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THE DEATH PENALTY AND THE PROHIBITION OF TORTURE AND OTHER FORMS OF CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

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Sussex Law School Human Rights Law Clinic

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Introduction

Traditionally, the death penalty has been dealt with under the provisions concerning the right to life.[1] The death penalty is an exception to this inherent right provided for by international law. In spite of the global trend to abolish this ultimate punishment, the death penalty is not per se a violation of the right to life provided that it is implemented in conformity with international and domestic restrictions and safeguards.[2] However, the legality of this punishment is being reexamined and there is a tendency to talk about the punishment in relation to the universal prohibition of torture and other forms of cruel, inhuman and degrading treatment or punishment (CIDT, or ill-treatment).[3] [4] The debate is now not only focusing on the methods of execution and other surrounding circumstances but also on the death penalty in itself. There is not just a global trend to abolish the death penalty, there is also, as stated by the United Nations (UN) Special Rapporteur on torture, "a developing global trend to reconsider capital punishment in all cases as a violation *per se* of the prohibition of torture or CIDT".[5] Back in 1996 Schabas stated that there is "an increasing willingness by judges to limit or totally abolish the death penalty by relying on what is a universal rule of human rights law prohibiting cruel punishment or torture".[6] However, at that time, in the literature on the relationship between the death penalty and the prohibition of torture, a common point of view was that it was as yet premature to consider this penalty in itself as ill-treatment or torture.[7]

Following this debate, this memorandum will examine whether there is a standard or legal norm – or a developing standard or legal norm – that identifies the death penalty not only as applied but in itself as CIDT or even as torture. Responding to the request for research on this by the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE), the aim of this memorandum is twofold. First, it will evaluate whether there is a trend in the OSCE region to consider the death penalty as ill-treatment or torture. However, even if that is the case, such a trend would not be enough by itself to determine that there is a

[1] See, for example, Universal Declaration on Human Rights (UDHR), Article 3; International Covenant on Civil and Political Rights (ICCPR), Article 6; Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 2; and American Convention on Human Rights (ACHR), Article 4.

[2] ICCPR, Article 6(5) and UN Economic and Social Council (ECOSOC), Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted under ECOSOC Resolution 1984/50 (1984), para. 3 (ECOSOC (1984)).

[3] See, for example, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/67/279 (2012) (Special Rapporteur (2012)); Yearly supplement of the Secretary-General to his quinquennial report on capital punishment, UN Doc A/HRC/30/18 (2015), para. 25-32 (Secretary-General (2015)); and Resolution adopted by the Human Rights Council on 1 October 2015, UN Doc A/HRC/RES/30/5, p. 2 (Human Rights Council (2015)).

[4] Throughout the memorandum, the phrasing 'cruel, inhuman or degrading treatment or punishment', or simply, CIDT, is used. This wording is found in the ICCPR, however, it is recognized that the terminology varies in the different instruments. For the purpose of this memorandum, CIDT or ill-treatment is used interchangeably to define an unacceptable punishment.

[5] Méndez, J.E. (2012). The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment, 20 Human Rights Brief, pp. 2-6, especially p. 4.

[6] Schabas, W. A. (1996). The Death Penalty as Cruel Treatment and Torture. Northeastern University Press, Boston, pp. 3-206, see, p. 4 (Schabas (1996)).

[7] Ibid., p. 9.

developing norm of customary law. Therefore, the second aim is to look beyond the OSCE region and examine whether there is this developing norm of customary international law to that effect.

This memorandum begins with an outline of the applicable law and standards, including the constituent elements of customary law. Following that, the conduct of the 57 OSCE participating States is considered. This conduct includes the relations with international and regional law as well as domestic law and statements and practices. The death penalty under international law is then examined, including the interpretation of treaties, the evolution of the definition of torture, the death penalty as applied and the death penalty in itself. From this, consideration is given to whether there is a developing norm of customary law. Much in line with the literature, the memorandum concludes that it is still too early to argue that there is an existent legal standard considering the death penalty in itself as a violation of the prohibition of CIDT or torture. However, the memorandum recommends that retentionist States reconsider the use of this ultimate punishment in light of this developing norm.

