

# REFLECTIONS ON THE NORMATIVE STATUS OF THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

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## 1. INTRODUCTION

On this sixtieth anniversary of the adoption of the American Declaration of the Rights and Duties of Man, it is fitting to compare its status to the Universal Declaration of Human Rights and take a new look at the normative status of this instrument within the inter-American system. The American Declaration was the first formal catalogue of the "fundamental rights of the individual" proclaimed in the Organization of American States ("OAS") Charter.<sup>1</sup> The Declaration and the Charter were both approved at the creation of the OAS in 1948.

The American Declaration, like the contemporaneous but better-known Universal Declaration of Human Rights, was never intended to be a legally binding instrument. The Universal Declaration was acclaimed at the time of its adoption by Eleanor Roosevelt as "a common standard of achievement" for mankind, but it was not to be considered legally binding on States as a treaty; instead, the adoption of its norms was considered an aspiration rather than a legal commitment.<sup>2</sup> The Universal Declaration has

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<sup>1</sup> Organization of American States [OAS], Charter of the Organization of American States art. 3(1), Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

<sup>2</sup> The Universal Declaration was not considered legally binding and the Europeans upon adopting the European Convention on Human Rights in Rome in 1950, formally known as the *Convention for the Protection of Human Rights and Fundamental Freedoms*, considered it worthy to mention in the Preamble that they were giving legal force to some of the rights set forth in the Universal Declaration: the "Governments of European countries" in adopting this treaty "take the first steps for the collective enforcement of certain of the rights stated in

never been applied by organs of the United Nations ("UN") system to the member States in anything but a rhetorical manner, but it has served repeatedly as an inspiration in the preambles of the constitutions of many nations in the world. Preambles, however, are not the operative provisions of constitutions. At best they set forth the context: the aspirations, the purposes, and the goals. The United Nations did not translate the norms of the Universal Declaration into legally binding norms until it adopted the UN International Covenants on Civil and Political Rights ("ICCPR") and on Economic, Social and Cultural Rights ("ICESCR") in 1966, which did not enter into force for another decade. The Cold War determined the creation and adoption of two separate instruments rather than one, and today both are in force with 164 State parties to the ICCPR (as of February 2, 2009) and 160 parties to the ICESCR. The adoption of the Optional Protocol to the ICCPR granted individuals the right to present individual complaints against States for violation of their human rights to the UN Human Rights Committee, which supervises compliance with the ICCPR. Today the ICCPR Optional Protocol has 111 State parties. An Optional Protocol granting individuals the right to petition the ICESCR was finally adopted by the UN General Assembly on December 10, 2008 and will enter into force when it has ten State parties. The United States has ratified the ICCPR but has not accepted the Optional Protocol, and it has yet to become a party to the ICESCR. Consequently, individuals who seek to present cases against the United States for violations of international human rights currently only have recourse to the Inter-American Commission on Human Rights.

The Inter-American Commission on Human Rights has maintained that the American Declaration acquired legally binding force because it was the only human rights document in existence in 1967, when the Charter of the OAS was amended and elevated the Inter-American Commission to the status of a "principal organ" of the regional body. It is argued that the American Declaration was incorporated into the text of the 1967 Charter by means of the amendment, since the reference to "human rights" in the OAS Charter must be understood as referring to the American Declaration, the only existing catalogue of human rights norms in

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the Universal Declaration." Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, *publ.*, Nov. 4, 1950, 213 U.N.T.S. 221.

the inter-American system at the time. Given that the Charter amendments were "ratified" by the OAS member States, it has been suggested that the American Declaration acquired the normative status of a treaty. This position has been repeated in many merits decisions of the Inter-American Commission over the years. This Essay argues that asserting that the American Declaration is legally binding is a useful mechanism, but a legal fiction, in the absence of ratification of, or accession to, the American Convention by all the member States of the OAS. The OAS does not require as a condition of membership, as the Council of Europe does, that all member States become parties to the regional human rights convention. Given the failure of a number of OAS member States to ratify or accede to the American Convention, the American Declaration, as a default instrument, continues to exist for a reason. This Essay seeks to promote debate on the Inter-American Commission's practice of applying both the American Convention and the American Declaration in the same case to State parties to the American Convention, purportedly under the authority of Article 29(d) of the Convention. The practice has evolved whereby the Commission, first, declares violations of rights set forth in the American Declaration that occurred in a State before it became a party to the American Convention and second, declares violations of rights set forth in the American Convention that occurred after the State became a party to the treaty. This practice offends various principles of international law; first among them, the principle that treaties cannot be applied retroactively, set forth in Article 28 of the Vienna Convention on the Law of Treaties.

## 2. EVOLUTION OF THE COMMISSION'S POSITION THAT THE AMERICAN DECLARATION IS LEGALLY BINDING ON NON-SIGNATORIES, INCLUDING THE UNITED STATES

### 2.1. *Abortion*

The American Declaration on the Rights and Duties of Man was the only existing human rights instrument in the inter-American system from 1948 to 1978, when the American Convention entered into force. The American Convention on Human Rights, a regional human rights treaty comparable to the UN's ICCPR, entered into force on July 18, 1978. In 1959, the OAS member States charged the Inter-American Commission with the

task of promoting and protecting human rights in the Americas. From its earliest days, the Commission received complaints of human rights violations from individuals in the Western hemisphere, but the political bodies did not grant the Commission the competence to examine these complaints until 1965.<sup>3</sup> From 1965 until 1978, the Commission looked to the American Declaration as the sole source of legal norms to define human rights in the inter-American system.

Under the Commission's Rules of Procedure, or "Regulations" as they were called at that time, the Commission was authorized to transmit the pertinent parts of a communication to the State for its response and the State had six months (180 days) to respond. In the majority of cases even today, a State usually responds to a communication from an international human rights monitoring body by informing it that the petitioner has failed to exhaust domestic remedies, since the failure to exhaust domestic remedies is the primary bar to bringing a case before an international human rights mechanism. Over time, the rule has evolved that a State alleging failure to exhaust domestic remedies has the obligation to inform the human rights body of the effective remedies that need to be exhausted.

