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**The Death Row Phenomenon:
Examining the Concept from a Human Rights
Point of View**

Seminar Paper

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Table of Contents

Introduction	1
I. Definition and Key Elements.....	2
A. The Temporal Element.....	3
B. The Physical Element	4
C. The Experiential Element	5
D. The Death Row <i>Syndrome</i>	6
II. The Death Row Phenomenon from a Human Rights Perspective	8
A. The European Court of Human Rights.....	8
B. The UN Human Rights Committee.....	9
C. The UN Special Rapporteur on Torture.....	11
III. Conclusion	13
Bibliography.....	I

Introduction

*"I feel that it's bad enough
they're going to kill me;
they could at least treat me like
a human being until that time."*

Words of a death row prisoner,
Holman Prison, Alabama

Whilst global developments unmistakably point towards the general abolition of the death penalty, a number of countries, including the United States (U.S.), still sentence people to death and carry out executions.¹ Moreover, a consensus of qualifying capital punishment as a human rights violation per se has not yet materialised, albeit states' discretion as to its implementation is getting more and more restricted.²

The seminar paper at hand, however, is not concerned with the question whether the death penalty breaches international human rights norms in principle, but approaches the issue from another point of departure. Leaving aside aforementioned general debate, the focus is laid on *how* capital punishment cases are dealt with and looks primarily at prevailing conditions on death row. Surveys show that death row prisoners are to a vast extent exposed to living under very harsh circumstances for increasingly longer periods of time. Their confinement is marked by being locked up in very small, often solitary cells, where access to any kind of activities or social contacts is severely restricted.³ Given this scenario, arguments arose that whilst the death penalty might be considered lawful still, the conditions and lengthy delays attached to it are not, and can in fact amount to torture or other cruel, inhuman or degrading treatment or punishment. In trying to conceptualise this claim, the notion "death row phenomenon" has been introduced

¹ Cf. Amnesty International, Death Sentences and Executions, AI Index: ACT 50/001/2014 (Public), 26 March 2014, at <http://www.amnestyusa.org/sites/default/files/act500012014en.pdf> (consulted on 28 April 2014).

² Méndez, Juan. E., 2012, p. 2.

³ Cf. for the U.S.: ACLU, 2013, p. 4f; Center for Constitutional Rights, 2011, p. 2f.

as a description of the accumulation of circumstances typically related to death row confinement and as a legal doctrine that labels said combination as a violation of human rights.⁴

In the course of this paper, attempts are made to clarify the content and scope of the concept and to outline its key components as commonly received (I.). Following this, selected decisions of international and regional bodies and tribunals are presented in order to illustrate their positions on the death row phenomenon (II.). The overall aim is to figure out whether a trend towards recognising the doctrine as amounting to a human rights violation can be detected, which in turn could serve as yet another valuable argument for abolishing the death penalty altogether.

I. Definition and Key Elements

Before opening the debate on the legal qualification of the death row phenomenon, it is crucial to understand what is generally understood by this concept. In the present chapter, I will hence attempt to provide a definition of the phenomenon which shall reflect the predominant opinion currently held within academia and courtrooms respectively.

Whilst a universal definition of the term has not yet been developed and will most likely not be established in the near future, it can be seen that the overwhelming opinion considers the death row phenomenon as comprising of at least two separate components, i.e. the length of time spent on death row, and the harsh conditions such prisoners are typically exposed to.⁵ Hudson, for instance, defines the concept as "prolonged delay under the harsh conditions of death row"⁶.

⁴ Bojosi, 2004, p. 304f.

⁵ Smith, 2008, p. 239.

⁶ Hudson, 2000, p. 836.

Additionally, most scholars as well as the European Court of Human Rights (ECtHR)⁷ additionally include the psychological effects that are related to living under the sentence of death as another essential part of the phenomenon.⁸ Following latter approach, I will now discuss the abovementioned three distinct elements in more detail.

A. The Temporal Element

The temporal element refers to the time span between the sentence and the actual execution. Whilst in the 19th century, executions were usually carried out within hours or days after the person had been sentenced to death,⁹ this interval has been increasing steadily and on a global basis.¹⁰ For practical reasons, the following remarks are limited to the U.S. as a retentionist country in which considerable delays on death row have become a cause for concern.