Terminology

Throughout the memorandum different terms are put to use. First, an *abolitionist* State is treated as a State which has discontinued the use of the death penalty, in law, for all crimes.[8] A *de facto abolitionist* State is one wherein the death penalty is allowed for crimes committed in peacetime, although in practice the punishment is not imposed.[9] Lastly, a *retentionist* State is a State which continues to implement this penalty.[10] Furthermore, certain States have a *moratorium* on the death penalty, whereby resort to the punishment is suspended, but not abolished under the law. Moreover, the *mandatory death penalty* is "a legal regime under which judges have no discretion to consider aggravating or mitigating circumstances with respect to the crime or the offender".[11]

Applicable law and standards

Before an analysis of whether there is a developing – or an existent – standard or legal norm that identifies the death penalty in itself as CIDT or torture can begin, the legal background of this punishment as well as the prohibition of torture has to be outlined. The following section will introduce the applicable law and standards.

Treaty law and commitments

The right to life – and also the exception to it – is found in a number of instruments. At the UN level, the International Covenant on Civil and Political Rights (ICCPR) sets out the inherent right to life in Article 6.[12] However, the very same Article regulates the possibility of recourse to the death penalty. This punishment may only be imposed for the "most serious crimes" and the sentence of death can only be made by a "competent

[8] The Death Penalty in the OSCE Area: Background Paper 2015 (OSCE's Office for Democratic Institutions and Human Rights (2015)), http://www.osce.org/odihr/184581?download=true (accessed 4 April 2016), p. 9.
[9] Ibid., p. 10.
[10] Ibid.
[11] Special Rapporteur (2012), para. 59.
[12] ICCPR, Article 6.

court".[13] Moreover, the death penalty cannot be applied to "persons below eighteen years of age" and "pregnant women".[14] The UN Safeguards guaranteeing protection of the rights of those facing the death penalty expands on these conditions and includes, for example, "persons who have become insane".[15] It is evident from Article 6 that the death penalty is not prohibited by the ICCPR. However, Article 6(6) states: "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant",[16] thereby signaling an early desire to see eventual abolition. This is supplemented by the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, in respect of which 81 of the members of the UN are States parties. The ICCPR provides another article relevant to the current analysis, Article 7, which sets out the absolute prohibition of torture and CIDT.[17]

A second international mechanism pertinent to this research is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Particular attention will be paid to Article 1(1), in which it is stated that: "It [torture] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions". Secondly, Article 16 sets out the prohibition of acts of CIDT, being acts that "do not amount to torture".[18]

Seeing that 47 out of the 57 OSCE participating States are members of the Council of Europe, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is also of particular relevance. The right to life is found in Article 2.[19] While this also provides for an exception to the right, 47 States have signed – wherein 46 have ratified – Protocol No. 6 to the ECHR, a protocol concerning the abolition of the death penalty in peacetime.[20] Furthermore, 45 of the OSCE participating States have signed – wherein 44 have ratified – Protocol No. 13 concerning the abolition of the death penalty in all circumstances.[21] The prohibition of torture and CIDT is also included in the ECHR, under Article 3.[22]

Two of the participating States are located in the Americas, namely Canada and United States of America (US). Even though Canada is not a State party and the US is only a signatory State to the American Convention on Human Rights (ACHR), it will be seen that the Inter-American human rights system is a useful reference point in the determination of whether there is a relevant developing norm of customary international law.[23]

[13] ICCPR, Article 6(2).
[14] Ibid., Article 6(5).
[15] ECOSOC (1984), para. 3.
[16] ICCPR, Article 6(6).
[17] Ibid., Article 7.
[18] CAT, Article 16.
[19] ECHR, Article 2.
[20] Council of Europe, Treaty Office, http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114/signatures?p_auth=1XRxrxct (accessed 3 April 2016).
[21] Council of Europe, Treaty Office, http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187 (accessed 3 April 2016)
[22] ECHR, Article 3.

