



LIVING CONDITIONS ON DEATH ROW

FACTSHEET FOR LAWYERS

16th World Day against the Death Penalty

On 10 October 2018 the World Coalition Against the Death Penalty and abolitionists all over the world will celebrate the 16th World Day Against the Death Penalty. This year, the World Day will focus on the living conditions of those sentenced to death. The World Coalition is addressing the issue because it is aware that regardless of the prospect of execution, the imprisonment of those sentenced to death in itself inflicts considerable physical and psychological suffering, which can in some cases amount to torture.

In striving for the complete abolition of the death penalty we cannot ignore the daily treatment imposed by retentionist countries on prisoners sentenced to death.



Introduction

People sentenced to death often live in an extreme solitude over fifteen years, twenty years, and sometimes much longer, with only one thought: their execution. Those sentenced to the most severe punishment experience the harshest conditions of detention. Living conditions can be so difficult that people on death row die as a result of them.

The never-ending wait in solitary confinement often amounts to a double sentence and can amount to torture. A death sentence is traumatic, but in addition prisoners on death row generally do not have access to what makes life in prison a little more bearable, especially activity programmes or regular physical contact with their relatives and family.

Most people on death row are struck by what is known as the "death row phenomenon", which is characterized by serious depression, mental illness, withdrawal, and heightened distrust. Some prisoners are so devastated that they decide to give up and drop their appeals because of the intolerable conditions. Some wish to speed up their execution, while others try by any means to commit suicide.

The idea behind this 'Factsheet for Lawyers' defending people sentenced to death is to identify what you as a lawyer need to pay attention to in your relationship with your client and what resources you can use.

This factsheet is inspired by the practical guide "Representing Individuals Facing the Death Penalty: A Best Practices Manual" written by Death Penalty Worldwide.

It is meant to be used by lawyers in many jurisdictions throughout the world. As a result, you may find some sections more relevant to your practice than others. No need to say that it's your responsibility to remain within the framework of your professional ethics and regulations that apply to you in your country.



The impact of death row conditions on lawyers and their relationship with their clients

Your client has been convicted to death. As a lawyer appointed to defend a person sentenced to death, it's your responsibility to represent your client in all his proceedings, up to his possible execution, by making requests for appeal or clemency. As an assigned lawyer, you cannot refuse this task unless you specifically request it and a replacement is officially appointed. You must be aware that abandoning your client after his death sentence can be particularly destructive both in human and defence strategies that can still be implemented.

Thus, **if you no longer wish to defend your client**, you must ensure that a new defender can take over properly within a reasonable time so that your client does not find himself without a counsellor. Even if you do not represent your client on appeal, you must advise the client directly of all applicable deadlines for seeking post-conviction relief and immediately inform any successor counsel of the procedural status of the case, including whether an appeal has been filed.



How to maintain a relationship with a client sentenced to death?

You must develop and maintain an effective lawyer-client relationship in order to provide quality representation. This is especially critical in death penalty cases. Your client's death sentence may cause some difficulties in your relationship and damage the trust your client may have had in you. It is essential after your client is sentenced to death, to explain how you will attempt to challenge the conviction. Make sure your client understands the appeals process and timeline. The psychological impact of the death sentence is immense and is sometimes accentuated by harsh prison conditions. The person may be in a state of shock and experience a phase of depression. You will therefore have to be very tactful in order to make him understand that all is not lost and that it is still possible to act. He must feel that you are by his side to keep fighting. Establishing or restoring trust with the client sentenced to death is a necessary step in obtaining the client's cooperation in the preparation of the client's further defence.

You should try to **visit your client regularly**, especially if you are the only person allowed to access the prison and your client receives no visits from relatives or friends. Be attuned to the detention conditions and intercede with the officer in charge of the prison where necessary to register any complaints in these proceedings, you must rely on national law and analyse the possibilities available.

Solitary confinement, in particular, can have devastating consequences on the person's mental health, so you should always do everything possible to ensure, where appropriate, that your client has access to visitors, other prisoners, and work and educational opportunities.

In this regard, you may refer to the **Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)**¹ which are, to date, the most robust set of standards in the area of prison conditions. The Nelson Mandela Rules focus on basic principles on the treatment of prisoners, including, but not limited to: health care; restrictive measures, contact with the outside world and food, and above all on cruel, inhuman or degrading treatment, which is a violation of international standards.

