INTERNATIONAL LAW AND THE MORTAL PRECIPICE: A LEGAL POLICY CRITIQUE OF THE 'DEATH ROW PHENOMENON'

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INTRODUCTION

In the 1989 landmark case of Soering v. United Kingdom, 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. If the United Kingdom granted extradition and Soering was then convicted of murder, he was eligible to face the death penalty under Virginia law. To avoid extradition, Soering did not allege that the death penalty itself was unlawful; 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)\(^5\) under a novel legal theory labeled the “death row phenomenon”.

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 due to the debilitating circumstances generally endured by a death-row inmate\(^6\) in Virginia. That prognostication was based on the statistically average length of confinement of such prisoners at the Mecklenburg Correctional Center\(^7\) (where Soering would have been assigned) and the severe nature of that confinement, as exacerbated by his youth and mental impairment.\(^8\) In a unanimous decision (18-0), the European Court embraced this contention, holding that, absent assurance the death

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\(^2\) 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) (see supra note 4), but the Court found no merit in that contention. Soering, 11 E.H.R.R. at 488-89, paras. 100-03. 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.” Parl. Ass’y, COE, Res. 1253, adopted on June 25, 2001, available at http://assembly.coe.int/Documents/AdoptedText/ta01/ERES1253.htm (last viewed on Mar. 12, 2008).

\(^3\) More recently, in 2005, the Grand Chamber of 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 (see supra note 4) revealed that “capital punishment in peacetime has come to be regarded as an unacceptable form of punishment which is no longer permissible under Article 2.” Öcalan v. Turkey, 282 Eur. Ct. Hum. Rts. 46221/99 (Grand Ch.) (May 12, 2005), reprinted in [2005] 41 E.H.R.R. 45, paras. 163-64 (dicta).

\(^4\) 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. See 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).

\(^5\) Mecklenburg was characterized by the Court as a “modern maximum-security institution”. Soering, 11 E.H.R.R. at 459, para. 61.

\(^6\) Id. at 475-78, paras. 106-109, 111.
penalty would not be imposed, Soering’s extradition presented a “real risk” that he could be directly exposed to “inhuman treatment.”

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. That diversity of judicial opinion can be explained in part by certain complicating factors pertaining to the Phenomenon. To begin, the term itself has no widely established definition, and accordingly has sometimes been confused with other death row-related concepts or experiences. In addition, the Phenomenon is applied against a broad range of legal standards, whether under an international human rights convention like the International Covenant of Civil and Political Rights (ICCPR), a regional human rights instrument such as the ECHR, or a domestic constitution or statute. While the terminology used tends to be substantially similar – e.g., “cruel and unusual punishment” or “cruel, inhuman or degrading treatment or punishment” – their essential meaning can, and often does, vary based on how that standard is understood.

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9 Id. at 468-69, para. 91. 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 (1998-99).
10 See Hudson, supra note 6, at 837 (describing term as evolving).
11 These areas of confusion are discussed at Part I.B infra.
13 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 under an international or regional human rights body, however, he or she must first exhaust available remedies afforded under domestic law. See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, G.A. Res. 2200A (XXI), entered into force Mar. 23, 1976, art. 5; ECHR, supra note 4, art. 35.
14 U.S. CONST. VIII amend.
within its specific jurisprudential context as construed by the corresponding judicial body.\footnote{See generally State v. Makwanyane & Mchunu, No. CCT/3/94, 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 [circumstance constitutes] a cruel, inhuman or degrading punishment in the ordinary meaning of those words but whether it is a cruel, inhuman or degrading punishment within the meaning of section 11(2) of our Constitution.”) (emphasis in original); Pratt and Morgan v. Attorney General for Jamaica, [1994] 2 A.C. 1, 12, [1993] 3 W.L.R. 995, 4 All E.R. 769 (P.C. 1993) (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, by way of 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, No. 30210/96, Eur. Ct. Hum. Rts. 2000-XI (Grand Ch.) (Oct. 26, 2000), reprinted in [2002] 35 E.H.R.R. 11, para. 92.}

Moreover, the courts have applied the Phenomenon under two distinct scenarios: (i) when extradition to a “retentionist” State\footnote{Retentionist States are those that have retained the death penalty under their domestic laws. Prominent among them include 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, at http://www.deathpenaltyinfo.org/article.php?scid=30&did=140 (last viewed on May 9, 2008) (as of January 11, 2008, there are 135 de jure or de facto abolitionist States compared with 62 retentionist States).} is under consideration, as in \textit{Soering} (an \textit{ex ante} perspective), and (ii) based on the actual experience of a death-row inmate (an \textit{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, whereas in the latter context, all such matters, including the actual psychological impact on the death-row inmate, are generally known or reasonably ascertainable. 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 seldom distinguish between them. The \textit{ex ante} approach is of particular relevance today in light of certain retentionist States’ aggressive efforts to obtain physical custody via extradition of known or alleged terrorists, narco-traffickers, and other types of criminals abroad.
Mindful of these factors, this article attempts to meet the following four objectives: (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 judicial approaches for separately addressing *ex ante* and *ex post* Phenomenon claims.

I. 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; the two must go hand-in-hand. As the *Soering* Court observed, the “source” of the Phenomenon “lies in the imposition of the death penalty”. Notwithstanding that close nexus, a Phenomenon claim only challenges the death penalty collaterally. In either case, however, a successful claim ultimately would yield the same result: No death penalty “implementation”. In the case of a Phenomenon claim,  

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20 It is beyond the scope of this article to address either the legality or desirability of capital punishment.
21 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
this would most likely 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 defining features.

The Death Row Phenomenon is a legal – not a clinical – term\(^\text{22}\) perhaps best generally defined as a “combination of circumstances to which [a prisoner] would be exposed if sentenced to death” and placed on death row.\(^\text{23}\) The circumstances underpinning the Phenomenon generally consist of two key ingredients: the harsh, dehumanizing conditions of confinement and the prolonged period of detention an inmate may endure on death row.\(^\text{24}\) As for the conditions of imprisonment, inmates frequently are confined to a small cell for up to 23 hours a day, and may experience total or near-total isolation, no natural light, inadequate sanitation, and no meaningful contact with the

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\(^{22}\) Notably, the term is not recognized by the American Psychiatric Association as a mental health disorder in its authoritative and comprehensive reference text. *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) (4\(^{\text{th}}\) ed. 2000).


