The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment

*by Juan E. Méndez**

Introduction

As the United Nations Special Rapporteur on Torture and other Cruel, Inhuman, and Degrading Treatment or Punishment, I have the responsibility every year to select two emerging issues that contribute substantially to the debate on the prohibition of torture. The conclusions of these studies, along with my recommendations to States, are included in thematic reports. One of these reports is presented in March before the Human Rights Council, and another in October before the UN General Assembly. My most recent thematic report, presented in October 2012 to the General Assembly, explores the death penalty as it relates to the international prohibition of torture and cruel, inhuman, and degrading treatment (CIDT).

To date, the death penalty has generally been treated under the international standards and regulations governing the right to life, and in accordance with Article 6 of the International Covenant on Civil and Political Rights (the Covenant); under certain circumstances, it has been considered a lawful sanction under international law. International law decidedly encourages abolition of the death penalty but does not require it. There is evidence, however, of an evolving standard within regional and local jurisprudence and state practice to frame the debate about the legality of the death penalty within the context of the fundamental concepts of human dignity and the prohibition of torture and CIDT. Regional and domestic courts have increasingly held that the death penalty, both as a general practice and through the specific methods of implementation and other surrounding circumstances, can amount to CIDT or even torture.

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I therefore believe that further investigation into this evolving standard is needed in order to reexamine the legality of the death penalty under international law, and to determine its implications for the global trend towards abolition.

Juan E. Méndez, Courtesy Washington College of Law

Although it may still be considered that the death penalty is not *per se* a violation of international law, my research suggests 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 CIDT is becoming increasingly restricted. Taking this into account, I have called upon all States to consider whether the use of the death penalty, as applied in the real world today, fails to respect the inherent dignity of the human person, causes severe mental and physical pain or suffering, and constitutes a violation of the prohibition of torture or CIDT.

Overview of the Death Penalty and the Prohibition of Torture and CIDT

Article 6 of the Covenant protects the right to life but allows the use of the death penalty under specific conditions. Among these conditions, the death penalty "may be imposed only for the most serious crimes," and must be in accordance with both the law in force at the time of the commission of the crime and the provisions of the Covenant.[1] Furthermore, the death penalty may only be imposed "pursuant to a final judgment rendered by a competent court" and may not be carried out against pregnant women or invoked for crimes committed by persons below the age of eighteen.[2] The Covenant also notes that Article 6 may not be invoked to prevent or delay the abolition of the death penalty by States Parties.[3]

Article 7 of the Covenant, however, expressly prohibits the use of torture or cruel, inhuman, or degrading treatment or punishment.[4] Under Article 1.1 of the Convention against Torture (CAT), torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person,"

by, or with the instigation or consent of a public official or person acting in an official capacity, so as to intimidate, punish, or obtain information from the person, among other motives.[5] Article 16.1 of the CAT prohibits other acts of cruel, inhuman, and degrading treatment (CIDT) committed by, or with the instigation or consent of public officials, that cause pain and suffering but do not reach the level of severity of torture nor carry the same motive requirements.[6] Under Article 1.1 of the CAT, however, the definition of torture does not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions."[7] Some States and other international actors argue that, similar to Article 6 of the Covenant, Article 1.1 of the CAT provides an exception for the death penalty when conducted in accordance with the laws of the State imposing the sanctions.

As emphasized by various international judicial bodies, however, this interpretation may change over time.[8] The proper understanding of Article 1.1 of the CAT should be that the "lawful sanctions" exception refers to sanctions that are lawful under *both* national and international law, and that practices initially considered lawful under domestic law may still violate Article 1 if they constitute violations of international human rights law.

The prohibition of corporal punishment offers an example of such an evolving standard. Once considered to be a lawful form of sanction, numerous decisions by treaty bodies and regional and domestic courts have held that various forms of corporal punishment violate Article 1 of the CAT. It is now widely accepted that corporal punishment amounts *per se* to CIDT or torture, and no longer qualifies as a "lawful sanction."[9]

Actual Practices of Capital Punishment

Aside from the issue of whether capital punishment constitutes a *per se* violation of the prohibition of torture and CIDT, specific methods of execution and other circumstances related to the implementation of the death penalty, including the so-called "death row phenomenon," often constitute violations in and of themselves. Evolving state practice and international opinion, including responses to new developments in forensic science, highlight the extreme difficulty of implementing the death penalty without violating the prohibition of torture and CIDT.

