

Reply of the United States Government
to the Report of the Inter-American Commission made on
October 15, 2001

Re. Case No. 12.185 (Michael Domingues)

Introduction

The United States regrets the Inter-American Commission's decision reflected in Case No. 12.185.¹ ("Report") Not only does the Report apply standards well beyond those set forth in the American Declaration on the Rights and Duties of Man, but it is an attempt to assemble unrelated - and, in places, totally irrelevant - sources to reach a conclusion that has no basis in law. The United States respectfully requests that the Commission publish this response of the United States in the next Annual Report of the Commission, if Report No. 116/01 is published.

First, the Commission has ignored its own rules of procedure that preclude the consideration of a petition "if its subject matter . . . essentially duplicates a petition pending or already examined and settled by the Commission." See Rule 33, Commission Rules of Procedure. The issues presented by the Domingues petition are exactly the same as those already examined and settled by the Commission in the Case of Jay Pinkerton and James Terry Roach ("Roach").

Second, the evidence assembled by the Report does not support its conclusion there exists a customary international law prohibition on the execution of juvenile offenders. Indeed, upon close examination, the evidence of state practice identified leads to the opposite conclusion: no such principle exists in international law. Equally important (and necessarily fatal for the Commission's analysis) is the Report's total failure to identify evidence of *opinio juris* - a necessary element for establishing any principle of customary international law.

¹On _____, the United States filed a Response to the Petition in this matter that was not considered by the Commission in the preparation of its Report. The United States incorporates by reference herein that Response in its entirety and respectfully requests that the Commission consider the _____ Response in connection with this Reply. For ease of reference, a copy of the _____ Response is attached as Appendix A to this Reply.

I. This Petition Is Duplicative Of A Petition Already Examined And Settled By The Commission.

Rule 33 of the Rules of Procedure of the Inter-American Commission on Human Rights expressly provides that "the Commission shall not consider a petition if its subject matter . . . essentially duplicates a petition pending or already examined and settled by the Commission." The Commission previously examined the precise question presented in the instant case and found that while there was a *jus cogens* norm prohibiting the execution of children, there did not exist "a norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty."²

Clearly, the Domingues petition presents exactly the same issues as raised in the Roach case, as reflected in the Report's extensive treatment of the Roach opinion. Accordingly, this petition should be dismissed under Rule 33. Given the failure to follow Commission rules, it should withdraw this Report.³

II. Customary International Law Does Not Prohibit The Execution Of Juvenile Offenders.

The Report assembles a hodge-podge of treaties, UN resolutions, and incomplete discussion of US law, which - without any analysis - it concludes constitutes "overwhelming evidence" that displays "consistency and generality" of State practice. As if waving a magic wand, the Report even goes so far as to declare a *jus cogens* norm of international law. It is the position of the United States that neither the state practice identified by, nor the legal standards cited by the Report are sufficient to establish either a customary or *jus cogens* prohibition of the execution of juvenile offenders.

² Case of Jay Pinkerton and James Terry Roach, Resolution No. 3/87, Case 9647, Inter-Am. Cm. H.R. 1986-87, 147 OES/Ser.L/VII/71, doc. 9, rev. 1 (1987) ¶ 60.

³ Presently, there are several petitions pending before the Commission that have been filed against the United States raising the same issue as addressed in Roach. The United States has not filed - nor does it intend to file - responses in any of those cases, as provided under Rule 33.

**A. The Commission's Reliance Upon Treaties As Evidence
Of State Practice Is Misplaced.**

In its Report the Commission concludes that the prohibition of the death penalty with respect to individuals under 18 years of age in the American Convention on Human Rights (Article 4.5), in the International Covenant on Civil and Political Rights (Article 6.5), the Convention on the Rights of the Child (Article 37), and in the Fourth Geneva Convention (Article 68) demonstrates a pattern of practice, which establishes a *jus cogens* norm. See Michael Domingues, Report No. 116/01, Case No. 12.285 (October 15, 2001)(hereinafter "CRP") ¶¶ 55-68. These instruments create no such pattern, nor are they sufficient to establish the existence of a *jus cogens* norm of international law.

