can hinder the parties' perception of the fairness of the adjudication: "It is unfair to decide a case without giving the losing party opportunity to present information which may influence the Court's decision."<sup>195</sup> This principle also has been recognized in international law.<sup>196</sup>

9 rev. 1 (1987).

190. Aguilar, *supra* note 188, at 215.

191. See Regulations of the Commission, *supra* note 3, art. 26(2) (enumerating the independent precautionary measures available to the Commission).

192. See Aguilar, *supra* note 188, at 215 (noting that, in the majority of cases, the parties present all the evidence that can be collected to support their respective positions).

193. Richardson, *The Role of an Appellate Judge*, 5 OTAGO L. REV. 1, 8 (1981).

194. See Note, *Appellate Court Sua Sponte Activity: Remaking Disputes and the Rule of Non-Intervention*, 40 S. CAL. L. REV. 352, 364 (1967) [hereinafter *Sua Sponte*] (arguing that fairness and public acceptability of the trial demands that parties be allowed to brief supplemental issues); cf. Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1332 (1969) (suggesting that when a court decides a case on an issue not briefed, it should at least grant the parties a rehearing, no matter how certain the court is of the correctness of its decision).

195. *Sua Sponte*, *supra* note 194, at 364; see also Christie, *supra* note 194, at 1331 (noting that the Supreme Court often addresses issues not raised by parties).

196. C. SMITH, *THE RELATION BETWEEN PROCEEDINGS AND PREMISES, A STUDY IN INTERNATIONAL LAW* 77 (1962).

One of the most elementary procedural rights is the right of a party to be heard. If that be denied, the decision may be considered null. There is of course normally a great difference between not being heard at all and not being heard as to the relevant points. But the difference seems to be very much reduced if the arguments of the parties are entirely ignored.

*Id.* Cf. S. ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 99 (1973)

The use of supplemental briefing on issues the Commission raises independently is also suggested by the Regulations of the Commission. The Statute and Regulations of the Commission provide for the consideration of petitions submitted to the Commission in an adversarial context.<sup>197</sup> The rationale for an adversary system of decision-making is that self-interest motivates the parties to present the best arguments in their favor.<sup>198</sup> The rule of the Commission that a petitioner must exhaust all domestic legal remedies before appealing to it means that petitioners and governments before it will be quite familiar with all the arguments in support of their positions.<sup>199</sup> In their provision for a hearing on a petition, the Regulations of the Commission suggest a procedure similar to requesting of supplemental briefs.<sup>200</sup>

When a decision-maker decides an issue not raised by the parties to the dispute, it takes risks for the adequacy of the decision-making process.<sup>201</sup> A decision-maker departing from the arguments before it in search of an alternative basis for resolution of the dispute also runs a high risk of error.<sup>202</sup> Although decision-makers cannot always be limited to consideration of only the arguments that counsel happen to advance, they should not stray rashly into areas not raised or argued by the parties.<sup>203</sup> Professor Karl Llewellyn states:

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(noting that the International Court of Justice requires parties before it to provide final submissions indicating what each party considers should be the language of the operative part of the judgment).

197. See Aguilar, *supra* note 188, at 210 (stating that the Commission procedures for deciding petitions create an adversarial hearing process); Statute of the Commission, *supra* note 2, art. 19, para. a (granting the Commission power to act on petitions); Regulations of the Commission, *supra* note 3, art. 43, para. 1 (stating that the Commission may hold a hearing and summon parties to verify the facts in a petition).

198. T. MARVELL, *APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM* 25 (1978). See also Freedman, *Arguing the Law in an Adversary System*, 16 GA. L. REV. 833, 839 (1982) [hereinafter T. MARVELL] (stating that "[t]he adversary system is successfully designed to encourage each side of a legal dispute to search out and to present to the court the relevant facts, law, and policy considerations bearing upon matters in dispute").

199. See Regulations of the Commission, *supra* note 3, art. 37 (providing that prior to submitting a petition to the Commission all domestic remedies must be exhausted).

200. See *id.* art. 43(2) (providing that "[a]t that hearing, the Commission may request any pertinent information from the representative of the state in question and shall receive, if so requested, oral or written statements presented by the parties concerned").

201. See T. MARVELL, *supra* note 198, at 122 (noting the judicial distaste for the rendering of a decision based on an issue that counsel did not raise or argue).

202. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 416 (1983-84).

