# *Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law?*

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## Abstract

*In countries retaining capital punishment, delay before execution is usually measured in years. A major cause of delay is the inmate's appeals to numerous tribunals. Excessive delay, even when caused by the prisoner, can form the basis of a human rights violation. The author points out that the human instinct to survive drives prisoners to appeal their death sentence. A state facilitating such a struggle may be in violation of human rights laws prohibiting cruel punishment. Specific cases demonstrate judicial acceptance of this doctrine, entitled the 'death row phenomenon'. The author illustrates the inmates' arguments, and the evolution of the judicial response. The author concludes that the 'death row phenomenon' is firmly established in international jurisprudence. The ramifications will pressure states to modify their procedures, or abandon capital punishment.*

A new legal doctrine is emerging for persons who challenge the legitimacy of capital punishment. Instead of direct attacks, which are largely unsuccessful in countries that retain the death penalty, prisoners are using collateral attacks based on the doctrine of the 'death row phenomenon'.[1]

The basic argument is that execution after prolonged delay under the harsh conditions of death row constitutes cruel and inhuman punishment. It is not the sentence of death that is being challenged, but the sentence of death after a torturous period of delay. Prisoners are slowly convincing a wide variety of tribunals that the death penalty must be exercised without undue and prolonged suffering.

The death row phenomenon has explicitly been recognized as a violation of human

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[1] The number of countries which retained and used the death penalty at the end of 1998 was 89. Amnesty International, *The Death Penalty Worldwide: Developments in 1998* (Amnesty International Report ACT 50/04/99, May 1999) at 3.

rights in several international and domestic tribunals. Tribunals which refuse to adopt the doctrine, especially the United States, point to the fact that the prisoner himself usually drives the delays by pursuing appeals. While this certainly is true, tribunals are beginning to accept that the struggle for life is part of human nature, and, as long as there is a chance to remain alive, a prisoner will exploit it to its fullest. The countries that facilitate this excess struggle, or directly cause delays, are being held in violation of numerous human rights laws.

The purpose of this paper is to demonstrate that the death row phenomenon is becoming firmly rooted in international law as a violation of a prisoner's human rights. The discussion will begin by providing the basis of the death row phenomenon, describing the doctrine and its underlying logic. Next, judicial acceptance of the doctrine will be examined in detail. Starting with the famous *Soering* decision,[2] the doctrine will be examined through the eyes of numerous domestic and international tribunals. It is submitted that these decisions will prove the viability of the death row phenomenon doctrine in international law. Further, this paper attempts to reconcile a difficult question within the doctrine: whether delay of a certain length (e.g., four years) is automatically a violation of a prisoner's human rights. Should it be? Finally, the paper reviews jurisprudence from the United States, where the doctrine has been rejected.

This paper does not purport to express any views on the merits of capital punishment. It is the agonizing delays prior to execution that will be called into question as a violation of human rights. To this end, a description of the death row phenomenon is in order.

## 1 Description of the Death Row Phenomenon

What exactly is the death row phenomenon? Does it consist of the long wait which a prisoner endures on death row, or is it the brutal, dehumanizing conditions of imprisonment? Although the phrase is often used without precision, an accurate definition should account for both the delay and the conditions of imprisonment.

### A *The Element of Delay*

The first consideration, delay, is a fairly recent development. In the nineteenth century, executions took place within days or even hours of a sentence of death. However, delays have steadily increased in length, and normally are measured in years. Consider the United States, where the average length of time between sentence and execution has steadily increased from 51 months in 1977, to 133 months in

[2] *Soering v. United Kingdom*, ECHR (1989), Series A, No. 161; (1989) 28 ILM 1063; (1989) 11 *European Human Rights Reports* 439.

1997.[3] Somehow, it now takes the United States over 10 years to execute a death row inmate. What promotes this increased delay in the US, and in other countries?

The lengthy delays are predominately caused by three factors. First, support of the death penalty is waning. State officials are more cautious in their approaches to executions, and politicians are sensitive to public opinion. When an official (such as a state governor in the US) wants to avoid responsibility for executing a prisoner, he can grant stays, remanding the case for further review, which the prisoner gladly accepts. Furthermore, officials often call for moratoria, which are designed to halt executions while the effects of the death penalty are reviewed.[4] California provides a good example. Amid public support for a moratorium,[5] California carried out no executions in 1997, although it led the US with 486 prisoners waiting on death row.[6]

The second factor for delay is the increase in laws which protect a prisoner's rights. In addition, an increase in appeals to human rights tribunals, such as the United Nations Human Rights Committee, has lengthened the time needed to dispose of a case. 'Ironically, then, 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.'[7] The increase in human rights protection is having a backlash effect in some countries, which are withdrawing from international human rights conventions such as the American Convention on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights.[8]

The third factor for delay is the prisoner's willingness to accept, and even encourage, delay. Even if delay constitutes cruelty, prisoners are unwilling to accelerate the processes that tend to lead to their death. The instinct to survive forces prisoners to welcome otherwise intolerable delays.

## B *The Effect of Prison Conditions*

'Death row' refers to the area in a prison which houses inmates awaiting execution.[9] Aptly described as a prison within a prison, due to the strict security and minimal freedoms, death row is often considered an institutionalized hell. The strict regime is

[3] Bureau of Justice Statistics, Capital Punishment, 1997, Time under Sentence of Death Sentence and Execution, by Race, 1977–1997, 20, Table 12.

[4] W. Schabas, *The Death Penalty as Cruel Treatment and Torture* (1996) 97–98.

[5] *The Catalyst: A Monthly Bulletin About Social Issues and the Death Penalty in California*, 23 March 1999, available online at www.deathpenalty.org/newsninfo/catalyst/1999/mar99.html.

[6] See Bureau of Justice Statistics, Capital Punishment, 1997, Executions During 1997, and Number of Prisoners under Sentence of Death, 1.

[7] Schabas, *supra* note 4.

[8] See Amnesty International, *Jamaica, Trinidad and Tobago and Guyana Unacceptably Limiting Human Rights Protection* (Amnesty International Report 05/01/99). See also Schiffrin, 'Jamaica Withdraws the Right of the International Petition under the International Covenant of Civil and Political Rights', 92 *AJIL* (1998) 563.

[9] For an in-depth description of conditions on death row, see Amnesty International, *Conditions for Death Row Prisoners in H-Unit, Oklahoma State Penitentiary* (Amnesty International Report AMR 51/35/94).

usually justified by the explanation that a prisoner on death row has nothing to lose, and may be capable of anything.

Words such as harsh and brutal are often used, but they cannot capture the prisoner's transformation from human being to caged animal. Amid countless horror stories from prisoners on death row, a terrifying vision of the system emerges. Prisoners are usually confined to small cells for up to 23 hours a day, while reading materials and contact with others is severely restricted. The prisoner's mind has little to contemplate except the crimes which have been committed, the impending execution, and the chances of a successful appeal. Many times, prisoners will face the moment of their execution, only to have a last minute stay granted, forcing them to relive their suffering until the next execution date.

