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HUMAN RIGHTS COMMITTEE
Fifty-second session

VIEWS

Communication No. 539/1993

Submitted by:	Keith Cox [represented by counsel]
Victim:	The author
State party:	Canada
Date of communication:	4 January 1993 (initial submission)
Documentation references:	Prior decisions - Combined rule 86/rule 91 decision, transmitted on 20 April 1993 (not issued in document form) - CCPR/C/49/D/539/1993 (Decision on admissibility, dated 3 November 1993)
Date of adoption of Views:	31 October 1994

On 31 October 1994, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Prot ocol, in respect of communication No. 539/1993. The text of the Views is appended to the present document.

[ANNEX]

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

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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
- FIFTY-SECOND SESSION -

concerning

Communication No. 539/1993

Submitted by:	Keith Cox [represented by counsel]
Victim:	The author
State party:	Canada
Date of communication:	4 January 1993 (initial submission)
Date of decision on admissibility:	3 November 1993

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

Meeting on 31 October 1994,

Having concluded its consideration of communication No. 539/1993 submitted to the Human Rights Committee by Keith Cox 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.

*/ The texts of 8 individual opinions, signed by 13 Committee members, are appended to the present document.

1. The author of the communication is Keith Cox, a citizen of the United States of America born in 1952, currently detained at a penitentiary in Montreal and facing extradition to the United States. He claims to be a victim of violations by Canada of articles 6, 7, 14 and 26 of the International Covenant on Civil and Political Rights. The author had submitted an earlier communication which was declared inadmissible because of non-exhaustion of domestic remedies on 29 July 1992. [1]

The facts as submitted by the author:

2.1 On 27 February 1991, the author was arrested at Laval, Québec, for theft, a charge to which he pleaded guilty. While in custody, the judicial authorities received from the United States a request for his extradition, pursuant to the 1976 Extradition Treaty between Canada and the United States. The author is wanted in the State of Pennsylvania on two charges of first-degree murder, relating to an incident that took place in Philadelphia in 1988. If convicted, the author could face the death penalty, although the two other accomplices were tried and sentenced to life terms.

2.2 Pursuant to the extradition request of the United States Government and in accordance with the Extradition Treaty, the Superior Court of Québec, on 26 July 1991, ordered the author's extradition to the United States of America. Article 6 of the Treaty 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.

2.4 Concerning the course of the proceedings against the author, it is stated that a habeas corpus application was filed on his behalf on 13 September 1991; he was represented by a legal aid representative. The application was dismissed by the Superior Court of Québec. The author's representative appealed to the Court of Appeal of Québec on 17 October 1991. On 25 May 1992, he abandoned his appeal, considering that, in the light of the Court's jurisprudence, it was bound to fail.

2.5 Counsel requests the Committee to adopt interim measures of protection because extradition of the author to the United States would deprive the Committee of its jurisdiction to consider the communication, and the author to properly pursue his communication.

The complaint:

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[1] CCPR/C/45/D/486/1993.

3. The author claims that the order to extradite him violates articles 6, 14 and 26 of the Covenant; he alleges that the way death penalties are pronounced in the United States generally discriminates against black people. He further alleges a violation of article 7 of the Covenant, in that he, if extradited and sentenced to death, would be exposed to "the death row phenomenon", i.e. years of detention under harsh conditions, awaiting execution.

Interim measures:

4.1 On 12 January 1993 the Special Rapporteur on New Communications requested the State party, pursuant to rule 86 of the Committee's rules of procedure, to defer the author's extradition until the Committee had had an opportunity to consider the admissibility of the issues placed before it.

4.2 At its forty-seventh session the Committee decided to invite both the author and the State party to make further submissions on admissibility.

The State party's observations:

5.1 The State party, in its submission, dated 26 May 1993, submits that the communication should be declared inadmissible on the grounds that extradition is beyond the scope of the Covenant, or alternatively that, even if in exceptional circumstances the Committee could examine questions relating to extradition, the present communication is not substantiated, for purposes of admissibility.

5.2 With regard to domestic remedies, the State party explains that extradition is a two step process under Canadian law. The first step involves a hearing at which a judge examines whether a factual and legal basis for extradition exists. The judge considers inter alia the proper authentication of materials provided by the requesting State, admissibility and sufficiency of evidence, questions of identity and whether the conduct for which the extradition is sought constitutes a crime in Canada for which extradition can be granted. In the case of fugitives wanted for trial, the judge must be satisfied that the evidence is sufficient to warrant putting the fugitive on trial. The person sought for extradition may submit evidence at the judicial hearing, after which the judge decides whether the fugitive should be committed to await surrender to the requesting State.