203. See K. LLEWELLYN, *THE COMMON LAW TRADITION* 389 (1960) [hereinafter K. LLEWELLYN] (asserting that "[a] court ought always to be slow in *uncharted* territory, and, in such territory, ought to be narrow, again and again, in any ground for

"[a]n appellate court in quest of justice can do (and often has done) more reformulating of ill-drawn issues than is generally realized even by lawyers . . . [n]evertheless, such action . . . is both relatively rare and a function of peculiarly sharp pressure from felt need."<sup>204</sup>

Another commentator criticized judges' departures from the arguments of the parties, noting that "deciding issues not raised may produce a more comprehensive body of law, but the quality of the law may suffer for being made without the help of counsel."<sup>205</sup> Although these comments refer specifically to common law jurisdictions, the process of the parties bringing before the judge the information necessary to decide the case is not peculiar to the common law. Even in civil law jurisdictions, the determination of what issues to raise and what evidence to introduce is left almost entirely to the parties.<sup>206</sup>

The Commission, as an organ of the OAS, must accommodate the different legal systems of the OAS member states. The majority of those states have civil law systems.<sup>207</sup> Although civil and common law systems differ in many ways, both permit lawyers to provide input in the decision-making process as adversaries.<sup>208</sup> Because of this similarity, a study of the procedure and experience of common law courts has some relevance for the improvement of the quality of the decision-making of the Commission. The experience of the United States Supreme Court, the most visible and easily-researched United States court, may provide some help in illustrating the wisdom of allowing the parties to a dispute to contribute their views as to the basis for the resolution of the dispute.

It has been recognized that United States courts should refrain from deciding cases on issues not raised by the parties, though courts unfortunately continue to do so.<sup>209</sup> Courts should not decide cases on new

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decision, until the territory has been reasonably explored"); cf. Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1152 (1973) (questioning whether it is the duty of a judge to protect litigants whose counsel submit weak appellate briefs).

204. K. LLEWELLYN, *supra* note 203, at 29.

205. T. MARVELL, *supra* note 198, at 125; cf. Williamson, *Judicial Activism: Section 1983 and Antitrust Liability Chill Decision Making by State and Local Officials*, 6 HARV. J.L. & PUB. POL'Y 149, 162 (1983) (observing that "[judicial restraint is] a doctrine that teaches judges whether, and if so when, they should decide the merits of questions that litigants press upon them") (quoting Justice Stevens).

206. J. MERRYMAN, *THE CIVIL LAW TRADITION* 115 (2d ed. 1985).

207. *Id.* at 2.

208. *Id.* at 114-15 (criticizing as quite misleading the characterization of civil law proof-gathering as "inquisitorial" as opposed to the "adversary" system of the common law).

209. *See* United States v. Falstaff Brewing Co., 410 U.S. 526, 545-46 (1972) (Marshall, J., concurring) (noting that "our remand leaves the hapless District Judge with the unenviable task of reassessing non-existent evidence under a theory advanced

issues without inviting the comments of the parties on those issues.<sup>210</sup> Although the doctrine of judicial notice allows courts to take notice of information not offered by the parties in reaching a decision, the doctrine requires that the parties be afforded an opportunity to be heard on such "noticed" information.<sup>211</sup>

The United States Supreme Court will ordinarily refrain from deciding issues not raised or resolved in the lower courts.<sup>212</sup> The Court, however, does have discretionary power to consider a plain error below not raised by the parties on appeal.<sup>213</sup> If the Court discovers issues overlooked by the parties, it may accompany its grant of certiorari or not-

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by neither of the parties"). In the *Roach* case the Commission illustrated the infrequency of decisions based on issues not raised by denying the request for reconsideration. Request for Reconsideration, Case 9647, INTER-AM. C.H.R. 147, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987) (outlining the reasons of the Commission for its denial of the Request for Reconsideration).

210. See Conford, *Management of the Oral Argument by an Appellate Court*, 14 JUDGES' J. 14, 15 (1975), stating that:

Where . . . the interests of justice require expansion of the record . . . both sides should be permitted to be heard on the expansion and given an opportunity to address any new issue by supplemental brief. The same considerations apply if the court conceives that a just determination of the matter requires the introduction of a legal issue not raised below or briefed on the appeal. Excursion into such an issue at argument on the initiative of the court should be followed by the opportunity for counsel to file supplemental briefs.

*Id.* at 15.

It might be suggested that a wrong decision based on an issue not raised by the parties could be remedied by a reversal on rehearing. The extreme infrequency with which courts grant petitions for rehearing makes that procedure no real remedy at all, however. See R. STERN, E. GRESSMAN & S. SHAPIRO, *SUPREME COURT PRACTICE* 624-25 (6th ed. 1986) [hereinafter STERN & GRESSMAN] (noting that while 729 requests for rehearings were filed with the Court between 1976 and 1982, only six petitions were in fact granted). Similar factors probably motivated the refusal of the Commission to accept the rather tardy request of the United States for reconsideration in *Roach*.