These standards are based on the human rights and dignity of the individual and States must comply with these various safeguards.

With regards to your client's defence, you must be able to clearly present the alternatives which arise within the framework of the defence. Your client should also be aware of the potential legal consequences of his actions (like filing a *pro se* appeal).

You should obtain access to the court records and trial transcript, wherever they are kept, and make a copy of the entire file. You cannot be denied access to records from the lower court². Access to these records is an inherent part of the right to a fair trial and the correlative principle of equality of arms³.

¹ U.N. Standard Minimum Rules for the Treatment of Prisoners, U.N.G.A. Res. 70/175 (Dec. 17, 2015)

<https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/F-book.pdf>

² See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27–Sept. 7, 1990, Basic Principles on the Role of Lawyers, ¶ 21, U.N. Doc. A/CONF.144/28/Rev.1 (“It is the duty of competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients.”).

³ See *id.*; Amnesty Int’l, The International Criminal Court: Making the Right Choices Part II—Organizing the Court and Ensuring a Fair Trial 53–54 (Position Paper No. 2 IOR 40/011/1997) (“An essential component of the principle of equality of arms is that procedural rights, such as inspection of records or submission of evidence, must be dealt with in a manner equal for both parties.” (internal quotation omitted)).



How to challenge the death penalty based on death row phenomenon?

We will not mention all the legal arguments that may be put forward on appeal and are based on national law principles that vary from one country to another. We will only discuss international legal arguments that have already been successfully raised around the world and are related to the “**death row phenomenon**”.

The prerequisite is to examine your country's Constitution and laws to determine whether the court must take international law into account. If the court is not bound by international or regional conventions, you can nevertheless highlight the universal and customary value of the norms you wish to invoke.

- **Prohibition of torture and inhuman or degrading treatment**

Article 7 of the ICCPR provides that “*no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.*”⁴

Other human rights treaties contain identical language⁵:

- **Waiting on death row**

Over the last two decades, **a rich body of jurisprudence** has developed in support of the notion that prolonged incarceration on death row (also known as “*death row phenomenon*”) constitutes cruel, inhuman, or degrading punishment⁶. These decisions have prompted scores of articles by legal commentators and mental health experts.

In ***Pratt & Morgan***, the **Privy Council** held that a delay of 14 years between the time of conviction and the execution in the case of a Jamaican prisoner was “inhuman punishment.” The Privy Council further concluded that “in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute “inhuman or degrading punishment.”

In ***Soering v. United Kingdom***, the **European Court** found that prisoners in Virginia spend an average of six to eight years on death row prior to execution⁷. The court determined that “however well-intentioned and even potentially beneficial is the provision of the complex post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.”⁸

More recently, the **Supreme Court of Canada** considered evidence that prisoners sentenced to death in the state of Washington (United States) took, on average, 11.2 years to complete state and federal post-conviction review, when weighing the legality of extraditing two men to the United States to face capital charges.⁹ The court acknowledged a “widening acceptance” that “the finality of the death penalty, combined with the determination of the criminal justice system to satisfy itself fully that the conviction is not wrongful, seems inevitably to provide lengthy delays, and the associated psychological trauma.”¹⁰

⁴ ICCPR, art.7.

⁵ See, e.g., ECHR, art. 3; ACHR, art. 5; ACHPR, art. 5; CAT, art. 16.

⁶ See, e.g., *Pratt and Morgan v. The Attorney General of Jamaica* [1993], 3 SLR 995, 2 AC 1, 4 All ER 769 (P.C.) (en banc); *Soering v. United Kingdom*, 11 Eur. H.R. Rep. (ser. A) 439 (1989).

⁷ *Soering c. Royaume-Uni*, 11 EHRR (ser. A) 439 (1989).

⁸ 161 CEDH (ser. A) para. 42 (1989).

⁹ *Minister of Justice v. Burns and Rafay*, 2001 SCC 7 (S.C. Canada, 22 March 2001) (at para. 122)

¹⁰ *Id.*

Relying in part on this evidence, the court held that the Canadian Charter of Rights and Freedoms precluded the defendants' extradition, absent assurances the United States would not seek the death penalty¹¹.

The **Ugandan Supreme Court** has also embraced these arguments, holding that a delay of more than three years between the confirmation of a prisoner's death sentence on appeal and execution constitutes cruel, inhuman or degrading treatment or punishment in violation of its national constitution¹².