\(^{24}\) See, e.g., Joint Oral Statement on Question of the Death Penalty by NGOs, Members of the Steering Committee of the World Coalition Against the Death Penalty, Apr. 7, 2005, 61\(^{\text{st}}\) Sess. of the U.N. Comm’n on Hum. Rts. (the notion of the Death Row Phenomenon” indicates “the conditions of a person condemned to capital punishment while awaiting the execution of the sentence. Those conditions of detention . . . can include 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”); Tung Yin, *Can ‘Death Row Phenomenon’ Be Confined to Death Row Inmates?*, U. IOWA L. STUD. RES. PAPER, No. 05-11, at 1 (Feb. 2005) (describing the Death Row Phenomenon as “lengthy delays between pronouncement of a death sentence and its actual [implementation], combined with the conditions on death row.”).
outside world. 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 his or her death.

Those two factors tend to work in tandem, mutually reinforcing each other. Accordingly, lengthy detention on death row under harsh prison conditions often is viewed by courts as both mentally and physically debilitating. Neither of these factors alone, however, is generally deemed sufficient to give rise to the Death Row Phenomenon. Apart from those two features, the circumstances faced by the death-row inmate may be compounded by his or her age (i.e., if barely an adult or very old) or mental state (i.e., 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 implemented. It is not enough that an inmate experiences psychological distress at the thought that he or she might be executed one day unless the death penalty poses a real and present threat. Courts are not inclined to provide relief for a Phenomenon claimant in circumstances where, for example: (i) a

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26 The Soering Court expressed this idea as “the ever present and mounting anguish of awaiting execution of the death penalty.” Soering, 11 E.H.R.R. at 478, para. 111. Significantly, “[d]eath 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. Thus, the system as it exists today, has indeed strayed far from its original purpose.” Michael P. Connolly, Note, Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment, 23 NEW ENG. J. CRIM. & CIV. CONFINEMENT 101, 121 (1997).
27 Hudson, supra note 6, at 837.
28 HRA, supra note 25, at 2.
29 This proposition was treated exceptionally by the Judicial Committee of the Privy Council in Pratt and Morgan and its progeny (discussed infra at notes 82-90 and accompanying text) in which the variable of delay was deemed singularly dispositive.
State has capital punishment on the books but, as a practical matter, never imposes it;\(^{30}\)
(ii) a State might one day conceivably lift an existing moratorium on executions;\(^{31}\) or (iii) a person is serving prison time for a non-capital offense in one State even though he faces the prospect of the death penalty in another State once that sentence has been served.\(^{32}\)

**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. To begin, 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.\(^{33}\) Such challenges are reviewed on independent legal

\(^{30}\) See Hudson, *supra* note 6, at 843 (citing Cinar v. Turkey, App. No. 17864/91, [1994] 79A DR 5, in which 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.”) (reported in French language only).

\(^{31}\) See Iorgov v. Bulgaria, Eur. Ct. Hum. Rts. 40653/98 (Mar. 11, 2004), reprinted in [2005] 40 E.H.R.R. 7, paras. 1, 12-28, 63, 76 (2005) (denying Iorgov’s Phenomenon claim, despite evidence he had suffered psychologically over the “uncertainty, fear and anxiety as to his future” due to the Bulgarian government’s inability to abolish the death penalty without delay, because he was never actually at risk of the death penalty; during his entire time in detention, there was either a moratorium on executions or a legislative decision to defer executions in force). *But see* Öcalan, 41 E.H.R.R. 45, paras. 170-72 (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”).


\(^{33}\) Regrettably, a U.S. appellate court appeared to link these concepts 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 [alleged Death Row Phenomenon] even begins to approach a constitutional violation.” Chambers v. Bowersox, 157 F.3d 560, 570 (8th Cir. 1998) (citation omitted), *reh’g en banc denied*, 1998 U.S. App. LEXIS 30951 (1998), *cert. denied*, 527 U.S. 1029 (1999).
grounds and sometimes prove successful even where a parallel Phenomenon claim has been asserted. Nor is the Phenomenon synonymous with the circumstances posed by multiple life sentences or a life sentence without parole, although the prospective imposition of such criminal penalties deters some governments from extraditing persons to States that employ such practices.

The Phenomenon also must be distinguished from certain psychologically aggravating circumstances related to detention on death row. Those circumstances, which tend to raise a heightened level of anxiety and uncertainty in the death-row inmate distinct from the general prolonged experience on death row, include where a death-row inmate: (i) is not informed promptly of any stay of execution; (ii) is informed of his execution and then placed in a “death cell” for a period of time to await imminent execution before being returned to death row, absent a detailed explanation by the State

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34 See, e.g., Ng v. Canada, Comm. 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, violated article 7 of the ICCPR; the Court did not deem it necessary to reach the Phenomenon claim).
35 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, No. 21906/04, [2008] Eur. Ct. Hum. Rts. (Grand Ch.), para. 97 (Feb. 12, 2008) (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 claim under the facts). The European regime’s test for irreducibility is whether “a life prisoner can be said to have any prospect of release” even “when the possibility of parole . . . is limited” and if “in practice [the sentence ends up being] served in full.” Id., para. 98. In Kafkaris, the Grand Chamber held that it was enough to overcome applicant’s art. 3 challenge where the Cypriot Constitution allowed solely for the President to commute any court-imposed sentence. Id., paras. 102-07.
for such treatment; 38 or (iii) is removed from death row for a period of time only to be
returned to it without explanation by the State. 39

Finally, the Death Row Phenomenon must not be conflated with the similarly
sounding term, “death row syndrome”. 40 Although both terms denote a degree of mental
trauma and may derive from the same confinement experience, 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, while the “syndrome” pertains strictly
to the psychological effects that may result from prolonged death-row detention, such as
incapacitated judgment, mental illness, or suicidal tendencies. 41

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(1998) (held in “death cell” for two weeks).
HRC (prisoner had been removed from death row for two years).
40 The two terms are frequently 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, Late Ed. – Final, Sec. B, Col. 4.
41 See Time on Death Row, at http://www.deathpenaltyinfo.org/article.php?did=1397 (last viewed on May
Penalty Cases, 14 J. L. & POL’Y 735, 749 (2006) (describing the syndrome as the “mental incompetence”
that obtains in inmates due to the stress inherent in “prolonged exposure to death row”). For example,
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
living 17 years on death row, which, has been observed, “can make prisoners delusional, violently insane,
or suicidal.” Salzman, supra note 40. (Ross was ultimately found competent and executed on May 13,
2005. Time on Death Row, supra.) In another instance, 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 MAGAZINE, Jan. 14, 2008, available at
II. 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. The cases are categorized by tribunal because each applies its own governing legal standard.\(^\text{42}\) Initially, we will examine the seminal \textit{Soering} case adjudicated by the European Court of Human Rights\(^\text{43}\) as it provides a useful baseline for our analysis and is almost universally cited by courts reviewing such claims.