211. See FED. R. EVID. 201(e) (stating that "[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken"). Rule 201 is a codification of the common law doctrine allowing judicial notice to be taken of facts about which reasonable persons could not differ. Turner, *Judicial Notice and Federal Rule of Evidence 201—A Rule Ready for a Change*, 45 U. PITT. L. REV. 181, 181 (1983). The rationale for the requirement that the parties be given an opportunity to be heard on judicially-noticed facts is that "human judges make mistakes, and one of the functions of adversaries is to point out mistakes so that they may be corrected." Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 979 (1955).

212. See *California v. Taylor*, 353 U.S. 553, 556-57 n.2 (1957) (refusing to consider claim not briefed by the state in the district court); *Lawn v. United States*, 355 U.S. 339, 362-63 n.16 (1958) (refraining explicitly from reviewing contentions raised by the parties for the first time on appeal).

213. SUP. C. R. 34.1(a) states: "[a]t its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." STERN & GRESSMAN, *supra* note 210, § 13.8, at 553.



ing of probable jurisdiction with a specification of the additional questions it wishes briefed and argued.<sup>214</sup> This procedure ensures full argument on points that counsel otherwise would not have briefed which might be decisive in the Court's disposition of the case.<sup>215</sup>

The soundness of this procedure finds support in several cases in which the Supreme Court has reversed itself on rehearing, or has overruled previous decisions.<sup>216</sup> The following four cases illustrate various aspects of how full briefing on all relevant issues, and attention to the arguments of the parties, can improve decision-making by the Supreme Court.<sup>217</sup>

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214. STERN & GRESSMAN, *supra* note 210, § 5.11, at 276.

215. *Id.* Other courts have recognized the soundness of this procedure. See Bellocosa, *The Importance of Being an Earnest Clerk*, 54 N.Y. ST. B.J. 74, 76 (1982) (describing the New York Court of Appeals *sua sponte* review procedure: "If . . . an impediment is identified no judicial resolution is arrogated by the Clerk. Rather, a letter is sent to all counsel, thereby converting the *sua sponte* initiation into a thorough adversarial participation and exchange"). *Id.*

216. Between 1810 and 1880, the Supreme Court overturned previous decisions 171 times. See THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. DOC. NO. 82, 92d Cong., 2d Sess. 1789-97, S332-33 (1973 & Supp. 1980) (listing all previous decisions overturned by the United States Supreme Court). Eight of these overrulings were reversals on rehearing. *Id.* at 1789-94.

217. It should be noted that these four cases are the exception, rather than the rule, in Supreme Court overruling of precedents. Overrulings are often a result of a change in the Court's composition, for example, *Knox v. Lee* (Legal Tender Cases), 79 U.S. (12 Wall.) 457 (1871), or a change in United States societal or legal needs, for example, *Brown v. Board of Education*, 347 U.S. 483 (1954). Few Supreme Court overrulings were based on the inadequate consideration of issues in the earlier case. The Court's narrow restriction of its certiorari jurisdiction might cause petitioners to raise every possible issue, to improve the chance of the petition being granted. See STERN & GRESSMAN, *supra* note 210, at 27 (noting that the Court denies certiorari to 95 percent of the cases submitted to it). The level of expertise of Supreme Court practitioners also may render it less necessary for the Court to go beyond the arguments of counsel. The Court does so on occasion, however. See Sherry, *Issue Manipulation by the Burger Court: Saving the Community from Itself*, 70 MINN. L. REV. 611, 645 (1986) (describing a case in which the Court resolved an issue never raised by the parties to the case).

Two renowned cases that have not been overruled, in which the Supreme Court went beyond the arguments of the parties, are *Roe v. Wade*, 410 U.S. 113 (1973), and *New York Times v. Sullivan*, 376 U.S. 254 (1964). See Lamb, *Judicial Policy-Making and Information Flow to the Supreme Court*, 29 VAND. L. REV. 45, 64-66 (1976) (arguing that both decisions illustrate Supreme Court policy-making in that each decision rests upon factors that extend beyond the adjudicative facts of the case). In *Roe*, the petitioner sought an injunction prohibiting enforcement of the Texas statute that criminalized abortion. Justice Blackmun's trimester system of balancing the interests of the mother and the fetus was not suggested in briefs or oral argument. Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1218 (1975). In *New York Times*, the petitioner sought only a ruling that the first amendment does not permit a conclusion that libel *per se* has occurred when the plaintiff, a government official, has not been named, and when there was no intent to injure him. Lamb, *supra*, at 66. The Court, instead, ignored the fact that the plaintiff had not been named in an allegedly

