

RACE, TORTURE, AND EXECUTION: A HUMAN RIGHTS ANALYSIS OF THE DEATH PENALTY IN THE U.S.

October 9, 2013

American University, Washington College of Law

Talking points for the Special Rapporteur on Torture

Introduction:

I want to thank the Center for Human Rights and Humanitarian Law's Anti-Torture Initiative, the Center for Constitutional Rights, and the FIDH – International Federation for Human Rights for organizing this important event on the eve of the World Day Against the Death Penalty to discuss the death penalty from a human rights perspective. I also want to congratulate the Center for Constitutional Rights and the FIDH for their upcoming report on the death penalty in the U.S. and hope it helps to continue open spaces for discussion of this issue across the country.

As of today, while international law decisively claims for abolition of this practice, it does not mandate States to do so. However, as I highlighted in my 2012's thematic report to the United Nations General Assembly on the death penalty and the prohibition of torture, there is an observable growing global trend towards abolition. It is also observable that, increasingly, the reasons States claim for abolition stem from human rights arguments and, therefore, it is of significant importance to frame the debate from this perspective.

The Death Penalty and the International Prohibition against Torture and Ill Treatment

There are different human rights perspectives to the death penalty. The most common one is to examine the death penalty under the framework of the right to life. In this sense, Article 6 of the International Covenant for Civil and Political Rights (ICCPR) protects the right to life but allows the use of the death penalty under specific conditions, such as restricting its application for the most serious crimes and complying with all due process guarantees. It also explicitly prohibits the application of this punishment for pregnant women or for crimes committed by persons below the age of eighteen.

However, because of my mandate as Special Rapporteur on torture, I would like to focus my presentation on the practice of the death penalty from the perspective of the right to personal integrity and the absolute prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment. The prohibition of torture and ill treatment, as enshrined under Article 7 of the ICCPR and Articles 1 and 16 of the Convention against Torture (CAT), is absolute and inderogable and, therefore, does not admit exceptions. In this sense, anytime that the death penalty is deemed to constitute ill treatment or torture it is contrary to international law. The exception of "legal sanctions" found in the definition of torture in article 1.1 of CAT cannot be read, as many have

claimed, as an exception for the death penalty. A sanction that is illegal under international law cannot be made legal by domestic laws.

Hence, from this perspective, we need to examine what circumstances surrounding the practice of the death penalty may constitute ill treatment or torture, and, more broadly, whether the death penalty *per se* can amount to these crimes, making it illegal under international law under all circumstances. These were precisely the issues I examined in my 2012 thematic report to the General Assembly. The premise of this report was the need for a new approach to frame the international debate about the legality of the death penalty within the context of the fundamental concepts of human dignity and the prohibition of torture and cruel, inhuman or degrading treatment or punishment. A new approach that is demanded by an observable global trend in regional and local jurisprudence and State practice to increasingly consider that the death penalty, both as a general practice and through the specific methods of implementation and other surrounding circumstances, can amount to ill-treatment or even torture.

I concluded that, although it may still be considered that the death penalty is not *per se* a violation of international law, there are strong indications that international standards and practices are in fact moving in that direction. The ability of States to impose the death penalty without violating the prohibition of torture and ill treatment is becoming increasingly restricted.

Methods of Execution and death row phenomenon

To start with, aside from the issue of whether capital punishment constitutes a *per se* violation of the prohibition of torture and ill treatment, specific methods of execution and other circumstances related to the implementation of the death penalty often constitute violations in and of themselves, and this understanding is reflected in State practice and international, regional and domestic jurisprudence. The two main circumstances to consider are the methods of execution and the so called “death row phenomenon”. An examination of both of these issues reveals that **States simply cannot guarantee that method of execution or conditions faced by persons sentenced to death do not inflict illegitimately severe pain and suffering.**

Many methods of execution, including stoning and gas asphyxiation have been explicitly deemed to violate the prohibition of torture and ill treatment by international and domestic judicial bodies. The UN High Commissioner for Human Rights has also found hanging to present a real risk of ill treatment. Several high courts and UN treaty bodies have also closely scrutinized other methods such as the lethal injection, and have found that it cannot be empirically supported that in every case this method complies with the prohibition of torture and ill treatment. The Human Right Committee, for instance, has called on the US, which uses lethal injections, to review its execution methods in order to prevent severe pain and suffering.

