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**“Death Row Phenomenon. A Fate Worse Than
Death.”**

Torture on death row from a psychological and legal
perspective.

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ABSTRACT

The conditions on death row globally are characterised by an emphasis on high security, isolation and a limitation of resources. Under these deplorable conditions death row inmates are deteriorating mentally and physically. Internationally, the notion “death row phenomenon” had emerged in an attempt to conceptualise a claim that confining death row inmates in such conditions is unlawful and constitutes torture or inhuman treatment. Twenty-seven years since the doctrine first entered the international realm, there is still no agreement on what constitutes the phenomenon. This absence of clear-cut lines leaves ambiguous of when death row detention becomes unlawful. This paper seeks to answer whether it is possible to detain inmates on death row without triggering the death row phenomenon. After examining various psychological studies on the effects of death row confinement and current divergent approaches to finding detention unlawful, the thesis concludes that the psychological anguish from awaiting execution is inherent in death row, and therefore it is impossible to confine inmates on death row without breaching the norm prohibiting torture or inhuman treatment.

CAT Convention	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ECHR	European Convention on Human Rights
ECommHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
HRC	United Nations Human Rights Committee
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
Privy Council	Judicial Committee of the Privy Council of the United Kingdom
SRT	United Nations Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment

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1. INTRODUCTION

Currently, over half of the world's population live in countries where capital punishment takes place.¹ Capital punishment, or the death penalty, is when a government executes a person as a punishment for a capital offense. These offences vary greatly around the world. Some countries restrict capital punishment only to multiple murders, in others engaging in pre-marital sex or changing one's religion can result in the death penalty.² At present, the death penalty is used actively in 58 countries, with China, Iran, Saudi Arabia, Iraq and the United States ("US"), accounting for over 90% of world's executions.³

In countries retaining death penalty, the delay prior to an execution is often measured in years, often decades. Capital offenders are confined on death row - a cell or block of cells physically and socially isolated not only from the outside world but from the prison community as well.⁴ The conditions on death row are characterised by emphasis on high security, isolation and limitation of resources, with solitary confinement being the most common condition of death row globally.⁵ While awaiting their executions under these deplorable conditions, inmates are deteriorating mentally and physically.⁶ Death row has been categorised as a prison within a

¹ Roger Hood and Surya Deva, *Confronting Capital Punishment in Asia: Human Rights, Politics, and*

² Religious Tolerance, *World & U.S. Death Penalty Maps: Countries abandoning the death penalty* (2012) <<http://www.religioustolerance.org/executh.htm>> at 5 May 2016.

³ Amnesty International, *Death Penalty* (2015) <<https://www.amnesty.org/en/what-we-do/deathpenalty/>> at 19 May 2016.

⁴ William Schabas, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts* (Northeastern University Press, Boston, 1996); Reena Mary George, *Prisoner Voices from Death Row: Indian Experiences* (Routledge, New York, 2016).

⁵ Jacqueline Macalesher, "Death row phenomenon and the circumstances under which it could amount to torture or other cruel, inhuman or degrading treatment or punishment" (Speech delivered at the Harvard Law School, Wasserstein Hall 4059, 25-26 June 2012) 3.

⁶ Caycie Bradford, "Waiting to die, Dying to live" (2011) 5 *Interdisciplinary Journal of Human Rights Law* 77.

prison.⁷ Inmates themselves have described it as a “living hell”, a “graveyard behind high walls far from the eye of the public”.⁸

Internationally, conditions and treatment of prisoners on death row developed to be recognised as a breach of human right not to be tortured.⁹ The notion “death row phenomenon” had emerged in an attempt to conceptualise this claim.¹⁰ The death row phenomenon refers to the prolonged detention under harsh conditions of death row with constant anguish of awaiting execution.¹¹ The concept was first introduced in 1989 by the European Court of Human Rights (“ECtHR”) in the *Soering v United Kingdom*¹² case, and thus initiated its development and establishment internationally.¹³ Twenty-seven years since the landmark decision, legal scholars, psychologists and judges largely debate the issue of the death row phenomenon. While majority is unanimous about the existence of the doctrine, there is still no consensus on its precise contours.¹⁴ This absence of clear-cut lines on what constitutes the phenomenon leaves ambiguous of when death row detention becomes unlawful and whether it is possible to detain inmates on death row without triggering the phenomenon.

The purpose of this thesis is two-fold. Firstly, it aims to understand the psychological and physical effects that different aspects of death row have on inmates; and, secondly, to analyse whether it is possible to detain the inmates on death row without

⁷ Patrick Hudson, “Does the Death Row Phenomenon Violate a Prisoner’s Human Rights under International Law?” (2000) 11(4) *European Journal of International Law* 833, 835.

⁸ Bradford, above n 6.

⁹ *Soering v United Kingdom* 161 (1989) Eur Court HR (ser A); *Earl Pratt and Ivan Morgan v Jamaica*, Communication No. 210/1986 and 225/1987, UN Doc Supp. No. 40 (A/44/40) at 222 (1989); *Albert Wilson v Philippines*, Communication No 868/1999, UN Doc CCPR/C/79/D/868/1999 (2003).

¹⁰ Nina Kren, “The Death Row Phenomenon: Examining the Concept from a Human Rights Point of View” (Seminar paper, University of Vienna, 2014).

¹¹ *Soering v United Kingdom* 161 (1989) Eur Court HR (ser A) (“*Soering*”).

¹² *Ibid.*

¹³ Kren, above n 10, 8.

¹⁴ Kealeboga N. Bojosi, “The death row phenomenon and the prohibition against torture and cruel, inhuman or degrading treatment” (2004) 4 *African Human Rights Law Journal* 303, 305.

triggering these severe mental and physical reactions, which may amount to torture in the form of the death row phenomenon.

The question that it seeks to answer is: “*When does detention on death row violate the prohibition of torture and ill-treatment and how it could be avoided?*” The hypothesis is that a society, which respects fundamental human rights, will be unable to impose the death penalty without subjecting prisoners to torture or inhuman treatment on death row, and, therefore, the death penalty should not and cannot be imposed.

The thesis is not concerned with the legality of the death penalty *per se* (as it is still lawful and not *ipso facto* contrary to international law), but rather, it is limited to whether the *post-sentence process*, experienced by the inmates awaiting execution amounts to torture and inhuman treatment, which in turn may question the legality of the death penalty.

This study employed a qualitative interdisciplinary approach: on one hand, examining various psychological studies conducted in relation to the potential effects of death row incarceration; and on the other hand, employing doctrinal comparative research on the relevant legal standards and case law in different jurisdictions, with focus on evaluating the adequacy of the existing rules. Further, in order to clarify accumulated qualitative findings in relation to death row confinement, in particular explain areas of difficulty and predict future developments, three death row inmates, currently held in one of the US death penalty States, were asked to participate and provide written answers to an open-ended questionnaire. The name of the State is purposefully withheld in order to protect the identity of the participants, as they did not consent to the use of their names. The questionnaire was chosen over in-person interviews due to time restraints. Taking into account limited number of participants, the open-ended approach of the questionnaire was offered to capture a greater level

of detail that would generally be left out in the closed-ended questionnaire.¹⁵ This approach allowed for participants to freely express their views. Two out of three inmates agreed to participate in the study and provided written answers to the questionnaire. Lastly, the study is also supplemented by the quantitative research of statistics on the death penalty.

The thesis begins by defining the death row phenomenon and examining the role of each of its three elements: prolonged waiting on death row, harsh conditions, in particular solitary confinement, and the psychological trauma endured by death row inmates. All three elements and their potential effect on death row prisoners are investigated. Various psychological and social studies are examined for this purpose.

Next, the thesis considers when the death row detention becomes unlawful. The chapter begins by providing the universally accepted definition of torture. Then, jurisprudence of the ECtHR, the United Nations Committee on Human Rights (“HRC”) and the Judicial Committee of the Privy Council of the United Kingdom (“Privy Council”) are reviewed, critiquing the current approaches to finding the death row phenomenon. It is not suggested that these are the only courts that have thus far dealt with the issue, however, the decisions reflect the current divergent views on the death row phenomenon.¹⁶ The relevant views of the United Nations Special Rapporteur on Torture (“SRT”), as well as the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in relation to the death row phenomenon are also discussed.

Finally, the issue of how torture and inhuman treatment can be avoided in detention on death row is analysed. The chapter gives hypothetical consideration whether

¹⁵ A closed-ended question is a question format that limits respondents with a list of answer choices from which they must choose to answer the question. The questions can generally be answered by a simple “yes” or “no”, while open-ended questions are those which require more thought and more than a simple one-word answer (Your Dictionary, *Open-Ended and Closed-Ended Questions* <<http://examples.yourdictionary.com/examples-of-open-ended-and-closed-ended-questions.html>> at 27 June 2016).

¹⁶ Bojosi, above n 14.

changing conditions on death row or reducing time inmates spend on death row can potentially avoid the death row phenomenon and thus render death row detention lawful within international law. In an attempt to assess whether improving conditions of death row can potentially improve the psychological state of the inmates, the views of two death row prisoners currently held on the US's death row are examined. These death row inmates were able to get a settlement as a result of the legal case challenging the conditions of their confinement and a subsequent transfer to a better facility.

The thesis concludes that the psychological anguish from awaiting execution is inherent in death row. This anguish is itself sufficient to amount to torture or inhuman treatment and, therefore, render death row confinement unlawful, which in turn questions the legality of the death penalty itself. However, currently limited and dated medical research on death row inmates provides conflicting results and further research is essential in order to support the conclusion. To date, the legal concept of the death row phenomenon is much more advanced in the legal field, than that of psychology or psychiatry. In order to adequately protect the fundamental rights of individuals, the legal term of the death row phenomenon must be advanced into theory that meets the criteria of stringent scientific support.¹⁷ It is important to wholly understand the actual psychological experiences of those about whom law speculates.¹⁸

¹⁷ Amy Smith, "Not 'Waiving' but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution" (2008) 17 *Public Interest Law Journal* 237, 239.

¹⁸ *Ibid.*

2. DEATH ROW PHENOMENON AND ITS EFFECTS

Before opening the debate on the legality of the death row phenomenon, it is important to understand what is generally meant by this concept.¹⁹ This chapter provides definition of the death row phenomenon which reflects the predominant opinion currently held amongst scholars.²⁰ While there is no consensus on the precise contours of the phenomenon, the dominating view is that presence of the three components suffices in finding of the phenomenon: *prolonged detention* under *harsh conditions* of death row and the resulting *emotional trauma*.²¹ The chapter also examines medical studies in relation to the psychological and physical effects of each component of the death row phenomenon.

2.1. Definition of the death row phenomenon

There is no agreement between scholars on the definition of the death row phenomenon. Academic discussions of the term generally identify at least two components: the length of time spent on death row and the severity of conditions that prisoners are typically exposed to.²² Patrick Hudson, for example, defines the concept as “prolonged delay under the harsh conditions of death row”.²³

Additionally, many scholars have included a third component - the psychological effects that result from living on death row - as another essential element of the phenomenon.²⁴ Many authors, like Amy Smith and David Sadoff, give this element its own stand-alone meaning and term it “death row syndrome”.²⁵ Sadoff emphasises the important difference between the death row phenomenon and the death row

¹⁹ Kren, above n 10.

²⁰ Ibid.

²¹ David A. Sadoff, “International Law and the Mortal Precipice: A Legal Policy Critique of the Death Row Phenomenon” (2008) 17 *Tulane Journal of International and Comparative Law* 77, 82.

²² Human Rights Advocates, *Death Row Phenomenon Violates Human Rights* (2012) 12 <<http://www.humanrightsadvocates.org/wp-content/uploads/2010/05/Death-Row-Phenomenon-2012.pdf>> at 16 April 2016.

²³ Hudson, above n 7, 836.

²⁴ Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford University Press, United Kingdom, 3rd ed, 2015) 203.

²⁵ Smith, above n 17.

syndrome. He states that “the phenomenon relates to the circumstances on death row, while the syndrome refers strictly to the mental effects themselves that derive from prolonged death row detention”.²⁶ As such, the death row syndrome refers to the enduring psychological effects of the death row phenomenon, which in turn merely triggers the syndrome.²⁷

The first appearance of the *concept* of the death row syndrome is linked by scholars to a 1986 article by Dr. Stuart Grassian, in which he described the drastic psychological reactions of inmates held in solitary confinement as a clinically distinguishable psychiatric syndrome.²⁸ However, the *term* “death row syndrome” as such did not appear in the article, and the prisoners in his study were not on death row. Nevertheless, the connection to death row inmates is obvious as majority of them are held in similar solitary confinement conditions as described in Grassian’s study.

In fact, it was the *term* “death row phenomenon” that was first introduced to the international realm by the ECtHR in *Soering*²⁹ case in 1989. In subsequent scholarly discussions of the case, many authors, like David Stewart and James Lenihant, began using the terms “death row phenomenon” and “death row syndrome” interchangeably,³⁰ perhaps linking the phenomenon to the psychiatric syndrome resulting from solitary confinement, portrayed by Grassian in his study.

²⁶ Sadoff, above n 21.

²⁷ Ibid.

²⁸ Stuart Grassian and Nancy Friedman, “Effects of Sensory deprivation in Psychiatric Seclusion and Solitary Confinement” (1986) 8 *International Journal of Law and Psychiatry* 49; Stuart Grassian, “Psychopathological Effects of Solitary Confinement” (1983) 140 *Journal of the American Academy of Psychiatry* 1450; Harold Schwartz, “Death Row Syndrome and Demoralization: Psychiatric Means to Social Policy Ends” (2005) 33 *Journal of the American Academy of Psychiatry and the Law* 153.

²⁹ 161 (1989) Eur Court HR (ser A).

³⁰ David Stewart, “The Torture Convention and The Reception of International Criminal Law within the United States” (1991) 15 *Nova law Review* 449, 462; Richard Bilber, “The year of international law in review” (1991) 85 *American Society International Law Proceedings* 562; James M. Lenihant, “Soering’s case: waiting for Godot - Cruel and Unusual Punishment?” (1992) 4 *Pace Yearbook of International Law* 157.

This attempt to shift the terminology from the “phenomenon” to “syndrome” has been described by Harold Schwartz as “an effort to change social policy, namely abolition of the death penalty, through the use of a psychiatric disorder”.³¹ The use of the term “syndrome” weighs heavier and “implies a medical diagnosis with a set of recognisable signs or symptoms”, whereas the word “phenomenon” simply “implies an experience of an incident”.³²

Later, as a result of this interchangeable use of the two terms, the “death row syndrome” began appearing in some courts instead of the “death row phenomenon” in cases when mental competency of death row inmates was raised, particularly in relation to the “volunteering” for executions.³³ This, in a way, had marked the use of the two terms in distinct legal contexts: while the phenomenon can arise under an extradition scenario, the syndrome is relevant when mental competency claims are raised.³⁴ Though, unlike death row phenomenon claims, cases relating to the death row syndrome have not been successful to date. This raises doubts whether the “death row syndrome” concept should have its own stand-alone meaning at all.

Accordingly, the current analysis of the death row phenomenon has moved towards the recognition of the psychological effects as a third essential component of the phenomenon, whether or not seen as a distinct “death row syndrome” concept. Hence, this section will consider all three components potentially comprising the death row phenomenon: the harsh, *dehumanising conditions* of imprisonment; the *length of time* spent living under such conditions; and the *psychological repercussions* (i.e. death row syndrome) associated with living on death row.³⁵ Smith refers to these fundamental components as the temporal, physical and experiential.³⁶

³¹ Schwartz, above n 28.

³² Ibid.

³³ *Ross ex rel. Dunham v Lantz*, 408 F.3d 121 (Conn. 2005); *Re Ross*, 272 Conn. 674 (2005); *Ross ex rel. Smyth v Lantz*, 396 F.3d 512 (2d Cir. 2005).

³⁴ Sadoff, above n 21.

³⁵ Ibid.

³⁶ Smith, above n 17, 240.

Detailed discussion of these three elements and its effects on death row inmates follows below.

2.2. Conditions on death row and its effects

The conditions that death row prisoners are subjected to are very harsh. While such conditions may vary from one jurisdiction to another, they can be generally characterised by emphasis on high security, isolation and limitation of resources.³⁷ Examples of current conditions on death row globally include: solitary confinement for up to 24 hours a day; excessive use of handcuffs and other restraints; inadequate sanitation arrangements; poor nutrition; physical or verbal abuse; denied access to prison activities.³⁸ For example, death row inmates in China are subjected to physical abuse, food and sleep deprivation, and are kept in chains from the arrest until their execution.³⁹

2.2.1. Solitary confinement

Solitary confinement is one of the most common conditions of death row globally.⁴⁰ It refers to physical and social isolation of an individual in a single tiny, sometimes windowless cell for up to 24 hours a day, with the remaining time typically spend exercising in a barren yard or cage, at best slightly larger than the prisoner's living quarters.⁴¹ Many death row inmates will go years without access to fresh air or sunshine.⁴²

³⁷ George Lombardi, Richard Sluder and Donald Wallace, "Mainstreaming Death-Sentenced Inmates: The Missouri Experience and Its Legal Significance" (1997) 61(2) *Federal Probation* 3.

³⁸ Macalesher, above n 5.

³⁹ Amnesty International, *People's Republic of China: Executed "According to law?" – The Death Penalty in China* (2004) <www.amnesty.eu/static/documents/Report_ASA170032004.doc> at 16 April 2016.

⁴⁰ Macalesher, above n 5.

⁴¹ Sharon Shalev, Mahnneim Centre for Criminology, *A Sourcebook on Solitary Confinement* (2008) <http://solitaryconfinement.org/uploads/sourcebook_web.pdf> at 15 May 2016.

⁴² American Civil Liberties Union ("ACLU"), *A Death Before Dying: Solitary Confinement on Death Row* (2013) <<https://www.aclu.org/files/assets/deathbefore-dying-report.pdf>> at 1 April 2016.

