International Law and the Mortal Precipice: A Legal Policy Critique of the Death Row Phenomenon

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I. INTRODUCTION

In the 1989 landmark case of *Soering v. United Kingdom*,[1] the issue presented before the European Court of Human Rights was whether the United Kingdom could lawfully extradite Jens Soering to the United States from which he had fled following the 1985 murder of his college girlfriend's parents in Virginia.[2] If the United Kingdom granted extradition[3] and Soering was convicted of murder, he was eligible to face the death penalty under Virginia law.[4] To avoid extradition, Soering did not allege that the death penalty itself was unlawful;[5] instead, he argued that his extradition would lead to "inhuman and degrading treatment and punishment" in violation of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) under a novel legal theory labeled the "death row phenomenon."[6]

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1. 11 Eur. H.R. Rep. 439 (1989).

2. *Id.* at 439-41.

3. His return would have been effected pursuant to the U.S.-U.K. Extradition Treaty, U.S.-U.K., art. III, June 8, 1972, 28 U.S.T. 227 (recognizing murder as an extraditable offense).

4. In the United States, the permissibility of the death penalty is generally determined by state law. Almost three out of four American states (thirty-six of fifty) currently subscribe to capital punishment. Death Penalty Information Center (DPIC), Death Penalty Policy by State, http://www.deathpenaltyinfo.org/article.php?did=121&scid=11 (last visited on Sept. 9, 2008).

5. Although the United Kingdom had previously abolished the death penalty as a matter of domestic law, the applicable treaty subject to interpretation by the European Court expressly allowed for capital punishment: "No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a *crime for which this penalty is provided by law*." European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Nov. 4, 1950, 213 U.N.T.S. 221, art. 2 (emphasis added). Had this case surfaced a decade later, however, the United Kingdom would have been legally bound *not* to extradite Soering on account of the death penalty. An optional instrument to the ECHR, which the U.K. ratified in May 1999, abolished the death penalty except "in respect of acts committed in time of war or of imminent threat of war." Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, Europ. T.S. No. 114, *entered into force* Mar. 1, 1985.

6. An amicus curiae brief before the European Court contended that article 3 had implicitly dispensed with the recognized use of the death penalty in article 2(1), but the Court found no merit in that contention. *Soering*, 11 Eur. H.R. Rep. at 488-89. By 2001, however, the Parliamentary Assembly of the Council of Europe (COE) had adopted a resolution affirming its "complete opposition to capital punishment" while maintaining that "its application constitutes torture and inhuman or degrading punishment within the meaning of Article 3 of the European Convention on Human Rights." Eur. Parl. Ass., *Abolition of the Death Penalty in Council of Europe Observer States*, 17th Sess., Doc. No. 9115 (2001), *available at* http://assembly.coe.int/Documents/AdoptedText/ta01/ERES1253.htm (last visited on Mar. 12, 2008). More recently, in 2005, the European Court of Human Rights itself expressed sympathy with that perspective. In *Öcalan v. Turkey*, the Grand Chamber embraced the view that evolving attitudes about the meaning of "inhuman and degrading treatment and punishment" among COE Member States and the COE's almost universal adoption of Protocol No. 6 revealed that "capital punishment in peacetime has come to be regarded as an unacceptable . . . form of punishment that is no longer permissible under Article 2." 41 Eur. H.R. Rep. 45, 48 (2005) (*dictum*) (citation omitted).

More specifically, Soering claimed that, upon extradition, he might well be convicted and sentenced to death by a Virginia court, and consequently would suffer impermissible treatment—amounting to an actual or expected form of intense mental suffering—due to the debilitating circumstances generally endured by a death row inmate[7] in Virginia.[8] That prognostication was based on the average length, and purported severity, of confinement of such prisoners at the Mecklenburg Correctional Center[9] (where Soering would have been assigned) as exacerbated by his youth and mental impairment.[10] In a unanimous decision (18-0), the European Court of Human Rights embraced this contention, holding that, absent an assurance that the death penalty would not be imposed, Soering's extradition presented a "real risk" that he could be directly exposed to "inhuman treatment."[11]

Soering has spawned a body of international and domestic case law, most—but not all—of which recognizes the validity of the death row phenomenon. But even among those courts adopting it in principle, its application has been far from uniform. This diversity of judicial opinion can be explained in part by certain complicating factors pertaining to the phenomenon's interpretation. To begin, the term itself has no widely established definition,[12] and accordingly has sometimes been confused with other death row-related concepts or experiences.[13] In addition, the phenomenon is applied against a broad range of legal standards, whether under an international human rights convention like the International Covenant on Civil and Political Rights (ICCPR),[14] a regional human rights instrument such as the ECHR, or a domestic constitution or

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7. A "death row inmate" is a prisoner who has been sentenced to death for a capital crime and is awaiting execution of that sentence. Death row inmates generally reside in high-security prisons, are separated from other prisoners in the same facility, and experience greater physical restrictions and fewer human contacts than other prisoners. Patrick Hudson, *Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law?*, 11 EUR. J. INT'L L. 833, 835-36 (2000).

8. *Soering*, 11 Eur. H.R. Rep. at 462.

9. Mecklenburg was characterized by the Court as a "modern maximum-security institution." *Id.* at 459.

10. *Id.* at 475-78.

11. *Id.* at 468-69. Soering was eventually extradited to the United States but only on the explicit condition that he not face the death penalty if convicted; he ultimately received two life sentences. Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 202 n.219 (1998).

12. *See* Hudson, *supra* note 7, at 837 (describing term as developing).

13. These sources of confusion are discussed at Part I.B *infra*.

14. Dec. 16, 1966, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter ICCPR].

statute.[15] While the terminology used tends to be substantially similar—for example, "cruel and unusual punishment"[16] or "cruel, inhuman or degrading treatment or punishment"[17]—its essential meaning can, and often does, vary based on how that standard is understood within its specific jurisprudential context as construed by the corresponding judicial body.[18]

Moreover, the courts have applied the phenomenon under two distinct scenarios: (1) when extradition to a "retentionist" state[19] is under consideration, as in *Soering* (an ex ante perspective), and (2) based on the actual experience of a death row inmate (an ex post perspective). In the former context, a court must speculate about the actual conditions and duration of death row detention, as well as the prospect that the accused will be convicted and sentenced to death in the first place.[20] In the latter context, however, all such matters, including the actual psychological impact on the death row inmate, are generally known or reasonably ascertainable.[21] By their very nature, these two types of cases entail decidedly different approaches to the analysis of a phenomenon claim, and yet curiously the judiciary and the academic community alike

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15. Which body of law the claim arises under depends in which forum the claimant chooses to lodge his or her complaint. Before a litigant can bring a cause of action before an international or regional human rights body, however, he or she must first exhaust available remedies afforded under domestic law. *E.g.*, Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 5, 1496th plen. mtg. (Mar. 23, 1976); ECHR, *supra* note 5, art. 26.

16. U.S. CONST. amend. VIII.

17. *E.g.*, ICCPR, *supra* note 14, art. 7; *accord* Org. of Am. States, American Convention on Human Rights, art. 5, para. 2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *entered into force* July 17, 1978 [hereinafter ACHR].

18. *See generally State v. Makwanyane* 1995 (3) S.A. 391 (CC) (S. Afr.), *reprinted in* 16 HUM. RTS. L.J. 154, para. 26 (1995) ("The question is not, however, whether the death sentence is a cruel, inhuman or degrading punishment in the ordinary meaning of these words but whether it is a cruel, inhuman or degrading punishment within the meaning of *section* 11(2) of our Constitution."); Pratt & Morgan v. Attorney Gen. for Jam., (1993) 2 A.C. 1, 12 (P.C.) (en banc) ("There is no global consensus as to what constitutes inhuman or degrading punishment or treatment."). To constitute "inhuman treatment" under article 3 of the ECHR, for example, the conduct must be premeditated, occur over an extended time period, and either cause "actual bodily injury or intense physical or mental suffering." Kudla v. Poland, App. No. 30210/96, 35 Eur. H.R. Rep. 11, 35 (2000).

19. Retentionist states are those that maintain the death penalty under their domestic laws while abolitionist states are those that have rendered capital punishment unlawful. Prominent among retentionist states are India, Indonesia, Iran, the People's Republic of China, Saudi Arabia, and the United States. About two out of every three states worldwide today have abolished capital punishment in law or in practice. *See* Abolitionist and Retentionist States, http://www.deathpenaltyinfo.org/article.php?scid=30&did=140 (last visited May 9, 2008) (listing 135 de jure or de facto abolitionist states compared with sixty-two retentionist states).

20. *E.g.*, Soering v. United Kingdom, 11 Eur. H.R. Rep. 439, 468 (1989).

21. *Id.*

seldom expressly distinguish between them. The ex ante approach is of particular relevance today in light of certain retentionist states' intensified efforts to obtain physical custody via extradition of known or alleged terrorists abroad.

Mindful of these factors, this Article has four chief aims: (1) to clarify the nature, scope, and meaning of the death row phenomenon; (2) to summarize the relevant international and domestic case law, as well as to examine the political reaction it has elicited; (3) to critically evaluate the legitimacy of a phenomenon claim from a legal policy perspective; and, based on the foregoing analysis; (4) to prescribe constructive judicial approaches for separately addressing ex ante and ex post phenomenon claims.

II. CLARIFYING THE CONCEPT OF THE DEATH ROW PHENOMENON

A. What It Is

The death row phenomenon cannot realistically be detached from the death penalty itself; logically they are inseparable. As the *Soering* Court observed, the "source" of the phenomenon "lies in the imposition of the death penalty."[22] Although a phenomenon claim only poses an indirect challenge to the death penalty,[23] a successful claim in either instance ultimately yields the same result: No death penalty "implementation."[24] In the case of a phenomenon claim, this most likely would manifest itself in either a host state refusing to honor an extradition request or a retentionist state choosing to commute a death sentence to life imprisonment. Let us now explore the concept's fundamental character and unpack its defining features.

The "death row phenomenon" is a *legal*—not a clinical—term[25] perhaps best generally defined as a "combination of circumstances to

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22. *Soering*, 11 Eur. H.R. Rep. at 469; Bickaroo v. Trinidad & Tobago, UNHRC Commc'n No. 555/1993, U.N. Doc. CCPR/C/61/D/555/1993, para. 5.5 (1997) ("[C]ruelty of the death row phenomenon is first and foremost a function of the permissibility of capital punishment under the [ICCPR].").

23. It is beyond the scope of this Article to address either the morality or policy desirability of capital punishment.

24. To avoid confusion, it is helpful to distinguish between the "imposition" (which occurs during sentencing) and the "implementation" (which takes place at execution itself) of the death penalty. *See* Andrew Clapham, *Symbiosis in International Human Rights Law: The* Öcalan *Case and the Evolving Law on the Death Sentence*, 1 J. INT'L CRIM. JUST. 475, 475 n.2 (2003) (observing that distinction in the context of the First Section Chamber's judgment in Öcalan v. Turkey, 37 Eur. H.R. Rep. 10 (2003)).