As accurately stated by a member of the Commission in Roach, "the fact that prohibition of the death penalty appears in these treaties . . . does not mean that these treaties have declared an existing custom or have crystallized or reflected a custom."⁴ Indeed, the negotiating histories of each of these conventions reflects that the inclusion of the provision concerning the juvenile death penalty was neither based upon custom, nor even by consensus:

- Article 4(5) of the American Convention on Human Rights was approved only with a two-vote margin, with 40% of the assembled States abstaining from voting in favor of the provision.⁵
- Article 6(5) of the International Covenant on Civil and Political Rights was adopted by fifty-three votes to five, with fourteen abstentions.⁶

⁴ Case of Jay Pinkerton and James Terry Roach, Case No. 9647 (Inter.-Am.C.H.R. 1987)(Dissenting Opinion, Dr. Marco Gerardo Monroy Cabra § 3).

⁵ Digest of U.S. Practice in International Law, Vol. I, p. 882 (1981-1988)(citing United States Memorandum to Edmundo Vargas Carreno, Executive Secretary of the Inter-American Commission on Human Rights (July 15, 1986)).

⁶ Commission on Human Rights, 12th Session (1957), A/3764, § 120 (o) [A/C.3/SR.820, § 25]; See Bossuyt, M.J., Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights, p. 143 (Martinus Nijhoff Publishers 1987).

- Article 37 of the Convention on the Rights of the Child was adopted with the express understanding that States retained the right to ratify the Convention with a reservation on this article.⁷
- Article 68 of the Fourth Geneva Convention by its terms only applies to international armed conflicts and, consequently, cannot be considered a demonstration of custom in time of peace.

As explained by Dr. Munroy in Roach, "the American Declaration of the Rights and Duties of Man cannot be interpreted in light of the provisions of the American Convention on Human Rights, the International Covenant on Civil and Political Rights and other treaties on human rights because these treaties are subsequent to the aforesaid Declaration and are binding only on States parties to them."⁸

In any event, it is common knowledge that many States ratify treaties, but fail to implement the obligations they have assumed thereunder. Indeed, The UN Secretary General has reported that there appear to be at least 14 countries which have ratified the CRC, but have not amended their laws to exclude the imposition of the death penalty on persons who committed the capital offense when under the age of 18.⁹ Hence, reference to treaties that establish prohibitions on the use of the death penalty is not sufficient to establish state practice sufficient for customary international law, particularly where, as is the case here, those provisions were not adopted by consensus.

⁷ See Commission on Human Rights, Report of the Working Group on a Draft Convention on the Rights of the Child, 45th Sess., 2 Mar. 1989, at 101, U.N. Doc. E/CN.4/1989/48.

⁸ Case of Jay Pinkerton and James Terry Roach, Case No. 9647 (Inter.-Am.C.H.R. 1987)(Dissenting Opinion, Dr. Marco Gerardo Monroy Cabra § 6) (emphasis added).

⁹ Sixth quinquennial report of the Secretary General on capital punishment, *supra* note 13, at 40. A number of countries mentioned in the report have taken general reservations to the CRC, based upon their State constitutions or Islamic Law. See Reservations, Declarations and Objections Relating to the CRC, UN Doc. CRC/C/2/Rev.8.

B. UN Organs Have Recognized There Is No Customary International Law Prohibition On The Execution Of Juvenile Offenders.

The Report cites a 1998 UN Commission on Human Rights resolution for the proposition that the United Nations considers the execution of juvenile offenders to be contrary to customary international law. The text cited, however, was adopted by a vote of 26(yes)-13(no)-12(abstentions); and fifty-one States, including non-Commission members, signed a statement disassociating themselves from that decision. See CRP ¶¶ 69-71. A similar text was adopted at the 2001 session of the Commission, by a vote of 27-18-7, with an even greater number of States - sixty-one - dissociating themselves from the resolution.

At its 2001 session, the UN Sub-Commission on the Promotion and Protection of Human Rights also recommended a draft decision to the Commission that would have "confirm[ed]" that international law "clearly establishes that the imposition of the death penalty on persons aged under 18 at the time of the offense is in contravention of customary international law."¹⁰ The Commission, however, did not adopt the recommended decision. Instead, in two other resolutions adopted by consensus - Extrajudicial, Summary or Arbitrary Executions and Rights of the Child - the Commission called upon all States "in which the death penalty has not been abolished, to comply with their obligations as assumed under relevant provisions of international human rights instruments, including in particular articles 37 and 40 of the Convention on the Rights of the Child (CRC) and articles 6 and 14 of the International Covenant on Civil and Political Rights (ICCPR)."¹¹

So, contrary to claims made in the Report, recent decisions of the UN Commission on Human Rights actually show that there is no international agreement on whether

¹⁰ The text of the draft decision is reported in UN Doc. E/CN.4/2001/2 at 14.

