**HUMAN RIGHTS MEMORIAL**

**Communication to the Human Rights Committee under the Optional Protocol to the ICCPR in relation to the Death Penalty in the United States**

**Instructions**

Set out below is a factual situation that gives rise to a number of human rights considerations. The situation envisaged is of an individual in the United States of America who claims to have been the victim of specified human rights violations. The individual concerned has decided to initiate a communication to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (the “ICCPR”). You are required to prepare either the written individual communication to the Committee, or to draft a response to the communication for the State party (depending on which side you have been assigned) (in both cases, a “Memorial”).

Please read the factual scenario below, meet with your team-mates, and consider the ways in which you intend to approach the problem. Then, schedule a meeting with your Teaching Assistant (Mikiko) as soon as possible to discuss the problem, and to raise any queries or concerns that you may have. You are required to research both the issues raised by the problem (including factual issues, questions of domestic and international law, and any other relevant points) and the general work of the Human Rights Committee to the extent required to write your Memorial in a persuasive and comprehensive manner. This is a “team exercise” (and you should endeavour to work on it together), although each of you is solely responsible, and will be graded for, your section of the Memorial that you finally submit.

In framing the problem we have taken certain liberties (such as assuming that the United States is a party to the Optional Protocol when in reality it is not) in order to create a good hypothetical problem for the purposes of this exercise. While you are not required to follow all the rules of procedure of the Human Rights Committee, you should approach this problem as if it were as realistic as possible. Your focus, however, should be on the substantive human rights issues raised in the problem rather than on more technical issues of procedure. You are encouraged to consult international human rights experts, NGOs, or any other resources.

The aim of the exercise to familiarize you with how human rights complaints mechanisms actually work, and for you to gain some experience in preparing the kinds of arguments that arise for adjudication before treaty bodies. While we have provided detailed guidelines as to how we suggest that you approach the problem, you should see this as only the required minimum (ie, feel free to include your own creative ideas or arguments and to move beyond the points we have set out—particularly by researching new cases or decisions that support your arguments). If you have any concerns, please email either your TA or Peter Danchin.
Your Memorial should be approximately 10-15 pages in length per student (that is, approximately 35-45 pages in total) including any footnotes. This assumes that you will use 11 or 12 point font (smaller for footnotes), and space-and-a-half in the main text. Do not exceed this word limit.

Facts

David Jackson, an African-American male, was convicted of the stabbing death of Nancy Cole, a 26-year-old white woman who was working at the convenience store she and her husband owned and operated in Avondale, Missouri.

The relevant facts of the case are as follows. Jackson committed the murder on July 27, 1989, when he was approximately 16 years and 6 month of age. Jackson planned to rob the store and murder whoever was behind the counter. Jackson stabbed Cole, who was standing behind the sales-counter of the store. Even after Cole fell to the floor, Jackson stabbed her three more times in her chest. Two of these wounds penetrated the victim’s heart. When Cole began to beg for her life, Jackson stabbed her four more times in the neck, opening her carotid artery. After stealing liquor, cigarettes, rolling papers, and approximately $450 in cash and checks, Jackson left Cole to die on the floor.

The juvenile court in Missouri certified Jackson for trial as an adult under Missouri criminal law. The relevant Missouri Statute proscribes that the punishment for first degree murder shall be either death or imprisonment for life unless a person has not reached his sixteenth birthday at the time of the commission of the crime. The jury recommended the death sentence. Accordingly, Jackson was sentenced to death in the trial court on December 16, 1989. Jackson has exhausted all domestic remedies, challenging the constitutionality of the Missouri criminal law. However, the U.S. Supreme Court, on March 23, 1991, rejected Jackson’s claim that the imposition of capital punishment on an individual for a crime committed at 16 years of age constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution.

Assume that the United States is a party to the Optional Protocol to the ICCPR. Jackson, being on death row, filed a communication to the Human Rights Committee on August 5, 1998 alleging the violation by the U.S. of Articles 2, 6, 7, 14 and 26 of the Covenant.

ARGUMENTS AND ISSUES IMPLIED

In his communication, Jackson makes a number of claims on the merits. The main claims of Jackson, and expected responses by the United States, which you should consider are as follows:

(1) VIOLATION OF ARTICLE 6(5)—PROHIBITION OF DEATH PENALTY ON JUVENILES
Jackson claims that:

1) Imposition of the death penalty on him as a person under 18 years of age at the time of commitment of the crime violates his right to life under Article 6 of the Covenant.