During the 1970s, many of the governments of the OAS member States were non-democratic. During this period, most States tended not to respond at all to the Commission or provided a non-substantive response to the complaint and the Commission created a "default" remedy, applying Article 51.1 of its Regulations which allowed it "to presume the occurrence of the events denounced" to be true.<sup>4</sup>

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<sup>3</sup> The Second Special Inter-American Conference, which met in Rio de Janeiro in 1965, broadened the Commission's powers to authorize the Commission to "examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by the Commission and to make recommendations to it, when it finds appropriate, in order to bring about more effective observance of fundamental human rights." This was later codified into the statute of the commission itself. Statute of the Inter-American Commission on Human Rights, O.A.S. C.A. Res. 447, art 20(b), OAS Doc. OEA/Ser.P/IX.0.2/80 (Jan. 1, 1980).

<sup>4</sup> Article 51.1 of the Commission's Regulations provided: "The occurrence of the events on which information has been requested will be presumed to be confirmed if the Government referred to has not supplied such information within 180 days of the request, provided always that the invalidity of the events denounced is not shown by other elements of proof." See Rodríguez Larreta Piera v. Argentina, Case 2155, Inter-Am. C.H.R. Report No. 20/78 (1978) (discussing Article 51.1 procedural requirements).

For example, many countries, including Argentina, Bolivia, Brazil, Chile, Cuba, Haiti, Nicaragua, Panama, Paraguay, and Uruguay, either did not respond to requests for information or responded in a cursory manner, and the Commission automatically applied Article 51.1, declaring that the State had violated the relevant provisions of the American Declaration. In the operative part of these resolutions, the Commission developed a formulaic recommendation that the State: (1) order a complete, impartial investigation to determine responsibility for the facts denounced; and (2) sanction those responsible and inform the Commission within a maximum of thirty days as to the measures taken to comply with the recommendations in its resolution on the case. The Commission also decided to publish its resolutions in its Annual Report to the OAS General Assembly.

The “Baby Boy” decision against the United States in March 1981 provides the first clear statement of the Commission’s position regarding a State’s legal obligations under the American Declaration.<sup>5</sup> The case was presented by a Catholic Action non-governmental organization on behalf of a “baby boy” that had been aborted in Boston, Massachusetts on October 3, 1973. The petition to the Commission followed the January 22, 1973, US Supreme Court decision in *Roe v. Wade*, which rendered inoperative the Massachusetts criminal abortion statute and allowed abortions to take place. The petitioners sought an interpretation of Article I of the American Declaration as informed by Article 4 of the American Convention on Human Rights, for a determination that the right to life was protected “from the moment of conception.”<sup>6</sup>

The Commission, making reference to the *travaux préparatoires* of the American Declaration, concluded that abortion did not

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<sup>5</sup> Baby Boy Case, Case 2141, Inter-Am. C.H.R., Report No. 23/81, OEA/Ser.L/V/II.81 doc. 9 rev. 1 ¶ 14 (1981).

<sup>6</sup> Article I of the American Declaration provides that “Every human being has the right to life, liberty and the security of his person.” Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. G.A. Res. XXX, art. I, O.A.S. Doc. OEA/Ser.L.V/II.82 doc. 6 rev. 1 (1948), available at <http://cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>. Article 4(1) of the American Convention on Human Rights provides “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.” OAS, American Convention on Human Rights art. 4(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

violate the American Declaration despite the language of Article 4 of the American Convention that appears to indicate the contrary. Dr. Andres Aguilar, in his concurring decision stated:

[I]t is clear from the *travaux preparatoires* that Article I of the Declaration, which is the fundamental legal provision in this case, sidesteps the very controversial question of determining at what moment human life begins. The legislative history of this article permits one to conclude that the draft which was finally approved is a compromise formula, which even if it obviously protects life from the moment of birth, leaves to each State the power to determine, in its domestic law, whether life begins and warrants protection from the moment of conception or at some other point in time . . . . The decision of the majority does not begin, and could not begin, to judge whether abortion is reprehensible from a religious, ethical or scientific point of view, and it correctly limits itself to deciding that the United States of America has not assumed the international obligation to protect the right to life from conception or from some other moment prior to birth and that, consequently, it could not be correctly affirmed that it had violated the right to life set forth in Article I of the American Declaration on the Rights and Duties of Man.<sup>7</sup>

While the "Baby Boy" case was pending, the Commission received a request from four members of the U.S. Congress for an advisory opinion related to the consequences of an eventual decision of the Commission adverse to the United States. The Commission noted that it was required to respond to inquiries made by any member States on matters related to human rights. It then set forth the following position on the legally binding nature of the American Declaration on the United States:

The international obligation of the United States of America, as a member of the Organization of American States (OAS), under the jurisdiction of the Inter-American Commission on Human Rights (IACHR) is governed by the Charter of the OAS (Bogota, 1948) as amended by the

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<sup>7</sup> *Baby Boy Case*, Case 2141, Inter-Am. C.H.R., Report No. 23/81, OEA/Ser.L./V/II.54, doc. 9 rev. 1 ¶ 1 (1981) (Dr. Andres Aguilar M., concurring).

Protocol of Buenos Aires on February 27, 1967, ratified by the United States on April 23, 1968.

As a consequence of articles 3(i), 16, 51(e), 112 and 150 of this Treaty, the provisions of other instruments and resolutions of the OAS on human rights, acquired binding force. Those instruments and resolutions approved with the vote of U.S. Government are the following:

- American Declaration of the Rights and Duties of Man (Bogota, 1948)
- Statute and Regulations of the IACHR 1960, as amended by resolution XXII of the Second Special Inter-American Conference (Rio de Janeiro, 1965)
- Statute and Regulations of IACHR of 1979-1980

Both Statutes provide that, for the purpose of such instruments, the IACHR is the organ of the OAS entrusted with the competence to promote the observance and respect of human rights. For the purpose of the Statutes, human rights are understood to be the rights set forth in the American Declaration in relation to States not parties to the American Convention on Human Rights (San Jose, 1969). (Articles 1 and 2 of the 1960 Statute and article 1 of 1979 Statute).<sup>8</sup>

Despite the adoption of this general doctrinal position, the Commission did not insert language affirming the legally binding nature of the American Declaration into later reports dealing with any other country under the American Declaration other than the United States.<sup>9</sup> In 1978 the American Convention entered into

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<sup>8</sup> *Baby Boy Case*, Case 2141, Inter-Am. C.H.R., Report No. 23/81, OEA/Ser.L/V/II.81, doc. 9 rev. 1 ¶¶ 15-17 (1981).

