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HUMAN RIGHTS COMMITTEE
Forty-eighth session

VIEWS

Communication No. 470/1991

Submitted by:	Joseph Kindler [represented by counsel]
Alleged victim:	The author
State party:	Canada
Date of communication:	25 September 1991 (initial submission)
Documentation references:	Prior decisions - Special Rapporteur's rule 86/rule 91 decision, transmitted to the State party on 26 September 1991 (not issued in document form) - CCPR/C/45/D/470/1991 (Decision on admissibility, dated 31 July 1992)
Date of adoption of Views:	30 July 1993

On 30 July 1993, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol, in respect of communication No. 470/1991. The text of the Views is appended to the present document.

[Annex]

*/ Made public by decision of the Human Rights Committee.

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights
- Forty-eighth session -

concerning

Communication No. 470/1991 */

Submitted by: Joseph Kindler
[represented by counsel]

Alleged victim: The author

State party: Canada

Date of communication: 25 September 1991 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 July 1993,

Having concluded its consideration of communication No. 470/1991, submitted to the Human Rights Committee by Mr. Joseph Kindler under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

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*/ The text of 6 individual opinions, signed by 7 Committee members, are appended to the present document.

The facts as submitted by the author:

1. The author of the communication is Joseph Kindler, a citizen of the United States of America, born in 1961, at the time of his submission detained in a penitentiary in Montreal, Canada, and on 26 September 1991 extradited to the United States. He claims to be a victim of a violation of articles 6, 7, 9, 10, 14 and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 In November 1983 the author was convicted in the State of Pennsylvania, United States, of first degree murder and kidnapping; the jury recommended the death sentence. According to the author, this recommendation is binding on the court. In September 1984, prior to sentencing, the author escaped from custody. He was arrested in the province of Quebec in April 1985. In July 1985 the United States requested and in August 1985 the Superior Court of Quebec ordered his extradition.

2.2 Article 6 of the 1976 Extradition Treaty between Canada and the United States provides:

> "When the offence for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offence, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed".

Canada abolished the death penalty in 1976, except in the case of certain military offences.

2.3 The power to seek assurances that the death penalty will not be imposed is conferred on the Minister of Justice pursuant to section 25 of the 1985 Extradition Act. On January 17, 1986, after hearing the author's counsel, the Minister of Justice decided not to seek these assurances.

2.4 The author filed an application for review of the Minister's decision with the Federal Court, which dismissed the application in January 1987. The author's appeal to the Court of Appeal was rejected in December 1988. The matter then came before the Supreme Court of Canada, which decided on 26 September 1991 that the extradition of Mr. Kindler would not violate his rights under the Canadian Charter of Human Rights. The author was extradited on the same day.

The complaint:

3. The author claims that the decision to extradite him violates articles 6, 7, 9, 14 and 26 of the Covenant. He submits that the death penalty *per se* constitutes cruel and inhuman treatment or punishment, and that conditions on death row are cruel, inhuman and degrading. He further alleges that the judicial procedures in Pennsylvania, inasmuch as they relate

specifically to capital punishment, do not meet basic requirements of justice. In this context, the author, who is white, generally alleges racial bias in the imposition of the death penalty in the United States, without, however, substantiating how this alleged bias would affect him.

The State party's observations and the author's comments:

4.1 The State party recalls that the author illegally entered the territory of Canada, where he was arrested in April 1985. It submits that the communication is inadmissible *ratione personae*, *loci* and *materiae*.

4.2 It is argued that the author cannot be considered a victim within the meaning of the Optional Protocol, since his allegations are derived from assumptions about possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States. The State party refers in this connection to the Committee's Views in communication No. 61/1979[1], where it was found that the Committee "has only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant".

4.3 The State party indicates that the author's allegations concern the penal law and judicial system of a country other than Canada. It refers to the Committee's inadmissibility decision in communication No. 217/1986[2], where the Committee observed "that it can only receive and consider communications in respect of claims that come under the jurisdiction of a State party to the Covenant". The State party submits that the Covenant does not impose responsibility upon a State for eventualities over which it has no jurisdiction.

4.4 Moreover, it is submitted that the communication should be declared inadmissible as incompatible with the provisions of the Covenant, since the Covenant does not provide for a right not to be extradited. In this connection, the State party quotes the Committee's inadmissibility decision in communication No. 117/1981[3]: "There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country". It further argues that even if extradition could be found to fall within the scope of protection of the Covenant in exceptional circumstances, these circumstances are not present in the instant case.

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[1] *Leo Hertzberg et al. v. Finland*, Views adopted on 2 April 1982, para. 9.3.

[2] *H. v.d.P. v. the Netherlands*, declared inadmissible on 8 April 1987, para. 3.2.

[3] *M. A. v. Italy*, declared inadmissible on 10 April 1984, para. 13.4.

4.5 The State party further refers to the United Nations Model Treaty on Extradition[4], which clearly contemplates the possibility of unconditional surrender by providing for discretion in obtaining assurances regarding the death penalty in the same fashion as is found in article 6 of the Canada-United States Extradition Treaty. It concludes that interference with the surrender of a fugitive pursuant to legitimate requests from a treaty partner would defeat the principles and objects of extradition treaties and would entail undesirable consequences for States refusing these legitimate requests. In this context, the State party points out that its long, unprotected border with the United States would make it an attractive haven for fugitives from United States justice. If these fugitives could not be extradited because of the theoretical possibility of the death penalty, they would be effectively irremovable and would have to be allowed to remain in the country, unpunished and posing a threat to the safety and security of the inhabitants.

4.6 The State party finally submits that the author has failed to substantiate his allegations that the treatment he may face in the United States will violate his rights under the Covenant. In this connection, the State party points out that the imposition of the death penalty is not *per se* unlawful under the Covenant. As regards the delay between the imposition and the execution of the death sentence, the State party submits that it is difficult to see how a period of detention during which a convicted prisoner would pursue all avenues of appeal, can be held to constitute a violation of the Covenant.

5. In his reply to the State party's submission, the author maintains that, since the right to life is at stake, there is no possible argument for leaving extradition outside the Committee's jurisdiction.

The Committee's admissibility considerations and decision:

6.1 During its 45th session in July 1992, the Committee considered the admissibility of the communication. It observed that extradition as such is outside the scope of application of the Covenant[5], but that a State party's obligations in relation to a matter itself outside the scope of the Covenant may still be engaged by reference to other provisions of the Covenant[6]. The Committee noted that the author does not claim that extradition as such violates the Covenant, but rather that the particular circumstances related to the effects of his extradition would raise issues under specific provisions of the Covenant. Accordingly, the Committee

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[4] Adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990; see General Assembly resolution 45/168 of 14 December 1990.

[5] Communication No. 117/1981 (*M.A. v. Italy*), paragraph 13.4: "There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country".

[6] *Aumeeruddy-Cziffra et al. v. Mauritius* (No. 35/1978, Views adopted on 9 April 1981) and *Torres v. Finland* (No. 291/1988, Views adopted on 2 April 1990).

found that the communication was thus not excluded *ratione materiae*.

6.2 The Committee considered the contention of the State party that the claim is inadmissible *ratione loci*. Article 2 of the Covenant requires States parties to guarantee the rights of persons within their jurisdiction. If a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person's rights that may later occur in the other jurisdiction. In that sense a State party clearly is not required to guarantee the rights of persons within another jurisdiction. However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over. For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.

6.3 The Committee therefore considered itself competent to examine whether the State party is in violation of the Covenant by virtue of its decision to extradite the author under the Extradition Treaty of 1976 between the United States and Canada, and the Extradition Act of 1985.

6.4 The Committee observed that the Covenant does not prohibit capital punishment for the most serious crimes provided that certain conditions are met. Article 7 of the Covenant prohibits torture and cruel, inhuman and degrading treatment. In respect of the so-called "death row phenomenon" the Committee recalled its earlier jurisprudence and noted that "prolongued judicial proceedings do not *per se* constitute cruel, inhuman and degrading treatment, even if they can be a source of mental strain for the convicted persons."[7] This also applies to appeal and review proceedings in cases involving capital punishment, although an assessment of the particular circumstances of each case would be called for. In States whose judicial system provides for review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies can be necessary to review the sentence. Thus, even prolonged periods of detention under a strict custodial regime on death row could not necessarily be considered to constitute cruel, inhuman and degrading treatment if the convicted person is merely availing himself of appellate remedies[8]. But each case will depend on its own facts.

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[7] Views on communications Nos. 210/1986 and 225/1987 (*Earl Pratt and Ivan Morgan v. Jamaica*) adopted on 6 April 1989, paragraph 13.6.

[8] Views on communications Nos. 270/1988 and 271/1988 (*Randolph Barrett & Clyde Sutcliffe v. Jamaica*), adopted on 30 March 1992, paragraph 8.4.

6.5 The Committee observed further that article 6 provides a limited authorization to States to order capital punishment within their own jurisdiction. It decided to examine on the merits the question whether the scope of the authorization permitted under article 6 extends also to allowing foreseeable loss of life by capital punishment in another State, even one with full procedural guarantees.

6.6 The Committee also found that it is clear from the *travaux preparatoires* that it was not intended that article 13 of the Covenant, which provides specific rights relating to the expulsion of aliens lawfully in the territory of a State party, should detract from normal extradition arrangements. Nonetheless, whether an alien is required to leave the territory through expulsion or extradition, the general guarantees of article 13 in principle apply, as do the requirements of the Covenant as a whole. In this connection the Committee noted that the author, even though he had unlawfully entered the territory of Canada, had ample opportunity to present his arguments against extradition before the Canadian courts, including the Supreme Court of Canada, which considered the facts and the evidence before it and found that the extradition of the author would not violate his rights under Canadian or international law. In this context the Committee reiterated its constant jurisprudence that it is not competent to re-evaluate the facts and evidence considered by national courts. What the Committee may do is to verify whether the author was granted all the procedural safeguards provided for in the Covenant. The Committee concluded that a careful study of all the material submitted by the author and by the State party does not reveal arguments that would support a complaint based on the absence of those guarantees during the course of the extradition process.

6.7 The Committee also observed that, in principle, lawful capital punishment under article 6 does not *per se* raise an issue under article 7. The Committee considered whether there are nonetheless special circumstances that in this particular case still raise an issue under article 7. Canadian law does not provide for the death penalty, except in military cases. Canada may by virtue of article 6 of the Extradition Treaty seek assurances from the other State which retains the death penalty, that a capital sentence shall not be imposed. It may also, under the Treaty, refuse to extradite a person when such an assurance is not received. While the seeking of such assurances and the determination as to whether or not to extradite in their absence is discretionary under the Treaty and Canadian law, these decisions may raise issues under the Covenant. In particular, the Committee considered that it might be relevant to know whether the State party satisfied itself, before deciding not to invoke article 6 of the Treaty, that this would not involve for the author a necessary and foreseeable violation of his rights under the Covenant.

6.8 The Committee also found that the methods employed for judicial execution of a sentence of capital punishment may in a particular case raise issues under article 7.