These conditions can easily lead to physical and mental deterioration. Some prisoners are reduced to little more than the living dead. As viewed by an Indian judge, '[the prisoner] must, by now, be more a vegetable than a person and hanging a vegetable is not death penalty'.[10] Executing such persons is inconsistent with the purposes of the death penalty, as the prescribed punishment was death, not torture followed by death.

### C *Forming a Definition*

With the above considerations in mind, it is submitted that the death row phenomenon is to be defined as prolonged delay under the harsh conditions of death row.

Harsh conditions alone are not sufficient, because they may be justified for security reasons. Further, prisoners are expected to lose their freedom upon incarceration: it is part of the punishment. If conditions are too harsh, then the prisoner has other remedies available. Certainly, a prisoner who receives a daily flogging has reason to complain, and there are established avenues to handle such complaints. However, it is not solely the harsh conditions which form the death row phenomenon.

Long delays do not constitute the death row phenomenon either. Although differing from the view of some courts on this issue, *it is submitted that delay alone is insufficient to form the death row phenomenon*. Suppose a long delay has no particular adverse effect on a prisoner. Perhaps the prison is modern, with a liberal approach to personal freedoms, allowing stimulating confinement. Perhaps the prisoner enjoys structure and discipline in his life, or he has turned to religion. Whatever the reason, is it logical to say he has been treated in an inhumane manner when the prisoner is not agonizing or deteriorating while incarcerated?

A further complication with defining the death row phenomenon as delay alone comes from defining the appropriate period of delay. Granted, this argument presupposes that a certain period of delay constitutes a human rights violation, even though defining the relevant time period is difficult. However, the root of this problem is that a court following this approach eventually establishes jurisprudence on the

[10] Schabas, *supra* note 4, at 99, quoting *Rajendra Prasad v. State of Uttar Pradesh* [1979] 3 SCR 78, at 130 (Krishna Iyer J).

issue that creates a framework for the proper time frame to conduct an execution. Beyond the problems associated with judicial activism and judicial legislation, there are a number of pitfalls in this approach. States that know they have X number of years to execute a prisoner may do everything possible to conduct the execution within that time frame. This area is explored more fully in the discussion below concerning the jurisprudence of the United Nation's Human Rights Committee.

Only when the excessive delay converges with harsh conditions can a human rights violation arise. This formulation is not rigid and may be best viewed as a type of sliding scale. A longer delay under moderately harsh conditions could be treated the same as a moderate delay under very harsh conditions.

In the cases and materials cited throughout this paper, definitions of the death row phenomenon will often be contradictory. This is because it is a developing concept, which is often used to cover a broad category of cases. However, for purposes of this paper, death row phenomenon is to be defined as prolonged delay under the harsh conditions of death row.

## 2 Description of International Law against Cruel and Inhumane Punishment

When examining cases on the death row phenomenon, it is notable that each of the international tribunals uses a convention as the source of law. For domestic tribunals, the relevant provisions are found in the domestic constitution.

These sources of law are certainly influenced by custom, as well as general principles, but these are not at issue because all cases apply rules based on an existing treaty or constitution.

However, the treaties and constitutions do not employ uniform terminology. For example, the International Covenant on Civil and Political Rights protects against 'torture [or] cruel, inhuman or degrading treatment or punishment', while the Constitution of the United States prohibits 'cruel and unusual punishment'.[11] While the terminology is different, it is submitted that the underlying concept is the same. Each clause, in each national and international instrument, was adopted to protect persons from unnecessary and undue suffering.

The selected words are not material, rather it is the interpretation and application which is important. Any lack of uniform interpretation is based on various backgrounds of customs and values, not the selected words which prohibit cruelty.

Against this background, the author will use the phrase 'cruel or inhuman punishment' throughout this paper to assist the reader by using uniform terminology. This phrase is intended only as a reference to a general legal standard, not a term of art or reference to a particular source of law. However, when a tribunal is applying a particular source of law, reference will be to the selected source.

[11] International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, Article 7; Constitution of the United States, Eighth Amendment.

## 3 The *Soering* Case

No discussion of the death row phenomenon is complete without reference to the landmark case of *Soering v. United Kingdom*, decided by the European Commission and Court of Human Rights.[12] This case changed the landscape of death row phenomenon cases forever, providing a seed of legitimacy for the doctrine in tribunals around the world.[13] The vast majority of subsequent death row phenomenon cases cite the judgment, a testament to its strong relevance in international law. Prior to 1989, there were no international cases which explicitly accepted the death row phenomenon as cruel or inhumane punishment. However, this case broke new ground and warrants detailed discussion, as it set the standard for other courts to follow.

When Jens Soering was a child, he was brought to the United States where his father was working as a German diplomat. He grew up in Virginia, where he met his girlfriend, Elizabeth Haysom. Soering and Haysom grew to despise her parents, who disapproved of their relationship. They devised a plan to murder the parents, and Soering, by himself, executed the plan by savagely stabbing both parents to death.

Both Soering and Haysom escaped apprehension, fleeing to the United Kingdom where they were arrested some six months later on charges of cheque fraud. The United States sought extradition of both individuals. Haysom did not contest her extradition, and she was returned to the United States. She pleaded guilty to charges of being an accessory to murder, and she received a sentence of 90 years' imprisonment.

Soering challenged his extradition. He feared that, if he was returned to the United States, he would be found guilty of capital murder and subject to a sentence of death. The relevant extradition treaty gave the United Kingdom the ability to seek assurance that the death penalty would not be imposed or carried out.[14] However, the UK's practice was not to seek such an assurance, but rather to ask for 'an assurance from the prosecuting authorities of the relevant [US] State that a representation will be made to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should be neither imposed nor carried out'.[15] Soering believed that such an assurance would be insufficient to save him from the death penalty in Virginia.

While exhausting his remedies in the United Kingdom, Soering petitioned the European Commission and Court of Human Rights (respectively 'the Commission' and 'the Court'). His claim was made under Articles 3, 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'European Convention').[16] Article 3 is the relevant portion for discussion because it states that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

[12] *Soering* case, *supra* note 2.
[13] *Ibid.*
[14] Extradition Treaty, United States–United Kingdom, 8 June 1972, 28 UST 227; TIAS No. 8468.
[15] *Soering* case, *supra* note 2, at para. 37.
[16] Convention for the Protection of Human Rights and Fundamental Freedoms, (1955) 213 UNTS 221; ETS 5.

Soering's claim was novel in that he did not seek to establish that the death penalty itself was 'inhuman or degrading treatment or punishment'. Rather, he sought to demonstrate that Article 3 *would be violated* due to the unique circumstances of his case, especially the long delays in Virginia between the death sentence and execution (usually six to eight years). Further, the United Kingdom would be the party in violation (the United States was not a contracting state to the European Convention) by its act of extraditing him to a state where Article 3 would be breached.

## A *The Commission's Decision*

The European Commission on Human Rights was the first international body to examine Soering's claims.[17] The Commission's judgment was composed of four basic steps en route to their decision.