Additional to these treaties, there is the Universal Declaration on Human Rights (UDHR). This declaration not only prescribes the right to life in Article 3 and the prohibition of torture in Article 5, it also sets out the concept of human dignity in Article 1.[24]

This list of human rights mechanisms is in no way exhaustive. However, these are the main instruments relied on in this memorandum. Aside from these international and regional instruments, national law will also be referred to. In addition, this research depends on different standards, focusing on relevant commitments made by participating States.[25]

Customary international law

In the Statute of the International Court of Justice, customary international law is described as "evidence of a general practice accepted as law".[26] To assess the second aim of this research, whether there is development of a relevant rule of customary international law, "the existence and content of a rule of customary international law" has to be determined.[27]

To determine whether there is such a rule, either as an international rule or as a regional rule, it is required to find out "whether there is a general practice and whether that practice is accepted as law (*opinio juris*)", as expressed by the International Law Commission (ILC).[28] The first component of customary law – general practice – is "primarily the practice of States".[29] However, "the practice of international organizations" can also be a factor in the establishment of customary law.[30] In the ILC's report it is clarified that "State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions".[31] In the report, some of the forms of State practice are set forth. However, due to the limitations of this research, the focus here will be on "conduct in connection with resolutions adopted by an international organization", "conduct in connection with treaties", "legislative and administrative acts" and "decisions of national courts".[32] Moreover, and a practical limitation to this memorandum, "[a]ccount is to be taken of all available practice of a particular State, which is to be assessed as a whole".[33] Lastly, the requirement that this general practice has to be accepted as opinio juris "means that the practice in question must be undertaken with a sense of legal right or obligation".[34]

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[23] Organization of American States (*oas.org*) http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (accessed 3 April 2016).
[24] UDHR, Articles 1, 3 and 5.
[25] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE (Organization for Security and Co-operation in Europe (1990)), http://www.osce.org/odihr/elections/14304 (accessed 4 April 2016), § 17(7).
[26] Statute of the International Court of Justice, Article 38(1)(b).
[27] Identification of Customary International Law (International Law Commission (2015)), p. 1.
[28] Ibid.
[29] Ibid., p. 2.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Ibid.

The death penalty and the prohibition of torture and ill-treatment in the OSCE region

In order to comment on a potential trend within the OSCE region to consider the death penalty in itself as CIDT or torture, the international, regional and national law and jurisprudence of relevant participating States, as well as statements and practices, have to be examined. Going further than this, to evaluate whether there is development of a rule of particular customary law, the general practice of the OSCE participating States and whether this practice is accepted as law (*opinio juris*) has to be determined.[35] In order to assess the practice of the participating States "all available practice of a particular State" would have to be taken into account.[36] At the outset, this presents a challenge for this memorandum. Due to the limited space, it is not possible to look into all practices of the 57 participating States. However, as mentioned above, evidence of State practice and *opinio juris* can be found in various conduct, acts and decisions.

Seeing that 47 out of the 57 participating States are members of the Council of Europe, a starting point for analysis is found in the conduct of these States with the European human rights system. By virtue of being members of the Council of Europe, all of these 47 countries are States parties to the ECHR.[37] All except the Russian Federation (Russia) have ratified Protocol No. 6.[38] Protocol No. 13 has been ratified by 44 member States, excluding Armenia, Azerbaijan and Russia.[39] The 47 States parties to the ECHR are all abolitionists, except for Russia which is a *de facto* abolitionist State.[40]

Because a majority of the OSCE participating States are States parties to the ECHR, decisions of the European Court of Human Rights (ECtHR) are instructive. Even though Europe is the only region in the world where the death penalty is not carried out, the ECtHR has dealt with a number of cases concerning this punishment.[41] In fact, in the 2010 case, *Al-Saadoon and Mufdhi v. United Kingdom*, the ECtHR held that the death penalty constitutes inhuman treatment and is prohibited by Article 3.[42] In this case, due to a real risk of being sentenced to death if extradited to Iraq, the ECtHR opinioned that the fact that the applicants knew about this risk caused "intense psychological suffering".[43] The ECtHR held that "causing the applicants psychological suffering of this nature and degree constituted inhuman treatment".[44] As stated by Méndez, who currently holds the mandate of the UN Special Rapporteur on torture, the ECtHR "has held that the death penalty constitutes CIDT or even torture, citing various resolutions