According to the U.S. Department of Justice, the average time spent on death row has been rising from 74 months in 1984 to 198 months in 2011¹¹. In other words, such inmates are subjected to living under the very stringent death row prison regime for not less than 16.5 years on average. In search for an explanation, this development is often connected to changes in the procedural and legal sphere, but can also be attributed to a shift in attitude towards the death penalty within society as a whole. First of all, the growing scepticism amongst the population tempts state officials to make use of their powers to prevent executions from effectively taking place, such as granting stays or issuing moratoria.¹²

⁷ See *Soering v. United Kingdom* (ECtHR, 1989).

⁸ See e.g. Center for Constitutional Rights, 2011, p.6; Harrison and Tamony, 2010, p. 3.

⁹ Death Penalty Information Center, Time on Death Row, at <http://www.deathpenaltyinfo.org/time-death-row> (consulted on 22 April 2014).

¹⁰ Supra note 4, p. 307.

¹¹ U.S. Department of Justice, Capital Punishment, 2011 - Statistical Tables, 16 July 2013, at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4697> (consulted on 22 April 2014).

¹² Supra note 6, p. 835.

Moreover, the current judicial system and legal framework for capital punishment cases in the U.S. doubtlessly supports those excessive delays on death row.¹³ Despite the fact that new laws and procedural safeguards have largely been enacted in order to improve prisoners' rights, that very development has led to the prolonged time they are forced to live under the harsh conditions on death row. Numerous procedural steps that must or can be taken throughout capital trials and appeals, for example the assembly of a complete record for appellate review or the possibility to petition for postconviction relief, are to a large extent responsible for such huge delays.¹⁴ Although it could be argued that many of these 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.¹⁵

B. The Physical Element

Although the exact circumstances may vary from one institution to another, death row prison conditions are generally characterised by "a pervasive emphasis on rigid security, isolation, limited movement, and austere conditions"¹⁶. Recent studies show that the majority of states in the U.S. (out of which still conduct the death penalty) keep their death row prisoners in very small solitary cells for 23 hours per day, with half of them not even allowing inmates any physical contact with family or other visitors until up to one week prior to their execution.¹⁷ Generally speaking, imprisonment on death row is often marked by sensory deprivation due to prolonged solitary confinement, the denial of access to education, exercising, or other prison activities, and little or no contact with family/friends.¹⁸

¹³ Liebman, 2000, p. 2032.

¹⁴ Sharkey, 2013, p. 871.

¹⁵ Cf. Human Rights Advocates, 2010, p. 9; Supra note 6, p. 835; Supra note 4, p. 306.

¹⁶ Lombardi et al, 1997, p. 3.

¹⁷ Cf. NAACP Legal Defense and Educational Fund, Death Row USA, 01 April 2010, at <http://www.deathpenaltyinfo.org/death-row> (consulted on 22 April 2014); Supra note 3.

¹⁸ Cf. ACLU, 2013, p. 5.

Because it is shown that solitary confinement is applied quite comprehensively to prisoners on death row, I want to take up this issue and briefly discuss its effects on the individuals concerned. Research has shown that inmates living under this regime often show symptoms such as paranoia, hallucinations, suicidal thoughts, impaired concentration and loss of a sense of reality¹⁹. Notwithstanding the fact that conditions vary significantly, it is by now recognised that this type of imprisonment leads to serious health problems (in psychological, psychiatric, and physiological terms), which are primarily caused by the lack of any meaningful social contact.²⁰ Therefore, experts urge states to limit the practice of solitary confinement to the maximum extent possible, having in mind that this form of detention shall be considered as *ultima ratio* and shall only be applied to very exceptional cases. Moreover, *The Istanbul Statement* explicitly calls for an absolute prohibition of solitary confinement regarding death row and life-sentenced prisoners.²¹

C. The Experiential Element

As shortly introduced at the beginning of this chapter, the third component of the death row phenomenon deals with the psychological effects related to living under the death sentence. In fact, this element can be considered as being decisive for differentiating death row prisoners from other inmates, since (prolonged) solitary confinement is commonly applied to non-capital offenders as well.²² So besides living under harsh prison conditions for usually a very long period of time, what makes the death row phenomenon unique is "the anguish and mounting tension of

¹⁹ Harrison and Tamony, 2010, p. 4.

²⁰ Scharff Smith, 2006, p. 502f.

²¹ International Psychological Trauma Symposium Istanbul, The Istanbul Statement on the use and effects of solitary confinement, adopted on 09 December 2007, at http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf (consulted on 23 April 2014).