¹¹ CHR Res. 2001/45 (Apr. 23)(Extrajudicial, summary or arbitrary executions); CHR Res. 2001/75 (Apr. 25)(Rights of the Child). For the Convention see G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49 at 167, U.N. Doc. A/44/49, 28 I.L.M. 1448, 1470.

customary international law prohibits the execution of juvenile offenders.

C. In Focussing On The Domestic Practice of States, The Report Ignores A Necessary Element Of Customary International Law - Opinio Juris.

In assembling its claim that customary international law prohibits the execution of juvenile offenders, the Report asserts that the principle is reflected in the domestic practice of States. See ¶¶ CRP 72-76. Assuming that State practice is consistent (which it is not), however, is not enough to establish customary international law - *opinio juris* is also necessary. That is, these States must be engaging in the practice out of a sense of legal obligation to do so. This necessary element has not been established by the Report; indeed, it is wholly overlooked.

It is well established that that customary international law is "international law result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation" or *opinio juris*.¹² For *opinio juris* to exist, there must be a "sense of legal obligation, as opposed to motives of courtesy, fairness, or morality . . . and the practice of states recognizes a distinction between obligation and usage."¹³ Here, the Report makes no attempt to establish the basis for the practice it alleges States are engaged. Without some analysis of the context in which States discontinued the process of executing juvenile offenders, it is impossible to assert it was done out of a sense of legal obligation and not for motives of courtesy, fairness or morality.¹⁴

¹² Brownlie, Principles of Public International Law (5th), 1998 at 7; Restatement of the Foreign Relations Law of the United States (Third), § 102(2).

¹³ Id.

¹⁴ Furthermore, the existence of a treaty obligation to engage (or not to engage) in a practice is not sufficient to establish *opinio juris*. Treaty obligations are separate and distinct from obligations under customary international law, and cannot be used to prove custom.

D. United States Practice Does Not "Demonstrate a Trend Towards Lack of Acceptance of the Application of the Death Penalty to Those Under the Age of 18 Years."

The Report asserts, on the basis of the United States Supreme Court decision in Thompson v. Oklahoma, 487 U.S. 815 (1988), that there is a trend towards lack of acceptance of the application of the death penalty to those offenders under the age of 18. However, the Report fails to acknowledge that the Supreme Court in Stanford v. Kentucky, 492 U.S. 361 (1989), subsequently held that imposition of capital punishment on an individual for a crime committed at the age of 16 or 17 did not violate evolving standards of decency and, thus, did not constitute cruel and unusual punishment under the Eighth Amendment.

The Report also references the adoption in 1999, by Florida and Montana, of higher standards concerning the application of the death penalty which allegedly "complement the international movement to the establishment of 18 as the minimum age for the imposition of capital punishment"; however, neither action was based upon a rule of customary law prohibiting the death penalty with respect to offenders under 18 years of age. The Florida Supreme Court held in Brennen v. Florida that the imposition of the death penalty upon a juvenile under the age of 17 was cruel or unusual punishment under the Florida state constitution, due to the fact that "since 1972, more than a quarter of a century ago, no individual under the age of seventeen at the time of the crime has been executed in Florida." No discussion of customary law can be found in the negotiating history of the Montana Legislature, or in its consideration and approval of changing the minimum age limit for the death penalty. See Montana Legislature Committee Minutes, 1999 Session, 56th Legislature, Regular Session, Senate Judiciary Committee (Mar. 23, 1999) and House Judiciary Committee (Jan. 29, 1999).

In addition, the Report claims that the different minimum age limits for the death penalty in different U.S. states demonstrate "a lack of acceptance of the application of the death penalty to those offenders under the age of 18 years." Under a federal system, however, states are expected to have different laws, because "[e]ach has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses." United States v. Wheeler,

435 U.S. 313, 320 (1978)(*quoting United States v. Lanza*, 260 U.S. 377, 382 (1922)). Further, the Commission finds "it significant in this respect that the U.S. federal government itself has considered 18 years to be the minimum age for the purpose of federal capital crimes," see CRP ¶ 79, however, that reliance is entirely misplaced. As the Supreme Court found in *Stanford v. Kentucky*, 492 U.S. 361, 372, "the statute in question does not embody a judgement by the federal legislature that no murder is heinous enough to warrant the execution of a youthful offender, but merely that the narrow class of offense it defines is not." Finally, the Report neglects to note that the U.S. Uniform Code of Military Justice permits the use of capital punishment for crimes committed by members of the military under the age of 18, for the crimes specified therein.