This method of lethal injection, as currently administered, does not work as effectively as intended. Some prisoners take minutes to die, and others become very distressed.

Although the US Supreme Court has rejected this argument in Baze et al. v. Rees (2008), new studies indicate that even if it is administered without technical error, it may induce painful suffocation, which in occasion can be disguised by the paralytic agent used in the injection.

The fact that a number of execution methods have been deemed to constitute torture or ill treatment, together with a growing trend to review all methods of execution for their potential to cause severe pain and suffering, highlights the increasing difficulty with which a State may impose the death penalty without violating international law. Methods either involve unnecessary pain and suffering, or we have no way of establishing that they do not.

Additionally, what we refer as the **death row phenomenon** also makes it very difficult for States to apply the death penalty without violating the prohibition of torture and ill treatment. The death row phenomenon refers to a combination of circumstances that produces severe mental trauma and physical suffering among prisoners serving death sentences, including uncertainty and anxiety created by the threat of death, prolonged solitary confinement, poor prison conditions, and the lack of educational or recreational activities. The European Court of Human Rights has held that prolonged periods of time spent on death row awaiting execution violate the prohibition of ill treatment. This decision, however, was based not only on the length of time spent on death row, but also on the personal circumstances of the inmate, including age and mental state. The Inter-American Court of Human Rights and Inter- American Commission on Human Rights have similarly held that prison conditions, together with the anxiety and psychological suffering caused by prolonged periods on death row, constitute a violation of the prohibition of torture and ill treatment.

This is not to say, however, that if States were to carry out a capital sentence as expeditiously as possible the risk of ill treatment would be avoided. The lengthy wait for execution is in many cases tied with the availability of legal recourses compatible with the demands imposed by due process, which also point to the increasing difficulty of States to apply the death penalty without violating international law.

The death penalty as a per se violation of the prohibition of torture

But even if these circumstances did not amount to torture or ill treatment, there is the question of whether the death penalty per se can be deemed to do so. In fact, international law already expressly considers the death penalty to be a violation *per se* of the prohibition of torture or ill treatment when carried out against juveniles, persons with mental disabilities, pregnant women, elderly persons, and persons sentenced after an unfair trial. Also, an increasing number of regional and domestic courts, including the Inter-American Court of Human Rights and the United States Supreme Court, have held that the mandatory death penalty, where judges have no discretion to consider aggravating or mitigating circumstances with respect to the crime or the offender, violates due process and amounts to ill treatment.

In analyzing this issue in my report, I reached the conclusion that there is an evolving trend within international bodies, which is also supported by robust State practice and regional and domestic jurisprudence, which considers the death penalty a violation of the prohibition of torture and ill treatment, regardless of the methods or circumstances of the execution. In my opinion, this trend is evolving - – if it has not already done so – into a norm of customary international law. It is important to keep in mind that from the perspective of international human rights law, Conventions are living instruments, and need to be interpreted in light of present-day conditions. With this understanding, the notion of torture has developed over time, and acts originally considered lawful become unlawful and prohibited under the right to be free from torture. As recognized in international jurisprudence, the definition of torture needs to evolve with a democratic society's understanding of the term.

A report presented in July 2012 by the UN Secretary-General on the death penalty evidences and highlights the trend towards abolition. The report states that approximately 150 of the 193 Member States of the UN have abolished the death penalty for all crimes and that in those States that retain it there is an observable trend to restrict its use or to call for a moratorium on executions. Also, in 2011 the UN General Assembly issued a Resolution calling for a moratorium on the use of the death penalty with a view to achieve its abolition. In August 2012 the UN Secretary-General reported to the UN General Assembly that, in implementing that Resolution, several States had either abolished the death penalty, introduced amendments to abolish it, stopped its application for certain crimes, or had adopted a moratorium on the executions.

