# [International Jurisprudence: the death penalty and the prohibition of cruel, inhuman or degrading treatment or punishment]

## INTRODUCTION AND METHODOLOGY

This memorandum was prepared by Ann G. Fort, Stacy D. Fredrich, Robert J. Howell, and Heather R. Winter of Sutherland Asbill & Brennan LLP law firm at the request of The Advocates for Human Rights. Additional information was provided by the International Commission of Jurists. Both organizations are members of the World Coalition Against the Death Penalty.

The memorandum is divided in four topics:

1. **The Right to Be Free from Cruel, Inhuman or Degrading Treatment or Punishment**
2. **Methods of Execution**
3. **Death Row Conditions**
4. **Families of the Persons Sentenced to Death**

The following international entities have been investigated regarding these topics:

United Nations:

- **Economic and Social Council**
- **Human Rights Committee**
- **Commission on Human Rights** (replaced by the Human Rights Council)
- **Committee against Torture**
- **Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**
- **Special Rapporteur on Extrajudiciary, Summary or Arbitrary Executions**

Regional Human Rights Mechanisms:

- **African Commission on Human and Peoples' Rights**
- **European Court of Human Rights**
- **Inter-American Court of Human Rights**

Case Law of Domestic Courts:

- Supreme Court of **Canada**
- Supreme Court of the State of **Georgia, USA**
- Supreme Court of **India**
- Judicial Committee of the **Privy Council**
- Supreme Court of **Uganda**
- Supreme Court of **Zimbabwe**

## [1] The Right to Be Free from Cruel, Inhuman or Degrading Treatment or Punishment

### • United Nations

#### Human Rights Committee

The United Nations Human Rights Committee is the United Nations treaty body of independent experts that monitors the implementation and interpretation of the International Covenant on Civil and Political Rights and its two Protocols.[1]

Article 7 of the International Covenant on Civil and Political Rights provides:

"*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*."[2]

### • Regional Human Rights Mechanisms

#### African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights is charged with ensuring the protection and promotion of human and peoples' rights under the conditions laid down by the African Charter on Human and Peoples' Rights.[3]

In 2005, a Working Group on the Death Penalty was established. In May 2011, the Chairwoman of the Working Group stated:

"*The Commissioner, who serves on the Working Group on the Death Penalty in Africa with the Special Rapporteur for Prisons and Conditions of Detention in Africa, will like to remind State Parties to the African Charter that capital punishment is cruel and therefore morally unjustifiable, unnecessary, irreversible, illogical; and represents a most grave violation of fundamental human rights in particular the right to life under Article 4 of the African Charter.*"[4]

#### European Court of Human Rights

The European Court of Human Rights is a multi-national court established by the European Convention on Human Rights.[5] It provides legal recourse of last resort to individuals who feel that their human rights have been violated by a nation subscribing to the European Convention.[6]

The European Court of Human Rights has used Article 3 of the European Convention to highlight the harsh realities of the imposition and application of the death penalty:

"*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*"[7]

In *Al-Saadoon and Mufdhi v. The United Kingdom* (2010),[8] the European Court for Human Rights ruled that the government of the United Kingdom breached Article 3 by sending two Iraqi citizens, Faisal Al Saadoon and Khalaf Mufdhi, back to Iraq, knowing the likelihood that those individuals would face death by hanging.

The Court held that the death penalty, which involved the "*deliberate and premeditated destruction of a human being by the State authorities causing physical pain and intense psychological suffering as a result of the foreknowledge of the death, could be considered inhuman and degrading, and contrary to Article 3.*"[9]

#### Inter-American Court of Human Rights

The American Convention on Human Rights[10] (also known as the Pact of San José) was adopted by the nations of the Americas meeting in San José, Costa Rica, on 22 November 1969 and took effect on 18 July 1978. The bodies responsible for overseeing compliance with the Convention are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, both of which are organs of the Organization of American States (OAS).[11]

The Inter-American Court of Human Rights has relied on the American Convention's Article 4(1) providing the right to life and Article 5 prohibiting cruel and inhuman treatment as a means to restrict the imposition of the death penalty:

"*1. Every person has the right to have his physical, mental, and moral integrity respected.*
*2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.*" [12]

---

[1] http://www2.ohchr.org/english/bodies/hrc/index.htm
[2] http://www2.ohchr.org/english/law/ccpr.htm
[3] http://www.achpr.org/english/_info/charter_en.html
[4] http://www.achpr.org/english/Commissioner's%20Activity/49th%20OS/Commissioner/Kayitesi.pdf
[5] European Convention on Human Rights, 4 Nov. 1950, 213 U.N.T.S. 221
[6] http://www.echr.coe.int/
[7] http://conventions.coe.int/treaty/en/Treaties/Html/005.htm art.3 (47 European States are party to the Convention)
[8] Eur. Ct. H.R., App. No. 61498/08 (2010)
[9] *Id.* at para. 13
[10] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123
[11] http://www.corteidh.or.cr/
[12] http://www.oas.org/juridico/english/treaties/b-32.htm