The **Zimbabwe Supreme Court** has held that delays of 52 and 72 months between the imposition of a death sentence and execution constitute inhuman punishment¹³.

The **Inter-American Court of Human Rights** in *Cantoral Benavides¹⁴ and Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago¹⁵*, considered that leaving a person on death row waiting to be executed, without communication with the outside world, isolated in a small cell, without ventilation or natural light and subject to visitation restrictions clearly constitutes cruel, inhuman and degrading treatment.

In its Resolution¹⁶, the **Economic and Social Council** invites States to "allow sufficient time to prepare a defence which also applies to appeals process in order to prepare and complete appeals, including petitions for clemency".

This resolution makes it possible to avoid hasty executions.

- Extradition

In 2010, the **European Court on Human Rights** (ECHR) expanded its rule from Soering in **Al Saadoon & Mufdhi v. United Kingdom**. There, the Court found that the United Kingdom had violated its obligations under Article 3 of the European Convention merely by exposing the applicants to the threat of capital punishment¹⁷.

In **Öcalan v. Turkey** in 2005, the **ECHR** deepened its jurisprudence not on death row phenomenon but on the concept of a fair trial. Thus, a death sentence resulting from a trial which does not meet the guarantees of a fair trial entails psychological stress for the sentenced person covered by Article 3 of the European Convention.

The rule that it is necessary to seek firm assurances from the country in which the death penalty is maintained that persons to be extradited will not be sentenced to death has been taken up in the Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers on 11 July 2002.

At the international level, the **Human Rights Committee** (HRC) considered, in the **Kindler case¹⁸**, that the decision to extradite an American national to his country of origin where he had been sentenced to death would constitute a violation of article 6 of the Covenant only whether that decision had been taken without having obtained assurances that such a sentence would not be imposed.

¹¹ *Id.*

¹² *Kigula and Others v. Attorney Gen.*, 2006 S. Ct. Const. App. No. 03, at 56-57 (Uganda 2009).

¹³ Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimb. June 24, 1993 (reported in 14 Hum. Rts. L. J. 323 (1993)) (available at http://www.unhcr.org/refworld/country,,ZWE_SC,,ZWE,,3ae6b6c0f,0.html). In Cameroon, the law provides that any prisoner who has not been executed within 20 years of the imposition of his death sentence should be freed; this provision has not been implemented in practice, however.

¹⁴ CIDH, *Cantoral Benavides*, 18 août 2000, série C, n° 69. IN FRENCH - NEEDS TO BE TRANSLATED

¹⁵ CIDH, *Hilaire, Constantine, Benjamin et autres c/ Trinité et Tobago*, 21 juin 2002. IN FRENCH – NEEDS TO BE TRANSLATED

¹⁶ ECOSOC Res. 1989/64, 1(a).

¹⁷ *Al-Saadoon & Mufdhi v. the United Kingdom*, [2010], No. 61498/08, 51 Eur. H.R. Rep. 9.

¹⁸ N° 470/1900 Joseph Kindler c. Canada 30 July 1993

The HRC now considers that any abolitionist State extraditing an individual to a country where he risks the death penalty violates Article 6 of the ICCPR¹⁹.

These examples demonstrate that, arguably, the prohibition against lengthy confinement on death row as cruel, inhuman, or degrading treatment has attained binding force as customary international law²⁰.

- **Excluding people with mental illness from the death penalty**

International law squarely prohibits the execution of certain categories of offenders, especially individuals with mental disabilities.

Your client may have developed a severe mental illness after he was sentenced to death. The United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, which received almost unanimous support from U.N. state party members, prohibit the imposition of the death penalty “*on persons who have become insane.*”²¹

In 1989, the **Economic and Social Council** expanded this protection to cover “*persons suffering from...extremely limited mental competence, whether at the stage of sentence or execution.*”²²

The **U.N. Commission on Human Rights** has likewise urged retentionist countries “*not to impose the death penalty on a person suffering from any form of mental...disabilities or to execute any such person.*”²³

The **European Union** has declared that the execution of persons suffering from any form of mental disorder is contrary to internationally recognized human rights norms and violates the dignity and worth of the human person²⁴.

International law may not require that your client is formally found to be mentally ill for this prohibition to apply.