25. Notably, the term is not recognized by the American Psychiatric Association (APA) as a mental health disorder in its authoritative and comprehensive reference text. AM. PSYCHIATRIC

which [a prisoner] would be exposed if . . . he were sentenced to death" and placed on death row.[26] The two key circumstances underpinning the phenomenon are the harsh, dehumanizing conditions of confinement and the prolonged period of detention an inmate may endure on death row.[27] As for the conditions of imprisonment, inmates might be confined to a small cell for up to twenty-three hours a day, and may experience total or near-total isolation, no natural light, inadequate sanitation, and no meaningful contact with the outside world.[28] Protracted incarceration, for its part, arguably subjects a death row inmate to a particularized form of mental suffering due to the constant and growing anxiety over the uncertainty (and timing) of the carrying out of his or her death sentence.[29]

Those two factors tend to reinforce each other.[30] Accordingly, courts often view lengthy detention on death row under harsh prison conditions as both mentally and physically debilitating.[31] Neither factor alone, however, is generally deemed sufficient to give rise to the death row phenomenon.[32] Apart from those two features, the circumstances faced by the death row inmate may be compounded by his or her age (if barely an adult or very old) or mental state (if psychologically ill or fragile).

One additional element is required under either an ex ante or ex post scenario: a genuine risk that the death penalty will be imple-

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ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) (Michael B. First ed., 4th ed. 2000).

26. *Soering*, 11 Eur. H.R. Rep. at 464; *see* Konstantin Korkelia, *Extradition Under the Case-Law of the European Court of Human Rights*, 5 GEOR. L. REV. 177, 179 (2002) (focusing on "circumstances").

27. *See* Members of the Steering Committee of the World Coalition Against the Death Penalty, Joint Oral Statement on Question of the Death Penalty by NGOs, Remarks at the 61st Sess. of the U.N. Comm'n on Human Rights (UNCHR) (Apr. 7, 2005). The death row phenomenon encompasses such factors as "the very long duration of detention, total or near-total isolation in individual cells, the uncertainty of the moment of the execution, and deprivation of contacts with the outside world, including family members and legal counsel." *Id.*; *see also* Tung Yin, *Can "Death Row Phenomenon" Be Confined to Death Row Inmates?* (U. Iowa L. Stud. Res. Paper No. 05-11, 2005).

28. Human Rights Advocates, Inc. (HRA), *The Death Row Phenomenon as a Violation of International Law* 2, U.N. Doc. E/CN.4/2004/NGO/98* (Mar. 3, 2004).

29. The *Soering* Court expressed this idea as "the ever present and mounting anguish of awaiting execution of the death penalty." *Soering*, 11 Eur. H.R. Rep. at 478. Michael P. Connolly, *Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 NEW ENG. J. CRIM. & CIV. CONFINEMENT 101, 121 (1997). ("Death row was historically designed for short term confinement: a matter of months, not years, while the prisoner exhausts last minute appeals and requests for clemency.").

30. Hudson, *supra* note 7, at 837.

31. HRA, *supra* note 28, at 2.

32. This proposition was treated exceptionally by the Judicial Committee of the Privy Council in *Pratt & Morgan* and its progeny (discussed *infra* notes 97-105 and accompanying text) in which the variable of delay was deemed singularly dispositive.

mented.[33] It is not enough that death row inmates in an extradition-requesting state tend to suffer long and onerous periods of confinement, or that an actual inmate experiences psychological distress at the thought that he or she might be executed one day unless the death penalty poses a realistic threat. Courts are reluctant to provide relief for a phenomenon claimant in situations where, for example, a state, for the time being, has chosen to forego executions, whether through an existing moratorium or legislative policy, even though capital punishment technically remains on the books and the current practice could be reversed.[34]

B. What It Is Not

In defining the phenomenon we must be equally clear about what it is *not*. To that end, the phenomenon should be distinguished from several closely related but distinct concepts. As an initial matter, a claim under the phenomenon is not equivalent to a cause of action based on a particular modality of execution, such as electrocution, gas asphyxiation, or lethal injection.[35] The death row phenomenon is indifferent as to the specific mechanics of implementing a death sentence. Modality challenges, however, are reviewable on independent legal grounds and sometimes prove successful even when a parallel phenomenon claim has been asserted.[36] Nor is the phenomenon synonymous with the circumstances posed by multiple life sentences or a life sentence without

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33. *See Soering*, 11 Eur. H.R. Rep. at 469.

34. *See* Iorgov v. Bulgaria, 40 Eur. H.R. Rep. 7, 9-11, 15, 17 (2004) (denying Iorgov's phenomenon claim, despite evidence he had suffered psychologically over the uncertainty of his fate under the death penalty because, although it was never actually abolished during his entire time in detention, there was either a moratorium on executions or a legislative decision to defer executions in force); Hudson, *supra* note 7, at 843. The European Commission found no violation of article 3 of the ECHR largely on the ground that "everyone knew Turkey was no longer executing prisoners, thus . . . any threat of execution was illusory." *Id.* (citing Cinar v. Turkey, App. No. 17864/91 (1994) 79 A DR 5). *But see* Öcalan v. Turkey, 41 Eur. H.R. Rep. 45, 50-51 (2005) (unwilling to rule out the possibility, in contradistinction to *Cinar*, that Turkey's moratorium on the death penalty, which had been in effect since 1984, would be lifted in the extreme case of applicant, as he was "Turkey's most wanted person" and "had been convicted of the most serious crimes existing in the Turkish Criminal Code").

35. Regrettably, a U.S. appellate court appeared to link these concepts comparatively when it stated: "If it is not cruel and unusual punishment to execute someone after the electric chair malfunctioned the first time, . . . we do not see how the present situation [prolonged death row detention] even begins to approach a constitutional violation." Chambers v. Bowersox, 157 F.3d 560, 570 (8th Cir. 1998) (citing Francis v. Resweber, 329 U.S. 459 (1947)).

36. *See* Ng v. Canada, UNHRC Commc'n No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991, para. 16.4 (1994) (determining that execution by gas asphyxiation would prolong agony and suffering, and therefore extradition to a state where that mode of execution was practiced, absent assurances that it would not be used, would violate article 7 of the ICCPR; the Court did not deem it necessary to reach the phenomenon claim).

parole;[37] the ongoing specter of state-sanctioned death is a necessary component. Nevertheless, the prospective imposition of such significant criminal penalties deters some governments from extraditing persons to states that employ such practices.[38]

The phenomenon also must be distinguished from certain psychologically aggravating circumstances that may arise incidentally during death row detention. Those circumstances, which tend to spike anxiety and uncertainty well above the ordinary death row experience, include when an inmate: (1) is not promptly informed of any stay of execution;[39] (2) is notified of his execution and then placed in a "death cell" to await imminent execution before being returned to death row, absent a detailed justification by the state for such treatment;[40] or (3) is removed from death row for a period of time only to be returned to it without explanation by the state.[41]

Finally, the death row phenomenon must not be conflated with the similarly sounding term, "death row syndrome."[42] Both terms denote a degree of mental trauma in connection with the death row experience and both potentially can justify reprieve from execution, but their commonality essentially ends there. The phenomenon relates to the *circumstances* on death row, including the duration and isolation of detention, as well as the uncertainty as to the time of execution that can

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37. Nevertheless, under the case law of the European Court of Human Rights, the "imposition of an irreducible life sentence on an adult may raise an issue under Article 3." Kafkaris v. Cyprus, App. No. 21906/04, [2008] Eur. Ct. H.R., para. 97 (Feb. 12, 2008), http://www.echr.coe.int./echr/Homepage_EN (follow "case-law" hyperlink; then follow "HUDOC" hyperlink and search "Kafkaris"); *see also id.* para. 107 (recognizing the validity of the claim in principle and how the absence of a minimum prison term "necessarily entails anxiety and uncertainty related to prison life" but rejecting the claim under the facts).

38. *See* Nora V. Demleitner, *AALS Panel—The* Avena *Case in the International Court of Justice—Crime and Immigration: Domestic, Regional and International Consequences*, 5 GERMAN L.J. 1, para. 24 (Apr. 2004), *available at* http://www.germanlawjournal.com/print.php?id=415 (citing by example applicable restrictions under the Mexican and Portuguese constitutions).

39. A near twenty-hour delay in notifying the inmate of the stay of execution was found to be a violation. Pratt & Morgan v. Jamaica, UNHRC Commc'n No. 225/1987, U.N. Doc. CCPR/C/35/D/225/1987, para. 13.7 (1989). However, removal from the gallows fifteen minutes before scheduled execution was acceptable when the inmate was informed immediately of the decision. Thompson v. St. Vincent, UNHRC Commc'n No. 806/1998, U.N. Doc. CCPR/C/70/D/806/1998, para. 8.4 (2000).

40. *E.g.*, Pennant v. Jamaica, UNHRC Commc'n No. 647/1995, U.N. Doc. CCPR/C/64/D/647/1995, paras. 3.7, 8.6 (1998) (held in "death cell" for two weeks).

41. Chisanga v. Zambia, UNHRC Commc'n No. 1132/2002, U.N. Doc. CCPR/C/85/D/1132/2002, para. 7.3 (2005) (finding a violation where the prisoner had been off death row for two years).

42. The two terms are often treated synonymously, especially in the mass media. *E.g.*, Avi Salzman, *Killer's Fate May Rest on New Legal Concept*, N.Y. TIMES, Feb. 1, 2005, at B4.

be tantamount to a form of psychological maltreatment, while the syndrome pertains strictly to the mental *effects* themselves that derive from prolonged death row detention, such as incapacitated judgment, mental illness, or suicidal tendencies.[43] It follows that the phenomenon, unlike the syndrome, does not per se require demonstrable proof of mental suffering. In addition, the two concepts are implicated in distinct contexts: while the phenomenon alone can arise under an extradition scenario, only the syndrome is germane when mental competency claims are raised.[44]

III. DEATH ROW PHENOMENON CASE LAW AND ITS POLITICAL RESPONSE

In this Part, we will summarize international and domestic case law concerning the death row phenomenon by highlighting the most significant or representative rulings of ex ante or ex post claims. The cases are categorized by tribunal because each applies its own governing legal standard.[45] Initially, we will examine the seminal *Soering* case adjudicated by the European Court of Human Rights[46] as it provides a

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43. *See* DPIC, Time on Death Row, http://www.deathpenaltyinfo.org/article.php?&did=1397 (last visited May 10, 2008); Stephan Black, *Killing Time: The Process of Waiving Appeal—The Michael Ross Death Penalty Cases*, 14 J. L. & POL'Y 735, 749 (2006) (describing the syndrome as the "mental stress" that develops in inmates due to "prolonged exposure to death row"). Alvin Ford was not put to death in Florida in 1986 because the court concluded that his experience on death row had rendered him insane. Tom Geoghegan, *The Search for a 'Humane' Execution*, BBC NEWS, Jan. 14, 2008 (Magazine), *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/magazine/7183957.stm.

44. Lawyers for Michael Bruce Ross, a convicted serial killer in Connecticut, argued that he did not have the competency to decide to forgo appeals that might delay his execution, given the psychological impact of his living seventeen years on death row. Salzman, *supra* note 42.

45. One tribunal omitted from our analysis is the Inter-American Commission on Human Rights (IACHR), as it has yet to take a clear position on the death row phenomenon. *See* WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 349 (Cambridge Univ. Press 3d ed. 2002) (1993); *see also* Lamey v. Jamaica, Case 11.826, Inter-Am. C.H.R., Report No. 49/01, OEA/Ser.L/V/II.111, doc. 20 rev. paras. 231-237 (2000) (ruling on other grounds when issue was raised); Andrews v. United States, Case 11.139, Inter-Am. C.H.R., Report No. 57/96, OEA/Ser.L/V/II.98, doc. 6 rev. para. 178 (1996) (concluding that appellant suffered "cruel, infamous, or unusual punishment" under article XXVI of the 1948 American Declaration of the Rights and Duties of Man based in part on his having spent eighteen years on death row and being confined to his cell for all but a few hours per week, but this ruling also notably factored in his receipt of "at least eight execution dates" and his execution based on the verdict of a racially biased jury). No more recent cases address the death row phenomenon squarely on its merits.