7. On 31 July 1992 the Committee decided that the communication was admissible in as much as it might raise issues under articles 6 and 7 of the Covenant. The Committee further indicated that, in accordance with rule 93, paragraph 4, of its rules of procedure, the State party could request a review of the decision on admissibility at the time of the examination

of the merits of the communication. Two Committee members appended a dissenting opinion to the decision on admissibility.[9]

The State party's submission on the merits and request for review of admissibility:

8.1 In its submissions dated 2 April and 26 May 1993, the State party submits facts on the extradition process in general, on the Canada-United States extradition relationship and on the specifics of the present case. It further requests a review of the Committee's decision on admissibility.

8.2 The State party recalls that "extradition exists to contribute to the safety of the citizens and residents of States. Dangerous criminal offenders seeking a safe haven from prosecution or punishment are removed to face justice in the State in which their crimes were committed. Extradition furthers international cooperation in criminal justice matters and strengthens domestic law enforcement. It is meant to be a straightforward and expeditious process. Extradition seeks to balance the rights of fugitives with the need for the protection of the residents of the two States parties to any given extradition treaty. The extradition relationship between Canada and the United States dates back to 1794 ... In 1842, the United States and Great Britain entered into the Ashburton-Webster Treaty which contained articles governing the mutual surrender of criminals ... this treaty remained in force until the present Canada-United States Extradition Treaty of 1976."

8.3 With regard to the principle *aut dedere aut judicare* the State party explains that while some States can prosecute persons for crimes committed in other jurisdictions in which their own nationals are either the offender or the victim, other States, such as Canada and certain other States in the common law tradition, cannot.

8.4 Extradition in Canada is governed by the Extradition Act and the terms of the applicable treaty. The Canadian Charter of Rights and Freedoms, which forms part of the constitution of Canada and embodies many of the rights protected by the Covenant, applies. Under Canadian law extradition is a two step process, the first involving a hearing at which a judge considers whether a factual and legal basis for extradition exits. The person sought for extradition may submit evidence at the judicial hearing. If the judge is satisfied on the evidence that a legal basis for extradition exists, the fugitive is ordered committed to await surrender to the requesting State. Judicial review of a warrant of committal to await surrender can be sought by means of an application for a writ of *habeas corpus* in a provincial court. A decision of the judge on the *habeas corpus* application can be appealed to the provincial court of appeal and then, with leave, to the Supreme Court of Canada. The second step in the extradition process begins following the exhaustion of the appeals in the judicial phase. The Minister of Justice is charged with the responsibility of deciding whether to surrender the person sought for extradition. The fugitive may make written submissions to the Minister and counsel for the fugitive, with leave, may appear before the Minister to present oral argument.

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[9] See Appendix under A.

In coming to a decision on surrender, the Minister considers a complete record of the case from the judicial phase, together with any written and oral submissions from the fugitive, and while the Minister's decision is discretionary, the discretion is circumscribed by law. The decision is based upon a consideration of many factors, including Canada's obligations under the applicable treaty of extradition, facts particular to the person and the nature of the crime for which extradition is sought. In addition, the Minister must consider the terms of the Canadian Charter of Rights and Freedoms and the various instruments, including the Covenant, which outline Canada's international human rights obligations. Finally, a fugitive may seek judicial review of the Minister's decision by a provincial court and appeal a warrant of surrender, with leave, up to the Supreme Court of Canada. In interpreting Canada's human rights obligations under the Canadian Charter, the Supreme Court of Canada is guided by international instruments to which Canada is a party, including the Covenant.

8.5 With regard to surrender in death penalty cases, the Minister of Justice decides whether or not to request assurances on the basis of an examination of the particular facts of each case. The Canada-United States Extradition Treaty was not intended to make the seeking of assurances a routine occurrence but only in circumstances where the particular facts of the case warrant a special exercise of discretion.

8.6 With regard to the abolition of the death penalty in Canada, the State party notes that "A substantial number of States within the international community, including the United States, continue to impose the death penalty. The Government of Canada does not use extradition as a vehicle for imposing its concepts of criminal law policy on other States. By seeking assurances on a routine basis, in the absence of exceptional circumstances, Canada would be dictating to the requesting State, in this case the United States, how it should punish its criminal law offenders. The Government of Canada contends that this would be an unwarranted interference with the internal affairs of another State. The Government of Canada reserves the right ... to refuse to extradite without assurances. This right is held in reserve for use only where exceptional circumstances exist. In the view of the Government of Canada, it may be that evidence showing that a fugitive would face certain or foreseeable violations of the Covenant would be one example of exceptional circumstances which would warrant the special measure of seeking assurances under article 6. However, there was no evidence presented by Kindler during the extradition process in Canada and there is no evidence in this communication to support the allegations that the use of the death penalty in the United States generally, or in the State of Pennsylvania in particular, violates the Covenant."

8.7 The State party also refers to article 4 of the United Nations Model Treaty on Extradition, which lists optional, but not mandatory, grounds for refusing extradition: "(d) If the offence for which extradition is requested carries the death penalty under the law of the Requesting State, unless the State gives such assurance as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out." Similarly, article 6 of the Canada-United States Extradition Treaty provides that the decision with respect to obtaining assurances regarding the death penalty is discretionary.

8.8 With regard to the link between extradition and the protection of society, the State party submits that Canada and the United States share a 4,800 kilometre unguarded border,

that many fugitives from United States justice cross that border into Canada and that in the last twelve years there has been a steadily increasing number of extradition requests from the United States. In 1980 there were 29 such requests; by 1992 the number had increased to 83. "Requests involving death penalty cases are a new and growing problem for Canada ... a policy of routinely seeking assurances under article 6 of the Canada-United States Extradition Treaty will encourage even more criminal law offenders, especially those guilty of the most serious of crimes, to flee the United States for Canada. Canada does not wish to become a haven for the most wanted and dangerous criminals from the United States. If the Covenant fetters Canada's discretion not to seek assurances, increasing numbers of criminals may come to Canada for the purpose of securing immunity from capital punishment."

9.1 With respect to Mr. Kindler's case, the State party recalls that he challenged the warrant of committal and the warrant of surrender in accordance with the extradition process outlined above, and that his counsel made written and oral submissions to the Minister to seek assurances that the death penalty not be imposed. He argued that extradition to face the death penalty would offend his rights under section 7 (comparable to articles 6 and 9 of the Covenant) and section 12 (comparable to article 7 of the Covenant) of the Canadian Charter of Rights and Freedoms.

9.2 As to the Committee's admissibility decision, the State party reiterates its argument that the communication is inadmissible *ratione materiae* because extradition *per se* is beyond the scope of the Covenant. A review of the *travaux preparatoires* reveals that the drafters of the Covenant specifically considered and rejected a proposal to deal with extradition in the Covenant. In the light of the negotiating history of the Covenant, the State party submits that "a decision to extend the Covenant to extradition treaties or to individual decisions pursuant thereto would stretch the principles governing the interpretation of human rights instruments in unreasonable and unacceptable ways. It would be unreasonable because the principles of interpretation which recognize that human rights instruments are living documents and that human rights evolve over time cannot be employed in the face of express limits to the application of a given document. The absence of extradition from the articles of the Covenant when read with the intention of the drafters must be taken as an express limitation."

9.3 As to the merits, the State party stresses that Mr. Kindler enjoyed a full hearing on all matters concerning his extradition to face the death penalty. "If it can be said that the Covenant applies to extradition at all ... an extraditing State could be said to be in violation of the Covenant only where it returned a fugitive to certain or foreseeable treatment or punishment, or to judicial procedures which in themselves would be a violation of the Covenant." In the present case, the State party submits that whereas it was reasonably foreseeable that Mr. Kindler would be held in the State of Pennsylvania subject to a sentence of death, it was not reasonably foreseeable that he would in fact be put to death or be held in conditions of incarceration that would violate rights under the Covenant. The State party points out that Mr. Kindler is entitled to many avenues of appeal in the United States and that he can petition for clemency; furthermore, he is entitled to challenge in the courts of the United States the conditions under which he is held while his appeals with respect to the death penalty are outstanding.

9.4 As to the imposition of the death penalty in the United States, the State party recalls that article 6 of the Covenant did not abolish capital punishment under international law. "In countries which have not abolished the death penalty, the sentence of death may still be imposed for the most serious crimes in accordance with law in force at the time of the commission of the crime, not contrary to the provisions of the Covenant and not contrary to the Convention on the Prevention and Punishment of the Crime of Genocide. The death penalty can only be carried out pursuant to a final judgment rendered by a competent court. It may be that Canada would be in violation of the Covenant if it extradited a person to face the possible imposition of the death penalty where it was reasonably foreseeable that the requesting State would impose the death penalty under circumstances which would violate article 6. That is, it may be that an extraditing State would be violating the Covenant to return a fugitive to a State which imposed the death penalty for other than the most serious crimes, or for actions which are not contrary to a law in force at the time of commission, or which carried out the death penalty in the absence of or contrary to the final judgment of a competent court. Such are not the facts here ... Kindler did not place any evidence before the Canadian courts, before the Minister of Justice or before the Committee which would suggest that the United States was acting contrary to the stringent criteria established by Article 6 when it sought his extradition from Canada... The Government of Canada, in the person of the Minister of Justice, was satisfied at the time the order of surrender was issued that if Kindler is executed in the State of Pennsylvania, this will be within the conditions expressly prescribed by article 6 of the Covenant. The Government of Canada remains satisfied that this is so."

9.5 Finally, the State party observes that it is "in a difficult position attempting to defend the criminal justice system of the United States before the Committee. It contends that the Optional Protocol process was never intended to place a State in the position of having to defend the laws or practices of another State before the Committee."

9.6 With respect to the issue whether the death penalty violates article 7 of the Covenant, the State party submits that "article 7 cannot be read or interpreted without reference to article 6. The Covenant must be read as a whole and its articles as being in harmony... It may be that certain forms of execution are contrary to article 7. Torturing a person to death would seem to fall into this category as torture is a violation of article 7. Other forms of execution may be in violation of the Covenant because they are cruel, inhuman or degrading. However, as the death penalty is permitted within the narrow parameters set by article 6, it must be that some methods of execution exist which would not violate article 7."

9.7 As to the methods of execution, the State party indicates that the method of execution in Pennsylvania is lethal injection, which is the method proposed by those who advocate euthanasia for terminally ill patients. It is thus at the end of the spectrum of methods designed to cause the least pain.