2) The U.S. reservation to Article 6(5) of the Covenant (the prohibition of the imposition of death penalty on juveniles) is invalid because:

   a) the reservation is incompatible with the object and purpose of the Covenant. It necessarily falls within the competence of the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant [See, Article 19 of the Vienna Convention on the Law of Treaties, Human Rights Committee General Comment No. 24];

   b) the prohibition of the imposition of the death penalty on a person under 18 years of age at the time of commission of the crime is established as customary international law. Because of the nature of this rule as a rule of jus cogens (a peremptory norm), “the persistent objector rule” does not apply and the U.S. is legally obliged to follow the rule in spite of its continuing objection.

In response, the United States argues that:

1) Article 6(5) is not applicable to the United States by virtue of its reservation to it. The reservation is valid. The ICCPR does not prohibit the death penalty per se, in relation to the right to life. In light of the general allowance by the ICCPR of the death penalty, whether or not to accept the specific obligation to abolish the death penalty on juveniles is left to the decision of States which ratify the Covenant. The U.S. reservation with regard to the death penalty on juveniles cannot be said to be incompatible with the object or purpose of the Covenant.

2) The Human Rights Committee does not have competence to judge the validity of specific reservations by States Parties, unless such a specific mandate is given by the treaty. Under the consensual basis of international law, for treaty monitoring bodies to judge the validity of reservations in spite of the specific mandate given for this purpose is an improper intrusion into the sovereignty of States Parties. [See, Report of the International Law Commission at its 48th Session].

3) There is no existing rule in customary international law prohibiting the imposition of the death penalty on juveniles. There is no universal state practice, as in fact some states have criminal laws which impose the death penalty on juveniles. More importantly, the United States, which is a state most concerned with preserving the death penalty on juveniles, not only has such state laws but also has been practicing the death penalty on juveniles.
4) Even if the prohibition of the imposition of the death penalty on juveniles has been emerging as customary international law, it is not applicable to the United States because of the U.S.’s continuing objection to it. [See, International Court of Justice, the *Anglo-Norwegian Fisheries Case*, the *Asylum Case*].

5) Even if the prohibition of the imposition of the death penalty on juveniles has been emerging as customary international law, it is not a rule of *jus cogens* in any event. Thus, it does not exclude the claim of the United States of the “persistent objector rule.”

*Note: For the effect of reservations to treaties and the issue of their incompatibility with the object and purpose of the treaty, see S&A, 34. For the background and the controversy over the U.S. reservation to Article 6(5) and objections submitted by other State Parties, see S&A, 766-777. You can find the official reservations of the U.S. and objections to them by other States Parties on the Web of the United Nations High Commissioner for Human Rights. Why is the US reservation to Article 6(5) incompatible with the object and purpose of the Covenant? What is the relationship between non-derogability (Article 4(2)) and the permissibility of reservations? What does the Human Rights Committee General Comment No. 24 say in this regard? Also, please go back to T. Meron’s article in the Course Packet (at p. 17).

**Note: For the development of customary international law, the relationship between customary international law and treaties, and the persistent objector rule, see S&A, 28-30, 37-38, 40-42, 132-148; Henkin Casebook, 54-57, 78-82. What kind of facts should you show to claim the existence of customary international law? Can you find sufficient state practice and *opinio juris* to claim the existence of customary international law in relation to the prohibition of the imposition of the death penalty on juveniles? You may explore the relevant U.N. resolutions, the status of ratifications and reservations to relevant international and regional instruments, in particular the ICCPR and the CRC (Article 37). For state practice, see the U.S. Supreme Court Case, Thompson v. Oklahoma 487 U.S. 815.

***Note: For the concept of *jus cogens*, and its relationship to “the persistent objector rule,” see S&A 130, 133-134; Henkin Casebook, 91-93. Can you equate the prohibition of the imposition of the death penalty on juveniles with the examples that the International Law Commission has referred to, such as the prohibition of slavery and genocide? For discussion on the application of this rule to the United States with respect to the death penalty, see the argument of the United States in an Inter-American case, Pinkerton and Roach v. United States.