46. The European Court (and, until it was abolished in 1999, the European Commission, the first-tier organ that rendered admissibility determinations and nonbinding opinions for the Court's consideration) has made other rulings on extradition requests to retentionist states, but in all such cases the death row phenomenon factors were not at issue, as those cases were disposed of either because adequate assurances were obtained regarding nonuse of the death penalty or it

useful baseline for our analysis and is almost universally cited by courts reviewing phenomenon claims.

A. Soering v. United Kingdom

In its judgment, the European Court addressed two threshold issues integral to an ex ante death row phenomenon claim: (1) whether a genuine risk existed that the death penalty would be imposed following extradition; and (2) the prospect that the applicant would suffer ill-treatment while awaiting execution on death row.[47] Both of these speculative determinations are typical in extradition cases, unless the accused has already been tried and convicted in absentia or has escaped from custody following sentencing.[48]

Risk of Obtaining Death Sentence if Extradited. In *Soering*, the United Kingdom contended that the applicant did not run a sufficiently high risk of receiving a death sentence in Virginia to implicate article 3 of the ECHR.[49] The United Kingdom pointed to the following factors:

(1) Soering had "not acknowledged his guilt of capital murder as such";[50]
(2) there was "psychiatric evidence" that he may have been "suffering from a disease of the mind sufficient to amount to a defence of insanity under Virginia law";[51]
(3) even if he were convicted, it was by no means certain that "the jury [would] recommend, the judge [would] confirm and the Supreme Court of Virginia [would] uphold the imposition of the death penalty,"[52] particularly given certain mitigating factors like Soering's

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was deemed unlikely that capital punishment would be imposed. William A. Schabas, *Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice*, 25 LOY. L.A. INT'L & COMP. L. REV. 581, 590 (2003) (referencing, by example, H. v. Sweden, App. No. 22408/93, 79A Eur. Comm'n H.R. Dec. & Rep. 85 (1994)); *see also* European Court of Human Rights Web site, http://www.echr.coe/int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/ (last visited May 13, 2008).

47. A third threshold issue, although not specific to the death row phenomenon, was also considered. The European Court had to determine if a state that is a party to the ECHR could be held responsible under article 3 not for itself inflicting ill-treatment but for exposing an individual to such treatment by another state. Soering v. United Kingdom, 11 Eur. H.R. Rep. 439, 468 (1989) (concluding in the affirmative).

48. This dynamic generally applies in cases of extradition requests, unless of course the accused has already been tried and convicted in absentia or has escaped from custody following sentencing.

49. Indeed, Soering's girlfriend and accomplice (Elizabeth Haysom) in the double murder was extradited to the United States from the United Kingdom in 1987 but did not receive the death penalty; upon her guilty plea, a Virginia court sentenced her to ninety years in prison. *Soering*, 11 Eur. H.R. Rep. at 445.

50. *Id.* at 469.

51. *Id.*

52. *Id.*

> age (eighteen at the time the crime was committed) and his lack of a prior criminal record; and
>
> (4) the prosecuting attorney in Virginia had certified that, should Soering be convicted, a "representation [would] be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out."[53]

Nevertheless, the Court concluded that because the prosecutor would still actively pursue the death penalty, and the diplomatic assurances were far from a guarantee that no death sentence would be imposed, there existed a "real" risk that the applicant would face the death penalty if tried by a Virginia court.[54]

Prospect of Ill-Treatment on Death Row. Courts are not typically in the business of determining harm before it occurs because it "departs from the principle of assessment after the event."[55] The *Soering* Court acknowledged this departure, but justified it on the grounds of the "serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article (art. 3)."[56] Other reasons have been advanced to buttress this exceptional approach: "[T]he belief that the [European] Convention is designed to promote and maintain democratic ideals, [and] the fact that Article 3 admits of no exceptions or derogations."[57]

But there are established limits to such speculative harm under the European Court's jurisprudence. In particular, the exception must not be applied unless: (1) the "ill-treatment [itself] attain[s] a minimum level of severity," which is a relative determination based on "all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim,"[58] and (2) there must be "a real risk of exposure to the known ill-treatment" not "a mere possibility of ill-treatment."[59]

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53. *Id.* at 471.

54. *Id.* at 471-72. In its reasoning, the Court took due notice of "[t]he democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures." *Id.* at 478.

55. Michael K. Addo & Nicholas Grief, *Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?*, 9 EUR. J. INT'L L. 510, 520 (1998).

56. *Soering*, 11 Eur. H.R. Rep. at 468.

57. Addo & Grief, *supra* note 55, at 520; *see also* Saadi v. Italy, [2008] Eur. Ct. H.R., para. 127 (Feb. 28, 2008), http://www.echr.coe.int./echr/Homepage_EN (follow "case-law" hyperlink; then follow "HUDOC" hyperlink and search "Saadi") (referencing nonderogability and absolute character of article 3).

58. *Saadi*, [2008] Eur. Ct. H.R., para. 134. *See also* Addo & Grief, *supra* note 55, at 521 ("[T]he nature and effects of the ill-treatment in question are known, from previous experience, to violate the guarantees of Article 3.") In any event, the ill-treatment to be experienced "must . . .

The *Soering* Court then assessed three key issues on the merits: (1) the length of detention, (2) the conditions on death row, and (3) the applicant's age and mental state.[60]

Length of Detention Prior to Execution. The *Soering* Court noted that the duration on Virginia's death row (the period between sentencing and execution or release), based on seven consummated cases since 1977, averaged six to eight years.[61] The Court was willing to concede both that this time frame was "largely of the prisoner's own making in that he takes advantage of all avenues of appeal which are offered to him by Virginia law"[62] and that "[t]he remedies available under Virginia law serve the purpose of ensuring that the ultimate sanction of death is not unlawfully or arbitrarily imposed."[63] Nonetheless, the Court reasoned that it is "part of human nature that the person will cling to life by exploiting [these] safeguards to the full . . . . [T]he consequence is that the condemned 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."[64] The Court ultimately appears to have discounted the State's intentions, ignored the likely causes of any delay (particularly any attributable to the prisoner), and downplayed the benefits afforded the inmate by the criminal justice system, not to mention placing undue reliance on a statistical average.

Conditions on Death Row. The death row cells at the Mecklenburg facility measure about nine feet by six feet six inches, its inmates spend about an hour a day in a recreational yard and another hour in a common area indoors, and inmates generally can receive noncontact visitors.[65] While recognizing the justifiable need for extra security on death row

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go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment." *Saadi*, [2008] Eur. Ct. H.R., para. 135. Under the ECHR generally, courts may evaluate the sex, age, and state of health of the victim in evaluating "inhuman treatment" claims. *Soering*, 11 Eur. H.R. Rep. at 472.

59. Addo & Grief, *supra* note 55, at 521 (citing Vilvarajah & Others v. United Kingdom, 14 Eur. H.R. Rep. 248 (1991)).

60. In addition to these three factors, the Court also considered relevant the availability of an alternative forum where Soering could be extradited without the risk of suffering on death row. *Soering*, 11 Eur. H.R. Rep. at 477. The other forum under review was a court from the Federal Republic of Germany, as Soering was a German national. Unlike the United States, Germany had abolished the death penalty. *Id.*

61. *Id.* at 457. For purposes of comparison, the average period of detention for death row prisoners in the United States between 1977 and 2006 was 126 months (equivalent to ten and one-half years). U.S. Dep't of Justice, *Capital Punishment, 2006—Statistical Tables*, *available at* http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/tables/cp06st11.htm.

62. *Soering*, 11 Eur. H.R. Rep. at 475.

63. *Id.*

64. *Id.* at 475-76.

65. *Id.* at 459-61.

(for example, the use of handcuffs and waist shackles when moving around the facility and the occasional lockdown[66]), the Court still found the "severity of a special regime"[67] unacceptable,[68] given the "protracted period lasting on average six to eight years."[69] It is noteworthy that the Court inextricably linked the conditions on death row to the duration of time spent there, rather than treating the conditions of confinement for their stand-alone significance.

Applicant's Age and Mental State. The *Soering* Court found the applicant's youth and impaired mental state at the time of the offense[70] as "contributory factors . . . to bring the treatment on death row within the terms of Article 3."[71] Such "extenuating circumstances" were thus treated as materially relevant for purposes of this case, but the Court's judgment left ambiguous whether the existence of such factors would be deemed necessary in other cases.

B. Case Law of the United Nations Human Rights Committee

The United Nations Human Rights Committee (UNHRC), which monitors states' implementation of the ICCPR, has adopted a more demanding approach to death row phenomenon claims than has the European Court of Human Rights. In *Kindler v. Canada*, the UNHRC considered whether it was lawful as a human rights matter for Canada to extradite Joseph Kindler to the United States.[72] Kindler was an American citizen who had escaped from custody after a Pennsylvania jury had recommended his death sentence for first degree murder and kidnapping.[73] Initially, the Court examined the threshold question of whether, by extraditing Kindler, Canada would violate its obligations under article 2(1) of the ICCPR "to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant," including the right to life.[74] Consonant with *Soering*, the

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66. *Id.* at 459, 460.

67. *Id.* at 476.

68. It is unclear whether, in reaching this conclusion, the Court took account of Soering's expressed concerns about physical and sexual violence while in detention at Mecklenburg. *Id.* at 475.

69. *Id.* at 476.

70. *See supra* Part II.A (under Subpart *Risk of Obtaining Death Sentence If Extradited*).

71. *Soering*, 11 Eur. H.R. Rep. at 477.

72. UNHRC Commc'n No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993).

73. *Id.* para. 2.1.

74. *Id.* para. 13.1. Canada had already extradited Kindler to the United States before the matter was reviewed by the Committee. Kindler v. Canada, [1991] 2 S.C.R. 779 (Can.). However, the death row phenomenon analysis still largely followed a prospective approach as the accused had not been long on death row.

UNHRC answered affirmatively on the condition that a "real" risk existed that extradition ultimately would lead to the applicant's death.[75]

The UNHRC next turned its attention to the question of whether the phenomenon, if proven, would constitute a violation of article 7 of the Covenant, which bars "cruel, inhuman or degrading treatment or punishment."[76] The UNHRC invoked its existing jurisprudence on this matter: "'prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies.'"[77] The Committee added that it examines each case on a fact-specific basis.[78] In its review, the UNHRC distinguished material facts in *Soering* from the facts presented in the instant case. The UNHRC found that the author had provided no information about the "possibility or the effects of prolonged delay in the execution of sentence" or about the "prison conditions in Pennsylvania"; and the Committee noted differences in the "conditions on death row" between the Virginia and Pennsylvania prison systems and regarding the "age and mental state of the [respective] offender[s]."[79] Consequently, the UNHRC found no violation of article 7.[80]

A year later, the UNHRC faced another U.S. extradition request involving Canada and Pennsylvania in *Cox v. Canada*.[81] Keith Cox, a U.S. citizen, was wanted in Pennsylvania on two charges of first degree murder, offenses potentially punishable by death.[82] In addressing the period of detention, the Committee indicated that Cox "ha[d] not yet been convicted nor sentenced, and that the trial of the two accomplices in the murders of which Mr. Cox [was] also charged did not end with sentences of death but rather of life imprisonment."[83] The Committee then reiterated its well-established position that "every person confined to death row must be afforded the opportunity to pursue all possibilities

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75. *Kindler*, UNHRC Commc'n No. 470/1991, para. 13.2. This essential position was later reaffirmed with greater clarity. *See* Cox v. Canada, UNHRC Commc'n No. 539/1993, U.N. Doc. CCPR/C/52/D/539/1993, para. 16.1 (1994) (relying on the same legal standard but adding the phrase "necessary and foreseeable consequence" to describe more precisely the required nexus).

