

International Jurisprudence on the Death Penalty and the Prohibition of Torture and other Ill-treatment*

[1] Death Penalty as Inhuman and Degrading Treatment and Punishment

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

In his 2009 report to the Human Rights Council, the Special Rapporteur Manfred Nowak addressed capital punishment as a form of cruel, inhuman or degrading punishment and stated that “the use of the death penalty does not constitute a violation of the right to life” but this conclusion does “not provide a legal response to the question [...] whether capital punishment is to be considered cruel, inhuman or degrading punishment.”¹

He further states “*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?*”²

Based on these considerations he concludes that cruel, inhuman and degrading treatment and punishment should be interpreted “in light of the present-day understanding of these words by

*An earlier version of this document 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.

¹ Promotion and Protection of All Human Rights, Civil, Political Economic, Social And Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/10/44, 14 January 2009, para. 33.

² *Id* para. 38.

Governments around the world”. He adds that “*human rights are a rapidly developing concept and most international and regional treaty monitoring bodies apply a dynamic interpretation of human rights treaty law.*”³

In 2012 the Special Rapporteur Juan Mendez published a thematic report on the death penalty and the prohibition of torture and cruel, inhuman and degrading treatment. He concluded that “*there is an evolving standard whereby States and judiciaries consider the death penalty to be a violation per se of the prohibition of torture or cruel, inhuman or degrading treatment.*”⁴

European Court of Human Rights

In the case of *Al-Saadoon and Mufdhi v. The United Kingdom*, where the Court ruled that the United Kingdom breached Article 3 by sending two Iraqi citizens back to Iraq, it 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.*”⁵

Consequently, the risk of being sentenced to death also constitutes a violation of the prohibition of torture and other ill-treatment. In the case of *A.L. (X.W.) v. Russia*, the Court found the forcible return of a man to China where he would risk of being convicted to death incompatible with Article 3 of the Convention. The Court reasoned that “*capital punishment has become an unacceptable form of*

³ *Id* para. 34.

⁴ Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. 9 August 2012, para. 72.

⁵ *Al-Saadoon and Mufdhi v. The United Kingdom*, App. No. 61498/08 (2010), para. 13.

punishment that is no longer permissible [...] it amounts to “inhuman or degrading treatment or punishment” under Article 3”. The Court further provided that this interpretation “applies fully to Russia, [and] Russia is therefore bound by an obligation that stems from Articles 2 and 3 not to extradite or deport an individual to another State where there exist substantial grounds for believing that he or she would face a real risk of being subjected to the death penalty there.”⁶

African Commission on Human and Peoples’ Rights

In its 2015 General Comment No. 3 on the African Charter on Human and Peoples’ Rights on the Right to Life (Article 4), the African Commission acknowledged a connection between inhuman and degrading punishment and the death penalty by holding that “[t]he vast majority of African States have now abolished the death penalty in law or in practice. International law requires those States that have not yet abolished the death penalty to take steps towards its abolition in order to secure the rights to life and to dignity, in addition to other rights such as the right to be free from torture, and cruel, inhuman or degrading treatment.”⁷

[2] Methods of Execution

Human Rights Committee

The United Nations Human Rights Committee held that “particularly abhorrent”⁸ methods of execution and methods of execution that involve unnecessary physical and mental suffering⁹ 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 it be carried out in a manner to cause “the least possible physical and mental suffering.”¹⁰ For example, the Committee has found that execution by gas asphyxiation “constitutes cruel and inhuman treatment.”¹¹ The Human Rights Committee further found that the act of performing an execution in public constitutes inhuman or degrading treatment.¹²

⁶ A.L. (X.W.) v. Russia, App. No. 44095/14 (2015), para. 64.

⁷ General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), 18 November 2015, para. 22.

⁸ *Kindler v. Canada*, Com. No. 470/1991 (1993), para. 15.3.

⁹ General Comment No. 20, UN Doc. CCPR/C/21/Add.3, para. 6.

¹⁰ *Id.* para. 6.

¹¹ *Ng v. Canada*, Com. No. 469/1991, (1994), para. 16.4.

¹² Concluding Observations on the Islamic Republic of Iran, UN Doc. CCPR/C/79/Add.25, para. 8.