Several methods of execution have been explicitly deemed violations of the prohibition of torture and CIDT by international or domestic judicial bodies and have been prohibited by a number of States retaining the death penalty. The European Court of Human Rights has held that death by stoning constitutes torture,[10] and the United Nations Commission on Human Rights described stoning as a particularly cruel and inhuman means of execution.[11] Similarly, the Human Rights Committee has held that execution by gas asphyxiation constitutes CIDT, pointing to the length of time that this method takes to kill a person and the availability of other, less cruel methods.[12] The Committee refrained from deciding what other specific methods of execution might constitute torture or CIDT, holding instead that the death penalty, in all cases, "must be carried out in such a way as to cause the least possible physical and mental suffering." [13]

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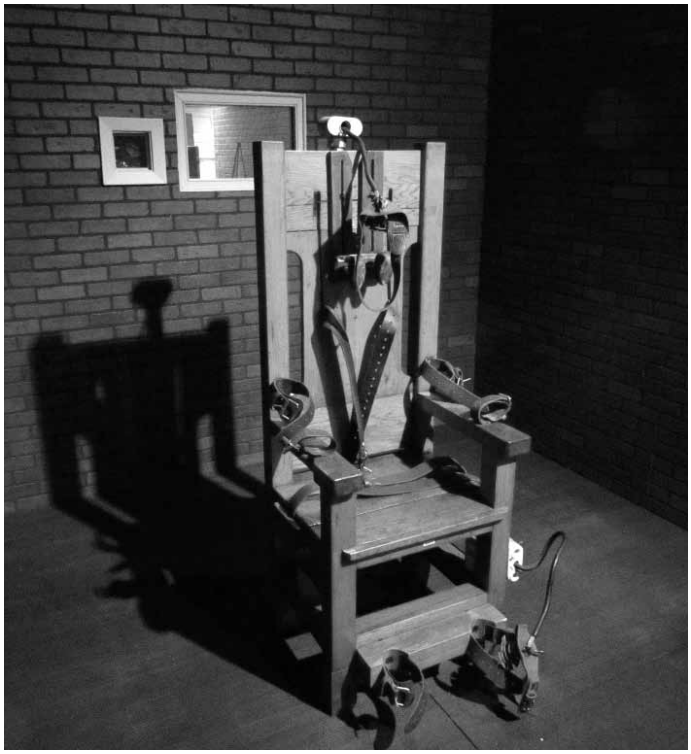
It has been argued that various other methods of execution constitute CIDT or torture, although there has not been a clear consensus in international opinion and practice. Such has been the case of execution by hanging,[14] which some international and domestic judicial bodies have indicated may constitute CIDT or torture.[15] Similarly, the Human Rights Committee decided in 1994 that lethal injection did not amount to torture or CIDT and has yet to review its decision despite the emergence of new forensic evidence that indicates otherwise.[16]

The fact that a number of execution methods have been deemed to constitute torture or CIDT, 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.

The "death row phenomenon" is a relatively new concept that has emerged within the context of the implementation of the death penalty and the prohibition of torture and CIDT. The phenomenon refers to a *combination* of circumstances that produce severe mental trauma and physical suffering in prisoners serving death row sentences, including prolonged periods waiting for uncertain outcomes, solitary confinement, poor prison conditions, and lack of educational and recreational activities.



Courtesy NixBC

The European Court of Human Rights has held that prolonged periods of time spent on death row awaiting execution violate the prohibition of CIDT.[17] 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.[18] 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 CIDT.[19]

The Death Penalty as a Violation *Per Se*

In certain cases, international law expressly considers the death penalty to be a violation *per se* of the prohibition of torture or CIDT. These standards hold that executions of persons belonging to certain groups, such as juveniles,[20] persons with mental disabilities,[21] pregnant women, elderly persons, and persons sentenced after an unfair trial,[22] are considered particularly cruel and inhuman, regardless of the specific methods of implementation or other attendant circumstances.

Although international law does not attribute a different value to the right to life of these particular groups, it holds that the imposition of the death penalty in such cases *per se* constitutes CIDT. These standards are based on the established belief that the execution of such persons is inherently cruel. The prohibition on the execution of juveniles is also considered a *jus cogens* norm, an imperative rule that binds all States.[23] Similarly, 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 CIDT.[24]

International standards holding the death penalty in certain cases to constitute CIDT, as well as the regulation of specific methods of execution and other surrounding circumstances, highlight the difficulty with which States may implement the death penalty without violating the prohibition of torture or CIDT. Concurrently, these standards and practices also illustrate a developing global trend to reconsider capital punishment in all cases as a violation *per se* of the prohibition of torture or CIDT.

The Possible Emergence of a Customary Norm

The prohibition of torture is a non-derogable customary and *jus cogens* norm that no State is allowed to ignore. The Statute of the International Court of Justice defines customary international law in Article 38(1)(b) as "evidence of a general practice accepted as law." This is usually determined through state practice applied under a sense of legal obligation or *opinio juris*. Evidence of state practice and *opinio juris* can be found in the signing and ratification of treaties, policy statements, and the votes and resolutions of political decision-making bodies.