76. ICCPR, *supra* note 14.

77. *Kindler*, UNHRC Commc'n No. 470/1991, para. 15.2 (quoting Martin v. Jamaica, UNHRC Commc'n No. 317/1988, U.N. Doc. CCPR/C/47/D/317/1988, para. 12.2 (1993)).

78. *Id.*; *see also* Williams v. Jamaica, UNHRC Commc'n No. 609/1995, U.N. Doc. CCPR/C/61/D/609/1995, para. 4.4 (1997) ("[E]ach case must be examined on its own merits.").

79. *Kindler*, UNHRC Commc'n No. 470/1991, para. 15.3.

80. *Id.* para. 16.

81. UNHRC Commc'n No. 539/1993, U.N. Doc. CCPR/C/52/D/539/1993 (1994).

82. *Id.* paras. 1, 2.1.

83. *Id.* para. 17.2.

of appeal"[84] and that such possibilities must be "made available to the condemned prisoner within a reasonable time."[85] The Committee found that the author failed to show "that these procedures [were] not made available within a reasonable time, or that there [were] unreasonable delays which would be imputable to the State."[86]

The UNHRC also examined the state of prisons in Pennsylvania, especially the death row facilities, and noted the inmates are now "housed in new modern units where cells are larger than cells in other divisions, and inmates are permitted to have radios and televisions in their cells, and to have access to institutional programs and activities such as counseling, religious services, education programs, and access to the library."[87] The UNHRC next looked at the author's age (early forties) and mental condition (by comparison with Jens Soering); although it acknowledged that "confinement on death row is necessarily stressful,"[88] it found nothing specific about the state of his physical or mental health to consider that his extradition to the United States would otherwise amount to a violation of article 7.[89]

In *Johnson v. Jamaica*,[90] a nonextradition case, the Committee was asked to evaluate whether death row confinement for over eleven years was sufficient in itself to constitute a violation of article 7.[91] In rejecting that claim, the Committee reasoned as follows: (1) detention on death row is a direct function of capital punishment, which is itself permitted by the ICCPR in certain circumstances;[92] (2) the Committee opposed encouraging states to expedite implementation of the penalty, whether to meet a specified time frame or otherwise; and (3) the Committee did not want to create disincentives for states from undertaking antideath penalty measures, such as imposing stays or moratoria on executions, which it viewed positively.[93] In sum, while setting a reasonably high threshold for phenomenon claims, the UNHRC nevertheless has found violations of

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* para. 13.6.
88. *Id.* para. 17.1.
89. *Id.* para. 13.7.
90. UNHRC Commc'n No. 588/1994, U.N. Doc. CCPR/C/56/D/588/1994 (1996).
91. *Id.* para. 8.2.
92. *Id.; see also* ICCPR, *supra* note 14, art. 6(2). ("In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and the Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.").
93. *Johnson*, UNHRC Commc'n No. 588/1994, paras. 8.2-8.6.

the ICCPR's article 7 in cases of extreme detention conditions combined with a prolonged period of confinement.[94] Notably, in such instances, evidence of actual mental deterioration or illness is not required; the circumstances alone can prove sufficient to meet the applicable standard for impermissible treatment.[95]

C. Case Law of the Judicial Committee of the Privy Council[96]

The Judicial Committee of the Privy Council (Privy Council) has pushed the death row phenomenon well beyond the doctrinal parameters espoused in *Soering* to a point where delay *alone*—and even a relatively short period at that—has been held sufficient to constitute a human rights violation. The Privy Council first embraced the phenomenon in *Pratt & Morgan v. Attorney General for Jamaica*,[97] a case involving two inmates who claimed that after serving fourteen years on death row—including several prolonged delays and being placed three times in death cells adjacent to the gallows—it would be "inhuman treatment" under the Jamaican constitution to then execute them.[98]

The Privy Council responded by pronouncing that any death row detention lasting "more than five years after sentence [would be] strong grounds" for presuming the confinement to be unconstitutional.[99] The Privy Council offered up an explanation rooted in the notion of

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94. *See* Edwards v. Jamaica, UNHRC Commc'n No. 529/1993, U.N. Doc. CCPR/C/60/D/529/1993, para. 8.3 (1993) (finding violation based on "deplorable conditions" of confinement included ten years alone in a small cell without access to books or recreational facilities); Francis v. Jamaica, UNHRC Commc'n No. 606/1994, U.N. Doc. CCPR/C/54/D/1994, para. 3.7 (1995) (holding that a death row inmate had significantly deteriorated during his confinement and no longer behaved normally (even by prisoner standards), and taken together with other factors, found a violation based on the death row phenomenon).

95. *E.g.*, *Edwards*, UNHRC Commc'n No. 529/1993, para. 8.3.

96. This is the ultimate appellate judicial body for a number of Commonwealth countries; it is based in London and is a vestige of British Colonialism. Natalia Schiffrin, *Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights*, 92 AM. J. INT'L L. 563, 565 n.18 (1998) ("It is an advisory body to the British sovereign, but by constitutional convention the sovereign is bound to give effect to its advice."). In recent years, however, a number of Commonwealth countries from the Caribbean, dissatisfied with the Privy Council's locational inconvenience and perceived irrelevance, have withdrawn from its jurisdiction and instead have opted for a new, regionally based supreme appellate forum, the Caribbean Court of Justice. Bruce Zagaris, *Privy Council Declares Trinidad & Tobago Mandatory Death Penalty Illegal*, 20 INT'L ENFORCE. L. REP. 8, 9-10 (2004) [hereinafter Zagaris, *Trinidad & Tobago*]; Bruce Zagaris, *Privy Council Overturns Bahamas' Mandatory Death Penalty*, 22 INT'L ENFORCE. L. REP. 198, 199 (2006) [hereinafter Zagaris, *Bahamas*].

97. (1993) 2 A.C. 1 (P.C.) (en banc).

98. *Id.* at 1-2.

99. *Id.* at 35. As a direct consequence, the "Jamaican Government commuted the death sentences of 105 prisoners to life imprisonment and Trinidad & Tobago took the same action in relation to 50 prisoners." Schiffrin, *supra* note 96, at 566 n.22.

"humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time."[100] In a subsequent case, *Guerra v. Baptiste*,[101] the Privy Council clarified that the five-year limit was not to be applied in absolutist terms.[102]

Significantly, the Privy Council did not adopt the posture that all "delays" necessarily contribute to a constitutional claim. For instance, any time attributed entirely to the fault of the inmate, for example, if he or she resorted to frivolous filings or temporarily escaped from custody, would not count toward the total.[103] The Privy Council also recognized that some legitimate delay was inherent in appeals to the UNHRC and/or the Inter-American Commission.[104] Indeed, in *Henfield v. Attorney General of Bahamas*, the Privy Council held that, where petition to such review tribunals is not available, a period of eighteen months is to be deducted from the overall amount of time allowed for appeals under *Pratt & Morgan*, reducing the constitutionally permissible appeals process in principle to only about three and one-half years.[105]

D. Case Law of Domestic Courts

In stark contrast to the Privy Council, U.S. domestic courts generally remain unpersuaded by, if not outright hostile to, the logic of the death row phenomenon. Rather than dealing with phenomenon claims in the context of extradition requests, the U.S. judiciary more typically has had to determine whether death sentences should be commuted to life in prison based on the argument that an extended period on death row, and its attendant psychological effects, constituted "cruel and unusual punishment" in prohibition of the Eighth Amendment to the United States Constitution.[106] No U.S. federal or state court has yet

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100. *Pratt & Morgan*, (1993) 2 A.C. at 29.

101. (1996) A.C. 397, 415-16 (P.C.).

102. *Id.* (treating death row confinement that lasted only four years and ten months as a violation of Trinidad & Tobago's constitution).

103. *Pratt & Morgan*, (1993) 2 A.C. at 29-30.

104. *Id.* at 35.

105. Henfield v. Attorney Gen. of Bah., (1997) A.C. 413, 429 (P.C.).

106. Courts in the United States reviewing such claims do not tend to employ the term "death row phenomenon"; rather, they often refer to a so-called "*Lackey* claim." That term derives from the case of a Texas inmate who argued that his execution after spending seventeen years on death row would violate the Eighth Amendment's bar on "cruel and unusual punishment." Lackey v. Texas, 514 U.S. 1045, 1045 (1995). In his memorandum denying the petitioner the opportunity for his case to be heard by the Supreme Court (known as the "*Lackey* Memorandum"), Justice Stevens nevertheless acknowledged the importance of the issue and the psychological anguish experienced by death row prisoners. *Id.* at 1045-47. The "*Lackey* claim" and the "death row phenomenon" are in fact *not* identical, as the former term alone dispenses with any consideration of detention conditions or personal circumstances such as youth or mental

to so rule.[107] Indeed, the United States Supreme Court has denied requests for its review each of the four times a petitioner has raised the issue.[108] The U.S. judiciary tends to rely on the rationale that the constitutional safeguards that result in the lengthy periods of detention between sentencing and execution are fundamentally in the inmate's own interest and are not due to bad faith on the part of the administrative or criminal justice system to gratuitously extend such detentions. That view was well articulated by the United States Appeals Court for the Eighth Circuit in *Chambers v. Bowersox*:

> Chambers's strongest argument is that the State has had to try him three times before getting it right. That is true, but there is no evidence, not even

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infirmity, and focuses exclusively on the duration of death row confinement and its adverse psychological impact. *E.g.*, Chambers v. Bowersox, 157 F.3d 560, 570 (8th Cir. 1998); McKenzie v. Day, 57 F.3d 1461, 1466 (9th Cir. 1995) (additionally, a "*Lackey* claim" is one made exclusively by death row inmates in an ex post context, whereas a phenomenon claim also can surface prospectively).

107. That said, in outlawing the death penalty under its state law, the Supreme Court of California recognized the concerns underlying the phenomenon:

> The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

People v. Anderson, 493 P.2d 880, 894-95 (Cal. 1972) (finding capital punishment violated the State's constitution, which then only required that punishment be "cruel" *or* "unusual," and commuting all pending death sentences to life imprisonment). In November 1972, by constitutional amendment, that Court ruling was overturned and the death penalty was reinstated. Santa Cruz Public Libraries Web site, http://www.santacruzpl.org/readyref/files/c/cappun.shtml (last visited May 8, 2008).