²² Cf. *supra* note 19, p. 3.

living in the ever-present shadow of death"²³, as the ECtHR pointed out appropriately.

Whilst the living conditions of death row inmates are by themselves often severe enough to trigger adverse effects on prisoners' health and mental stability (as explained above), the imposition of the death penalty entails yet another set of highly stressful factors for the individual. Especially the uncertainty of the exact date of one's execution and alternating feelings of hope and despair, are likely to lead to traumatisation.²⁴ Moreover - and even worse - death row prisoners are sometimes told to be executed on a specific day, but are then being granted a temporary stay or simply given another date at the last minute.²⁵ Living in constant indefiniteness, coupled with raising false hopes or being provided with wrong information, presumably further exacerbate the inmates' state of mind and thus constitute additional factors for individuals on death row committing (or at least considering) suicide or volunteering for execution by waiving their appeals.²⁶

D. The Death Row Syndrome

Although the terms "death row phenomenon" and "death row syndrome" are sometimes used interchangeably, I want to clarify any potential confusion and shortly underline the difference between the two concepts. Whilst the former refers to the conditions and its effects on death row prisoners, the term "death row syndrome" describes the psychological harms, including identifiable signs and symptoms, that can result from living under those circumstances for extended periods of time. However, notwithstanding the fact that there exists some clinical and psychiatric research and recognition of the syndrome, it is up to date not accepted as a mental health disorder by the American Psychiatric Association

²³ Supra note 3, para. 106.

²⁴ Supra note 4, p. 309.

²⁵ Center for Constitutional Rights, 2011, p. 5.

²⁶ See McMahon, 2006, p. 11: According to a study carried out in Florida, 42% of prisoners on death row had seriously considered suicide and 35% actually attempted it.

(APA).²⁷ Much more psychological research would be needed in order to establish it as an acknowledged and clearly defined illness. So far, both the phenomenon and the syndrome are still mainly used in the legal sphere, from which they also originate.²⁸

This being said, I want to mention one of the few studies that actually looked into the effects of death row confinement and how individuals cope with those conditions. Based on interviews conducted with 35 out of 37 prisoners on death row in Alabama, the author identified the following adverse psychological effects as pervading: a sense of helplessness and defeat; a sense of widespread and diffuse danger with an accompanying perception of helpless vulnerability; emotional emptiness characterised by loneliness and a deadening of feelings for self and others; and a decline in mental and physical acuity. Besides, their mental capabilities were said to have deteriorated in such a way comparable to senility.²⁹

In the present chapter, I wanted to delineate the key components of the death row phenomenon and provide an insight into current literature about its nature and effects. Whilst it is widely acknowledged that spending time on death row is highly encumbering for individuals and often accompanied by deteriorating mental and physical health, it is often far from easy to point out what is the exact cause for such developments. To my mind, however, the combination of the temporal, physical, and experiential element typically found in connection to capital cases and death row conditions, must be seen as principally responsible for the debilitating effects witnessed. Whether the death row phenomenon per se can be labelled as amounting to torture or other cruel, inhuman or degrading treatment or punishment, is another issue which will be investigated in the section that follows.

²⁷ Cf. supra note 5, p. 242f.

²⁸ Cf. supra note 7; Wallace-Wells, 'What Is Death Row Syndrome?', 01 February 2005, at http://www.slate.com/articles/news_and_politics/explainer/2005/02/what_is_death_row_syndrome.html (consulted on 24 April 2014).

²⁹ Cunningham and Vigen, 2002, p. 204, quoting Johnson, 1979, p. 179.

II. The Death Row Phenomenon from a Human Rights Perspective

After having laid the foundation by providing a basic understanding of the concept, I will now delve into the question of how the death row phenomenon is perceived and qualified under international (and regional) human rights law today. For this purpose, statements by the following organs, which have been confronted with the issue will be examined below: the United Nations (UN) Human Rights Committee (HRC), the UN Special Rapporteur on Torture (UNSR), and the ECtHR as it coined the term and paved the way for further discussion.

