

# The Death Row Phenomenon: A Prohibition Against Torture, Cruel, Inhuman and Degrading Treatment or Punishment

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## ABSTRACT

Several debates on the legitimacy, constitutionality, and acceptability of the death penalty have arisen throughout the years. The death row phenomenon refers to the psychological effects on prisoners of being on death row for a prolonged period while awaiting an imminent execution under harsh conditions of confinement. Having been declared a violation of a customary norm of international law by several international tribunals and national courts, this Article explores the possibility of the death row phenomenon, as a legal concept, becoming widely accepted and ultimately preventing the execution of another category of offenders. The existence of a lack of judicial consensus arising from different standards set by these courts in the determination of what constitutes delay could be an obstacle to this development. This Article suggests that if pursued diligently, the death row phenomenon could become universally accepted as an unacceptable practice and a standard could be set under international law which would become binding upon national courts.

## I. INTRODUCTION

Capital punishment is reportedly waning; death sentences and executions are on the decline. At the end of 2020, more than two-thirds of the world's nation states, 144 countries, had abolished the death penalty in law or practice; 108 countries had abolished the death penalty in law for all crimes.<sup>1</sup> A significant reduction in the number of death sentences and executions worldwide has been recorded in 2020 with 483 executions in eighteen countries and 1,477 death sentences imposed in fifty-four countries.<sup>2</sup> This reveals a 26% reduction in executions, with 657 executions in twenty countries in 2019, and a 36% decrease in death sentences, with 2,307 death sentences imposed in 2019.<sup>3</sup> The ills of capital punishment are blatant in countries where death sentences and executions are retained in violation of international human rights standards: discrimination against the poor and racial minorities; execution of juveniles; imposition of death sentences on the mentally ill and racial minorities; mandatory death sentences; and illegal proceedings contrary to fair trial standards with inmates detained under deplorable conditions.

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1. *Death Penalty in 2020: Facts and Figures*, AMNESTY INT'L (Apr. 21, 2021), <https://www.amnesty.org/en/latest/news/2021/04/death-penalty-in-2020-facts-and-figures/> [<https://perma.cc/2TWV-43HS>].

2. *Id.*

3. AMNESTY INT'L, AMNESTY INTERNATIONAL GLOBAL REPORT: DEATH SENTENCES AND EXECUTIONS 2020, at 9, 12 (2021).

At the end of 2020, at least 28,567 inmates were housed on death row worldwide, an increase from 26,604 prisoners housed the previous year.<sup>4</sup> While there is a reduction in executions, apart from cases where prisoners' sentences are commuted to life imprisonment or the prisoners get a reprieve, the death row phenomenon pervades. The death row phenomenon, described by Patrick Hudson as a developing legal concept<sup>5</sup> and by David P. Blank as an emerging legal doctrine,<sup>6</sup> has since developed and become popularized through its acceptance by international, regional, and national courts. Further, it has elicited a political reaction and awareness of the adverse consequences of applying the death penalty. The death row phenomenon has also been described as an ancillary attack on the death penalty, another argument tactically framed by abolitionists to eradicate capital punishment.<sup>7</sup> However, the discussion around the death row phenomenon differs from the quintessential argument that capital punishment should be abrogated because it is contrary to the right to life or that the method of execution is barbaric.<sup>8</sup> Rather, it requires that a death sentence should be commuted because "execution after prolonged delay under the harsh conditions of death row constitutes cruel and inhuman punishment. It is not the sentence of death that is being challenged, but the sentence of death after a torturous period of delay."<sup>9</sup>

This assertion relates to death row inmates concerned that their right to be free from any form of torture, cruel and inhuman treatment, or punishment while awaiting execution is being impinged on by a lengthy incarceration and the mental strain and torture arising there-from. The psychological and devastating effects of a lengthy stay on death row—the anxiety resulting from an imminent execution, postponement of execution dates, and confinement on death row for decades—is what constitutes torture.<sup>10</sup> The argument, therefore, is that execution after a prolonged

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4. AMNESTY INT'L, *supra* note 1; *Death Penalty in 2019: Facts and Figures*, AMNESTY INT'L (Apr. 21, 2020), <https://www.amnesty.org/en/latest/news/2020/04/death-penalty-in-2019-facts-and-figures/> [<https://perma.cc/YG7R-78PN>].

5. Patrick Hudson, *Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law?*, 11 EUR. J. INT'L. L. 833, 837 (2000).

6. David P. Blank, *Mumia Abu-Jamal and the "Death Row Phenomenon,"* 48 STAN. L. REV. 1625, 1630 (1996).

7. Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 163 (1998).

8. See Hudson, *supra* note 5, at 833.

9. *Id.*

10. Blank, *supra* note 6, at 1626.

delay is an abuse of fundamental rights of prisoners' and amounts to an excessive and disproportionate punishment.<sup>11</sup>

In addition, execution after such delay no longer serves the two core legitimate penological objectives of retribution and deterrence.<sup>12</sup> Consequentialists argue that if the death penalty can prevent the murder of one innocent life through incapacitation of the offender or general deterrence, then it is morally justified and a morally required penal purpose.<sup>13</sup> Opponents of capital punishment argue that "regardless of whether capital punishment is justified in the abstract, the fact that it is too often imposed arbitrarily [and] invidiously [and executed decades after its imposition] renders it a morally unacceptable practice in contemporary society."<sup>14</sup>

Although the first normative treaties of human rights did not explicitly proscribe capital punishment, they did contain implicit limitations on how the penalty should be administered.<sup>15</sup> Opponents of the death penalty, however, have argued that the punishment itself is excessive, and its severity is unavoidably reflected in the manner it is administered.<sup>16</sup> In effect, the unique nature of the penalty, such as its irreversibility and finality, makes it an unacceptable and unjustifiable sanction which cannot be imposed or inflicted without excesses.

The prohibition of torture, or any cruel, inhuman, or degrading treatment or punishment is an accepted customary norm of international law and is enshrined in virtually every international human rights treaty and domestic bill of rights.<sup>17</sup> Even though the wording of this norm varies in these covenants and constitutions and the terms in the clause might have distinct interpretations, the meaning is generally the same. Debates on the legitimacy of capital punishment have established that it can no longer be considered a violation of the right to life alone, but an infringement of this customary

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11. Hudson, *supra* note 5, at 833.

12. Christopher Adams Thorn, *Retribution Exclusive of Deterrence: An Insufficient Justification for Capital Punishment*, 57 S. CAL. L. REV. 199, 200–01 (1983).

13. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 705–07 (2005).

14. Carol S. Steiker, *No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 753 (2005).

15. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 6 (Mar. 23, 1976) (stating that a death sentence can only be imposed for the most serious crimes after a final judgement).

16. DAVID PANNICK, JUDICIAL REVIEW OF THE DEATH PENALTY 83–84 (1982).

17. WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS 4–5 (1996); *see* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 5 (Dec. 10, 1948); EUR. CT. OF HUM. RTS., EUROPEAN CONVENTION ON HUMAN RIGHTS 7 (2021); G.A. Res. 2200A (XXI), *supra* note 15, art. 7.

norm.<sup>18</sup> This Article explores a condition where the death penalty in its entirety goes beyond violating the right to life to becoming a cruel, unusual, and degrading treatment or punishment.

The death row phenomenon has been studied mostly as a legal concept because it gained recognition in a court of law.<sup>19</sup> Although Amy Smith posits that the death row phenomenon could be studied by psychologists, psychiatrists, or social scientists,<sup>20</sup> taking a legal scholarship perspective, this Article focuses on arguments that question the legal propriety of execution after a lengthy incarceration and explores the possibility of the proscription of the death row phenomenon attaining the status of an accepted customary norm—mainly because the arguments presented here are not limited by constitutional debates on the legitimacy of capital punishment but on the violation of inmates' rights.