5.3 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.

5.4 The second step of 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 may appear before the Minister to present oral argument. In coming to a decision on surrender, the Minister considers the case record from the judicial phase, together with any written and oral submissions from the fugitive, the relevant treaty terms which pertain to the case to be decided and the law on extradition. 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. A fugitive, subject to an extradition request, cannot be surrendered unless the Minister of Justice orders the fugitive surrendered and, in any case, not until all available avenues for judicial review of the Minister's decision, if pursued, are completed. For extradition requests before 1 December 1992, including the author's request, the Minister's decision is reviewable either by way of an application for a writ of habeas corpus in a provincial court or by way of judicial review in the Federal Court pursuant to section 18 of the Federal Court Act. As with appeals against a warrant of committal, appeals against a review of the warrant of surrender can be pursued, with leave, up to the Supreme Court of Canada.

5.5 The courts can review the Minister's decision on jurisdictional grounds, i.e. whether the Minister acted fairly, in an administrative law sense, and for its consistency with the Canadian constitution, in particular, whether the Minister's decision is consistent with Canada's human rights obligations.

5.6 With regard to the exercise of discretion in seeking assurances before extradition, the State party explains that each extradition request from the United States, in which the possibility exists that the person sought may face the imposition of the death penalty, must be considered by the Minister of Justice and decided on its own particular facts. "Canada does not routinely seek assurances with respect to the non-imposition of the death penalty. The right to seek assurances is held in reserve for use only where exceptional circumstances exist. This policy ... is in application of article 6 of the Canada-United States Extradition Treaty. The Treaty was never intended to make the seeking of assurances a routine occurrence. Rather, it was the intention of the parties to the Treaty that assurances with respect to the death penalty should only be sought in circumstances where the particular facts of the case warrant a special exercise of the discretion. This policy represents a balancing of the rights of the individual sought for extradition with the need for the protection of the people of Canada. This policy reflects ... Canada's understanding of and respect for the criminal justice system of the United States."

5.7 Moreover, the State party refers to a continuing flow of criminal offenders from the United States into Canada and a concern that, unless such illegal flow is discouraged, Canada could become a safe haven for dangerous offenders from the United States, bearing in mind that Canada and the United States share a 4,800 kilometre unguarded border. In the last twelve years there has been an increasing number of extradition requests from the United States. In 1980 there were 29 such requests; by 1992 the number had grown to 88, including requests involving death penalty cases, which were becoming a new and pressing problem. "A policy of routinely seeking assurances under article 6 of the Canada-United States Extradition Treaty would encourage even more criminal offenders, especially those guilty of the most serious crimes, to flee the United States into 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."

6.1 As to the specific facts of the instant communication, the State party

indicates that Mr. Cox is a black male, 40 years of age, of sound mind and body, an American citizen with no immigration status in Canada. He is charged in the state of Pennsylvania with two counts of first degree murder, one count of robbery and one count of criminal conspiracy to commit murder and robbery, going back to an incident that occurred in Philadelphia, Pennsylvania in 1988, where two teenage boys were killed pursuant to a plan to commit robbery in connection with illegal drug trafficking. Three men, one of whom is alleged to be Mr. Cox, participated in the killings. In Pennsylvania, first degree murder is punishable by death or a term of life imprisonment. Lethal injection is the method of execution mandated by law.

6.2 With regard to the exhaustion of domestic remedies, the State party indicates that Mr. Cox was ordered committed to await extradition by a judge of the Quebec Superior Court on 26 July 1991. This order was challenged by the author in an application for habeas corpus before the Quebec Superior Court. The application was dismissed on 13 September 1991. Mr. Cox then appealed to the Quebec Court of Appeal, and, on 18 February 1992, before exhausting domestic remedies in Canada, he submitted a communication to the Committee, which was registered under No. 486/1992. Since the extradition process had not yet progressed to the second stage, the communication was ruled inadmissible by the Committee on 26 July 1992.