## [2] Methods of Execution

### • United Nations

#### Economic and Social Council

The United Nations Economic and Social Council (ECOSOC) was established under the United Nations Charter as the principal organ to coordinate international economic and social issues, and to formulate policy recommendations addressed to Member States and the United Nations system, including encouraging universal respect for human rights and fundamental freedoms.

The document entitled "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" permits the death penalty, but provides:

"*Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.*"[13]

#### Human Rights Committee

The United Nations Human Rights Committee held that "*particularly abhorrent*"[14] methods of execution and methods of execution that involve unnecessary physical and mental suffering[15] are cruel punishments and violate Article 7 of the International Covenant of Civil and Political Rights.

When the death penalty is imposed, General Comment 20 of the Committee requires that it be carried out in a manner to cause "*the least possible physical and mental suffering.*"[16] For example, the Committee has found that execution by **gas asphyxiation** "*constitutes cruel and inhuman treatment*."[17]

**Commission on Human Rights** (replaced by the Human Rights Council)

The UN Commission on Human Rights has described execution by **stoning** as a "*particularly cruel or inhuman means of execution*."[18]

#### Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Special Rapporteur on Torture is an independent expert appointed by the United Nations Human Rights Council to examine questions relevant to torture.[20] The mandate of the Rapporteur covers all countries, irrespective of whether a State has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In January 2009, the Special Rapporteur explicitly addressed capital punishment as a form of cruel, inhuman or degrading punishment:

"*If the amputation of limbs is considered cruel, inhuman or degrading punishment, how can beheading then be qualified differently? If even comparatively lenient forms of corporal punishment, such as 10 strokes on the buttocks, are absolutely prohibited under international human rights law, how can hanging, the electric chair, execution by a firing squad and other forms of capital punishment ever be justified under the very same provisions?*"[21]

### • Regional Human Rights Mechanisms

#### European Court of Human Rights

In *Al-Saadoon and Mufdhi v. The United Kingdom*,[22] where the European Court for Human Rights ruled that the United Kingdom breached Article 3 by sending two Iraqi citizens back to Iraq, the Court added that the method of execution itself may also violate Article 3. Specifically, hanging "*was an ineffectual and extremely painful method of killing, such as to amount to inhuman and degrading treatment.*"[23]

The Court explicitly held that "*whatever the method of execution, the extinction of life involves some physical pain, as well as intense psychological suffering deriving from the foreknowledge of death.*"[24]

---

[13] http://www2.ohchr.org/english/law/protection.htm
[14] *Kindler v. Canada*, Commc'n No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993), para. 15.3
[15] General Comment 20, CCPR/C/21/Add.3, para. 6
[16] *Id*. at para. 6
[17] *Ng v. Canada*, Commc'n No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994), para. 16.4
[18] Human Rights Commission Res. 2003/67, para. 4(i); Res. 2004/67, para. 4(i); and Res. 2005/59 para. 7(i)

[20] http://www2.ohchr.org/english/issues/torture/rapporteur/
[21] *Promotion and Protection of All Human Rights, Civil, Political Economic, Social And Cultural Rights, Including the Right to Development*, 14 January 2009, http://ap.ohchr.org/documents/dpage_e.aspx?m=103 (URL to PDF does not work; navigate by date to document)
[22] Eur. Ct. H.R., App. No. 61498/08 (2010)
[23] *Id.* at paora. 99
[24] *Al-Saadoon and Mufdhi v. The United Kingdom*, Appl No. 61498/08, Judgment of 4 October 2010, para. 115

## • Case Law of Domestic Courts

### Supreme Court of the State of Georgia, USA

Georgia's Supreme Court held the electric chair to constitute cruel and unusual punishment.[25]

# [3] Death Row Conditions

## • United Nations

### Human Rights Committee

The Human Rights Committee established that ill-treatment suffered by prisoners on death row at the hands of warders and other death row personnel can constitute cruel, inhuman and degrading treatment.