## II. THE ORIGIN OF THE DEATH ROW PHENOMENON

The concept of the death row phenomenon can be traced to a 1983 article by an American psychiatrist and former professor at Harvard Medical School, Dr. Stuart Grassian. Grassian made an evaluation of the psychiatric effects of solitary confinement on prisoners at the Massachusetts Correctional Institute at Walpole.<sup>21</sup> Grassian described the clinical observations of fourteen inmates who alleged that conditions in solitary confinement violated their rights under the Eighth Amendment.<sup>22</sup> These living conditions as described by Dr. Grassian were extreme. Each cell measured approximately 1.8 m x 2.7 m and had no access to natural light, and furnishings included a steel bed, steel table, a stool, and a steel toilet.<sup>23</sup> Each cell had double-barred doors with a small Plexiglas window on the outer door, and personal belongings such as radios, televisions, and reading

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18. WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 140 (3d ed. 2002); *see also* Ernest van den Haag, *The Death Penalty Once More, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 445 (Hugo Adam Bedau ed., 1997); HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 92–94 (1987).

19. *See* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).

20. Amy Smith, *Not "Waiving" but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. PUB. INT. L.J. 237, 238 (2008).

21. Harold I. Schwartz, *Death Row Syndrome and Demoralization: Psychiatric Means to Social Policy Ends*, 33 J. AM. PSYCHIATRY & L. 153, 154 (2005).

22. Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1451 (1983).

23. *Id.*

materials, except a Bible, were removed by correction officers.<sup>24</sup> In Harold I. Schwartz's words, "Dr. Grassian described a number of severe psychiatric reactions to these conditions, which together have come to be referred to in legal venues as death row syndrome."<sup>25</sup> These prisoners displayed various symptoms ranging from generalized hyper-responsivity to external stimuli;<sup>26</sup> perceptual distortions, hallucinations, and derealization experiences;<sup>27</sup> to problems with impulse control and overt paranoia.<sup>28</sup> However, they all reported a very rapid diminution of their symptoms during periods of relief from solitary confinement.<sup>29</sup> Although none of these inmates were on death row,<sup>30</sup> Grassian confirms that prisoners on death row in the United States under similar conditions of confinement have been reported to experience these symptoms, especially during the long appeals process.<sup>31</sup>

Although Grassian never used the term "death row syndrome or phenomenon" in his report, he was referred to as an "expert on death row syndrome" to testify in the habeas corpus proceedings of Michael Ross, an American serial killer who spent eighteen years on death row before his execution in 2005.<sup>32</sup> Grassian testified that Ross, whose competency to waive further appeals and volunteer for execution was being questioned,<sup>33</sup> was not competent to be executed since he had suffered from mental deterioration due to years of being in solitary confinement.<sup>34</sup> Ross's

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24. *Id.*

25. Schwartz, *supra* note 21, at 154.

26. A progressive inability to tolerate ordinary stimuli. See *Madrid v. Gomez*, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995).

27. These experiences include hearing voices saying frightening things to them, loss of perceptual constancy, and complex and personalized illusions. Grassian, *supra* note 22, at 1452.

28. *Madrid*, 889 F. Supp. at 1230.

29. Grassian, *supra* note 22, at 1453.

30. The last execution in Massachusetts was in 1947, and in 1984, the death penalty was held to be unconstitutional in *Commonwealth v. Cruz*, 470 N.E.2d 116, 161 n.3, 171–72 (Mass. 1984).

31. Michael J. Carter, *Waiting to Die: The Cruel Phenomenon of "Death Row Syndrome,"* IPS NEWS (Nov. 10, 2008), <https://deathpenaltynews.blogspot.com/2008/11/waiting-to-die-cruel-phenomenon-of.html> [<https://perma.cc/N75P-JXT3>].

32. *The Michael Ross Case and "Death Row Syndrome,"* DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/the-michael-ross-case-and-death-row-syndrome> [<https://perma.cc/8SYU-XNSS>].

33. Steve Miller, *Conn. Serial Killer Executed by Lethal Injection*, NBC NEWS (May 12, 2005, 2:57 PM), <https://www.nbcnews.com/id/wbna7834496> [<https://perma.cc/4XQB-TVND>].

34. *In re Ross*, 866 A.2d 542, 550 (Conn. 2005).

desire to be executed was propelled by his death row experience at the Northern Correctional Institute.<sup>35</sup>

### *A. Defining the Concept*

The evolution of this concept has been dependent on judicial and academic interpretations. It is defined as a legal term and not a clinical term since it is neither recognized by the American Psychiatric Association nor represented in its handbook.<sup>36</sup> The death row phenomenon can be described as the “mental anguish suffered by inmates awaiting execution due to protracted delays . . . and the harsh conditions of confinement on death row.”<sup>37</sup> In 1989, the European Court of Human Rights (ECtHR) in *Soering v. United Kingdom* defined the death row phenomenon as a combination of circumstances to which a prisoner is exposed after being sentenced to death and being on death row.<sup>38</sup> The “combination of circumstances” refers to the lapse of time between the sentence of death and the actual execution, the deplorable conditions of confinement, and the mental anguish endured during this wait.<sup>39</sup> These circumstances, which exacerbate the detrimental effects upon prisoners, have come to dominate the torturous effects of death row.<sup>40</sup>

The death row phenomenon has become one of several ancillary subjects used to address legal and moral debates on the constitutionality of the death penalty.<sup>41</sup> The subject has developed into a viable and justiciable issue from its recognition by the ECtHR to other international, regional, and national courts. Franck has described it as “the psychological pressure that a prisoner who has been sentenced to death suffers through the drawn-

35. Kratos, *Serial Killer Sent Taunting Note Before Execution*, UNEXPLAINED-MYSTERIES (June 14, 2005), <https://www.unexplained-mysteries.com/forum/topic/43195-serial-killer-sent-taunting-note-before-execution/> [<https://perma.cc/8PT3-LL66>].

36. David Wallace Wells, *What is Death Row Syndrome? And Who Came Up With It?*, SLATE (Feb. 1, 2005, 6:37 PM), <http://www.slate.com/id/2112901/> [<https://perma.cc/R7YZ-6S8N>].

37. Anne Mori Kobayashi, *International and Domestic Approaches to Constitutional Protections of Individual Rights: Reconciling the Soering and Kindler Decisions*, 34 AM. CRIM. L. REV. 225, 229 n.24 (1996).

38. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 25 (1989).

39. *Id.* at 36.

40. William Schabas, *Developments in Criminal Law and Criminal Justice: Execution Delayed, Execution Denied*, 5 CRIM. L.F. 180, 184 (1994).

41. David A. Sadoff, *International Law and the Mortal Precipice: A Legal Policy Critique of the Death Row Phenomenon*, 17 TUL. J. INT'L & COMPAR. L. 77, 79 (2008).

out period of time between pronouncement of the death sentence and execution, when appeals and circumstances are reviewed. During this time, the prisoner suffers from . . . growing stress, anguish, and mental and moral torment.”<sup>42</sup>

Even though the death penalty involves the lawful extinction of human life, certain legal prohibitions which accord rights to offenders are in place to curb any excesses that might occur. When capital punishment goes beyond the deprivation of life, it inflicts excessive suffering on the offender, making it a cruel and unjust sanction. In essence, “[p]unishments are cruel when they involve torture or a lingering death . . . . It implies there is something inhuman and barbarous, something more than the mere extinguishment of life.”<sup>43</sup> The personal circumstances of the prisoner, the conditions of detention prior to execution, and the length of detention have all been accepted as factors that bring the punishment within the proscription of torture and the cruel, inhuman, or degrading treatment or punishment clause.<sup>44</sup>

The death row phenomenon has received judicial acceptance among key international and domestic courts each using comparative and international law in their determinations. This acceptance, however, is not universal, and some scholars have imputed this lack of uniformity to lack of an established definition.<sup>45</sup>

### *1. Disparities in Definition*

David A. Sadoff contends that the “diversity of judicial opinion” arises from a number of factors, which include the lack of a widely accepted definition, confusion with other “death row-related concepts or experiences,” such as the death row syndrome, and its application against a “broad range of legal standards.”<sup>46</sup> Arguably, a universal definition of a concept connotes general acceptance, but the distinct opinions reached by different courts need for a uniformed definition. Rather, courts have disputed whether on the legitimacy of a death row phenomenon claim is not traceable to the delay is unconstitutional or a violation of prisoners’ rights; what constitutes

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42. HANS GORAN FRANCK, *THE BARBARIC PUNISHMENT: ABOLISHING THE DEATH PENALTY* 38 (William A. Schabas ed., 2003).