In *United States v. Ballard*,<sup>218</sup> the Court considered an appeal of a Ninth Circuit Court reversal, on first amendment grounds, of a district court conviction for mail fraud. The Court reversed the court of appeals on the first amendment issue and reinstated the district court conviction.<sup>219</sup> Respondents then urged that the court of appeals' action was justified on other grounds.<sup>220</sup> Because the court of appeals had not passed judgment on the grounds now alleged, and the issues had not been fully briefed or argued before the Supreme Court, the Court remanded the case to the court of appeals.<sup>221</sup> The court of appeals then affirmed the district court conviction. In *Ballard v. United States*,<sup>222</sup> the Supreme Court ultimately overturned the conviction, reaching a result opposite to its initial finding after having the benefit of the parties' briefs and arguments on the additional grounds offered to support a reversal of the conviction.

In *Reid v. Covert*,<sup>223</sup> the Court reversed two decisions of the previous term on an issue that had been urged by respondents, but that a majority of the Justices previously had thought need not be decided.<sup>224</sup> Justice Frankfurter questioned the wisdom of the majority's disregard of that issue in reaching its first decision:

[T]he judgments of this Court are . . . neither solo performances nor debates between two sides, each of which has its mind quickly made up and then closed. The judgments of this Court presuppose full consideration and reconsideration by all of the reasoned views of each. Without adequate study there cannot be adequate deliberation and discussion. And without these, there cannot be that full interchange of minds which is indispensable to wise decision and its persuasive formulation.<sup>225</sup>

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defamatory advertisement, and fashioned its "actual malice" test for libel of a public official. *Id.*

218. *United States v. Ballard*, 322 U.S. 78 (1944).

219. *Id.* at 88.

220. *Id.*

221. *Id.*

222. *Ballard v. United States*, 329 U.S. 187 (1946).

223. *Reid v. Covert*, 354 U.S. 1 (1957).

224. See *Kinsella v. Krueger*, 351 U.S. 470, 476 (1956) (holding that once a court determines that the plaintiff may be tried before a legislative court, it has no further need to examine the power of Congress under art. I). *Kinsella* and *Reid* were argued and decided concurrently. *Reid v. Covert*, 354 U.S. 1 (1957).

225. *Kinsella v. Krueger*, 351 U.S. 470, 485 (1956) (reservation of Frankfurter, J.). Dissenting opinions, one means by which members of the Court try to save the Court from error, often point out when the majority has gone beyond the arguments of the parties, or decided issues unnecessarily. See *Mapp v. Ohio*, 367 U.S. 643, 672-86 (1961) (Harlan, J., dissenting) (stating that the Court addressed issues not briefed by either party). The Commission, in *Roach*, did not have the benefit of its dissenter's views, because the Commission issued its decision on March 27, 1987, approximately one month before it received the dissent. Case 9647, INTER-AM. C.H.R. 147, 173, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987) (dissenting opinion of Dr. Marco Gerardo

On rehearing, the Court reversed itself by a vote of six to two, after further argument and consideration of the issue that previously had been thought unnecessary to the disposition of the case.<sup>226</sup>

In *Swift & Co. v. Wickham*,<sup>227</sup> the Court overruled *Kesler v. Department of Public Safety*,<sup>228</sup> a case that had been decided only three years earlier. In *Kesler*, the Court addressed a jurisdictional question not raised by the parties.<sup>229</sup> The Court determined that the case was properly before it, and formulated a test to determine which cases alleging conflicts between state and federal laws must be heard by a district court panel of three judges.<sup>230</sup> Chief Justice Warren dissented, predicting that the test created by the majority would create more problems for the lower federal courts, as well as for the Supreme Court, than it would solve.<sup>231</sup> This prophecy proved to be correct and the Court overturned *Kesler* at its first opportunity.<sup>232</sup>

In *Cohen v. Hurley*,<sup>233</sup> the Court stated, in *dicta*, that the petitioner had no federal constitutional right not to incriminate himself.<sup>234</sup> The petitioner had not suggested a violation of any federal right, but relied solely on his privilege against self-incrimination under the New York state constitution.<sup>235</sup> Three years later, in *Malloy v. Hogan*,<sup>236</sup> the Court held that the federal constitutional privilege against self-incrimination applied to the states through the fourteenth amendment.<sup>237</sup> Al-

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Monroy Cabra). Additionally, the dissenting opinion, which was written in Spanish, took two months to be translated into English. The text of the dissent was not posted to counsel in *Roach* until July 24, 1987, nearly four months after the majority of the Commission issued its decision. In any case, the dissenter's views in *Roach* would not have saved the Commission from error. Also, the dissent itself goes beyond the contentions of the parties by discussing the issue of whether article 4(5) of the American Convention binds the United States directly. Case 9647, INTER-AM. C.H.R. 147, 173, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987) (dissenting opinion of Dr. Marco Gerardo Monroy Cabra).