\textbf{A. Soering v. United Kingdom}

In its judgment, the European Court addressed two threshold issues integral to an \textit{ex ante} Death Row Phenomenon claim: (1) whether a genuine risk existed that the death

\(^{42}\) 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, \textit{The Abolition of the Death Penalty in International Law} 349 (3d ed. 2002); e.g., Lamey v. Jamaica, Rep. No. 49/01 (Apr. 4, 2001), OEA/Ser.L/V/II.111 doc. 20 rev. at 996 (2000) (ruling on other grounds when issue was raised); William Andrews v. United States, Rep. No. 57/96 (Apr. 13, 1998), OEA/Ser.L/V/II.98 doc. 6 rev. at para. 178 (concluding that appellant suffered “cruel, infamous or unusual punishment” under Art. XXVI of the 1948 American Declaration of the Rights and Duties of Man based in part on his having spent 18 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.

\(^{43}\) The European Court (and, until it was abolished in 1999, the European Commission, the first-tier organ that rendered admissibility determinations and non-binding 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 non-use of the death penalty or it was deemed unlikely that capital punishment would be imposed. William A. Schabas, \textit{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, [1994] 79AQ Eur. Comm’n H.R. Dec. & Rep. 85). See also European Court of Human Rights website, at \url{http://www.echr.coe/int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/} (last viewed on May 13, 2008).
penalty would be imposed following extradition; and (2) the prospect that the applicant
would suffer ill-treatment while awaiting execution on death row.\textsuperscript{44} Both determinations
entail speculation as there was no certain death-row prospect or actual detention
experience to evaluate.\textsuperscript{45}

\textit{Risk of Obtaining Death Sentence if Extradited.} In \textit{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. The United Kingdom pointed
out the following factors:

(1) Soering had “not acknowledged his guilt of capital murder as such”;

(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”;

(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,” particularly given certain mitigating
factors like Soering’s age (18 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 sentencing judge that
it is the wish of the United Kingdom that the death penalty
should not be imposed or carried out.”\textsuperscript{46}

\textsuperscript{44} A third threshold issue, although not specific to the Death Row Phenomenon, was also addressed. The
European Court had to determine if a State party to the ECHR could be held responsible under article 3 not
for itself inflicting ill-treatment but for extraditing an individual to a State where there were “substantial
ground[s]” for believing that the individual would face a “real risk of ill-treatment”. \textit{Soering}, 11 E.H.R.R.
at 468, para. 91 (concluding in the affirmative).

\textsuperscript{45} This dynamic generally applies in cases of extradition requests, unless of course the accused has already
been tried and convicted in \textit{absentia} or has escaped from custody following sentencing.

\textsuperscript{46} \textit{Soering}, 11 E.H.R.R. at 469-71, paras. 93-97.
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.47

_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.”48 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 [article 3].”49 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, the fact that article 3 admits of no exceptions or derogations and, more to the point, that article 3 represents an absolute standard.”50

But there are established limits to such speculative harm under the European Court’s jurisprudence. In particular, the exception must not be applied unless: (i) the “ill-

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47 Id. at 471-72, paras. 98-99. 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, para. 111.
49 Soering, 11 E.H.R.R. at 468, para. 90. In fact, this prospective accounting for article 3 concerns has resulted in Soering’s close identification with a broader legal proposition than the Death Row Phenomenon itself; namely, that States parties to the ECHR must not deport, expel, or extradite a fugitive to other States “where substantial grounds have been shown for believing that the person concerned, if [sent to another country], faces a real risk of being subjected to [torture or inhumane or degrading treatment or punishment] contrary to Article 3 [of the European Convention].” Saadi v. Italy, No. 37201/06, Eur. Ct. Hum. Rts. (Grand Ch.), para. 125 (Feb. 28, 2008) (concerning deportation of terrorist to Tunisia). _See, e.g._, Cruz Varas v. Sweden, 201 Eur. Ct. Hum. Rts. 15576/89 (ser. A) (Mar. 20, 1991), _reprinted in_ [1992] 14 E.H.R.R. 1 (involving expulsion to Chile where applicant feared torture).
50 Addo & Grief, _supra_ note 48, at 520. _See also_ Saadi, _supra_ note 49, para. 127 (referencing non-derogability and absolute character of article 3).
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”;51 and (ii) there must be a “real risk of exposure to the known ill-treatment” – not “a mere possibility of ill-treatment”.52

The Soering Court then assessed three key issues on the merits: (i) the length of detention, (ii) conditions on death row, and (iii) the applicant’s age and mental state.53

**Length of Detention Prior to Execution.** The Soering Court noted that the average duration on Virginia’s death row (i.e., the period between sentencing and execution), based on seven consummated cases since 1977, was 6-8 years.54 The Court was willing to concede both that this timeframe is “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” 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.”55 Nonetheless, the Court reasoned that because it is “part of human nature that the person will cling to life

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51 Saadi, *supra* note 49, para. 134. *Accord* Addo & Grief, *supra* note 48, at 521 (“the 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 go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment”. Saadi, *supra* note 49, 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 E.H.R.R. at 472, para. 100.


53 In addition to the three factors discussed below, Soering also considered relevant the availability of an alternative forum where Soering could be extradited. Soering, 11 E.H.R.R. at 477, para. 110. The forum under review was the Federal Republic of Germany, as Soering was a German national. Unlike the United States, Germany had abolished the death penalty. *Id.*


55 Soering, 11 E.H.R.R. at 475, para. 106.
by exploiting those safeguards to the full,” the necessary “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.” 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 legal benefits afforded the inmate.

**Conditions on Death Row.** The death-row cells at the Mecklenburg facility measure about 9 x 6.5 feet in dimension, its inmates spend about an hour a day in a recreational yard and another hour in a common area indoors, and they generally can receive non-contact visitors. While recognizing the justifiable need for extra security on death row (e.g., the use of handcuffs and waist shackles when moving around the facility and the occasional lockdown), the Court still found the “severity of a special regime” unacceptable, given the “protracted period lasting on average six to eight years.” 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 as “contributory factors” to “bring

56 *Id.*
57 *Id.* at 459-61, paras. 61-68.
58 *Id.* at 459, 460, paras. 63, 67.
59 It is unclear whether, in reaching this conclusion, the Court took account of Soering’s anticipated concerns about physical and sexual violence while in detention at Mecklenburg. *Soering, 11 E.H.R.R.* at 475, para. 105.
60 *Id.* at 476, para. 107.
61 See Part II.A *supra.*
the treatment on death row within the terms of Article 3.” Such “extenuating circumstances” were not treated as a necessary part of the Court’s determination, but rather as reinforcing elements.