43. *In re Kemmler*, 136 U.S. 436, 447 (1890).

44. *Iorgov v. Bulgaria*, 62 Eur. Ct. H.R. 14–15 (2004); *see also* *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 34 (1989).

45. *See* Sadoff, *supra* note 41, at 79 (noting that the application of the death row phenomenon has been “far from uniform.”).

46. *Id.*



delay; and to whom the delay is attributable.<sup>47</sup> In addition to the delay dispute, these courts have addressed allegations of mental anguish arising from being confined under dehumanizing conditions.<sup>48</sup> There has been little contention about the legitimacy of the death row phenomenon on this basis, especially since it relates to a human experience.<sup>49</sup>

Smith and Sadoff have distinguished the death row phenomenon from the death row syndrome. According to Sadoff, the phenomenon relates to the circumstances on death row, which include the length of incarceration, isolation of detention, and uncertainty as to the time of execution, which is equivalent to a form of “psychological maltreatment.”<sup>50</sup> On the other hand, the death row syndrome pertains to the mental effects arising from prolonged death row detention, such as incapacitated judgement, mental illness, or suicidal tendencies.<sup>51</sup> Smith further restricts the phenomenon to the “experience of confinement under harsh conditions” while relating the syndrome to the “resulting psychological harms of . . . extended periods of time spent on death row . . . [and the] stresses of living under sentence of death.”<sup>52</sup> Generally, both authors define the phenomenon as the “physical experience” of being on death row and the syndrome as the mental anguish resulting from being on death row for a prolonged period.<sup>53</sup> It is not clear what may have necessitated this distinction since both terms have both been used interchangeably and defined as a singular term since their inception.<sup>54</sup>

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47. See Hudson, *supra* note 5, at 835–36 (“A further complication with defining the death row phenomenon as delay alone comes from defining the appropriate period of delay.”).

48. See *Soering*, 161 Eur. Ct. H.R. (ser. A) at 36 (“[T]he consequence is that the 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.”).

49. See *id.* at 38 (discussing length of detention prior to execution and the direct correlation to mental anguish).

50. Sadoff, *supra* note 41, at 84–85.

51. *Id.* at 85.

52. Smith, *supra* note 20, at 242.

53. Smith states that “[u]nlike the word ‘phenomenon,’ the word ‘syndrome’ connotes a clinically definable set of recognizable signs or symptoms.” *Id.* at 243

54. Wells, *supra* note 36. The author states that the death row syndrome has also been known as the death row phenomenon and is a “vaguely defined term that refers to the dehumanizing effects of living for a prolonged period on death row.” *Id.* The death row syndrome is referred to as a term “sometimes called death row phenomenon” and defined as the psychological effects of living under a death sentence. *Ross Case Highlights “Death Row Syndrome,”* NAT’L COAL. TO ABOLISH THE DEATH PENALTY (Feb. 1, 2005), <http://www.democracyinaction.org/dia/organizations/ncadplnews.jsp?key=1198&t> [<https://>

Sadoff further distinguishes the two concepts: the death row phenomenon arises only in extradition cases and does not need “demonstrable proof of mental suffering,” unlike the death row syndrome, which arises when mental competency claims are raised.<sup>55</sup> Undoubtedly, a death row phenomenon claim arises when an extradition is under consideration and where a petition for the vacation of a death sentence is pending. But there have been instances where the court considered the current and prospective effect of a lengthy incarceration on death row on a prisoner and on a suspect who is about to be extradited to face capital charges.<sup>56</sup> For instance, the ECtHR in *Soering v. United Kingdom* described the death row phenomenon as constituting both physical and mental suffering amounting to torture, inhuman or degrading punishment contrary to Article 3 of the European Convention on Human Rights (ECHR).<sup>57</sup>

### B. “A Combination of Circumstances”

The death row phenomenon was defined by the ECtHR as a “combination of circumstances” which exposes a prisoner to conditions that violate the inherent dignity of a person deprived of liberty.<sup>58</sup> Notably, certain authors have restricted these circumstances to two factors.<sup>59</sup> It is important to note that these factors do not undermine the accuracy of these definitions or present any contradictions. Rather, it shows that continuous adjudication of the phenomenon defines how each definition has been framed. Sadoff for instance, refers to “two key circumstances”: namely, the harsh, dehumanizing conditions of confinement and the prolonged period of detention endured on death row.<sup>60</sup> However, he does not exclude the mental suffering experienced in his definition. Rather, he describes it as a consequence of being incarcerated for a protracted period under the growing anxiety caused by the uncertainty of the execution.<sup>61</sup>

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perma.cc/ZQ8L-B3XJ?type=image]; see also Saby Ghoshray, *Tracing the Moral Contours of the Evolving Standards of Decency: The Supreme Court’s Capital Jurisprudence Post-Roper*, 45 J. CATH. LEGAL STUD. 561, 611–12 (2006) (pointing out that the two terms are used synonymously).

55. Sadoff, *supra* note 41, at 85.

56. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 33 (1989).

57. *Id.*

58. *Id.* at 25.

59. These factors are the prolonged incarceration and the conditions of confinement. The third aspect, the psychological torture experienced, is discussed as part of the poor living conditions. See SIMEON C.R. MCINTOSH, *FUNDAMENTAL RIGHTS AND DEMOCRATIC GOVERNANCE: ESSAYS IN CARIBBEAN JURISPRUDENCE* 263 (2005).

60. Sadoff, *supra* note 41, at 82.

61. *Id.*

Sadoff backs this categorization by making reference to certain factors considered by the ECtHR in determining whether conditions of confinement are contrary to Article 3 of the ECHR.<sup>62</sup> The Court would normally consider the adverse psychological effects of the punishment, the institutionalized nature of the punishment, and the mental anguish suffered by the prisoner in anticipation of the punishment.<sup>63</sup> While Smith acknowledges that most definitions include two components—a temporal requirement which describes the length of time on death row and a physical requirement which constitutes the harsh living conditions—she also recognizes a third, separate component: “the psychological effects of living under sentence of death.”<sup>64</sup> Both authors agree that neither of these factors alone is sufficient to constitute the death row phenomenon.<sup>65</sup> Long delays alone may not necessarily be detrimental to prisoners if none of their rights are violated while they are detained.<sup>66</sup> Neither can harsh conditions alone constitute the phenomenon since there are machineries available to alleviate any form of abusive treatment prisoners are likely to encounter.<sup>67</sup> Like Smith, I have chosen to categorize and discuss three aspects of the phenomenon, which I briefly explore below.

### C. *The Issue of Delay*

Delay is the foremost subject in the discourse of the death row phenomenon. It is the protracted delay that exposes the prisoner to the other two factors. In the past, executions swiftly followed the sentence, as condemned persons were executed within hours or days.<sup>68</sup> Executions that occurred weeks after the sentence were deemed inappropriate; the suffering incurred by the condemned lay only in the method used during the execution.<sup>69</sup> It was not until the mid-twentieth century that inmates on death row began experiencing delays of years after the death sentence had been imposed.<sup>70</sup>

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62. *Id.* at 86–87.

63. Michael P. Connolly, *Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 101, 120 (1997); *see also* *Tyrer v. United Kingdom*, 26 *Eur. Ct. H.R.* (ser. A) at 11 (1978).

64. Smith, *supra* note 20, at 239–40.

65. Hudson, *supra* note 5, at 836.

66. *Id.*

67. *Id.* at 837.

68. *Id.* at 834.

69. *Id.* at 853.

70. *Id.* at 834–35.