<sup>9</sup> The Commission tends to use language such as:

[T]he American Declaration constitutes a source of international legal obligation for all member States of the Organization of American States, including The Bahamas. Moreover, the Commission is empowered under Article 20 of its Statute and Articles 49 and 50 of its Rules of Procedure to receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the American Declaration in relation to OAS member States that are not parties to the American Convention.

force and in the 1980s, more States ratified the American Convention, particularly as they made the transition from non-democratic to democratic forms of government.<sup>10</sup> Despite the fact that some States, such as El Salvador and Guatemala, became States parties to the American Convention as early as 1978 did not mean that they complied with the Commission's procedures or decisions.<sup>11</sup>

## 2.2. *The Death Penalty*

The next major case against the United States also involved an interpretation of the "right to life" provision of the American Declaration and dealt with another controversial issue—the death penalty as imposed on juvenile offenders.<sup>12</sup> The petitioners were represented by David Weissbrodt, a professor of international law and Mary McClymont. Two prominent non-governmental organizations, the American Civil Liberties Union and the International Human Rights Law Group co-sponsored the complaint and Amnesty International also filed a petition alleging that the imminent execution of James Terry Roach, while lawful in the United States, was a violation of international law. The petitioners alleged that the United States had violated the right to life guaranteed under the American Declaration, as informed by customary international law, which prohibits the execution of persons who committed crimes under the age of eighteen. The

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Prince Pinder v. Bahamas, Case 12,513, Inter-Am. C.H.R., Report No. 79/07, OEA/Ser.L./V/II.130, doc. 22 rev.1 ¶ 20 (2007).

<sup>10</sup> The American Convention as of February 2, 2009 has twenty-four State parties out of thirty-five OAS member States: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. The eleven OAS member States to which the Inter-American Commission applies only the American Declaration of the Rights and Duties of Man are: Antigua and Barbuda, Bahamas, Belize, Canada, Cuba, Guyana, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, and the United States.

<sup>11</sup> In its Annual Report for 1983–1984, the Commission's decisions, for example, on El Salvador were all adopted on the basis of the Article 39 presumption (previously Article 51.1 of the Commission's Regulations) that presumed the facts to be true in cases in which the State did not provide a response to the complaint. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT: SITUATION OF HUMAN RIGHTS: EL SALVADOR (1983–84), available at <http://www.cidh.oas.org/annualrep/83.84.eng/chap.4b.htm>.

<sup>12</sup> Roach v. United States, Case 9647, Inter-Am. C.H.R., Report No. 3/87 (1987).

petitioners alleged that the American Declaration should be interpreted according to the canons of the Vienna Convention on the Law of Treaties ("VCLT") because the Convention represents a consensus on how international instruments should be construed. According to this view, the terms of the American Declaration should be interpreted in accordance with their ordinary meaning and in light of the object and purpose of the instrument.

The petitioners argued that killing a young person who has not had the chance to mature to adulthood is cruel and inhuman punishment that is prohibited under Article 26 of the American Declaration.<sup>13</sup> More importantly, the petitioners alleged that Article 31 of the VCLT looks to relevant rules of international law to help interpret treaties, and therefore, the Commission should take account of customary international law. They alleged that a norm prohibiting the execution of juvenile offenders has "obtained the status of customary international law" and cited as evidence of the creation of this norm Article 4(5) of the American Convention, Article 6(5) of the ICCPR, and Article 68 of the Fourth Geneva Convention, all of which prohibit the imposition of the death penalty on persons under eighteen years of age.<sup>14</sup> In addition, the petitioners alleged, approximately two-thirds of the nations of the world either abolished the death penalty or have prohibited it for juveniles by adhering to these human rights instruments. As further evidence of state practice, in terms of actually carrying out the death penalty, petitioners submitted evidence compiled by Amnesty International to the effect that since 1979, although eighty nations of the world had executed over 11,000 persons, only six persons who committed capital crimes under the age of eighteen had been executed by four nations, including the United States.

The United States responded that the execution of juvenile offenders was not inconsistent with the standards set forth in the American Declaration, which is silent on the issue of capital punishment. The drafters considered and declined to adopt any

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<sup>13</sup> Article 26 provides in relevant part that: "Every person accused of an offense has the right . . . not to receive cruel, infamous or unusual punishment." OAS, American Declaration of the Rights and Duties of Man, OAS Res. XXX, art. 26, OEA/Ser.LV/II.82 doc. 6 rev. 1 (1948), available at <http://cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>.

<sup>14</sup> American Convention, *supra* note 6, art. 4(5); International Covenant on Civil and Political Rights, G.A. Res. 2200A, art. 6(5), Dec. 16 1966, 999 U.N.T.S. 171; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 68, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

specific standards on the issue of capital punishment and the United States pointed out that reference to prohibiting capital punishment, except for exceptional crimes, had been deleted in the final draft. The debate surrounding Article I demonstrated that a standard on capital punishment could not be devised due to the diversity of state legislation in the hemisphere. The United States argued that the VCLT should not be relied on to interpret the American Declaration because the Declaration was not a binding treaty on the United States. Further, the United States declared that:

The U.S. Government does not agree with the Commission's holding in [the earlier case] that the Declaration acquired binding force with the adoption of the revised OAS Charter. . . . The Declaration was not drafted with the intent to create legal obligations, therefore, the Commission should take special care 'where the intentions of the drafters are manifest with respect to any particular article,' not to overturn that meaning.<sup>15</sup>

The United States took the position that the petitioners request that the Commission look to the American Convention and other instruments "to interpret" the American Declaration as encompassing the standard of Article 4(5), "requires the Commission to go far beyond its interpretative powers."<sup>16</sup> The three human rights instruments mentioned by petitioners, the United States argued, are irrelevant to the Commission's consideration of the case. The United States is neither a party to the ICCPR nor the American Convention, and standards cannot be imposed by "interpretation."