108. A request for such review is called a petition for a writ of certiorari; appeal to the United States Supreme Court is a matter of discretion, not of right. The cases where the Supreme Court has denied such petitions include: Foster v. Florida, 537 U.S. 990 (2002) (twenty-seven years); Knight v. Florida, 528 U.S. 990 (1999) (twenty-four years); Elledge v. Florida, 525 U.S. 944 (1998) (twenty-three years on death row); and *Lackey*, 514 U.S. at 1045. The number of years in confinement in each of these cases far exceeds the single-digit period of years at issue under review in *Soering*. Soering v. United Kingdom, 11 Eur. H.R. Rep. 439, 457 (1989). Notably, in three of those judgments Justice Stephen Breyer dissented, expressing sympathetic support for the phenomenon. *See Elledge*, 525 U.S. at 944-46; *Knight*, 528 U.S. at 993-99; *Foster*, 537 U.S. at 991-93. The psychological trauma of the death row experience also has been acknowledged historically by justices in at least three other Supreme Court cases. *See* Furman v. Georgia, 408 U.S. 238, 288 (1972) (Brennan, J., concurring) ("[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."); Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) ("[T]he onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."); *In re* Medley, 134 U.S. 160, 172 (1890) ("[W]hen 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.") (duration of confinement only four weeks).

> a claim, that the State has deliberately sought to convict Chambers invalidly in order to prolong the time before it could secure a valid conviction and execute him. We believe the State has been attempting in good faith to enforce its laws. Delay has come about because Chambers, of course with justification, has contested the judgments against him, and, on two occasions, has done so successfully.[109]

Several cases have arisen in other national courts that address requests for the extradition of death row eligible persons. By and large, however, the judgments in those cases do not turn on the death row phenomenon. Rather, they consider the theory among other factors in a balancing of interests or else subordinate the phenomenon altogether to concerns about the death penalty itself. For example, in *United States v. Burns*,[110] when faced with a phenomenon claim, the Canadian Supreme Court held: "[I]n the absence of exceptional circumstances, which we refrain from trying to anticipate, assurances in death penalty cases are always constitutionally required."[111] The Court, while appreciating the psychological trauma often associated with extended incarceration on death row,[112] indicated that "[t]he death row phenomenon [was] not a controlling factor" but it was a "factor that weigh[ed] in the balance against extradition without assurances."[113] But as one commentator astutely observed: "[I]t was the administration of capital punishment itself, and not simply the extended incarceration preceding it" that led Canada to forgo extradition absent the required assurances.[114]

Likewise, in *Netherlands v. Short*, the Supreme Court of the Netherlands relied in part on *Soering* to deny the extradition, pursuant to the 1951 NATO Status of Forces Agreement, of a death penalty-eligible American soldier stationed in the Netherlands who had been accused of butchering his wife.[115] The Court found that Short's human rights interests in this situation outweighed the Netherlands' obligation to

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109. 157 F.3d at 570.

110. [2001] 1 S.C.R. 283 (Can.).

111. *Id.* para. 65. This ruling effectively superseded a Supreme Court ruling that there was no violation of Canada's constitution in extraditing a fugitive convicted of a capital crime to the United States where he could face the death penalty and where the phenomenon was expressly raised (Kindler v. Canada, (1991) 2 S.C.R. 779 (Can.)).

112. *Burns*, 1 S.C.R. 283, para. 122.

113. *Id.* para. 123.

114. Daniel Givelber, *Innocence Abroad: The Extradition Cases and the Future of Capital Litigation*, 81 OR. L. REV. 161, 163 (2002). In particular, the *Burns* Court was concerned about the "number of instances of wrongful convictions for murder despite all of the careful safeguards put in place for the protection of the innocent." *Burns*, 1 S.C.R. 283, para. 1.

115. Netherlands/Short, Hoge Road der Nederlanden [HR] [Supreme Court of the Netherlands], 1990, (Neth.), *translated in* 29 INT'L L. MATS. 1388 (1990).

extradite him.[116] In another case, the Italian constitutional court disallowed the extradition of a fugitive indicted for a capital crime in Florida based on the paramount value accorded the right to life under the Italian constitution "regardless of the sufficiency of the assurances provided by [the United States] that the death penalty would not be imposed or, if imposed, would not be executed."[117] Although the death row phenomenon was not explicitly raised, the issue was clearly implicated and yet the Court nevertheless chose to "rely only on Italian constitutional law."[118]

At the same time, several national courts have enthusiastically embraced the phenomenon in nonextradition, i.e., ex post contexts. In 1993, the Supreme Court of Zimbabwe found that the mental grief suffered by four prisoners who had been on death row for four to six years each, had contemplated suicide, and had suffered the constancy of their upcoming executions was sufficient to justify commuting their death sentences to life imprisonment on constitutional grounds.[119] Similarly, the Indian Supreme Court found the issue of "prolonged delay" relevant to the implementation of a death sentence,[120] and has commuted such sentences to terms of life imprisonment in instances of lengthy "delays,"[121] although it would not go so far as to set a specific period of death row detention as a per se violation of the Indian constitution.[122] In addition, the Constitutional Court of the Republic of

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116. *Id.* at 1389.

117. Andrea Bianchi, *International Decisions:* Venezia v. Ministero di Grazia e Giustizia*, Judgment No. 223, 79 Rivista di Diritto Internazionale 815 (June 27, 1996)*, 91 AM. J. INT'L L. 727, 728 (1997) (discussing Court's analysis) (opinion reported in Italian language only).

118. *Id.* at 730-31 (noting surprise that the Court's rationale was so one-dimensional; the appellant had raised the death row phenomenon in a prior proceeding (although concededly it was before a different tribunal), the European Court of Human Rights had found the logic of the phenomenon compelling, and the Italian Court itself had previously "always invoked international law principles").

119. Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney Gen., [1993] 1 Z.L.R. 242 (S), 4 S.A. 239 (Z.S.C.), *as reported in* 14 HUM. RTS. L.J. 323, 335 (Sup. Ct. Zimb.) (Gubbay, C.J.) ("[F]rom the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanizing environment of near hopelessness. . . ."). This Supreme Court ruling was based on section 15(1) of the Zimbabwean Declaration of Rights, which reads almost identically to article 3 of the ECHR.

120. Sher Singh v. State of Punjab (1983) 2 S.C.R. 582 (India).

121. *See* Vatheeswaran v. State of Tamil Nadu (1983) 2 S.C.R. 348 (India) (two-judge bench) (converting a death sentence into life imprisonment after eight years had elapsed on death row); Mehta v. Union of India (1989) 3 S.C.R. 774, 777 (India) (exchanging death sentence for life imprisonment where inmate's petition for relief had been pending before the Indian President for more than eight years).

122. Triveni Ben v. State of Gujarat (1989) 1 S.C.R. 509 (India) (relying on *dicta* from *Vatheeswaran*, 2 S.C.R. 348, to the effect that a death sentence should be revoked if the delay exceeded two years).

South Africa determined in 1995 that capital punishment could no longer be justified, based in part on the reasoning that "[a] prolonged delay in the execution of a death sentence may in itself be cause for the invalidation of a sentence of death that was lawfully imposed."[123]

E. Political Reactions to the Case Law

Apart from the direct impact of the above cases on the litigants themselves and in setting legal precedents for future claims, the more phenomenon-receptive jurisprudence has provoked an unmistakable political backlash in some quarters. Reflecting a deep-seated hostility to such legal judgments, the executive or legislative branches in several states have exhibited a cautionary retreat in their express legal obligations, even at times to the point of imposing greater restrictions on individual rights.

Political opposition to the 1993 *Catholic Commission*[124] ruling prompted the Zimbabwean legislature to amend its national constitution to render delay in the execution of a death sentence no longer a contravention of the provision barring cruel, inhuman, and degrading treatment or punishment.[125] In October 1997, the Government of Jamaica became the first State to denounce the Optional Protocol to the ICCPR[126] and thereby withdraw the valuable right of individual petition to the UNHRC.[127] Thus death row inmates, among others, no longer have continued recourse to the UNHRC for their various claims. The Jamaican Government move was widely seen not as a function of UNHRC case law but rather of the Privy Council's 1993 ruling in *Pratt & Morgan*,[128] as Jamaica became concerned about its ability to complete the entire appeals process within the more circumscribed time frame set by the Court.[129] In May 1998, for similar reasons, Trinidad & Tobago

123. *State v. Makwanyane* (3) SA 391 (CC) para. 6 n.3 (S. Afr.), *reprinted in* 16 HUM. RTS. L.J. 154 (1995) (citing precedents in India, Zimbabwe, and Jamaica).

124. *Catholic Comm'n for Justice & Peace*, [1993] 1 Z.L.R. 242.

125. CONST. OF ZIMB. amend. (No. 13) Act (1993).

126. ICCPR, *supra* note 15. As of March 2008, 111 States had ratified or acceded to the Optional Protocol. Office of the U.N. High Comm'r for Hum. Rts., Optional Protocol to the International Covenant on Civil and Political Rights, http://www2.ohchr.org/english/bodies/ratification/5.htm (last visited May 6, 2008).

127. A State Party to the Optional Protocol, "recognizes the competence of the [United Nations Human Rights] Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant." Office of the U.N. High Comm'r for Human Rights, Optional Protocol to International Covenant on Civil and Political Rights, http://www2.ohchr.org/english/law/ccpr-one.htm (last visited May 6, 2008).

128. (1993) 2 A.C. 1, 12 (P.C.).

129. Schiffrin, *supra* note 96, at 567.

denounced the Optional Protocol to the ICCPR[130] and became the first State to withdraw from the American Convention on Human Rights.[131]

In 1992, in response to the decision in *Soering* and its immediate progeny, the United States entered a treaty reservation in connection with its ratification of the ICCPR to reflect its view that article 7 (barring "cruel, inhuman or degrading treatment or punishment") only applies to actions amounting to "cruel and unusual . . . punishment" prohibited under its Constitution, as interpreted by the U.S. judiciary.[132] Similarly, in ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[133] the United States introduced an "understanding" as a powerful hedge against *Soering*-like legal interpretations.[134]

IV. LEGAL POLICY ANALYSIS OF THE DEATH ROW PHENOMENON

As we have seen, the death row phenomenon elicits remarkably varying reactions. To attain a deeper understanding of the legitimacy of a phenomenon claim, let us now probe its underlying logic, assumptions, and dynamics by critically examining each of the core issues comprising the concept: (1) confinement conditions, (2) time in detention and the appeals process, (3) attribution of delay, (4) extenuating circumstances, (5) resulting stress and anguish, and (6) risk that a death sentence will be imposed and implemented.

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130. On May 26, 1998, Trinidad & Tobago informed the U.N. Secretary-General of its decision to denounce the Optional Protocol effective August 26, 1998. Kennedy v. Trinidad & Tobago, UNHRC Commc'n No. 845, U.N. Doc. CCPR/C/67/D/845/1999, para. 6.6 (1999). Instead, on that date, Trinidad & Tobago re-acceded to the Optional Protocol with a reservation that barred the UNHRC from hearing petitions of any kind submitted solely by death row prisoners. *Id.* The UNHRC later invalidated that reservation, finding it contrary to the Protocol's object and purpose. *Id.* para. 6.7. Consequently, on March 27, 2000, Trinidad & Tobago denounced the Optional Protocol altogether, which took effect on June 27, 2000. Office of the U.N. High Comm'r for Human Rights, Optional Protocol to International Covenant on Civil and Political Rights, http://www2.ohchr.org/english/law/ccpr-one.htm (last visited May 6, 2008).

131. Schiffrin, *supra* note 96, at 563.

132. 138 CONG. REC. S4781-01, S4783 (daily ed. Apr. 2, 1992) (recording reservation); S. EXEC. DOC. NO. 102-23, at 12 (1992) (explaining purpose of reservation).