In ***Francis v. Jamaica***, the **Human Rights Committee** held that issuing an execution warrant for a mentally disturbed individual who was examined and found not to be “insane” amounted to cruel, inhuman or degrading treatment in violation of Article 7 of the ICCPR²⁵.

If you suspect your client’s mental health has deteriorated during his stay on death row, you should seek a stay of execution and seek assistance from a qualified mental health professional.

Your client has the right to seek clemency or commutation of his death sentence whether he suffers from mental illness or any other pathology related or not to the living condition in detention. Indeed, several international instruments guarantee the right to seek pardon or commutation of a death sentence, which may be granted in all cases of capital punishment²⁶.

¹⁹ Judge c/ Canada, 5/08/2003

²⁰ See Proclamation of Tehran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, 23 GAOR, U.N. Doc. A/CONF. 32/41, at 4 (May 13, 1968) (noting status of Universal Declaration of Human Rights, including prohibition against cruel, inhuman or degrading treatment, as customary international law). *Accord. De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (noting that the right not to be subjected to cruel, inhuman, and degrading treatment constitutes universally accepted international law).

²¹ United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ¶ 3 (available at <http://www2.ohchr.org/english/law/protection.htm>).

²² U.N. ECOSOC, Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty, p. 51, para. 1(d), U.N. Doc. E/1989/91, May 24, 1989.

²³ See, e.g., U.N. Office of the High Commissioner for Human Rights, The Question of the Death Penalty, E/CN.4/RES/2003/67, Apr. 25, 2003.

²⁴ EU Memorandum on the Death Penalty (Feb. 25, 2000).

²⁵ *Francis v. Jamaica* (No. 606/1994), U.N. Doc. CCPR/C/54/D/606/1994 (Aug. 3, 1995).

²⁶ ACHR, art. 4(6); ICCPR, art. 6(4); U.N. ECOSOC, Safeguards guaranteeing protection of the rights of those facing the death penalty, principle 7, Resolution 1996/15, July 23, 1996 available at <http://www2.ohchr.org/english/law/protection.htm>; Arab Charter on Human Rights, art. 6, 18 Hum. Rts. L.J. 151, September 15, 1994.

- **Advocating before international bodies**

The death row phenomenon, which amounts to torture or cruel, inhuman or degrading treatment, may also allow you to lodge various appeals with international and regional human rights mechanisms.

International appeals are often filed when lawyers feel that they no longer have recourse to national courts. Most international mechanisms require that you exhaust all domestic remedies before filing your petition. But domestic remedies need not be exhausted if local remedies are unavailable or inaccessible (for example, denial of appeals or legal aid). Moreover, under the HRC's jurisprudence, a remedy must also be *effective*—not merely formally available²⁷.

In other words, domestic remedies need not be exhausted if they are inaccessible or if they are plainly ineffective (meaning they are accessible but unlikely to provide actual relief). For example, **the Inter-American Court on Human Rights** found in one case that domestic remedies were not sufficient to protect people on death row from “illegal execution,” in part because the state executed these persons while their cases were still pending before the Court²⁸.

Similarly, under the Convention against Torture, domestic remedies need not be exhausted where “the application of remedies is unreasonably prolonged.”²⁹

The filing of an application before an international body will depend on your country, if your State is a party. Regarding the invocation of torture and the prohibition of inhuman or degrading treatment, it is possible to refer the complaints to the UN Human Rights Committee if your State has ratified the first Optional Protocol to the ICCPR and to the UN Committee against Torture, and if your State is a party to the Convention against Torture and has recognised the competence of the HRC to hear individual complaints under Article 22 of the Convention.

European, African and American regional mechanisms also provide for the prohibition of torture and can also be invoked.

In the absence of any exhaustion of domestic remedies, consideration may also be given to referring the complaint to the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment. The rapporteur examines individual complaints from nationals and these may be submitted as a matter of urgency. If the rapporteur concludes that there has been a violation of the applicable law, he sends an opinion to the State concerned and may submit other remedies to the State through diplomatic voices. You may be able to request interim protective measures without exhausting domestic remedies.

²⁷ *Hamilton v. Jamaica*, Communication No. 616/1995, U.N. Doc. CCPR/C/66/D/616/1995 (Jul. 18, 1999).

²⁸ *Medellin, Ramirez Cardenaz & Leal Garcia v. United States*, ¶ 68, Case 12.644, Report No. 90/09, IACHR (Aug. 7, 2009).

²⁹ CAT Art. 22(5)(b).



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