Family visits, where allowed at all, may be held through a glass barrier or, alternatively, prisoners will be in arm and leg restraints during visits.⁴³ This prevents any physical contact between the prisoner and others and leaves death row inmates unable to ever touch or hug family members or loved ones.⁴⁴ Some countries do not allow visits at all, or like Mongolia, before its recent commitment to abolishing the death penalty,⁴⁵ death row inmates were allowed only one family member to visit them before they are executed.⁴⁶

The deprivation of human contact prevalent in solitary confinement is commonly accompanied by additional restrictions and controls applied to the inmate.⁴⁷ The exact nature of these will vary from one country to another.⁴⁸ But mostly, isolated prisoners have no access to work or employment opportunities and very limited, if any, access to educational, vocational and recreational activities, all conducted in isolation from others.⁴⁹

Different countries may use other terms to describe what is essentially a regime of solitary confinement, including: closed confinement, segregation, cellular confinement, isolation and super-maximum security.⁵⁰ Despite the different terminology, this practice of solitary confinement is prevalent in the majority of

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ In 2012, Mongolia acceded to the Second Optional Protocol of the ICCPR, aimed at abolishing the death penalty (Salil Shetty, “The Value of International Standards in the Campaign for Abolition of the Death Penalty” (2014-2015) 21 *Brown Journal of World Affairs* 41). The new Criminal Code that abolishes the death penalty will take effect from September 2016 (Amnesty International News, *Mongolia: Historic vote abolishes death penalty* (2015) <<https://www.amnesty.org/en/latest/news/2015/12/mongolia-historic-vote-abolishes-death-penalty/>> at 4 April 2016). Mongolia will be the 103rd country in the world which has completely abolished the death penalty.

⁴⁶ Manfred Nowak, *Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Civil and Political Rights, including: the questions of torture and detention*, UN Doc. E/CN.4/2006/6/Add.4 (20 December 2005) [50].

⁴⁷ ACLU, *The Dangerous Overuse of Solitary Confinement in the United States* (2014) <https://www.aclu.org/sites/default/files/assets/stop_solitary_briefing_paper_updated_august_2014.pdf> at 15 May 2016.

⁴⁸ Ibid.

⁴⁹ ACLU, above n 47.

⁵⁰ Shalev, above n 41.

retentionist countries.⁵¹ For example, in Malaysia, prisoners may spend over ten years on death row, kept in solitary confinement for approximately 23 hours per day.⁵² In Iran, prisoners are placed in solitary confinement tiny cells with a light on 24 hours a day.⁵³ In Japan, death row prisoners are also held in strict solitary confinement from the time of their sentence until their execution. In Algeria, the law requires that death sentenced prisoners are incarcerated in individual cells during their first five years in prison.⁵⁴ In the US, 93% of death-penalty States lock up their death row prisoners for 22 or more hours per day.⁵⁵

2.2.2. Reasons for automatic segregation regime

The reasons for this automatic solitary confinement in retentionist countries are somewhat obscure.⁵⁶ There is a suggestion that “the death row prisoner is already a ‘dead man’ and thus no longer belongs with the living”.⁵⁷ Another explanation is that death row prisoners have demonstrated their dangerous tendencies through the very nature of their crimes,⁵⁸ or that they have “nothing to lose” and may be capable of anything.⁵⁹ As such, death row inmates are placed in segregation units to adequately protect both, prison personnel and other inmates, for whom exposure to a desperate individual with literally “nothing to lose” may be dangerous.⁶⁰ Effectively, prisoners on death row are condemned to solitary for life, based solely on their death

⁵¹ Macalesher, above n 5. Retentionist countries are countries which retain the death penalty as means of punishment.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid. Note: The last known execution in Algeria was carried out in 1993. However, the courts continue to impose death sentences. According to Amnesty International, at least 62 death sentences were imposed in 2015.

⁵⁵ ACLU, above n 47.

⁵⁶ Schabas, above n 4.

⁵⁷ Ibid.

⁵⁸ Robert M. Ferrier, “An Atypical and Significant Hardship: the Supermax Confinement of Death Row Prisoners Based Purely on Status - a Plea for Procedural Due Process” (2004) 46 *Arizona Law Review* 291.

⁵⁹ Michael Mushlin, “Dying Twice: Incarceration on Death Row” (2003) 31 *Capital University Law Review* 852.

⁶⁰ Ferrier, above 58.

sentences, and cannot be moved to less restrictive conditions based on good conduct.⁶¹

The actual facts about death row inmates strongly suggest that they are among the best behaved in the prison system, and always have been.⁶² If anything, they have the most to lose by misbehaving and incurring disciplinary infractions. In many retentionist countries, like US, if death row inmates persist in their appeals, their in-prison behaviour is admissible in the new trial (unlike any other prisoners in the system), where it will bear directly on the question of whether they are subsequently sentenced to life or death.⁶³ Additionally, as Robert Ferrier indicates “besides murderers, there are several groups of prisoners that arguably present a greater security threat than those on death row, such as those who have committed several rapes, those with strong gang ties inside prison, and others who have been convicted of multiple violent crimes”.⁶⁴ However, almost none of these prisoners would be confined in the solitary confinement without at least some evidence of affirmative misconduct while they were in the prison.⁶⁵ Further, those sentenced to life terms also have “nothing to lose”, yet they are commonly mixed with the general inmate population.

Essentially, while solitary confinement should only be used for brief periods for reasons related to discipline, security, or crime,⁶⁶ the overwhelming majority of death-penalty countries automatically and permanently place death row inmates in solitary confinement - forced to withstand particularly severe conditions purely as a consequence of their sentence. This placement is functionally indefinite since it can

⁶¹ Elli Marcus, “Toward a standard of meaningful review: examining the actual protections afforded to prisoners in long-term solitary confinement” (2015) 163 *University of Pennsylvania Law Review* 1159.

⁶² Mushlin, above n 59.

⁶³ Ibid.

⁶⁴ Ferrier, above 58.

⁶⁵ Ibid.

⁶⁶ ACLU, above n 42.

take years, or even decades, before individuals exhaust their appeals and finally face execution.⁶⁷

2.2.3. Health effects of solitary confinement

Various studies have been conducted on the effects of solitary confinement.⁶⁸ These studies have documented serious deterioration of mental and physical health of the incarcerated inmates.

2.2.3.1. Psychological effects

Dr. Craig Haney,⁶⁹ one of the leading correctional psychologists in the US, stated that “there are few, if any, forms of imprisonment that appear to produce so much psychological trauma and in which so many symptoms of psycho-pathology are manifested”, as in solitary confinement.⁷⁰ The consequences of solitary confinement are serious and disturbing and result in deep changes in prisoners who are kept in solitary confinement for long periods of time. They are forms of psychological deterioration and dysfunctional adaptations to the segregation environment that literally change who the prisoners are.⁷¹

Sharon Shalev stated that harmful psychological effects result from three main factors inherent in all solitary confinement regimes: *social isolation*, *reduced activity* and environmental input, and *loss of control* and autonomy over almost all aspects of

⁶⁷ Marcus, above n 61.

⁶⁸ For a useful examination of existing literature, see Peter Scharff Smith, “The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature” (2006) 34 *Crime and Justice* 441.

⁶⁹ Haney spent most of last 30 years researching psychological effects of solitary confinement. He has served as an expert witness in several landmark cases addressing the constitutional rights of prisoners, including *Toussaint v McCarthy* (1983), *Madrid v Gomez* (1995), *Coleman v Gomez* (1995), *Ruiz v Johnson* (1999), and *Brown v Plata* (2011).

⁷⁰ Craig Haney, “Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement” (2003) 49 *Crime and Delinquency* 124.

⁷¹ Hernan Reyes, “The worst scars are in the mind: psychological torture” (2007) 89 (867) *International Review of the Red Cross* 591.

daily life.⁷² Each of these factors is potentially distressing.⁷³ Possible pathologies consequential from each factor are discussed below.⁷⁴

Firstly, the absence of social contact creates a feeling of unreality that affects one's entire existence in these places.⁷⁵ Haney states that "since so much of human's identity is socially constructed and maintained, the loss of such contact and the opportunity to ground one's thoughts and feelings in a social life leads to an undermining of the sense of self and a disconnection of experience from meaning".⁷⁶ This has been referred to as ontological insecurity - prisoners not sure if they actually exist and, if they do, exactly who they are.⁷⁷ Some prisoners would provoke confrontations with prison staff members (that sometimes result in brutal "cell extractions") in order to reaffirm their existence.⁷⁸ It is a way of getting a reaction from their environment, prove to themselves that they are still alive and capable of prompting a human response, however hostile.⁷⁹ Haney observed that for others, the experience of total social isolation for long periods of time leads to social withdrawal. That is, they move from being initially starved for social contact to eventually being disoriented, and even frightened by it.⁸⁰ As they become "increasingly unfamiliar and uncomfortable with social interaction, they are further alienated from others and made anxious in their presence".⁸¹ Further, Haney stated that "in extreme cases another pattern emerges: the environment of isolation is so painful and impossible to make sense of, that some prisoners create their own reality, they live in a world of fantasy instead".⁸²

⁷² Shalev, above n 41.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Mushlin, above n 59.

⁷⁶ Ibid.

⁷⁷ Elizabeth Bennion, "Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far too Unusual Punishment" (2015) 90(2) *Indiana Law Journal* 741.

⁷⁸ Ibid.

⁷⁹ Haney, above n 70.

⁸⁰ Mushlin, above n 59.

⁸¹ Ibid.

⁸² Ibid.

Secondly, the restrictions, reduced activity and the total and prolonged absence of opportunities for happiness and joy fill many prisoners with intolerable levels of frustration.⁸³ They ruminate in the course of the empty hours of uninterrupted time they are given during which they can do little else. Haney observed that this again results in many inmates to lash out physically and verbally against others.⁸⁴

Lastly, the unprecedented totality of authority and loss of control over almost all aspects of daily life, forces people to become entirely dependent upon their surroundings to organise their existence.⁸⁵ That is why prisoners subjected to segregation lose the ability to initiate and control their own behaviour, to organise their own lives: apathy, depression and despair often result.⁸⁶ Many prisoners literally give up and become inert.⁸⁷

Shalev in her influential practitioner's guide to the health effects of solitary confinement, *Sourcebook on Solitary Confinement*, detailed other widely reported psychological effects of solitary confinement, which include:⁸⁸

- Anxiety; panic attacks; fear of impending death.
- Clinical depression; emotional flatness/blunting – loss of ability to have any “feelings”; social withdrawal; lethargy.
- Anger; rage; violence against others, such as stabbings, attacks on staff, and property destruction, and collective violence.
- Cognitive disturbances; decreased ability to concentrate on mental tasks; notable memory lapses; disorientation.
- Paranoia; psychosis; schizophrenia.
- Hypersensitivity to noises and smells; hallucinations; derealisation/depersonalisation.⁸⁹

⁸³ Ibid.

⁸⁴ Haney, above n 70.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Shalev, above n 41.

2.2.3.2. Self-harm and suicide

In addition to increased psychiatric symptoms generally, auto-aggression, self-mutilation and suicide impulses and behaviours are prevalent in solitary confinement.⁹⁰ Prisoners in segregation are approximately 6.9 times as likely to commit acts of self-harm.⁹¹ According to a study carried out in Florida, 42% of prisoners on death row had seriously considered suicide and 35% actually attempted it.⁹² It is not atypical for prisoners in segregation to cut their flesh, swallow razors and other harmful objects, repeatedly smash their heads against walls, or attempt to hang themselves.⁹³ Researchers have noted that self-mutilation or cutting is often “a result of sudden frustration from situational stress with no permissible physical release; self-addressed aggression forms the only activity outlet”.⁹⁴ Another study found that self-mutilation occurs as a means to “liberate the self from unbearable tension”;⁹⁵ “the physical pain becomes a compensatory substitute for emotional pain or shame”.⁹⁶ Shalev stated that “former prisoners have testified that self-harm played another role for them when they were held in segregation - it asserted that they were still alive”.⁹⁷

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Harvard Kennedy School, Shorenstein Center on Media, Politics and Public Policy, *Solitary confinement in prisons: Key data and research findings* (2016)

<<http://journalistsresource.org/studies/government/criminal-justice/solitary-confinement-prisons-key-data-research-findings>> at 3 May 2016.

⁹² Peter Lewis, “Killing the Killers: A Post-Furman Profile of Florida’s Condemned” (1979) 25 *Crime & Delinquency* 200. Lewis spent eighteen days on Florida’s Death Row, which contained the largest population of condemned men in the US at the time, interviewing inmates and studying their prison life. Eighty-three of the eighty-six death row inmates were interviewed extensively.

⁹³ Jeffrey Metzner and Jamie Fellner, “Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics” (2010) 28 *Journal of the American Academy of Psychiatry and the Law* 104.

⁹⁴ Eric Lanes, “The Association of Administrative Segregation Placement and Other Risk Factors with the Self-Injury-Free Time of Male Prisoners” (2009) 48 *Journal of Offender Rehabilitation* 529.

⁹⁵ Shalev, above n 41.

⁹⁶ Holly Miller and G. Young, “Prison Segregation: Administrative Detention remedy or Mental Health Problem?” (1997) 7 *Criminal Behavior and Mental Health* 85, 92.

⁹⁷ Shalev, above n 41.

2.2.3.3. Physical effects

Many studies indicate that extended isolation not only causes extensive psychological damage, but can have physical consequences (beyond self-harm) on prisoners as well. Dr. Huda Akil, a neuroscientist at the University of Michigan, found that “the lack of physical interaction with the natural world, the lack of social interaction, and the lack of touch and visual stimulation associated with solitary confinement are each sufficient to dramatically change the brain”.⁹⁸ She noted that “factors like stress and depression literally shrivel areas of the brain, including the hippocampus, the region of the brain involved in memory, spatial orientation, and control of emotions”.⁹⁹ The hippocampus controls how our senses are translated to the rest of our brain, and is in charge of our relation to outside space.¹⁰⁰

Dr. Michael Zigmond, professor of neurology at University of Pittsburgh, conducted studies of mice put in isolation. He indicated that “overall there is a measurable difference consisting of simpler neurons, fewer connections between those neurons, and fewer synapses in the brain compared to mice which have not been subjected to isolation”.¹⁰¹ Ironically, in order to conduct these experiments, Zigmond had to get special permission from animal care boards, as extended isolation is carefully regulated in animal experiments as a cruel condition.¹⁰²

⁹⁸ Center for Constitutional Rights, Legal Services for Prisoners with Children, and California Prison Focus, *Shadow Report Submission to the Committee on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment: The use of prolonged solitary confinement in United States prisons, jails, and detention centers* (2014)

<http://ccrjustice.org/sites/default/files/assets/files/CCR_CAT%20Submission_SolitaryConfinement.pdf> at 5 May 2016.

⁹⁹ ACLU, above n 47.

¹⁰⁰ Ibid.

¹⁰¹ Carol Schaeffer, Solitary Watch, “Isolation Devastates the Brain: The Neuroscience of Solitary Confinement” (2016) <<http://solitarywatch.com/2016/05/11/isolation-devastates-the-brain-the-neuroscience-of-solitary-confinement/>> at 14 April 2016.

¹⁰² Ibid.

Further, other researches have demonstrated that prisoners subjected to isolation suffer many of the same physiological symptoms caused by physical torture,¹⁰³ including: heart palpitations,¹⁰⁴ diaphoresis (sudden excessive sweating); insomnia and nightmares;¹⁰⁵ lethargy; tremulousness (shaking); headaches; dizziness;¹⁰⁶ aggravation of pre-existing medical problems; lower levels of brain function, including a decline in electroencephalogram (EEG) activity.¹⁰⁷

Moreover, scientists note that many diseases exacerbated by loneliness and isolation, including Alzheimer's, obesity, diabetes, high blood pressure, heart disease, neurodegenerative diseases, and even cancer - tumours can metastasise faster in lonely people.¹⁰⁸

2.3. Psychological effects of impending execution

Whilst the living conditions of segregation themselves are often severe enough to trigger adverse effects on the prisoner's health and mental stability, the imposition of the death penalty entails yet another set of highly stressful factors.¹⁰⁹ Not only are the inmates confined for years in solitary confinement, their lives are also filled with constant anxiety about their execution. Death row prisoners spend years with a very real possibility hanging over them, every single day that they will be killed.¹¹⁰ The uncertainty of the exact date of one's execution and alternating feelings of hope and despair, lead to severe traumatisation.¹¹¹ Moreover and even worse, death row inmates are sometimes told that they will be executed on a specific day, but are then granted a temporary stay or simply given another date at the last minute.¹¹² Living in

¹⁰³ ACLU, above n 47.

¹⁰⁴ Shalev, above n 41.

¹⁰⁵ Haney, above n 70.

¹⁰⁶ Ibid.

¹⁰⁷ Paul Gendreau, N.L. Freedman and G.J.S. Wilde, "Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement" (1972) 79 *Journal of Abnormal Psychology* 57.

¹⁰⁸ Judith Shulevitz, "The Lethality of Loneliness" (2013) *The New Republic*

<<https://newrepublic.com/article/113176/science-loneliness-how-isolation-can-kill-you>> at 1 May 2016.

¹⁰⁹ Kren, above n 10.

¹¹⁰ Mushlin, above n 59.

¹¹¹ Bojosi, above n 14, 309.

¹¹² Kren, above n 10, 6.