133. G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51, at 197 (Dec. 10, 1984).

134. The understanding reads as follows:

> [T]he United States . . . does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

U.S. RESOLUTIONS, DECLARATIONS, AND UNDERSTANDINGS, CAT, CONG. REC. S17,486-01 (daily ed., Oct. 27, 1990), para. II(4), 136 CONG. REC. 36,192-99 (1990), *available at* http://www1.umn.edu/humanrts/usdocs/tortres.html.

A. Confinement Conditions

The purpose of death row detention is ostensibly *not* to penalize the prisoner for his capital crime, but merely to hold him or her securely pending execution. It is no less true, however, that "the nature of this confinement status may limit the availability of certain privileges."[135] Security grounds largely justify tough detention conditions when dealing with persons convicted of capital offenses. To the extent that physical treatment is unduly harsh, however, the death row inmate can pursue a cause of action under applicable human rights conventions or domestic laws.[136]

While no court has held that the conditions of confinement on death row by themselves give rise to the phenomenon—indeed, courts in the United States tend to ignore such conditions when hearing delayed-detention claims[137]—the character of those conditions still matters. Even in the face of an extremely long death row detention, a phenomenon claim is far less likely to yield judicial relief where the prison conditions are not (or, in the case of ex ante claims, are not believed to be) unduly harsh. Humane conditions, such as adequately sized cells, radio and television availability, and regular access to counseling, religious services, education programs, and library books, militate against the phenomenon.[138] Tellingly, in recognizing the phenomenon claim, the *Soering* Court stressed the stark conditions at the Mecklenburg Correctional Center in Virginia, including cramped cells, limited hours of recreation and time spent outside of the cell, and physical restraints when moving around the prison.[139]

B. Time in Detention and the Appeals Process

Of all the courts that have reviewed the merits of the phenomenon, the Privy Council alone provided a notional temporal threshold (five years including all appeals) beyond which a death row inmate's detention

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135. Rules of the Dep't of Corrections, ch. 33-602, Sec. Ops., Jan. 26, 2000 Draft, http://www.dc.state.fl.us/secretary/press/2000/deathrow_proposed_rule.doc.

136. *See, e.g.*, Iorgov v. Bulgaria, 40 Eur. H.R. Rep. 7, 21-22 (2005) (rejecting phenomenon claim, while finding a violation under article 3 of the ECHR based on the especially harsh custodial regime); Deidrick v. Jamaica, UNHRC Commc'n No. 619/1995, U.N. Doc. CCPR/C/62/D/619/1995, para. 9.3 (1998) (ruling that unacceptable detention conditions violated ICCPR articles 7 and 10).

137. *E.g.*, McKenzie v. Day, 57 F.3d 1461 (9th Cir. 1995).

138. *E.g.*, Cox v. Canada, UNHRC Commc'n No. 539/1493, U.N. Doc. CCPR/C/52/D/539/1993, para. 13.6 (1994).

139. Soering v. United Kingdom, 11 Eur. H.R. Rep. 439, 459-61 (1989).

presumptively would give rise to a legal violation.[140] Setting such a time frame is problematic because it is entirely arbitrary while committing the Privy Council to a timeline that provides for little flexibility based on the particular circumstances of each case.[141] Indeed, prolonged delay does not affect all prisoners equally; some may not be adversely impacted based on their strong mental constitutions, religious beliefs, or preference for structure and discipline.[142]

A related problem is that this approach ignores the other major element generally contributing to the phenomenon: the circumstances of living on death row. The Privy Council appears to believe that a certain period of time on death row on its own, divorced from any meaningful consideration of cell size, recreational opportunities, access to the outside world, and the like, automatically would constitute a violation. But it is self-evident that those factors can significantly influence an individual's psychological health as well as his overall frame of mind. The Privy Council approach also would create an absurd irony. Executing the death row inmate within some designated time horizon would *not* necessarily be a violation of a state's legal obligations while it could well be a violation to leave him or her on death row beyond a certain time.[143]

In addition, as observed by the UNHRC, imposing a time frame sets up perverse incentives for a state to expedite the implementation of the penalty, effectively assigning a higher priority to speed than to accuracy[144]

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140. It is true that the European Court in *Soering* provided a time frame of sorts as well (six to eight years) but in doing so failed to establish either a numerical benchmark or an impermissible range for the length of such detention, all while suggesting that a greater number of years in detention might not give rise to a violation under a different set of circumstances. *Id.* at 457.

141. Admittedly, the Privy Council has tried to build in some discretion into its computation of time, for example, allowing for exceptions when the clock starts to tick in cases of extreme pretrial delays, *see* Fisher v. Minister of Pub. Safety & Immigration, (1998) 1 A.C. 673 (P.C.)—but ultimately cases over time will pin down the Privy Council as it strives for consistency in its rulings. Hudson, *supra* note 7, at 851-52.

142. Hudson, *supra* note 7, at 836.

143. *E.g.*, Johnson v. Jamaica, UNHRC Commc'n No. 588/1944, U.N. Doc. CCPR/C/56/D/588/1994, para. 8.3 (1996).

144. *See* McKenzie v. Day, 57 F.3d 1461, 1467 (9th Cir. 1995) ("Sustaining a claim such as McKenzie's would, we fear, wreak havoc with the orderly administration of the death penalty in this country by placing a substantial premium on speed rather than accuracy."). *In fact*, the push for a shortened criminal appeals process is essentially what prompted the United States Congress to pass legislation "substantially amend[ing] federal habeas corpus law as it applies to both state and federal prisoners whether on death row or imprisoned for a term of years." Charles Doyle, Antiterrorism and Effective Death Penalty Act of 1996: A Summary (June 3, 1996), http://www.fas.org/irp/crs/96-499.htm. Among other provisions, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) created a six-month statute of limitations in death penalty cases by which *habeas* petitions must be filed after the completion of a direct appeal, and requires appellate court approval for repetitious *habeas* petitions by state and federal prisoners. *Id.* The

in the hierarchy of criminal justice norms and, at the same time, discouraging states from taking pro-inmate measures such as imposing moratoria on executions.[145] Those incentives conceivably could result in reviewing courts "giv[ing] short shrift to a capital defendant's legitimate claims so as to avoid violating [constitutional rights],"[146] and almost certainly would yield more—not fewer—executions. Surely, in almost every case, the prisoner is not worse off extending his stay on death row than being executed.[147]

Furthermore, death row phenomenon proponents tend to discount the value inherent in the appeals process itself. The fact is that those petitioning for habeas corpus relief from death row, at least in the United States, have been remarkably successful in obtaining reversals on their death sentences.[148] A comprehensive study covering the period of 1973 through 1995 concluded that federal and state courts overturned death sentences in almost seven out of every ten cases because of "serious error" at trial; and of those cases subject to retrial, more than eighty percent yielded sentences other than death, including seven percent in which appellants were found innocent.[149]

C. Attribution of Delay

Although *Soering* and other extradition opinions do not discuss sources of delay (as confinement is prospective), virtually all courts handling phenomenon claims ex post facto have addressed the question of attribution. Were the state held responsible for every imaginable delay in an inmate's prolonged confinement on death row, that would effectively allow such inmates to abuse the criminal justice system with impunity and would run contrary to the general legal principle that a person should not benefit from his or her own wrongdoing. After all, it is not as though the state has mandated a series of delays in order for the inmate to cogitate over his crime, but rather, in most instances, it is the

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upshot of the AEDPA is that death row inmates have fewer appellate opportunities and less time to seek relief.

145. *See Johnson*, UNHRC Commc'n No. 588/1944, paras. 8.2-8.6.

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

147. As the UNHRC concisely put it, "[l]ife on death row, harsh as it may be, is preferable to death." *Johnson*, UNHRC Commc'n No. 588/1944, para. 8.4.

148. Yin, *supra* note 27, at 18. *See generally McKenzie*, 57 F.3d at 1467 ("By and large, the delay in carrying out death sentences has been of benefit to death row inmates, allowing them to extend their lives, obtain commutation or reversal of their sentences or, in rare cases, secure complete exoneration.").

149. JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (Colum. L. Sch. Habeas Relief Report) (2000), http://www2.law.columbia.edu/instructional services/liebman/liebman_final.pdf.

inmate who has elected to avoid the death penalty by filing appeals.[150] Plus, even the Privy Council, which as a tribunal has most robustly applied the logic of the phenomenon, has acknowledged there are types of delay attributable to the accused that should not count toward the total time in detention.[151]

But the question of attribution also relates to whether delays caused by a prisoner's *legitimate* appeals should count against the prisoner or the state. The Privy Council held that it is ultimately the state's responsibility:

> 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.[152]

That position is highly dubious. To begin, the Privy Council approach likely would contravene a fundamental tenet of domestic law,[153] as well as of international human rights norms,[154] namely, that an individual must have bona fide access to all means of appeal available to challenge his or her conviction. To the extent the death penalty is constitutional within a given state, death row inmates must be granted an adequate opportunity to appeal their convictions and sentences, or else the host state will risk violating its domestic, if not international, legal requirements. As such, both domestic and international law, to some extent, *mandate* a period of delay by ensuring that a convict has a proper opportunity to exercise the right of appeal.[155]

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150. *See* Yin, *supra* note 27, at 18.

151. Pratt & Morgan v. Attorney Gen. of Jam., (1993), 2 A.C. 1, 29-30 (P.C.) (citing by example prisoner escape and frivolous appeals).

152. *Id.* at 33.

153. *See* Chambers v. Bowersox, 157 F.3d 560, 570 (8th Cir. 1998) ("We believe that delay in capital cases is too long. But delay, in large part, is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone's life."); Deutscher v. Whitley, 991 F.2d 605, 607 (9th Cir. 1993) ("We recognize that one who is sentenced to death need not have *excessive* review before the penalty is carried out, but the constitutional mandate of *adequate* review requires strict adherence. To provide less renders the death penalty cruel and unusual." (internal citations omitted)).

154. This is true at least under the ICCPR, *supra* note 14, and the ACHR, *supra* note 17. *See, e.g.*, Henry v. Jamaica, UNHRC Commc'n No. 230/1987, U.N. Doc. CCPR/C/43/D/230/1987, para. 8.4 (1991) (finding a breach of article 14(5) under the ICCPR, which is "interpreted to mean that if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them"); Abella v. Argentina, Case No. 11.137, INTER-AM. CHR, Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. at 273 (1997) (finding breach of article 8(2)(h) of the ACHR where applicants were not afforded a proper right of appeal).