The paradox, however, is that most delays are precipitated by repetitive procedural filings on the behalf of prisoners who are exercising their constitutional rights to appeal in the hope of a commutation or vindication in cases of alleged innocence.<sup>71</sup>

This has led some legal scholars and judges to question the efficacy of the argument of prolonged incarceration on death row either as a human rights issue or a justiciable matter.<sup>72</sup> Moreover, in most cases, delay means victory both for the prisoner whose life is spared once again and the defense lawyer who gains another opportunity to present his legal arguments and express his disfavor of capital punishment. The principal concern, however, is the severe and debilitating effects of being confined on death row for a prolonged period of years or decades.<sup>73</sup> Another contradiction lies in the reality that in capital cases where due process is duly followed, delay is inevitable. According to David Pannick, “[a] legalistic society will be unable to impose the death penalty without an unconstitutionally cruel delay, and hence it will be unable lawfully to impose the death penalty at all.”<sup>74</sup> In a real case scenario, trials could take months; appeals, years, and this could happen without a deliberate act of the State to inflict suffering on the inmate. Judges die, new laws are imposed, public records get misplaced, and lawyers get dismissed, for example. However, Pannick adds that “[i]t must, at the very least, be accepted by a society committed to due process of law and the rule of law that a death sentence becomes unconstitutionally cruel unless carried out within a reasonable time after it has been awarded, and without the incidental infringement of any of the other rights . . . guaranteed by due process.”<sup>75</sup> Hudson postulates three reasons for the predominance of the substantial delay in executing death row inmates, and these three theories on delay are analyzed below.<sup>76</sup>

### *1. Delay Attributable to the State*

The first cause of delay discussed is not attributable to the prisoner. As support for the death penalty wanes, state officials are more discreet in permitting executions and instead grant stays and moratoria to review death penalty processes.<sup>77</sup> There are recent cases where prisoners have petitioned international courts stating that the delay was due to the

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71. See Connolly, *supra* note 63, at 111.

72. See *id.* at 121.

73. *Id.*

74. PANNICK, *supra* note 16, at 84.

75. *Id.*

76. Hudson, *supra* note 5, at 834–35.

77. *Id.* at 835.

indecision of the State to reach a timely decision on the death penalty.<sup>78</sup> There are also instances where legislation can demand that death sentences are examined on appeal without the consent of the prisoner.<sup>79</sup> For instance, Article 101 of the Third Geneva Convention imposes a moratorium of six months between imposition of the death sentence and the execution of prisoners of war.<sup>80</sup> Delay is also attributable to executive action in the form of consideration of pardon, amnesty, or commutation.<sup>81</sup> Delay can be caused when third parties, such as relatives of the inmate, initiate judicial challenges in the name of the condemned person without their consent.<sup>82</sup> Finally, and significantly, delay can be attributed to the sheer neglect of the State to advance proceedings.<sup>83</sup> This is significant because in such instances prisoners expect a reprieve or commutation of their sentence since they cannot be faulted for the lengthy incarceration.

## 2. Delay Resulting from Legitimate Appeals

Secondly, these delays are a consequence of the inmate availing himself of all remedies in the form of appeals against conviction or for consideration of reprieve. Limitations placed on the death penalty, especially those that protect the offenders' rights once a death sentence is given, can also aggravate delays.<sup>84</sup> Prisoners can launch successive petitions to domestic courts; petitions to appellate courts; judicial review; and constitutional litigation.<sup>85</sup> Where these are unsuccessful, requests for pardon and commutation are subsequently made.<sup>86</sup> Appeals can also be brought before international human rights bodies, such as the United Nations Human

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78. See, e.g., *Iorgov v. Bulgaria*, 62 Eur. Ct. H.R. 12 (2004).

79. ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 308 (5th ed. 2015).

80. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; SCHABAS, *supra* note 18, at 217.

81. See Joseph B. Schimmel, Comment, *Commutation of the Death Sentence: Florida Steps Back from Justice and Mercy*, 20 FLA. ST. U. L. REV. 253, 253 (1992).

82. See Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners*, 16 B.U. PUB. INT. L.J. 195, 251 (2007).

83. See Angela April Sun, "Killing Time" in the Valley of the Shadow of Death: *Why Systematic Preexecution Delays on Death Row Are Cruel and Unusual*, 113 COLUM. L. REV. 1585, 1591 (2013).

84. Hudson, *supra* note 5, at 835.

85. See Russell L. Christopher, *The Irrelevance of Prisoner Fault for Excessively Delayed Executions*, 72 WASH. & LEE L. REV. 3, 7 (2015).

86. SCHABAS, *supra* note 18, at 371.

Rights Committee and the Inter-American Commission on Human Rights, as well as regional courts such as the Privy Council and the ECtHR.<sup>87</sup> In other words, delay may not be deliberate but provide an opportunity for inmates to maximize due process avenues which prevent the arbitrary taking of human life.

This scenario, therefore, presents another paradox. The exploitation of the procedures provided by the State to limit the use of the death penalty become responsible for an inmate's suffering. This exploitation of appellate remedies is the main reason courts have rejected the death row phenomenon as a substantive ground, while others have refused to find a violation based on delay alone.<sup>88</sup> On the other hand, it is accepted that one's natural instinct for survival will inevitably lead that person to exploit to the fullest every opportunity to remain alive. Still, exploiting these efforts to survive can lead to the sequential suffering of the inmate, and this should not be ignored or dismissed simply as "the price of due process."

### 3. Delay Attributable to the Prisoner

Last but not the least, prisoners can encourage delay by filing frivolous appeals just to remain alive. There have been instances where inmates deliberately stall their appeals and even request that their attorneys challenge their death sentence in several courts just to delay the process.<sup>89</sup> In one such instance, the United States Ninth Circuit Court of Appeals responded by saying that it would "be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place."<sup>90</sup> If this were the case, many inmates would delay their executions by delaying their proceedings. Another argument is that a prisoner will cling to life at any cost, for "while there's life, there's hope."<sup>91</sup> The determination of what constitutes an appropriate delay continues to be a bone of contention. It was only in *Pratt and Morgan v. Attorney General of Jamaica*<sup>92</sup> that the Judicial Committee of the Privy Council set a threshold for delay, determining that a death

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87. Hudson, *supra* note 5, at 835.

88. *See id.* at 275, 371–72.

89. *See, e.g.,* Richmond v. Lewis, 948 F.2d 1473, 1492 (9th Cir. 1990); *see also* Richmond v. Ricketts, 640 F. Supp. 767, 803 (D. Ariz. 1986) (noting that the delay in the execution was due to several petitions Richmond requested his lawyers to make to different courts).

90. Lewis, 948 F.2d at 1492.

91. Jud. Comm. of the Privy Council, *Comments on Cases*, 44 J. CRIM. L. 89, 89 (1980) (quoting Abbott v. A-G [1979] 1 WLR 1342 (PC) (appeal taken from Trin. & Tobago).

92. Pratt v. A-G [1994] 2 AC 1 (PC) (appeal taken from Jam.).

sentence should be commuted to life imprisonment if it exceeds the five-year threshold.<sup>93</sup> The Privy Council reached this decision because they found fourteen years on death row “disturbing.”<sup>94</sup>

### III. THE JUDICIAL RECOGNITION OF THE DEATH ROW PHENOMENON: THE *SOERING* CASE

The death row phenomenon was first identified and given momentum by the decisions of the now defunct European Commission of Human Rights and the ECtHR in *Soering v. United Kingdom*,<sup>95</sup> both using the ECHR as the source of law.<sup>96</sup> The decisions reached by these courts have significantly shaped the jurisprudence of the phenomenon by “providing a seed of legitimacy for the doctrine in tribunals around the world.”<sup>97</sup> The explicit acceptance given by these institutions has also become a landmark for other international, regional, and domestic courts.

