

Expert consultation

“The death penalty: ‘Most serious crimes’, complicity and the question of torture”

25-26 June 2012 (Harvard Law School, Wasserstein Hall 4059)

Death row phenomenon and the circumstances under which it could amount to torture or other cruel, inhuman or degrading treatment or punishment

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I was asked to look at the death row phenomenon and the circumstances under which it could amount to torture or other cruel, inhuman or degrading treatment or punishment. The death row phenomenon is a relatively new concept, albeit one that has become firmly established in international jurisprudence, and one that has the potential to pressure states to modify their procedures or abandon executions.

A brief example of how the death row phenomenon can affect the implementation of the death penalty in retentionist states can be demonstrated by the 2009 landmark ruling¹ of the Uganda Supreme Court. The Court held that to execute a person after a delay of three years in conditions that were “not acceptable by Ugandan standards” would amount to cruel, inhuman punishment. The *Susan Kigula* case resulted in 186 death row prisoners having their sentences commuted to life imprisonment, 5 of which were immediately released from prison as they had served more than 20 years on death row. As this case demonstrates, the death row phenomenon can have an indirect effect on challenging the legitimacy of the death penalty by reducing the number of prisoners on death row, and subsequently, the number of executions.

In the time allotted to me, I would like to focus on discussing two key issues:

- Firstly, what circumstances need to be met for there to be a violation of Article 7 of the ICCPR? Are those circumstances clear, or do they need additional clarification? Would it be useful to have a narrow definition, or a broad set of criteria?
- Secondly, how can we use the death row phenomenon to put added pressure onto retentionist states to modify their human rights safeguards, or ultimately, to abandon executions altogether?

In 1989, the European Court of Human Rights gave legitimacy to the doctrine of the death row phenomenon in the landmark case of *Soering v. United Kingdom*². The Court identified it as a combination of circumstances:

1. The very long period of time spent on death row.
2. The extreme harsh conditions of death row.
3. The ever present and mounting anguish of awaiting execution.

Let me first tackle the question of length of time spent on death row, as there has been some debate as to whether delay of a certain length automatically violates a prisoner’s rights.

¹ *Attorney General v. Susan Kigula and 417 Others* (Constitutional Appeal No. 3 of 2006) [2009] UGSC 6 (21 January 2009).

² *Soering v. The United Kingdom* (1989) 11 EHRR 439 (Series A, No 161; Application No 14038/88).

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The Judicial Committee of the Privy Council has taken the approach that length of time is the sole factor in constituting cruel or inhuman punishment. The 1993 *Pratt and Morgan*³ case created a presumption that spending more than five years on death row meets the criteria necessary for a finding of death row phenomenon. The Privy Council’s reasoning was that the domestic appeals process should take approximately two years. An appeal to an international body should take approximately 18 months. By combining the two and adding an appropriate amount of time for reasonable delay, the court was able to come up with a timetable of five years. In following cases, the Privy Council relied on the five year principle as a guide. In *Guerra v. Baptiste*⁴, the Privy Council found that four years and ten months was too long a delay, and in *Henfield v. Bahamas*⁵, three and a half years was an appropriate time limit.

I would briefly like to note that the Privy Council looked at the reasons behind delay, finding that it could be due to:

1. Fault of the prisoner.
2. A legitimate appeal process.
3. Delay caused by the State.

The Privy Council found that delay inappropriately caused by the prisoner could not be used to the advantage of the inmate, but where a state causes delay, it is logical to hold the state responsible for violating prisoners’ rights. Where delay is caused by a prisoner exercising his legitimate right to appeal, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. The Privy Council recognised that a prisoner will cling to any hope in order to protect his life, and that such human instinct cannot be treated as a prisoners’ fault.

The approach taken by the Privy Council raises a number of questions that warrant further discussion:

- May delay alone constitute the death row phenomenon, and if so, is there a definitive amount of time that would be enough to violate Article 7?
- Does setting a narrow timetable, such as five years in the case of the Privy Council or three years in the case of the Ugandan Supreme Court, assist in protecting human rights, or would a broader and more flexible definition of the death row phenomenon be more appropriate?

Like the Privy Council and the European Court of Human Rights, the UN Human Rights Committee has also accepted the doctrine of the death row phenomenon. However, it does not accept that delay itself is a violation, but focuses on the harsh conditions as well.

In the 1994 *Francis v. Jamaica*⁶ case, the Committee found that a delay of over 13 years combined with the substandard conditions on death row – where the plaintiff was regularly beaten and ridiculed by prison officers – violated Articles 7 and 10 of the ICCPR.

The UN Human Rights Committee also looked at delay and harsh conditions in the case of *Cox v. Canada*⁷. Cox had similar facts to *Soering* however the plaintiff was

³ *Pratt and Morgan v. Attorney General of Jamaica and Superintendent of Prisons* [1994] 2 AC 1, PC.

⁴ *Guerra v. Baptiste* [1996] AC 397, PC.

⁵ *Henfield v. Attorney General of the Bahamas*, [1997] AC 413, PC.

⁶ *Francis v Jamaica* (Communication No. 606/1994), UN Human Rights Committee, 3 August 1995.

⁷ *Cox v. Canada* (Communication No. 539/1993), UN Human Rights Committee, 9 December 1994.

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facing extradition to Pennsylvania instead of Virginia. In this case the Committee distinguished the case from *Soering* because the prison conditions in Pennsylvania were accepted as being reasonable, and all possibilities of appeal could be available within a reasonable time.

So it seems that the European Court and the Human Rights Committee takes a sliding scale approach on a case-by-case basis, rather than one quantified by timetables. This would presume that a longer delay under moderately harsh conditions would be treated the same as a moderate delay under very harsh conditions.