In addition to its argument on the lack of binding force of the American Declaration, the United States responded that the petitioners were incorrect in stating that the provision in question was declaratory of customary international law. The age of majority for purposes of imposing the death penalty, it argued, is not a matter of uniform state practice and the specific standard

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<sup>15</sup> *Roach v. United States*, Case 9647, Inter-Am. C.H.R., Report No. 3/87 ¶ 38 (1987).

<sup>16</sup> Article 4(5) of the American Convention provides: "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women." American Convention, *supra* note 14, art. 4(5).

intended to create uniformity where none existed. As to state practice, the United States noted that countries that have enacted prohibitions on the execution of those who committed crimes before their eighteenth birthday did not do so out of any sense of legal obligation; relevant rules of law must exist apart from any convention or treaty standards. The U.S. government stated that it did not acknowledge the existence of a customary international law norm that prohibits the execution of juveniles. It stated that to establish a norm of customary law there must be "extensive and virtually uniform"<sup>17</sup> state practice and second, evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The rule must be recognized as a legal obligation based on the custom or practice of states. In this case, the United States argued, there is neither the uniformity of state practice, nor the required *opinio juris* to merit the conclusion that the rule constitutes a binding norm of customary international law.

The United States also noted that it previously dissented from the creation of such a norm; specifically it opposed Article 4(5) of the American Convention, and when President Carter signed the American Convention, he proposed that the Senate advice and consent to ratification be accompanied by a reservation stating that "United States adherence to Article 4 is subject to the Constitution and other law of the United States."<sup>18</sup> The U.S. government concluded by stating that "There 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 which it has indicated it will not accept when it becomes a party."<sup>19</sup>

The Commission's decision was adopted following the execution of two adults who had committed capital crimes while juveniles. Mr. Roach was executed on January 10, 1986, and Mr. Pinkerton was executed on May 15, 1986. On February 23, 1987, the U.S. Supreme Court announced that it would hear in its next term the case of *Thompson v. Oklahoma*, taking up the issue of the imposition of the death penalty on juvenile offenders.<sup>20</sup> As with

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<sup>17</sup> *Roach v. United States*, Case 9647, Inter-Am. C.H.R., Report No. 3/87 ¶ 38 (1987).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> The Supreme Court's decision in *Thompson v. Oklahoma*, 487 U. S. 815, 823-31 (1988), appears to have been subtly influenced by the Commission's decision on the merits in *Roach v. United States*, as the Supreme Court held that the execution of offenders under the age of sixteen at the time of their crimes was

abortion, the American Declaration, in Article I, is silent on the issue of the death penalty. The American Convention, on the other hand, devotes five out of six subparagraphs of Article 4 (on the right to life) to the death penalty and Article 4(5) of the American Convention specifically prohibits the imposition of capital punishment on persons "under 18 years of age."<sup>21</sup>

Despite the United States protestation regarding the Commission's decision holding the American Declaration legally binding, the Commission reiterated that the "international obligation of the United States of America, as a member State of the Organization of American States (OAS), under the jurisdiction of the Inter-American Commission on Human Rights, is governed by the Charter of the OAS as amended by the 1967 Protocol of Buenos Aires on 27 February 1987, ratified by the United States on 23 April 23 1968."<sup>22</sup> The Commission then took into consideration the U.S. objection to applying the American Convention "by interpretation" and noted:

The United States is a member State of the Organization of American States, but is not a State party to the American Convention on Human Rights, and, therefore, cannot be found to be in violation of Article 4(5) of the Convention, since as the Commission stated in Case 2141 (United States), para. 31: 'it would be impossible to impose upon the United States Government or that of any other State member of the OAS, by means of 'interpretation,' an

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prohibited by the Eighth Amendment to the Constitution. The Commission's subsequent *Michael Domingues* decision, Case 12,285, Inter-Am. C.H.R., Report No. 62/02 (2002), determined that the imposition of the death penalty on an individual, Michael Domingues, who had committed a capital crime at the age of sixteen, violated an international norm of *jus cogens* as reflected in Article I of the American Declaration. *Michael Domingues*, Case 12,285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser.L/V/II.117doc. 1 rev. 1 ¶ 80 (2002). This decision appears to have subtly influenced the U.S. Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), in which the Supreme Court held that it was unconstitutional to impose the death penalty on an individual who had committed a capital crime under the age of eighteen.

<sup>21</sup> Article 4(5) provides: "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women." American Convention, *supra* note 14, art. 4(5).

<sup>22</sup> *Roach v. United States*, Case 9647, Inter-Am. C.H.R., Report No. 3/87 ¶ 46 (1987).

international obligation based upon a treaty that such State has not duly accepted or ratified.<sup>23</sup>

The Commission, however, continued to insist that the American Declaration and the Statute and Regulations of the Commission acquired binding force through the United States' ratification of the OAS Charter and noted that "[f]or the purposes of the Statute, human rights are understood to be the rights set forth in the American Declaration in relation to States not parties to the American Convention on Human Rights."<sup>24</sup>

As opposed to the earlier case dealing with abortion, the Commission did find the United States in violation of the right to life provision of the American Declaration in this death penalty case. Since the American Declaration does not specifically address the issue of the death penalty, the Commission introduced notions of *jus cogens* and customary international law into its decision. The Commission found that the member States of the OAS recognize a *jus cogens* norm that prohibits the State execution of children, and stated that the case arose, not because of doubt concerning the existence of an international norm as to the prohibition of the execution of children, but because the United States disputed the allegation that consensus exists regarding the age of majority. The Commission was persuaded by the U.S. government's argument that a customary international law norm establishing eighteen as the minimum age for imposition of the death penalty did not exist, although it was of the opinion that in light of the increasing numbers of States ratifying the American Convention and the ICCPR that this norm was "emerging."<sup>25</sup> The Commission by a five to one vote (since the U.S. member was not permitted to participate in a decision affecting his own country) found a violation of Articles I (right to life) and II (right to equality before the law) of the American Declaration, concluding that the diversity of state practice, within the United States, was reflected in the fact that some states had abolished the death penalty entirely while others allowed a potential threshold limit of applicability as low as ten years of age, meant that the deprivation by the State of an offender's life was made subject to the fortuitous element of where the crime took place and did not depend upon the nature of the

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<sup>23</sup> *Id.* ¶ 47.