The first step was to establish whether extraditing a person to a country where there is a serious risk of cruel treatment would trigger responsibility for the extraditing state. The Commission held that a contracting state could be held responsible because the effect of extradition would be to expose the fugitive to 'inhuman or degrading treatment or punishment'.[18] This ruling was a breakthrough in international human rights law.

The second step was to determine whether the death penalty, in itself, was a violation of the European Convention. Because Article 2 of the Convention expressly permits the death penalty, there was no issue as to the penalty itself. However, this did not preclude an issue arising on the manner in which the execution was carried out. Importantly, the death row phenomenon (protracted delay) could raise an issue under the Convention.[19]

The third step was to determine whether there was a substantial risk that Soering would be sentenced to death in Virginia. The Commission examined the assurance by the United States that any judge would be instructed that the United Kingdom opposed the death penalty. It also examined the mitigating factors which worked in Soering's favour: his age, mental state and lack of a prior criminal record. The Commission decided that, 'notwithstanding the assurance and the existence of mitigating factors, the risk that the applicant will be sentenced to death is a serious one'.[20]

These three steps set the stage for the fourth and final determining decision: whether the death row phenomenon rose to 'a degree of seriousness contrary to Article 3 of the Convention'.[21] Thus, the issue was placed squarely before the Commission. The following section describes the Commission's reasoning on this point in detail.

Soering claimed that the following five circumstances raised the death row phenomenon to a violation of Article 3:

[17] *Soering v. United Kingdom*, European Commission of Human Rights, slip op. (19 January 1989), reprinted in part (slip op. at 15–39) in *Soering v. United Kingdom*, ECHR (1989), Series A, No. 161, at 54–83.
[18] *Ibid*, at para. 96.
[19] *Ibid*, at para. 102.
[20] *Ibid*, at para. 120.
[21] *Ibid*, at para. 122.

1 delay in Virginia's appeal system;
2 the possibility that his age and mental condition might not be taken into account during sentencing;
3 the difficult and harsh conditions of treatment on death row;
4 the method of execution itself;
5 the fact that he could be extradited to Germany, where he could be tried but could not be sentenced to death.[22]

The Commission considered each of these factors in turn when deciding whether their totality would lead to 'inhuman or degrading treatment or punishment'.

The first factor, delay in Virginia's appeal system, has become a subject of major controversy in this area of the law. Does an extended stay on death row violate a prisoner's human rights? When a person is sentenced to death in Virginia, they are subjected to an automatic appeal process which takes approximately six months. However, death row inmates have the discretion to pursue federal and state appeals, which may take several years to exhaust. Thus, an inmate's average stay on death row in Virginia is six to eight years. The Commission concluded that most of the delay was caused by the inmates themselves by way of pursuing procedures designed to protect human life.[23] The Commission felt that, if the prisoner was causing the delay, he had little basis to complain that the delay violated his human rights. This may be called the 'attribution argument', where any delay attributable to the prisoner's own actions cannot form the basis of a complaint.

The second factor concerned the likely treatment of Soering's age and mental condition in Virginia. Soering was 18 years old when he committed the crime, and there was some evidence that he had mental problems which contributed to the crime. The Commission was satisfied by the fact that, under Virginia law, his age and mental condition could be considered as mitigating factors during sentencing.[24]

The third factor dealt with daily life on death row. Small cells, tight security, potential homosexual assaults and minimal recreational time all contributed to a harsh environment which Soering claimed violated Article 3.[25] The Commission disagreed because it felt that this was the normal 'nature of a detention centre which houses prisoners who have been sentenced to death and who, consequently, require a higher level of security than other prisoners'.[26]

The argument that the method of execution itself, electrocution, constituted a violation of Article 3 was given little discussion by the Commission. It deferred to the Virginia Supreme Court, which had previously rejected the argument that execution by electrocution involved a needless degree of pain and suffering.[27]

Soering's final argument was especially unique to his case. Germany had requested

[22] *Ibid*, at para. 123.
[23] *Ibid*, at para. 128.
[24] *Ibid*, at para. 133.
[25] *Ibid*, at para. 135.
[26] *Ibid*, at para. 141.
[27] *Ibid*, at para. 142, discussing *Stamper v. Commonwealth*, 257 SE 2d 808 (1979).

extradition of Soering because he was a German national, and could be tried for the crimes in Germany. Germany had abolished the death penalty, so he would not face the death row phenomenon if Germany's request was granted. The Commission held that Germany's request for extradition was irrelevant and extraneous because the issue was whether extradition to the United States would cause a violation of the European Convention.[28]

Once the Commission disposed of all of Soering's arguments, it held that the death row phenomenon did not rise to a level of seriousness which violated Article 3 of the European Convention.

## B *The Court's Decision*

After the Commission reached its decision, the case was referred to the European Court of Human Rights.[29] The Court agreed with the Commission on the majority of the issues.

First, it agreed that a state's decision to extradite a fugitive may be a violation of Article 3 where there is a substantial risk that the fugitive would be subject to 'inhuman or degrading punishment or treatment' in the requesting country.[30] Next, it agreed that the death penalty was not a per se violation of Article 3.[31] Then, it agreed that there was a substantial risk that Soering would be sentenced to death in Virginia, despite the United Kingdom's claims otherwise.[32]

The point of disagreement between the Court and the Commission arose in regard to whether the death row phenomenon rose to the level of a violation of Article 3. The Court unanimously came to a different conclusion, disagreeing with the Commission on four of the factors, which it discussed in turn.

First, the Court considered the length of detention prior to execution, noting that most of the delay was attributable to the prisoner pursuing discretionary appeals. However, it refused to take the view that the blame lay with the prisoner. As long as there was hope for life, the prisoner could be expected to pursue that hope, even in the face of continued cruelty. In the words of the Court:

> just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so *it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full*. . . [T]he consequence is that the prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.[33]

[28] *Soering* Commission Report, *supra* note 17, at para. 147.

[29] *Soering* case, *supra* note 2.

[30] *Ibid*, at paras 88–91. The Court states: 'It would hardly be compatible with the underlying values of the Convention . . . were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed.'

[31] *Soering* case, *supra* note 2, at paras 101–103.

[32] *Ibid*, at paras 93–99.

[33] *Ibid*, at para. 106 (emphasis added).

Thus, the Court was unanimously of the view that delay caused by the prisoner could constitute cruel and inhuman punishment.