“constant indefiniteness, coupled with raising false hopes or being provided with wrong information, further aggravates the inmates’ state of mind and thus constitute additional factors for individuals on death row”.¹¹³

To date, there is only a small number of psychological research conducted on the experience of death row inmates, which partially suggests the absence of pathologies in prisoners,¹¹⁴ such as studies conducted by Harvey Bluestone and Carl McGahee,¹¹⁵ or James Panton.¹¹⁶

For instance, James Panton compared the MMPI profiles of death row inmates with a general prison population.¹¹⁷ MMPI is the Minnesota Multiphasic Personality Inventory. It is the most widely used and researched standardised psychometric test of adult personality and psychopathology.¹¹⁸ Panton discovered that “death row inmates showed increased feelings of depression and hopelessness, however severe disturbances, such as psychosis, were not observed”.¹¹⁹ Smith and Felix conducted unstructured psychiatric interviews of thirty-four death row inmates.¹²⁰ Most of them exhibited well-intact defences regarding their alleged guilt.¹²¹ Only seven inmates evidenced a depressed mood that might have required further counselling intervention.¹²² Further, Harvey Bluestone and Carl McGahee interviewed nineteen inmates (eighteen men and one woman) awaiting execution at Sing Sing prison in

¹¹³ Kate McMahon, “Dead Man Waiting: Death Row Delays, The Eighth Amendment, and What Courts and Legislature Can Do” (2006) *Bepress Legal Repository* <<http://law.bepress.com/cgi/viewcontent.cgi?article=6508&context=expresso>> at 7 June 2016.

¹¹⁴ Julius Debro, K. Murty, J. Roebuck and C. McCann, “Death Row Inmates: A Comparison of Georgia and Florida Profiles” (1987) 12 *Criminal Justice Review* 41.

¹¹⁵ Harvey Bluestone and Carl McGahee, “Reaction to extreme stress: Impending death by execution” (1962) 119 *American Journal of Psychiatry* 393.

¹¹⁶ G.W. Dahlstrom, J.H. Panton, K.P. Bain, and L.E. Dahlstrom, “Utility of the Megargee-Bohn MMPI typological assessments: Study with a sample of death row inmates” (1986) 13 *Criminal Justice and Behavior* 5.

¹¹⁷ James Panton, “Personality characteristics of death row prison inmates” (1976) 32 *Journal of Clinical Psychology* 306.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ C.E. Smith and R.R. Felix, “Beyond deterrence: A study of defenses on death row” (1986) 50 *Federal Probation* 55.

¹²¹ *Ibid.*

¹²² *Ibid.*

New York.¹²³ “Expecting to find intense anxiety and depression, they found none”.¹²⁴ They have suggested, “that death row inmates have particularly well-developed defence mechanisms, but this hypothesis has been based solely on subjective clinical impressions”.¹²⁵ Roebuck and McCann interviewed twenty-five death row inmates and found that “all slept well and felt relatively good about themselves”.¹²⁶ None requested or received tranquilisers.¹²⁷ Finally, in a rare study conducted by Dahlstrom, Panton, and Bain of death row inmates who had their sentences commuted to life imprisonment, twenty-three inmates (46%) showed no change in personality functioning as measured by the MMPI, eighteen (36%) showed an improvement while only nine (18%) deteriorated.¹²⁸

Conversely, Robert Johnson and Lloyd Vogelmann found severe deteriorations in prisoners on death row. Johnson, a professor of criminology at the American University,¹²⁹ conducted interviews with thirty-five men under sentence of death in Alabama. He found that the fear of execution gives rise to intense preoccupation for prisoners.¹³⁰ It is a major concern of many death row inmates, a source of worry, anxiety, even dread of the unknown. The future is necessarily uncertain and men feel vulnerable and afraid. Some death row prisoners commented that they are scared twenty-four hours a day, because they do not know what is going to happen.¹³¹ Others had recurring nightmares in which the ritual of execution is played out to its lethal conclusion.¹³² For some of the condemned men, this concern is constant, and not a day passes that they do not think about the death sentence.¹³³ Researchers note that persons expressing manifestations of fear believe they are unable to defend

¹²³ Bluestone, above n 115.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Debro, above n 114.

¹²⁷ Ibid.

¹²⁸ Dahlstrom, above n 116.

¹²⁹ While attaining his M.A. and Ph. D. in criminal justice, Robert Johnson also acquires B.A. in Psychology.

¹³⁰ Robert Johnson, “Under Sentence of Death: The Psychology of Death Row Confinement” (1979) 5 *Law and Psychology Review* 141.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

themselves against danger, or to ignore perceived threats of danger. Danger is often seen as widespread and diffuse, beyond the ability of any person to constructively cope or respond. A sense of vulnerability is experienced as a continuing and dominant characteristic.¹³⁴

During Johnson's research, he termed life on death row as a "living death", the phrase that was used by many inmates to capture the essential and cumulative experience of the condemned prisoner.¹³⁵ Living death conveys the "zombie-like, mechanical existence of an isolated physical organism that emerges when men are systematically denied their humanity".¹³⁶ The image, spontaneously and forcefully rendered by the prisoners themselves, serves as a dramatic summary statement of the death row experience, encompassing its central psychological features of powerlessness, fear, and emotional emptiness.¹³⁷

Another psychological dimension described by Johnson, particular to the death row inmates, is "emotional death". Emotional death or emotional emptiness is felt when one believes he is beyond the reach and support of family and friends and has been abandoned or forgotten by them and the free community in general. It is a reaction to confinement in a setting in which human needs are discounted.¹³⁸ The person expressing manifestations of emotional emptiness feels "loneliness, a deadening of feelings for self and others, and a decline in mental and physical awareness".¹³⁹ A sense of apathy, passivity, and degrade is experienced as a continuing and dominant feature.¹⁴⁰ This is further aggravated by deterioration of the death row prisoner's relationships with family and friends because of the prospect of permanent

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

separation, and a sense of the pointlessness of pursuing relationships. The limited visits are often a cause of terrible anguish.¹⁴¹

Johnson observed that strong emotions consume prisoners. They are chronically angry. Prisoners speak of slowing down mentally, feeling confused, forgetful, listless, and drowsy. Material objects get lost from one moment to the next, even within the limited confines of the cell.¹⁴² The pressures bearing down on the prisoners make them feel alternately comfortable and depressed without reason, as though problems emerged from nowhere to disrupt their existence.¹⁴³ Feelings of anxiety emerge from waiting, thus filling life with uncertainty.¹⁴⁴ Condemned prisoners must nurture both “a desire to live and an acceptance of imminent death”.¹⁴⁵ This task is an extremely difficult one.¹⁴⁶

These psychological dimensions, identified by Johnson, echoed in other case study. Lloyd Vogelman, a clinical psychologist, conducted interviews with eight men who had been incarcerated on death row in South Africa for more than a year, before they had their sentences overturned - some of whom had been only hours from execution.¹⁴⁷ Similarly to Johnson, Vogelman characterised death row incarceration by fear, anxiety and helplessness.¹⁴⁸ The men expressed a fear of death, stating that “there is intense anxiety about the unknown”.¹⁴⁹

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Tierenney M. Garrison, *Death on the brain: the psychological effects of the death penalty based on the views of those condemned to die* (Master of Criminal Justice Thesis, Tennessee State University, 2008).

¹⁴⁵ Johnson, above n 130.

¹⁴⁶ Ibid.

¹⁴⁷ Lloyd Vogelman, “The Living Dead: Living on Death Row” (1989) 5 *South African Journal on Human Rights* 183; Lloyd Vogelman, Sharon Lewis and Lauren Segal, “Life After Death Row: Post traumatic stress and the story of Philip Takedi” (2004) 24(2) *South African Journal of Psychology* 91.

¹⁴⁸ Diana Peel, “Clutching at Life, Waiting to Die: The Experience of Death Row Incarceration”

(2013) 14(3) *Western Criminology Review* 61.

¹⁴⁹ Ibid.

Further, various studies of persons with terminal illness provide supplementary information of the experience of those living under sentence of death.¹⁵⁰ These studies explore the role of uncertainty in otherwise certain death, especially in light of medical developments, and bears strong connection to the experiences of those currently awaiting execution.¹⁵¹ For instance, research examining the experience of persons with cancer has documented multiple physical, psychological, and behavioural deteriorations.¹⁵² Work with HIV/AIDS patients provided similar findings.¹⁵³ These psychological reactions of terminally ill hospital patients have been found to be similar to those of death row inmates.¹⁵⁴

Therefore, to date the various studies on psychological repercussions for death row inmates about imminent death have produced conflicting results. Drawing firm conclusions from these limited studies is impossible. The research is dated and the samples were small and done over relatively short intervals, making it impossible to generalise from the results.¹⁵⁵ Therefore, whether the pains of impending death always translate into severe psychological harm is impossible to establish without further research. The reason behind this limited studies is that majority of the contemporary research on the psychological effects of death row directed at the effects of solitary confinement, severe repercussions of which are very well documented. As such the psychological effects unique to death row prisoners are limited by insufficient research conducted in the area.

2.4. Prolonged detention and its effects

Prolonged detention refers to the extreme time delays between sentencing and the actual execution. Whilst in the nineteenth century, executions were usually carried

¹⁵⁰ Smith, above n 17.

¹⁵¹ Ibid.

¹⁵² Hayley Pessin, Barry Rosenfeld and William Breitbart, "Assessing Psychological Distress near the End of Life" (2002) 46 *American Behavioral Scientist* 357.

¹⁵³ Angelo Alonzo and Nancy Reynolds, "Stigma, HIV and AIDS: An Exploration and Elaboration of a Stigma Trajectory" (1995) 41 *Social Science and Medicine Journal* 303.

¹⁵⁴ Bojosi, above n 14.

¹⁵⁵ Barbara A. Ward, "Competency for execution: Problems in Law and Psychiatry" (1986) 14 *Florida State University Law Review* 35.

out within hours or days after the person had been sentenced to death, this interval has been increasing steadily and on a global basis.¹⁵⁶ For example in the US, death row inmates typically spend decades awaiting execution.¹⁵⁷ The average length of time from sentence to conviction of those executed in 2015 was 16.9 years; ranging from 4 to 31 years. The country's longest serving death row inmate, Gary Alvord, had spent 39 years on death row in Florida until he died of natural causes in 2013.¹⁵⁸

The US is not the only country where prisoners languish for many years under the sentence of death. Delay on death row is a global problem. For example, in Pakistan prisoners spend 10 to 15 years on death row.¹⁵⁹ Nigerian death row prisoners have an average wait of twenty years before execution.¹⁶⁰ In Japan, Iwao Hakamada, spent 45 years on death row. He was certified by the *Guinness Book of Records* as the world's longest serving death row inmate. Hakamada was sentenced to death in 1968, but in 2014 he was released from prison, aged 77, after a judge had ordered a retrial because DNA tests had raised serious doubts about his guilt, which Hakamada had always denied.¹⁶¹

2.4.1. Reason behind prolonged detention

The lengthy delays are predominately caused by the increase in laws to safeguard an individual's right to appeal. Prisoners launch what seem to be unending challenges to conviction and sentence, directed to the domestic courts responsible for appeal, judicial review, and constitutional litigation.¹⁶² When these fail, there are requests for pardon or commutation of sentence.¹⁶³ In addition, an increase in appeals to human rights tribunals, such as the HRC and the Inter-American Commission on Human

¹⁵⁶ Bojosi, above n 14.

¹⁵⁷ Death Penalty Information Center, *Time on Death Row* (2009) <<http://www.deathpenaltyinfo.org/time-death-row>> at 18 April 2016.

¹⁵⁸ *Ibid.*

¹⁵⁹ Hood, above n 24, 203.

¹⁶⁰ Bradford, above n 6.

¹⁶¹ *Ibid.*

¹⁶² Hudson, above n 7.

¹⁶³ Schabas, above n 4.

Rights (“IACHR”), have lengthened the time needed to dispose of a case.¹⁶⁴ Although it could be argued that many of these appeal steps are optional and are hence taken voluntarily, it is widely acknowledged that “one cannot blame the prisoners for making use of all the possibilities at hand in order to fight for their lives”.¹⁶⁵

Delay in execution is also an unintended by-product of initiatives to abolish the death penalty such as moratorium on executions.¹⁶⁶ For example, in Pakistan the average time of 10 to 15 years that prisoners spend on death row,¹⁶⁷ have increased substantially following the moratorium on executions, which ran in the country from 2008 to 2014.¹⁶⁸ Despite the moratorium, hundreds of people continued to be sentenced to death. Furthermore, most moratoriums exist because a president either pronounces that he or she will commute all death sentences to life sentences, as in

¹⁶⁴ Hudson, above n 7, 836.

¹⁶⁵ Lombardi, above n 37, 3.

¹⁶⁶ On 18 December 2007, the United Nations General Assembly adopted a Resolution 62/149, entitled “moratorium on the use of the death penalty” (*Moratorium on the use of the death penalty*, GA Res 62/149, 62nd), cttee mtg, Agenda Item 70(b), UN Doc A/RES/62/149 (18 December 2007). The resolution called upon all States “to establish a moratorium on executions with a view to abolishing the death penalty, to progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed, and to refrain from reintroducing the death penalty where it has been abolished”. Further, the General Assembly has affirmed the “moratorium on the use of the death penalty” three more times since 2007¹⁶⁶ – in 2008 (*Moratorium on the use of the death penalty*, GA Res 63/168, 63rd sess, cttee mtg, Agenda Item 64(b), UN Doc A/RES/63/168 (18 December 2008), 2010 (*Moratorium on the use of the death penalty*, GA Res 65/206, 65th sess, cttee mtg, Agenda Item 68(b), UN Doc A/RES/65/206 (21 December 2010), and 2012 (*Moratorium on the use of the death penalty*, GA Res 67/176, 67th sess, cttee mtg, Agenda Item 69(b), UN Doc A/RES/67/176 (20 December 2012)). The establishment of moratorium on executions does not necessarily guarantee the actual abolition of the death penalty. It is simply a middle ground between “yes” and “no” in the international legal arena. It may be official and announced, or simply practised (Wenqiang Yin, “Moratorium in International Law” (2012) 11 *Chinese Journal of International Law* 321, 336.).

¹⁶⁷ Hood, above n 1, 203.

¹⁶⁸ Human Rights Advocates, above n 22. Despite the moratorium, hundreds of new inmates were sentenced to death and thousands remained on death row. Further in 2014, in the aftermath of the Peshawar school attack, the country has lifted the moratorium on executions in terrorism related cases (Asad Hashim, “Pakistan lifts death penalty moratorium” (2014) *Al Jazeera*, 17 December 2014 <<http://www.aljazeera.com/news/asia/2014/12/pakistan-lifts-death-penalty-moratorium-2014121710537499387.html>> at 30 March 2016). Moreover, only months after a moratorium was partially lifted to allow executions of terror convicts, Pakistan resumed executions for all death penalty offences. Since it lifted its six-year long moratorium on executions, Pakistan has executed more than 320 people (British Broadcasting Corporation New, *Pakistan ends death penalty suspension after seven years* (2015) <<http://www.bbc.com/news/world-asia-31812177>> at 3 April 2016).

Mali, or vows not to sign death warrants, as in Zambia.¹⁶⁹ These moratoriums appear tenuous at best because future presidents may not consider themselves bound by the executive policies of their predecessors. Countries such as Chad, Taiwan, and Guinea resumed executions after years of observing unofficial moratorium.¹⁷⁰ Indonesia is another example. The last unofficial moratorium in the country ran from 2008 to 2013 under the presidency of Susilo Bambang Yudhoyono (who reportedly deeply disliked capital punishment), but his replacement, Joko Widodo, embraced executions as part of a hard-line stance against drug offending. As such moratorium may effectively place death row inmates into a permanent waiting pattern of uncertainty about their future.¹⁷¹

Ironically then, as Schabas indicated “prolonged detention on death row, which may itself constitute a violation of an individual’s human rights, is the consequence of efforts to limit and eventually abolish the death penalty that can be directly attributed to the influence of contemporary human rights law”.¹⁷² Consequently, the length of time before execution has changed over the past several decades, making the death sentence process much different than that of even a few years ago.¹⁷³ Today, very long detention before execution is the customary practice on death rows globally.¹⁷⁴ This creates a dilemma for States that hope to retain the death penalty. If it is to provide the full range of procedural guarantees that are prescribed by international and domestic law, then it may be simply impossible to complete the process within an acceptably short period.¹⁷⁵

¹⁶⁹ Death Penalty Worldwide, *Moratoria*, (2011) Cornell Law School
<<http://www.deathpenaltyworldwide.org/moratoria.cfm>> at 29 March 2016.

¹⁷⁰ Ibid.

¹⁷¹ Human Rights Advocates, above n 22.

¹⁷² Schabas, above n 4, 97.

¹⁷³ Bradford, above n 6.

¹⁷⁴ Ibid.

¹⁷⁵ Schabas, above n 4.

2.4.2. Health effects of prolonged detention

Various studies on the psychological effects of long-term imprisonment have produced inconsistent results. On one hand, some researchers have documented negative changes in inmates over time.¹⁷⁶ For example, Richard Schill and David Marcus compared thirty randomly selected, recently incarcerated male inmates and thirty male inmates who had been incarcerated at least 5 years in two prisons in Texas. They found that inmates who have been in prison for at least 5 years developed a type of “learned helplessness”.¹⁷⁷ A person is said to have acquired learned helplessness when he or she have learned that they are helpless in aversive situations, have lost control, and gave up trying as a consequence. Learned helplessness closely connected to depression, loneliness, and physical illness.¹⁷⁸

On the other hand, many researchers have found little evidence that prolonged incarceration invariably has harmful psychological effects, but instead suggest that “condemned inmates may become more accustomed to their situation over time”.¹⁷⁹ Studies of long-term inmates in a general prison population have displayed an improved adaptation to prison conditions.¹⁸⁰ For example, Banister, Smith, Heskin and Bolton found that “incarceration over time does not appear to result in intellectual deterioration”.¹⁸¹ Doris MacKenzie found that “inmates who served at least 6 years in prison actually reported fewer psychosomatic complaints, less anxiety and depression, and higher self-esteem than recently incarcerated inmates”

¹⁷⁶ Smith, above n 17.

¹⁷⁷ Ibid.

¹⁷⁸ Richard Schill and David Marcus, “Incarceration and Learned Helplessness” (1998) 42(3) *International Journal of Offender Therapy and Comparative Criminology* 224.