B. Case Law of the Human Rights Committee

The Human Rights Committee (HRC), 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 HRC considered whether to extradite to the United States Joseph Kindler, an American citizen who had escaped from custody after a Pennsylvania jury had recommended his death sentence for first degree murder and kidnapping. The Court first examined the threshold question of whether, by extraditing Kindler, Canada could 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. In a finding consonant with Soering, the HRC answered affirmatively on the condition that a “real risk” existed that extradition ultimately would lead to the applicant’s death.

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64 Id., para. 13.1. Although Canada had already extradited Kindler to the United States before the matter was reviewed by the Committee (pursuant to a domestic court ruling in a case by the same name, see infra note 96), the Death Row Phenomenon analysis still followed a prospective approach as the accused had not been long on death row.
65 Id., para. 13.2. This essential position was later re-affirmed with greater clarity. See Cox v. Canada, Comm. No. 539/1993, U.N. Doc. CCPR/C/52/D/539/1993, para. 16.1 (1994) (relying on same legal standard but adding the phrase “necessary and foreseeable consequence” to describe more precisely the required nexus).
The HRC 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”. The HRC recalled 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.”

The Committee added that it examines each case on a fact-specific basis. In its review, the HRC distinguished material facts in *Soering* from the facts presented in the case at bar. The HRC 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 offenders.” Consequently, the HRC found no violation of article 7.

A year later, the HRC faced another U.S. extradition request related to Canada in *Cox v. Canada*. Keith Cox, a U.S. citizen, was wanted in Pennsylvania on two charges of first-degree murder, offenses potentially punishable by death. In addressing the period of detention, the Committee began by indicating that Cox “ha[d] not yet been convicted nor sentenced, and that the trial of the two accomplices in the murders of which

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68 Kindler, *supra* note 63, para. 15.3.
69 *Id.*, para. 16.
70 *See supra* note 65.
71 Cox v. Canada, *supra* note 65, paras. 1, 2.1.
Mr. Cox [was] also charged did not end with sentences of death but rather of life imprisonment.”\textsuperscript{72} The Committee then reiterated its well-established position that “every person confined to death row must be afforded the opportunity to pursue all possibilities of appeal” and that such possibilities must be “made available to the condemned prisoner within a reasonable time.”\textsuperscript{73} 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.”\textsuperscript{74}

The HRC then 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.”\textsuperscript{75} The HRC also looked at the author’s age (early 40s) and mental condition (by comparison with Jens Soering) and, although it acknowledged that “confinement on death row is necessarily stressful”, 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.\textsuperscript{76}

In \textit{Errol Johnson v. Jamaica},\textsuperscript{77} a non-extradition case, the Committee arguably shed the greatest light on its thinking with respect to the Phenomenon. In that case, the

\begin{flushleft}
\textsuperscript{72} Id., para. 17.2. \\
\textsuperscript{73} Id. \\
\textsuperscript{74} Id. \\
\textsuperscript{75} Id., paras. 13.6, 17.2. \\
\textsuperscript{76} Id., paras. 13.7, 17.1. \\
\end{flushleft}
HRC was asked to consider whether death-row confinement for over 11 years was sufficient in itself to constitute a violation of article 7. In rejecting that claim, the Committee reasoned as follows: (1) detention on death row is a direct by-product of capital punishment, which is itself permitted by the ICCPR in certain circumstances,\(^78\) (2) the Committee did not wish to encourage States to expedite the imposition of the penalty, whether to meet a specified timeframe or otherwise; and (3) the Committee did not want to create disincentives for States from undertaking anti-death penalty measures – such as imposing stays or moratoria on executions, which are viewed positively – even at the risk of extending the detention period on death row.\(^79\) In sum, while setting a reasonably high threshold for Phenomenon claims, the HRC nevertheless has found violations of the ICCPR’s article 7 in cases of extreme detention conditions combined with a prolonged period of confinement.\(^80\)

\(^78\) Specifically, the death penalty may be imposed 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 Covenant on the Prevention and the Punishment of the Crime of Genocide” and “may only be carried out pursuant to a final judgment rendered by a competent court”. ICCPR, supra note 12, art. 6(2).

\(^79\) Errol Johnson, supra note 77, paras. 8.2-8.6.

C. Case Law of the Judicial Committee of the Privy Council

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 and Morgan, a case involving two inmates who claimed that after serving 14 years on death row – including multiple appeals, several prolonged delays, and three times being placed in death cells adjacent to the gallows – it would be “inhuman treatment” under the Jamaican Constitution to then execute them.

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. The Privy Council offered up an explanation rooted in the notion of “humanity”: “we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.” In a subsequent case, Guerra v. Trinidad and Tobago, the Privy Council clarified that the five-year limit was

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81 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). Technically, it is “an advisory body to the British sovereign but by constitutional convention the sovereign is bound to give effect to its advice.” Id. For general information on the Judicial Committee, see the Privy Council Office website, at http://www.privy-council.org.uk/output/page5.asp (last viewed on May 7, 2008).
82 See supra note 16.
84 Id. at 35. As a direct consequence, the “Jamaican Government commuted the death sentences of 105 prisoners to life imprisonment and Trinidad and Tobago took the same action in relation to 50 prisoners.” Schiffrin, supra note 81, at 566 n.22.
not to be applied in absolute terms; tellingly, in that case, death-row confinement of only four years and ten months was treated as unconstitutional.  

Significantly, the Privy Council did not adopt the posture that all “delays” (i.e., the post-sentencing period of confinement) necessarily contribute to a constitutional claim. For example, any time attributed entirely to the fault of the inmate – e.g., if he or she resorted to frivolous filings or escaped from custody – would not count toward the total. The Privy Council also recognized that some legitimate delay was inherent in appeals to the ICCPR’s Human Rights Committee and/or the Inter-American Commission. In *Henfield v. Attorney General of Bahamas*, the Privy Council held that, where petition to such review tribunals is not available, a period of 18 months is to be deducted from the overall amount of time allowed for appeals under *Pratt and Morgan*, reducing the constitutionally permissible appeals process in principle to only about three and one-half years.