Next, the Court considered the impact of the conditions on death row, such as the risk of homosexual abuse and physical assault. It felt that, even if the special regime was necessary, its severity was compounded by the length of detention.[34]

The Court then turned to examine the impact of Soering's age and mental state. It was noted that Soering's age and mental state would be considered both during the trial and sentencing in Virginia, but this was extraneous information for the Court, which opted for a more subjective approach. The important consideration was how his age and mental state would affect him if he were subjected to the death row phenomenon, that is, if he were condemned to death.[35] The Court felt that these factors tended to bring his anticipated treatment on death row within the terms of Article 3.[36]

Finally, the Court gave weight to the fact that Germany was willing to extradite and try Soering without the risk of suffering on death row. Although it admitted that there may be a 'dual standard' which afforded protection to fugitives who were fortunate in having an alternative destination for extradition, it insisted that this factor should still be examined. This subjective approach of the Court, when compared to the objective approach of the Commission, has drawn criticism as being unfair.[37] However, the Court felt that this was 'a circumstance of relevance for the overall assessment'.[38] The author agrees with the use of the subjective approach because the Court is weighing the punishment and circumstances of a particular individual, not the 'ordinary person'.

The Court's final conclusion was that extradition of Soering to the United States would be a violation of Article 3. It states:

> [H]aving regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution and the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.[39]

There are two major reasons why this decision remains important. First, the Court ruled on speculative violations in the area of extradition.[40] Secondly, the case broke new ground, providing a basis for other courts to embrace the death row

[34] *Ibid*, at para. 107.
[35] *Ibid*, at para. 109.
[36] *Ibid*.
[37] See Lillich, 'The Soering Case', 85 *AJIL* (1991) 128.
[38] *Soering* case, *supra* note 2, at para. 110.
[39] *Ibid*, at para. 111.
[40] See Yuzon, 'Conditions and Circumstances of Living on Death Row — Violative of Individual Rights and Fundamental Freedoms?: Divergent Trends of Judicial Review in Evaluating the "Death Row Phenomenon"', 30 *George Washington Journal of International Law and Economics* (1996) 39.

phenomenon. Surprisingly, the case has not been heavily criticized on the point that the Court's jurisdiction covers countries which have all abandoned the use of capital punishment. The Court was probably driven by a strong antipathy to the death penalty.

One may wonder whether the case makes Europe a safe haven for fugitives who are fleeing from countries with the death penalty. It can certainly be argued that it was a breakdown in co-operation in criminal extradition cases.[41]

## C *The Legacy of* Soering

Numerous cases and academic writers have cited the decision, but the direct legacy of the *Soering* decision can be seen in the subsequent case of *Cinar v. Turkey*.[42]

The plaintiff was sentenced to death in 1984 but released on parole in 1991, pursuant to legislation commuting all death sentences. The plaintiff claimed that his suffering on death row was in violation of Article 3 of the European Convention. The case was tried by the European Commission on Human Rights which denied a violation of Article 3.

The Commission stated that the minimum severity of treatment for a breach of Article 3 was relative in itself. It depended on 'the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim'.[43] The Commission was willing to find a breach based on a long delay in execution, under harsh conditions, with a constant anxiety of death.[44] Notably, the Commission did not require the particular factors which were present in the *Soering* case, such as youth and mental instability.

However, the Commission distinguished the case from *Soering* on the following points: the duration of detention; the risk for the condemned to be exposed to harassment and aggression during detention; and the possibility of the execution of the capital sentence.[45] The problem with the plaintiff's case is that everyone knew Turkey was no longer executing prisoners, thus the Commission said that any threat of execution was illusory.[46] Because the plaintiff was not anticipating execution, his detention on death row was not viewed as being particularly 'inhuman or degrading treatment or punishment' in violation of Article 3.

[41] See Kobayashi, 'International and Domestic Approaches to Constitutional Protections of Individual Rights: Reconciling the Soering and Kindler Decisions', 34 *American Criminal Law Review* (1996) 225, at 240.

[42] *Cinar v. Turkey*, App. No. 17864/91, (1994) 79A DR 5 (reported in French version only).

[43] *Ibid*, at 8, quoting *Soering* case, *supra* note 2, at para. 100.

[44] *Ibid*, at 9.

[45] *Ibid*, at 8.

[46] *Ibid*.

## 4 United Nations Human Rights Committee

The Human Rights Committee, pursuant to the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol, examines a large number of death row phenomenon cases.[47] This is largely due to the Optional Protocol which gives individuals on death row the right to petition the Committee with alleged infractions.

All death row phenomenon claims are brought under Articles 7 and 10 of the ICCPR.[48] The Committee takes an intermediate position on the death row phenomenon. It will *not* accept delay alone as a violation of the ICCPR, but it will examine the facts of a particular case to determine if conditions as a whole constitute 'cruel, inhuman or degrading treatment or punishment'.

Several cases where prisoners have asserted that the death row phenomenon violated the ICCPR have been rejected by the Committee because the applicants did not exhaust domestic remedies.[49] However, the Committee clearly stated its position in the 1989 case of *Pratt and Morgan v. Jamaica* (also discussed below with reference to the Judicial Committee of the Privy Council) when it issued the following oft-quoted statement:

> In principle prolonged judicial proceedings do not per se constitute cruel, inhuman, or degrading treatment even if they can be a source of mental strain for the convicted prisoners. However, the situation could be otherwise in cases involving capital punishment and an assessment of the circumstances of each case would be necessary.[50]

Although the delay and the surrounding circumstances were not in violation of Article 7, a particularly cruel incident gave the Committee a basis for granting the

[47] International Covenant on Civil and Political Rights, (1976) 999 UNTS 171.

[48] Article 7 of the ICCPR states: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' Article 10(1) of the ICCPR states: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'

[49] See *Little v. Jamaica* (No. 283/1988), UN Doc. CCPR/C43/D/283/1998 (1991); *KC v. Canada* (No. 486/1992), UN Doc. CCPR/C/45/D/486/1992 (1992); *Chitat Ng v. Canada* (No. 469/1991), UN Doc. CCPR/C/49/D/469/1991 (1994).

[50] *Pratt and Morgan v. Jamaica* (Nos 210/1986 and 225/1987), UN Doc. A/44/40 222 (1989), at para. 13.6. Pratt and Morgan also appealed to the Inter-American Commission and Court of Human Rights pursuant to the American Convention on the Rights and Duties of Man (OAS Doc. OEA/Ser.L/V/I.4.) and the American Convention on Human Rights ((1979) 1144 UNTS 123, OASTS 36). The case arose twice before the Committee, but only the second instance has relevance to the death row phenomenon. The opinion was issued informally, and information must be gleaned from the Privy Council's published opinion. The relevant findings of the Commission are as follows: 'Pratt and Morgan suffered a denial of justice during the period 1980–1984 violative of Article 5(2) of the American Convention on Human Rights. The Commission found that the fact the Jamaican Court of Appeal issued its decision on December 5, 1980 but did not issue the reasons for that decision until four years later, September 24, 1984, was tantamount to cruel, inhuman and degrading treatment because during that four year delay the petitioners could not appeal to the Privy Council and had to suffer four years on death row awaiting execution. The [Inter-American Commission and Court of Human Rights] . . . requests that the execution of Messrs Pratt and Morgan be commuted for humanitarian reasons.' *Pratt v. Attorney General for Jamaica* [1994] 2 AC 1; [1993] 3 WLR 995; [1993] 4 All ER 769.

applicant's requested relief under Article 7.[51] A similar analysis occurred in *Kelly v. Jamaica*, where the Committee held that the deplorable conditions on death row, particularly the lack of basic medical treatment, was a violation of Article 10.[52] However, neither of these cases accepted that the prisoner's exposure to the death row phenomenon constituted cruel or inhuman punishment under international law.