¹⁷⁹ James Bonta and Paul Gendreau, “Reexamining the cruel and unusual punishment of prison life” (1990) 14 *Law and Human Behaviour* 347; Timothy Flanagan, “Dealing With Long-Term Confinement Adaptive Strategies and Perspectives Among Long-Term Prisoners” (1981) 8 *Criminal Justice and Behavior* 201; Wilfried Rasch, “The effects of indeterminate detention: A study of men sentenced to life imprisonment” (1981) 4 *International Journal of Law and Psychiatry* 417; Stephen Wormith, “The Controversy over the Effects of Long-Term Incarceration” (1984) 26 *Canadian Journal of Criminology* 423.

¹⁸⁰ P.A. Banister, F.V. Smith, K.J. Heskin and N. Bolton, “Psychological correlates of long-term imprisonment: I. Cognitive variables” (1973) 13 *British Journal of Criminology* 312.

¹⁸¹ Ibid.

with lengthy sentences.¹⁸² Edward Zambe documented that inmates “become better adjusted psychologically over the course of long-term incarceration”, their stress decreases, and they become more involved in structured activity.¹⁸³ Similarly, Lynne Goodstein found that “inmates adapt well in prison life over time by giving up their autonomy and unquestioningly going along with the prison routine”.¹⁸⁴

One of very few studies into death row inmates also reflects seemingly uncertain impact of time on prisoners’ psychological state.¹⁸⁵ Johnnie Gallemore and James Panton conducted evaluations of eight men sentenced to death over a period of two years, and found “that five of the men seemed to adjust to living under sentence of death, while three participants became significantly less functional”.¹⁸⁶

Therefore, while many academics, describing death row phenomenon, emphasise the importance of the prolonged detention, there is conflicting research in relation to the interconnection of time spent on death row and its psychological effects.¹⁸⁷ As Smith indicated, “while it seems likely that there will be measurable changes in the psychological effects of this experience over time, the direction of these changes is unknown”.¹⁸⁸ Current research has not so far linked the temporal element of death row phenomenon to psychological theory in order to predict or understand its health effects.¹⁸⁹

¹⁸² Doris Layton MacKenzie and Lynne Goodstein, “Long-Term Incarceration Impacts and Characteristics of Long-Term Offenders: An Empirical Analysis” (1985) 12 *Criminal Justice and Behavior* 395.

¹⁸³ Edward Zambe, “Behavior and adaptation in long-term prison inmates” (1992) 19 *Criminal Justice and Behavior* 409.

¹⁸⁴ Lynne Goodstein, Doris Mackenzie and Lance Shotland, “Personal Control and Inmate Adjustment to Prison” (1984) 22 *Criminology* 343.

¹⁸⁵ Smith, above n 20.

¹⁸⁶ Johnnie Gallemore and James Panton, “Inmate Responses to Lengthy Death Row Confinement” (1972) 129 *American Journal of Psychiatry* 167.

¹⁸⁷ Smith, above n 17.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

2.5. Interrelation between three elements of the death row phenomenon

The relationship between all three elements of the death row phenomenon is complex and intertwined.¹⁹⁰ Many authors insist that the first two components, prolonged detention and harsh conditions, are in themselves enough to establish the phenomenon.¹⁹¹ Others argue that harsh conditions alone, such as solitary confinement, are not sufficient, because they may be to an extent justified for security reasons, and prolonged time spent on death row is required for prisoners to exercise their right to appeal.¹⁹² Prisoners are also expected to lose their freedom and partial control over their lives upon incarceration - it is part of the punishment.¹⁹³ Such views, though, tend to ignore the international standard that prolonged solitary confinement, beyond 15 consecutive days, is said to amount to torture or inhuman treatment.¹⁹⁴ The use of solitary confinement is absolutely prohibited for death row prisoners simply by virtue of their sentence.¹⁹⁵

Therefore, the enduring pressure of a life awaiting a death sets death row inmates apart from other prisoners who may face harsh prison conditions or delays in the appeals process.¹⁹⁶ As Smith indicates “it is this part of the experiential component, focused on the unique situation of inmates living under a sentence of death, that distinguishes death row inmates from other inhabitants of the prisons today, and limits the possible application of the concept to a larger group”.¹⁹⁷

¹⁹⁰ Ibid.

¹⁹¹ Hudson, above n 7, 836.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Juan E. Méndez, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/67/279 (9 August 2012).

¹⁹⁵ *The Istanbul Statement on the Use and Effects of Solitary Confinement* was adopted on 9 December 2007 at the Fifth International Psychological Trauma Symposium in Istanbul, Turkey, by a working group of 24 international experts, including doctors, academics, civil society and the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. The Istanbul Statement was annexed in the interim report by Manfred Nowak to the United Nations General Assembly on 28 July 2008 (A/63/175).

¹⁹⁶ Sadoff, above n 21.

¹⁹⁷ Smith, above n 17.

Each element, taken individually, *may* be sufficient to cause mental suffering or harm to an individual prisoner. Though to date the studies on the effects of the conditions on death row, particularly solitary confinement, have produced most conclusive results. Studies on the psychological repercussions from living with the uncertainty about the imminent death have produced conflicting results. The same is true for the psychological consequences of the prolonged detention. This is likely attributed to the lack of the psychological research on the issue. Today, the strongest findings in relation to severe psychological trauma of death row are mostly focused on the effects of solitary confinement. While it is true, that the majority of death row inmates are held in segregation, they also experience many additional psychological effects which are unique to them. In that regard, studies of death row prisoners are one step behind those done on the effects of solitary confinement. Perhaps the psychological effects of the threat of execution are in themselves severe enough to establish the death row phenomenon, although without further research, it is impossible to know.¹⁹⁸ This type of information would help to ascertain whether certain patterns of experience actually constitute a separate structural death row phenomenon, or “if it merely represents a unique assembly of condemned individuals’ personal circumstances”.¹⁹⁹

To date, the death row phenomenon or death row syndrome are not accepted by any medical or psychiatric bodies as some kind of established illness.²⁰⁰ As Schwartz indicates that if we label all of the death row inmates’ condition a mental illness, what we might really be doing is “implementing a social policy (abolition of the death penalty) on the back of psychiatry by inappropriate use of a speculative psychiatric diagnosis”.²⁰¹ He further notes that such an important decision could not be made without future extensive research in order to draw a line between individual’s moral distress and real psychopathology.²⁰² Schwartz stresses that, at

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Schwartz, above n 28.

²⁰¹ Ibid.

²⁰² Ibid

minimum, this effort would require collaborative input from nosologists; descriptive, dynamic, and forensic psychiatrists; neuroscientists; ethicists; and philosophers.²⁰³

The discussion will now continue to the legality of the death row phenomenon. Mirroring the academic disagreement on what constitutes the death row phenomenon, various courts and tribunals came up with their own contours of the term. The following chapter investigates in which form the phenomenon is said to amount to torture or other cruel, inhuman or degrading treatment or punishment.

²⁰³ Ibid.

3. DEATH ROW PHENOMENON IN INTERNATIONAL HUMAN RIGHTS LAW

After providing an understanding of the concept of the death row phenomenon and its potential effects on the inmates, the discussion will now turn into examining the status of the doctrine under international law. The aim is to analyse under what circumstances detention on death row triggered the death row phenomenon as a violation of international law.

The jurisprudence of the ECtHR, the HRC and the Privy Council are investigated. Each of these tribunals applies its own governing legal standard in establishing the death row phenomenon.²⁰⁴ It is by no means suggested that these are the only courts that have so far dealt with the issue.²⁰⁵ However, the decisions are representative of the current divergent views on the death row phenomenon.²⁰⁶

Before considering the international developments towards recognising the death row phenomenon as a breach of a right not to be tortured or subjected to inhuman treatment by the ECtHR, the HRC and the Privy Council,²⁰⁷ it is important to first provide universally accepted definition of what constitutes torture.

3.1. Torture under international law

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT Convention”) provides the most precise and widely-cited definition of torture under international law. It defines torture as: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is

²⁰⁴ Sadoff, above n 21.

²⁰⁵ Bojosi, above n 14, 306.

²⁰⁶ Ibid.

²⁰⁷ Peel, above n 148.

suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.²⁰⁸ It does not include “pain or suffering arising only from, inherent in or incidental to lawful sanctions”.²⁰⁹

Therefore, CAT Convention identifies the following elements in qualifying an act as torture:

- Nature of the act, which encompasses both acts and omissions that inflict severe pain or suffering.²¹⁰ Further, pain and suffering may be physical or mental.²¹¹
- Pain and suffering must be inflicted intentionally on the victim.²¹²
- Specific purpose, such as to obtain information, as punishment or to intimidate, or for any reason based on discrimination.²¹³ This list, established according to CAT Convention may be viewed as indicative rather than exhaustive.²¹⁴
- Involvement of public officials or assimilated.²¹⁵

There is no international legal definition of a cruel, inhuman or degrading treatment or punishment, and no objective element of distinction between inhuman treatment and torture.²¹⁶ Acts are generally alike and only the level of intensity/severity of the

²⁰⁸ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“CAT Convention”), Article 1.

²⁰⁹ *Ibid.*

²¹⁰ Office of the United Nations High Commissioner for Human Rights, *Interpretation of torture in the light of the practice and jurisprudence of international bodies* (2011) <http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf> at 1 July 2016.

²¹¹ Office of the High Commissioner for Human Rights, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, UN Doc HRI/GEN/1/Rev.9 (10 March 1992) [5].

²¹² Office of the United Nations High Commissioner for Human Rights, above n 210.

²¹³ *Ibid.*

²¹⁴ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture. A Commentary* (Oxford University Press, New York City, 2008) 75.

²¹⁵ Office of the United Nations High Commissioner for Human Rights, above n 210.

²¹⁶ Nowak, above n 214, 73.

ill-treatment may vary.²¹⁷ Consequently, the distinctive element is *subjective*, but must still reach a *minimum level of severity*.²¹⁸ The minimum level of severity is determined by the specific circumstances of each case and is not always obvious.²¹⁹ In some cases, the qualification of torture may be easily granted because of the nature of certain acts.²²⁰ However, in others, the vulnerability of the victim (age, gender, state of health, etc), as well as duration of treatment, and its physical and mental effects should be taken into account to determine whether the case amounts to torture or inhuman treatment.²²¹ Proving inhuman treatment also does not require a showing of the actor's *specific intent*.²²² So if the suffering does not satisfy the definition of torture, the victim may still be able to prove cruel, inhuman or degrading treatment or punishment was imposed.²²³

Further, the United Nations SRT, Mr. Manfred Nowak, stated that: “a thorough analysis of Articles 1 and 16 of the CAT Convention as well as a systematic interpretation of both provisions in light of the practice of the Committee against Torture leads one to conclude that the decisive criteria for distinguishing torture from cruel, inhuman and degrading treatment may best be understood to be the *purpose* of the conduct and the *powerlessness* of the victim, rather than the intensity of the pain or suffering inflicted”.²²⁴ Accordingly, it might be the powerlessness of the victim that can enable to differentiate between torture and other ill-treatment.²²⁵ Thus, ill-treatments applied in a situation of powerlessness (such as detention) will be more likely to amount to torture.²²⁶

²¹⁷ Office of the United Nations High Commissioner for Human Rights, above n 210.

²¹⁸ Office of the High Commissioner for Human Rights, above n 211.

²¹⁹ Office of the United Nations High Commissioner for Human Rights, above n 210.

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ Nowak, above n 46.

²²⁵ Office of the United Nations High Commissioner for Human Rights, above n 210.

²²⁶ Nowak, above n 214, 77.

Additionally, some legal instruments do not differentiate between the two terms.²²⁷ International Covenant on Civil and Political Rights (“ICCPR”), for example, protects against torture and inhuman treatment generally.²²⁸ The same is true for the European Convention on Human Rights (“ECHR”).²²⁹ The HRC has indicated that “it may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment”,²³⁰ the term “torture” tends to be reserved solely for the most serious offences against human dignity and personal integrity.

Interestingly, nor the ICCPR or the ECHR, while prohibiting torture and inhuman treatment generally, provide definitions for these acts. Further, it is only Article 1 of the Convention Against Torture that highlights the fact that torture and other infringing acts can be physical or mental.²³¹ Nevertheless, in spite of this, mental suffering has been found to infringe or contribute towards infringement of both, ICCPR and ECHR. As such, according to the HRC, solitary confinement, especially when the person is kept incommunicado, may be contrary to Article 7 of the ICCPR.²³² The ECtHR decided that sufficiently severe mental suffering may occasion a violation of Article 3 of the ECHR.²³³ It is apparent from the foregoing that treatment, involving little or possibly no physical injury, may infringe the provisions on maltreatment and human dignity.²³⁴

The prohibition of torture and cruel, inhuman and degrading treatment is “an absolute and non-derogatory right”.²³⁵ This means that no exceptional circumstances,

²²⁷ Reyes, above n 71.

²²⁸ International Covenant on Civil and Political Rights (“ICCPR”), Articles 7.

²²⁹ European Convention on Human Right (“ECHR”), Article 3.

²³⁰ HRC, *General Comment 7, Article 7, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.1 (1994) [7].

²³¹ As relevant for the purpose of this thesis, because *Arab Charter on Human Rights*, Article 13 also highlights the fact that torture and other infringing acts can be physical or mental.

²³² HRC, above n 230 [2].

²³³ ECHR, Article 3; *Selçuk and Asker v Turkey*, ECtHR Vol 1998-II, No 71 (1998).

²³⁴ Office of the United Nations High Commissioner for Human Rights, above n 187.

²³⁵ *Universal Declaration of Human Rights*, Article 5; Common Article 3 of the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces*, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*,

such as war or any emergency threatening the life of the nation can be invoked as a justification.²³⁶ The prohibition on torture is also considered a *jus cogens* norm or absolute norm of general international law, also giving rise to the obligation *erga omnes* (owed to and by all States).²³⁷ As such, “the prohibition may be enforced against a State even if it has not ratified any of the relevant treaties”.²³⁸

The prohibition on torture, cruel, inhuman or degrading treatment or punishment is implemented in the United Nations system through the human rights treaty bodies, including the HRC, the Committee Against Torture and the Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.²³⁹ In addition, the United Nations Human Rights Council’s special procedures may investigate and report on allegations of torture. For example, the United Nations SRT, is “authorised to examine questions related to torture in all United Nations Member States, including through urgent appeals, country visits, and reporting”.²⁴⁰

Further, it is noted, that courts and tribunals, discussed in this chapter, do not employ uniform terminology and use different terms in respect to the prohibition of torture. For example, the ICCPR protects against “torture or cruel, inhuman or degrading treatment or punishment”,²⁴¹ while the ECHR excludes the word “cruel”.²⁴² The reason is that the right not to be subjected to torture or other inhuman treatment

Geneva Convention Relative to the Treatment of Prisoners of War; ICCPR, Article 7; ECHR, Article 3.

²³⁶ CAT Convention, Article 2.

²³⁷ International Justice Resource Center, *Torture* (2013) <<http://www.ijrcenter.org/thematic-research-guides/torture/>> at 3 July 2016. *Jus cogens* are international norms considered so fundamental that no derogation from them is permitted, even through the application of other international norms; *Vienna Convention on the Law of Treaties*, Article 53; Erika de Wet, “The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary Law” (2005) 15 *European Journal of International Law* 97.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ ICCPR, Article 7.

²⁴² ECHR, Article 3. Though this is of little significance since any form of cruel treatment will almost inevitably be brought within the ambit of inhuman or degrading in terms of the ECHR. For example, in the case of *Irlande v United Kingdom*, (Application no. 5310/71) Eur Court HR, the ECtHR concluded that “it was the intention of the Convention that the term ‘torture’ attached to deliberate inhuman treatment causing very serious and cruel suffering” [167].

derives from different sources of law, such as ICCPR, ECHR or domestic constitutions. While the sources are different, the fundamental notion is the same. Each section, in each national and international document, was endorsed to protect persons from unnecessary and undue suffering.²⁴³

3.2. Divergent approaches to the death row phenomenon

Currently, various courts and tribunals use different approaches to establishing the death row phenomenon as a violation of a right not to be tortured. The doctrine was first given legitimacy in 1989 by the ECtHR²⁴⁴ in the landmark case of *Soering*.²⁴⁵ In that case, the court was confronted with the question whether the extradition of a German citizen Jens Soering to the US, where he would have faced the death penalty for double murder of his girlfriend's parents,²⁴⁶ would breach Article 3 of the ECHR, which prohibits torture, and inhuman or degrading treatment or punishment. The ECtHR upheld the death row phenomenon as a breach of Article 3 where an individual passed a *very long period of time* spent on death row in *extreme conditions* under “mounting *anguish of awaiting execution*”.²⁴⁷ Importantly, the breach was based on the potential for harm to an individual in the future.²⁴⁸

²⁴³ Bojosi, above n 14, 323.

²⁴⁴ The ECtHR oversees the compliance with the ECHR of the 47 Council of Europe member States that have ratified the ECHR. It rules on individual or state applications alleging violations of the civil and political rights set out in the ECHR (Council of Europe, *European Court of Human Rights* (2014) <http://www.coe.int/t/democracy/migration/bodies/echr_en.asp> at 1 May 2015).

²⁴⁵ 161 (1989) Eur Court HR (ser A).

²⁴⁶ *Soering* [15].