9.8 As to the "death row phenomenon" the State party submits that each case must be examined on its facts, including the conditions in the prison in which the prisoner would be held while on "death row", the age and the mental and physical condition of the prisoner subject to those conditions. the reasonably foreseeable length of time the prisoner would be

subject to those conditions, the reasons underlying the length of time and the avenues, if any, for remedying unacceptable conditions. "Mr. Kindler argued before the Minister of Justice and in Canadian courts that conditions on 'death row' in the State of Pennsylvania would amount to a denial of his rights. His evidence consisted of some testimony and academic journal articles on the effect that electrocution, as a method of execution, was alleged to have on the psychological state of prisoners held on death row. He did not present evidence on the facilities or prison routines in the State of Pennsylvania ... he did not present evidence on his plans to contest the death sentence in the United States and the expected length of time he would be held awaiting a final answer from the courts of the United States. He did not present evidence that he intended to seek a commutation of his sentence. The evidence he did tender was considered by the courts and by the Minister of Justice but was judged insubstantial and therefore insufficient to reverse the premises underlying the extradition relationship in existence between Canada and the United States. The Government of Canada submits that the Minister of Justice and the Canadian courts in the course of the extradition process in Canada, with its two phases of decision-making and avenues for judicial review, examined and weighed all the allegations and facts presented by Kindler. The Minister of Justice, in deciding to surrender Kindler to face the possible imposition of the death penalty, considered all the factors. The Minister was not convinced on the evidence that the conditions of incarceration in the State of Pennsylvania, when considered with the reasons for the delay and the continuing access to the courts in the United States, would violate the rights of Kindler, either under the Canadian Charter of Rights and Freedoms or under the Covenant. The Canadian Supreme Court upheld the Minister's decision, making it clear that the decision was not seen as subjecting Kindler to a violation of his rights... The Minister of Justice and the Canadian courts came to the conclusion that Kindler would not be subjected to a violation of rights which can be expressed as 'death row phenomenon'. The Government of Canada contends that the extradition process and its result in the case of Kindler satisfied Canada's obligation in respect of the Covenant on this point."

Comments by author's counsel:

10.1 In his comments on the State party's submission, author's counsel argues that whereas article 6 of the Covenant does foresee the possibility of the imposition of the death penalty, article 6, paragraph 2, applies only to countries "which have not abolished the death penalty". Since Canada has abolished capital punishment in non-military law, the principle applies that one cannot do indirectly what one cannot do directly, and that Canada was required to demand guarantees that Mr. Kindler would not be executed and that he would be treated in accordance with article 7 of the Covenant.

10.2 Author's counsel refers to the factum presented to the Canadian Supreme Court on Mr. Kindler's behalf. In said factum, the relevant aspects of Canadian Constitutional and Administrative law are discussed, and the arguments are said to be applicable *mutatis mutandis* to articles 6 and 7 of the Covenant. In paragraphs 38 to 49 of the factum, author's counsel argues that the United States use of the death penalty is not compatible with the standards of the Covenant. He refers to a book by Zimring and Hawkings, *Capital Punishment and the American Agenda* (1986), which argues the absence of any deterrent effect

and the essentially vengeance-based motives for the resurgence of capital punishment in the United States. He also quotes extensively from the judgment of the European Court of Justice in the *Soering v. United Kingdom* case. He indicates that while the majority Court declined to find capital punishment *per se* cruel and unusual in every case, it did condemn the death row phenomenon as such. The European Court concluded:

> "For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of the Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial. Facilities are available on death row for psychiatric services... However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration."

10.3 Counsel further quotes from the concurring opinion of Judge DeMeyer, arguing that "No State Party to the Convention can in that context, even if it has not yet ratified the Sixth Protocol, be allowed to extradite any person if that person thereby incurs the risk of being put to death in the requesting State."

10.4 Counsel also quotes from numerous articles analysing the Soering decision, including one by Gino J. Naldi of the University of East Anglia:

> "The Court considered whether the death penalty violated article 3. The Court noted that as originally drafted, the Convention did not seek to prohibit the death penalty. However, subsequent national practice meant that few High Contracting Parties now retained it and this was reflected in Protocol No. 6 which provides for the abolition of the death penalty but which the United Kingdom has not ratified notwithstanding its virtual abolition of the death penalty. Yet the very existence of this Protocol led the Court to the conclusion that article 3 had not developed in such a manner that it could be interpreted as prohibiting the death penalty...
>
> In the present case the Court found that Soering's fears that he would be exposed to the 'death row phenomenon' were real... The fact that a condemned prisoner was subjected to the severe regime of death row in a high security prison for six to eight years, notwithstanding psychological and psychiatric services, compounded the problem... The Court was additionally influenced by Soering's age and mental

> condition. Soering was eighteen years old at the time of the murders in 1985 and in view of a number of international instruments prohibiting the imposition of the death penalty on minors ... the Court expressed the opinion that a general principle now exists that the youth of a condemned person is a significant factor to be taken into account... Another factor the Court found relevant was psychiatric evidence that Soering was mentally disturbed at the time of the crime. The Court was also influenced by the fact that Soering's extradition was sought by the Federal Republic of Germany whose constitution allows its nationals to be tried for offences committed in other countries but prohibits the death penalty. Soering could therefore be tried for his alleged crimes without being exposed to the 'death row phenomenon'.[10]

10.5 Counsel contests the argument by the State party that Mr. Kindler was not a minor at the time of the offence. "It is not sufficient to state that Mr. Kindler is not a minor and is charged with a serious offence because in a society in which minors and mentally defective citizens can be executed, the access to a pardon is almost non-existent for someone like Mr. Kindler; yet the right to apply for pardon is an essential one in the Covenant."

10.6 Counsel further contends that the Canadian Minister of Justice did not consider the issue of the "death row phenomenon" or the period of time or the conditions of "death row".

10.7 He points to works of law and political science favouring abolition, which are permeated by the horror at the thought of execution and the sense of cruelty which always accompanies it.

10.8 The fact that the Covenant provides for capital punishment for serious offenses does not prevent an evolution in the interpretation of the law. "By now capital punishment must be viewed as per se cruel and unusual, and as a violation of Sec. 6 and 7 of the Covenant in all but the most horrendous cases of heinous crime; it can no longer be accepted as the standard penalty for murder; thus except for those unusual cases, the Covenant does not authorize it. In this context, executing Mr. Kindler would *by itself* be a violation of Sec. 6 and 7 and he should not have been extradited without guarantees."

10.9 With regard to Canada's argument that it does not wish to become a haven for foreign criminals, counsel contends that there is no proof that this would happen, nor was such proof advanced at any time in the proceedings.

11. As to the admissibility of the communication, counsel rejects the State party's arguments as unfounded. In particular, he contends that "it is not logical to exclude extradition from the Covenant or to require certainty of execution as Canada suggests ... law almost never deals with certainties but only with probabilities and possibilities." He stresses "that there is plenty of evidence that, *with respect to the death sentence*, the legal system of the

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[10] Gino J. Naldi, *Death Row Phenomenon Held Inhuman Treatment*, *The Review* (International Commission of Jurists), December 1989, at pp. 61-62.

United States is not in conformity with the Covenant and that therefore, applying its own principles ..., Canada should have considered all the issues raised by Mr. Kindler. It is thus not possible for Canada to argue that Mr. Kindler's petition was inadmissible; he alleged *Canada's* repeated violation of the Covenant, not that of the United States; that the American system might be indirectly affected is no concern for Canada."

Review of admissibility and consideration of merits:

12.1 In his initial submission author's counsel claimed that Mr. Kindler was a victim of violations of articles 6, 7, 9, 10, 14 and 26 of the Covenant.

12.2 When the Committee, at its forty-fifth session, examined the admissibility of the communication, it found some of the author's allegations unsubstantiated and therefore inadmissible; it further considered that the communication raised new and complex questions with regard to the compatibility with the Covenant, *ratione materiae*, of extradition to face capital punishment, in particular with regard to the scope of articles 6 and 7 of the Covenant to such situations and their concrete application in the present case. It therefore declared the communication admissible inasmuch as it might raise issues under articles 6 and 7 of the Covenant. The State party has made extensive new submissions on both admissibility and merits and requested, pursuant to rule 93, paragraph 4, of the Committee's rules of procedure, a review of the Committee's decision on admissibility.

12.3 In reviewing its decision on admissibility, the Committee takes note of the objections of the State party and of the arguments by author's counsel in this respect. The Committee observes that with regard to the scope of articles 6 and 7 of the Covenant, the Committee's jurisprudence is not dispositive on issues of admissibility such as those raised in the instant communication. Therefore, the Committee considers that an examination on the merits of the communication will enable the Committee to pronounce itself on the scope of these articles and to clarify the applicability of the Covenant and Optional Protocol to cases concerning extradition to face capital punishment.

13.1 Before examining the merits of this communication, the Committee observes that, as indicated in the admissibility decision, what is at issue is not whether Mr. Kindler's rights have been or are likely to be violated by the United States, which is not a party to the Optional Protocol, but whether by extraditing Mr. Kindler to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant. States parties to the Covenant will often also be party to various bilateral obligations, including those under extradition treaties. A State party to the Covenant is required to ensure that it carries out all its other legal commitments in a manner consistent with the Covenant. The starting point for an examination of this issue must be the obligation of the State party under article 2, paragraph 1, of the Covenant, namely, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most essential of these rights.

13.2 If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.

14.1 With regard to a possible violation by Canada of article 6 the Covenant by its decision to extradite the author, two related questions arise:

(a) Did the requirement under article 6, paragraph 1, to protect the right to life prohibit Canada from exposing a person within its jurisdiction to the real risk (that is to say, a necessary and foreseeable consequence) of losing his life in circumstances incompatible with article 6 of the Covenant as a consequence of extradition to the United States?

(b) Did the fact that Canada had abolished capital punishment except for certain military offences require Canada to refuse extradition or request assurances from the United States, as it was entitled to do under article 6 of the Extradition Treaty, that the death penalty would not be imposed against Mr. Kindler?

14.2 As to (a), the Committee recalls its General Comment on Article 6[11], which provides that while States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use. The General Comment further notes that the terms of article 6 also point to the desirability of abolition of the death penalty. This is an object towards which ratifying parties should strive: "All measures of abolition should be considered as progress in the enjoyment of the right to life". Moreover, the Committee notes the evolution of international law and the trend towards abolition, as illustrated by the adoption by the United Nations General Assembly of the Second Optional Protocol to the International Covenant on Civil and Political Rights. Furthermore, even where capital punishment is retained by States in their legislation, many of them do not exercise it in practice.

14.3 The Committee notes that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Canada itself did not impose the death penalty on Mr. Kindler, but extradited him to the United States, where he faced capital punishment. If Mr. Kindler had been exposed, through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, that would have entailed a violation by Canada of its obligations under article 6, paragraph 1. Among the requirements of article 6, paragraph 2, is that capital punishment be imposed only for the most serious crimes, in circumstances not contrary to the Covenant and other instruments, and that it be carried out pursuant to a final judgment rendered by a competent court. The Committee notes that Mr. Kindler was convicted of premeditated murder, undoubtedly a very serious crime. He was over 18 years of age when the crime was committed. The author has not claimed before the Canadian courts or before the Committee that the conduct of the trial in the Pennsylvania court violated his rights to a fair hearing

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[11] General Comment No. 6[16] of 27 July 1982, para. 6.

under article 14 of the Covenant.