In *Barrett and Sutcliffe v. Jamaica*, the Committee attempted to distinguish its analysis from *Pratt and Morgan*, questioning whether the delay was *attributable* to the prisoner or the state.[53] It stated: 'even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered [to be cruel] if the convicted person is merely availing himself of appellate remedies.'[54]

In a celebrated dissent, Committee member Chanet took issue with the Court's new approach, stating: '[w]ithout being at all cynical, I consider that the author cannot be expected to hurry up in making appeals so that he can be executed more rapidly.'[55] She supported her position by quoting portions of the *Soering* decision (discussed above).[56]

Perhaps due to Ms Chanet, the Committee departed from questions of attribution of delay in the subsequent case of *Kindler v. Canada*.[57] Joseph Kindler had been sentenced to execution in Pennsylvania, but he escaped from custody, fleeing to Canada. He claimed that Canada was in breach of Article 7 of the ICCPR by extraditing him to the US because he would suffer from long delays on death row. The Committee reviewed the case in a manner similar to *Soering*, as the cases were comparable. It gave careful attention to 'the personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent'.[58] In the end, it ruled that each of the factors was materially distinguishable from *Soering*, resulting in no violations of the ICCPR.[59]

One of the most difficult cases for the Committee to agree upon (especially in light of *Soering*) was *Cox v. Canada*. Keith Cox was facing extradition to Pennsylvania to face two charges of murder, an offence that would qualify him for the death penalty.[60] Cox opposed the extradition, claiming that he would be subject to torturous delays on death row that would violate Article 7. In fact, at the time, Pennsylvania was not executing its death row prisoners, delaying their executions indefinitely.

The Committee gave three reasons for refusing to find a violation of Article 7. First,

[51] The plaintiffs were read their death warrants in anticipation of their scheduled execution. On the day before the execution, prison officials were notified that a stay of execution had been granted. The officials did not notify the prisoners of the stay, causing them to suffer in anticipation of impending execution until 45 minutes before the scheduled time. Pratt, *supra* note 50, at para. 13.7.

[52] *Kelly v. Jamaica* (No. 253/1987), UN Doc. A/46/40 241 (1991).

[53] *Barrett and Sutcliff v. Jamaica* (No. 271/1988), UN Doc. CCPR/C/44/D/1988 (1992) at para. 8.4.

[54] *Ibid.*

[55] *Ibid*, at Appendix, individual opinion of Ms Christine Chanet.

[56] *Ibid.*

[57] *Kindler v. Canada* (No. 470/1991), UN Doc. CCPR/C/48/D/470/1991 (1993).

[58] *Ibid*, at para. 15.3.

[59] *Ibid.*

[60] *Cox v. Canada* (No. 539/1993), UN Doc. CCPR/C/53/D/539/1993 (1994).

prison conditions in Pennsylvania were accepted as reasonable.[61] Next, Cox had not yet been convicted, and his purported accomplices had received life sentences upon their convictions.[62] Finally, all possibilities of appeal would be available within a reasonable time, and there were no unreasonable delays which would be imputable to the state (again returning to the issue of attribution of delay). Although the Committee was following its traditional analysis of the circumstances peculiar to a prisoner's case, the particular set of facts made it hard for the Committee to reach a consensus, and eight individual opinions were attached to the judgment.

### A *A Change in Jurisprudence*

A major case arose in 1994 in which the Committee accepted the death row phenomenon, though not solely on the basis of delay. In *Francis v. Jamaica*, the Committee restated its traditional position, stating that prolonged delays were not per se cruel, inhuman or degrading treatment.[63] However, it would examine the extent to which any delay was imputable to the state, the conditions of imprisonment, and the impact of detention on the person involved.[64] It is submitted that this analysis, and these considerations, constitute the proper inquiry in death row phenomenon cases. Delay alone is not the proper test, as will be discussed with reference to the *Johnson* case below. However, delay is important in combination with the factors that the Commission puts forth for examination.

The first factor was the extent to which delay was due to the state. In this case, the Jamaican Court of Appeal had refused to issue a written judgment (preventing further appeals) for over 13 years, despite several requests from the prisoner.[65]

The next factor was the conditions on death row, which the Committee found to be substandard. The inmate was regularly beaten and ridiculed by prison officers. In addition, he spent time in a special death cell under intense strain of impending execution.[66]

Finally, the mental condition of the prisoner had significantly and seriously deteriorated during his detention.[67] He no longer behaved as a normal human, or even a normal prisoner. These factors, in their entirety, led the Committee to find a violation of Articles 7 and 10 of the ICCPR, accepting the 'death row phenomenon' as cruel and inhuman punishment under international law. This was the first and only case in which the Committee accepted the death row phenomenon, as defined by the author. However, it has continually stated that it would be willing to accept the doctrine under the proper set of facts. Judging from the high standard the Committee has set, it may be very hard indeed to prove a case.

[61] *Ibid*, at para. 17.1.
[62] *Ibid*, at para. 17.2.
[63] *Francis v. Jamaica* (No. 606/1994), UN Doc. CCPR/C/54/D/606/1994 (1995).
[64] *Ibid.*
[65] *Ibid*, at para. 9.2.
[66] *Ibid.*
[67] *Ibid.*

## B *The Position that Delay, in Itself, is Not a Violation*

The question still remained as to why the Committee would not accept delay, by itself, as cruel and inhuman punishment. It answered critics in the case of *Johnson v. Jamaica*, providing three reasons for requiring more than simple delay to constitute a violation.[68]

First and foremost, the Committee found that allowing delay in execution to constitute a violation of the Covenant would be inconsistent with the object and purposes of the ICCPR.[69] It stated that the Covenant promotes reduction of the death penalty as its object and purpose.[70] Thus, it would be inconsistent to hold states in violation of the Covenant for failing to execute a prisoner, while finding adherence to the Covenant for states that execute prisoners rapidly. It is submitted that this reasoning is slightly flawed, because, if the Committee finds a violation based on delay, the remedy is to commute the sentence to life imprisonment rather than impose a speedy execution. Therefore, finding a violation spares a prisoner's life, consistent with the Convention. However, the Committee is correct in its view that to avoid a violation, a state may be required to speed up a prisoner's execution.

The second argument is that the Committee does not want to convey a message that states should execute prisoners as fast as possible.[71] 'Life on death row, harsh as it may be, is preferable to death.'[72] It is submitted that this reason is valid and should be of primary importance. It would be unusual to find a prisoner who would prefer execution over clinging to hopes of having his life spared. Furthermore, some prisoners actually prove their innocence on appeal, and, through time-consuming review, a state may be able to save an innocent life.