[34] International Law Commission (2015), p. 3.
[35] Ibid., p. 4.
[36] Ibid., p. 2.
[37] Council of Europe, *Treaty Office*, http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=iUsdB2SZ (accessed 4 April 2016).
[38] Council of Europe, *Treaty Office*, http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114/signatures?p_auth=1XRxrxct (accessed 3 April 2016).
[39] Council of Europe, *Treaty Office*, http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187 (accessed 3 April 2016).
[40] OSCE's Office for Democratic Institutions and Human Rights (2015), pp. 9 and 10.
[41] See, for example: *Soering v. United Kingdom* (1989) ECHR 14; and *Öcalan v Turkey* (2005) ECHR 282.
[42] *Al-Saadoon and Mufdhi v. United Kingdom* (2010) ECHR 285.
[43] Ibid., para. 136.
[44] *Al-Saadoon and Mufdhi v. United Kingdom* (2010) ECHR 285, para. 144.

of the European Human Rights System that call for the abolition of the death penalty, and stating that the definition of torture must evolve with democratic society's understanding of the term".[45]

The death penalty is not only considered as ill-treatment at the European regional level, a number of constitutional courts have come to the same conclusion. In the 2005 case, *Öcalan v. Turkey*, the ECtHR held that, were the death penalty to be carried out, Turkey would violate Mr. Öcalan's right to life because his right to a fair trial had been breached.[46] In this case, reference is made to decisions of the constitutional courts of Albania, Hungary, Lithuania and Ukraine, where the death penalty in itself has been held to be in violation of the prohibition of CIDT or torture.[47] Furthermore, in the 2012 report of the Special Rapporteur on torture, several other European countries considered the death penalty per se as ill-treatment when reporting to the UN Secretary-General. These countries are Bulgaria, Denmark, Finland, Italy, Slovenia and Spain.[48] In the yearly supplement of the Secretary-General to his quinquennial report on capital punishment, it is that the European Union (EU) finds "the death penalty to be cruel and inhuman, representing an unacceptable denial of human dignity and integrity".[49]

Apart from the OSCE participating States of Europe there are Canada, the Holy See, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Turkmenistan, Uzbekistan and the two retentionist States, Belarus and the US. All of these participating States, except for Holy See, are States parties to the ICCPR.[50] Additionally, Canada, Kyrgyzstan, Mongolia, Turkmenistan and Uzbekistan are States parties to the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.[51] All of the OSCE participating States are parties to the CAT.[52]

In 2001, the Canadian Supreme Court held, in *United States v. Burns*, that the death penalty constitutes ill-treatment.[53] In this case, this Court held that the death penalty engages "the underlying values of the prohibition against cruel and unusual punishment".[54] Moreover, in a speech from 2010, the President of Mongolia explained the reason for his country's abolition of this punishment on the grounds of it being degrading.[55] On 3 December 2015, Mongolian lawmakers abolished the death penalty and thereby Mongolia went from being a *de facto* abolitionist State to abolitionist. The new Criminal Code will be effective from September this year.[56]

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[45] Méndez (2012), p. 4.
[46] *Öcalan v Turkey*, op. cit.
[47] Ibid., para. 159.
[48] Special Rapporteur (2012), para. 71.
[49] Secretary-General (2015), para. 28.
[50] UN Human Rights, *Office of the High Commissioner*, http://indicators.ohchr.org/ (accessed 17 April 2016).
[51] Ibid.
[52] Ibid.
[53] *United States v. Burns*, [2001], S.C.R. 283, p. 289 (Can.).
[54] Secretary General (2015), para. 29.
[55] President of Mongolia, http://x.president.mn/eng/newsCenter/viewNews.php?newsId=122 (accessed 16 April 2016).

Belarus and the US are the only two participating States carrying out the death penalty. The arguments used by these retentionist States for continuing the use of this penalty are often that it works as a deterrent for crime, it gives just retribution and that it is in the public opinion to maintain this punishment. However, there is extensive literature on the discriminate use of the death penalty and a lack of proof of how the sentence of death is deterrent.[57] This memorandum will not go further into these arguments due to the word limitation.

To sum up, the ECtHR has held that the death penalty amounts to ill-treatment. Furthermore, a number of European Constitutional Courts have also held that the death penalty per se is a violation of the prohibition of torture.[58] The Canadian Constitutional Court was of the same opinion.[59] Moreover, in Mongolia, when talking about the move from being a de facto abolitionist State to an abolitionist State, the death penalty was referred to as degrading.[60] The examples given are not exhaustive. Whether there is a rule of particular customary law in the OSCE region is unresolved. Further research has to be carried out, looking into the conduct of all of the participating States. However, it can arguably be said from the abovementioned examples that there is indeed a trend within the OSCE region to consider the death penalty as ill-treatment.