226. *Reid v. Covert*, 354 U.S. 1, 5 (1957).

227. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965).

228. *Kesler v. Dep't of Pub. Safety*, 369 U.S. 153 (1962).

229. *Id.* at 175 (Warren, C.J., dissenting). The Court has a duty to take independent notice of questions of jurisdiction when they are not raised by the parties.

230. *Id.* at 157. 28 U.S.C. § 2281 (1948) (repealed 1976) formerly required a three-judge district court panel to hear any suit seeking an injunction against enforcement of a state law on grounds of unconstitutionality.

231. *Kesler v. Dep't of Pub. Safety*, 369 U.S. 153, 175 (1962) (Warren, C.J., dissenting).

232. *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965). The Court noted the uncertainty of lower courts in applying the *Kesler* rule and the uniform criticism of the rule by commentators. *Id.* at 124.

233. *Cohen v. Hurley*, 366 U.S. 117 (1961).

234. *Id.* at 127.

235. *Id.* at 118 n.1.

236. *Malloy v. Hogan*, 378 U.S. 1, 1 (1964).

237. *Id.* at 11.

though the Court did not specifically overrule *Cohen's dicta*, it stated that the principle on which it rested had been "seriously eroded."<sup>238</sup> *Cohen* was later explicitly overruled, six years after it was decided, in *Spevack v. Klein*.<sup>239</sup>

These cases illustrate the benefits that accrue to the decision-making abilities of a court when full argument of all relevant issues is provided. Had the Commission requested petitioners and the United States to brief the issues the Commission raised *sua sponte* in *Roach*,<sup>240</sup> it might have been persuaded of the unsoundness of some aspects of its opinion. The Commission might then have decided the case on the grounds suggested by petitioners. Even a decision favoring the United States would have avoided the confusion the Commission created by basing its decision on the different criminal laws in various parts of the United States.

The quality of the Commission's reasoning in *Roach* is unlikely to enhance its reputation as a decision-making body, or to promote confidence in its ability to adjudicate fairly and rationally cases brought before it.<sup>241</sup>

A Court . . . that presents a judgment that does not answer questions raised in litigation or that answers questions not raised in the briefs or oral arguments, or that presents illogical conclusions, or conclusions without presenting justifications for these conclusions . . . creates too great a risk of [appearing to perform] ad hoc, unprincipled . . . intervention.<sup>242</sup>

In the *Roach* decision, the Commission unfortunately committed each of these mistakes.

## CONCLUSION

The decision of the Inter-American Commission in *Roach* contains some unfortunate legal flaws, and represents a lost opportunity to influence the direction of United States and international law on the execution of juvenile offenders. This landmark decision is important, however, because it places the United States government on notice that it is not immune to be found in violation of international human rights law.

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238. *Id.*

239. *Spevack v. Klein*, 385 U.S. 511, 514 (1967).

240. These issues were: (1) the existence of a *jus cogens* norm forbidding the execution of children; and (2) whether the United States had violated article II of the American Declaration. Case 9647, paras. 54, 63, INTER-AM. C.H.R. 147, 168, 173, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

241. The quality of the reasoning and analysis of the Commission in a previous decision has also been criticized. See Shelton, *supra* note 79, at 310 (arguing that while the Court in Case 2141 may have reached the correct result, it used questionable reasoning and faulty analysis).

242. H. BALL, JUDICIAL CRAFTSMANSHIP OR FIAT? 143 (1978).

The opinion's sole value may prove to be its reaffirmation of the binding character of the American Declaration of the Rights and Duties of Man on all OAS member states. This finding ensures that the Commission has an effective tool to require the implementation of human rights provisions by those OAS member states that have failed to ratify the American Convention. If the Commission is to be taken seriously as a decision-making body, however, it must avoid the flawed reasoning and errors of law that mark the *Roach* decision. One way to accomplish this goal would be for the Commission to allow itself the benefit of full briefing on all issues it considers relevant to a dispute.