6.3 On 25 May 1992, Mr. Cox withdrew his appeal to the Quebec Court of Appeal, thus concluding the judicial phase of the extradition process. The second stage, the ministerial phase, began. He petitioned the Minister of Justice asking that assurances be sought that the death penalty would not be imposed. In addition to written submissions, counsel for the author appeared before the Minister and made oral representations. "It was alleged that the judicial system in the state of Pennsylvania was inadequate and discriminatory. He submitted materials which purported to show that the Pennsylvania system of justice as it related to death penalty cases was characterized by inadequate legal representation of impoverished accused, a system of assignment of judges which resulted in a 'death penalty court', selection of jury members which resulted in 'death qualified juries' and an overall problem of racial discrimination. The Minister of Justice was of the view that the concerns based on alleged racial discrimination were premised largely on the possible intervention of a specific prosecutor in the state of Pennsylvania who, according to officials in that state, no longer has any connection with his case. It was alleged that, if returned to face possible imposition of the death penalty, Mr. Cox would be exposed to the 'death row phenomenon'. The Minister of Justice was of the view that the submissions indicated that the conditions of incarceration in the state of Pennsylvania met the constitutional standards of the United States and that situations which needed improvement were being addressed ... it was argued that assurances be sought on the basis that there is a growing international movement for the abolition of the death penalty... The Minister of Justice, in coming to the decision to order surrender without assurances, concluded that Mr. Cox had failed to show that his rights would be violated in the state of Pennsylvania in any way particular to him, which could not be addressed by judicial review in the United States Supreme Court under the Constitution of the United States. That is, the Minister determined that the matters raised by Mr. Cox could be left to the internal working of the United States system of justice, a system which sufficiently corresponds to Canadian concepts of justice and fairness to warrant entering into and maintaining the Canada - United States Extradition Treaty." On 2 January 1993, the Minister, having determined that there existed no exceptional circumstances pertaining to the author which necessitated the seeking of assurances in his case, ordered him surrendered without assurances.

6.4 On 4 January 1993, author's counsel sought to reactivate his earlier communication to the Committee. He has indicated to the Government of Canada that he does not propose to appeal the Minister's decision in the Canadian courts. The State party, however, does not contest the admissibility of the communication on this issue.

7.1 As to the scope of the Covenant, the State party contends that extradition per se is beyond its scope and refers to the travaux préparatoires, showing that the drafters of the Covenant specifically considered and rejected a proposal to deal with extradition in the Covenant.

"It was argued that the inclusion of a provision on extradition in the Covenant would cause difficulties regarding the relationship of the Covenant to existing treaties and bilateral agreements." (A/2929, Chapt. VI, para. 72) In the light of the history of negotiations during the drafting 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 the Covenant, and of human rights instruments in general, 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."

7.2 As to the author's standing as a "victim" under article 1 of the Optional Protocol, the State party concedes that he is subject to Canada's jurisdiction during the time he is in Canada in the extradition process. However, the State party submits "that Cox is not a victim of any violation in Canada of rights set forth in the Covenant ... because the Covenant does not set forth any rights with respect to extradition. In the alternative, it contends that even if [the] Covenant extends to extradition, it can only apply to the treatment of the fugitive sought for extradition with respect to the operation of the extradition process within the State Party to the Protocol. Possible treatment of the fugitive in the requesting State cannot be the subject of a communication with respect to the State Party to the Protocol (extraditing State), except perhaps for instances where there was evidence before that extraditing State such that a violation of the Covenant in the requesting State was reasonably foreseeable."

7.3 The State party contends that the evidence submitted by author's counsel to the Committee and to the Minister of Justice in Canada does not show that it was reasonably foreseeable that the treatment that the author may face in the United States would violate his rights under the Covenant. The Minister of Justice and the Canadian Courts, to the extent that the author availed himself of the opportunities for judicial review, considered all the evidence and argument submitted by counsel and concluded that Mr. Cox's extradition to the United States to face the death penalty would not violate his rights, either under Canadian law or under international instruments, including the Covenant. Thus, the State party concludes that the communication is inadmissible because the author has failed to substantiate, for purposes of admissibility, that the author is a victim of any violation in Canada of rights set forth in the Covenant.

Counsel's submissions on admissibility:

8.1 In his submission of 7 April 1993, author's counsel argues that an attempt to further exhaust domestic remedies in Canada would be futile in the light of the judgment of the Canadian Supreme Court in the cases of Kindler and Ng. "I chose to file the communication and apply for interim measures prior to discontinuing the appeal. This move was taken because I presumed that a discontinuance in the appeal might result in the immediate extradition of Mr. Cox It was more prudent to seize the Committee first, and then discontinue the appeal, and I think this precaution was a wise one, because Mr. Cox is still in Canada... Subsequent to discontinuation of the appeal, I filed an application before the Minister of Justice, Kim Campbell, praying that she exercise her discretionary power under article 6 of the Extradition Act, and