155. The right of appeal under international human rights law, however, is not always guaranteed. *See, e.g.*, Lumley v. Jamaica, UNHRC Commc'n No. 662/1995, U.N. Doc. CCPR/

Furthermore, the purpose underlying the right of appeal is to ensure that the innocent are not mistakenly executed because of a judicial, administrative, or human error. In fact, it would be contrary to the interests of the accused and of justice itself to deny him or her adequate appellate opportunities solely to reduce the length of time he or she spends on death row. As the United States Court of Appeals for the Ninth Circuit made clear in *McKenzie v. Day*, which involved a claimant on Montana's death row for two decades, procedural safeguards are provided for the benefit of the death row prisoner and reflect an insistence on humanistic and nonarbitrary treatment:[156]

> The delay has been caused by the fact that McKenzie has availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances. That this differs from the practice at common law, where executions could be carried out on the dawn following the pronouncement of sentence . . . is a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences. Indeed, most of these procedural safeguards have been imposed by the Supreme Court in recognition of the fact that the common law practice of imposing swift and certain executions could result in arbitrariness and error in carrying out the death penalty.[157]

As the Court cogently concluded, "delays caused by satisfying the Eighth Amendment themselves [cannot] violate it."[158]

Finally, the Privy Council perspective "oversimplifies reality and ignores the substantial role that abolitionist defense lawyers play in using

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C/65/D/662/1995, para. 7.3 (1999) (finding no breach of article 14(5) of the ICCPR where "the examination of an application for leave to appeal entail[ed] a full [factual and legal] review"). In addition, as far as the ECHR is concerned, the right of appeal is not automatic for any state that has not ratified that Convention's Protocol 7. LOUISE DOSWALD-BECK & ROBERT KOLB, JUDICIAL PROCESS AND HUMAN RIGHTS: TEXTS AND SUMMARIES OF INTERNATIONAL CASE-LAW 267 (2004). Furthermore, when the right of appeal is exercised, domestic appellate courts are obligated to conduct their reviews "without delay." *See, e.g.*, Francis v. Jamaica, UNHRC Commc'n No. 320/1988, U.N. Doc. CCPR/C/47/D/320/1988, para. 12.2 (1993) (finding a violation of the ICCPR where the court of appeal failed to issue a written judgment more than nine years after dismissing the prisoner's appeal; accordingly, any delay attributable to a mandated right of appeal reasonably should not be expected to take very long).

156. McKenzie v. Day, 57 F.3d 1461, 1467 (9th Cir. 1995).

157. *Id.* at 1466-67 (citations omitted). For an expression of the same principle (long before the death row phenomenon was so labeled) in a war-crime context, see SCHABAS, *supra* note 45, at 238 ("'Delays in executing the death sentences have been due to the defendants' efforts to have every possible review of their cases and to the time necessarily consumed in such reviews and extending to the defendants the fullest possible consideration of their cases.'" (quoting *Report of the Advisory Board on Clemency for War Criminals to the United States High Commissioner for Germany*, 15 TRIALS OF THE WAR CRIMINALS 1157, 1164 (Aug. 28, 1950))).

158. *McKenzie*, 57 F.3d at 1467.

the strategy of delay to achieve what they believe to be the desirable result of obstructing imposition of the death penalty."[159] There are instances in which abolitionist attorneys press their clients to file appeals even against their clients' wishes.[160] Indeed, there are some inmates who, not wholly irrationally, might prefer death to a lifetime behind bars and the accompanying restrictions on their freedom and privacy.[161]

D. Extenuating Circumstances

Another fault line issue for the courts is the extent to which a death row inmate's personal circumstances, such as age and psychological state, are viewed as essential ingredients of the phenomenon. As noted above, the European Court of Human Rights treated Jens Soering's youth and his mental state as "contributory factors" in its analysis.[162] Likewise, the UNHRC consistently has taken personal circumstances into account, although often in comparison to the *Soering* facts.[163] Other judicial bodies, however, have departed from that approach. The European Commission on Human Rights in *Cinar v. Turkey*, did not require the existence of such personal factors in its consideration of the death row phenomenon.[164] Likewise, the Privy Council has not viewed extenuating

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159. Yin, *supra* note 27, at 25; *see also id.* at 22 ("[D]elay is often due to a condemned inmate's attorney's actions, and often those actions are taken in part or in full for the purpose of delay."). Delay tactics, for example, may involve "withholding petitions until the last minute, filing claims previously barred or waived in state proceedings, casting issues as constitutional questions simply to confuse the judiciary, and filing subsequent petitions solely for purposes of delay." Connolly, *supra* note 29, at 111.

160. *See* Yin, *supra* note 27, at 30 & n.90 (holding that an inmate had the requisite competence "to withdraw all habeas petitions filed by his court-appointed attorneys against his consent" (citing Rumbaugh v. Procunier, 753 F.2d 395 (5th Cir. 1985))).

161. *Id.* at 31 (statement of life-sentenced Ted Kaczynski, the Unabomber) ("To me, physical freedom is absolutely essential for a worthwhile existence. . . . Without freedom, only despair remains for me. Even if I were able to do so I wouldn't want to adjust to a life without freedom.").

162. Soering v. United Kingdom, 11 Eur. H.R. Rep. 439, 477 (1989).

163. *See, e.g.*, Kindler v. Canada, UNHRC Commc'n No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993); Cox v. Canada, UNHRC Commc'n No. 539/1993, U.N. Doc. CCPR/C/52/0/539 1993 (1994); *see also* SCHABAS, *supra* note 46, at 591 ("[A] majority of the U.N. Human Rights Committee has steadfastly insisted that delay on death row must be accompanied by other extenuating circumstances.").

164. Hudson, *supra* note 7, at 843 ("The Commission was willing to find a breach based on a long delay in execution under harsh conditions, with a constant anxiety of death. . . . [T]he Commission did not require the particular factors which were present in the *Soering* case, such as youth and mental instability.") (citing Cinar v. Turkey, App. No. 7864/96 [1994] 79A DRS (Eur. Comm'n 1994)).

circumstances as essential in finding constitutional violations, as the length of delay has been its sole variable under consideration.[165]

It seems reasonable to treat such personal factors as potentially germane but nondispositive, at least in the context of ex ante cases.[166] One could easily imagine a mentally frail or particularly immature person resigned to a death row cell over a long period of time suffering disproportionately. Accordingly, such extenuating factors should be taken into account to the extent they could discernibly bear on a death row inmate's mental state, but in no event should a preexisting psychological weakness or susceptibility unduly dominate the calculus. At the same time, there could be circumstances in which even a middle-aged, able-bodied, and mentally lucid individual could ultimately suffer severe psychological trauma from a prolonged period of detention on death row. Thus, the absence of such factors should not automatically disqualify inmates from obtaining court relief simply because their physical and mental constitution is, or appears, evidently stronger ab initio.

E. Resulting Stress and Anguish

Those favoring the death row phenomenon as a basis for judicial relief argue that there is inevitably a degree of stress and anguish that attends the uncertainty of whether—and when—one will be executed.[167] But this assumption is not ironclad. One cannot assume that all anxiety experienced by a death row inmate derives necessarily from the mental stress associated with the pressing fear of death; he or she may suffer psychologically from other factors related to incarceration generally, such as the deprivation of individual freedom or fear of inmate violence.[168] In addition, it may well be that certainty about the timing of one's death is less desirable than its uncertainty. As one criminal law observer has

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165. See discussion of Privy Council case law, *supra* Part II.C, and of length of time in detention, *supra* Part III.B.

166. As for phenomenon claims made from prison (ex post), this author recommends reliance on *proven* psychological impact on the death row inmate rather than on an abstract consideration of any generally contributing factors. *See infra* Part IV.A.

167. To the extent such anxiety can be measured in terms of suicidal tendencies, there is some evidence for this proposition. A study of death row inmates in Florida, for example, revealed relatively high numbers of those who attempted (thirty-five percent) or otherwise seriously considered (forty-two percent) suicide. Connolly, *supra* note 29, at 121 & n.174 (citing G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Execution*, 74 J. CRIM. L. & CRIMINOLOGY 860, 869-70 (1983)).

168. *See generally* Iorgov v. Bulgaria, 40 Eur. H.R. Rep., 7, 22 (2005) ("[A]ll forms of solitary confinement without appropriate mental and physical stimulation are likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties.").

opined, "It seems to most of us an inconceivably harsh fate to have to look forward to one's certain death at an appointed time in the very near future. However much we generally desire certainty, we do not want to know in advance the hour of our death."[169]

Furthermore, the very passage of time could in fact lessen—not heighten—the anxiety an inmate feels with regard to the prospect of death.[170] For one thing, it would seem logical to feel less stress awaiting one's execution following multiple appeals (where a chance, however remote, exists that one will win a reprieve) than to face the anguish of a more immediate execution.[171] Research has further revealed that death row prisoners often become accustomed to or otherwise learn to "accept" their predicament over time.[172] Notably, neither *Soering* nor any later cases documented that basic assumption in any way with psychological studies.[173]

F. Risk that Death Sentence Will Be Imposed and Implemented

In cases where the accused is the subject of an extradition request, courts must speculate about the prospect that the accused will actually be found guilty and sentenced to death. This poses a difficult question of foreseeability. Indeed, the judicial system in the United States (among other retentionist states) is anything but predictable. This is especially true in criminal cases, where the law must be heard by lay jurors who in most instances are required to reach a unanimous verdict when determining a death sentence.[174] There is also growing public opinion in certain retentionist states, notably the United States, against the death

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169. Yin, *supra* note 27, at 14 (quoting LEO KATZ, BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW 60 (1987)).

170. *Id.*

171. *Id.*

172. *See* Richard E. Shugrue, *"A Fate Worse Than Death"—An Essay on Whether Long Times on Death Row Are Cruel Times*, 29 CREIGHTON L. REV. 1, 18-20 (1995-1996) (reviewing four major psychiatric studies from the 1960s and 1970s). In one two-year study of eight death row inmates in North Carolina, the results showed that "'three men became significantly less functional with obvious deterioration while five appeared to adjust adequately over time.'" *Id.* (quoting Galiemore & Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 167, 169-70 (1967)). In fact, in that study, "a majority of inmates 'described a lessening of anxiety over time and alluded to a point of psychological 'acceptance' of their circumstances.'" *Id.* (quoting the same Galiemore & Panton study, *supra*, at 169-70).

173. Yin, *supra* note 27, at 17.

174. *See, e.g.*, Press Release, Colorado Judicial Branch, *Sentencing in 21st Century Colorado* (May 23, 2005) ("Only if all 12 jurors conclude, beyond a reasonable doubt, that the death sentence should be imposed, may it return a death verdict.").

penalty.[175] Probabilistically, this trend may lead jurors (especially those not properly screened by the prosecutors during *voir dire*) to balk at a death sentence, even if they are persuaded that the accused is guilty of the charges.

In addition, some states may authorize the death penalty on their books but may not implement those laws in practice.[176] Therefore, even if an individual is convicted of a capital crime and sentenced to death in such a state, he or she is unlikely to be executed. Moreover, political pressures may prompt legal changes not to permit the death penalty or otherwise to adopt a moratorium on that practice while it is being further studied. Many U.S. states undertake their own, or are otherwise subject to, periodic reviews of their death penalty laws to consider their utility and fairness.[177] Further, politicians, at least in the United States, are sensitive to the shifting sentiments of their electorates[178] and there is increasing concern about wrongful executions.[179] All of these factors can result in legal changes. Under an ex ante perspective, foreign courts may well be ignorant of such percolating reform pressures and might overestimate the likelihood, if extradition is granted, that the death penalty, and hence the phenomenon, will be implicated.

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175. *See* CAROL S. STEIKER, CAPITAL PUNISHMENT AND AMERICAN EXCEPTIONALISM, AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 66 (Michael Ignatieff ed., 2005) (noting that American public support for the death penalty has declined from a peak of eighty percent in 1994 to sixty-eight percent in October 2001). According to a May 2006 Gallup Poll, American support for capital punishment has dropped even further, to sixty-five percent. Death Penalty Fact Sheet, http://www.deathpenaltyinfo.org/FactSheet.pdf (last visited May 6, 2008).