14.4 Moreover, the Committee observes that Mr. Kindler was extradited to the United States following extensive proceedings in the Canadian Courts, which reviewed all the evidence submitted concerning Mr. Kindler's trial and conviction. In the circumstances, the Committee finds that the obligations arising under article 6, paragraph 1, did not require Canada to refuse the author's extradition.

14.5 The Committee notes that Canada has itself, save for certain categories of military offences, abolished capital punishment; it is not, however, a party to the Second Optional Protocol to the Covenant. As to question (b), namely whether the fact that Canada has generally abolished capital punishment, taken together with its obligations under the Covenant, required it to refuse extradition or to seek the assurances it was entitled to seek under the extradition treaty, the Committee observes that the abolition of capital punishment does not release Canada of its obligations under extradition treaties. However, it is in principle to be expected that, when exercising a permitted discretion under an extradition treaty (namely, whether or not to seek assurances that capital punishment will not be imposed) a State which has itself abandoned capital punishment would give serious consideration to its own chosen policy in making its decision. The Committee observes, however, that the State party has indicated that the possibility to seek assurances would normally be exercised where exceptional circumstances existed. Careful consideration was given to this possibility.

14.6 While States must be mindful of the possibilities for the protection of life when exercising their discretion in the application of extradition treaties, the Committee does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances. The Committee notes that the extradition of Mr. Kindler would have violated Canada's obligations under article 6 of the Covenant, if the decision to extradite without assurances would have been taken arbitrarily or summarily. The evidence before the Committee reveals, however, that the Minister of Justice reached a decision after hearing argument in favor of seeking assurances. The Committee further takes note of the reasons given by Canada not to seek assurances in Mr. Kindler's case, in particular, the absence of exceptional circumstances, the availability of due process, and the importance of not providing a safe haven for those accused of or found guilty of murder.

15.1 As regards the author's claims that Canada violated article 7 of the Covenant, this provision must be read in the light of other provisions of the Covenant, including article 6, paragraph 2, which does not prohibit the imposition of the death penalty in certain limited circumstances. Accordingly, capital punishment as such, within the parameters of article 6, paragraph 2, does not *per se* violate article 7.

15.2 As to whether the "death row phenomenon" associated with capital punishment, constitutes a violation of article 7, the Committee recalls its jurisprudence to the effect that "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."[12] The Committee has indicated that the facts and the circumstances of each case need to be examined to see whether an issue under article 7 arises.

15.3 In determining whether, in a particular case, the imposition of capital punishment could constitute a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent. In this context the Committee has had careful regard to the judgment given by the European Court of Human Rights in the *Soering v. United Kingdom* case[13]. It notes that important facts leading to the judgment of the European Court are distinguishable on material points from the facts in the present case. In particular, the facts differ as to the age and mental state of the offender, and the conditions on death row in the respective prison systems. The author's counsel made no specific submissions on prison conditions in Pennsylvania, or about the possibility or the effects of prolonged delay in the execution of sentence; nor was any submission made about the specific method of execution. The Committee has also noted in the Soering case that, in contrast to the present case, there was a simultaneous request for extradition by a State where the death penalty would not be imposed.

16. Accordingly, the Committee concludes that the facts as submitted in the instant case do not reveal a violation of article 6 of the Covenant by Canada. The Committee also concludes that the facts of the case do not reveal a violation of article 7 of the Covenant by Canada.

17. The Committee expresses its regret that the State party did not accede to the Special Rapporteur's request under rule 86, made in connection with the registration of the communication on 26 September 1991.

18. The Committee, acting under article 5, paragraph 4, of the Optional Protocol, finds that the facts before it do not reveal a violation by Canada of any provision of the International Covenant on Civil and Political Rights.

[Done in English, French and Spanish, the English text being the original version.]

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APPENDIX

Individual opinions under rule 94, paragraph 3, of the Human Rights Committee's rules of procedure, concerning the Committee's Views on communication No. 470/1991 (*Joseph Kindler v. Canada*)

A. Individual opinion by Mr. Kurt Herndl and Mr. Waleed Sadi
(concurring on the merits/dissenting on admissibility)

We fully concur in the Committee's finding that the facts of this case do not reveal a violation by Canada of any provision of the Covenant. We wish, however, to repeat our concerns expressed in the dissenting opinion we appended to the Committee's decision on admissibility of 31 July 1992:

"[...]

3. This communication in its essence poses a threat to the exercise by a State of its international law obligations under a valid extradition treaty. Indeed, an examination of the *travaux préparatoires* of the Covenant on Civil and Political Rights reveals that the drafters gave due consideration to the complex issue of extradition and decided to exclude this issue from the Covenant, not by accident, but because there were many delegations opposed to interference with their governments' international law obligations under extradition treaties.

4. Yet, in the light of the evolution of international law, in particular of human rights law, following the entry into force of the Covenant in 1976, the question arises whether under certain exceptional circumstances the Human Rights Committee could or even should examine matters directly linked with a State party's compliance with an extradition treaty. Such exceptional circumstances would be present if, for instance, a person were facing arbitrary extradition to a country where substantial grounds existed for believing that he or she could be subjected, for example, to torture. In other words, the Committee could declare communications involving the extradition of a person from a State party to another State (irrespective of whether it is a State party), admissible *ratione materiae* and *ratione loci*, provided that the author substantiated his claim that his basic human rights would be violated by the country seeking his extradition; this requires a showing of reasonable cause to believe that such violations would probably occur. In the communication at bar, the author has not made such a showing, and the State party has argued that the Extradition Treaty with the United States is not incompatible with the provisions of the Covenant and that it complies with the requirements of the Model Treaty on Extradition produced at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana in 1990.

5. The majority opinion nevertheless declared this communication admissible, albeit provisionally, because it views the extradition of the author by Canada to Pennsylvania as possibly raising issues under articles 6 and 7 of the Covenant. Yet, the facts as presented to the Committee do not disclose any probability that violations of the author's Covenant rights

by a State party to the Optional Protocol would occur. As an alien who illegally entered the territory of Canada, his only link with Canada is that in 1985 he was committed for extradition and that the legality of his extradition was tested in the Canadian courts and, following due consideration of his arguments, affirmed by the Supreme Court of Canada in September 1991. The author does not raise any complaint about a denial of due process in Canada. His allegations concern hypothetical violations of his rights by the United States, which is not a State party to the Optional Protocol. In our opinion, the "link" with the State party is much too tenuous for the Committee to declare the communication admissible. Moreover, Mr. Kindler, who was extradited to the United States in September 1991, is still appealing his conviction before the Pennsylvania courts. In this connection, an unreasonable responsibility is being placed on Canada by requiring it to defend, explain or justify before the Committee the United States system of administration of justice.

6. Hitherto, the Committee has declared numerous communications inadmissible, where the authors had failed to substantiate their allegations for purposes of admissibility. A careful examination of the material submitted by author's counsel in his initial submission and in his comments on the State party's submission reveals that this is essentially a case where a deliberate attempt is made to avoid application of the death penalty, which still remains a legal punishment under the Covenant. Here the author has not substantiated his claim that his rights under the Covenant would, with a reasonable degree of probability, be violated by his extradition to the United States.

7. As for the issues the author alleges may arise under article 6, the Committee concedes that the Covenant does not prohibit the imposition of the death penalty for the most serious crimes. Indeed, if it did prohibit it, the Second Optional Protocol on the Abolition of the Death Penalty would be superfluous. Since neither Canada nor the United States is a party to the Second Optional Protocol, it cannot be expected of either State that they ask for or that they give assurances that the death penalty will not be imposed. The question whether article 6, paragraph 2, read in conjunction with article 6, paragraph 1, could lead to a different conclusion is, at best, academic and not a proper matter for examination under the Optional Protocol.

8. As for the issues that may allegedly arise under article 7 of the Covenant, we agree with the Committee's reference to its jurisprudence in the Views on communications Nos. 210/1986 and 225/1987 (*Earl Pratt and Ivan Morgan v. Jamaica*) and Nos. 270 and 271/1988 (*Barrett and Sutcliffe v. Jamaica*), in which the Committee decided that the so-called "death row phenomenon" does not *per se* constitute cruel, inhuman and degrading treatment, even if prolonged judicial proceedings can be a source of mental strain for the convicted prisoners. In this connection it is important to note that the prolonged periods of detention on death row are a result of the convicted person's recourse to appellate remedies. In the instant case the author has not submitted any arguments that would justify the Committee's departure from its established jurisprudence.

9. A second issue allegedly arising under article 7 is whether the method of execution - in the State of Pennsylvania by lethal injection - could be deemed as constituting cruel, inhuman or degrading treatment. Of course, any and every form of capital punishment can

be seen as entailing a denial of human dignity; any and every form of execution can be perceived as cruel and degrading. But, since capital punishment is not prohibited by the Covenant, article 7 must be interpreted in the light of article 6, and cannot be invoked against it. The only conceivable exception would be if the method of execution were deliberately cruel. There is, however, no indication that execution by lethal injection inflicts more pain or suffering than other accepted methods of execution. Thus, the author has not made a *prima facie* case that execution by lethal injection may raise an issue under article 7.

10. We conclude that the author has failed to substantiate a claim under article 2 of the Optional Protocol, that the communication raises only remote issues under the Covenant and therefore that it should be declared inadmissible under article 3 of the Optional Protocol as an abuse of the right of submission."

K. Herndl
W. Sadi

[Done in English, French and Spanish, the English text being the original version.]

B. Individual opinion by Mr. Bertil Wennergren (dissenting)

I cannot share the Committee's Views on a non-violation of article 6 of the Covenant. In my opinion, Canada violated article 6, paragraph 1, of the Covenant by extraditing the author to the United States, without having sought assurances for the protection of his life, i.e. non-execution of a death sentence imposed upon him. I justify this conclusion as follows:

Firstly, I would like to clarify my interpretation of article 6 of the Covenant. The Vienna Convention on the Law of Treaties stipulates that a treaty must be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The object of the provisions of article 6 is human life and the purpose of its provisions is the protection of such life. Thus, paragraph 1 emphasizes this point by guaranteeing to every human being the inherent right to life. The other provisions of article 6 concern a secondary and subordinate object, namely to allow States parties that have not abolished capital punishment to resort to it until such time they feel ready to abolish it. In the *travaux préparatoires* to the Covenant, the death penalty was seen by many delegates and bodies participating in the drafting process an "anomaly" or a "necessary evil". Against this background, it would appear to be logical to interpret the fundamental rule in article 6, paragraph 1, in a wide sense, whereas paragraph 2, which addresses the death penalty, should be interpreted narrowly. The principal difference between my and the Committee's Views on this case lies in the importance I attach to the fundamental rule in paragraph 1 of article 6, and my belief that what is said in paragraph 2 about the death penalty has a limited objective that cannot by any reckoning override the cardinal principle in paragraph 1.