Accordingly, there is no "trend" in the United States toward a prohibition on the execution of juvenile offenders. At a minimum, practice is uneven, and there is no evidence that states that have chosen to end the practice have done so out of a sense of legal obligation as required to establish a principle of customary international law.

E. So-called "Related Developments" Are Neither Related Nor Relevant To Attempts To Establish A Prohibition On The Execution Of Juvenile Offenders Under International Law.

The Report cites the Optional Protocol to the Convention on the Rights of the Child Concerning Children in Armed Conflict as evidence "of the developments in other fields of international law addressing the age of majority for the imposition of serious and potentially fatal obligations and responsibilities." See CRP ¶¶ 80-83. The Commission, however, misconstrues the Protocol.

The Protocol (Article 3) obligates States Parties to deposit a binding declaration upon ratification affirming their agreement to raise the minimum age for voluntary recruitment into their national armed forces from the current international standard of 15 years. Hence, the Protocol expressly authorizes the voluntary recruitment of individuals aged 16 or 17. The Protocol further requires (Article 1) that States Parties take "all feasible measures" to ensure that members of their armed forces under the age of 18 do not take a "direct part in

hostilities." The standard recognizes that, in exceptional cases, it will not be "feasible" for a commander to withhold or remove a soldier under the age of 18 from taking a direct part in hostilities.¹⁵

Therefore, contrary to the Commission's assumption, related developments establish that the execution of individuals aged 16 or 17 at the time of the offence in exceptional circumstances is not contrary to accepted international treaties. The United Kingdom has adopted a similar understanding and states that:

"article 1 of the Optional Protocol would not exclude the deployment of members of its armed forces under the age of 18 to take a direct part in hostilities where: -

a) there is a genuine military need to deploy their unit or ship to an area in which hostilities are taking place; and

b) by reason of the nature and urgency of the situation:-

i) it is not practicable to withdraw such persons before deployment; or

ii) to do so would undermine the operational effectiveness of their ship or unit, and thereby put at risk the successful completion of the military mission and/or the safety of other personnel."

Multilateral Treaties Deposited with the Secretary General, Vol. I, p. 299, Optional Protocol to the Convention on the Rights of the Child Concerning Children in Armed Conflict, Declaration of the United Kingdom of Great Britain and Northern Ireland (Status as at 31 Dec. 2000).

In any event, the Optional Protocol addresses the use of children in armed conflict, not the execution of

¹⁵ The administration provided the following understanding in transmitting the Protocol to the Senate for its advice and consent to ratification:

With respect to Article 1, the United States understands that the term "feasible measures" are those measures which are practical or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations. * * *The phrase "direct participation in hostilities" does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions and other supplies or forward deployment.

juvenile offenders. The death penalty is a criminal justice issue wholly unrelated to the Optional Protocol. Accordingly, the Optional Protocol has absolutely no probative value to attempts to establish a norm of international law prohibiting the execution of juvenile offenders.

II. The United States Is Not Bound By Any International Norm Prohibiting The Execution Of Juvenile Offenders.

A. The United States Has Persistently Asserted Its Right to Execute Offenders Aged 16 and 17 at the Time of the Offense.

The Report asserts that "the United States, itself rather than persistently objecting to the standard, in several significant respects recognized the propriety of this norm, for example by proscribing the age of 18 as the federal standard for the application of capital punishment and by ratifying the Fourth Geneva Convention without reservation," see CRP ¶ 85, however, the Commission reached the opposite conclusion in Roach, on exactly the same set of facts. See Resolution 3/87 ¶ 54. As the Commission pointed out in Roach, "[s]ince the United States has protested the norm, it would not be applicable to the United States should it be held to exist. For a norm of customary international law to be binding on a State which has protested the norm, it must have acquired the status of *jus cogens*." Roach ¶ 53.

The Report identifies no statement or action of the United States since the Roach decision that would belie its previous persistent objection to the application of such a norm to the United States. Indeed, the United States has consistently asserted its right to execute juvenile offenders - by making reservations to treaties, by filing briefs before national and international tribunals, and by making public statements.¹⁶ There is simply no basis for a finding to the contrary.