²⁴⁷ In finding the death row phenomenon, the ECtHR also made reference to Soering's youth and his disturbed mental state (*Soering* [93]) and found these factors as contributory “to bring the treatment on death row within the terms of Article 3” (*Soering* [109]). At the time of the killings, Soering was 18 years old and there was some psychiatric evidence, which was not contested as such, that he “was suffering from an abnormality of mind which substantially impaired his mental responsibility for his acts” (*Soering* [109]). The judgment, however, left ambiguous whether the existence of such factors would be deemed necessary in other cases (Sadoff, above n 21). However, the cases, decided by the European Commission on Human Rights (“ECommHR”), following *Soering* provide some clarity on the point. Before 1998 individuals did not have direct access to the ECtHR. They had to apply to the ECommHR, which if found the case to be well-founded would launch a case in the ECtHR on the individual's behalf. Protocol 11 abolished the Commission in 1998, enlarged the ECtHR, and allowed individuals to take cases directly to it (Council of Europe, *European Commission on Human Rights* (2015) <<http://www.refworld.org/publisher/COECOMMHR.html>> at 20 May 2016). Following recognition of the death row phenomenon by ECtHR, the ECommHR did not require the existence of such personal factors in its consideration of the death row phenomenon (*Çinar v Turkey* (App. No.

*Soering*²⁴⁹ case remains significantly important as it broke new ground, providing a basis for other courts to embrace the death row phenomenon.²⁵⁰ Surprisingly though, the case has not been heavily criticised on the point that the ECtHR's jurisdiction covers countries which have all abandoned the use of capital punishment.²⁵¹ The ECtHR was probably driven by a strong antipathy to the death penalty.²⁵² Nevertheless, from this judgment onwards, the death row phenomenon grew in recognition all over the world when dealing with death row cases.²⁵³ The vast majority of subsequent death row phenomenon cases cite the ECtHR's landmark ruling, a testament to its strong relevance.²⁵⁴

By setting out the cornerstones of the phenomenon, the ECtHR unquestionably furthered the concept in gaining recognition and in becoming well established in international law.²⁵⁵ However, the standards applied to establishing the death row phenomenon by other courts had varied to that of the ECtHR.

Accordingly, the HRC, adopting the doctrine into its jurisprudence, established the threshold much higher than the ECtHR. Together with the three elements of the death row phenomenon (physical, temporal and experiential), what was essential is that the applicant demonstrated that he or she is specifically affected by those conditions, such as deterioration in mental or physical state. Further, the extradition

17864/91), (1994) 79A DR 5). As such the ECommHR cleared some ambiguity left by the *Soering* case in that three elements of the death row phenomenon do not need to be accompanied by further circumstances to constitute the breach of Article 3 under the ECHR. The doctrine and its precise extent was confirmed in numerous death-row-related cases, such as *H v Sweden* (App. No. 22408/93), (1994) 79A DR 85 (Schabas, above n 182; *Çinar v Turkey* (App. No. 17864/91), (1994) 79A DR 5).

²⁴⁸ Also, despite the ECtHR's condemnation of this phenomenon, the United Kingdom decided to extradite *Soering* when the charges against him were reduced to non-capital murder.

²⁴⁹ 161 (1989) Eur Court HR (ser A).

²⁵⁰ *Reyes*, above n 71.

²⁵¹ *Hudson*, above n 7, 843.

²⁵² *Ibid.*

²⁵³ Human Rights Advocates, above n 22.

²⁵⁴ *Hudson*, above n 7, 843.

²⁵⁵ *Kren*, above n 10.

cases based on the possibility of harm to a person in the future were consistently unsuccessful before the HRC.²⁵⁶

The Privy Council,²⁵⁷ on the other hand, embracing the death row phenomenon doctrine for the first time in 1993 in *Pratt and Morgan*²⁵⁸ case, adopted a more lenient approach to finding the death row phenomenon, allowing delay to be the main, if not the singular, factor in its analysis.²⁵⁹ This time-based approach has been referred to by Chief Justice of the Supreme Court of Zimbabwe, Anthony Gubbay in the *Catholic Commission* case²⁶⁰ as “progressive” and “compassionate”.²⁶¹ Countries like India, Uganda and Zimbabwe have adopted this approach in establishing the death row phenomenon in their courts.²⁶²

The divergent approaches amongst courts to what actually constitutes the death row phenomenon have led to an absence of clear-cut lines on when detention on death row amounts to the death row phenomenon and therefore constitutes a breach of international law.²⁶³ The debate of the death row phenomenon remains open on a number of issues, whether delay in itself constitutes a human rights violation or additional elements are required, such as conditions of prison detention and psychological effects from awaiting one’s death.

In order to determine what conditions and treatment of the death row prisoners were

²⁵⁶ Bradford, above n 6; *Kindler v Canada*, Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991 (1993); *Cox v Canada*, Communication No. 539/1993, UN Doc CCPR/C/52/D/539/1993 (1994).

²⁵⁷ The Privy Council sits in London as the highest court of appeal for many of the Caribbean and other commonwealth states (Hudson, above n 7).

²⁵⁸ *Pratt and Morgan v The Attorney General for Jamaica and another (Jamaica)* [1993] UKPC 1 (2nd November, 1993) (“*Pratt and Morgan*”).

²⁵⁹ Hudson, above n 7, 848.

²⁶⁰ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others* (2001) AHRLR 248 (ZwSC 1993) (“*Catholic Commission*”) [114].

²⁶¹ *Ibid* [66].

²⁶² *Susan Kigula & 416 Ors v Attorney General* (Constitutional Petition No. 6 of 2003) [2005] UGCC 8 (10 June 2005).

²⁶³ Penal Reform International, *Strengthening Death Penalty Standards* (2015)

<http://www.penalreform.org/wp-content/uploads/2015/02/PRI_Strengthening_death_penalty_standards_WEB.pdf> at 6 June 2016.

held to amount to a breach of a human right, it is important to examine the weight that courts gave to each element of the death row phenomenon (delay on death row, harsh conditions and health effects). This will further help in analysis of whether the breach of only one of the elements can be sufficient to establish a violation. Accordingly, the role that each element played in the establishment of a violation is discussed below.

3.3. Is prolonged detention a breach of prohibition of torture?

The Privy Council's decision in *Pratt and Morgan*²⁶⁴ created a debate as to whether delay of a certain length automatically violates a prisoner's rights. In its judgment, the Privy Council held that delay alone was sufficient to constitute an inhuman treatment.²⁶⁵ In finding that delay alone was enough to establish the death row phenomenon, the Privy Council has departed from the ECtHR and the HRC in its ruling, because both of these tribunals based their recognition of the death row phenomenon on factors in addition to delay.²⁶⁶

In *Pratt and Morgan*,²⁶⁷ Earl Pratt and Ivan Morgan spent on death row over 15 years and "faced several unexplainable delays while exercising rights for appeal under the domestic laws and individual complaint procedures" under the ICCPR Optional Protocol and the IACHR.²⁶⁸ The Privy Council observed that there was "an

²⁶⁴ [1993] UKPC 1 (2nd November, 1993).

²⁶⁵ *Pratt and Morgan* [13.6].

²⁶⁶ Hood, above n 24.

²⁶⁷ [1993] UKPC 1 (2nd November, 1993).

²⁶⁸ It is worth noting that even before the Privy Council ruled in *Pratt and Morgan*, the Inter-American Commission on Human Rights (IACHR) had found that the years spent by Pratt and Morgan on death row, awaiting the decision by the Jamaican Court of Appeal, were "tantamount to cruel, inhuman and degrading treatment" (*Pratt and Morgan* [13.6]). This conclusion was, however, never published and its existence was only known after it was referred in the Privy Council judgment in 1993 (Schabas, above n 4, 220). The jurisprudence of the IACHR is purposefully omitted from the analysis as it since has not taken a clear position on the death row phenomenon. In *Andrews v United States*, Case 11.139, Inter-Am. C.H.R., Report No. 57/96, OEA/Ser.L/V/II.98, doc. 6 rev. [178] (1996), IACHR concluded "that appellant suffered cruel, infamous, or unusual punishment under article XXVI of the 1948 American Declaration of the Rights and Duties of Man based in part on his having spent eighteen years on death row and being confined to his cell for all but a few hours per week". But this ruling also notably factored in "his receipt of at least eight execution dates and his execution based on the verdict of a racially biased jury". In *Hilaire, Constantine, and Benjamin et al*

instinctive revulsion against the prospect of executing a man after he has been under sentence of death for many years”.²⁶⁹ The Privy Council also put forward “a general rule” that a five-year gap between sentencing and execution, would be strong grounds for a violation of the right against inhuman or degrading treatment.²⁷⁰ Such conclusion was based on the considerations that “Jamaican appeal process should be completed within approximately two years”.²⁷¹

This five-year rule, however, had not been strictly adhered to by the Privy Council. In *Guerra v Baptiste*,²⁷² where the prisoner spent on death row four years and ten months (just short of the five-year time limit), the Privy Council found that this delay constituted an injustice.²⁷³ The Privy Council further refined this point clarifying that the period of five years was “a guide and not intended to provide a limit, or yardstick”.²⁷⁴ The Privy Council considered it important that “all domestic appeals be concluded within two years of a death sentence”.²⁷⁵ The time in *Guerra v Baptiste*²⁷⁶ went substantially beyond that limit, without any good explanation.²⁷⁷

The Privy Council’s time-based approach was further developed in *Henfield v Bahamas*.²⁷⁸ It was stated that where international courts were not approached, the

in 2002, the IACHR cited *Soering* and, despite not discussing the time spent on death row, found, “the detention conditions that all the victims in this case have experienced and continue to endure compel the victims to live under circumstances that impinge on their physical and psychological integrity and therefore constitute cruel, inhuman and degrading treatment”. In *NI Sequoyah v United States* Petition 120/07, Report No 42/10, IACHR (2010) March 2010, the IACHR also admitted a petition where the prisoner challenged his 15-year stay on death row in California. Two other petitions on similar grounds were also previously admitted, but a final decision on the merits do not appear to have been made. See *Tracy Lee Housel v United States* Case 129/02, Report No 16/04, IACHR (2004) and *John Elliott v United States* Case 28/0, Report No 68/04, IACHR (2004).

²⁶⁹ *Pratt v Morgan* [60].

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Guerra v Cipriani Baptiste and Others (Trinidad and Tobago)* [1995] UKPC 3 (“*Guerra v Baptiste*”).

²⁷³ Hudson, above n 7.

²⁷⁴ *Ibid.*, 413.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*, 415.

²⁷⁸ *Henfield v Attorney General of the Commonwealth of the Bahamas* [1996] UKPC 36 (“*Henfield v Bahamas*”).

three-and-a-half years, instead of a five-year rule should apply as a rough estimate in finding the death row phenomenon.²⁷⁹ The reasoning behind the timeframe is that “the domestic appeals process should take approximately two years and an appeal to an international body should take approximately 18 months”.²⁸⁰ By combining the two and adding an appropriate amount of time for a reasonable delay, the court was able to come up with a timeline of five years where international courts were approached²⁸¹ and three-and-a-half years within which domestic appeals ought to be completed.²⁸²

However, not any delay would count towards the total time guideline. The Privy Council stated that “delay inappropriately caused by the prisoner could not be used to the advantage of the inmate”.²⁸³ The Privy Council looked at the reasons behind the delay, finding that it could be due to: fault of the prisoner, a legitimate appeal process or delay caused by the State.²⁸⁴ Accordingly, any time attributed entirely to the fault of the inmate, for example, if he or she resorted to frivolous filings, would not count toward the total.²⁸⁵ But where a State causes delay, “it is logical to hold the State responsible for violating a prisoner’s rights”.²⁸⁶ “Where delay is caused by a prisoner exercising his legitimate right to appeal, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it”.²⁸⁷ The Privy Council recognised that “a prisoner will cling to any hope in order to protect his life, and that such human instinct cannot be treated as a prisoners’ fault”.²⁸⁸

²⁷⁹ Ibid .

²⁸⁰ *Guerra v Baptiste* [1995] UKPC 3.

²⁸¹ Ibid.

²⁸² *Henfield v Bahamas* [1996] UKPC 36.

²⁸³ *Pratt and Morgan* [29]-[30].

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Macalesher, above n 5.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

The HRC also expressed concern that many death row phenomenon cases are delayed in part because of the prisoners themselves.²⁸⁹ Accordingly in *Kindler v Canada*²⁹⁰ the HRC affirmed its position that “prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies”.²⁹¹ Similarly in *Cox v Canada*,²⁹² another extradition case, the HRC stated that Cox “failed to show that appeals were not made available to him within a reasonable time, or that there were unreasonable delays which would be imputable to the State”.²⁹³

In *Barrett and Sutcliffe v Jamaica*,²⁹⁴ the HRC again observed that some delay was inherent in an appeal and review process and cannot amount to a violation “if a person is merely availing himself of appellate remedies”.²⁹⁵ This view on attribution of delay is in contrast to the position taken by the ECtHR in *Soering*.²⁹⁶ In a celebrated dissent, the HRC member, Ms. Christine Chanet, stated: “without being at all cynical, I consider that the prisoner cannot be expected to hurry up in making appeals so that he can be executed more rapidly”.²⁹⁷ She supported her position by quoting the *Soering*²⁹⁸ decision.²⁹⁹ Interestingly, the Zimbabwe Supreme Court endorsing *Soering*,³⁰⁰ added that Chanet’s dissenting view in HRC was “more plausible and persuasive” than those of the majority.³⁰¹

²⁸⁹ Bradford, above n 6.

²⁹⁰ Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991 (1993).

²⁹¹ *Kindler v Canada* [15.2].

²⁹² Communication No. 539/1993, UN Doc CCPR/C/52/D/539/1993 (1994) [17.2].

²⁹³ *Ibid.*

²⁹⁴ *Randolph Barrett and Clyde Sutcliffe v Jamaica* Communication No. 271/1988, UN Doc CCPR/C/44/D/271/1988 at 71 (1992) (“*Barrett v Jamaica*”).

²⁹⁵ *Ibid* [8.4].

²⁹⁶ 161 (1989) Eur Court HR (ser A).

²⁹⁷ *Ibid*, at Appendix, individual opinion of Ms. Christine Chanet.

²⁹⁸ 161 (1989) Eur Court HR (ser A).

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ Bradford, above n 6.

The ECtHR took the position that “even if the delay was the result of the inmate’s actions they were not to be blamed for pursuing life as the fact remained that they were pursuing life under death row conditions with mounting tensions over their own death”.³⁰² The ECtHR ultimately have diminished the State’s intentions and disregarded the likely causes of any delay, particularly attributable to the prisoner.³⁰³ Nevertheless, the ECtHR’s position is preferred as “a prisoner should not be punished for taking advantage of the appeals process offered by the State when the prisoner is fighting to save his or her own life”.³⁰⁴ An inmate might be pursuing the appeal process to its full limits, but such an attempt to remain alive is a fundamental part of human nature.³⁰⁵

Therefore, according to the Privy Council the length of time, where not attributed to the death row prisoner, is the sole factor in constituting cruel or inhuman punishment. The presumption is that spending over a certain time on death row meets the criteria necessary for a finding of the death row phenomenon.³⁰⁶ This way, the appeal process for a prisoner is protected, and “it is the responsibility of the State to ensure that the appeal process is carried out in a reasonable time”.³⁰⁷ If the State fails to do this, then the death sentence becomes wrongful.³⁰⁸

The ECtHR and the HRC expressly do not accept the time-based approach. In *Johnson v Jamaica*,³⁰⁹ the HRC provided three reasons for the need to have more than simple delay to establish a breach. Firstly, it found that “allowing delay in execution to constitute a violation of the ICCPR would be inconsistent with its object and purpose”,³¹⁰ which promote reduction of the death penalty.³¹¹ Thus, “it would be

³⁰² Ibid.

³⁰³ Sadoff, above n 21.

³⁰⁴ Bradford, above n 6.

³⁰⁵ Ibid.

³⁰⁶ *Pratt and Morgan*, 222.

³⁰⁷ Peel, above n 148.

³⁰⁸ Ibid.

³⁰⁹ *Errol Johnson v Jamaica*, Communication No. 588/1994, UN Doc CCPR/C/56/D/588/1994 (1996).

³¹⁰ Ibid [8.3].

inconsistent to hold States in violation of the ICCPR for failing to execute a prisoner, while finding adherence to the Covenant for States that execute prisoners rapidly”.³¹² Secondly, it would be wrong “to convey a message that States should execute prisoners as fast as possible”.³¹³ Lastly, “other circumstances, when combined with prolonged detention, can give rise to a violation” of the ICCPR.³¹⁴ Therefore, an alternative option exists for serious cases.³¹⁵

Consequently, even in cases of detention on death row for more than 10 years, such as in *Simms v Jamaica*,³¹⁶ the HRC maintained its jurisprudence of not finding a violation of Article 7 “in the absence of some further compelling circumstances”.³¹⁷ However, a short delay of 15 months as in *Wilson v Philippines*³¹⁸ was held to be long enough to amount to the death row phenomenon because an applicant proved severe mental and physical health deterioration.³¹⁹ Accordingly, the HRC gives a great flexibility to the element of delay.

Indeed, as Sadoff stated “imposing a time frame sets up perverse incentives for a State to expedite the implementation of the penalty, effectively assigning a higher priority to speed than to accuracy in the hierarchy of criminal justice norms”.³²⁰ The time-based approach could cause courts “giving short shrift to a capital defendant’s legitimate claims so as to avoid violating constitutional rights”.³²¹ This almost certainly would result in a higher incidence of premature killings, and essentially “yield more, not fewer, executions”.³²² Certainly, in nearly every case, the inmate is

³¹¹ Ibid [8.2].

³¹² Ibid.

³¹³ Ibid [8.4].

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ *Simms v Jamaica*, Communication No. 541/1993, UN Doc CCPR/C/53/D/541/1993 (1995).

³¹⁷ Ibid.

³¹⁸ *Wilson v Philippines*, Communication No 868/1999, UN Doc CCPR/C/79/D/868/1999 (2003).

³¹⁹ Ibid [7.4].

³²⁰ *Johnson v Jamaica* [8.2]-[8.6].

³²¹ *Knight v Florida*, 528 U.S. 990,992 (1999) (Thomas, J., concurring).