<sup>24</sup> *Id.* ¶ 49.

<sup>25</sup> *Id.* ¶ 60.

crime, nor the condition of the offender. It concluded that the right to life was the most fundamental right and that the deprivation of one's life should not be left to the vagaries of federalism:

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. Ceding to state legislatures the determination of whether a juvenile may be executed is not of the same category as granting states the discretion to determine the age of majority for purposes of purchasing alcoholic beverages or consenting to matrimony. The failure of the federal government to pre-empt 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 American Declaration of the Rights and Duties of Man, respectively.<sup>26</sup>

The dissenting vote in this case was Commissioner Marco Gerardo Monroy Cabra from Colombia. The fact that Dr. Monroy Cabra was from Colombia is significant because seven years later Colombia would submit a request for an advisory opinion to the Inter-American Court regarding the normative status of the American Declaration.

Commissioner Monroy Cabra's dissent begins by noting that the Commission's jurisdiction over the United States is determined by Article 20 of its Statute to cover cases arising under the American Declaration. He agreed with the majority that the United States is bound by the Statute and Regulations of the Commission and is also bound by the American Declaration. Commissioner Monroy Cabra echoed the U.S. position that the *travaux préparatoires* reveal that the States parties did not wish to expressly prohibit the death penalty or they would have adopted wording proposed by the Inter-American Juridical Committee. By remaining silent on the death penalty and not approving the draft

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<sup>26</sup> *Id.* ¶ 63.

that included it, Commissioner Monroy Cabra concluded that the United States was free to establish the death penalty without violating Article I of the American Declaration. He noted that since the United States had not ratified the American Convention or the ICCPR, neither was applicable to the United States.<sup>27</sup> He further noted that although the United States had ratified the fourth Geneva Convention, that treaty applied only during international conflicts, and, therefore, could not be applied to the execution of juveniles in the absence of an armed conflict.

Regarding the emerging norm of customary international law, Dr. Monroy Cabra maintained that a generalized and uniform practice does not suffice—of vital importance is *opinio juris*. The States concerned, he suggested, must feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. Customary international law, he noted, can find its expression in treaties in three different ways: (1) the text of the treaty can declare a customary rule that existed previously; (2) it can give concrete expression to a rule that is developing *in statu nascendi*; or (3) the provision of a treaty can convert *de lege ferenda* to a subsequent state practice after a process of consolidation, whereupon it converts to custom.

The fact that the prohibition of the death penalty with respect to juveniles under the age of eighteen is mentioned in three treaties, he argued, does not mean that these treaties have declared an existing custom or have crystallized or reflected a custom. Dr. Monroy Cabra contended that an emerging norm did not exist, but did allow that in time it might emerge (which is essentially the majority position):

The only thing that can be accepted is the generating effect *de lege ferenda*, which can lead to the development of the custom if state practice in the matter is consolidated. With regard to the prohibition of the death penalty, there is no uniformity in the laws of states, since some allow it and others prohibit it; further, some prohibit the death penalty in the case of minors, and others accept it or remain silent on the subject. It is possible that with time, the practice of

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<sup>27</sup> The United States ratified the ICCPR in 1992, five years after Roach. U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, *Status of Ratifications of the Principal Human Rights Treaties*, at 11 (June 9, 2004), <http://www.unhcr.ch/pdf/report.pdf>.

States will lead to the emergence of the custom in the instant case, but at present, it is not an international custom.<sup>28</sup>

With regard to the existence of a norm of *jus cogens* that children below a certain age do not have criminal responsibility, Dr. Monroy Cabra only noted that there was no *jus cogens* norm prohibiting the imposition of the death penalty with respect to minors under the age of eighteen. This comment follows predictably from his preceding one that there is no customary norm prohibiting the death penalty with respect to juveniles, but it does not distinguish his position from that of the majority, which stated that the norm of *jus cogens* refers to a consensus that a child, for example, five years of age, will not be found guilty under the laws of any country in the world for committing murder and will not be executed. The failure to reach a consensus on the age at which criminal responsibility begins does not invalidate the norm that at certain very young ages, no state in the world imputes criminal responsibility to a child. Dr. Monroy Cabra also stated that he did not consider that the imposition of the death penalty with respect to minors violated Article 2 of the American Declaration, since there was no prohibition either in domestic or conventional law applicable to the United States, or in customary international law, as he claimed to have demonstrated.

### 3. AN UNSUCCESSFUL ATTEMPT TO INCORPORATE THE AMERICAN DECLARATION INTO THE AMERICAN CONVENTION

In 1988, the Commission joined two cases that dealt with the same issue: whether a law requiring the obligatory registration of lawyers in Argentina violated the right to freedom of association set forth in Article 16 of the American Convention.<sup>29</sup> If a lawyer in Argentina did not register he was not permitted to practice the profession. Article 34 of the American Declaration protects the "right to work," a right that is not specifically protected in the American Convention. For the purposes of this Article, the most important issue was the petitioners' allegation that the American Convention incorporated all the rights set forth in the American

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<sup>28</sup> *Roach v. United States*, Case 9647, Inter-Am. C.H.R., Report No. 3/87 (1987) (Monroy Cabra, dissenting).

<sup>29</sup> *Bomochil v. Argentina*, Inter-Am. C.H.R., Report Nos. 9777, 9718, OEA/Ser.L./V/II.74, doc. 10, rev. 1 ¶ 1(1988).