176. *See* Abolitionist and Retentionist States, *supra* note 19. Thirty-three states, such as the Russian Federation, Morocco, and Kenya follow this practice by "retain[ing] the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions" or "which have made an international commitment not to use the death penalty." *Id.*

177. *See, e.g.*, AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE ARIZONA DEATH PENALTY ASSESSMENT REPORT: AN ANALYSIS OF ARIZONA'S DEATH PENALTY LAWS, PROCEDURES, AND PRACTICES (July 2006), *available at* http://www.abanet.org/moratorium/assessmentproject/Arizona/finalreport.doc.

178. For example, the death penalty surfaced as a central campaign issue in the 1994 New York gubernatorial race between Mario Cuomo and George Pataki. Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909, 943 (2005).

179. In 2003, Illinois Governor Ryan commuted all 164 death sentences in his state based on this express concern. *Id.* at 946. Such decisions are often a function of publicity about erroneous convictions based on ex post facto DNA testing. The Innocence Project has documented over 210 such cases revealing the innocence of convicted persons based on their genetic codes. *See* http://www.innocenceproject.org (last visited Mar. 14, 2008).

V. PROPOSED APPROACHES TO THE DEATH ROW PHENOMENON

Despite its shortcomings, the death row phenomenon as a concept is not entirely meritless and should not be discarded in toto. To the extent that the length and severity of detention are excessive,[180] proponents properly contend that the death row inmate has received more than his or her due penalty.[181] While the phenomenon should be recognized with respect to bona fide claims, such claims must be defined narrowly along the lines of UNHRC jurisprudence.[182] Of particular concern is the risk that liberal application of the phenomenon paradoxically could well result in a higher incidence of premature executions.[183] Presented below are proposed judicial approaches for evaluating the legitimacy of the phenomenon claim in both ex post and ex ante contexts.

A. Ex Post Claim Evaluation

A phenomenon claim brought by a death row inmate should be reviewed on a fact-specific basis. The conditions of confinement on death row must be carefully evaluated along with the length of time a particular inmate has spent in a state of mortal suspension. A violation should not arise based on a designated period of time on death row. Rather, the causes for delay should be evaluated along two axes. First, whether the state intentionally or negligently failed to make available to the inmate, or otherwise implement, appellate opportunities within a reasonable time; and second, whether or not the inmate himself or herself was responsible for any other delays. A net assessment of attribution as between those two parties would then need to be conducted. Any ambiguity regarding attribution of delay should be construed in the inmate's favor. In any event, the inmate should be subject to an independent psychiatric evaluation to ascertain whether he or she has undergone intense mental suffering as a direct consequence of the

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180. *See generally* Knight v. Florida, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting) ("[T]he longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes."); Gregg v. Georgia, 428 U.S. 153, 183 (1976) ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.").

181. Foster v. Florida, 810 S.2d 910 (Fl. 2002), *cert denied*, 537 U.S. 990, 993 (2002) (Breyer, J., dissenting) ("Death row's inevitable anxieties and uncertainties have been sharpened by the issuance of two death warrants and three judicial reprieves. If executed, Foster, now 55, will have been punished both by death and also by more than a generation spent in death row's twilight."); Pratt & Morgan v. Attorney Gen. of Jam., (1993), 2 A.C. 1, 8 (P.C.); ("It is a fundamental principle of the common law that no man may be punished twice for the same offence.").

182. Shugrue, *supra* note 172, at 21-22.

183. *See id.* at 21.

lengthy detention as opposed to necessarily presuming an injury based solely on the prevailing circumstances.[184] An inmate's personal circumstances, such as age and mental state, should be given due consideration as a factor but their absence as a meaningful element should not be used to preclude relief.

B. Ex Ante Claim Evaluation

As for the speculative judgment of a phenomenon claim, as in the context of an extradition request between retentionist states,[185] courts face a much stiffer challenge. Assuming a requested state does not require assurances that the requesting state will not impose the death penalty in a given case, it is critical that courts not draw any negative inferences based solely on the average length of time inmates spend on death row at a given facility before they have had their sentences commuted or carried out. Instead, courts should seek (with due diligence) detailed information from prosecutors in the requesting jurisdiction concerning:

1. the extent to which cases with comparable facts have resulted in the imposition of death sentences;
2. whether any inmates at the facility in question have been expertly diagnosed with psychological damage based on their prolonged stays on death row (and, if so, the frequency of such damage and the circumstances involved);
3. the extent to which the judicial records in that jurisdiction reflect whether the causes for prolonged delay were primarily attributable

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184. One commentator has recommended that "the scientific community make a comprehensive examination of the claim [namely, of extended detention on death row and its psychological impact] so that judges can make principled decisions in this area." *Id.* at 24. In this author's judgment, that suggestion would amount to a useful preliminary step to provide general baseline data, but any decision in a given case should have to consider the mental consequences of incarceration on an *individualized* basis.

185. This turns out to be far less a concern for abolitionist states in general as they are increasingly obligated not to extradite persons to retentionist states on one or more legal grounds. For example, bilateral extradition agreements contain requirements that must be met before a requested state will surrender a person; they may include mandatory or discretionary assurances that the death penalty will not be carried out. Amnesty Int'l, *United States of America: No Return to Execution—The U.S. Death Penalty as a Barrier to Extradition*, AI Index: AMR 51/171/2001, Nov. 29, 2001, at 26. In addition, death penalty restrictions have been introduced into international or regional human rights instruments (for example, ICCPR, *supra* note 14, art. 6; Protocol No. 6 to the ECHR, *supra* note 5) as well as various extradition conventions. Amnesty Int'l, *supra*, at 4 (citing article 19(2) of the Charter of the Fundamental Rights of the European Union and art. 9 of the 1981 Inter-American Convention on Extradition). Furthermore, some states have imposed provisions in their national constitutions or statutes that bar extradition absent assurances that capital punishment will not be imposed. *Id.* at 7-8 (referencing Australia, Panama, Angola, and Azerbaijan).

to the inmates or to the state (and whether in instances of state-attributable delay the state was able to offer acceptable justifications);
4. the present state of the death row-confinement conditions at the subject facility;
5. whether inmates at that facility have ever brought a claim under the death row phenomenon as well as the holdings and legal analysis of any courts reviewing such claims; and
6. the political state of play in the jurisdiction at issue regarding its actual application or nonapplication of the death penalty.

Armed with such information, along with the personal circumstances of the accused, a court can more intelligently gauge the prospects of the death row phenomenon occurring in a given case. Otherwise, courts are essentially left to speculate about the most fundamental aspects of the circumstances that could give rise to the phenomenon.

VI. CONCLUSION

As noted above, the fate of the phenomenon is inextricably linked to the death penalty itself. Although there is as yet no "international law norm against the death penalty,"[186] capital punishment appears to be slowly, but perceptibly, eroding as a practice.[187] As an initial matter, mounting concern is reflected in the number of widely ratified human rights instruments strictly limiting its application.[188] In addition, fewer states continue to maintain legislation permitting the death penalty for serious crimes committed in their jurisdiction or against their nationals.[189]

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186. United States v. Burns, [2001] 1 S.C.R. 283, para. 89 (Can.).

187. *See* Mwiza Jo Nkhata, *Bidding Farewell to Mandatory Capital Punishment:* Francis Kafantayeni and Others v. Attorney General, 1 MALAWI L.J. 103, 112 (2007) ("Current trends in state practice suggest a steady and incremental shift towards the abolition of [the death] penalty.").

188. *See* Second Optional Protocol to the ICCPR, Dec. 15, 1989, 1642 U.N.T.S. 414, 415, art. 2 (providing for a national law exception to the prohibition against the death penalty only "in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime"); Protocol No. 6, *supra* note 5; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, *open for signature* on May 3, 2002, art. 1, E.T.S. 187 (prohibiting use of the death penalty under all circumstances); Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, 29 INT'L L. MATS. 1447, art. 1 (recognizing an exception only "in wartime in accordance with international law, for extremely serious crimes of a military nature").

189. *See* Amnesty Int'l, *supra* note 185, at 1 ("Since 1990, around 40 countries have abolished the death penalty in law."). Quite apart from these statutory developments, appellate courts have ruled unconstitutional mandatory death sentences for the crime of murder in certain Caribbean countries. Zagaris, *Trinidad & Tobago*, *supra* note 96, at 9-10; Zagaris, *Bahamas*, *supra* note 96, at 199.

Plus, as a result of European and other states' increasing refusal to extradite known or alleged criminals to retentionist states absent assurances that no capital punishment will be imposed,[190] fewer prosecutors are even seeking the death penalty.[191]

In addition, various collateral challenges to the death penalty that, like the death row phenomenon, have equated circumstantial features bearing on capital punishment with "inhuman or degrading treatment or punishment,"[192] are gaining legal traction. Notable examples include the method of execution,[193] the imposition of capital punishment after an unfair trial,[194] and the issuance of a death warrant to a mentally ill person.[195] These developments, among others, should help diminish the incidence of death row phenomenon claims and determinations alike.

As long as the death penalty remains in effect, we must contend with the phenomenon. Although the phenomenon is not without a dose of legitimacy, it is imperative that it not be liberally or indiscriminately applied. In reviewing such claims, it is strongly recommended that: (1) ex ante and ex post claims be treated differentially with correspondingly distinct considerations and evidentiary burdens; (2) the analysis in each case be individualized rather than based on arbitrary benchmarks or abstract considerations; and (3) with regard to ex post claims, courts identify both the source and the cause of any delay in death row confinement to determine if any legal wrong truly occurred. If those overarching guidelines are followed, along with the specific prescriptions set forth in Part IV, the death row phenomenon can come to

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190. *See* Robert Gregg, *The European Tendency Toward Non-Extradition to the United States in Capital Cases: Trends, Assurances, and Breaches of Duty*, 10 U. MIAMI INT'L & COMP. L. REV. 113, 127 (2002) ("[I]t appears that more countries are willing to ignore their extradition treaties with the U.S., or at least give them less than the consideration they warrant."); Amnesty Int'l, *supra* note 185, at 2 (citing examples from Thailand, Russia, and Spain).

191. Amnesty Int'l, *supra* note 185, at 14-15 (citing examples in Connecticut, Florida, and Texas). Death sentencing in the United States has dropped significantly in the past decade—for example, from 306 in 1998 to 110 in 2007. *Death Sentencing by Year*, http://www.deathpenalty info.org/death-sentences-year-1977-2007 (last visited May 6, 2008).

192. ICCPR, *supra* note 14, art. 7.

193. *See* Ng v. Canada, UNHRC Commc'n No. 469/1991, U.N. Doc. CCPR/C/49/D/ 469/1991 (1994), paras. 16.3-16.4 (finding that gas asphyxiation amounted to cruel and inhuman treatment).

194. *See* Öcalan v. Turkey, 41 Eur. H.R. Rep. 45 (2003) ("[T]he imposition of the death sentence on the applicant following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment. . . .").

195. R.S. v. Trinidad & Tobago, UNHRC Commc'n No. 684/1996, U.N. Doc. CCPR/C/ 74/D/684/1996, para. 7.2 (2002). Interestingly, however, another such challenge—the implementation of a death sentence while a prisoner's petition was still pending before an international body—has been deemed insufficient alone to constitute "inhuman or degrading treatment." Fisher v. Minister of Pub. Safety & Immigration (1998) 1 A.C. 673 (P.C.).

occupy its proper and limited place in the legal landscape without, at the same time, transforming into a jurisprudential "phenomenon" of its own.