³²² Sadoff, above n 21, 90.

not worse off prolonging his stay on death row than being executed.³²³ “Life on death row, harsh as it may be, is preferable to death”.³²⁴

The HRC and the ECtHR clear position that the long detention on death row *per se* would not be considered cruel and inhuman treatment is strongly supported by the United Nations SRT, Mr. Juan Méndez, who asserts that “prolonged delay is only one cause of the death row phenomenon and, considered alone, may be harmful to a prisoner’s rights, and that such approach risks conveying a message to States parties to carry out a capital sentence as expeditiously as possible after it is imposed”.³²⁵ The former United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr. Bacre Waly Ndiaye, expressed analogous concerns over Privy Council’s decision and stressed that time based approach might encourage Governments to carry out executions of death sentences more speedily. This might, in turn, affect defendants’ rights to full appeal procedures, including hearings when additional evidence discovered years later.³²⁶

Indeed, setting a time frame is problematic. Committing to a time limit provides for little flexibility based on the specific situation of each case.³²⁷ Further, prolonged detention does not affect all inmates similarly, and some may not be adversely affected based on their strong mental state, religious beliefs, or preference for discipline and structure.³²⁸ It is illogical to say that the prisoner has been treated in an inhumane form when he is not agonising or degrading on death row.³²⁹ This is supported by the scientific studies done on the effects of the prolonged detention, which document that while some inmates may deteriorate mentally over time, others become more accustomed and unaffected by the incarceration.

³²³ *Johnson v Jamaica* [8.4].

³²⁴ *Ibid.*

³²⁵ Méndez, above n 194 [47].

³²⁶ Bacre Waly Ndiaye, *Report by the Special Rapporteur: Question of the violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories*, UN Doc. E/CN.4/1994/7 (7 December 1993) [682].

³²⁷ Sadoff, above n 21, 100.

³²⁸ *Ibid.*

³²⁹ Hudson, above n 7.

Further, a related problem is that time-based approach also disregards the other major elements usually contributing to the phenomenon.³³⁰ such as harsh prison conditions and physiological effects. The Privy Council appears to believe that a certain period of time on death row on its own, separated from any analysis of cell size, access to the outside world, prison activities and the like, automatically constitutes a breach.³³¹ But it is evident that those aspects can substantially influence a person's psychological health as well as the overall frame of mind.³³² The requirement of other factors is essential in establishing the death row phenomenon. This allows for changing situations, different mental capacities and ages.³³³

The time-based approach also discourages States from taking pro-inmate measures such as imposing moratorium on executions,³³⁴ and consequently deprives the inmates of hope of their death sentence being commuted to life imprisonment. Although not legally binding, and may be detrimental in that it increases the time prisoners spent on death row (discussed in 2.4.1), the resolution carries considerable moral and political weight and contributes greatly to the global move towards abolition of the death penalty.³³⁵ Since the adoption of General Assembly's resolutions, several States have undertaken initiatives towards the abolition of the death penalty. For example, Mongolia's announcement of moratorium was a major step in the acceding to the Second Optional Protocol of the ICCPR.³³⁶ The new Mongolian Criminal Code that abolishes the death penalty will take effect from September 2016.³³⁷ Mongolia will be the 103rd country in the world which has completely abolished the capital punishment for all offences.³³⁸ Establishing a time limit within which death row inmates ought to be executed will certainly discourage

³³⁰ Sadoff, above n 21.

³³¹ Ibid.

³³² *Johnson v Jamaica* [8.3].

³³³ Hudson, above n 7, 836.

³³⁴ Sadoff, above n 21.

³³⁵ Shetty, above n 45, 46.

³³⁶ Ibid.

³³⁷ Amnesty International News, above n 45.

³³⁸ Amnesty International, above n 3.

States from imposing moratoriums in their countries, which could potentially lead to the complete abolition of death penalty. While it is certainly true that moratorium on executions does not guarantee the abolition of death penalty and may in fact aggravate the time prisoners spent on death row, States should not be discouraged from implementing such initiatives, the main goal of which is to eventually abolish the death penalty.

The reference can also be made to the recent ECtHR judgment in *Vinter v United Kingdom*³³⁹ in relation to “irreducible” life sentences where prisoners are sentenced to life without any possibility of parole.³⁴⁰ The incentive is analogous to imposing a time limit in which death row inmates are out to be executed in that it deprives them of hope and, perhaps, possibility of release or commutation of their sentence. It is with that hope that they are pursuing their appeal options to the fullest. The hope is also present when, and if, moratorium on executions may be imposed. Setting a time limit for execution to take place effectively robs them of that prospect. Such deprivation of hope was called to be degrading in *Vinter v United Kingdom*³⁴¹ case. The rationale for its position was eloquently stated by Judge Power-Forde in her concurring opinion: “Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity... Deserved though their prison sentence may be, they retain the right to hope... They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity, and to do that, would be degrading”.³⁴²

Therefore, the Privy Council’s time-based approach can actually be detrimental to prisoners’ rights, and essentially, creates “an absurd irony - executing the death row inmate within some designated time horizon would not necessarily be a violation of a

³³⁹ *Vinter and Other v the United Kingdom* [GC], nos 66069/09, 130/10.

³⁴⁰ William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, United Kingdom, 2015).

³⁴¹ *Vinter and Other v the United Kingdom* [GC], nos 66069/09, 130/10.

³⁴² *Ibid*, Concurring Opinion of Judge Power-Forde.

State's legal obligations while it could well be a violation to leave him or her on death row beyond a certain time".³⁴³

Therefore, while prolonged detention alone has been held by the Privy Council to constitute a breach, this element cannot be decisive. While the extreme delays have become the average wait time and are no longer an exception, it should not be sufficient to warrant a finding of the death row phenomenon.³⁴⁴ The HRC provides best approach to the element of delay - the element should be offered some flexibility and taken into consideration with other circumstances – conditions on death row and resulting psychological effects.

3.4. Do death row conditions violate prohibition of torture?

The character of the conditions on death row had been given significant importance and found by the courts to matter greatly in finding or mitigating the death row phenomenon. Thus in recognising the phenomenon claim in *Soering*,³⁴⁵ the ECtHR stressed the stark conditions at the Mecklenburg Correctional Center in Virginia (where Soering would have been assigned), including “cramped cells, limited hours of recreation and time spent outside of the cell, noncontact visits, and physical restraints when moving around the prison”.³⁴⁶ Although, despite stressing the importance of harsh condition in finding the phenomenon, the ECtHR linked the conditions to the duration of time spent there, rather than treating the conditions of confinement for their stand-alone significance.³⁴⁷ While recognising the justifiable need for extra security on death row (for example, the use of handcuffs and waist shackles when moving around the facility and the occasional lockdown), the ECtHR

³⁴³ Sadoff, above n 21; *Johnson v Jamaica* [8.3].

³⁴⁴ Bradford, above n 6.

³⁴⁵ 161 (1989) Eur Court HR (ser A).

³⁴⁶ *Soering* [61]-[68].

³⁴⁷ Sadoff, above n 21.

still found “the severity of a special regime unacceptable”³⁴⁸, given the “protracted period lasting on average six to eight years”.³⁴⁹

The HRC has also given great importance to the conditions on death row in its decisions. Where the prison conditions were not unduly harsh, even in cases of extremely long death row confinement, a death row phenomenon claim was far less likely to yield judicial relief.³⁵⁰ For example, in *Cox v Canada*³⁵¹ and *Kindler v Canada*,³⁵² humane conditions militated against the phenomenon.³⁵³ In both cases, the HRC examined the state of prisons in Pennsylvania (where Cox and Kindler would have been assigned), and noted the death row inmates were “housed in new modern units where cells were larger than cells in other divisions, and inmates were permitted to have radios and televisions in their cells, and to have access to institutional programs and activities such as counselling, religious services, education programs, and access to the library”.³⁵⁴

In determining the harshness of conditions, both the HRC and the ECtHR, did not establish a specific threshold of how severe conditions need to be in order to qualify for the death row phenomenon. Instead, the ECtHR and the HRC adopted a convenient method on a case-by-case basis. Despite the case-by-case approach, the HRC, however, had previously expressed concern about “poor living conditions of death row inmates, including undue restrictions on visits and correspondence”,³⁵⁵ “small cell size, and lack of proper food and exercise”,³⁵⁶ “extreme temperatures, lack

³⁴⁸ *Soering* [107].

³⁴⁹ *Ibid* [56].

³⁵⁰ Karen Harrison and Anouska Tamony, “Death row phenomenon, death row syndrome and their affect on capital cases in the US” (2010) *Internet Journal of Criminology* 1 <http://www.internetjournalofcriminology.com/Harrison_Tamony_%20Death_Row_Syndrome%20_IJC_Nov_2010.pdf> at 25 March 2016.

³⁵¹ No. 539/1993, UN Doc CCPR/C/52/D/539/1993 (1994).

³⁵² No. 470/1991, UN Doc CCPR/C/48/D/470/1991 (1993).

³⁵³ *Cox v Canada* [13.6].

³⁵⁴ *Ibid*.

³⁵⁵ Human Rights Committee, *Concluding observations: Japan*, UN Doc CCPR/CO/79/Add.102, (19 November 1998) [21].

³⁵⁶ Human Rights Committee, *Concluding observations: Uzbekistan*, UN Doc CCPR/CO/71/UZB, (26 April 2001) [10].

of ventilation, cells infested with insects, and inadequate time spent outside cells”.³⁵⁷ The HRC has called on States to better these conditions in line with the requirements of the provisions of the ICCPR.

Further, it is widely acknowledged that solitary confinement prevalent among the conditions faced by death row inmates.³⁵⁸ Therefore solitary confinement and death row phenomenon are intricately related. Researchers have found that “the clinical effects of extreme isolation can actually be similar to those of physical torture”.³⁵⁹ One scholar has even characterised this type of confinement as “no-touch torture”.³⁶⁰ Such an environment of despair and loneliness, combined with poor, often degrading, and highly restrictive conditions, has been described as “an austere world in which condemned prisoners are treated as bodies kept alive”.³⁶¹ Scientific studies have shown that “after being subjected to only a few hours of solitary confinement, prisoners’ brain waves shift to a pattern of ‘stupor and delirium’, and that complete sensory deprivation causes hallucinations in as little as 48 hours”.³⁶² Because of this, many experts and academics have explicitly linked death row phenomenon to solitary confinement, and would like to establish a presumption that where there has been prolonged solitary confinement, the conditions of the death row phenomenon could be met.³⁶³

This view is strongly supported by the United Nations SRTs, Mr. Méndez and his distinguished predecessor Mr. Nowak, who have asserted solitary confinement used on death row to cause severe mental and physical suffering and condemned it “by

³⁵⁷ Human Rights Committee, *Views on Safaruo Kurbanova v. Tajikistan*, UN Doc CCPR/C/79/D/1096/2002 (12 November 2003) [7.8].

³⁵⁸ Macalesher, above n 5.

³⁵⁹ ACLU, above n 47.

³⁶⁰ Alfred W. McCoy, *A question of torture: CIA interrogation from the cold war to the war on terror* (Metropolitan Books, American Empire Project ed., 2006).

³⁶¹ Hood, above n 1.

³⁶² Jeffrey Kluger, “Are Prisons Driving Prisoners Mad?” (2007) *Time Magazine*, 26 January 2007 <www.time.com/time/magazine/article/0,9171,,158204,00.html> at 14 June 2016.

³⁶³ *Ibid.*

definition prolonged and indefinite and thus constituting cruel, inhuman or degrading treatment or punishment or even torture”.³⁶⁴

Mr. Méndez, in his 2012 report on the death penalty,³⁶⁵ specifically addressed the detrimental and tortuous effects of solitary confinement in relation to the death row phenomenon.³⁶⁶ He stressed the “serious psychological and physiological adverse effects solitary confinement has on individuals”.³⁶⁷ The report echoed the stance of the Committee Against Torture by finding that “prolonged solitary confinement amounts to acts prohibited by Article 7 of the ICCPR, and consequently to an act as defined in Article 1 or Article 16 of the CAT Convention”.³⁶⁸ Mr. Méndez stated that “any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment, depending on the circumstances” and called on the international community “to agree to such a standard and to impose an absolute prohibition on solitary confinement exceeding 15 consecutive days”.³⁶⁹ This position is analogous to Mr. Nowak, who has repeatedly unequivocally stated that prolonged solitary confinement is cruel, inhuman or degrading treatment, and may amount to torture.³⁷⁰

Further, the Inter-American Commission on Human Rights (“IACHR”) also expressed concern over the excessive use of solitary confinement,³⁷¹ stating that “international human rights law establishes as a standard that the use of solitary confinement should be absolutely prohibited for death row and life-sentenced

³⁶⁴ Manfred Nowak, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, UN Doc A/HRC/13/39/Add.5 (5 February 2010).

³⁶⁵ Méndez, above n 194.

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*

³⁷⁰ Nowak, above n 364.

³⁷¹ Anna Conley, “Torture in US Jails and Prisons: An Analysis of Solitary Confinement Under International Law” (2013) 7 *Vienna Journal on International Constitutional Law* 415.

prisoners by virtue of their sentence”.³⁷² The IACHR went on to note that “solitary confinement should be used only in exceptional circumstances, for the shortest period possible and only as a measure of last resort”, and outlined “several minimum protections for prisoners in solitary, including judicial oversight, cells that meet minimum international standards, and strict medical supervision”.³⁷³

Holding prisoners in highly restrictive conditions of solitary confinement is also in direct conflict with the *United Nation Standard Minimum Rules for the Treatment of Prisoners*,³⁷⁴ which call for “a minimum suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering”.³⁷⁵ These rules establish a standard in which prisoners should be treated, such as proper cell size, no use of all dark cells as well as no use of permanently lit cells,³⁷⁶ access to outside exercise,³⁷⁷ hobbies and activities.³⁷⁸ Moreover, the *Istanbul Statement on the Use and Effects of Solitary Confinement*³⁷⁹ absolutely prohibits the use of solitary confinement for death row prisoners by virtue of their sentence.³⁸⁰

Although these sources are not legally binding, courts rely on them in cases dealing specifically with prisoners.³⁸¹ Further, these “non-binding norms have complex and potentially large impact on the development of international law” as a source of customary law and provide useful definitional contours for prohibition of torture.³⁸²

³⁷² Ibid.

³⁷³ Ibid.

³⁷⁴ *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council in its Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 <www.unhchr.ch/html/menu3/b/h_comp34.htm>.

³⁷⁵ Ibid.

³⁷⁶ Bradford, above n 6.

³⁷⁷ Ibid.

³⁷⁸ Ibid.

³⁷⁹ *The Istanbul Statement*, above n 195.

³⁸⁰ Ibid.

³⁸¹ Conley, above n 371, 427.

³⁸² Ibid.

Therefore, while no court has held that the conditions of confinement on death row *by itself* give rise to the phenomenon,³⁸³ international tribunals generally find solitary confinement for all prisoners contrary to applicable law “where it is unnecessarily prolonged without justification, and where the totality of conditions of confinement cross a threshold into unacceptable cruelty”.³⁸⁴

3.5. Does inmates’ psychological deterioration violate international law?

The Privy Council, in finding the detention on death row unlawful, had not taken into account any health deteriorations of the inmates, but instead based the finding of a violation solely on the delayed incarceration.³⁸⁵ Contrary, the ECtHR, giving legitimacy to the doctrine, identified the “ever present and mounting anguish of awaiting execution”³⁸⁶ as essential component in finding the death row phenomenon. The meaning of “anguish” entails in itself a severe mental or physical pain or suffering.³⁸⁷ However, since the ECtHR found the death row phenomenon based on the potential for harm in the future,³⁸⁸ Soering did not need to prove any deterioration to his health personally. Instead such anguish was presumed to be inherent in death row where detention is prolonged and under restrictive conditions.

In contrast, the HRC, in examining each case on fact specific basis,³⁸⁹ routinely insisted on prisoners to show that they are personally affected by the detention.³⁹⁰ It consistently ruled that delayed detention on death row does not *per se*, in the absence of further “compelling circumstances”, constitute cruel, inhuman and degrading

³⁸³ *McKenzie v Day*, 57 E3d 1461 (9th Cir. 1995).

³⁸⁴ Conley, above n 371.

³⁸⁵ *Pratt and Morgan*.

³⁸⁶ Soering [111].

³⁸⁷ Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/anguish>> at 25 June 2016.

³⁸⁸ Smith, above n 17.

³⁸⁹ *Williams v Jamaica*, Communication No. 609/1995, UN Doc CCPR/C/61/D/609/1995 (4 November 1997) [4.4].

³⁹⁰ William Schabas, *The abolition of the death penalty in international law* (Cambridge University Press, United Kingdom, 3rd ed, 2002).

treatment.³⁹¹ Taking into account that HRC approach is based on the case-by-case assessment, it is understandable that no list of compelling circumstances has been laid down.³⁹² However, the HRC has held that “compelling circumstances” are not the same as “deplorable conditions of detention” on death row,³⁹³ but in cases where the physical or mental health of the prisoner was a significant factor, the HRC had found violations, irrespective of the length of the detention on death row.³⁹⁴

Accordingly, in *Wilson v Philippines*,³⁹⁵ the HRC found that the prisoner’s mental state deteriorated severely during death row confinement. He suffered from extreme anxiety, depression and severe longstanding Post Traumatic Stress Disorder.³⁹⁶ His mental condition was further “exacerbated by his treatment in, as well as the conditions of, his detention, and resulted in documented long-term psychological damage to him”.³⁹⁷ The HRC concluded that these were “aggravating factors constituting further compelling circumstances” in addition to the 15 months on death row and found a violation of Article 7.³⁹⁸

In *Williams v Jamaica*,³⁹⁹ the HRC found that “the prisoner’s mental condition had seriously deteriorated during his seven-year incarceration on death row”.⁴⁰⁰ In addition, the State party had failed to investigate the author’s state of mental health

³⁹¹ *Reynolds v Jamaica* (No. 587/1994), UN Doc. CCPR/C/59/D/587/1994 [6.3]; *Williams v Jamaica*, Communication No. 609/1995, UN Doc CCPR/C/61/D/609/1995 [6.4]; *Sterling v Jamaica* (No. 598/1994), UN Doc. CCPR/C/57/D/598/1994 [8.1]; etc.