A. The European Court of Human Rights

Despite the fact that the ECtHR is not an international body, but oversees the compliance of 47 European states with the European Convention on Human Rights (ECHR), I want to depart from here since it was this court's jurisprudence that introduced the death row phenomenon as a legal doctrine and thus initiated its development and establishment across the globe.³⁰ In the well-known case *Soering v. United Kingdom*³¹, the ECtHR was confronted with the question whether the extradition of the applicant to the U.S. would breach Article 3 ECHR ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"). Soering was accused of murder and claimed that upon extradition he would face capital punishment and be put on death row in Virginia, which would give rise to the death row phenomenon in his particular case. The Court investigated the specific circumstances of the case very thoroughly and came to the conclusion that the prospect of the applicant being exposed to death row does indeed prohibit the UK to extradite Soering on the basis of Article 3 ECHR.³²

In its decision, the Court acknowledged the doctrine of the death row phenomenon, with its potential to amount to torture or inhuman or degrading

³⁰ Cf. supra note 6, p. 838.

³¹ Supra note 7.

³² Ibid., para. 111.

treatment. According to the judgment at hand, it views the following factors in combination as decisive: a) the very long period of time spent on death row; b) the extreme conditions, c) the ever present and mounting anguish of awaiting execution and finally d) the personal circumstances of the applicant.³³ As to the element of delay, the ECtHR adopted the position that the attributability of lengthy proceedings do not take on a significant role in its decision-making processes. By following the line of thinking previously presented³⁴, the Court appreciates that it is "part of the human nature that the person will cling to life by exploiting those safeguards to the full"³⁵.

From this judgment onwards, tribunals all over the world started to embrace this doctrine when dealing with death row cases and often quoted the Court's landmark ruling. By setting out the cornerstones of the phenomenon rather precisely, it undoubtedly facilitated the concept in gaining acceptance and in becoming well established in international law.

B. The UN Human Rights Committee

The HRC is a body of independent experts tasked with monitoring state parties' compliance with the International Covenant on Civil and Political Rights (ICCPR). As such, it is competent to receive and decide on individual complaints brought forward against states party to the Covenant and its Optional Protocol (i.e. momentarily 115 countries, the U.S. not included³⁶). The relevant provision in this context can be found in Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Over the last decades, the Committee has been invoked quite a number of times by death row prisoners who

³³ Ibid.

³⁴ See under Chapter I.A.

³⁵ Supra note 7, para. 106.

³⁶ Cf. UN Treaty Collection, 5. Optional Protocol to the International Covenant on Civil and Political Rights, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en (consulted on 25 April 2014).

claimed a violation of Article 7, mainly due to alleged deplorable living conditions and lengthy proceedings. In order to illustrate how the HRC has been handling such complaints, especially with regard to the death row phenomenon, its most informative statements will shortly be summarised in a chronological order.

Beginning with *Pratt and Morgan v. Jamaica*³⁷, the HRC had to decide whether excessive delays in the applicants' judicial proceedings constitute a violation of Article 7. In this regard, the Committee made it clear that they will not consider lengthy proceedings per se as constituting cruel, inhuman or degrading treatment. At the same time, however, they recognised that such delays in relation to capital punishment cases could actually amount to a violation, depending on specific circumstances of a case.³⁸ Additionally, they found a violation of Article 7 concerning the fact that the applicants were notified of having been granted a stay only 45 minutes prior to their scheduled execution, by acknowledging that the "issue of a warrant for execution necessarily causes intense anguish to the individual concerned"³⁹. So although the HRC did not mention the term expressly, it took into account that death penalty cases must be handled in a distinct way, having regard to the specific conditions prisoners on death row are exposed to.

Four years later, the Committee actually took up the term "death row phenomenon" by referring to the ECtHR in *Kindler v. Canada*⁴⁰, when deciding a case similar to *Soering* (see above). Although no violation was found in the specific instance, it is essential to note that the HRC recognised the existence of the concept and pointed out that the infliction of a death sentence may violate Article 7, dependent on "the relevant personal factors regarding the author, the specific conditions of detentions on death row, and whether the proposed method of execution is particularly abhorrent"⁴¹. Lastly, reference is to be made to *Francis v.*

³⁷ CCPR/C/35/D/210/1986, 06 April 1989.

³⁸ *Ibid.*, para 13.6.

³⁹ *Ibid.*

⁴⁰ CCPR/C/48/D/470/1991, 30 July 1993.

⁴¹ *Ibid.*, para 15.3.

*Jamaica*⁴² as the first case where the death row phenomenon in its entirety was said to amount to cruel, inhuman or degrading treatment. The Committee enumerated all key elements of the death row phenomenon and concluded that the combination of lengthy proceedings (temporal), harsh prison conditions (physical), and the deterioration of the author's mental state (experiential) establishes a violation of Article 7 in the specific case.⁴³

To wrap up, the following can be drawn from the views expressed above: First of all, the HRC has acknowledged the existence of the death row phenomenon as a concept that is severe enough to be able to violate the prohibition of torture. Secondly, the Committee has firmly established that it considers the temporal element by its own not as sufficient to breach Article 7. The imputability of long delays, however, does constitute an important factor when deciding over the existence of the death row phenomenon in such cases.