The growing trend toward the abolition of the death penalty as imposed on certain individuals, and the regulation of the particular methods of implementation, reflect the irreconcilable conflict between the lawful imposition of the sanction and the prohibition of torture or CIDT under international law. A report presented in July 2012 by the UN Secretary-General on the death penalty evidences and highlights this trend.[25] 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 among many of them to restrict its use or to call for a moratorium on executions.[26] Another document that provides evidence of this trend and, at the same time, constitutes a reflection of the international movement toward abolition is the 2011 UN General Assembly Resolution calling for a moratorium on the use of the death penalty with a view to achieve its abolition.[27] In August 2012 the UN Secretary-General reported to the UN General Assembly on the developments of the implementation of that resolution and noted that 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.[28]

> [T]he conflict between the application of the death penalty and the prohibition of torture and CIDT is most evident in the growing number of regional and domestic opinions and decisions that have held the death penalty in all cases to constitute CIDT or even torture, regardless of the methods or circumstances of implementation, or the particular individuals upon which it is imposed.

Yet, the conflict between the application of the death penalty and the prohibition of torture and CIDT is most evident in the growing number of regional and domestic opinions and decisions that have held the death penalty in all cases to constitute CIDT or even torture, regardless of the methods or circumstances of implementation, or the particular individuals upon whom it is imposed.[29] The European Court of Human Rights, for example, has held that the death penalty constitutes CIDT or even torture, citing various resolutions of the European Human Rights System that call for the abolition of the death penalty, and stating that the definition of torture must evolve with democratic society's understanding of the term.[30] 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 the provisions of the African Charter on Human and Peoples' Rights (African Charter), specifically 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 its resolutions, the African Commission urged States Parties that retain the death penalty to consider

establishing a moratorium on executions, with a view to abolishing this practice.[31]

In *Gregg v. Georgia* [32] (1976), U.S. Supreme Court Justice William J. Brennan argued in his dissenting opinion in the case that allowed for reinstatement or the death penalty 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." Similarly, a significant number of domestic courts have held that the death penalty *per se* violates the prohibition of torture and CIDT, including the South African Constitutional Court,[33] the Canadian Supreme Court,[34] and the Constitutional Courts of Albania, Hungary, Lithuania, and Ukraine.[35] These decisions are consistent with the abolition of the death penalty in a number of U.S. states based on the justification that the death penalty itself constitutes an extreme form of physical and psychological suffering, thereby violating the prohibition of torture and CIDT.[36]

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It can be said, therefore, that there is an evolving standard in international law to consider the death penalty in all cases as a violation *per se* of the prohibition of torture and CIDT. Although my report does not aim to determine the existence of such a customary norm, I firmly believe that a customary norm prohibiting the death penalty under all circumstances is at least in the process of formation. In the exchange before the General Assembly on October 23, 2012, I advocated the creation of a special rapporteurship within the United Nations on capital punishment that would undertake, among other things, a broad consultation with experts to determine the existence of such customary norm or the status of its development.

Conclusions

The report examines the growing trend in international law to frame the debate about the legality of the death penalty within the context of the prohibition of torture and CIDT. I argue that a customary norm considering the death penalty to be a violation *per se*, if not already established, is currently in the process of development.

Even if this norm has not yet been established, I argue that the rigorous conditions applied to the imposition of the death penalty under international law make retention of this punishment by states costly and impractical. These regulations include strict due process guarantees, restrictions on the specific methods of execution, prevention of the "death row phenomenon" and other related circumstances, and the prohibition on the execution of certain individuals. Even with such conditions in place, however, states cannot guarantee that the prohibition of torture will not be violated in each case.

I believe it is necessary for the international community to discuss this issue further and for states to reconsider whether the death penalty *per se* fails to respect the inherent dignity of the human person and violates the prohibition of torture or CIDT. I have also called on all states currently employing the death penalty to strictly observe the standards and conditions imposed by Article 7 of the Covenant and Articles 1 and 16 of the CAT in regards to the particular methods of implementation of execution and other related circumstances.