The rule in article 6, paragraph 1, of the Covenant stands out from among the others laid down in article 6; moreover, article 4 of the Covenant makes it clear that no derogations from this rule are permitted, not even in time of a public emergency threatening the life of the nation. No society, however, has postulated an absolute right to life. All human rights, including the right to life, are subject to the rule of necessity. If, but only if, absolute necessity so requires, it may be justifiable to deprive an individual of his life to prevent him from killing others or so as to avert man-made disasters. For the same reason, it is justifiable to send citizens into war and thereby expose them to a real risk of their being killed. In one form or another, the rule of necessity is inherent in all legal systems; the legal system of the Covenant is no exception.

Article 6, paragraph 2, makes an exception for States parties that have not abolished the death penalty. The Covenant permits them to continue applying the death penalty. This "dispensation" for States parties should not be construed as a justification for the deprivation of the life of individuals, albeit lawfully sentenced to death, and does not make the execution of a death sentence strictly speaking legal. It merely provides a possibility for States parties to be released from their obligations under articles 2 and 6 of the Covenant, namely to respect and to ensure to all individuals within their territory and under their jurisdiction the inherent right to life without any distinction, and enables them to make a distinction with regard to persons having committed the "most serious crime(s)".

The standard way to ensure the protection of the right to life is to criminalize the killing of human beings. The act of taking human life is normally subsumed under terms such as "manslaughter", "homicide" or "murder". Moreover, there may be omissions which can be subsumed under crimes involving the intentional taking of life, inaction or omission that causes the loss of a person's life, such as a doctor's failure to save the life of a patient by intentionally failing to activate life-support equipment, or failure to come to the rescue of a person in a life-threatening situation of distress. Criminal responsibility for the deprivation of life lies with private persons and representatives of the State alike. The methodology of criminal legislation provides some guidance when assessing the limits for a State party's obligations under article 2, paragraph 1, of the Covenant, to protect the right to life within its jurisdiction.

What article 6, paragraph 2, does not, in my view, is to permit States parties that have abolished the death penalty to reintroduce it at a later stage. In this way, the "dispensation" character of paragraph 2 has the positive effect of preventing a proliferation of the deprivation of peoples' lives through the execution of death sentences among States parties to the Covenant. The Second Optional Protocol to the Covenant was drafted and adopted so as to encourage States parties that have not abolished the death penalty to do so.

The United States has not abolished the death penalty and therefore may, by operation of article 6, paragraph 2, deprive individuals of their lives by the execution of death sentences lawfully imposed. The applicability of article 6, paragraph 2, in the United States should not however be construed as extending to other States when they must consider issues arising under article 6 of the Covenant in conformity with their obligations under article 2, paragraph 1, of the Covenant. The "dispensation" clause of paragraph 2 applies merely domestically and as such concerns only the United States, as a State party to the Covenant.

Other States, however, are in my view obliged to observe their duties under article 6, paragraph 1, namely to protect the right to life. Whether they have or have not abolished capital punishment does not, in my opinion, make any difference. The dispensation in paragraph 2 does not apply in this context. Only the rule in article 6, paragraph 1, applies, and it must be applied strictly. A State party must not defeat the purpose of article 6, paragraph 1, by failing to provide anyone with such protection as is necessary to prevent his/her right to life from being put at risk. And under article 2, paragraph 1, of the Covenant, protection shall be ensured to <u>all</u> individuals without distinction of any kind. No distinction must therefore be made on the ground, for instance, that a person has committed a "most serious crime".

The value of life is immeasurable for any human being, and the right to life enshrined in article 6 of the Covenant is the supreme human right. It is an obligation of States parties to the Covenant to protect the lives of all human beings on their territory and under their jurisdiction. If issues arise in respect of the protection of the right to life, priority must not be accorded to the domestic laws of other countries or to (bilateral) treaty articles. Discretion of any nature permitted under an extradition treaty cannot apply, as there is no room for it under Covenant obligations. It is worth repeating that no derogation from a State's obligations

under article 6, paragraph 1, is permitted. This is why Canada, in my view, violated article 6, paragraph 1, by consenting to extradite Mr. Kindler to the United States, without having secured assurances that Mr. Kindler would not be subjected to the execution of a death sentence.

B. Wennergren

[Done in English, French and Spanish, the English text being the original version.]

C. Individual opinion by Mr. Rajsoomer Lallah (dissenting)

1. I am unable to subscribe to the Committee's Views to the effect that the facts before it do not disclose a violation by Canada of any provision of the Covenant.

2.1 I start by affirming my agreement with the Committee's opinion, as noted in paragraph 13.1 of the Views, that what is at issue is not whether Mr. Kindler's rights have been, or run the real risk of being, violated in the United States and that a State party to the Covenant is required to ensure that it carries out other commitments it may have under a bilateral treaty in a manner consistent with its obligations under the Covenant. I further agree with the Committee's view, in paragraph 13.2, to the effect that, where a State party extradites a person in such circumstances as to expose him to a real risk that his rights under the Covenant will be violated in the jurisdiction to which that person is extradited, then that State party may itself be in violation of the Covenant.

2.2 I wonder, however, whether the Committee is right in concluding that, by extraditing Mr. Kindler, and thereby exposing him to the real risk of being deprived of his life, Canada did not violate its obligations under the Covenant. The question whether the author ran that risk under the Covenant in its concrete application to Canada must be examined, as the Committee sets out to do, in the light of the fact that Canada's decision to abolish the death penalty for all civil, as opposed to military, offences was given effect to in Canadian law.

2.3 The question which arises is what exactly are the obligations of Canada with regard to the right to life guaranteed under article 6 of the Covenant even if read alone and, perhaps and possibly, in the light of other relevant provisions of the Covenant, such as equality of treatment before the law under article 26 and the obligations deriving from article 5(2) which prevents restrictions or derogations from Covenant rights on the pretext that the Covenant recognizes them to a lesser extent. The latter feature of the Covenant would have, in my view, all its importance since the right to life is one to which Canada gives greater protection than might be thought to be required, on a minimal interpretation, under article 6 of the Covenant.

2.4 It would be useful to examine, in turn, the requirements of articles 6, 26 and 5(2) of the Covenant and their relevance to the facts before the Committee.

3.1 Article 6(1) of the Covenant proclaims that everyone has the inherent right to life. It requires that this right shall be protected by law. It also provides that no one shall be arbitrarily deprived of his life. Undoubtedly, in pursuance of article 2 of the Covenant, domestic law will normally provide that the unlawful violation of that right will give rise to penal sanctions as well as civil remedies. A State party may further give appropriate protection to that right by outlawing the deprivation of life by the State itself as a method of punishment where the law previously provided for such a method of punishment. Or, with the same end in view, the State party which has not abolished the death penalty is required to

restrict its application to the extent permissible under the remaining paragraphs of article 6, in particular, paragraph 2. But, significantly, paragraph 6 has for object to prevent States from invoking the limitations in article 6 to delay or to prevent the abolition of capital punishment. And Canada has decided to abolish this form of punishment for civil, as opposed to military, offences. It can be said that, in so far as civil offences are concerned, paragraph 2 is not applicable to Canada, because Canada is not a State which, in the words of that paragraph, has not abolished the death penalty.

3.2 It seems to me, in any event, that the provisions of article 6(2) are in the nature of a derogation from the inherent right to life proclaimed in article 6(1) and must therefore be strictly construed. Those provisions cannot justifiably be resorted to in order to have an adverse impact on the level of respect for, and the protection of, that inherent right which Canada has undertaken under the Covenant "to respect and to ensure to all individuals within its territory and subject to its jurisdiction". In furtherance of this undertaking, Canada has enacted legislative measures to do so, going to the extent of abolishing the death penalty for civil offences. In relation to the matter in hand, three observations are called for.

3.3 First, the obligations of Canada under article 2 of the Covenant have effect with respect to "all individuals within its territory and subject to its jurisdiction", irrespective of the fact that Mr. Kindler is not a citizen of Canada. The obligations towards him are those that must avail to him in his quality as a human being on Canadian soil. Secondly, the very notion of "protection" requires prior preventive measures, particularly in the case of a deprivation of life. Once an individual is deprived of his life, it cannot be restored to him. These preventive measures necessarily include the prevention of any real risk of the deprivation of life. By extraditing Mr. Kindler without seeking assurances, as Canada was entitled to do under the Extradition Treaty, that the death sentence would not be applied to him, Canada put his life at real risk. Thirdly. it cannot be said that unequal standards are being expected of Canada as opposed to other States. In its very terms, some provisions of article 6 apply to States which do not have the death penalty and other provisions apply to those States which have not yet abolished that penalty. Besides, unequal standards may, unfortunately, be the result of reservations which States may make to particular articles of the Covenant though, I hasten to add, it is questionable whether all reservations may be held to be valid.

3.4 A further question arises under article 6(1), which requires that no one shall be arbitrarily deprived of his life. The question is whether the granting of the same and equal level of respect and protection is consistent with the attitude that, so long as the individual is within Canada's territory, that right will be fully respected and protected to that level, under Canadian law viewed in its total effect even though expressed in different enactments (penal law and extradition law), whereas Canada might be free to abrogate that level of respect and protection by the deliberate and coercive act of sending that individual away from its territory to another State where the fatal act runs the real risk of being perpetrated. Could this inconsistency be held to amount to a real risk of an "arbitrary" deprivation of life within

the terms of article 6(1) in that unequal treatment is in effect meted out to different individuals within the same jurisdiction? A positive answer would seem to suggest itself as Canada, through its judicial arm, could not sentence an individual to death under Canadian law whereas Canada, through its executive arm, found it possible under its extradition law to extradite him to face the real risk of such a sentence.

3.5 For the above reasons, there was, in my view, a case before the Committee to find a violation by Canada of article 6 of the Covenant.

4. Consideration of the possible application of articles 26 and 5 of the Covenant would, in my view, lend further support to the case for a violation of article 6.

5. In the light of the considerations discussed in paragraph 3.4 above, it would seem that article 26 of the Covenant which guarantees equality before the law has been breached. Equality under this article, in my view, includes substantive equality under a State party's law viewed in its totality and its effect on the individual. Effectively, different and unequal treatment may be said to have been meted out to Mr. Kindler when compared with the treatment which an individual having committed the same offence would have received in Canada. It does not matter, for this purpose, whether Canada metes out this unequal treatment by reason of the particular arm of the State through which it acts, that is to say, through its judicial arm or through its executive arm. Article 26 regulates a State party's legislative, executive as well as judicial behaviour. That, in my view, is the prime principle, in questions of equality and non-discrimination under the Covenant, guaranteeing the application of the rule of law in a State party.

6. I have grave doubts as to whether, in deciding to extradite Mr. Kindler, Canada would have reached the same decision if it had properly directed itself on its obligations deriving from article 5(2), in conjunction with articles 2, 6 and 26, of the Covenant. It would appear that Canada rather considered, in effect, the question whether there were, or there were not, special circumstances justifying the application of the death sentence to Mr. Kindler, well realizing that, by virtue of Canadian law, the death sentence could not have been imposed in Canada itself on Mr. Kindler on conviction there for the kind of offence he had committed. Canada had exercised its sovereign decision to abolish the death penalty for civil,as distinct from military, offences, thereby ensuring greater respect for, and protection of the individual's inherent right to life. Article 5(2) would, even if article 6 of the Covenant were given a minimal interpretation, have prevented Canada from invoking that minimal interpretation to restrict or give lesser protection to that right by an executive act of extradition though, in principle, permissible under Canadian extradition law.