Declaration of the Rights and Duties of Man by way of Article 1(2) of the Statute of the Commission.<sup>30</sup>

The Commission rejected this argument, stating that it was not in agreement with Article 31(2) of the VCLT, to which Argentina is a State party, because there was no formulated or concerted agreement or instrument between the State parties in the American Convention for the purposes of making the American Declaration an integral part of the Convention or a supplement to it for States parties.<sup>31</sup> The Commission reiterated the point made by Commissioner Monroy Cabra in the dissenting opinion of the death penalty case that Article 19 of its Statute provided for the processing of cases under the American Convention with regard to States parties thereto, and Article 20 provided for the processing of cases under the American Declaration for States that are not parties to the Convention:

It can also be noted that the above interpretation is not consistent with the provisions of the IACHR Statute itself which, in Articles 19 and 20, distributes the competence of this organ among the member States of the OAS, depending on whether or not they are parties to the Convention, without which to this time the practice of the Commission in application of the aforementioned

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<sup>30</sup> Article 1(2) of the Commission's Statute provides:

For the purposes of the present Statute, human rights are understood to be: a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto; b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

Statute of the Inter-American Commission on Human Rights, OAS Res. 447, art. 1(2), O.A.S. Doc. OEA/Ser.P/IX.0.2/80 (Jan. 1, 1980), available at <http://www.cidh.org/Basicos/English/Basic17.Statute%20of%20the%20Commission.html>.

<sup>31</sup> *Bomochil*, Report Cases No. 9777, 9718, ¶ 6 (Conclusion). Article 31(2) of the VCLT provides:

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one of more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Vienna Convention on the Law of Treaties art. 31(2), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

provisions of its statute could be the point of reference for the opinion of the petitioners. It is generally recognized as a rule of interpretation of treaties that, 'when the normal meaning of the words is clear and logical in the context in question, there is no reason to resort to other means of interpretation' and that, furthermore, it is a rule of interpretation to establish that 'it must be presumed that the text of the treaty is an authentic expression of the intention of the parties,' as the International Rights Commission pointed out in its review of the draft convention on this matter. The fact is that the text of the Convention is clear on what rights it protects and, therefore, it is more than enough reason to not accept the aforementioned interpretation by the petitioners. In consequence, it is concluded that as it relates to the States parties of the Convention and to the case that concerns us here, Argentina, the IACHR can only, in accordance with its own Regulations (Article 31), take into consideration the petitions on presumed violations of human rights defined in the American Convention on Human Rights. The right to work is still not incorporated into the Convention which does not include economic, social and cultural rights.<sup>32</sup>

Until 1988, the Commission interpreted Articles 19 and 20 of its Statute as allocating two forms of jurisdiction: (1) jurisdiction over States parties to the American Convention, to which the American *Convention* was to be applied, and (2) jurisdiction over non-State parties, to which the American *Declaration* was to be applied. This interpretation changed significantly following Colombia's request to the Inter-American Court for an advisory opinion on the normative status of the American Declaration.

### 3.1. *Advisory Opinion No. 10 of July 14, 1989*<sup>33</sup>

On February 29, 1988, the Colombian Government submitted to the Inter-American Court a request for an advisory opinion on the normative status of the American Declaration within the legal

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<sup>32</sup> Bomoehil, Report Cases No. 9777, 9718, ¶ 6 (Conclusion).

<sup>33</sup> Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion, 1989 Inter-Am. Ct. H.R. (ser.A.) No. 10, ●C-10/89 (July 14, 1989) [hereinafter *Advisory Opinion No. 10*].

framework of the protection of human rights in the inter-American system.

The Court, in accordance with its Rules, requested written observations on the question from all the member States of the OAS. Several States offered varying interpretations of the binding nature of the American Declaration. Costa Rica and Venezuela, for example, replied that the American Declaration, unlike the American Convention, is not a treaty.<sup>34</sup> Peru, on the other hand, suggested that although the Declaration could have been considered an instrument without legal effect before the American Convention entered into force, the Convention has recognized its special nature by virtue of Article 29.<sup>35</sup> The relevant part of Article 29 of the Convention provides: “No provision of this Convention shall be interpreted as: d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”<sup>36</sup> Consequently, according to Peru, Article 29(d) has “given the Declaration a hierarchy similar to that of the Convention with regard to the States Parties, thereby contributing to the promotion of human rights in our continent.”<sup>37</sup> Uruguay, for its part, affirmed that the “juridical nature of the Declaration is that of a binding, multilateral instrument that enunciates, defines and specifies fundamental principles recognized by the American States and which crystallizes norms of customary law generally accepted by those States.”<sup>38</sup> Conversely, the United States argued that the American Declaration does not comprise “a binding set of obligations” since it is not a treaty.<sup>39</sup> Although the United States recognized the “good intentions” of those who would transform the Declaration from a statement of principles into a binding legal instrument, it maintained that “good intentions do not make law.”<sup>40</sup> The United States also specified that it “would seriously undermine the process of international lawmaking—by which sovereign States voluntarily undertake specified legal obligations—to impose legal

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<sup>34</sup> *Id.* ¶¶ 11, 15.

<sup>35</sup> *Id.* ¶ 13.

<sup>36</sup> American Convention, *supra* note 14, art. 29.

<sup>37</sup> Advisory Opinion No. 10, 1989 Inter-Am. Ct. H.R. (ser.A.) ¶ 13.

<sup>38</sup> *Id.* ¶ 14.

<sup>39</sup> *Id.* ¶ 12.

<sup>40</sup> *Id.* ¶ 12.

obligations on States through a process of 'reinterpretation' or 'inference' from a non-binding statement of principles."<sup>41</sup>

The Court began its analysis of the question by affirming that the American Declaration is not a treaty.<sup>42</sup> The unwillingness of the OAS member States to draft a legally binding convention on human rights in 1948 was interpreted as a first step. The Declaration, the Court noted, was conceived as:

[T]he initial system of protection considered by the American States as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly strengthen that system in the international field as conditions become more favorable.<sup>43</sup>

The Court noted that the references to "human rights" in the OAS Charter referred to the American Declaration.<sup>44</sup> The opinion reiterated several times that the Declaration is the text that defines the human rights referred to in the Charter. However, the Court noted, that for State parties to the American Convention, the "specific source of their obligations with respect to the protection of human rights is, in principle, the Convention itself."<sup>45</sup> In principle? This paragraph becomes even less clear as it goes on: "It must be remembered, however, that given the provisions of Article 29(d), these States cannot escape the obligations they have as members of the OAS under the Declaration, notwithstanding the fact that the Convention is the governing instrument for the States Parties thereto."<sup>46</sup> Article 29(d) of the American Convention provides that no provision of this Convention shall be interpreted as: "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."<sup>47</sup> Again, the "effect" of the American Declaration may not be diminished but it is never specified exactly what the nature of this effect is. And finally, the Court, with a set of triple negatives does little to define the normative status of the American Declaration: "That the Declaration is not a treaty does

<sup>41</sup> *Id.* ¶ 12.