**D. Case Law of Domestic Courts**

By stark contrast with the Privy Council, U.S. courts generally have not been persuaded by the logic of the Death Row Phenomenon. Rather than dealing with extradition requests, the U.S. judiciary typically has had to determine whether death sentences should be commuted to life in prison based on the argument that an extended

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87 *Id.*
89 *Id.* at 35.
period on death row, and its attendant psychological effects, constituted “cruel and unusual punishment” in prohibition of the Eighth Amendment to the U.S. Constitution.¹¹

No U.S. federal or state court has yet to so rule.¹² Indeed, the U.S. Supreme Court has denied requests for its review each of the four times the issue has been raised.¹³ The U.S. court position 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

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¹¹ Courts in the United States reviewing such claims do not tend to employ the term Death Row Phenomenon; rather, they refer to a so-called Lackey claim. That term derives from the case of a Texas death row inmate who argued that his execution after spending 17 years on death row would violate the Eighth Amendment’s bar on “cruel and unusual punishment”. Lackey v. Texas, 514 U.S. 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 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 infirmity, and focuses exclusively on the duration of death-row confinement and its adverse psychological impact. E.g., Chambers, 157 F.3d 560; McKenzie v. Day, 57 F.3d 1461, 1466 (9th Cir. 1995).

¹² That said, in outlawing the death penalty under California 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 (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 website, at http://www.santacruzpl.org/readyref/files/c/cappun.shtml (last viewed on May 8, 2008).

¹³ Such requests for review are called petitions for a writ of certiorari; appeal to the Supreme Court is a matter of discretion, not of right. The cases where the U.S. Supreme Court has denied such petitions include: Lackey, 514 U.S. 1045 (see supra note 91); Elledge v. Florida, 525 U.S. 944 (1998) (23 years on death row); Knight, supra note 17 (24 years); and Foster v. Florida, 537 U.S. 990 (2002) (27 years). The number of years in confinement in each case far exceeds that under review in Soering. In three of those judgments Justice 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 has been acknowledged historically by justices in at least three other Supreme Court cases. See In re Medley, 134 U.S. 160, 172 (1890) (“when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it.”) (duration of confinement in that case was only four weeks); Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) (pointing out that “[t]he onset of insanity while awaiting execution of a death sentence is not a rare phenomenon”); Furman v. Georgia, 408 U.S. 238, 288-89 (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”).
the inmate’s own interest and are not due to bad faith on the part of the administrative or judicial system to unnecessarily extend such detentions. That view was well articulated by the U.S. 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 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.\textsuperscript{94}

Several cases have arisen in other national courts which address requests for the extradition of death-eligible persons. By and large, however, the judgments in those cases do not turn on the Death Row Phenomenon but rather 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,\textsuperscript{95} when faced with a Phenomenon claim, the Canadian Supreme Court held: “in the absence of exceptional circumstances, which we refrain from trying to anticipate, assurances in death penalty cases are always constitutionally required.”\textsuperscript{96} That Court, while appreciating the “psychological trauma associated with extended incarceration on death row”,\textsuperscript{97} indicated that the Death Row Phenomenon was “not a controlling factor” but was

\textsuperscript{94} 157 F.3d at 570.
\textsuperscript{96} Id., paras. 8, 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 (Sup. Ct. Can.)).
\textsuperscript{97} Burns, 1 S.C.R. 283, para. 122
a “factor that weigh[ed] in the balance against extradition without assurances”.

But as one commentator pointedly 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.

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-eligible American soldier stationed in the Netherlands who had been accused of murdering and hacking up his wife. The Court found that Mr. Short’s human rights interests in this situation outweighed the Netherlands’ obligation to extradite him. In another case, the Italian Constitutional Court disallowed the extradition of a fugitive indicted for a capital crime in Florida based on the preeminent values 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.” 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.”

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98 *Id.*, para. 123.
99 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.
100 *Translated and excerpted in* 29 INT’L L. MATS. 1388 (1990) (Sup. Ct. Neth.).
101 *Id.* at 1389.
103 *Id.* at 730-31 (noting “surprise” that the Court’s rationale was so one dimensional, as the appellant had raised the Death Row Phenomenon in a prior proceeding 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”).
At the same time, several national courts have enthusiastically embraced the phenomenon in non-extradition 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 and had contemplated suicide and suffered the constancy of their upcoming executions – was sufficient to justify commuting their death sentences to life imprisonment under the national constitution. Similarly, the Indian Supreme Court found the issue of “[p]rolonged delay” relevant to the implementation of a death sentence, and has commuted such sentences to terms of life imprisonment in instances of eight-year delays, although would not go so far as to set a specific period of delay between the dates of sentencing and execution as a per se violation of the Indian Constitution. In addition, the Constitutional Court of the Republic of 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”.

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104 Catholic Comm’n for Justice and Peace in Zimbabwe v. Attorney General, et al. [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.) (noting that “from 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.


106 See Vatheeswaran v. State of Tamil Nadu, 1983 A.I.R. 361, 2 S.C.R. 348 (Feb. 16, 1983) (Sup. Ct. 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 A.I.R. 2299, 3 S.C.R. 774, 777 (Aug. 9, 1989) (Sup. Ct. India) (death sentence exchanged for life imprisonment where inmate’s petition for relief had been pending before the Indian President for more than eight years).


108 Makwanyane, 16 Hum. Rts. L.J. 154, para. 6 n.3 (citing precedents in India, Zimbabwe, and Jamaica).
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 national or international legal obligations, at times to the point of imposing greater restrictions on individual rights.

Political opposition to the 1993 Catholic Commission 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.109 In October 1997, the Government of Jamaica became the first State to denounce the Optional Protocol to the ICCPR110 and thereby withdraw the valuable right of individual petition to the HRC.111 That means death-row inmates, among others, will not have continued recourse to the HRC for any claims. The Jamaican government move was widely seen not as a function of HRC case law but of the Privy Council’s 1993 ruling in Pratt and Morgan,112 as Jamaica became concerned about its ability to complete the entire appeals process within the prescribed

112 See supra note 16.
timeframe. In May 1998, for similar reasons, Trinidad and Tobago denounced the Optional Protocol to the ICCPR as well as becoming the first State to withdraw from the American Convention on Human Rights.

In 1992, in response to the Soering Case and its 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. Similarly, in ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the United States introduced an “understanding” as a powerful hedge against Soering-like legal interpretations.