For instance, such ill-treatment may include:

- unjustified delay in informing a prisoner of a stay of execution and removing him from the death cell;[26]
- taunts over impending execution;[27] and
- mock executions of a death row prisoner.[28]

According to the jurisprudence of the Human Rights Committee, the **"death row phenomenon"** can constitute cruel, inhuman and degrading treatment if prolonged delays in the execution of the sentence can be imputed to States' faulty procedures[29] and result in the serious deterioration of prisoner's mental condition as a consequence of psychological tension suffered during prolonged detention on death row without appropriate medical treatment.[30]

### Committee against Torture

The United Nations Committee against Torture is the treaty body of 10 independent experts that monitors implementation and interpretation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[31] The Committee against Torture included overcrowding of death row among the conditions that can render detention on death row a cruel, inhuman and degrading treatment.[32]

### Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

In the country-visit report on Mongolia, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment determined that keeping prisoners on death row in complete isolation, continuously handcuffed and shackled throughout their detention and without adequate food "*constitute[d] additional punishments which can only be qualified as torture.*"[33]

## • Regional Human Rights Mechanisms

### European Court of Human Rights

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 punishment.

Specifically, in the landmark case of *Soering v. The United Kingdom*,[34] Jens Soering, a German national, faced extradition to the United States for murder. A conviction for murder likely would result in the death penalty. Soering maintained that the extreme stress and psychological trauma of waiting to be put to death would breach Article 3 of the European Convention if he were extradited to the United States.

"*In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading' [under Article 3], the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment."* In this connection, *"account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him.*"[35]

The European Court of Human Rights ruled that extradition to the United States would indeed subject Soering to inhuman and degrading treatment and punishment given the "*manner in which [the death penalty] is imposed or executed,*

---

[25] *Dawson v. Georgia*, 554 S.E.2d 137 (Ga. 2001)
[26] *Pratt and Morgan v. Jamaica*, Commc'ns No. 210/1986 and 225/1897 (1989), para. 13.7
[27] *Hylton v. Jamaica*, Commc'n No. 407/1990 (1994), para. 9.3
[28] *Linton v. Jamaica*, Commc'n No. 255/1987(1992), para. 8.5
[29] *Francis v. Jamaica*, Commc'n No. 606/1994 (1995), para. 9.2 (finding violations of Articles 7 and 10(1) where the Jamaican Court of Appeal failed to issue a written judgment for more than 13 years despite several requests by prisoner and the prisoner was exposed to humiliating treatments by warders, inadequate prison conditions and lack of adequate psychological treatment)
[30] *Williams v. Jamaica*, Commc'n No. 609/1995 (1997)
[31] http://www2.ohchr.org/english/bodies/cat/index.htm
[32] Committee against Torture, Concluding observations on Zambia, CAT/C/ZMB/CO/2, para. 19
[33] Report by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, U.N. Doc. E/CN.4/2006/6/Add.4 (2005), para. 53
[34] 161 Eur. Ct. H.R. (ser. A) at 42 (1989)
[35] *Id.* at para. 100

*the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution.*"[36]

Coined the **"death row phenomenon,"**[37] the inhuman and degrading conditions to which a death row inmate could be exposed include:

- the delays in the appeal and review procedures, subjecting the applicant to increasing tension and psychological trauma;
- the fact that the judge or jury may not take into account the defendant's age and mental state at the time of the offense when determining the sentence;
- the extreme conditions of the future detention on death row, where he could be the victim of violations and sexual abuse because of his age, color or nationality; and
- the constant expectation of the execution itself, including the ritual of the execution.

Similarly, in *Bader and Kanbor v. Sweden*,[38] the prospect of deporting a family of four Syrian nationals back to Syria where the father had been convicted and sentenced to death was found to violate Article 3 of the European Convention. The Court found that the father and his family had a justified and well-founded fear that the death sentence would be carried out without a fair trial. "*Since executions are carried out without any public scrutiny or accountability, the circumstances surrounding his execution would inevitably cause the first applicant considerable fear and anguish while he and the other applicants would all face intolerable uncertainty about when, where and how the execution would be carried out*."[39]

### Inter-American Court of Human Rights

The leading opinion out of the Inter-American Court of Human Rights is the *Hilaire, Constantine and Benjamin, et al. v. Trinidad and Tobago*.[40] The Inter-American Court for Human Rights addressed the mandatory nature of the death penalty in Trinidad and Tobago and the deficiencies in the treatment and conditions of detention pending execution. Each applicant was convicted of murder and sentenced to death by hanging.

Citing *Soering* and the **"death row phenomenon,"** the Inter-American Court of Human Rights found that "*contrary to the American Convention, all of the victims in the present Case live under the constant threat that they may be taken to be hanged at any moment*."[41] Further, "*the procedures leading up to the death by hanging of those convicted of murder terrorize and depress the prisoners; others cannot sleep due to nightmares, much less eat*."[42]

The detention conditions endured by the applicants compel them to "*live under circumstances that impinge on their physical and psychological integrity and therefore constitute cruel, inhuman and degrading treatment*"[43] proscribed by Article 5.