C. The UN Special Rapporteur on Torture

In the course of recent years, the UN Special Rapporteur on torture and other cruel, inhuman degrading treatment or punishment (UNSR) has devoted special attention to the issues of solitary confinement and the death penalty, which is why some of the views expressed therein will be pointed out below. In a nutshell, the UNSR (currently impersonated by Juan E. Méndez) is an independent expert, who is responsible for tackling questions relevant to torture. He does so by carrying out fact-finding country visits, issuing reports, and sending urgent appeals to states where people are at risk of being tortured.⁴⁴ Two such recently published reports will be examined below as they well reflect emerging trends in the field of interest.

⁴² CCPR/C/54/D/606/1994, 25 July 1995.

⁴³ *Ibid.*, para. 9.1.

⁴⁴ UN Human Rights, The Special Rapporteur on torture and other cruel, inhuman or degrading treatment. Introduction, at <http://www.ohchr.org/en/issues/torture/srtorture/pages/srtortureindex.aspx> (consulted on 26 April 2014).

Notwithstanding the fact that there exists a UN Special Rapporteur on Solitary Confinement, the UNSR published himself a report dedicated to the topic of solitary confinement seen in the light of the prohibition of torture.⁴⁵ Having due regard to the adverse psychological and physiological effects attributed to this form of detention, the UNSR in principal follows the views laid down in the *Istanbul Statement*⁴⁶ and calls upon states to work towards reducing the use of solitary confinement and finding less harsh alternatives.⁴⁷ Of particular interest within the scope of this paper is that indefinite solitary confinement and its usage as a form of punishment are both said to violate Article 7 ICCPR and shall thus be absolutely prohibited.⁴⁸

The second report was published in 2012 and deals with the relationship between the death penalty and the prohibition of torture.⁴⁹ In it, the UNSR specifically refers to the death row phenomenon as "a relatively new concept, albeit one that has become firmly established in international jurisprudence"⁵⁰. Similar to the HRC, the phenomenon is interpreted as a combined deprivation of basic human rights, with prolonged delay alone not being considered as amounting to inhuman or degrading treatment. But living conditions on death row are recognised as being particularly harsh and as potentially violating human rights on their own. Most important, however, is that Méndez explicitly spells out that the usage of solitary confinement on death row - due to its indefinite character - constitutes cruel, inhuman or degrading treatment or or even torture per se.⁵¹ Having in mind that this type of detention is known to be commonly applied on death row, many retentionist countries such as the U.S. are thereby indirectly accused of violating the prohibition of torture on a large scale.

⁴⁵ UN General Assembly, A/66/268, 05 August 2011.

⁴⁶ Supra note 21, see above under I.B.

⁴⁷ Supra note 44, para. 89.

⁴⁸ Ibid., para 72; 75; 84; 87.

⁴⁹ UN General Assembly, A/67/279, 09 August 2012.

⁵⁰ Ibid., para. 42.

⁵¹ Ibid., para. 48.

III. Conclusion

What can be derived from the above is first of all that the death row phenomenon has undeniably turned into a firmly embedded legal doctrine and has also gained some recognition in the area of psychiatry and psychology by now. Despite lacking consensus over its precise content, the prevailing opinion qualifies the death row phenomenon as amounting to torture or other cruel, inhuman or degrading treatment or punishment and thus a human rights violation.⁵² Whilst it is self-evident that tribunals have to decide over the existence of the phenomenon on a case-by-case basis, the overall acceptance of the doctrine supports individuals in their claims against being sentenced to death or extradited.

Moreover, as conditions on death row are known to be so deplorable that they often violate the prohibition of torture by themselves, plus with the common practice of solitary confinement widely condemned, retentionist countries will increasingly struggle to conduct the death penalty in a way consistent with human rights law. The death row phenomenon can thus serve as a strong argument for abolishing capital punishment for good, since its realisation amounts to torture or other cruel, inhuman or degrading treatment in the vast majority of cases.⁵³

⁵² Cf. e.g. supra note 4, p. 332.

⁵³ Cf. supra note 48, para. 75-76.

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