Endnotes

1 International Covenant on Civil and Political Rights, art. 6, para. 2, Dec. 16, 1966, 6 ILM 638, 993 U.N.T.S. 3.
2 *Id.* art. 6, para 5.
3 *Id.* art. 6, para 5.
4 *Id.* art. 7.
5 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, para. 1, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51), U.N. Doc. A/19/51 (1984), *entered into force* June 26, 1987.
6 *Id.* art. 16, para. 1.
7 *Id.* art. 1, para. 1.
8 See Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, sec. 3* The Death Penalty in the Light of the Prohibition of Cruel, Inhuman and Degrading Punishment, U.N. Doc. A/HRC/10/44 (Jan. 14, 2009) (by Manfred Nowak).
9 Nigel S. Rodley, *Integrity of the Person*, *in* International Human Rights Law (Oxford University Press ed., 2000).
10 98 Eur. Ct. H.R. at 8 (2001).
11 Human Rights Council Res. 2003/67, Question of the Death Penalty, E/CN.4/RES/2003/67 at ¶ 4(i) (Apr. 24, 2003); Human Rights Council Res. 2004/67, Question of the Death Penalty, E/CN.4/RES/2004/67 at ¶ 4(i) (Apr. 21 2004); Human Rights Council Res. 2005/59, Question of the Death Penalty, E/CN.4/RES/2005/59 at ¶ 7(i), 4(h) (Apr. 20 2005).
12 H.R. Comm., Chitat Ng v. Canada, Comm. No. 469/1991, 49th Sess., U.N. Doc. CCPR/C/49/D/469/1991 at ¶ 16.4 (Nov. 5 1993).
13 *Id.* at ¶16.2
14 *See* Aitken v. Jamaica, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 58/02, ¶ 138 (Oct. 21, 2002).
15 *See* In re Ramadan, Application for Leave to Intervene as Amicus Curiae of United Nations High Commissioner for Human Rights (2007); Republic v. Mbushuu, High Court of Tanzania (Jun. 22 1994).
16 *E.g.*, Cox v. Canada, Communication No. 539/1993, U.N. Doc. CCPR/C/52/D/539/19930 (1994); e.g. Zimmers et al., Lethal Injection for Execution: Chemical Asphyxiation (2007).

[17] Soering v. UK, 161 Eur. Ct. H.R. (ser. A) (1989).
[18] *Id.*
[19] *See* Rep. Inter-Am. Ct. H.R. no. 55/02, Merits, Case 11.765, Paul Lallion, Grenada, October 21, 2002 paras. 86-90; Rep. No. 58/02, Case 12.275, Merits, Denton Aitken, Jamaica, October 21, 2002, paras. 133-134; Hilaire v. Trinidad and Tobago, Inter-Am. Ct. H.R, Series C, No. 94, paras.167,168 (Jun. 21 2002).
[20] For the case of Juveniles *see* Domingues v. United States, Rep. Inter-Am. Ct. H.R, No. 62/02, paras. 84-87 (2002) and Roper v. Simmons, 543 U.S. 551 (2005).
[21] *See* UN Comm. H.R., E/CN.4/RES/2003/67; Atkins v. Virginia, 536 U.S. 304 (2002).
[22] *See* Baboheram-Adhin v. Suriname, Comms. Nos. 148-154/1983 (1985); Pratt v. Jamaica, Comms Nos. 210 & 225 (1986) (1987); Bader v. Sweden, Eur. Ct. H.R. Application no, 13284/04 (2005).
[23] Domingues v. United States, Rep. Inter-Am. Ct. H.R, No. 62/02, para. 84 (2002).
[24] Woodson v. North Carolina 428 U.S. 280 (1976); Hilaire v. Trinidad and Tobago, Inter-Am. Ct. H.R, Series C, No. 94, paras. 167,168 (2002).
[25] Report of the Secretary-General, Questions of the Death Penalty, Human Rights Council Twenty First Session, A/HRC/21/29 July 2, 2012, para.60.
[26] *Id.* at paras. 6-16.
[27] U.N. G.A. Res. A/RES/65/206 Marc 28, 2011 para.3.d.
[28] U.N. Secretary-General, Moratorium on the Use of the Death Penalty, A/67/226, paras. 6-10 (2012).
[29] *Supra* note 10; *see also* Manfred Nowak, *Is the Death Penalty an Inhuman Punishment*? In Jurisprudence of Human Rights Law – A comparative and interpretive approach, eds. Turku, Finland: Institute for Human Rights, Abo Akademi Univ. (2000).
[30] Al-Saadoon v. UK, application No. 61498/08, para. 115 (2010).
[31] A.C.H.P.R. Res. 42(XXVI) 99 and A.C.H.P.R. Res.136(XXXXIIII)08.
[32] Gregg v. Georgia, 428 U.S. 53, 229 (1976) (dissenting).
[33] State v. Makwanyane, 1995 SA no. CCT/3/94 (1995).
[34] United States v. Burns, [2001] S.C.R. 283, 289 (Can.).
[35] Cited in Ocalan v. Turkey, Eur. Ct. H.R no. 46221/99, para. 159 (2005).
[36] Tsakhia Elbegdorj, Pres. of Mongolia, Speech on Capital Punishment at the State Great Khural (Jan. 14, 2010), *available at* http://www.president.mn/eng/newsCenter/viewNews.php?newsId=122 (2010); Representación Permanente de España ante la ONU, 28 Abril 2011, Ginebra, MA/MSS/N° 14572011.