<sup>42</sup> *Id.* ¶ 33.

<sup>43</sup> *Id.* ¶ 34.

<sup>44</sup> *Id.* ¶ 39.

<sup>45</sup> *Id.* ¶ 46.

<sup>46</sup> *Id.* ¶ 47.

<sup>47</sup> American Convention, *supra* note 14, art. 29(d).

not, then, lead to the conclusion that it does not have legal effect. . .  
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This definition is a less than an enthusiastic affirmation by the Inter-American Court of the "binding legal nature" of the American Declaration. If the Declaration has "legal effect" what kind of legal effect does it have? Is it legally binding on States? Can it be interpreted to overturn inconsistent domestic laws?

The importance of a legally binding instrument cannot be underestimated. The Inter-American system has been strengthened through the adoption of the American Convention on Human Rights, which is a legally binding treaty for twenty-four States parties of the thirty-five OAS member States.<sup>49</sup> All of the Spanish-speaking States of the Americas and Brazil have become parties to the American Convention and have accepted the compulsory jurisdiction of the Inter-American Court. The United States, Canada and many states comprising the English-speaking Caribbean have not yet become parties to the American Convention and the Commission continues to apply the norms of the American Declaration to them. Despite the fact that the United States continues to argue that it is not "bound" by the American Declaration, the Commission continues to apply this instrument in cases presented against the United States as it has for several decades.

The Court's advisory opinion on the American Declaration, however, led to a change in practice following the Commission's opinion in the March 1988 Argentine case on the obligatory registration of lawyers. The Commission, in a subsequent Argentine case, began to apply both the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights to States that ratified or acceded to the American Convention. The Commission's justification for this practice was laid upon Article 29(d) of the American Convention, despite the fact that this provision does *not* provide or even suggest that the Commission should find violations of both the American Declaration and the American Convention in the *same* case.

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<sup>48</sup> Advisory Opinion No. 10, 1989 Inter-Am. Ct. H.R. (ser. A.) ¶ 47.

<sup>49</sup> The OAS has thirty-five member states, but the Cuban government has been interpreted as voluntarily excluding itself from participating in the activities of the system since the early 1960s following its adoption of Marxism-Leninism, which is considered in contradiction to the principles and purposes of the OAS Charter.

In the October 4, 1990, the Commission decision the case of Mr. Hector Geronimo Lopez Aurelli. The case alleged arbitrary detention, trial and conviction of an individual who was sentenced to life imprisonment by the military dictatorship in 1975, based on confessions obtained through torture. The democratic Argentine government argued that "inasmuch as the events and judgment by which the applicant was convicted preceded its taking office, and therefore the entry into force of the American Convention in this country, it cannot legitimately be held responsible for them."<sup>50</sup> The Commission decided, for the first time, that the Argentine State could be held liable for violations both of the American Convention and the American Declaration in the same case. It was found liable for violations of the American Declaration that occurred prior to Argentina's ratification of the American Convention, and violations of the latter, for acts that occurred subsequent to its ratification:

[T]he events that took place prior to the Convention's entry into force for Argentina were nevertheless grave violations of the rights of personal security and to humane treatment, and to justice and due process established in Articles 1, XVIII and XXVI, respectively, of the American Declaration on the Rights and Duties of Man. Ratification of the Convention by the member States at least complemented, augmented or perfected the international protection of human rights in the inter-American system, but did not create them *ex novo*, nor did it extinguish the previous or subsequent validity of the American Declaration. Specifically, in its advisory opinion OC-10/89 of July 14, 1989, the Inter-American Court of Human Rights decided that:

For the member States of the Organization the Declaration is the text that determines which are the rights referred to in the Charter. Moreover, Articles 1.2.b. and 20 of the Commission's Statute also define its competence in respect of the human rights enunciated in the Declaration. That is, the American Declaration is for the States, in

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<sup>50</sup> Aurelli v. Argentina, Case 9850, Inter-Am. C.H.R., Report No. 9850 (1990), OEA/Ser.L/V/II.79. doc.12, rev.1 ¶ 5.

pertinent matters in relation to the Organization's Charter, a source of international obligations.<sup>51</sup>

The Commission decided the case citing the Court's Advisory Opinion No. 10 as authority for its reasoning. The point that got lost here is that although the American Declaration is indeed the text to be applied to non-States parties to the American Convention, neither the Commission's Statute, nor Advisory Opinion No. 10, suggests that the Declaration be applied to States parties to the Convention to acts that occurred prior to the State's ratification of, or accession to, the treaty.

In one case from 2002, involving two individuals who were held in long term pre-trial detention in Paraguay without being formally charged or tried, the Commission found violations under the Declaration and the Convention for the same acts. The admissibility decision states that the acts alleged affected natural persons initially under the American Declaration, applicable to Paraguay, and subsequently under the American Convention.<sup>52</sup> Paraguay ratified the American Convention in 1989, and Mr. Dos Santos, one of the victims in the case was arrested in July 1985, and the Commission found that the arrest, an act that was consummated when it occurred in July 1985, violated both Article XXV of the American Declaration and Article 7(2) and (3) of the American Convention.<sup>53</sup>

Article 1 of the Commission's Statute also provides that human rights in the inter-American system are understood to be two separate catalogues of rights: (1) The rights set forth in the American Convention on Human Rights in relation to the States Parties thereto; and (2) the rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states. Nowhere in the Statute is the Commission mandated to consider violations of the American Declaration and the American Convention in the same case. On the contrary,

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<sup>51</sup> *Id.* ¶ 6.

