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

by Juan E. Méndez*

INTRODUCTION

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

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

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

Although it may still be considered that the death penalty is not per se a violation of international law, my research suggests that international standards and practices are in fact moving in that direction. The ability of States to impose the death penalty without violating the prohibition of torture and CIDT is becoming increasingly restricted. Taking this into account, I have called upon all States to consider whether the use of the death penalty, as applied in the real world today, fails to respect the inherent dignity of the human person, causes severe mental and physical pain or suffering, and constitutes a violation of the prohibition of torture or CIDT.

OVERVIEW OF THE DEATH PENALTY AND THE PROHIBITION OF TORTURE AND CIDT

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

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

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Several methods of execution have been explicitly deemed violations of the prohibition of torture and CIDT by international or domestic judicial bodies and have been prohibited by a number of States retaining the death penalty.

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

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

### Actual Practices of Capital Punishment

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

The “death row phenomenon” is a relatively new concept that has emerged within the context of the implementation of the death penalty and the prohibition of torture and CIDT. The phenomenon refers to a combination of circumstances that produce severe mental trauma and physical suffering in prisoners serving death row sentences, including prolonged periods waiting for uncertain outcomes, solitary confinement, poor prison conditions, and lack of educational and recreational activities.
The European Court of Human Rights has held that prolonged periods of time spent on death row awaiting execution violate the prohibition of CIDT. This decision, however, was based not only on the length of time spent on death row, but also on the personal circumstances of the inmate, including age and mental state. The Inter-American Court of Human Rights and Inter-American Commission on Human Rights have similarly held that prison conditions, together with the anxiety and psychological suffering caused by prolonged periods on death row, constitute a violation of the prohibition of torture and CIDT.

**The Death Penalty as a Violation Per Se**

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

Although international law does not attribute a different value to the right to life of these particular groups, it holds that the imposition of the death penalty in such cases *per se* constitutes CIDT. These standards are based on the established belief that the execution of such persons is inherently cruel. The prohibition on the execution of juveniles is also considered a *jus cogens* norm, an imperative rule that binds all States. Similarly, an increasing number of regional and domestic courts, including the Inter-American Court of Human Rights and the United States Supreme Court, have held that the mandatory death penalty, where judges have no discretion to consider aggravating or mitigating circumstances with respect to the crime or the offender, violates due process and amounts to CIDT.

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

**The Possible Emergence of a Customary Norm**

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

The growing trend toward the abolition of the death penalty as imposed on certain individuals, and the regulation of the particular methods of implementation, reflect the irreconcilable conflict between the lawful imposition of the sanction and the prohibition of torture or CIDT under international law. A report presented in July 2012 by the UN Secretary-General on the death penalty evidences and highlights this trend. The report states that approximately 150 of the 193 Member States of the UN have abolished the death penalty for all crimes and that in those States that retain it there is an observable trend among many of them to restrict its use or to call for a moratorium on executions. Another document that provides evidence of this trend and, at the same time, constitutes a reflection of the international movement toward abolishment is the 2011 UN General Assembly Resolution calling for a moratorium on the use of the death penalty with a view to achieve its abolition. In August 2012 the UN Secretary-General reported to the UN General Assembly on the developments of the implementation of that resolution and noted that several States had either abolished the death penalty, introduced amendments to abolish it, stopped its application for certain crimes, or had adopted a moratorium on the executions.

Yet, the conflict between the application of the death penalty and the prohibition of torture and CIDT is most evident in the growing number of regional and domestic opinions and decisions that have held the death penalty in all cases to constitute CIDT or even torture, regardless of the methods or circumstances of implementation, or the particular individuals upon which it is imposed.
U.S. Supreme Court Justice William J. Brennan argued that it is a moral principle that “the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings—a punishment must not be so severe as to be degrading to human dignity.”

Endnotes
2. Id. art. 6, para 5.
3. Id. art. 6, para 5.
4. Id. art. 7.
6. Id. art. 16, para. 1.
7. Id. art. 1, para. 1.
13. Id. at ¶16.2.

Id.


Id. at paras. 6-16.


U.N. Secretary-General, Moratorium on the Use of the Death Penalty, A/67/226, paras. 6-10 (2012).