³⁹² Hood, above n 24, 293.

³⁹³ *Levy v Jamaica*, Communication No 719/1996, UN Doc CCPR/C/64/D/719/1996 (1998) [6.5]; *Morgan and Williams v Jamaica*, Communication No 720/1996, UN Doc CCPR/C/64/D/720/1996/Rev.1 (1998) [6.3]; *Clarence Marshall v Jamaica*, Communication No 730/1996, UN Doc CCPR/C/64/D/730/1996 (1998) [5.7]. Interesting though, in *Edwards v Jamaica* Comm. No. 529/1993, U.N. Doc. CCPR/C/60/D/529/1993.

³⁹⁴ *Eustace Henry and Everald Douglas v Jamaica*, Communication No 571/1994, UN Doc CCPR/C/57/D/571/1994 (1996) (“*Henry v Jamaica*”); *Brown v Jamaica*, Communication No 775/1997, UN Doc CCPR/C/65/D/775/1997 (1999) [3.10]; *Beresford Whyte v Jamaica*, Communication No 732/1997, UN Doc CCPR/C/63/D/732/1997 (1998).

³⁹⁵ No 868/1999, UN Doc CCPR/C/79/D/868/1999 (2003) [7.4].

³⁹⁶ *Ibid* [5.8].

³⁹⁷ *Ibid* [7.4].

³⁹⁸ *Ibid*.

³⁹⁹ Communication No 609/1995, UN Doc CCPR/ C/61/D/609/1995 (1997).

⁴⁰⁰ *Ibid*.

or provide adequate medical treatment for his mental condition while detained on death row.⁴⁰¹ The HRC considered serious deterioration of the prisoner's mental health as a "compelling circumstance" to reach the high threshold of the death row phenomenon.⁴⁰²

Serious deterioration of the prisoner's mental condition in *Francis v Jamaica*⁴⁰³ was also taken into account by the HRC in finding a violation. In that case the "mental health of the prisoner had significantly and seriously deteriorated during the detention, and he no longer behaved as a normal human, or even a normal prisoner".⁴⁰⁴

Given the importance of proving physical or emotional trauma before the HRC, it is not surprising that extradition case such as *Kindler v Canada*⁴⁰⁵ and *Cox v Canada*⁴⁰⁶ are consistently unsuccessful as they are based on potential harm to an individuals in the future. In both cases, the HRC reaffirmed its view of the need for applicants to show compelling circumstances in order to establish a violation. In ruling against a breach of Article 7, although the HRC acknowledged that "confinement on death row is necessarily stressful",⁴⁰⁷ but found nothing specific about the state of physical or mental health of the applicants to consider that their extradition to the US would otherwise amount to a violation.⁴⁰⁸ In that regards the HRC's approach differs greatly from ECtHR where the court found violation in *Soering*⁴⁰⁹ case "based on the potential for harm to an individual in the future - a breach of international law by reason of its foreseeable consequences".⁴¹⁰

⁴⁰¹ Ibid [6.5].

⁴⁰² *Henry and v Jamaica*, Communication No 571/1994, UN Doc CCPR/ C/57/D/571/1994 (1996).

⁴⁰³ *Francis v Jamaica*, Communication No. 606/1994, U.N. Doc. CCPR/C/54/D/606/1994 (1995).

⁴⁰⁴ Ibid [9.1]-[9.2].

⁴⁰⁵ Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991 (1993).

⁴⁰⁶ Communication No. 539/1993, UN Doc CCPR/C/52/D/539/19930 (1994).

⁴⁰⁷ Ibid [17.1].

⁴⁰⁸ Ibid [13.7].

⁴⁰⁹ 161 (1989) Eur Court HR (ser A).

⁴¹⁰ Bradford, above n 6.

Therefore, while the psychological or physical effects considered immaterial by the Privy Council, the ECtHR and the HRC give it great importance in finding the death row phenomenon. The ECtHR's approach is that severe psychological or physical trauma (when coupled with delayed detention under harsh condition) is inherent in death row and therefore prisoners are not required to prove specific detriment to their health. Conversely, the HRC's approach demands that before granting a relief a prisoner must show that they are specially and personally affected by the detention. This may be "no longer behaved as a normal human" as in *Francis v Jamaica*,⁴¹¹ or severe deterioration in physical health as in *Henry and Douglas v Jamaica*,⁴¹² or decline in mental state as in *Wilson v Philippines*.⁴¹³ Such threshold, to say the least, is unjust and inhuman.

The psychological research suggests that not every prisoner will react to the death row conditions in the same way (discussed in 2.3). Shalev stated that "how individuals will react to the experience of death row depends on personal, environmental and institutional factors, including their individual histories, the conditions in which they are held, the regime provisions which they can access, the degree and form of human contact they can enjoy, and the context of their confinement".⁴¹⁴ The experience of previous trauma, for example, will render the person more vulnerable.⁴¹⁵ Also, the damaging effects will be more severe in environments that are more oppressive and impose the most extreme deprivations. Some of the most problematic changes will emerge only after long-term exposure.⁴¹⁶

Therefore, it is hard to predict how an individual prisoner will react to the death row confinement. This becomes problematic in the legal context for inmates who may be unaffected by the death row imprisonment in some serious way, and whom may cope

⁴¹¹ Communication No. 606/1994, U.N. Doc. CCPR/C/54/D/606/1994 (1995).

⁴¹² *Henry v Jamaica*, Communication No 571/1994, UN Doc CCPR/ C/57/D/571/1994 (1996).

⁴¹³ Communication No 868/1999, UN Doc CCPR/C/79/D/868/1999 (2003) [7.4].

⁴¹⁴ Shalev, above n 41.

⁴¹⁵ *Ibid.*

⁴¹⁶ Mushlin, above n 59.

better with the incarceration. As such it may be challenging, if not impossible, for them to establish death row phenomenon and receive a relief.

Just because a prisoner copes better with the adverse conditions, it does not mean that he or she is not suffering. People suffer differently, and because someone can tolerate harsh confinement better, it does not mean they should be subjected to such treatment. Subjecting condemned prisoners to conditions that are likely to lead to cognitive, emotional, and behavioural deterioration, and to result in other forms of potentially disabling psychological harm, is both unnecessary and inhumane. It is even more dangerous and unjustifiable than to provide relief to such prisoners only if they can prove the damage, in most cases irreparable. Such approach to establishing the death row phenomenon penalises hardy and strong prisoners.⁴¹⁷ At a minimum, it seems likely that individuals awaiting execution experience some kind of powerful psychological reaction to incarceration.⁴¹⁸ Psychological research already supports the idea that each component of death row phenomenon *may* have harmful effects⁴¹⁹ on the death row inmates. These effects are real, painful, damaging, and very few people emerge completely unscathed.⁴²⁰

The differentiation between strong and weak personalities is, therefore, simply wrong.⁴²¹ The approach of the HRC is inadequate as it sets too high a threshold for death phenomenon cases. It is against the notion of human rights to expect the applicants to show severe damage to themselves, often irreparable, in order to get a court's relief. The psychological suffering, experienced by death row inmates is not the punishment that these persons were sentenced to; their sentence was execution.⁴²² Such approach lacks imagination. Instead, effect upon the ordinary prisoner ought to

⁴¹⁷ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others* (2001) AHRLR 248 (ZwSC 1993).

⁴¹⁸ Smith, above n 17.

⁴¹⁹ *Ibid.*

⁴²⁰ Mushlin, above n 59.

⁴²¹ *Catholic Commission* [114].

⁴²² Bradford, above n 6.

be assessed rather than the actual effect,⁴²³ or alternatively, similarly to the ECtHR approach, it should be presumed that where there is a prolonged detention under harsh conditions, some psychological or physical suffering is inevitable.

Therefore, while the health repercussions are given great importance in establishing the death row phenomenon, there were no cases where death row detention was considered unlawful based solely on the health effects. The attempt to use these psychological effects, divorced from conditions and time on death row, materialised in the first death row ‘syndrome’ case. The death row “syndrome”, as opposed to “phenomenon”, has entered the US courts in relation to the case of a sexually sadistic serial killer, Michael Ross, in February 2005. Ross, who had supposedly attempted suicide three times while on death row,⁴²⁴ and in spite of personal opposition to the capital punishment, expressed repeatedly that he wished to waive his appeals and “volunteer” for execution.⁴²⁵

Indicating that Ross’s waiver might not be adequate, the judge in the case supposedly asked attorneys to explore the prospect that Ross was incompetent.⁴²⁶ Ross’s friends and family attempted a series of subsequent legal actions.⁴²⁷ They argued that Ross’s decision was spurred by a lack of competency resulting from a bunch of mental illnesses and death row syndrome.⁴²⁸ Subsequently, Ross was examined for four hours by Dr. Michael Norko, an experienced forensic psychiatrist, who had also examined Ross in the past. Dr. Norko found no active major psychiatric illness (other

⁴²³ Schabas, above n 4: the Zimbabwean Supreme Court in *Catholic Commission* questioned this approach, arguing that it penalised a hardy and strong prisoner. It, therefore, suggested that the likely effect upon the ordinary individual ought to be assessed rather than the actual effect.

⁴²⁴ *State v Ross*, 2005 (Conn. Super. Ct. Apr. 22, 2005); National Coalition to Abolish the Death Penalty, *Ross Case Highlights “Death Row Syndrome”* (2005) <<http://www.democracyinaction.org/dia/organizations/ncadp/news.jsp?key=1198&t>> at June 16 2016.

⁴²⁵ Smith, above n 17.

⁴²⁶ Andrew Cohen, “When a Killer Wants to Die” (2005), *CBS News*, 2 February 2005 <<http://election.cbsnews.com/stories/2005/02/02/opinion/courtwatch/main671161.shtml>> at 1 June 2016.

⁴²⁷ *Ross ex rel. Dunham v Lantz*, 408 F.3d 121 (Conn. 2005); *Re Ross*, 272 Conn. 674 (2005); *Ross ex rel. Smyth v Lantz*, 396 F.3d 512 (2d Cir. 2005).

⁴²⁸ Stephen Blank, “Killing Time: The Process of Waiving Appeal in the Michael Ross Death Penalty Cases” (2006) 14(2) *Journal of Law and Policy* 735.

than sexual sadism) and suggested that Ross was competent.⁴²⁹ Following the resolve that Ross was competent to waive his appeals, he was executed on May 13, 2005, after having spent eighteen years on Connecticut's death row.⁴³⁰

This practice of volunteering for execution, have become increasingly common. In the last 15 years in the US there were 67 inmates who have volunteered for executions.⁴³¹ Although delay is usually welcomed by the condemned individual, there are some who refuse all remedies against their sentence and plead to be executed promptly, perhaps simply expressing horror of any prolongation of the agony on death row. This agony haunts those sentenced to death, who are condemned not only to lose their lives but also to contemplate their fate. As Justice William J. Brennan of the US Supreme Court said in *Furman v Georgia*,⁴³² the "prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death".⁴³³ Years later, Justice Felix Frankfurter of the Supreme Court admitted that "the onset of insanity while awaiting execution of death sentence is not a rare phenomenon."⁴³⁴

Accordingly, the first attempt to establish a breach based solely on psychological effects, did not materialise into a human right violation. Taking into account the US courts non-persuasiveness, if not outright hostility, to the death row phenomenon cases in the past, such ruling in Ross's case is far from surprising.⁴³⁵ Following Ross's execution, some authors, like Stephen Blank, argued that "the death row syndrome could have been found present in the Ross's case and that the competency test currently employed by US courts does not adequately consider an inmate's

⁴²⁹ Schwartz, above n 28.

⁴³⁰ Death Penalty Information Center, *Execution Database* (2005) <<http://www.deathpenaltyinfo.org/getexecdata.php>> at 14 June 2016.

⁴³¹ *Ibid.*

⁴³² *Furman v Georgia*, 408 U.S. 238, 367-68 (1972).

⁴³³ *Jackson v Bishop*, 404 F.2d 571 (CA8 1968).

⁴³⁴ *Solesbee v Balkcom*, 339 U.S. 9, 14 (1950).

⁴³⁵ Sadoff, above n 21, 93.

motivation for ‘volunteering’, and threatens a State’s interest in having a non-arbitrary death penalty”.⁴³⁶

The relationship between death row phenomenon and volunteering may have constitutional implications.⁴³⁷ As Smith indicates, “if a phenomenon created by the justice system has the effect of somehow causing individuals to waive their constitutional rights, this may amount to coercion”.⁴³⁸ Such a claim could support an argument about the severity of death row in literally driving people to insanity.⁴³⁹ For example, it has been estimated that “as many as fifty per cent of Florida’s death row inmates become intermittently insane”.⁴⁴⁰ However, as already said, further extensive research is crucial, before these type of claims, based solely on the psychological effects, successfully advance in the international realm.

3.6. Summary - when does death row detention violate prohibition of torture?

As evident from the above examination, each court applies its own governing legal standard in what constitutes the death row phenomenon and renders death row detention unlawful.⁴⁴¹ The Privy Council found detention on death row to violate international law based solely on the element of delay before execution. However, such approach is flawed as it encourages States to execute inmates rapidly, preventing States from taking pro-inmate measures such as establishing moratorium on executions and affect prisoners’ rights to full appeal procedures.⁴⁴²

Moreover, while no court has held that conditions *on its own*, without prolonged detention or health effects, amount to the death row phenomenon, the standard of

⁴³⁶ Blank, above n 428.

⁴³⁷ Smith, above n 17.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ Ward, above n 155.

⁴⁴¹ Sadoff, above n 21.

⁴⁴² Ibid.

those conditions is given great importance in establishing the doctrine and finding death row detention unlawful. The United Nations SRT have asserted “solitary confinement to constitute cruel treatment or even torture, and called on absolute prohibition on solitary confinement exceeding 15 consecutive days”.⁴⁴³ Holding prisoners in highly restrictive conditions of solitary confinement is also in direct conflict with the *United Nation Standard Minimum Rules for the Treatment of Prisoners* and the *Istanbul Statement on the Use and Effects of Solitary Confinement*.

In relation to the psychological and physical effect of death row, no court has held that they *on their own* can amount to the death row phenomenon. The ECtHR’s approach is to consider the “anguish of awaiting execution” in combination with the conditions and time elements. As such, proof of psychological or physical trauma is not necessary. The HRC’s threshold is much higher in that prisoners must prove that they are specially and personally affected by the detention. Such threshold is unjust and inhuman. The psychological effects from living on death row should be assessed as potential effects upon an ordinary prisoner, rather than the actual effects. Death row inmates should not be expected to show irreparable damage to themselves in order to establish a violation.

The approaches that emerge from current jurisprudence of the death row phenomenon can be categorised into two groups: a time-based approach when long delays are in themselves cruel, inhuman or degrading treatment (as adopted by the Privy Council) and the approach that requires prisoners to prove the existence of circumstances over and above prolonged delay (views adopted by the ECtHR and the HRC). Kealeboga Bojosi termed these approaches “progressive” and “conservative”.⁴⁴⁴

Despite these divergent approaches to the exact parameters of the death row phenomenon, there is general acceptance that it might invoke the violation of the

⁴⁴³ Nowak, above n 364.

⁴⁴⁴ Bojosi, above n 14, 309.

prohibition against torture and cruel, inhuman and degrading treatment or punishment.⁴⁴⁵ Various international human rights instruments prohibit torture or cruel, inhuman or degrading treatment or punishment.⁴⁴⁶ This prohibition is also found in numerous domestic constitutions.⁴⁴⁷ Further, the prohibition against torture is regarded as having crystallised into a norm of customary international law.⁴⁴⁸ The importance of this is that, at international law, even countries that have not ratified the instruments prohibiting torture are nonetheless bound by the prohibition.⁴⁴⁹

The CAT Convention defines torture.⁴⁵⁰ The four elements of which are severe physical or mental suffering, intent, specific purpose and involvement of public official (discussed in 3.1). From the discussion of various psychiatric studies (2.2-2.4), it is very clear that, *firstly*, the death row phenomenon portrays a cruel picture of suffering: both psychological and physical.⁴⁵¹ The long delays, the conditions of confinement and the anguish of awaiting one's death, at minimum, individually or together result in some form of the psychological damage to the death row inmates.

Secondly, the restrictive conditions, that death row prisoners are subjected to, are imposed on them deliberately.⁴⁵² While one could argue that prison administrators only intend greater prison discipline and security to result from these restrictions, not psychological injury,⁴⁵³ this view is flawed.⁴⁵⁴ Inmates on death row frequently exhibit significant and highly visible signs of their psychological injuries,⁴⁵⁵ and the damaging results of death row are well documented by medical professionals. As such, prison administrators clearly have knowledge of these death row

⁴⁴⁵ Ibid.

⁴⁴⁶ Universal Declaration of Human Rights, Article 5; ICCPR, Article 7; ECHR, Article 3.

⁴⁴⁷ Bojosi, above n 14, 326.

⁴⁴⁸ Ibid.

⁴⁴⁹ Ibid.

⁴⁵⁰ CAT Convention, Article 1(1).

⁴⁵¹ Bradford, above n 6.

⁴⁵² Tracy Hresko, "In the cellars of the hollow men: use of solitary confinement in US prisons and its implications under international laws against torture" (2006) 18(1) *Pace International Law Review* 1.

⁴⁵³ Maria A. Luise, "Solitary Confinement: Legal and Psychological Considerations" (1989) 15 *New England Journal on Criminal and Civil Confinement* 301.

⁴⁵⁴ Hresko, above n 452.