The death penalty and the prohibition of torture in international law

In the following section, four issues are examined in order to evaluate whether there is a developing standard or legal norm internationally that identifies the death penalty in itself as CIDT or torture. This section looks into the arguments made by some States and other actors to disprove that there is a connection between the death penalty and the prohibition of torture.

The interpretation of treaties

Some States and other international actors argue that the very fact that the death penalty is mentioned within Article 6 of the ICCPR justifies the use of this ultimate punishment. Article 6(6) reads: "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant".[61] Although this is evidence that the drafters of the ICCPR sought to encourage the abolition of the death penalty, abolition is not a requirement.[62] The Second Optional Protocol to this Convention can also be considered as evidence of this encouragement.[63] Furthermore, the UN General Assembly

[56] Amnesty International, *Mongolia: Historic Vote Abolishes Death Penalty* (2015), https://www.amnesty.org/en/latest/news/2015/12/mongolia-historic-vote-abolishes-death-penalty/ (accessed 19 April 2015).
[57] See, for example, Moving Away from the Death Penalty: Arguments, Trends and Perspectives (United Nations 2014) or Schabas (1996).
[58] Special Rapporteur (2012)., para. 71 and Secretary General (2015), para. 28.
[59] *United States v. Burns*, [2001], S.C.R. 283, p. 289 (Can.).
[60] Special Rapporteur (2012), p. 5.
[61] ICCPR, Article 6(6).
[62] Schabas (1996), p. 31.
[63] The Mandatory Death Penalty under International Law: A report for the International Commission against the Death Penalty (Geneva Academy), pp. 1 and 7.

has adopted four resolutions where retentionist States are urged to "establish a moratorium on executions with a view to abolishing it".[64] The first of these resolutions was adopted in 2007 and the most recent resolution was adopted in 2014.

Under Article 7 of the ICCPR the prohibition of torture is set out.[65] Seeing that both articles are in the selfsame covenant, some argue that the death penalty must be compatible with the prohibition of torture.[66] In addition, the monitoring body of the ICCPR, the Human Rights Committee, stated in 1991 that the lawful imposition of the death penalty, in accordance with Article 6, is not incompatible with Article 7 because this exception is found in Article 6(2).[67]

In the CAT, Article 1(1) excludes "pain or suffering arising only from, inherent in or incidental to lawful sanctions".[68] Based on this wording, it can be argued that this article also "provides an exception for the death penalty".[69] Similar to the argument made in connection with the ICCPR, Article 1(1) of the CAT is thereby treated as a justification for the death penalty.

However, this justification is arguably flawed. First, Schabas recalls that "international human rights treaties are to be interpreted in a dynamic fashion, keeping pace with the progressive development and protection of human rights".[70] Similar to the ICCPR, the right to life – and the exception to this right – as well as the prohibition of torture are both found in the ECHR.[71] It is evident that when these treaties were adopted in respectively 1966 and 1950, the death penalty was not thought of as being in conflict with the prohibition of torture.[72] However, within the European system of human rights, when Protocol No. 6 was adopted in 1983, Cameron explains that this punishment was then thought of as "a remnant from a less civilized age".[73] As mentioned above, all of the members of the Council of Europe have signed this protocol and all, but Russia, have ratified it. Protocol No. 13 of 2002 has been signed by 45 participating States, not including Azerbaijan and Russia. Out of the 45 signatory States, Armenia is the only State not having ratified the protocol.[74] Méndez therefore asserts that the death penalty is now considered as CIDT or even as torture in the European region.[75]

Based on the fact that treaties are living instruments and are to be "interpreted in a dynamic fashion", to argue that the death penalty is justifiable because it is explicitly mentioned in the conventions together with the prohibition of torture seems no longer to