European Court of Human Rights

In *Al-Saadoon and Mufdhi v. The United Kingdom*, the Court found 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.”¹³ 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.”¹⁴

[3] Death Row Conditions

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;¹⁵
- taunts over impending execution;¹⁶
- mock executions of a death row prisoner;¹⁷
- imposing a death sentence after an unfair trial that does not meet the Article 13 requirements;¹⁸
- putting a minor on death row;¹⁹
- issuing a death warrant to a mentally ill person;²⁰
- making a detainee believe his death sentence was commuted but later returning him to death row.²¹

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 procedures²² 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.²³

¹³ *Al-Saadoon and Mufdhi v. The United Kingdom*, App. No. 61498/08 (2010), para. 99.

¹⁴ *Id.* para. 115.

¹⁵ *Pratt and Morgan v. Jamaica*, Com. No. 210/1986 and 225/1897 (1989), para. 13.7.

¹⁶ *Hylton v. Jamaica*, Com. No. 407/1990 (1994), para. 9.3.

¹⁷ *Linton v. Jamaica*, Com. No. 255/1987 (1992), para. 8.5.

¹⁸ *Larranaga v. the Philippines*, Com. No. 1421/2005 (2006), para. 7.1.

¹⁹ *Clive Johnson v. Jamaica*, Com. No. 592/1994 (1998), para. 12.

²⁰ *R.S v. Trinidad and Tobago*, Com. No. 684/1996 (2002), para. 7.2.

²¹ *Chisanga v. Zambia*, Com. No. 1132/2002 (2005), para. 7.3.

²² *Francis v. Jamaica*, Com. No. 606/1994 (1995), para. 9.2.

²³ *Williams v. Jamaica*, Com. No. 609/1995 (1997), para. 6.5.

Committee against Torture

The Committee against Torture found overcrowding,²⁴ solitary confinement and isolation²⁵, the secrecy surrounding the execution, the execution of mentally-ill detainees,²⁶ and the excessive length of time on death row²⁷ to be incompatible with the Convention against Torture.

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

In the country-visit report on Mongolia, for instance, the Special Rapporteur 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.”²⁸

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*, a German national, faced extradition to the United States for murder, a conviction that would likely result in the death penalty. The applicant 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.

The Court reasoned that “[i]n 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.”*²⁹

The European Court of Human Rights ruled that extradition to the United States would indeed subject the applicant to inhuman and degrading treatment and punishment given the “*manner in which [the death penalty] is imposed or executed, the personal circumstances of the condemned person and a disproportionately to the gravity of the crime committed, as well as the conditions of detention awaiting execution.*”³⁰

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 rape and sexual abuse because of his age, skin color or nationality; and
- the constant expectation of the execution itself, including the ritual of the execution.

Similarly, in *Bader and Kanbor v. Sweden*, 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.*”³¹

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*.³² 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

²⁴ Concluding observations on Zambia, UN Doc. CAT/C/ZMB/CO/2 (2008), para. 19.

²⁵ Concluding Observations on Kuwait, UN Doc. CAT/C/KWT/CO/3 (2016), para. 22.

²⁶ Concluding Observations on Japan, UN Doc. CAT/C/JPN/CO/2 (2013), para. 15.

²⁷ Concluding Observations on Ethiopia, UN Doc. CAT/C/ETH/CO/1 (2010), para. 24.

²⁸ 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

²⁹ *Id.* para. 100.

³⁰ *Id.* para. 104.

³¹ *Bader and Kanbor v. Sweden*, App. No. 13284/04 (2005), para. 46.

³² *Hilaire, Constantine and Benjamin, et al. v. Trinidad and Tobago*, Ser. C, No. 94 (2002).

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.*”³³ 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.*”³⁴

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*”³⁵ proscribed by Article 5.

In *Raxcaco-Reyes v. Guatemala*, 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).³⁶

[4] Families of the Persons Sentenced to Death

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.³⁷

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.³⁸

Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

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.*”³⁹

Committee against Torture

The Committee against Torture found the refusal to provide family members advance notice of the date and time of execution a violation of the Convention against Torture.⁴⁰

³³ *Id.* para 168.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Raxcaco-Reyes v. Guatemala*, Ser. C, No. 133 (2005).

³⁷ *Staselovich v. Belarus*, Com. No. 887/1999, (2003), para. 9.2.

³⁸ Report by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, UN Doc. AHRC/13/39/Add.6 (2010), p. 251;

³⁹ Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/2006/53/Add.3 (2006), para. 32.

⁴⁰ Concluding Observations on Japan, UN Doc. CAT/C/JPN/CO/2, para. 15.