<sup>52</sup> *Pinheiro v. Paraguay*, Case 11,506, Inter-Am. C.H.R., Report No. 77/02 ¶ 6 (2002) (stating that Paraguay is responsible under both the Declaration and the Convention).

<sup>53</sup> *Id.* This is purely dictum, however, since in the Conclusions to the case the Commission subsumes the right not to be subject to arbitrary arrest under the more general right to personal liberty and finds violations of the Declaration for those acts that occurred prior to the date of ratification and violations of the Convention for acts subsequent to that date.

Article 19 of the Statute specifically provides that the Commission shall apply the American Convention to State parties thereto and Article 20 provides that it shall apply the American Declaration to non-States parties to the Convention.

In general, cases decided under the American Declaration and the American Convention examine acts that occurred prior to the date on which the State became a party to the American Convention pursuant to the American Declaration and then the acts that occurred after, under the American Convention. The 2003 case of the prisoners who rioted in the police detention center of the police district of Parque Sao Lucas is one such case. The acts that were considered violations that occurred prior to the date of Brazil's accession to the American Convention (September 25, 1992) were considered violations of the American Declaration, whereas those that occurred thereafter were considered violations of the American Convention.<sup>54</sup>

The problem with the practice of applying both the American Declaration and the American Convention in the same case is that since the reform of its Rules of Procedure in 2001, the Commission is required to send to the Court any case in which the State has become a party to the Convention and accepted the compulsory jurisdiction of the Court if the Commission has determined that the State failed to comply with its recommendations (unless there is a reasoned decision by four members of the Commission to the contrary).<sup>55</sup> A Commission merits decision (also known as "an Article 50 report") finding violations of both the American Declaration for actions taken before the date the State became a party to the Convention, and violations of the Convention for actions taken after that date, sets in play two very different procedures. The Court will not consider the violations found under the American Declaration since Article 1 of the Court's Statute provides that: "The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on

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<sup>54</sup> *Police District of Sao Paulo v. Brazil*, Case 10.301, Inter-Am. C.H.R. Report No. 40/03 (Merits) (2003).

<sup>55</sup> OAS, *Rules of Procedure of the Inter-American Commission on Human Rights*, O.A.S. G.A. Res. 109, art. 44, O.A.S. Doc. OEA/Ser. L/V/III.25 doc.7 (2000), available at <http://www.cidh.org/Basicos/English/Basic18.Rules%20of%20Procedure%20of%20the%20Commission.htm>.

Human Rights.”<sup>56</sup> Consequently, the Court will determine, in a legally binding judgment, only whether the State violated provisions of the American Convention.

In terms of protection of the rights of the victim, the Commission’s determination of violations of the American Declaration in addition to the violations of the American Convention does not result in a separate Commission determination of reparations for the separate violations of the Declaration. The Commission is required, by Article 51 of the Convention, to publish its decisions under the American Declaration, if the State has not complied with its recommendations. It no longer publishes the decision, however, if violations of the American Convention are implicated and the case is transmitted to the Court. Although the Commission publishes merits decisions in its Annual Report of cases decided under the American Declaration, these decisions are not—may not—be published if the case is transmitted to the Court for consideration of the purported violations under the American Convention. Consequently, the requisite annual follow-up regarding State compliance that is conducted by the Commission regarding cases that have been published in its Annual Report (since 2001, generally under the American Declaration) is not conducted for those cases that have been submitted to the Court, as concerns the violations under the Declaration. Therefore, we can conclude that the determination of violations of the American Declaration in a report regarding a State that has become a party to the American Convention, adds nothing to the protection of human rights of the victim in terms of reparations.

A second, but no less significant point, was made by the United States in the juvenile death penalty case. The Commission tends to interpret vague and ambiguous terms of the American Declaration by using the American Convention as a tool to provide specific content to the vague language of the American Declaration, on the theory that the two instruments are complementary and not contradictory.<sup>57</sup> This practice can lead to reading the Convention

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<sup>56</sup> Statute of the Inter-American Court of Human Rights, Res. No. 448, art. 1, O.A.S. Doc. OEA/Ser.P/IX.0.2/80 (Jan. 1, 1980), available at <http://www.cidh.org/Basicos/English/Basic19.Statute%20of%20the%20IA%20Court.htm>.

<sup>57</sup> *C.f.* *Prince Pinder v. Bahamas*, Case 12,513, Inter-Am. C.H.R., Report No. 79/07, OEA/Ser.L./V/II.130, doc. 22 rev.1 ¶ 22 (2007).

into the Declaration, a kind of "incorporation" of the Convention into the Declaration, and since States like the United States consider the Declaration a non-binding instrument, this amounts to converting a non-binding Declaration into a legally binding instrument, despite the lack of consent of the United States and other countries in the region to be bound thereby. This practice, it is submitted, violates the principle of the non-retroactivity of treaties, set forth in Article 28 of the Vienna Convention on the Law of Treaties, which provides that: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."<sup>58</sup> In addition, this practice violates the principle that a State is only bound by a treaty that it has consented to be bound by, set forth in multiple articles of the VCLT.

Instead of continuing this legal confusion, the Commission, in celebration of the sixtieth anniversary of the American Declaration on the Rights and Duties of Man, should cease to apply it to States that have ratified the American Convention. As mentioned at the outset, the American Declaration is a useful instrument to be applied *in default*, when no other instrument is available. Today, however, the American Convention is thriving but it risks becoming a "Latin American" treaty since most of the English-speaking countries in the region have failed to become parties thereto or failed to accept the compulsory jurisdiction of the Inter-American Court.

No other international human rights body, such as the United Nations Human Rights Committee, for example, would think of applying the Universal Declaration of Human Rights to States that have ratified the International Covenant on Civil and Political Rights to declare State responsibility for actions that occurred prior to the ratification of the Covenant. The Commission should

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In particular, the organs of the inter-American system have previously held that developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may be drawn from the provisions of other prevailing international and regional human rights instruments. This includes the American Convention on Human Rights, which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration.

<sup>58</sup> VCLT, *supra* note 31, art. 28.

continue to apply the American Declaration exclusively to those member States that have not yet ratified or acceded to the American Convention.