[64] UN General Assembly Resolution 69/186 (2014). See also: UN General Assembly Resolution 62/149 (2007); UN General Assembly Resolution 63/168 (2008); and UN General Assembly Resolution 65/206 (2010).
[65] ICCPR, Article 6.
[66] Schabas (1996), pp. 9-10.
[67] *Kindler v. Canada*, Human Rights Committee Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991 (1993).
[68] CAT, Article 1(1)
[69] See, for example, Schabas, W. A. (2002). The Abolition of the Death Penalty in International Law. Cambridge University Press, Cambridge (Schabas (2002)), p. 193.
[70] Schabas (1996), p. 54.
[71] ECHR, Articles 2 and 3.
[72] Schabas (1996), p. 53.
[73] Cameron, I. (2011). An Introduction to the European Convention on Human Rights. Iustus Förlag, Uppsala, p. 79.
[74] Council of Europe, *Treaty Office*, http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187 (accessed 3 April 2016).
[75] Méndez (2012), p. 4.

be correct. On the contrary, the adoption of the different optional protocols abolishing the death penalty and the restatements made by the UN General Assembly seem to indicate that there is a willingness from many States and the international community to consider this penalty as unlawful. However, to suggest that there is a rule of customary law is as yet premature, considering the many States continue with the use of this punishment.

The evolution of the definition of torture

As shown in this section, the definition of CIDT has evolved. The argument that because the death penalty was not thought of as ill-treatment when the ICCPR or the ECHR were drafted, the same does not necessarily apply today.[76] Treaties are living instruments and changes with societal attitudes.[77]

To argue that the death penalty does not conflict with the prohibition of torture because this punishment is explicitly referred to in the different treaties is not just flawed on account of the evolving interpretation of these treaties. The prohibition of torture is generally recognized as a norm that changes over time.[78] As with the interpretation of the death penalty in the ECHR, the prohibition of torture has also evolved over time. Schabas wrote: "What was tolerated by society in 1945 may no longer be so in 1995".[79] The definition of torture evolves, the UN Special Rapporteur has said, with "a democratic society's understanding of the term".[80] An example of an act that is no longer tolerated under international law is corporal punishment. It is now generally recognized that this punishment "at least amounts to cruel, inhuman or degrading treatment".[81] The Special Rapporteur mentions a number of other acts that used to be considered as lawful but are now "unlawful and prohibited under the right to be free from torture".[82] The prohibition of torture now includes the "prohibition of slavery and domestic violence or, more recently, the qualification of rape".[83]

The death penalty as applied

Rather than challenging the imposition of the death penalty in itself head-on, the focus of litigants has generally been on the methods of execution and other surrounding circumstances.[84] In fact, to completely separate the death penalty per se from other aspects does not seem possible. There are a number of these aspects that are problematic, and not just the methods of execution. Other circumstances include – but are not limited to – discrimination against marginalized groups, the death row phenomenon and the mandatory death penalty.[85]

The mandatory death penalty is considered by the Inter-American Court of Human Rights and a number of national courts as not only being a violation of due process but also

[76] Geneva Academy, p. 23.
[77] Ibid.
[78] Schabas (1996), p. 7.
[79] Ibid.
[80] Special Rapporteur (2012), p. 14.
[81] Special Rapporteur (2012), p. 5.
[82] Ibid., p. 14.
[83] Ibid.
[84] Schabas (1996), p. 11.
[85] Moving Away from the Death Penalty: Arguments, Trends and Perspectives (United Nations 2014), p. 10.

constitutes CIDT.[86] In the 2012 report, the Special Rapporteur lists the different methods of execution and the lawfulness of these. Death by stoning and gas asphyxiation are methods that are considered as ill-treatment. Hanging, lethal injection and firing squad are methods that arguably can be considered as CIDT. [87]

A major question then arises on whether there are *any* methods of execution or *any* of the surrounding circumstances that are compliant with CIDT, or torture for that matter. If the answer to this question is no, it is the view of this author that the death penalty in itself or as applied can never be lawful.

Worldwide there are strict rules regulating the implementation of the death penalty. These regulations include "strict due process guarantees, restrictions on the specific methods of execution, prevention of the death row phenomenon and other related circumstances".[88] In the next section "the prohibition on the execution of certain individuals" will also be considered.[89] As Méndez points out in his article: "Even with such conditions in place, however, states cannot guarantee that the prohibition of torture will not be violated in each case".[90]

In 1982, Pannick similarly said: "A legalistic society will be unable to impose the death penalty without an unconstitutionally cruel delay, and hence it will be unable lawfully to impose the death penalty at all".[91]