R. Lallah

[Done in English, French and Spanish, the English text being the original version.]

D. Individual opinion by Mr. Fausto Pocar (dissenting)

While I agree with the decision of the Committee in so far as it refers to the consideration of the claim under article 7 of the Covenant, I am not able to agree with the findings of the Committee that in the present case there has been no violation of article 6 of the Covenant. The question whether the fact that Canada had abolished capital punishment except for certain military offences required its authorities to refuse extradition or request assurances from the United States that the death penalty would not be imposed against Mr. Kindler, must in my view receive an affirmative answer.

Regarding the death penalty, it has to be recalled that, although article 6 of the Covenant does not prescribe categorically the abolition of capital punishment, it imposes a set of obligations on States parties that have not yet abolished it. As the Committee has pointed out in its General Comment 6(16), "the article also refers generally to abolition in terms which strongly suggest that abolition is desirable." Furthermore, the wording of paragraphs 2 and 6 clearly indicates that article 6 tolerates - within certain limits and in view of a future abolition -the existence of capital punishment in States parties that have not yet abolished it, but may by no means be interpreted as implying for any State party an authorization to delay its abolition or, *a fortiori*, to enlarge its scope or to introduce or reintroduce it. Consequently, a State party that has abolished the death penalty is in my view under the legal obligation, according to article 6 of the Covenant, not to reintroduce it. This obligation must refer both to a direct reintroduction within the State's jurisdiction, and to an indirect one, as it is the case when the State acts - through extradition, expulsion or compulsory return - in such a way that an individual within its territory and subject to its jurisdiction may be exposed to capital punishment in another State. I therefore conclude that in the present case there has been a violation of article 6 of the Covenant.

F. Pocar

[Done in English, French and Spanish, the English text being the original version.]

E. Individual opinion of Ms. Christine Chanet (dissenting)

The questions posed to the Human Rights Committee by Mr. Kindler's communication are clearly set forth in paragraph 14.1 of the Committee's decision.

Paragraph 14.2 does not require any particular comment on my part.

On the other hand, when replying to the questions thus identified in paragraph 14.1, the Committee, in order to conclude in favour of a non-violation by Canada of its obligations under article 6 of the Covenant, was forced to undertake a joint analysis of paragraphs 1 and 2 of article 6 of the Covenant.

There is nothing to show that this is a correct interpretation of article 6. It must be possible to interpret every paragraph of an article of the Covenant separately, unless expressly stated otherwise in the text itself or deducible from its wording.

That is not so in the present case.

The fact that the Committee found it necessary to use both paragraphs in support of its argument clearly shows that each paragraph, taken separately, led to the opposite conclusion, namely, that a violation had occurred.

According to article 6, paragraph 1, no one shall be arbitrarily deprived of his life; this principle is absolute and admits of no exception.

Article 6, paragraph 2, begins with the words: "In countries which have not abolished the death penalty ...". This form of words requires a number of comments:

It is negative and refers not to countries in which the death penalty exists but to those in which it has not been abolished. Abolition is the rule, retention of the death penalty the exception.

Article 6, paragraph 2, refers only to countries in which the death penalty has not been abolished and thus rules out the application of the text to countries which have abolished the death penalty.

Lastly, the text imposes a series of obligations on the States in question." Consequently, by making a "joint" interpretation of the first two paragraphs of article 6 of the Covenant, the Committee has, in my view, committed three errors of law:

One error, in that it is applying to a country which has abolished the death penalty, Canada, a text exclusively reserved by the Covenant - and that in an express and unambiguous way - for non-abolitionist States.

The second error consists in regarding as an authorization to re-establish the death penalty in a country which has abolished it what is merely an implicit recognition of its existence. This is an extensive interpretation which runs counter to the proviso in paragraph 6 of article 6 that "nothing in this article shall be invoked ... to prevent the abolition of capital punishment". This extensive interpretation, which is restrictive of rights, also runs counter to the provision in article 5, paragraph 2, of the Covenant that "there shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent". Taken together, these texts prohibit a State from engaging in distributive application of the death penalty. There is nothing in the Covenant to force a State to abolish the death penalty but, if it has chosen to do so, the Covenant forbids it to re-establish it in an arbitrary way, even indirectly.

The third error of the Committee in the Kindler decision results from the first two. Assuming that Canada is implicitly authorized by article 6, paragraph 2, of the Covenant, to re-establish the death penalty, on the one hand, and to apply it in certain cases on the other, the Committee subjects Canada in paragraphs 14.3, 14.4 and 14.5, as if it were a non-abolitionist country, to a scrutiny of the obligations imposed on non-abolitionist States: penalty imposed only for the most serious crimes, judgement rendered by a competent court, etc.

This analysis shows that, according to the Committee, Canada, which had abolished the death penalty on its territory, has by extraditing Mr. Kindler to the United States re-established it by proxy in respect of a certain category of persons under its jurisdiction.

I agree with this analysis but, unlike the Committee, I do not think that this behaviour is authorized by the Covenant.

Moreover, having thus re-established the death penalty by proxy, Canada is limiting its application to a certain category of persons: those that are extraditable to the United States.

Canada acknowledges its intention of so practising in order that it may not become a haven for criminals from the United States. Its intention is apparent from its decision not to seek assurances that the death penalty would not be applied in the event of extradition to the United States, as it is empowered to do by its bilateral extradition treaty with that country.

Consequently, when extraditing persons in the position of Mr. Kindler, Canada is deliberately exposing them to the application of the death penalty in the requesting State.

In so doing, Canada's decision with regard to a person under its jurisdiction according to whether he is extraditable to the United States or not, constitutes a discrimination in violation of article 2, paragraph 1, and article 26 of the Covenant.

Such a decision affecting the right to life and placing that right, in the last analysis, in the hands of the Government which, for reasons of penal policy, decides whether or not to seek assurances that the death penalty will not be carried out, constitutes an arbitrary deprivation of the right to life forbidden by article 6, paragraph 1, of the Covenant and, consequently, a misreading by Canada of its obligations under this article of the Covenant.

Ch. Chanet

[Done in English, French and Spanish, the French text being the original version]

F. Dissenting opinion by Mr. Francisco Jose Aguilar Urbina

I. Inability to join in the majority opinion

1. I requested the Secretariat to clarify various defects in the Draft in respect of which no explanation had been given despite the fact that I had already requested their elucidation in advance. I asked, inter alia, for explanations regarding the system followed in the State of Pennsylvania for sentencing a person. In paragraph 2.1 of the Draft it was stated that "the jury recommended the death sentence". From my first statement during the discussion, I commented that there could be three possibilities, and that whether I joined in the majority or opposed it depended on which procedure was applied. Those possibilities were:

(a) That the jury could pronounce only on the guilt of the accused and that it was left to the judge, as a matter of law, to impose the sentence;

(b) That the jury not only pronounced on the innocence or guilt of the accused but also recommended the penalty, with the judge, however, remaining completely free to impose the sentence in keeping with his assessment of the case in conformity with law (in the terms in which paragraph 2.1 was drafted, this would appear to be the procedure practised by the State of Pennsylvania);

(c) That the jury ruled the innocence or guilt of the accused and, at the same time, decided upon the sentence to be imposed, not by way of a recommendation but as a penalty which the judge would necessarily be obliged to declare, not being able to change it in any circumstance but simply serving as a mouthpiece for the jury.

Consequently, in so far as the crux of the matter was whether Canada, in granting Mr. Kindler's extradition, had exposed him, necessarily or foreseeably, to a violation of article 6 of the Covenant, I was unable to give an opinion until that point was clarified, orally and in writing. It was necessary for me to know for certain what conditions governed the imposition of the death penalty. However, the Secretariat explained that the author had informed the Committee that the recommendation of the jury was binding (and this is stated in paragraph 2.1 of the Views), [1] [...] that the question had been addressed in the Canadian courts where it had been established that such was the system applied in Pennsylvania.

2. I also asked for explanations concerning the powers of the Canadian Minister of Justice under the Extradition Treaty between Canada and the United States of America, especially because it was not at all clear - in the Spanish version of the Draft which contained the text of article 6 of the Treaty - whether the requesting State (in this case, the United States of America) should not have officially provided assurances that the death penalty would not be applied. Moreover, I requested to be given the possibility of acquainting myself with the text of article 25 of the 1985 Extradition Act, to which reference was made in paragraph 2.3 of the Draft but which was not reproduced anywhere.

3. I also requested the Secretariat to clarify exactly of which offence the author of the communication had been found guilty, in so far as a number of matters were not clear, especially when working with the Spanish version of the text:

(a) In paragraph 2.1 of the Draft it was stated that Joseph John Kindler had been "convicted ... of first degree murder and kidnapping". [2] Nevertheless, in other parts of the Draft, as well as in the Amendments, it was merely stated that Mr. Kindler had been convicted of committing a murder. The first aspect that remained unclear was the type of murder concerned, since there was confusion in the terms used which in practice made it impossible to know what sentence hung over the author of the communication. In some parts it was stated that it was first degree murder, in others murder or murder with aggravating circumstances; in one of the paragraphs of the Draft it was even stated that he had been convicted of having committed "a most serious crime". [3] Faced with such confusion, I considered that the Committee could not have taken a decision until the acts for which Mr. Kindler had been convicted had been made absolutely clear. Although it is not for the Human Rights Committee to express an opinion on the procedure followed in the trial of the author of the communication in a country which is not a party to the Optional Protocol and which has not abolished the death penalty, it is important to know whether the acts imputed to him constitute "most serious crimes" within the meaning of article 6, paragraph 2, of the Covenant.

(b) In this connection, I asked for clarification, in the first place, as to whether the murder of which the author of the communication was convicted was the result of the kidnapping, of which he was also convicted, or whether the two offences were separate. This latter possibility can be inferred from the different treatment that has been given to the two offences in the Views, especially in so far as the "kidnapping" is mentioned only in paragraph

2.1.[4] I therefore asked to be informed whether the murder of which Mr. Kindler was convicted resulted from the kidnapping. In that connection, it should be borne in mind that basically there are three possibilities that can be imputed to the author of the communication as constituting murder - in the first two places, first degree murder - but which differ in seriousness for the purposes of the implementation of article 6, paragraph 2, of the Covenant:

(1) That Mr. Kindler may have committed a purpose-related murder, in other words, a murder in which the author, at the time of the killing, was intending to prepare, facilitate or commit the kidnapping. One of the aims which the murderer may seek to achieve, in this particular case, is to secure impunity for himself. The important point here is that the death of the victim appears, in the eyes of the murderer, to be a necessary - or simply convenient or favourable - means of perpetrating another offence or of avoiding punishment for committing that other offence;

(2) That Mr. Kindler may have committed a cause-related murder. The murder results from the fact that the intended purpose of the attempt to commit another offence was not achieved - in the case of the author of the communication, the kidnapping. Cause-related murder is motivated by failure, unlike purpose-related murder, which is prompted by an illicit hope;

(3) The third possibility that presents itself is that the death of the kidnapped person may not have been caused by Mr. Kindler but may have been the result of action taken to prevent the perpetrator from committing the offence of kidnapping. Here the death results from the criminal actions of the author of the communication, although he himself did not commit the murder directly.