The final argument is that other circumstances, when combined with prolonged detention, can give rise to a violation of the Covenant.[73] Therefore, an alternative exists for serious cases. This reason has merit, especially due to the alternative's flexibility, which can allow a liberal application based on the facts of a case. This allows recognition of evolving standards and values.

Though the Committee refused to find a violation of the Covenant in the *Johnson* case, the case is important because it produced a well-reasoned argument for refusing to accept delay alone as a violation. The Committee has maintained this position in subsequent cases, reiterating that delay alone was insufficient.[74]

The next section will contrast this approach with that of the Judicial Committee of the Privy Council, exploring the ramifications of allowing delay, by itself, to constitute a violation.

[68] *Johnson v. Jamaica* (No. 588/1994), UN Doc. CCPR/C/56/D/588/1994 (1996).
[69] *Ibid*, at para. 8.3.
[70] *Ibid*, at para. 8.2.
[71] *Ibid*, at para. 8.4.
[72] *Ibid*.
[73] *Ibid*, at para. 8.5.
[74] See *Spence v. Jamaica* (No. 599/1994), UN Doc. CCPR/C/57/D/599/1994 (1996); *Sterling v. Jamaica* (No. 598/1994), UN Doc. CCPR/C/57/D/598/1994 (1996).

## 5 Judicial Committee of the Privy Council

The Judicial Committee of the Privy Council (the 'Privy Council') sits in London as the highest court of appeal for many of the Caribbean states. It has numerous opportunities to hear cases where prisoners cite excessive delay as constituting cruel and inhuman punishment. Certain states under its jurisdiction, especially Jamaica, impose the death penalty frequently but lack resources to conduct a timely appellate review.

The Privy Council has adopted its version of the death row phenomenon allowing delay to be the predominant, if not the sole, factor in its analysis, unlike the Human Rights Committee. However, the Privy Council has not always been receptive to the doctrine.

In the 1976 case of *de Freitas v. Benny*, Lord Diplock refused to accept excessive delay as cruel punishment, especially since the delay was caused by the prisoner pursing appeals.[75] He felt that the 'initiative for securing expedition in all these proceedings lay with the appellant'.[76]

Lord Diplock maintained this approach in the subsequent case of *Abbott v. Attorney General of Trinidad and Tobago*, where he reasoned that the delay was caused by the prisoner's own actions.[77] In effect, he was making his determination based solely upon attribution of delay. However, he did 'accept that it is possible to imagine cases in which the time allowed by the authorities to elapse . . . was so prolonged as to arouse in [the prisoner] a reasonable belief that his death sentence must have been commuted to a life sentence'.[78]

The question of attribution of delay was again raised in *Riley v. Attorney General of Jamaica*, where the Privy Council held that attribution was irrelevant under the Jamaican Constitution.[79] With a creative interpretation of a constitutional provision, it held that as long as the punishment was constitutional, the method of carrying it out was constitutional.[80] It reasoned, by a three to two vote, that the purpose of the Constitution was to prevent the enactment of unjust laws, not to protect against cruel treatment under the laws. 'Accordingly, whatever the reasons for or length of delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of section 17(1).'[81] The dissent found this position untenable, providing a well-reasoned disagreement with the majority.

The dissent's arguments did not fall on deaf ears, as the Privy Council reversed itself 10 years later in the momentous case of *Pratt and Morgan v. Jamaica*.[82] This case marked the first time that the Privy Council embraced the death row phenomenon, in

[75] *de Freitas v. Benny* [1976] AC 239; [1975] 3 WLR 388.
[76] *Ibid.* [1976] AC 239 at 243.
[77] *Abbott v. Attorney General of Trinidad and Tobago* [1979] 1 WLR 1342.
[78] *Ibid.* at 1348.
[79] *Riley v. Attorney General of Jamaica* [1983] 1 AC 719; [1982] 3 WLR 557; [1982] 2 All ER 469.
[80] *Ibid.* [1982] 3 WLR 557 at 561.
[81] *Ibid.*
[82] *Pratt*, *supra* note 50.

any form. It has been the subject of considerable study and discussion and is responsible for saving the lives of dozens of Caribbean death row inmates.

The case arose when two death row prisoners claimed that, after extensive delays (14 years), it would be inhuman to carry out their execution. The background of the case is extensive, consisting of numerous appeals to various tribunals and several prolonged delays.

The claims brought to the Privy Council arose under Article 17(1) of the Jamaican Constitution, which provides: 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.' Unlike the earlier decision in *Riley*, the Privy Council held that these protections do not end with the pronouncement of a sentence.[83]

After holding that a prisoner has protections after he has been sentenced to death, the question of delay was placed directly before the Privy Council: was delay sufficient to constitute cruel or inhuman punishment? The Council addressed the effect of delay with the following statement:

> [T]here is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity: we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.[84]

With this pronouncement, it was clear that the Privy Council was adopting the view that the death row phenomenon was a human rights violation. Furthermore, delay, in itself, was considered the sole factor for the decision. Thus, the Privy Council was departing from the European Court of Human Rights and the United Nations Human Rights Committee in its ruling because both of these tribunals based their acceptance of the doctrine on factors in addition to delay. It could be argued that the delay in *Pratt and Morgan* was so prolonged that the Privy Council did not consider it necessary to examine other factors, and perhaps, in a borderline case, it would take other items into account. But, in the words of the Privy Council, *Pratt and Morgan* 'is not a borderline case'.[85]

When using delay, by itself, as the test of a violation, what factors come into play? The obvious question relates to the length of delay sufficient to trigger a violation. A more advanced question concerns attribution: does it matter whether the prisoner or the state caused the delay?

## A *Attribution of Delay*

The Privy Council described three types of delay which could occur during a prisoner's time on death row:

[83] *Ibid*, [1993] 4 All ER 769 at 782.
[84] *Ibid*, at 783.
[85] *Ibid*, at 787.

1 delay entirely due to the fault of the prisoner (escape from custody, frivolous appeals);
2 delay caused by a prisoner's legitimate appeals; and
3 delay caused by the state.[86]

It stated that the first of these types, delay inappropriately caused by the prisoner, could not be used to the advantage of the inmate.[87] This is sound jurisprudence because it is untenable for a prisoner to elude custody for years, only to claim that delay in execution constitutes cruel punishment.

Delay of the third type was also relatively easy to deal with. If a state is causing delay, it is logical to hold the state responsible for violating a prisoner's rights.

The real challenge for the Privy Council was to determine whether delay occasioned by a prisoner's legitimate appeals could suffice as unconstitutional delay. That is, could a prisoner rely on delay which he caused by pursuing appeals?

The Council examined cases in a number of domestic and international tribunals, reaching the conclusion that it is the responsibility of the state to conclude the prisoner's appeals in a prompt fashion. The following statement makes it clear that the Privy Council considered the burden of concluding appeals to be on the state:

> In their Lordships' view a state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. *If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it* . . . The death row phenomenon must not become established as a part of our jurisprudence.[88]

This bold step is the key declaration in this case, and in others which hold that the death row phenomenon constitutes cruel punishment.[89] Just as legal systems recognize the legitimacy of doctrines such as necessity and duress, they must also recognize that a prisoner will cling to any hope in order to protect his life. Such human instinct cannot be treated as a prisoner's fault. Gradual recognition of this view is giving the death row phenomenon doctrine a strong foothold in both international and domestic law.