113 Schiffrin, supra note 81, at 567.
114 On May 26, 1998, Trinidad & Tobago informed the U.N. Secretary-General of its decision to denounce the Optional Protocol effective August 26, 1998. Instead, on that date, Trinidad & Tobago re-accessed to the Optional Protocol with a reservation that barred the HRC from hearing petitions of any kind submitted solely by death-row prisoners. The HRC, however, ruled that reservation invalid and severed it. Kennedy v. Trinidad and Tobago, Comm. No. 845, U.N. Doc. CCPR/C/67/D/845/1999, paras. 6.6-6.7 (1999) (finding the reservation contrary to the Protocol’s object and purpose). Consequently, on March 27, 2000, Trinidad & Tobago denounced the Optional Protocol altogether, which took effect on June 27, 2000. UNHCHR website, supra note 110.
115 Schiffrin, supra note 81, at 563.
118 The understanding read as follows: “The 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. S17486-01 (daily ed., Oct. 27, 1990), para. II(4), 136 Cong. Rec. 36192-36199 (1990), available at http://www1.umn.edu/humanrts/usdocs/tortres.html (last viewed on May 6, 2008).
III. 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 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.

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.”

119 Tough detention conditions can be largely justified on security grounds when dealing with persons convicted of capital offenses. And to the extent the physical treatment is unduly harsh, the death-row inmate can file a cause of action under applicable human rights conventions or domestic laws. 120


While no court has held that the conditions of confinement on death row by themselves give rise to the Phenomenon – and, indeed, courts in the United States tend to ignore such conditions when hearing delayed-detention claims\(^\text{121}\) – the character of those conditions still can prove critical. Even in the face of an extremely long death-row detention (say, 20 years or more), 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 the library, militate strongly against the Phenomenon.\(^\text{122}\) Tellingly, in adopting a 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.\(^\text{123}\)

### 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 (here, five years including all appeals) beyond which a death-row inmate’s detention presumptively would give rise to a

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\(^{121}\) *See supra* note 91.

\(^{122}\) *See, e.g.*, Cox, *supra* note 65, and accompanying text.

\(^{123}\) *Soering*, 11 E.H.R.R. at 459-61, paras. 61-68.
constitutional violation. Setting such a timeframe is problematic, first, because it is
equally arbitrary while committing the Privy Council to a timeline that provides for little
flexibility based on the particular circumstances of each case. For example, 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.

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. The Privy
Council approach also would create an absurd irony. By executing the death-row inmate
within some designated time horizon would not necessarily be a violation of a State’s
legal obligations while it would definitely be a violation to leave him or her on death row
beyond that time.

More generally, it would be contrary to the interests of the accused and of justice
itself to deny the accused adequate appellate opportunities solely to reduce the length of

124 It is true that Soering provided a timeframe of sorts as well (6-8 years) but that Court did not establish a
benchmark and did not indicate where in the range of permissible length of death-row detention 6-8 years
would fit, all while seeming to suggest that a greater number of years in detention might not give rise to a
violation of the Convention under a different set of circumstances.
125 Admittedly, the Privy Council has tried to build in some discretion into its computation of time – e.g.,
allowing for exceptions for when the clock starts to tick in cases of extreme pre-trial delays, see Fisher v.
Minister of Public Safety and Immigration (No. 1) A.C. 673 (P.C. 1998) – but ultimately the cases over
time will pin down the Privy Council as it strives for consistency in its rulings. Hudson, supra note 6, at
851-52.
126 Hudson, supra note 6, at 836.
127 See, e.g., Errol Johnson, supra note 77, para. 8.3.
time he or she spends on death row. Therefore, some delay in remaining on death row would seem a reasonable price to pay for the chance at having a death sentence commuted and possibly even having one’s freedom restored. In addition, as observed by the HRC, imposing a timeframe sets up perverse incentives for a State to expedite the implementation of the penalty, effectively assigning a higher priority to speed than to accuracy\(^\text{128}\) 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.\(^\text{129}\) Those incentives might well result in reviewing courts “giv[ing] short shrift to a capital defendant’s legitimate claims so as to avoid violating [constitutional rights]”,\(^\text{130}\) and almost certainly would yield more – not fewer – executions. At bottom, surely, the prisoner is not worse off extending his stay on death row than being executed.\(^\text{131}\)

Furthermore, Death Row Phenomenon proponents tend to discount the value inherent in the appeals process. The fact is that those petitioning for *habeas corpus* relief from death row, at least in the United States, have been remarkably successful in

\(^{128}\) See McKenzie, 57 F.3d at 1467 (“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.”). This push for a shortened criminal appeals process is essentially what prompted the U.S. 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*, CRS, U.S. Congress (June 3, 1996), at [http://www.fas.org/irp/crs/96-499.htm](http://www.fas.org/irp/crs/96-499.htm) (last viewed on Apr. 7, 2007). 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 upshot of the AEDPA is that death-row inmates have fewer appellate opportunities and less time to seek relief.

\(^{129}\) See Errol Johnson, *supra* note 77, paras. 8.2-8.6.

\(^{130}\) Knight, 528 U.S. at 992 (Thomas, J., concurring).

\(^{131}\) As the HRC concisely put it, “Life on death row, harsh as it may be, is preferable to death.” Errol Johnson, *supra* note 77, para. 8.4.
obtaining reversals on their death sentences. 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 re-trial, more than 80 percent yielded sentences other than death, including seven percent in which appellants were found innocent.

C. Attribution of Delay

Although Soering and other extradition opinions do not discuss sources of delay (as the confinement was 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 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 period of delays for the inmate to contemplate his crime, but rather in most instances it is the inmate who has elected to avoid the death penalty by filing appeals. Plus, even the Privy Council, which as a tribunal has most robustly applied the logic of the Phenomenon, has

132 Yin, supra note 24, 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 many to extend their lives, obtain commutation or reversal of their sentences or, in rare cases, secure complete exoneration.”).
134 See Yin, supra note 24, at 18.
acknowledged there are types of delay attributable to the accused that should not count toward the total time in detention.\(^{135}\)

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.\(^{136}\)

That position is flawed. To begin, the Privy Council approach likely would contravene a fundamental tenet of domestic constitutional and/or judicial rights\(^{137}\) as well as of international human rights law,\(^{138}\) 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 held constitutional within a given State, death-row inmates must be granted an adequate opportunity to appeal their convictions and sentences, or else the

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\(^{135}\) Pratt and Morgan, [1994] 2 A.C. at 29-30 (citing by example prisoner escape and frivolous appeals).

\(^{136}\) Id. at 33.

\(^{137}\) See, e.g., 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.”); see also Chambers, 157 F.3d at 570 (“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.”).