However, it is mainly regional and domestic jurisprudence what reflects the understanding that the death penalty constitutes per se torture or ill treatment and a violation of human dignity. In the case of *Al-Saadoon v. UK*, for instance, the European Court of Human Rights, held that, whatever the method of execution, the extinction of life involves some physical pain and that, foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering. Similarly, the African Commission on Human and Peoples' Rights has consistently encouraged the abolition of the death penalty in Africa, expressing concerns that executions will constitute a violation of several provisions of the African Charter, including Article 4, which states that human beings are inviolable, with every human being entitled to respect for his life and the integrity of his person, and Article 5, which guarantees the right to respect of the dignity inherent in a human being.

In *Gregg v. Georgia* (1976), U.S. Supreme Court Justice Brennan argued in his dissenting opinion that it is a moral principle that “the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings—a punishment must not be so severe as to be degrading to human dignity.” In my report I pointed to similar conclusions reached by domestic courts, including the South African Constitutional Court, the Canadian Supreme Court, and the Constitutional Courts of Albania, Hungary, Lithuania, and Ukraine.

This global trend towards abolition is reinforced today by other examples that took place after my report was published. Only last week, news came from Pakistan government's decision to reinstate the moratorium on executions that expired this year. In a report published in 2013, Amnesty International claimed that, by the end of 2012, up to 100 States had abolished the death penalty for all crimes, and over 140 are currently abolitionist in law and practice, meaning that no executions have been carried out in the past 10 years. Overall, the report found that 174 of 193 member states of UN were execution free in 2012.

Even in the US the use of the death penalty is also declining, from a high of 98 executions in 1999 to 43 in 2011 and 2012, respectively.¹ In March of this year, Maryland abolished the death penalty, making it the 6th state in six years to do so. A recent report by the Death Penalty Information Center,² found that since the Death Penalty was reinstated in the U.S., all State executions stem from cases in just 15% of counties throughout the U.S., and all of the 3,125 inmates on death row as of January 1, 2013 come from just 20% of counties. The report argues that contrary to the assumption that the death penalty is widely practiced across the U.S., it is in fact just a relatively small cluster of places that use it

Conclusion

Based on these arguments, and as I concluded in my 2012 report, even while it may still be theoretically possible to impose and execute the death penalty without being against the absolute prohibition of torture and ill treatment, the rigorous conditions that States must apply for that purpose make retention of capital punishment costly and impractical and not worth the effort. Even with such conditions, States cannot guarantee that in all cases the prohibition of torture will be scrupulously adhered to.

In addition, based on the global trend towards abolition, and although my report did not aim to determine the existence of a customary norm, I firmly believe that a customary norm that prohibits the death penalty under all circumstances because it violates the prohibition of torture and ill treatment is at least in the process of formation. States need to **reexamine** their **procedures under international law**, because their ability to impose and carry out the death penalty is diminishing as these practices are increasingly viewed to constitute torture or ill treatment.

In my report and in my presentation to the General Assembly, I advocated for the creation of a mechanism, such as a special rapporteurship within the United Nations on capital punishment, with the ability to undertake, among other things, a broad consultation with experts to determine the existence of this customary norm or the status of its development. I continue to believe that this is an important need. Specially since difficult

¹ **Amnesty International Report:** <http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-trends>

² **Death Penalty Info Report:** <http://deathpenaltyinfo.org/documents/TwoPercentReport.pdf>

situations like the fight against terrorism or drug trafficking create new opportunities to claim for the reintroduction of the death penalty, and States, such as India or Indonesia, that have not carried out execution for a while, have now again carried out some executions in 2012 and 2013.