This approach therefore raises a very important question for further discussion:

- If delay is not enough, how harsh do the conditions need to be?

Death row has been characterised as a living hell. Not only do inmates spend an enormous amount of time anticipating their own execution, they do so in horrific conditions, which are often much worse than those for the rest of the prison population. Under these conditions, prisoners’ mental and physical states deteriorate rapidly. Examples of current death row conditions around the world include:

- Solitary confinement for up to 23 hours a day in small, cramped, airless cells, often under extreme temperatures.
- Inadequate nutrition and sanitation arrangements.
- Limited contact with family members and/or lawyers.
- Excessive use of handcuffing or other types of shackles or restraints.
- Physical or verbal abuse.
- Lack of appropriate health care (physical and mental).
- Being denied access to books, newspapers, exercise, education, employment, or any other type of prison activities.

Solitary confinement is one of the most common conditions of death row phenomenon. The *Istanbul Statement on the use and effects of solitary confinement*⁸ absolutely prohibits the use of solitary confinement for death row prisoners by virtue of their sentence. However, the *Istanbul Statement* is not legally binding, and prolonged solitary confinement, for months, years or even decades, continues to be used in retentionist countries such as Belarus⁹, Japan¹⁰, USA¹¹, Algeria¹², Laos,¹³ and Malaysia¹⁴.

⁸ The Istanbul Statement was adopted on 9 December 2007 at the Fifth International Psychological Trauma Symposium in Istanbul, Turkey, by a working group of 24 international experts, including doctors, academics, civil society and the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. The Istanbul Statement was annexed in the interim report by Manfred Nowak to the UN General Assembly on 28 July 2008 (A/63/175).

⁹ In Belarus, human rights organisations⁹ have reported that death row prisoners are taken for a walk once a week, and are not allowed to have any correspondence with their relatives, to receive parcels, or to watch TV. They are fully cut off from the world.

¹⁰ Death-row prisoners in Japan are also held in strict solitary confinement from the time of their sentence until their execution -- on average six years, in some cases more than 20 years and even more in individual cases

¹¹ In Texas, death row inmates are held in solitary confinement in every aspect of their lives—they eat alone, exercise alone and worship alone. Physical contact is not permitted. Even in the final hours before execution, a prisoner is permitted no physical contact with family members or loved ones. Prisoners spend 22 hours a day in their cells, and are allowed two hours of exercise in small indoor or outdoor cages.

¹² In Algeria, the law requires that death-sentenced prisoners are incarcerated in individual cells during their first five years in prison.

¹³ In Laos, reports have emerged indicating that death row prisoners are incarcerated for long periods of time in solitary confinement in completely dark rooms.

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You can imagine the psychological situation of a prisoner on death row and the extreme uncertainty, anxiety, isolation and sensory deprivation that solitary confinement must trigger. Over the years there have been a number of studies which have looked at the effects of solitary confinement on prisoners. Such conditions include paranoia, self-mutilation, suicidal thoughts, depression, and loss of a sense of reality. In certain conditions and circumstances prolonged solitary confinement amounts to torture and ill-treatment, and even where this threshold is not met, it infringes the right to mental health and the right to human dignity.

Solitary confinement also results in an elevated risk of torture or ill-treatment going unnoticed and undetected. It raises questions about double jeopardy, with years of living in particularly harsh conditions, irrespective of actual security concerns, on top of the execution at its end.

Because of this, many experts and academics have explicitly linked death row phenomenon to solitary confinement, and would like to establish a presumption that where there has been prolonged solitary confinement, the conditions of the death row phenomenon could be met.

This raises the questions as whether solitary confinement is enough to find a violation of Article 7 of the ICCPR, and what added legal safeguards could be implemented to counter the practice?

It should be noted that last week (18 June 2012) a US Senate Judiciary Committee had its first ever congressional hearing on solitary confinement, presided over by Chairman Dick Durbin (Democrat – Illinois). Anthony Graves, who had spent almost all of his 12 years on death row in solitary confinement, gave evidence to the committee that the practice of solitary confinement was "inhuman and by its design, is driving men insane." Although it is too early to know what recommendations the Committee might make, it is hoped that they will reassess the practice of solitary confinement in the USA and reform policies that will respect human rights standards and norms.

In conclusion, the death row phenomenon is a useful tool by which the legitimacy of the death penalty can be undermined. However, although there is legal recognition of this phenomenon at the international level, domestically it remains un-developed. While some states, such as Canada, India, Uganda, Pakistan and Zimbabwe have developed their own domestic jurisprudence following judgements from the European Court and the Human Rights Committee, other retentionist states still refuse to acknowledge that certain conditions on death row can amount to torture or other cruel, inhuman or degrading punishment.

The courts in the USA, for example, have refused to accept the doctrine of death row phenomenon, and the US Supreme Court refuses to review the constitutionality of it. Only Justices Stephen Breyer and John Paul Stevens have questioned the excessive delays on death row in the US. The average length of time a prisoner spends on death row in the USA is 15 years, and in 25 of the 33 USA states that still retain the death penalty, death row inmates are kept in solitary confinement for 23 hours per day.

¹⁴ In Malaysia, sources indicate that prisoners may spend ten or more years on death row, kept in solitary confinement for approximately 23 hours per day.

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With this in mind, how can we work together in implementing safeguards that prevent the death row phenomenon from occurring, and what steps can we take at the international level to generate a greater degree of consensus that the death row phenomenon is a human rights concern that should have domestic legal protections?

Thank you.

For more information, please contact:

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