\(^{138}\) This is true at least under the ICCPR, supra note 12, and ACHR, supra note 15. See, e.g., Henry v. Jamaica, Comm. No. 230/1987, U.N. Doc. CCPR/C/43/D/230/1987, para. 8.4 (1991) (finding a breach of art. 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, Rpt. No. 55/97, Inter-Am. Ct. Hum. Rts., OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997) (finding breach of art. 8(2)(h) of the ACHR where applicants were not afforded a proper right of appeal).
host State will risk violating its own constitutional or statutory requirements and possibly international human rights norms as well. 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.139

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. As the U.S. Court of Appeals for the Ninth Circuit made clear in McKenzie v. Day involving 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 non-arbitrary treatment:

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

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139 The right of appeal under international human rights law, however, is not always guaranteed. See, e.g., Lumley v. Jamaica, Comm. No. 662/1995, U.N. Doc. CCPR/C/65/D/662/1995, para. 7.3 (1999), (finding no breach of art. 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 (Victor) v. Jamaica, Comm. No. 320/1988, U.N. Doc. CCPR/C/47/D/320/1988, para. 12.2 (1993) (finding violation where Court of Appeal failed to issue written judgment more than nine years after appeal was dismissed). Accordingly, any delay attributable to a mandated right of appeal reasonably should not be expected to take very long.
imposing swift and certain executions could result in arbitrariness and error in carrying out the death penalty. 140

As the Court cogently concluded, “delays caused by satisfying the Eighth Amendment themselves [cannot] violate it.” 141

Finally, the Privy Council perspective “oversimplifies reality and ignores the substantial role that abolitionist defense lawyers play in using the strategy of delay to achieve what they believe to be the desirable result of obstructing imposition of the death penalty.” 142 There are instances in which abolitionist attorneys press their clients to file appeals even against their clients’ wishes. 143 Indeed, there are some inmates who not wholly irrationally might well prefer death to a lifetime behind bars and the accompanying restrictions on their freedom and privacy. 144

140 McKenzie, 57 F.3d 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 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 (as quoted in SCHABAS, supra note 42, 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.”)).

141 McKenzie, 57 F.3d at 1467.

142 Yin, supra note 24, at 25; see also id. at 22 (“delay 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 26, at 111.

143 See Yin, supra note 24, at 30 & n.90 (citing, e.g., Rumbaugh v. Procunier, 753 F.2d 395 (5th Cir. 1985) (“upholding inmate’s competence to withdraw all habeas petitions filed by his court-appointed attorneys against his consent”)).

144 Id. at 31 (citing the example of life-sentenced Ted Kaczynski, the Unabomber, who stated: “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.”).
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.145 Likewise, the HRC consistently has taken personal circumstances into account, although usually by distinguishing the Soering facts.146 The European Commission on Human Rights in Cinar v. Turkey, however, departed from this approach by not requiring such personal factors in its consideration of the Death Row Phenomenon.147 And, of course, the Privy Council has not required extenuating circumstances in finding constitutional violations, as the length of delay has been its sole variable under consideration.148

Although the courts are divided on this issue, it seems reasonable to treat such personal factors as “contributory” – not as essential – at least in the context of ex ante

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146 See, e.g., Kindler, supra note 63, and Cox, supra note 65. See also Schabas, supra note 43, 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.”). In one case, however, the Committee concluded 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. Francis (Clement) v. Jamaica, No. 606/1994, U.N. Doc. CCPR/C/54/D/1994 (1995).
147 Hudson, supra note 6, at 843 (citing Cinar, supra note 30) (European Commission was “willing to find a breach based on a long delay in execution, under harsh conditions, with a constant anxiety of death,” but “did not require the particular factors which were present in the Soering case, such as youth and mental instability.”).
After all, a middle-aged, able-bodied, and mentally lucid individual could still suffer psychologically from a prolonged period of detention on death row. Such a person, therefore, should not be automatically disqualified from obtaining court relief simply because his or her physical and mental constitution is demonstrably stronger *ab initio*.

### E. Resulting Stress and Anguish

Those favoring the Death Row Phenomenon as a basis for judicial relief argue that there is necessarily a degree of stress and anguish that attends the uncertainty of whether – and when – one will be executed. 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. In addition, it may well be that certainty about the timing of one’s death is less desirable than uncertainty. As one criminal law observer has opined: “It seems to most of us an inconceivably harsh fate to have to look forward to

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149 As for Phenomenon claims made from prison (*ex post*), we would recommend reliance on proven psychological impact on the death-row inmate rather than abstract consideration of any contributory factors.

150 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 (35%) or otherwise seriously considered (42%) suicide. Connolly, *supra* note 26, 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)).

151 See generally Iorgov, 40 E.H.R.R. 7, para. 83 (“[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”).
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.”152

Furthermore, the very passage of time could in fact lessen – not heighten – the
anxiety an inmate feels with regard to the prospect of death. 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
an immediate execution.153 Plus, research has revealed that death-row prisoners often
become accustomed to or otherwise learn to “accept” their predicament.154 Notably,
neither Soering nor any later cases documented that basic assumption in any way with
psychological studies.155

F. Risk that Death Sentence Will be Imposed and Implemented

In cases where the accused is the subject of an extradition request and has not yet
been convicted or sentenced, 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. But the judicial system in the United States (among other retentionist

152 Yin, supra note 24, at 14 (quoting LEO KATZ, BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE
CRIMINAL LAW 60 (1987)).
153 Id.
154 See Richard E. Shugrue, ‘Fate Worse Than Death’ – An Essay on Whether Long Times on Death Row
are Cruel Times, 29 CREIGHTON L. REV. 1, 18-20 (1995-96) (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, at 169-70).
155 Yin, supra note 24, at 17.
States) is anything but predictable, especially in criminal cases that by law must be heard by lay jurors who, in most instances, are required to reach a unanimous verdict calling for a death sentence.156 There is also growing public opinion in certain retentionist States, notably including the United States, against the death penalty,157 which probabilistically 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 do not implement those laws in practice.158 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 further studied. Many U.S. states, for instance, undertake their own, or are otherwise subject to, periodic reviews of their death penalty laws to consider their utility and fairness,159 state politicians are

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156 See, e.g., Sentencing in 21st Century Colorado, Press Release, Colorado Judicial Branch, 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.”).
158 See Abolitionist and Retentionist States, supra note 17 (including 33 States, such as the Russian Federation, Morocco, and Kenya “which retain 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.”).
159 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).
sensitive to the shifting sentiments of their electorates,\textsuperscript{160} and there is increasing concern about wrongful executions,\textsuperscript{161} all of which can result in state law changes. Under an \textit{ex ante} perspective, foreign courts may well be ignorant of such reform pressures and thereby overestimate the probability that the death penalty, and hence the Phenomenon, will be implicated.