Most famously in the 1972 case *Furman v. Georgia*, Justice Blackmun of the United States Supreme Court said in a dissenting opinion: "Although most of the public seem to desire, and the Constitution appears to permit, the penalty of death, it surely is beyond dispute that if the death penalty cannot be administered consistently and rationally, it may not be administered at all".[92]

The death penalty itself

To consider the death penalty not only as applied but in itself as CIDT or torture is not unheard of. In some circumstances the death penalty is a violation per se of the prohibition of torture.[93] There are a number of instances where international law clearly considers the death penalty in itself as a violation of the prohibition of ill-treatment or torture. One of these instances is the prohibition on the execution of certain individuals. As explicitly stated in Article 6(5) of the ICCPR and in the UN Safeguards, the execution of juveniles and pregnant women is not allowed. Furthermore, executions of "persons with mental disabilities", "elderly persons" and "persons sentenced after an unfair trial are considered particularly cruel and inhuman, regardless of the specific methods of implementation of other attendant circumstances".[94]

[86] Ibid.
[87] Special Rapporteur (2012), pp. 6-9.
[88] Méndez (2012), p. 5.
[89] Ibid.
[90] Ibid.
[91] Pannick, D. (1982). Judicial Review of the Death Penalty. Gerald Duckworth & Company Limited, London, p. 84.
[92] *Furman v. Georgia*, 408 US 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).
[93] Méndez (2012), p. 4.
[94] Ibid.

The death penalty as a violation in itself of customary international law

Based on the four issues presented above, the following section will examine whether there is a developing – or an existent – standard or legal norm that identifies the death penalty per se as ill-treatment or even as torture.

In 1996, a leading scholar on the abolition of the death penalty, Schabas, wrote: "It is certainly premature to suggest that the universal norm prohibiting cruel treatment and torture, whether this be in customary or conventional form, now compels abolition of the death penalty. Yet if it is understood that this norm must necessarily evolve as society matures, then we must already anticipate such a development".[95] Schabas continued by saying that this development had already begun.

Even though the Special Rapporteur did not comment in detail on this development in his 2012 report concerning the death penalty, he elaborated on this point in an article published the same year. He stated in that article: "It can be said… that there is an evolving standard in international law to consider the death penalty in all cases as a violation *per se* of the prohibition of torture and CIDT".[96] He continued by saying: "I firmly believe that a customary norm prohibiting the death penalty under all circumstances is at least in the process of formation".[97]

Moreover, "[t]he growing trend toward the abolition of the death penalty as imposed on certain individuals, and the regulation of the particular methods of implementation, reflect the irreconcilable conflict between the lawful imposition of the sanction and the prohibition of torture or CIDT under international law".[98]

Throughout the memorandum it has become evident that it is at present time still too early to argue that the death penalty itself is a violation of customary international law. However, it can be argued that Schabas was right in saying that a development of such a legal norm has begun.

Conclusion

It has been established in this memorandum that international law clearly encourages the abolition of the death penalty, although abolition is not an obligation, and there is a trend of such abolition. However, the legality of the death penalty is being reexamined and there is a developing standard within regional jurisprudence to frame the debate about this punishment in connection with the prohibition of torture and CIDT.

It has also been established that there is a trend within the OSCE to consider the death penalty as a violation per se of the prohibition of torture or CIDT. However, seeing that there is this trend within this region does not indicate that there is a developing rule of customary international law. The next step would be to analyze this information calling to mind the constituent elements of customary international law and to elaborate whether there is an evolving standard to frame the debate about the legality of the

[95] Schabas (1996), p. 9.
[96] Méndez (2012), p. 5.
[97] Ibid.
[98] Ibid., p. 4.

death penalty within the context of the universal prohibition of torture and CIDT developing into a norm of customary law or if it has already done so. Short of this, it has been concluded that there is a developing standard, but no such existing norm.

Recommendations

OSCE participating States have agreed to keep the question of the abolition of the death penalty under consideration. Similar to the recommendation made by the Special Rapporteur in 2012, this memorandum encourages the participating States "to reconsider whether the use of the death penalty per se respects the inherent dignity of the human person, causes severe mental and physical pain or suffering and constitutes a violation of the prohibition of torture or cruel, inhuman or degrading treatment".[99] Even though there is a trend within the OSCE region to consider the death penalty in itself as CIDT or torture, Belarus and the US continue to implement this ultimate punishment.

[99] Special Rapporteur (2012), p. 21.