## B *Length of Delay*

The question remained for the Privy Council as to what would be the threshold for excessive delay. Resorting to judicial activism rather than allowing the threshold to develop over time, the Privy Council articulated a set of rules for Jamaica. Although

[86] *Ibid*, at 783.
[87] *Ibid*.
[88] *Ibid*, at 786 (emphasis added).
[89] See *Soering* case, *supra* note 2, discussed above.

purporting not to set a rigid timetable, the Privy Council put forth general rules which would guide future decisions. The first premise was that the Jamaican appeal process should be completed within approximately two years. Furthermore, any appeals to international bodies should take no longer than 18 months. 'These considerations lead their Lordships to the conclusion that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing the delay [is a violation].'[90]

At last, a number had been pronounced: five years. Five years of delay constitutes 'strong grounds' for a violation. While this is certainly not a hard and fast rule, it does provide guidance for subsequent interpretation.

However, the subsequent interpretations have worked to yield a new body of rules, which are confusing and arbitrary. The first case was *Guerra v. Baptiste*, where the prisoner had been held on death row for four years and 10 months, just short of the five-year guideline.[91] The Privy Council held that this delay was unacceptable, and constituted an injustice. It went out of its way to state that there was no specific time period within which execution should take place, although the time for appeal should be reasonable.[92] Furthermore, 'the period of five years was not intended to provide a limit, or a yardstick'.[93]

The Privy Council considered it important that all domestic appeals be concluded within two years of a death sentence. The *Guerra* case went substantially beyond that time, without any good explanation.[94] Therefore, it concluded that the length of the delay, along with the cause of the delay, constituted cruel punishment, affording the condemned the right to have his death sentence commuted to life imprisonment.[95]

Months later, in a change of course, the Privy Council treated the five-year rule as the length of time which needed to be reached before a violation could occur.[96] Furthermore, if delay was caused by a stay issued so that points of mercy could be argued on a prisoner's behalf, the effect was to extend the five-year period.[97]

In another case, the Privy Council ruled that, where a prisoner does not pursue appeals to international organizations, the constitutional period for appeals must be reduced.[98] In *Pratt and Morgan*, the estimated time for appeals to international tribunals was 18 months.[99] Therefore, the prisoner argued that 18 months should be subtracted from the five-year guideline, making the constitutional appeal period only three and a half years. The Privy Council agreed that three and a half years was the

[90] *Pratt*, *supra* note 50, [1993] 4 All ER 769 at 788.
[91] *Guerra v. Baptiste* [1996] AC 397; [1995] 3 WLR 891; [1995] 4 All ER 583.
[92] *Ibid*, [1996] AC 397 at 413.
[93] *Ibid*, at 414.
[94] *Ibid*, at 415. The primary reason for the delay is that the trial judge did not submit his notes on the trial evidence until four years after the trial.
[95] *Ibid*, at 415.
[96] *Reckley v. Minister of Public Safety and Immigration (No. 2)* [1996] AC 527; [1996] 2 WLR 281; [1996] 1 All ER 562.
[97] *Ibid.*
[98] *Henfield v. Attorney General of the Commonwealth of the Bahamas* [1997] AC 413; [1996] 3 WLR 1079.
[99] *Pratt*, *supra* note 50.

appropriate time limit, although it purported to claim that it was not simply a matter of subtraction, but a reformulation of what it considered a reasonable time.[100]

In 1997, the Privy Council held that the clock started ticking when the prisoner was sentenced to death, although exceptions could be made for extreme pre-trial delays.[101] Later, the Privy Council held that a prisoner could be executed while his application was under consideration by international tribunals. Thus, excessive delays by international tribunals, such as the Inter-American Commission and Court of Human Rights, could not bar a prisoner's execution.[102]

Recently, the Privy Council revised this position, stating that executions should be stayed while cases are under review by international bodies, and that any excessive delays should be added to the 18-month guideline declared in *Pratt and Morgan*.[103]

One gathers from all these cases that the Privy Council has put itself in a position where its precedents will someday establish a narrow and rigid time line for lawful executions. It will lose flexibility because precedent ties it to previous decisions. How can it say 50 months is too short, when it allowed 50 months in a prior case? Eventually, the volume of cases will tie the Privy Council to a timetable.

How can the Privy Council escape its jurisprudence when it becomes bound by a timetable? How can it tell the prisoner that his 50 months was reasonable, while the last prisoner's 50 months was unreasonable? Perhaps the only way is to look at other factors beyond delay. The Council must tell a prisoner that for some reason, there were other factors at play which made his delay different. At that point, the inquiry is similar to the Human Rights Committee.

Another problem with the Privy Council's approach is that it results in a direct conflict with the points enunciated in *Fisher* (discussed above) against allowing delay itself to trigger a violation.[104] Time will reveal the correct approach, but it appears that the Human Rights Committee's method is preferable because it is easier to refine a broad principle than to broaden a narrow principle.

## 6 Rejection of the Doctrine

This section is designed to present the story of the United States, which largely rejects the doctrine. However, the US is not alone, as many countries will not accept that delay caused by a prisoner's appeals can result in a human rights violation. For example, when the Supreme Court of Zimbabwe accepted that the death row phenomenon was a violation of human rights it was a major change in the country's jurisprudence. However, the legislature was quick to pass a constitutional amendment stating that death row delays will not constitute cruel punishment.[105]

[100] *Henfield, supra* note 98, [1996] 3 WLR 1079 at 1088.
[101] *Fisher v. Minister of Public Safety and Immigration (No. 1)* [1998] AC 673; [1998] 3 WLR 201.
[102] *Fisher v. Minister of Public Safety and Immigration (No. 2)* [1999] 2 WLR 349.
[103] *Thomas v. Baptiste* [1999] 3 WLR 249.
[104] *Francis v. Jamaica, supra* note 63.
[105] Constitution of Zimbabwe Amendment (No. 13) Act 1993.

Nevertheless, the Court's contribution to academic literature, debate and future court decisions is certain.[106]

Due to the numerous options for appealing a death sentence in the United States, delays on death row are extremely protracted. In 1996, the average delay between sentence and execution for the 45 prisoners executed was 10.5 years.[107] These delays have provoked numerous claims of cruel and unusual punishment under the Eighth Amendment.[108] The result is a mass of inconsistent interpretations from the federal and state courts which have deliberated the death row phenomenon.