Jens Soering and his girlfriend Elizabeth Haysom fled to England after being charged with the murder of Elizabeth’s parents.<sup>98</sup> After indictment in Virginia, the United States sought its extradition under the 1972 Extradition Treaty.<sup>99</sup> Haysom pleaded guilty and was given two life sentences for being an accessory to murder.<sup>100</sup> Upon receipt of the extradition request by the U.S. Government, a warrant was obtained for Soering’s arrest under the Extradition Act of 1870.<sup>101</sup> During his committal proceedings, Soering produced evidence that he was suffering from an abnormality of the mind, a psychiatric syndrome referred to as “*folie à deux*.”<sup>102</sup> Under Virginia law, Soering’s diminished mental capacity was not a defense to

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93. *Id.* at 30.

94. *Id.* at 2.

95. *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439, 464 (1989).

96. *See id.* at 476.

97. *See Hudson, supra* note 5, at 838.

98. *Soering*, 11 Eur. H.R. Rep. at 443.

99. Richard B. Lillich, *The Soering Case*, 85 AM. J. INT’L L. 128, 129 (1991).

100. *Id.* Haysom was granted parole in November 2019 and ordered to be deported after her release. Jeff Williamson, *Jens Soering, Elizabeth Haysom Granted Parole, Set to Be Deported*, WSLs 10 NEWS (Nov. 25, 2019, 5:43 PM), <https://www.wsls.com/news/local/2019/11/25/jens-soering-elizabeth-haysom-granted-parole-set-to-be-deported/> [<https://perma.cc/VX4W-YY79>].

101. *Soering*, 11 Eur. H.R. Rep. at 444.

102. “A madness shared by two” is a rare syndrome in which psychotic symptoms are transmitted from one person to another in a close relationship. *Id.* at 446.

murder but would be a mitigating factor for the jury to consider at sentencing.<sup>103</sup> Soering argued that he should not be extradited without receiving assurances that he would not be sentenced to death.<sup>104</sup> An assurance was received from the United States under Article 4 of the U.S.-U.K. Extradition Treaty, requesting that Soering should be exempt from the death penalty.<sup>105</sup> Soering submitted that the assurance received “was so worthless,” and he petitioned the Secretary of State, requesting him not to order his extradition.<sup>106</sup> His request was rejected and an order for his surrender to the United States was signed.<sup>107</sup> After exhausting all remedies in the United Kingdom, Soering petitioned the European Commission arguing that the decision to extradite him without receiving assurances from the United States was contrary to article 3.<sup>108</sup> After addressing the issues raised by the applicant, including a request to be extradited to Germany, the Commission concluded that Soering’s extradition to the United States would not constitute treatment contrary to Article 3 of the ECHR.<sup>109</sup>

#### *A. Before the European Court of Human Rights*

The Commission referred the case to the ECtHR,<sup>110</sup> which confirmed that extraditing Soering to another state where he would be in danger of being subjected to torture would not be compatible with the underlying values of the ECHR.<sup>111</sup> In considering whether the death row phenomenon would constitute a breach of Article 3, the Court took a different stance from the Commission, which had imputed delays to the prisoner’s appeal.<sup>112</sup>

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103. *Id.* at 455.

104. *Id.* at 444.

105. *Id.* at 445, 451; *see* Extradition Treaty Between the United States and the United Kingdom of Great Britain and Northern Ireland, U.K.-U.S., art. 7, Mar. 31, 2003, T.I.A.S. No. 07-426 (replacing the 1972 Treaty and Article 4 therein).

106. *Soering*, 11 Eur. H.R. Rep. at 447.

107. *Id.* at 448.

108. *See id.* at 486.

109. *Id.* at 499.

110. Both judicial bodies, the ECtHR and the Commission, were established by Article 19 of the ECHR. *See* EUR. CT. OF HUM. RTS., *supra* note 17, at 15. The Commission had an intermediary role and was set up to limit frivolous filings. *See also* EUR. CT. OF HUM. RTS., PRACTICAL GUIDE ON ADMISSIBILITY CRITERIA 62 (2021) (noting that the Commission was originally meant to determine if the European Court of Human Rights has jurisdiction). By 1999, Protocol 11 of the ECHR abolished the Commission, allowing individuals to file cases directly to the Court. *See id.* at 62–63 (noting that Protocol 11 allowed the Court to have jurisdiction without the Commission as an intermediary).

111. *Soering*, 11 Eur. H.R. Rep. at 467–68.

112. *See id.* at 478.



Although the Court acknowledged that the primary cause of the delay was the prisoner's use of collateral attacks in the form of habeas proceedings to federal and state courts, it gave a pioneering opinion that "just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full."<sup>113</sup>

Though these safeguards are made available by the State to avoid any arbitrary imposition of the death penalty, the State cannot exempt itself from the accompanying delay.<sup>114</sup> The Court added "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."<sup>115</sup> Regarding the living conditions in Mecklenburg Correctional Center, the Court scrutinized its procedures for death row inmates.<sup>116</sup> Inmates faced the risk of homosexual abuse and physical assault from other prisoners; they moved around with handcuffs and were confined with shackles.<sup>117</sup> Visiting rights were restricted, and their correspondence was censored.<sup>118</sup> They were subjected to periodic lockdowns and were isolated in the death house fifteen days before their execution date.<sup>119</sup> The Court pointed out that the severity of this isolation would be compounded by the fact that the inmate was subjected to these conditions for a protracted period.<sup>120</sup> In an addendum, the court held:

[H]aving regard to the very long period of time spent on death row in such extreme conditions, with the ever-present and mounting anguish of awaiting execution . . . and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.<sup>121</sup>

In summary, the ECtHR found that extraditing Soering to the United States would give rise to a breach of Article 3.<sup>122</sup> Following his extradition in 1990,

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113. *Id.* at 475.

114. *See id.* at 475–76.

115. *Id.*

116. *See id.* at 459–61.

117. *Id.* at 459–60.

118. *Id.* at 460.

119. *Id.*

120. *See id.* at 478.

121. *Id.*

122. *Id.*

he was convicted of two counts of first-degree murder and sentenced to serve two life sentences.<sup>123</sup> Soering was granted parole in November 2019 after serving years in prison.<sup>124</sup> While the *Soering* decision has been commended by commentators for effectively safeguarding individual constitutional guarantees and protecting human rights, it has been criticized by some because the Court reached its decision based on the specific facts of the case, making its impact somewhat uncertain.<sup>125</sup> Some critics feared that the decision in *Soering* would result in Europe becoming a “safe haven” for those fleeing the death penalty in their country.<sup>126</sup> Others have argued that the decision is proof that the death penalty is no longer an acceptable and justifiable decision under human rights law.<sup>127</sup>

#### IV. *SOERING*'S IMPACT ON OTHER COURTS

*Soering* has become notable in breaking grounds in international human rights jurisprudence and in generating academic commentary on the subject. The meaning and scope of Article 3 has extended to rendering the death penalty a potential violation of the ECHR when read in conjunction with Article 2.<sup>128</sup> While its impact is axiomatic, there have been substantial disagreements among international, regional, and national courts over whether a significant delay amounts to a breach of law.<sup>129</sup> Others acknowledge the sufferings endured by prisoners but will only find a violation where all three aspects of the phenomenon are present in each case.<sup>130</sup> Some have

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123. David Reed, *Soering Found Guilty in Grisly Murders of Girlfriend's Parents*, WASH. POST (June 22, 1990), <https://www.washingtonpost.com/archive/local/1990/06/22/soering-found-guilty-in-grisly-murders-of-girlfriends-parents/ada83dbe-2dd7-4b06-82bd-4f05c99211f7/> [https://perma.cc/Z3JB-ZVAZ].

124. Tania Snuggs, *Jens Soering: German Diplomat's Son Arrives Home from US After 33 Years in Jail for Double Murder*, SKY NEWS (Dec. 17, 2019), <https://news.sky.com/story/jens-soering-german-diplomats-son-arrives-home-from-us-after-33-years-in-jail-for-double-murder-11889270> [perma.cc/Y7ZN-9FK5].

125. Michael P. Shea, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering*, 17 YALE J. INT'L L. 85, 110 (1992); Bernard Robertson, *Extradition, Inhuman Treatment and the Death Penalty*, 154 JUST. PEACE 231, 232 (1990).