(c) The confusion increases when we see that in the Views mention is made of "murder", of "murder with aggravating circumstances" and of "premeditated murder". The first point that would have to be noted is that, in legal terms, first degree murder is in itself the killing of a person in aggravating circumstances, so that to speak of "first degree murder with aggravating circumstances" (asesinato con circunstancias agravantes) would be pleonastic. It is quite clear that the murder committed by Mr. Kindler is one in which first degree factors were involved. However, on the one hand not all first degree murders constitute most serious crimes within the meaning of article 6.

(d) On the other hand, the Committee, when it states that Mr. Kindler committed a premeditated murder without indicating that he committed more than one murder, would rule out the possibility that he may have committed other types of first degree murder. I asked the Secretariat to inform me on the basis of what information it was affirmed that specifically premeditated murder had been committed. Premeditated murder is a specific kind of murder different from other types of murder, such as those mentioned in subparagraphs (1) and (2) above. It is a kind of murder involving "cold" reflection on the part of the murderer, who not only decides to commit the crime but, once he has resolved to do so, begins to give detailed consideration to how to carry it out. Thus there is, in the offence of premeditated murder, a dual reflection: in the first place the murderer decides to commit the act; in the second place, he reflects on the means that he intends to use to carry it out.

(e) If premeditated murder was involved, the other offences related to kidnapping would be eliminated. It would no longer be a matter of categorization connected with the perpetration of the other offence (purpose-related murder) or with frustration at not having been able to carry it out successfully (cause-related murder), but rather of an "unrelated" murder involving, as the ground for aggravation, cold reflection regarding the means that were used to carry it out.

(f) Consequently, if what was involved was a premeditated murder, mention should not have been made of the kidnapping. However, if on the contrary the case was one of related murder, either purpose-related or cause-related, connected with the kidnapping, then these are no grounds for
speaking of premeditated murder or for imputing to the author the coldness in the choice of means or manner of carrying out the murder that is characteristic of premeditation.

4. I find it intolerable that most of the doubts which I raised with the Secretariat were at no time cleared up before the Committee took a majority decision. The only doubt that was resolved was that concerning the system of sentencing followed in the State of Pennsylvania, but in the form of information imparted by the author to the Committee and not as a reliable fact. [5]

II. Decision to write a dissenting opinion on the merits of the communication

5. After having considered the unconditional handing-over of the author of the communication by the Government of Canada to the Government of the United States of

America, I have arrived at the conclusion that Canada has violated the International Covenant on Civil and Political Rights.

III. Extradition and the protection afforded by the Covenant

6. In analysing the relationship between the Covenant and extradition, it is remiss - and even dangerous, as far as the full enjoyment of the rights set forth in the Covenant is concerned - to state that since "it is clear from the travaux préparatoires that it was not intended that article 13 of the Covenant, which provides specific rights relating to the expulsion of aliens lawfully in the territory of a State party, should detract from normal extradition arrangements", extradition would remain outside the scope of the Covenant. [6] In the first place, we have to note that extradition, even though in the broad sense it would amount to expulsion, in a narrow sense would be included within the procedures regulated by article 14 of the Covenant. Although the procedures for ordering the extradition of a person to the requesting State vary from country to country, they can roughly be grouped into three general categories: (1) a purely judicial procedure, (2) an exclusively administrative procedure, or (3) a mixed procedure involving action by the authorities of two branches of the State, the judiciary and the executive. This last procedure is the one followed in Canada. The important point, however, is that the authorities dealing with the extradition proceedings constitute, for this specific case at least, a "tribunal" that applies a procedure which must conform to the provisions of article 14 of the Covenant.

7. The fact that the drafters of the International Covenant on Civil and Political Rights did not include extradition in article 13 is quite logical, but on that account it cannot be affirmed that their intention was to leave extradition proceedings outside the protection afforded by the Covenant. The fact is, rather, that extradition does not fit in with the legal situation defined in article 13. The essential difference lies, in my opinion, in the fact that this rule refers exclusively to the expulsion of "an alien lawfully in the territory of a State party". [7] Extradition is a kind of "expulsion" that goes beyond what is contemplated in the rule. Firstly, extradition is a specific procedure, whereas the rule laid down in article 13 is of a general nature; however article 13 merely stipulates that expulsion must give rise to a decision in accordance with law, and even - in cases where there are compelling reasons of national security - it is permissible for the alien not to be heard by the competent authority or to have his case reviewed. Secondly, whereas expulsion constitutes a unilateral decision by a State, grounded on reasons that lie exclusively within the competence of that State - provided that they do not violate the State's international obligations, such as those under the

Covenant - extradition constitutes an act based upon a request by another State. Thirdly, the rule in article 13 relates to aliens who are in the territory of a State party to the Covenant, whereas extradition may relate both to aliens and to nationals; indeed, on the basis of its discussions the Committee has considered the practice of expelling nationals (for example exile) in general (other than under extradition proceedings) to be contrary to article 12. [8] Fourthly, the rule in article 13 relates to persons who are lawfully in the territory of a country; in the case of extradition, the individuals against whom the proceedings are initiated are not necessarily lawfully within the jurisdiction of a country; on the contrary - and especially if it is borne in mind that article 13 leaves the question of the lawfulness of the alien's presence to national law - in a great many instances persons who are subject to extradition proceedings have entered the territory of the requested State illegally, as in the case of the author of the communication.

8. Although extradition cannot be considered to be a kind of expulsion within the meaning of article 13 of the Covenant, this does not imply that it is excluded from the scope of the Covenant. Extradition must be strictly adapted in all cases to the rules laid down in the agreement. Thus the extradition proceedings must follow the rules of due process as required by article 14 and, furthermore, their consequences must not entail a violation of any other provision. Therefore, a State cannot allege that extradition is not covered by the Covenant in order to evade the responsibility that would devolve upon it for the possible absence of protection in a foreign jurisdiction.

IV. The extradition of Mr. Joseph Kindler to the United States of America

9. In this particular case, Canada extradited the author of the communication to the United States of America, where he had been found guilty of first degree murder. It will have to be seen - as the Committee stated in its decision on the admissibility of the communication - whether Canada, in granting Mr. Kindler's extradition, exposed him, necessarily or foreseeably, to a violation of article 6 of the Covenant.

10. The same State party argued that "the author cannot be considered a victim within the meaning of the Optional Protocol, since his allegations are derived from assumptions about possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States". [9] Although it is impossible to foresee a future event, it must be understood that whether or not a person is a victim depends on whether that event is foreseeable or, in other words, on whether, according to common sense, it may

happen, in the absence of exceptional events that prevent it from occurring - or necessary - in other words, it will inevitably occur, unless exceptional events prevent it from happening. An initial aspect that has to be elucidated is, then, the nature of the jury's decision under the Code of Criminal Procedure of the State of Pennsylvania. The fact that Mr. Kindler may (foreseeably) or must (necessarily) be sentenced to death depends on the judge's power to change the jury's "recommendation". Although the Secretariat merely indicated that the author of the communication had stated that the recommendation of the jury had to be complied with by the judge, documents in the possession of the Secretariat showed that it was more than a simple statement by Mr. Kindler. [10] Before the Supreme Court of Canada the author stated, without being refuted by the Canadian Executive or the contrary being established in any other way that "the recommendation is binding and the judge must impose the death sentence". [11] In view of this affirmation, we must then take it for granted that the author, necessarily and foreseeably, will be sentenced to death and that, consequently, he may be executed at any moment. In this connection, it is the law of Pennsylvania that obliges the judge to comply with the jury's order. Canada's contention that what is involved is an event that may not materialize because it depends on the law and actions of the authorities is groundless. In the case of the Code of Criminal Procedure under which the court that sentenced Mr. Kindler operates, the imposition of the death penalty is definite, since the judge cannot change the jury's decision.

11. It is possible, in this connection, that the author may appeal against the jury's decision, in which case the foreseeability and necessity of the execution could be affected in such a way that the death sentence might not hang over Mr. Kindler. However, four questions must be borne in mind in order to be able to decide that the death sentence would not necessarily or foreseeably be imposed:

(a) Whether the author still has the possibility of appealing against the sentence of first instance, in which he was sentenced to death;

(b) In the event of his still having that possibility, whether - if he was found guilty of the first degree murder of which he was convicted - the court of second instance must comply with the decision reached by the jury of first instance or whether it can impose another sentence more beneficial for the protection of the life of the author of the communication;

(c) The fact that the prevailing trend in the United States of America is to bar appeals in cases involving the death sentence. The intention not to accept appeals in such cases has already been stated, at least in the case of the Supreme Court of Justice;

(d) The fact that, according to the available documentation, the imposition of the death sentence might become increasingly frequent in the State of Pennsylvania. Thus, whereas in the author's pleas before the Supreme Court of Canada in May 1990 it is stated that the death penalty has not been applied in that State for a long time - although a large number of persons are awaiting execution by electric chair - the State party, in defending the extradition before the Committee, indicates that "the method of execution in Pennsylvania is lethal injection, which is the method proposed by those who advocate euthanasia ...". [12] Such an affirmation, which is, moreover, unacceptable in so far as it appears to be a defence of the death penalty by a State which has abolished it for all offences except a few of a military nature, would appear to serve to conceal the fact that, in the jurisdiction to which Mr. Kindler has been extradited, attempts have been made to find more effective methods of execution, implying that executions have been resumed in the State of Pennsylvania.

Consequently, and in application of the principle of in dubio pro reo, it has to be assumed that the execution of the author of the communication is a foreseeable event which, furthermore, will necessarily take place unless exceptional events intervene. [13]

12. However, in connection with the "exceptional circumstances" mentioned by the State party in the reply of the Government of Canada to the communication from Joseph John Kindler following the Human Rights Committee's decision on admissibility dated 2 April 1993 (hereinafter referred to as the Reply), [14] the majority opinion in the Committee was that events that would have affected the jury's decision when it convicted Mr. Kindler were involved. The Canadian authorities should, therefore, have made an assessment of the proceedings at the trial in the United States.