One of the earliest cases arose in 1890, where the Supreme Court stated the following:

> when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, *which may exist for the period of four weeks*, as to the precise time when his execution may take place.[109]

The Supreme Court of California echoed this view when it found cruelty 'in the dehumanizing effects of the lengthy imprisonment prior to execution'.[110]

However, a commanding majority of other courts have reached a different conclusion. The case of *Chessman v. Dickson* demonstrates a common response from the courts.[111] Caryl Chessman was confined to death row for over 11 years while pursuing appeals. He claimed that this amounted to 'cruel and unusual punishment'. The court stated in response:

> [i]t may show a basic weakness in our government system that a case like this takes so long, but I do not see how we can offer life (under a death sentence) as a prize for one who stalls the process for a given number of years, especially when in the end it appears that

[106] The courts in Zimbabwe have produced two important decisions on the death row phenomenon. The first case is *Dhlamini v. Carter*, 1968 (1) RLR 136 (A), where the court ruled that a prisoner could complain about delay in execution being a cruel treatment, but the only remedy would speed up the execution. 'The only remedy ... is to ask for an order that the delay should stop, something which no person sentenced to death is likely to do.' *Ibid*, at 154–155. A primary criticism of this ruling is that a prisoner suffering under the death row phenomenon is given a choice only between continued torture or prompt death. The second case is *Catholic Commission for Justice and Peace, Zimbabwe v. Attorney-General of Zimbabwe*, 1993 (4) SA 239. A notable contribution of the case comes from the principles put forward to guide future decisions. First, the court said that the relevant consideration was the extent of the delay, and not the cause thereof, the cause being irrelevant because it does not reduce the mental anguish. Next, the court promoted an objective approach to deciding death row phenomenon cases. It felt that 'it would be wrong to differentiate between strong and weak personalities. That is why what is to be assessed is the likely and not the actual effect of the length of the delay upon the ordinary individual.' *Ibid*, at 269.

[107] Bureau of Justice Statistics, Capital Punishment, 1996, Time under Sentence of Death and Execution, by Race, 1977–1996, 12, Table 12.

[108] The Eighth Amendment to the US Constitution states that: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'

[109] *Re Medley*, 134 US 160 (1890) (emphasis added).

[110] *People v. Anderson*, 493 P 2d 880 (Cal. 1972).

[111] *Chessman v. Dickson*, 275 F 2d 604 (9th Cir. 1960).

> the prisoner never really had any good points ... I think he has heckled his keepers long enough.[112]

The striking point in the above-quoted passage is that the court is *attributing* delay to the prisoner. This is one of the few consistencies among courts which reject death row phenomenon cases. The courts tend to distinguish between mandatory and discretionary appeals, and refuse relief if a prisoner's delay was due to pursuit of discretionary appeals. The US Court of Appeals for the Seventh Circuit has based its decision on the fact that 'any inordinate delay in the execution of [the prisoner's] sentence is directly attributable to his own conduct'.[113] This approach discounts the fact that human nature presses a person to survive, and it is this struggle which is cruel. From this reasoning, it follows that any system which *facilitates excess struggle* commits a human rights violation.

### A *A Possible Shift from the US Supreme Court*

For assorted reasons, courts in the United States have steadfastly refused to accept the doctrine. The Supreme Court has yet to rule on the issue, but recent statements from members of the Supreme Court suggest that a decision may come soon.

In 1995, the Supreme Court refused to review a case where a prisoner claimed that his detention on death row for 17 years constituted 'cruel and unusual punishment'.[114] Notably, Justice Stevens issued the following statement:

> Though the importance and novelty of the question ... are sufficient to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue until it has been addressed by other courts.[115]

He went on to note that the two principal social purposes of the death penalty, deterrence and retribution, are hardly furthered after such long delays in execution.[116]

In 1998, the same issue arose where a prisoner had spent 23 years on death row, primarily due to the state's faulty procedures.[117] Justice Breyer dissented from the majority's decision not to review the case, arguing that an answer could benefit the criminal system.[118] With continued pressure from the Justices, the Supreme Court will likely address the issue in the near future. A country with such rampant death row delay problems will not be able to avoid a decision indefinitely.

[112] *Ibid*, at 607.
[113] *Free v. Peters*, 50 F 3d 1362 (7th Cir. 1995).
[114] *Lackey v. Texas*, 514 US 1045 (1995) (petition for writ of certiorari denied).
[115] *Ibid*, at 1045 (Memorandum of Justice Stevens, respecting the denial of certiorari).
[116] *Ibid*.
[117] *Elledge v. Florida*, 119 S Ct 366 (petition for writ of certiorari denied).
[118] *Ibid*, at 366 (Justice Breyer dissenting).

## 7 Conclusion

The decisions of international tribunals provide irrefutable proof that the death row phenomenon, as defined in this paper, is part of the world's jurisprudence. Both the European Court and Commission on Human Rights and the United Nations Human Right Committee have explicitly adopted the doctrine into their jurisprudence. Domestic tribunals contribute to the doctrine as well, allowing grass-roots development at the local courts.

The author concludes that there is often a single decisive issue which separates opinions on this subject. That is, who should be considered at fault for delay, when the prisoner is pursuing reasonable appeals? Some believe that the prisoner is at fault because he is driving the delay process. Others believe that it is the fault of the system, which allows the delays. This latter view is the view of the author, based on the following reasoning.

Basic human instinct to survive tells us that we will endure hardship, rather than accept death. Humans will cling to the slimmest hope of life, enduring dehumanizing conditions for years, rather than acquiesce to execution. It is this survival instinct which causes prisoners to file appeals that go on for years. Can we really attribute fault to a person who acts on this survival instinct?

The alternative is to place fault on the system which allows the delays. Such was the view of the Privy Council when it stated: 'the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it.'[119] This approach is more reasonable because the system can change, as the prisoner has not the luxury of changing human nature. The system is placed in a dilemma, however, because human rights law demands a careful review of a death sentence. A thorough review process and a rapid execution are conflicting ideals, but that does not mean that they cannot be balanced.

This paper also examined whether delay on death row, by itself, constitutes a human rights violation. Some courts accept delay alone, others require additional elements. The author believes that other elements are necessary, especially in light of the Privy Council's jurisprudence. The problem with accepting delay as a violation, without requiring more, is that the tribunal will eventually bind itself to a timetable. Not only is this judicial legislation, but it also makes states rush to execute prisoners before the deadline, so as to not have a death sentence commuted. In the author's view, it is preferable to have the flexibility of requiring other factors beyond a long delay. This allows for changing situations, different ages and mental capacities, and evolving community standards and values.

In conclusion, the death row phenomenon is a human rights violation, according to many tribunals. The exact nature of the doctrine varies among the courts, but the underlying concept remains the same. The essential principle is that a death row prisoner is sentenced to execution, not lengthy periods of harsh treatment, followed by execution. States should not be allowed to keep prisoners on death row for years due to

[119] *Pratt*, *supra* note 50, at para. 13.6.

a lack of support for capital punishment or a lack of judicial resources. They should either do it right or not do it at all. It is the author's view that the doctrine of the death row phenomenon forces states to make such a choice: carry out executions properly, or do not carry them out at all. Such a demanding doctrine has a legitimate position in any legal system which uses capital punishment.