¹⁶ Perhaps the most telling example of the United States' persistent objection to the application of such a norm to the U.S. was its reservation to ICCPR article 6(5) - which was made after the Roach decision. Through its instrument of ratification, the U.S. reserved the right to impose capital punishment for crimes committed by persons less than 18 years of age, subject to constitutional restraints. See 138 Cong. Rec. 8070-71 (1992). Out of the 149 states that are parties to the ICCPR, only 11 have objected to the United States' reservation to Article 6(5), and this does not equate "condemnation within the

Accordingly, even if a norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty has evolved since Roach, which it has not, the United States is not bound to such a rule, given its status as a persistent objector, a fact recognized by this very Commission in Roach.¹⁷

B. The Report Fails To Establish A Jus Cogens Norm Of International Law.

In Roach, the Commission did not find evidence of customary international law that would prohibit the imposition of the death penalty for 16-18 year old offenders. To find that there now exists a *jus cogens* norm is both inconsistent and implausible. See Inter-American Commission on Human Rights, Report 116/01, Case 12.285, Michael Domingues, ¶ 41 (October 15, 2001); In Re Roach, Case 9647, ¶ 56 (Inter.-Am.C.H.R. 1987).

The only argument presented by the Report in favor of the finding of a *jus cogens* principle that prohibits the execution of juvenile offenders is the assertion that the execution of Mr. Domingues will "shock the conscience of humankind." This assertion is specious at best.

international community." See CRP ¶ 62 and fn. 52. Significantly, not one of these States noted that it does not recognize the ICCPR as being in force between itself and the United States. See UNITED NATIONS MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 2000, UN Doc. ST/LEG/SER.E/19 (2001); Vienna Convention on the Law of Treaties, opened for signature Aug. 23, 1969, Art. 20(4)(b), 1155 UNTS 332, 333 (objection by a contracting State to another State reservation to part of a treaty does not prevent the treaty entering into force unless such intention "is definitely expressed by the objecting State.")

¹⁷ As noted by the Report, the United States has ratified the Fourth Geneva Convention, which prohibits imposition of the death penalty against a national of another country held during time of war who was under 18 when he committed the offense. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 6 U.S.T. 3516, 3560 75 U.N.T.S. 286, 330. As the Commission recognized in Roach, however, this minor exception to the United States' policy of opposing treaty provisions barring the execution of persons who committed their crimes when they were 16 or 17, is limited only to foreign nationals held during time of war and does not vitiate the country's persistent-objector status.

On October 22, 1993, sixteen-year-old Michael Domingues brutally murdered Arjin Chanel Pechpo and her four-year-old son, Jonathan Smith. After the victims arrived home, where Domingues was waiting for them, Domingues threatened Pechpo with a gun then tied her up with a cord which he used to strangle her. He ordered her little boy to take off his pants and get into the bathtub with his mother's dead body. When an attempt at electrocuting the four-year-old failed, Domingues stabbed Jonathan with a knife multiple times, killing him. After the murders, Domingues then bragged about killing Pechpo for her car, gave items he had stolen from Pechpo as gifts to friends, and used the victim's credit card. Domingues v. Nevada, 112 Nev. 683, 917 P.2d 1364, 112 Nev. 683; 917 P.2d 1364 (1996).¹⁸ The acts of Mr. Domingues should shock the consciousness of humankind, not the punishment those acts have earned him.

Conclusion

For the foregoing reasons, the United States considers Report No. 116/01 to mark a regrettable departure from the Commission's ordinary scrupulous adherence to the norms and procedure for the determination of individual cases. The Commission should withdraw its Report in the instant case and, if it deems necessary, hear further argument.

¹⁸ There is simply no support for the proposition that this alleged prohibition against the execution of 16- or 17-year-old offenders has similar force to prohibitions such as those against piracy, slavery, and genocide. Imposition of capital punishment upon offenders, who committed offenses at 16 or 17 years of age, clearly does not fall within this category of recognized and accepted non-derogable, *jus cogens* norms. See Inter.-Am.C.H.R. Report 116/01, Case 12.285, ¶ 49 and FN 43 (*citing* The Restatement of Foreign Relations Law of the United States, § 702). Moreover, as Dr. Monroy stated Roach:

"There is no proof to the effect that all states worldwide feel bound by an obligatory rule of customary law prohibiting the death penalty with respect to juveniles under 18 years of age." Roach, § 3 (dissenting opinion).

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