In *Raxcaco-Reyes v. Guatemala*,[44] the Court, also citing *Soering*, found that the prison conditions experienced by the applicant while he awaited execution constituted inhuman and degrading treatment in breach of Article 5(1) and 5(2).

## • Case Law of Domestic Courts

### Supreme Court of Canada

The "*horrors*" of the death row phenomenon, even when regarded as self-inflicted, "*weigh in the balance against extradition without assurances [that the death penalty will not be imposed]*."[45]

### Supreme Court of India

As a result of several years spent with "*agony hanging over his head*" on death row, a prisoner becomes "*more a vegetable than a person,*" and "*hanging a vegetable is not death penalty*."[46]

In another case, the Court stigmatized the "*dehumanizing character*" of the delay in carrying out judicial executions.[47]

### Judicial Committee of the Privy Council[48]

To execute men after holding them in an agony of suspense for a prolonged delay would be "*inhuman punishment*."[49]

[36] *Id.* at para. 104
[37] *Id.* at para. 100
[38] Eur. Ct. H.R., App. No. 13284/04 (2005)
[39] *Id.* at para. 46
[40] Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94 (2002)
[41] *Id.* at para. 168
[42] *Id.*
[43] *Id.*
[44] Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 133 (2005()
[45] *United States v. Burns*, 1 S.C.R 283 (2001), para. 123
[46] *Prasad v. State of Uttar Pradesh*, 1979 SCR (3) 78, 130
[47] *Vatheeswaran v. State of Tamil Nadu*, 1983 SCR (2) 348, 348
[48] The Judicial Committee of the Privy Council is the provision of a final Court of Appeal for the UK overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty. The Committee consists of the Supreme Court Justices and some senior Commonwealth Judges; *See* http //www.privy-council.org.uk/output/page2.asp
[49] *Pratt and Morgan v. Jamaica* [1994] 4 All E. R. 769 (P. C. 1993)

### Supreme Court of Uganda

Unjustified delays (longer than three years) in carrying out capital punishment, after the definitive decision confirming the sentence has been issued on appeal, constitute cruel, inhuman and degrading treatment.[50]

### Supreme Court of Zimbabwe

Punishments are cruel when they involve a "*lingering death,*"[51] and "*death is* [ ] *lingering if a person spends several years in a death cell awaiting execution as if the mode of execution takes an unacceptably long time to kill him. The pain of mental lingering can be as intense as the agony of physical lingering.*"[52]

## [4] Families of the Persons Sentenced to Death

### • United Nations

### Human Rights Committee

In *Staselovich v. Belarus*, the Human Rights Committee found that family members of sentenced prisoners are victims of "*inhuman treatment*" when the State fails to notify family members of the scheduled date of execution and the location of the grave following the execution.[53]

### Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

In a follow-up report on the recommendations to States, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stated that certain forms of treatment reserved to relatives in capital cases, such as refusing them the opportunity to bid farewell to the condemned, failing to notify them of the date of the execution and not disclosing the place of burial afterwards, are cruel and inhuman.[54]

### Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions is an independent expert appointed by the United Nations Human Rights Council to examine questions relevant to extrajudicial, summary or arbitrary executions and to monitor the implementation of existing international standards on safeguards and restrictions relating to the imposition of capital punishment. The mandate of the Special Rapporteur covers all countries, irrespective of whether a State has ratified relevant international Conventions.[55]

In a report to the Human Rights Council on Transparency and the Imposition of the Death Penalty, the Special Rapporteur stated that the practice of informing death row prisoners of their impending executions only moments before the executions actually take place, and their respective family members only after the executions, is "*inhuman and degrading.*"[56]

*[END]*

[50] *See Attorney General v. Susan Kigula et al.*, Appeal No. 03 of 2006 (2009), 47 (discussing the Constitutional Court of Uganda "death row syndrome" jurisprudence)
[51] *Catholic Commissioner for Justice and Peace in Zimbabwe v. Zimbabwe*, (4) SA 239 (ZS 1993) (quoting *In re Kemmler*, 136 US 436 (1890) at 447)
[52] *Id*.
[53] Commc'n No. 887/1999, U.N. Doc. CCPR/C/77/D/887/1999 (2003), para. 9.2
[54] Report by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, U.N. Doc. AHRC/13/39/Add.6 (2010), pp. 251; Nowak, *supra* note 33 at para. 50
[55] http://www2.ohchr.org/english/issues/executions/index.htm
[56] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, UN Doc. E/CN.4/2006/53/Add.3 (2006), para. 32