IV. PROPOSED APPROACHES TO THE DEATH ROW PHENOMENON

Despite its shortcomings, the Death Row Phenomenon as a concept is not entirely without value and should not be discarded \textit{in toto}. To the extent that the conditions of confinement over a protracted period of time approximate inhuman treatment or excessive punishment,\textsuperscript{162} proponents properly contend that the death-row inmate has received more than his or her due penalty.\textsuperscript{163} Rather, the Phenomenon should be circumscribed in its application to \textit{bona fide} claims, i.e., those involving more severe

\textsuperscript{160} 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, \textit{Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence}, 68 ALB. L. REV. 909 (2005).

\textsuperscript{161} In 2003, Illinois Governor Ryan commuted all 164 death sentences in his state based on this express concern. \textit{Id}. Such decisions are often a function of publicity about erroneous convictions based on \textit{ex post facto} DNA testing. The Innocence Project has documented over 210 such cases revealing convicted persons of innocence based on their genetic codes. See \url{http://www.innocenceproject.org} (last viewed on Mar. 14, 2008).

\textsuperscript{162} Significantly, “the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment’s basic retributive or deterrent purposes.” Knight, 528 U.S. at 995 (Breyer, J., dissenting).

\textsuperscript{163} As the Privy Council observed, “[i]t is a fundamental principle of the common law that no man be punished twice for the same offence.” Pratt and Morgan, [1994] 2 A.C. at 8. \textit{See, e.g.}, Foster, 537 U.S. at 993 (denying petition for \textit{writ of certiorari}) (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.”). \textit{Accord} 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”).
circumstances of a manner that generally track the jurisprudence of the HRC. Of particular concern is the risk that liberal application of the Phenomenon paradoxically could well result in a higher incidence of premature executions. Below we present a constructive legal approach for use by courts in evaluating the merit of a 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 on death row. A violation should not arise based on a designated period of time on death row; rather, the causes for delay should be evaluated to determine whether the State intentionally or negligently failed to make available to the inmate appellate opportunities within a reasonable time or whether the inmate himself or herself was primarily responsible for the delays. Any ambiguity regarding attribution of delay should be construed in the inmate’s favor. In any event, the inmate should be subject to a psychiatric evaluation to ascertain whether he or she has actually suffered as a consequence of the lengthy detention as opposed to necessarily presuming an injury based on the situation at hand.\(^{164}\)

An inmate’s personal circumstances, such as age and mental state, should be given due

\(^{164}\) 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.” Shugrue, *supra* note 154, 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.
consideration as a contributing 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, 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 length of time inmates spend on average on death row at a given facility before their inmates have had their sentences commuted or executed. Instead, courts should seek with due diligence from prosecutors in the requesting jurisdiction detailed information, where available, concerning:

(i) the extent to which cases with comparable facts have resulted in the imposition of death sentences;

(ii) 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);

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 International, United States of America: No Return to Execution – The U.S. Death Penalty as a Barrier to Extradition (Nov. 2001) at 26, AI Index: AMR 51/171/2001 [hereinafter AI Report]. In addition, death penalty restrictions have been introduced into international or regional human rights instruments (e.g., ICCPR, supra note 12, art. 6; Protocol No. 6 to the ECHR, supra note 4) as well as various extradition conventions. AI Report, supra, at 8 (citing art. 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).
(iii) the extent to which the judicial records in that jurisdiction reflect whether the causes for prolonged delay were primarily attributable to the inmates or to the State (and whether in instances of State-attributable delay the State was able to offer acceptable justifications);

(iv) the present state of the confinement conditions at the subject facility;

(v) whether inmates at that facility have ever brought a claim for Death Row Phenomenon and the holdings and legal analysis of any courts reviewing such claims; and

(vi) the political state of play in the jurisdiction at issue regarding its continued use or non-use 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 Death Row Phenomenon occurring in a given case. Otherwise, courts are essentially left to guesswork about the most fundamental aspects of the circumstances that could give rise to the Phenomenon.

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”, capital punishment appears to be slowly, but perceptibly, eroding as a practice. As an initial matter, mounting concern is reflected in the number of widely

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166 Burns, 1 S.C.R. 283, para. 89.
ratified human rights instruments strictly limiting its application. In addition, fewer States continue to maintain legislation permitting the death penalty for serious crimes committed in their jurisdiction or against their nationals. Plus, as a result of European and other States increasingly refusing to extradite known or alleged criminals to retentionist States absent assurances that no capital punishment will be imposed, fewer prosecutors are seeking the death penalty.

Furthermore, various collateral challenges to the death penalty that, like the Death Row Phenomenon have equated circumstantial features bearing on capital punishment with “inhuman and degrading treatment and punishment”, are gaining legal traction. Notable examples include the method of execution, the imposition of capital

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168 See the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), Dec. 15, 1989, 1642 U.N.T.S. 414, 415, art. 1 (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 4 (providing for a national law exception only “in respect of acts committed in time of war or of imminent threat of war”); 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”).

169 See AI Report, supra note 165, at 1 (“Since 1990, around 40 countries have abolished the death penalty in law.”).

170 See Robert Gregg, The Death Penalty: 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.”); AI Report, supra note 165, at 2 (citing examples from Thailand, Russia, and Spain).


172 See Ng v. Canada, supra note 34, paras. 16.3-16.4 (finding that gas asphyxiation amounted to cruel and inhuman treatment).
punishment after an unfair trial,\textsuperscript{173} and the issuance of a death warrant to a mentally ill person.\textsuperscript{174} These developments, among others, should help diminish the incidence of Death Row Phenomenon claims and determinations alike.

So long as the death penalty remains in effect, however, we must contend with the Phenomenon. Although the Phenomenon is not without some merit, it is imperative that it not be liberally or indiscriminately applied. In reviewing such claims, it is strongly recommended that: (i) \textit{ex ante} and \textit{ex post} claims be treated differentially with correspondingly distinct considerations and evidentiary burdens; (ii) the analysis in each case be individualized rather than based on arbitrary benchmarks or abstract considerations; and (iii) with regard to \textit{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 has occurred. If those overarching guidelines are followed, along with the specific prescriptions set forth in Part IV, the Death Row Phenomenon can come to occupy its proper and limited place in the legal landscape without, at the same time, transforming into a jurisprudential “phenomenon” of its own.

\textsuperscript{173} See Öcalan v. Turkey, 41 E.H.R.R. 45, paras. 166-75 (“[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”).

\textsuperscript{174} R.S. v. Trinidad and Tobago, Comm. 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 is still pending before an international body – has been deemed insufficient alone to constitute “inhuman or degrading treatment”. \textit{E.g.}, Fisher, supra note 125.