126. Shea, *supra* note 125, at 86; Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909, 929 (2005).

127. Burleson, *supra* note 126.

128. *See id.* at 933.

129. JAVAID REHMAN, INTERNATIONAL HUMAN RIGHTS LAW: A PRACTICAL APPROACH 73 (2003).

130. *See Cox v. Canada*, CCPR/C/52/D/539/1993, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 539/1993, ¶¶ 17.1–17.3, 18 (U.N. Hum. Rts. Comm. Dec. 9, 1994).

used the *Soering* decision as a standard and will only find a violation where the petitioner's circumstances are indistinguishable.<sup>131</sup>

#### A. *United Nations Human Rights Committee*

The Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) gives individuals the right to petition the United Nations Human Rights Committee (UNHRC) regarding alleged infractions.<sup>132</sup> Claims alleging delay can be brought under Article 7 ICCPR, the equivalent of Article 3 of the ECHR, as well as Article 10.<sup>133</sup> The UNHCR became notorious for rejecting pleas by applicants based on delay alone and claims that do not fit the exact circumstances in *Soering*, such as the applicant's age, mental state, and the prison conditions.<sup>134</sup> However, it accepted that other circumstances connected with detention on death row could violate Article 7.<sup>135</sup> The UNHRC's stance on the death row phenomenon has been blamed for the inconsistency in interpreting and applying identical human rights norms.<sup>136</sup>

In *Pratt and Morgan v. Jamaica*, the UNHRC did not accept that delay alone was a violation of the ICCPR.<sup>137</sup> It found:

131. See *Kindler v. Canada*, CCPR/C/48/D/470/1991, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 470/1991, ¶¶ 15.3, 16 (U.N. Hum. Rts. Comm. Nov. 11, 1993).

132. G.A. Res. 2200A (XXI), Optional Protocol to the International Covenant on Civil and Political Rights, at 1 (Dec. 16, 1966).

133. See *id.* at 3–4.

134. See *Pratt v. Jamaica*, CCPR/C/35/D/225/1987, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication Nos. 210/1986 & 225/1987, ¶ 13.6 (U.N. Hum. Rts. Comm. Apr. 6, 1989); *Barrett v. Jamaica*, CCPR/C/44/D/271/1988, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 271/1988, ¶ 8.4 (U.N. Hum Rts. Comm. June 4, 1992).

135. See *Cox v. Canada*, CCPR/C/52/D/539/1993, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 539/1993, ¶ 17.2 (U.N. Hum. Rts. Comm. Dec. 9, 1994); *Kindler v. Canada*, CCPR/C/48/D/470/1991, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 470/1991, ¶ 15.3 (U.N. Hum. Rts. Comm. Nov. 11, 1993); *Williams v. Jamaica*, CCPR/C/61/D/609/1995, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 609/1995, ¶¶ 6.3–6.5 (U.N. Hum. Rts. Comm. Nov. 4, 1997).

136. See REHMAN, *supra* note 129, at 72.

137. *Pratt v. Jamaica*, CCPR/C/35/D/225/1987, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication Nos. 210/1986 & 225/1987, ¶ 13.6 (U.N. Hum. Rts. Comm. Apr. 6, 1989).

In principle[,] prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners. However, the situation could be otherwise in cases involving capital punishment[,] and an assessment of the circumstances of each case would be necessary.<sup>138</sup>

Instead, the Committee found a violation of Article 7 in the manner in which the prisoners were notified of their stay of execution.<sup>139</sup> The prisoners had been granted a stay a day before the execution but were only notified by prison officials forty-five minutes before the execution, causing them intense anguish.<sup>140</sup> In *Barrett and Sutcliffe v. Jamaica*, the applicants alleged that they had suffered prolonged and extreme anguish after thirteen years on death row under extremely harsh conditions, with several death warrants issued contrary to Article 7 of the ICCPR.<sup>141</sup> The Committee reiterated its stance that prolonged judicial proceedings, even where they are a source of mental strain, do not violate Article 7.<sup>142</sup> Notably, one of the Committee members, Ms. Chanet, in an oft-quoted dissent, pointed out that “[w]ithout being at all cynical . . . the author cannot be expected to hurry up in making appeals so that he can be executed more rapidly.”<sup>143</sup>

The Committee took a slightly different perspective in *Kindler v. Canada*.<sup>144</sup> It acknowledged the death row phenomenon, but as noted earlier, it considered it inapplicable to the facts of the case, which were similar to those of *Soering*—the applicant made no submissions about the prison conditions in Pennsylvania or the effects of a prolonged delay.<sup>145</sup> The Committee concluded that the applicant’s ECHR rights were not breached, and there was no violation of Article 7.<sup>146</sup> A year later, in *Cox v. Canada*,<sup>147</sup> the Committee did not find a violation of Article 7 for three reasons. First, it found the prison conditions in Pennsylvania acceptable.<sup>148</sup> Second, Cox had not yet been convicted, and it was likely that he would

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138. *Id.*

139. *Id.* ¶ 13.7.

140. *Id.*

141. *Barrett v. Jamaica*, CCPR/C/44/D/271/1988, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 271/1988, ¶ 3.5 (U.N. Hum Rts. Comm. June 4, 1992).

142. *Id.* ¶ 8.4.

143. *Id.* app. at 11.

144. *Kindler v. Canada*, CCPR/C/48/D/470/1991, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 470/1991 (U.N. Hum. Rts. Comm. Nov. 11, 1993).

145. *Id.* ¶ 15.3.

146. *Id.* ¶¶ 16, 18.

147. *Cox v. Canada*, CCPR/C/52/D/539/1993, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 539/1993 (U.N. Hum. Rts. Comm. Dec. 9, 1994).

148. *Id.* ¶ 17.1.

receive a life sentence like his accomplices, and finally, with appeals made available within a reasonable time, there would be no unreasonable delays anticipated by the applicant.<sup>149</sup>

Significantly, in *Francis v. Jamaica*, the Committee delivered a different opinion from its ruling in *Barrett and Sutcliffe v. Jamaica*. In this case, the Committee finally accepted the death row phenomenon as a cruel, inhuman or degrading punishment.<sup>150</sup> The Committee reiterated its well established jurisprudence of not accepting delay alone as the ground to determine a violation; rather, it would consider each case on its own merits, examining the extent to which any delay was imputable to the state, the conditions of imprisonment, and the psychological impact on the person involved.<sup>151</sup> Despite repeated requests from Francis, the Jamaican Court of Appeal failed to issue a written judgment for over thirteen years, thus preventing further appeals.<sup>152</sup> The Committee acknowledged the deplorable conditions of confinement which eventually led to his mental deterioration, finding that such delay could only be attributed to the state party.<sup>153</sup> Finally, and significantly, the Committee accepted that the circumstances the inmate endured revealed a violation of Articles 7 and 10 of the ICCPR.<sup>154</sup> In *Johnson v. Jamaica*, the Committee described the death row phenomenon as one of the unfortunate consequences of the death penalty but maintained that “[l]ife on death row, harsh as it may be, is preferable to death.”<sup>155</sup>

### *B. Inter-American Court of Human Rights*

The Inter-American Court of Human Rights (IACHR) is an autonomous judicial institution which enforces and interprets the American Convention

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149. *Id.* ¶ 17.2.

150. *See* *Francis v. Jamaica*, CCPR/C/45/D/382/1989, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 606/1994, ¶ 9.2 (U.N. Hum. Rts. Comm. Aug. 3, 1995).

151. *Id.* ¶ 9.1.

152. *Id.* ¶ 9.2.