⁴⁵⁵ Grassian, above n 28, 1452.

repercussions.⁴⁵⁶ It is impossible to know of certain death row condition creating almost guaranteed harm to inmates and yet continue to impose those conditions without the intent. Therefore, this knowledge of likely pain and suffering seemingly fulfils the intent element of torture.⁴⁵⁷ Article 1 of the CAT Convention implies that intent may be fulfilled by “consent or acquiescence”.⁴⁵⁸ Therefore, acting “intentionally” can mean acting purposely or knowingly.⁴⁵⁹ Thus, knowing that psychological injuries will result from death row, prison administrators would likely be held to have “intent” under international law.⁴⁶⁰

On the other hand though, the definition of torture also expressly excludes pain or suffering incidental to lawful sanctions.⁴⁶¹ This is very crucial in the context of the death row phenomenon.⁴⁶² If sanction is lawful, than it is difficult to establish the specific intent. In the discussed cases, there appears to be consensus that “a certain amount of mental anguish or suffering is incidental to the imposition of the death penalty”.⁴⁶³ If this is accepted and it is also accepted that the death penalty can be a lawful punishment, then it might be difficult to insist that the inevitable confinement to death row may invoke a violation of the prohibition against torture.⁴⁶⁴ Nevertheless, as already discussed (in 3.1), one of the distinctions between torture and inhuman treatment is that torture requires specific intent. Therefore, if such proposition is accepted, the treatment of death row inmates may still amount to inhuman treatment, which does not entail a requirement of intention.⁴⁶⁵

⁴⁵⁶ Hresko, above n 452.

⁴⁵⁷ Ela Grdinic, “Application of the Elements of Torture and Other Forms of Ill-Treatment, as Defined by the European Court and Commission of Human Rights” (2000) 23 *Hastings International and Comparative Law Review* 217, 228.

⁴⁵⁸ CAT Convention, Article 1.

⁴⁵⁹ Hresko, above n 452.

⁴⁶⁰ Ibid.

⁴⁶¹ Bojosi, above n 14, 327.

⁴⁶² Hresko, above n 452.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid 328.

Thirdly, the conditions that inmates experience on death row are imposed on them as a form of punishment, and therefore for a specific purpose within the meaning of the CAT convention.⁴⁶⁶ For example, automatic solitary confinement is inflicted on inmates merely because of their sentence. Statistics confirm that death row prisoners are amongst the best behaved within the prison population, and, therefore, are not required to be segregated from others. *Lastly*, it is prison administrators who impose highly restrictive death row conditions on inmates. They are employees or contractors of a State government.⁴⁶⁷ Accordingly, death row contravenes international laws prohibiting torture.⁴⁶⁸ Inmates on death row fulfil all four elements of torture as a form of punishment, intentionally imposed by instruments of the State, which inflicts severe psychological injury on inmates.⁴⁶⁹

Reflecting back to the divergent court approaches, the stance adopted by the time-based approach is difficult to support in dealing with the prohibition against torture and cruel, inhuman or degrading treatment.⁴⁷⁰ The definition of torture has four distinct elements, three of which would not be satisfied when the time-based approach is adopted (as it is not important to show psychological or physical harm, and it is hard to establish intent and purpose when an inmate is merely availing himself of available appeal options). In this regard, the conservative approach appears to be more attractive to the extent that it requires allegations and proof of circumstances over and above prolonged delay in detention.⁴⁷¹ It is evident that the emphasis should not be on delay, but rather on the actual effects of detention on death row on death row prisoner as a result of factors like treatment, conditions on death row and the prisoner's personal circumstances.⁴⁷² The severe changes in the mental health of persons in as little as 48 hours of being subjected to segregation are well established, and courts should find a human right violation in cases where

⁴⁶⁶ CAT Convention, Article 1.

⁴⁶⁷ Hresko, above n 452.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *Ibid.*

⁴⁷¹ Bojosi, above n 14, 330.

⁴⁷² *Ibid.*

solitary confinement is used. Therefore, it should be immaterial whether there is delay or not. It should equally be immaterial, in the event there is delay, whether the inmates contributed to delay or not.⁴⁷³ The alternative approach is one that does not only require proof of any delay.⁴⁷⁴ This does not mean that a death row inmate would be prevented from proving that in his case, delay on its own subjected him to the death row phenomenon.⁴⁷⁵ A prisoner should be able to prove that certain circumstances, which may include delay, have subjected him to mental and/or physical suffering.⁴⁷⁶

Between divergent court approaches in finding death row incarceration amounting to a breach of international law and the brutal picture of the effects of death row phenomenon on inmates and, what also seems to be missing is the basic human rights norms that are essential to human dignity. They are universal, indivisible and non-derogable. They are not optional standards. They are fundamental minimum standards binding on all States by virtue of their membership in the community of nations.⁴⁷⁷ While inmates may lose their right to free movement, they maintain other rights as human beings.⁴⁷⁸ Though, while retentionist countries continue living under the guise of ethical relativism, there is not a universal ethical context in which to view the rights of all death row prisoners.⁴⁷⁹

⁴⁷³ Ibid.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ David Matas, "The death penalty as a violation of International Human Rights" (1994) 22 *American Journal of Criminal Law* 254; Enid Harlow, David Matas and Jane Rocamora, *The Machinery of Death: A Shocking Indictment of Capital Punishment in the United States* (Amnesty International Publications Department, New York, 1995).

⁴⁷⁸ Bradford, above n 6.

⁴⁷⁹ Matas, above n 477.

4. HOW TORTURE AND INHUMAN TREATMENT CAN BE AVOIDED IN DETENTION ON DEATH ROW?

After considering the health effects caused by death row phenomenon (discussed in 2.2.3-2.4.2), and how much importance each element is given by courts in finding death row detention unlawful (discussed in 3.3-3.6), the analysis will proceed to a final stage of examining whether it is actually possible to impose the death penalty in a way as to not violate a prisoner's right.

Hypothetically, in order to avoid triggering the death row phenomenon, it seems that at least the death row conditions need to be drastically improved or the time inmates are held in such conditions reduced. Detailed discussion of "potential improvement" of these two components and consequential outcome follow below.

4.1. Does reducing time prisoners spent on death row avoid the death row phenomenon?

While reducing the waiting time before execution could arguably avoid the death row phenomenon, it will certainly interfere with the due process requirements and discourage States from taking pro-inmate measures such as imposing moratorium on executions.⁴⁸⁰ Further, attempt to reduce a time on death row or setting a timeframe, within which executions are ought to be completed, can actually result in denying prisoners their human rights. As such, following the decision in *Pratt and Morgan*⁴⁸¹ a certain political backlash was evident in some countries, which resulted in the withdrawal of the valuable right of an individual before international tribunals. For instance, in October 1997, the Government of Jamaica became the first State to denounce the Optional Protocol to the ICCPR⁴⁸² and thereby taking away

⁴⁸⁰ Sadoff, above n 21.

⁴⁸¹ [1993] UKPC 1 (2nd November, 1993).

⁴⁸² Ibid.

individual's right of petition to the HRC.⁴⁸³ This move was widely seen as a reaction to the Privy Council's ruling, as Jamaica became concerned about its capacity to complete the entire appeals process within the time limit set by the Privy Council.⁴⁸⁴ In May 1998, for similar reasons, Trinidad and Tobago denounced the Optional Protocol to the ICCPR and became the first State to withdraw from the American Convention on Human Rights.⁴⁸⁵

Therefore, reducing time on death row to some specific guideline in an attempt to comply with international law can actually create an opposite effect of infringing inmates' other fundamental rights, such as rights to full appeal procedures, including hearings when additional evidence discovered years later. Further, "it encourages countries to expedite the implementation of the death penalty, effectively assigning a higher priority to speed than to accuracy".⁴⁸⁶ Perhaps, this finding also leads to a conclusion that countries respecting human rights will be unable to impose the death penalty without unconstitutionally long delays, and therefore suggests that the death penalty cannot be imposed in way that does not interfere with the rights of the inmates.⁴⁸⁷

4.2. Does changing conditions on death row avoid death row phenomenon?

Changing conditions on death row and preventing automatic segregation of death row prisoners can ensure a better compliance with international legal standards such as *United Nation Standard Minimum Rules for the Treatment of Prisoners* and the *Istanbul Statement on the Use and Effects of Solitary Confinement*. The United Nations SRT also called on a "complete ban on the use of solitary confinement

⁴⁸³ Ibid.

⁴⁸⁴ Natalia Schiffirin, "Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights" (1998) 92 *American Journal of International Law* 563.

⁴⁸⁵ Ibid 423.

⁴⁸⁶ *Johnson v Jamaica*, Communication No. 588/1994, UN Doc CCPR/C/56/D/588/1994 (1996).

[8.2]-[8.6].

⁴⁸⁷ Schabas, above n 4, 98.

beyond 15 days”.⁴⁸⁸ While these are not binding sources of international law, they are meant to apply political pressure on countries in upholding individual’s rights and set as universally desirable standards.

However, even if conditions on death row could be improved, avoidance of the death row phenomenon may still not be possible due to psychological effects resulting from constant living with the imminent death. Although with the current limited research drawing firm conclusions in this regard is impossible.

During this study, in an attempt to assess whether improving conditions of death row can potentially improve the psychological state of the inmates, three death row prisoners in one of the death penalty States in the US⁴⁸⁹ were asked to participate in the questionnaire about their experience.⁴⁹⁰ These death row inmates brought legal action challenging the conditions of their confinement, in particular solitary confinement.⁴⁹¹ As a consequence, they were able to get a settlement as a result of the legal case and a subsequent transfer to a better facility.

The three prisoners were moved from “Maximum Security Restrictive Housing” to “Custody Management Control Units”. In “Restrictive Housing” prisoners were locked for 23 hours a day without outdoor physical activity and only allowed to exercise in another cell. They had no access to fresh air or sunlight. While “Management Control Units” can still be described as solitary confinement, conditions there are less restrictive. The inmates were able to have access to an

⁴⁸⁸ Méndez, above n 194.

⁴⁸⁹ The name of the state is purposefully withheld to protect the identity of the participants.

⁴⁹⁰ For the study to occur, the permission was obtained from the Executive Director of the State’s Department of Corrections. The prisoners were provided with the questionnaires and consent forms so that they could agree or refuse to be part of the study. The consent form further explained the reasons for the study. The participants were asked to sign the consent form if they did or did not want to participate and to answer the questions to the best of their knowledge and ability, and they were also informed that they could cease to answer questions any further at any given time in the questionnaire if they were discomforted.

⁴⁹¹ There is a recent wave of cases in the US with death row prisoners challenging their automatic segregation based solely on their death penalty sentence, such as *Lopez v Brown* (2015) Case4:15-cv-02725 N.D. Cal.

outdoor courtyard with some gym equipment, twice as large as the exercise room at the previous facility, access to sunlight and fresh air. Before, the only access to sunlight had been their small and barred prison windows. In “Management Control Units”, inmates were also permitted to leave their cells for up to four hours per day and have contact visits with their family members.

The main aim of the written questionnaire was to assess what role conditions play on an overall wellbeing of the death row inmates by examining how their experience had changed following the transfer. Two out of the three inmates have agreed to participate and provided written answers to the questions about the change in their wellbeing after the transfer.

Following the transfer, both inmates noted positive effects on their mental state as a result. In particular they credit their better emotional state to the ability to be out of their cells for longer period of time than previously; walking around the pod freely; the possibility to sit at the table with someone and eat together; and being able to hug their family members, take photos together and have face-to-face communication during visits. “Just all these little things, that most people in prison normally do”, and the inmates were not permitted before the transfer, “made life on death row a lot more bearable”. One prisoner wrote that it made him feel “less like an animal that nobody wanted to be around”. “We could go outside and feel sunlight on our faces. We had a jungle gym to work out. Just being able to move around without being treated like you are going to snap and harm someone, can make life more tolerable”. The other prisoner noted that these changes made him feel as if he was “considered human enough or worthy enough” to be allowed those privileges. Because of it the days were faster and he felt healthier.

Interestingly though, despite noting the positive psychological changes following the transfer, the inmates also stressed that just because they got some freedom, life on death row was still hard. Even with extra freedom it only made the situation “just bearable”. Perhaps indicating that psychological anguish from living under the

sentence of death is still making the life hard. One prisoner described one of the most difficult things on death row as “not knowing the future in general - it is always like a cloud around me”. The second prisoner described it as a “cloud of death”.⁴⁹²

Their experience on death row provides an interesting insight into how less restrictive conditions can have a positive effect on the inmates’ psychological state. While the findings are very limited and representative only of the views of the two death row inmates, they are nevertheless important in the better understanding of the effects of death row confinement, even with improved conditions. The findings, although limited, suggest that even if States improve the conditions, the psychological anguish from awaiting execution may be too much to bear. This, however, without further medical research is hard to establish.

While we know that many inmates today live on death row for many years, we do not know whether there is a measurable psychological response to the anguish of awaiting one’s death.⁴⁹³ In other words, we do not know whether the death row phenomenon needs to be accompanied by the conditions and time spent on death row, or whether it can exist in the good prison conditions.⁴⁹⁴ While it is possible to make prognosis about the likely effect of living under sentence of death as an individual free-standing component, no study has explored it in significant detail.⁴⁹⁵

This also explains why death row “syndrome” cases based exclusively on psychological effects are not successful before the courts. This shift in language “appears to have thrust the legal concept forward much more quickly than the fields

⁴⁹² Following recent prison reform and the move of all “Management Control Units” into the Correctional Institution the offenders were originally held in, these offenders were moved back to the original Correctional Institution as well. Due to the facility and outdoor recreation yards being under construction, the death row inmates are temporarily do not have access to the outdoor exercise. The construction anticipated to be done by this December 2016. In the meantime, they are getting outdoor recreation through areas that are within the prison but open to the sky only.

⁴⁹³ Smith, above n 17.

⁴⁹⁴ Ibid.

⁴⁹⁵ Ibid.

of psychology and psychiatry are able to follow”.⁴⁹⁶ As such, psychological research to confirm the existence of death row “syndrome” follows far behind the legal usage of the term.⁴⁹⁷ This information would assist in development of the concept, particularly in light of the minimal psychiatric and clinical studies involving death row prisoners.⁴⁹⁸ Such scientific data is essential in determining whether certain experiences actually constitute a structural phenomenon or syndrome, or whether it simply shows a particular inmate’s personal circumstances.⁴⁹⁹ This current detachment between psychology and law in relation to death row phenomenon introduces highly problematic dissonance into an already complex legal arena.⁵⁰⁰

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid.

⁴⁹⁸ Jeremy A. Blumenthal, “Law and the Emotions: The Problems of Affective Forecasting” (2005) 80 *Indiana Law Journal* 155.

⁴⁹⁹ Smith, above n 17.

⁵⁰⁰ Ibid.

5. CONCLUSION

Examination of medical studies in relation to the psychological and physical health of death row offenders depicts a brutal picture of suffering. Death row emerges as an environment in which prisoners feel impotent, afraid and alone, defenceless against their keepers and unable to alter their fate; “some prisoners are reduced to little more than the living dead”.⁵⁰¹

Long delays, restrictive conditions of solitary confinement and the anguish of awaiting one’s death, make the confinement of prisoners on death row in conflict with international norm prohibiting torture or inhuman treatment. In attempt to prevent such torture, the death row phenomenon has gained wide recognition by medical and legal professionals, United Nations experts and national and regional courts. However, divergent approaches amongst courts to what actually constitutes the death row phenomenon have led to an absence of clear-cut lines on when death row detention becomes unacceptable.⁵⁰²

This thesis attempted to answer whether the death penalty can be imposed on inmates without subjecting them to torture or inhuman treatment while awaiting execution on death row. It concludes that even if retentionist countries substantially improve the conditions on death row, there are strong indications that anguish from awaiting execution over long periods of time may be sufficient to give rise to the death row phenomenon and thus declare death row incarceration illegal. Although drawing a firm conclusion with minimal psychiatric and clinical research involving death row inmates is impossible, some findings and research already point in the direction that imposing death penalty in humane way is impossible.

Further, while reducing the time spent on death row can potentially navigate the death row phenomenon, such measure will result in breach of other prisoner’s rights

⁵⁰¹ Vogelmann, above n 147.

⁵⁰² Penal Reform International, above n 263.

such as the right to exercise their appeal options to the fullest and discourage countries from implementing pro-inmate measures such as moratorium on executions. Perhaps, this finding further leads to a conclusion that the death penalty cannot be imposed in a way that does not interfere with the rights of the inmates. As the author David Pannick has argued, “A legalistic society will be unable to impose the death penalty without an unconstitutionally cruel delay, and hence it will be unable to impose the death penalty at all”.⁵⁰³

The essential principle is that “a death row prisoner is sentenced to execution, not to lengthy periods of harsh treatment, followed by execution”.⁵⁰⁴ The repercussions of the death row phenomenon have been determined to be “a second punishment inflicted upon death row inmates”.⁵⁰⁵ Executing persons subjected to such treatment is “inconsistent with the purposes of the death penalty, as the prescribed punishment was death, not torture followed by death”.⁵⁰⁶ As the Indian Judge Krishna Iyer put the matter bluntly in the case of Rajendra Prasad, who had lived with the impending hanging for six years: “he must, by now, be more a vegetable than a person and hanging a vegetable is not the death penalty”.⁵⁰⁷

“The one consideration that must not be forgotten in all of this is that prisoners are human beings”.⁵⁰⁸ Prisoners are still humans, entitled to respect; regardless of what crime they may have committed, they remain persons.⁵⁰⁹ To talk of death row that is not cruel and inhuman is an oxymoron, a self-contradiction. The qualitative findings strongly point in that direction. What is left is for the psychology to bridge the gap and support the already legally advanced use of the death row phenomenon.

⁵⁰³ Schabas, above n 4, 98.

⁵⁰⁴ Hudson, above n 7, 836.

⁵⁰⁵ Bradford, above n 6.

⁵⁰⁶ Hudson, above n 7, 836.

⁵⁰⁷ Schabas, above n 4, 99; *Rajendra Prasad v State of Uttar Pradesh* [1979] 3 SCR 78 [130].

⁵⁰⁸ Bradford, above n 6.

⁵⁰⁹ *Ibid.*

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