****Note: Please think again about the relationship between customary international law, *jus cogens*, non-derogability, and the permissibility of reservations. How are all of these concepts inter-related with each other?
(2) Violation of Article 7—Prohibition of Cruel, Inhuman or Degrading Treatment or Punishment

Jackson claims that:

Keeping him on the death row for seven years under harsh conditions, awaiting execution constitutes “cruel, inhuman or degrading treatment or punishment” prohibited by Article 7 of the Covenant. See, European Court of Human Rights, Soering v. United Kingdom. In particular, imposing the death penalty on Jackson as a person below 18 years of age is “cruel, inhuman or degrading treatment or punishment.”

The United States replies that:

1) Prolonged detention is generally in the interests of sentenced persons and does not per se constitute “cruel, inhuman and degrading treatment or punishment”. See, Human Rights Committee, Cox v. Canada, (Herndl and Sadi concurring opinion). Taking into account the difference in factors between the Soering case and the Kindler case, the Committee did not follow the decision of the European Court in the Soering case (See, Human Rights Committee, Kindler v. Canada).

2) The U.S. practice of the death penalty on juveniles is not a violation of Article 7 because of the reservation to Article 7. The United States reserved its right to considers itself bound by Article 7 to the extent that “cruel, inhuman or degrading treatment or punishment” means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States. As the US jurisprudence denies unconstitutionality of the death penalty on juveniles, the United States is not obliged to abolish the death penalty on juveniles under Article 7 of the Covenant. (See, U.S. Supreme Court Cases, Thompson v. Oklahoma, Stanford v. Kentucky).

*Note: Does “death row phenomena” in general constitute “cruel, inhuman or degrading treatment or punishment” under Article 7 of the ICCPR? Can you make a case based on the Soering case? What factors should you emphasize besides the length of detention? What about the actual situation of the prison in which Jackson is detained? What about the way of carrying out the death penalty in Missouri? What factors are considered in the Soering case to determine whether the order of extraditing Soering to the U.S. constitutes “cruel, inhuman and degrading treatment or punishment”? How can you effectively argue against the line of the Soering case in the current problem?

(3) Violation of Articles 2, 14 and 26—Discrimination/Arbitrariness

Jackson claims that:
1) The arbitrariness of state practice throughout the United States with regard to the application of the death penalty to juveniles results from the failure of the federal government to prohibit the death penalty on juveniles. This failure of the United States violates Jackson’s right to equality before the law under Article 26 of the Covenant, because it deprives him of his life depending on the state in which he committed the crime. (See, Inter-American Commission on Human Rights, Pinkerton & Roach v. United States).

2) There is obvious racial bias in the juries of Missouri courts in imposing the death penalty on black defendants. The failure of the United States to eliminate racial bias in the imposition of the death penalty against black defendants violates its international obligations under Article 2, and also violates Jackson’s right to an impartial trial under Article 14 and to equality before the law under Article 26. (See, Inter-American Commission on Human Rights, Andrews v. United States).

In response, the United States argues:

1) The petitioner has not shown that in his case the death sentence was imposed by actual racial bias of the jury, apart from the assertion of a general tendency of discrimination against black defendants.

2) As articulated in the Understanding submitted by the United States upon the ratification of the Covenant, the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant. The United States federal government, as an example of such an appropriate measure, enacted legislation requiring judges in death penalty cases to make instructions to jurors on the imposition of the death penalty. (See, 1994 Congressional report, 18 U.S.C. 3593 (f), cited in Inter-American Commission on Human Rights, Andrews v. United States).

*Note: Even given the apparent presence of racial bias in the imposition of the death penalty in Missouri, does the individual petitioner himself need to prove that he was sentenced to death by the actual racial bias of the jury?

**Source Materials**

(1) For Individual Communication Procedures


(2) For cases under international or regional human rights mechanisms:


(3) For U.S. Supreme Court Cases:

- *Thompson v. Oklahoma* 487 U.S. 815

- *Stanford v. Kentucky* 492 U.S. 361

(4) For Human Rights Committee General Comments and other relevant UN Documents:

- General Comment No. 6 - The right to life (Article 6)

- General Comment No. 7 - Torture or cruel, inhuman or degrading treatment or punishment (Article 7)
- General Comment No. 24 - Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant


(5) For Books/Articles:

- William Schabas, The abolition of the death penalty in international law; (1997)


- Joan Fitzpatrick, The relevance of customary international norms to the death penalty in the United States, 25 Georgia Journal of International and Comparative Law 165-180


Good luck!!