153. *Id.*

154. *Id.*

155. *Johnson v. Jamaica*, CCPR/C/56/D/588/1994, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 588/1994, ¶ 8.4 (U.N. Hum Rts. Comm. Aug. 5, 1996).

on Human Rights.<sup>156</sup> The Court has considered claims that prolonged detention on death row in poor conditions amounts to a breach of Article 5(2) of the American Declaration of Human Rights.<sup>157</sup> Initially, the Court only found violations of Article 5 on poor prison conditions, not on delay.<sup>158</sup> However, in *Fermin Ramírez v. Guatemala*, the Court found a violation of Article 5 both on delay and prison conditions.<sup>159</sup> Ramírez had been on death row for seven years under a harsh custodial regime.<sup>160</sup> These conditions had caused Ramírez mental suffering for which he received no medical treatment.<sup>161</sup> The Court held that the delay and mental suffering he endured while awaiting his execution constituted the death row phenomenon.<sup>162</sup> The Court further held that the State had violated the right to humane treatment enshrined in Articles 5(1) and 5(2).<sup>163</sup>

### C. The European Court of Human Rights

Since the decision in *Soering*, there has been a steady trend towards abolition of capital punishment among Member States of the Council of Europe. Protocol No. 13 to the ECHR, which concerns the abolition of the death penalty in all circumstances, has been signed by forty-five of the forty-seven Member States and ratified by forty-two, making it the “most progressive pronouncement to date on the legal status of capital punishment under the European Convention.”<sup>164</sup> The Court’s position on the death penalty is clear: the right under Article 1 of Protocol 13 to not be subjected to the death penalty is non-derogable, applies in all circumstances, and is equivalent to the fundamental rights protected under Articles 2 and 3—both rights enshrine one of the basic values of the democratic societies comprising the Council of Europe.<sup>165</sup>

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156. *Inter-American Human Rights System*, INT’L JUST. RSCH. CTR., [https://ijrcenter.org/regional/inter-american-system/#Inter-American\\_Court\\_of\\_Human\\_Rights](https://ijrcenter.org/regional/inter-american-system/#Inter-American_Court_of_Human_Rights) [<https://perma.cc/QQ6X-CGM6>].

157. See *Fermin Ramírez v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 126, ¶ 112 (June 20, 2005).

158. See *Raxcacó-Reyes v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 133, ¶ 102 (Sept. 15, 2005).

159. *Fermin Ramírez v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 126, ¶¶ 118–19 (June 20, 2005).

160. *Id.* ¶ 54.

161. *Id.*

162. *Id.* ¶¶ 112(d), 125(e).

163. *Id.* ¶ 138(5).

164. Christine Bourloyannis-Vrailas, *Introductory Note to the European Court of Human Rights: Al-Saadoon & Mufdhi v. United Kingdom*, 49 INT’L LEGAL MATERIALS 762, 762 (2010).

165. *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at 37 (1995).

In *Çinar v. Turkey*, a plaintiff who was released on parole in 1991 after spending seven years on death row, following a commutation of death sentences in Turkey, claimed that his experience on death row violated Article 3 of the ECHR.<sup>166</sup> The Commission found that the minimum severity of treatment for a breach of Article 3 was relative.<sup>167</sup> It would find an Article 3 violation depending on the nature of the punishment; the method of execution; the duration of the delay; and the conditions of confinement with an impending execution, in addition to factors such as the sex, age, and mental state of the prisoner.<sup>168</sup> Unlike *Soering*, the plaintiff's fear of prolonged detention under continuous threats of death was not anticipatory but illusory since executions had ceased in Turkey; thus, the Commission could not reach a similar decision.<sup>169</sup>

In *Iorgov v. Bulgaria*, the Court found conditions of an applicant's confinement to be in breach of Article 3. One such condition, in particular, was the applicant's detention pending a moratorium on executions.<sup>170</sup> The applicant was subjected to eight years of uncertainty on death row following a moratorium introduced by Parliament, which meant executions were deferred.<sup>171</sup> Eventually, the punishment was abolished in 1998, and all death sentences were commuted to life imprisonment.<sup>172</sup> The Court held that being subjected to such a stringent custodial regime was inhuman and degrading treatment exceeding the "unavoidable level inherent in detention" and reaching the minimum threshold of severity under Article 3.<sup>173</sup>

In *Öcalan v. Turkey*, the Court held that handing down a death sentence following a trial which failed to meet "the most rigorous standards of fairness . . . both at first instance and on appeal" would breach both Articles 2 and 3.<sup>174</sup> The Court found a violation of Article 3 with regard to imposition of the death penalty following an unfair trial.<sup>175</sup> The Court also found that Mr. Ocalan's condition of detention at some point had violated the prohibition on inhuman and degrading treatment contained in

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166. *Cinar v. Turkey*, App. No. 17864/91, 79 Eur. Comm'n H.R. Dec & Rep. 5, 7–8 (1994).

167. *Id.* at 8.

168. *See id.* at 8–9.

169. *Id.* at 9–10.

170. *See Iorgov v. Bulgaria*, 62 Eur. Ct. H.R. 1 (2004).

171. *Id.* at 15.

172. *Id.* at 3.

173. *Id.* at 17.

174. *Öcalan v. Turkey*, 2005-IV Eur. Ct. H.R. 131, 187.

175. *Id.* at 189.

Article 3, with particular regard to the level of isolation he was subjected to.<sup>176</sup>

The case *R (Al-Saadoon and Mufdhi) v. The United Kingdom*<sup>177</sup> can be likened to *Soering* with regard to extradition to a territory where the applicant could be tortured and sentenced to death, a direct violation of Article 3 of the ECHR.<sup>178</sup> This case raised other issues concerning the United Kingdom's compliance with international human rights obligations and the status and effect of interim measures issued by the ECtHR.<sup>179</sup> This case involved two applicants, Iraqi nationals, who were accused of involvement in the ambush and murder of two British soldiers after the invasion of Iraq in March 2003.<sup>180</sup> The dispositive issue was whether the detainees were within the jurisdiction of the United Kingdom for the purposes of Article 1 of the ECHR, which would determine whether the detainees could assert a right under the ECHR to not be refouled to a jurisdiction where they would face a real risk of capital punishment.<sup>181</sup> The Court found that the applicants had been subjected to mental suffering resulting from the fear of execution, amounting to inhuman treatment within the meaning of Article 3.<sup>182</sup> This suffering resulted from the actions and inaction of the United Kingdom authorities.<sup>183</sup> The court emphasized the need for the United Kingdom government to alleviate this suffering by obtaining an assurance from the Iraqi authorities that the applicants would not be subjected to the death penalty—an assurance which the Iraqi authorities were yet to provide.<sup>184</sup> The significance of this case is not limited to the core question of the legality of capital punishment but extends to the application of the non-refoulement principle.<sup>185</sup> The Court reiterated that the use of the death penalty negates fundamental human rights recognized by Member States of the Council of Europe.<sup>186</sup> The Court held unanimously that there had been a violation of Article 3 of the ECHR.<sup>187</sup>

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176. *Öcalan v. Turkey* (No. 2), App. Nos. 24069/03, 197/04, 6201/06, 10464/07, ¶ 146 (Eur. Ct. H.R. Mar. 18, 2014).

177. *Al-Saadoon v. United Kingdom*, 2010-II Eur. Ct. H.R. 61.

178. *See id.* at 127.

179. *See id.* at 140.

180. *Id.* at 83.

181. For a discussion on whether or not the U.K. had jurisdiction to detain the applicants, see *R v. Secretary of State* [2007] UKHL 26 (appeal taken from Eng.).

182. *Al-Saadoon v. United Kingdom*, 2010-II Eur. Ct. H.R. 61, 141.

183. *Id.* at 141.

184. *Id.* at 141–42.

185. *See id.* at 90, 99, 131.

186. *Id.* at 122.

187. *Id.* at 143.