13. Nevertheless, I cannot agree with the Committee in its assessment of what those "exceptional circumstances" are. In the first place, the Government of Canada has not explained what they consist of; it only mentions that "evidence showing that a fugitive would face certain or foreseeable violations of the Covenant" [15] would constitute an example of exceptional circumstances. It can be seen how the State party itself agrees that exceptional circumstances have a connection with the consequences of the extradition. Accordingly, the erroneous perception which the majority of the members of the Committee have had has led

it to believe that the exceptional circumstances refer to the trial and conviction of Mr. Kindler in Pennsylvania. Thus the majority states that "all the evidence submitted concerning Mr. Kindler's trial and conviction" had been reviewed [16] when it is certain that the jurisprudence of the Supreme Court of Canada has indicated that the judge who deals with the extradition may not weigh the evidence or give an opinion as to its credibility and that such functions are left to the jury or judge in the trial that determines whether an offence has been committed. [17]

14. In the second place, the Committee observes, in its majority opinion, that the discretionary right to seek assurances "would normally be exercised where exceptional circumstances existed" and that "careful consideration was given to this possibility". [18] Nevertheless, here too the Committee has a wrong perception. Canada itself, in its Reply, refers to exceptional circumstances only in two paragraphs and in a very summary manner; it also states, with reference to them, that "there was no evidence presented by Kindler during the extradition process in Canada and there is no evidence in this communication to support the allegations that the use of the death penalty ... violates the Covenant". [19] This affirmation contains two elements which do not allow me to share the majority opinion:

(a) Firstly - and this relates to my contention in the previous paragraph - the exceptional circumstances are connected with the application of the death penalty and not with the proceedings at the trial and the sentencing;

(b) Secondly, there was no exhaustive examination of what the State considers to be exceptional circumstances, since Kindler submitted no evidence in that connection. According to what we are told by the State party, it was not the responsibility of the Canadian courts, the Minister of Justice or the Human Rights Committee to study ex officio the details of the trial and sentencing but rather of Mr. Kindler to present, before all the organs that had heard the case, evidence that the death penalty violated his rights, in which case there would be an exceptional circumstance. In so far as the author did not present such "evidence", the State party admits that it had not been possible to give careful attention to that possibility.

15. Nevertheless, the most important aspect of the exceptional circumstances is that related to the State party's affirmations that they refer to the application of the death penalty. I have pointed out on several occasions that exceptional circumstances have to be considered in relation to the possibility that the death penalty may be applied. I do not share the idea

expressed by Canada concerning the relationship between those circumstances and the death penalty. In my view, the most important matter is the link between the application of the death penalty and the protection given to the lives of persons within the jurisdiction of the Canadian State. For them, the death penalty constitutes in itself a special circumstance. For that reason - and in so far as the jury decided that the author of the communication must die - Canada had a duty to seek assurances that Joseph John Kindler would not be executed.

16. The fact that the death penalty constitutes a special circumstance derives from article 6 of the Extradition Treaty. Of all the provisions of the Treaty, only this one (relating to the extradition of persons who may be sentenced to death or who have already been so sentenced) makes it possible for one of the parties to seek from the other assurances that the individual whose extradition is requested will not be executed. This article stipulates that the death penalty is different from other sentences and must be viewed in a special way.

17. This provision also accepts that the States parties to the Extradition Treaty have values and traditions in regard to the death penalty which the requesting State must respect. Consequently, in order to guarantee respect for those values and traditions, both have provided, in article 6, for the inclusion of an exception rule in the Extradition Treaty. This fact is closely linked to the assertion which Canada made before the Human Rights Committee to the effect that the request for assurances was not pertinent in the case in question in so far as "The Government of Canada does not use extradition as a vehicle for imposing its concepts of criminal law policy on other States". [20] This contention seems to me to be unacceptable for three main reasons:

(a) It is stipulated in the Extradition Treaty that, where it is possible that the death penalty may be applied, the State requested to hand over the fugitive may seek assurances that he will not be executed and the requesting State has accepted a priori that it may be asked to apply a philosophy that does not accept death as a punishment for a crime under the ordinary law;

(b) The Extradition Treaty envisages that a person may not be extradited to the United States except for offences that are recognized as such in Canada. This would be the clearest case of the imposition of the penal concepts of one country on another, in so far as, even when there is reliable evidence of the guilt of an individual or he had already been sentenced in the United States, he could not be extradited since Canadian penal legislation would not consider his conduct to be an offence;

(c) Not to request assurances out of a desire to see the foreign law strictly applied amounts to imposing (in a self-inflicting manner) the law of one of the component parts of the United States of America (Pennsylvania) and its pro-death-penalty philosophy on the Canadian legal and social system.

18. It has been argued that Mr. Kindler was extradited without any assurances being sought because to have requested them would have prevented his handing-over to the United States authorities. This is another assertion that I cannot accept. On the one hand, since the State party to the Extradition Treaty has accepted in advance that assurances may be requested of it, it must be prepared to give them in any case. [21] On the other hand, Canada is affirming that the authorities of the United States of America are not willing in any circumstance to give those assurances and that they are even prepared to use extradition as a means of imposing their conception of penal law on Canada. I do not believe this to be the case.

19. The problem that arises with the extradition of Mr. Kindler to the United States without any assurances having been requested is that he has been deprived of the enjoyment of a right in conformity with the Covenant. Article 6, paragraph 2, of the Covenant, although it does not prohibit the death penalty, cannot be understood as an unrestricted authorization for it. In the first place, it has to be viewed in the light of paragraph 1, which declares that every human being has the inherent right to life. It is an unconditional right admitting of no exception. In the second place, it constitutes - for those States which have not abolished the death penalty - a limitation on its application, in so far as it may be imposed only for the most serious crimes. For those States which have abolished the death penalty it represents an insurmountable barrier. The spirit of the article is to eliminate the death penalty as a punishment, and the limitations which it imposes are of an absolute nature.

20. In this connection, when Mr. Kindler entered Canadian territory he already enjoyed an unrestricted right to life. By extraditing him without having requested assurances that he would not be executed, Canada has denied the protection which he enjoyed and has necessarily exposed him to be sentenced to death and foreseeably to being executed. Canada has therefore violated article 6 of the Covenant.

21. Further, Canada's misinterpretation of the rule in article 6, paragraph 2, of the International Covenant on Civil and Political Rights raises the question of whether it has also violated article 5, specifically paragraph 2 thereof. The Canadian Government has interpreted article 6, paragraph 2, as authorizing the death penalty. For that reason it has found that

Mr. Kindler's extradition, even though he will necessarily be sentenced to death and will foreseeably be executed, would not be prohibited by the Covenant, since the latter would authorize the application of the death penalty. In making such a misinterpretation of the Covenant, the State party asserts that Mr. Kindler's extradition would not be contrary to the Covenant. In this connection, then, Canada has denied Mr. Joseph John Kindler a right which he enjoyed under its jurisdiction, adducing that the Covenant would give a lesser protection - in other words, that the International Covenant on Civil and Political Rights would recognize the right to life in a lesser degree than Canadian legislation. In so far as the misinterpretation of article 6, paragraph 2, has led Canada to consider that the Covenant recognizes the right to life in a lesser degree than its domestic legislation and has used that as a pretext to extradite the author to a jurisdiction where he will certainly be executed, Canada has also violated article 5, paragraph 2, of the Covenant.

22. I have to insist that Canada has misinterpreted article 6, paragraph 2, and that, when it abolished the death penalty, it became impossible for it to apply that penalty directly in its territory, except for the military offences for which it is still in force, or indirectly through the handing-over to another State of a person who runs the risk of being executed or who will be executed. Since it abolished the death penalty, Canada has to guarantee the right to life of all persons within its jurisdiction, without any limitation.

23. One final aspect to be dealt with is the way in which Mr. Kindler was extradited, no notice being taken of the request that the author should not be extradited prior to the Committee forwarding its final views on the communication to the State party [22] made by the Special Rapporteur on New Communications under rule 86 of the rules of procedure of the Human Rights Committee. On ratifying the Optional Protocol, Canada undertook, with the other States parties, to comply with the procedures followed in connection therewith. In extraditing Mr. Kindler without taking into account the Special Rapporteur's request, Canada failed to display the good faith which ought to prevail among the parties to the Protocol and the Covenant.

24. Moreover, this fact gives rise to the possibility that there may also have been a violation of article 26 of the Covenant. Canada has given no explanation as to why the extradition was carried out so rapidly once it was known that the author had submitted a communication to the Committee. By its censurable action in failing to observe its obligations to the international community, the State party has prevented the enjoyment of the rights which the author ought to have had as a person under Canadian jurisdiction in relation to the

Optional Protocol. In so far as the Optional Protocol forms part of the Canadian legal order, all persons under Canadian jurisdiction enjoy the right to submit communications to the Human Rights Committee so that it may hear their complaints. Since it appears that Mr. Kindler was extradited on account of his nationality [23] and in so far as he has been denied the
possibility of enjoying its protection in accordance with the Optional Protocol, I find that the State party has also violated article 26 of the Covenant.

25. In conclusion, I find Canada to be in violation of article 5, paragraph 2, and articles 6 and 26 of the International Covenant on Civil and Political Rights. I agree with the majority opinion that there has been no violation of article 7 of the Covenant.

[Done in Spanish] San Rafael de Escazú, Costa Rica, 12 August 1993
Geneva, Switzerland, 25 October 1993 (Revision)

Notes

1. Views, para. 2.1.
2. Draft, para. 2.1 (emphasis added).
3. Draft, para. 14.4.
4. Views, para. 2.1.
5. Views, para. 2.1.
6. Views, para. 6.6 (emphasis added).
7. International Covenant on Civil and Political Rights.

8. In this connection, see the summary records of the Committee's recent discussions regarding Zaire and Burundi, in relation to the expulsion of nationals, and Venezuela in relation to the continuing existence, in criminal law, of the penalty of exile.

9. Views, para. 4.2 (emphasis added).

10. See above, para. 8.

11. Appeal of Joseph John Kindler to the Supreme Court of Canada, para. 1, p. 1.

12. Views, para. 9.7.

13. In this connection, I understand by "exceptional events" (it should be noted that "exceptional events" differ somewhat from "exceptional circumstances") those events or acts which would prevent the execution of the author of the communication. They would normally be of a political nature, such as a pardon or the entry into force of legislation abolishing the death penalty. However, since these are decisions of a political nature, taken by persons who depend on the voters' will, and since the death penalty is favoured by a substantial majority of the population of the United States, the possibility that such exceptional events could occur is extremely remote.

14. Reply, paras. 22 and 23.

15. Reply, para. 23 (emphasis added).

16. Views, para. 14.4.

17. Supreme Court of Canada, United States of America vs. Shepard (1977), 2 S.C.R. 1067, pp. 1083-1087.

18. Views, para. 14.5.

19. Reply, para. 23 (emphasis added). In the same connection, the State refers to exceptional circumstances in para. 86 of the same document.

20. Views, para. 8.6.

21. I must point out that article 6 of the Extradition Treaty between Canada and the United States of America places no limit on requests for assurances. The exceptional circumstances which could provide a basis for requesting assurances form part of the Extradition Act.

22. Rules of procedure of the Human Rights Committee.

23. The various passages in the Reply which refer to the relations between Canada and the United States, the 4,800 kilometres of unguarded frontier between the two countries and the growing number of extradition applications by the United States to Canada should be taken into account. The State party has indicated that United States fugitives cannot be permitted to take the non-extradition of the author in the absence of assurances as an incentive to flee to Canada.