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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.

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

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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] 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.

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 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.

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[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).

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.

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

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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.

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

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[9] See Appendix under 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. 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.

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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.

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 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

[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

[12] Howard Martin v. Jamaica, No. 317/1988, Views adopted on 24 March 1993, paragraph 12.2.

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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[13]European Court of Human Rights, judgment of 7 July 1989.