*D. Judicial Committee of the Privy Council*

The Judicial Committee of the Privy Council (Privy Council) acts as the final court of appeal for the territories of the Commonwealth Caribbean with the exception of Guyana.<sup>188</sup> In *Riley v. Attorney General of Jamaica*, the Privy Council considered whether execution after a prolonged delay contravened Article 17 of the Jamaican Constitution.<sup>189</sup> In a dissenting opinion, Lords Scarman and Brightman contended that the “treatment” to be considered is not the death penalty in isolation but the “execution of the sentence of death as the culmination of a prolonged period of respite.”<sup>190</sup> They argued that execution after such a long lapse amounted to inhuman treatment as long as the prisoner was not responsible for the delay.<sup>191</sup> This dissent undoubtedly paved way for the Privy Council’s decision 10 years later in *Pratt and Morgan v. Attorney General for Jamaica*.<sup>192</sup> The appellants, after spending almost fourteen years on death row and having lived through last minute stays of execution on three occasions, alleged that executing them would be cruel and inhuman.<sup>193</sup> Also, part of the relevant period was taken up by a temporary moratorium on execution. The Privy Council’s ruling has contributed immensely to the international and judicial acceptance of the phenomenon:

There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.<sup>194</sup>

The Privy Council went further to set a threshold for excessive delay to guide future decisions.<sup>195</sup> After examining the length of trials and appeals,

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188. See, e.g., JUD. COMM. OF THE PRIVY COUNCIL, <https://www.jcpc.uk/> [<https://perma.cc/7VDM-5GUF>].

189. *Riley v. A-G* [1983] 1 AC 719 (PC) (appeal taken from Jam.). Section 17(1) of the Jamaican Constitution is identical to Article 3 of the ECHR. See *Pratt v. A-G* [1994] 2 AC 1 (PC) (appeal taken from Jam.).

190. *Riley v. A-G* [1983] 1 AC 719 (PC) (appeal taken from Jam.) (Lord Scarman, joined by Lord Brightman, dissenting).

191. *Id.*

192. *Pratt v. A-G* [1994] 2 AC 1 (PC) (appeal taken from Jam.).

193. *Id.* at 1, 13.

194. *Id.* at 16.

195. Louis Blom-Cooper & Christopher Gelber, *The Privy Council and the Death Penalty in the Caribbean: A Study in Constitutional Change*, 4 EUR. HUM. RTS. L. REV. 386, 400 (1998).

it argued that execution after five years on death row would be unconstitutional.<sup>196</sup> This decision led to the commutation of over 200 death sentences in the Caribbean and had “a profound impact upon the standards and procedures for applying the death penalty in the region, including the role of international human rights instruments and supervisory bodies.”<sup>197</sup>

## V. CONCLUSION

The *Universal Declaration of Human Rights*, which recognized the “inherent dignity” and the “equal and inalienable rights of all members of the human family,” pioneered a significant development in international law.<sup>198</sup> Since then, the protection and preservation of individual rights has become one of the most prominent themes in international law. This inception of human rights law was significant because it challenged the positivist doctrines of state sovereignty and the right to non-interference in domestic affairs as provided for in Article 2(7) of the UN Charter.<sup>199</sup> These rights allowed individuals to seek redress in the event of violations, and States were required to respect and protect these rights *vis-à-vis* the reciprocal rights of sovereign states. It is on this foundation that individuals on death row can present petitions of violations while awaiting the enforcement of their punishment. The decision reached in *Soering* has become notable for breaking ground in international human rights jurisprudence and generating academic commentary on the subject. Through this decision,<sup>200</sup> the death row phenomenon has entered the mainstream of human rights vocabulary. Richard B. Lillich believes that defining the contours of the phenomenon has contributed to the “internationalization of human rights law,” where national courts look to international norms and decisions for persuasive guidance, and international and regional courts take national court decisions into account.<sup>201</sup>

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196. Pratt v. A-G [1994] 2 AC 23 (PC) (appeal taken from Jam.).

197. Brian D. Tittmore, *The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections*, 13 WM. & MARY BILL RTS. J. 445, 465 (2004).

198. G.A. Res. 217 (III) A, *supra* note 17, at 71.

199. U.N. Charter art. 2, ¶ 7. Article 2(7) prevents any intervention in matters within the domestic jurisdiction of states. *Id.*

200. The decision in *Soering* has had a profound effect on extradition laws and decisions of the ECtHR. See *Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A) (1991) and *Vilvarajah v. United Kingdom*, 215 Eur. Ct. H.R. (ser. A) (1991) for examples of extradition cases alleging that extradition would be in breach of Article 3 of the ECHR.

201. Richard B. Lillich, *Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon As a Case Study*, 40 ST. LOUIS U. L.J. 699, 702 (1996).

As has been noted, the death row phenomenon has become recognized as a breach of international human rights law through international and domestic court decisions, treaties, conventions, general principles of law, and customary norms. Courts have referred to international decisions and treaties not as binding law but rather a persuasive source of guidance in the interpretation and application of their own constitutions. With regard to customary norms, the question is whether the status of *jus cogens* can be ascribed to the death row phenomenon since it contravenes an accepted customary norm: the prohibition of cruel, inhuman or degrading punishment.<sup>202</sup> Even as the abolitionist trend steadily increases, abolition of the death penalty has yet to be recognized as a peremptory norm of *jus cogens*, although this is still foreseeable.<sup>203</sup> To demonstrate the existence of a customary norm, there has to be a widespread, consistent state practice and an acceptance by these states that such a norm is a binding legal rule.<sup>204</sup> There are certain international law norms that may have acquired the status of *jus cogens*, such as the right to life and the prohibition of execution of prisoners of war.<sup>205</sup> Unequivocally, the prohibition of cruel and inhuman punishments is an accepted customary norm rooted in general principles of law, as apparent by its overt inclusion in various constitutions. It is also unquestionable that this norm largely limits the scope of the death penalty.

One interpretation of this clause is that it prohibits excessive and disproportionate punishments, which, by judicial and academic recognition, the death row phenomenon falls under. However, the likelihood of asserting that the death row phenomenon can be qualified as a customary norm is contentious. The divergent approaches to the death row phenomenon, especially on the issue of delay, pose a serious threat to its global acceptance and recognition. The lack of consistency in the decisions of international bodies, arising from different standards set by these courts in determining what constitutes delay, poses a serious threat to the advancement of this doctrine. These conflicting interpretations and diverse decisions have left

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202. See Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

203. SCHABAS, *supra* note 18, at 3; see HOOD, *supra* note 79, at 9–14.

204. See William A. Schabas, *International Law and the Death Penalty: Reflecting or Promoting Change?*, in CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION 36, 37–43 (Peter Hodgkinson & William A. Schabas eds., 2004).

205. See W. Paul Gormley, *The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus Cogens*, in THE RIGHT TO LIFE IN INTERNATIONAL LAW 120, 128–29 (B.G. Ramcharan ed., 1985).

international litigants in a state of uncertainty.<sup>206</sup> Anticipating a customary norm at this stage may indeed seem ambitious, but as society matures and standards evolve, the cruelty of delay will become more apparent, and more attention will be focused on the intensity of suffering incurred by the prisoner, as well as the length of delay. The death row phenomenon has no doubt revealed another aspect of the cruelty of capital punishment, thus emphasizing the fact that the taking of human life by anyone under any condition or circumstance should be prevented, including by the State. In August 2009, Kenyan President Mwai Kibaki commuted the death sentences of over 4,000 prisoners on death row, making this the largest commutation in history.<sup>207</sup> According to President Kibaki, the reason for the commutation was that “extended stay on death row causes undue mental anguish and suffering, psychological trauma, [and] anxiety, while it may as well constitute inhuman treatment.”<sup>208</sup> Indeed, courts that have accepted delay as a breach of law have all acknowledged that it constitutes inhuman and degrading treatment or punishment.

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206. William A. Schabas, *Soering's Legacy: The Human Rights Committee and the Judicial Committee of the Privy Council Take a Walk Down Death Row*, 43 INT'L & COMPAR. L.Q. 913, 913 (1994).

207. *4000 Kenyans on Death Row Get Life*, AMNESTY INT'L (Aug. 5, 2009, 12:00 AM), <https://www.amnesty.org/en/latest/news/2009/08/vida-4000-kenianos-condenados-muerte-20090805/> [<https://perma.cc/59Q3-A4Z3>].

208. *Id.*