refuse to extradite Mr. Cox until an assurance had been provided by t he United States government t hat if Mr. Cox were to be found guilty, the death penalty would not be applie d... I was granted a hearing before Minister Campbell, on November 13, 1992. In reasons dated January 2, 1993 Minister Campbell refused to exercise her discretion and refused to seek assurances from the Unite d States government that the death penalty not be employed... It is possible to apply for judicial review of the decision of Minister Campbell, on the narrow grounds of breach of natural justice or other gross irregularity. However , there is no suggestion of any grounds to justify such recourse, an d consequently no such dilatory recourse has been taken ... all useful an d effective domestic remedies to contest the extradition of Mr. Cox have been exhausted."

8.2 Counsel contends that the extradition of Mr. Cox would expose him to the real and present danger of:

"a. arbitrary execution, in violation of article 6 of the Covenant;

b. discriminatory imposition of the death penalty, in violation of articles 6 and 26 of the Covenant;

c. imposition of the death penalty in breach of fundamenta l procedural safeguards, specifically by an impartial jury (th e phenomenon of 'death qualified' juries), in violation of articles 6 and 14 of the Covenant;

d. prolonged detention on 'death row', in violation of article 7 of the Covenant."

8.3 With respect to the system of criminal justice in the United States , author's counsel refers to the reservations which the United States f ormulated upon its ratification of the Covenant, in particular to article 6: "T he United States reserves the right, subject to its Constitutional constraints, t o impose capital punishment on any person (other than a pregnant woman) dul y convicted under exi sting or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." Author's counsel argues that this is "an enormously broad reservation that no doubt is inconsistent with the nature and purpose of the treaty but t hat furthermore ... creates a presumption that the United States does not intend to respect article 6 of the Covenant."

9.1 In his comments, dated 10 June 1993, on the State party's submission, counsel addresses t he refusal of the Minister to seek assurances on the non-imposit ion of the death penalty, and refers to the book La Forest' s Extradition to and from Canada , in which it is stated that Canada in fac t routinely seeks suc h an undertaking. Moreover, the author contests the State party's interpretation that it was not the intention of the drafters of the extradition treaty that assurances be routin ely sought. "It is known that the provision in the extradition treaty with the United States was added at the request of the United States. Does Canada have any evidence admissible in a court of law to support such a questionable claim? I refuse to accept th e suggestion in the absence of any serious evidence."

9.2 As to the State party's argument that extradition is intended to prot ect Canadian society, author's counsel challenges the State party's belief that a policy of routinely seeking guarantees will encourage criminal law offenders to seek refuge in Canada and contends that there is no evidence to suppor t such a belief. Moreover, with regard to Canada's concern that if the United

States does not give assurances, Canada woul d be unable to extradite and have to keep the criminal without trial, author's counsel argues that "a stat e governm ent so devoted to the death penalty as a supreme punishment for a n offender would surely prefer to obtain extradition and keep the offender in life imprisonment r ather than to see the offender freed in Canada. I know of two case s where the guarantee was sought from the United States, one fo r extradition from the United Kingdom to the state of Virginia (Soering) and one for extradition from Canada to the state of Florida (O'Bomsawin). In bot h cases the states willingly gave the guarante e. It is pure demagogy for Canada to raise the spectre of 'a haven for many fugitives from the death penalty' in the absence of evidence."

9.3 As to the murders of which Mr. Cox was accused, author's counsel indicates that "two individuals have pleaded guilty to the crime and are now serving life prison terms in Pennsylvania. Each individual has alleged that the other individual actually committed the murder, and that Keith Cox participated."

9.4 With regard to the scope of the Covenant, counsel refers to the travaux préparatoires of the Covenant and argues that consideration of the issue of extradition must be placed within the context of the debate on the right to asylum, and claims that extradition was in fact a minor point in the debates. Moreover, "nowhere in the summary records is there evidence of a suggestion that the Covenant would not apply to extradition requests when torture or cruel, inhuman and degrading punishment might be imposed... Germane to the construction of the Covenant, and to Canada's affirmations about the scope of human rights law, is the more recent Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides, in article 3, that States parties shall not extradite a person to another State where there are serious grounds to believe that the person will be subjected to torture... It is respectfully submitted that it is appropriate to construe articles 7 and 10 of the Covenant in light of the more detailed provisions in the Convention Against Torture. Both instruments were drafted by the same organization, and are parts of the same international human rights system. The Convention Against Torture was meant to give more detailed and specialized protection; it is an enrichment of the Covenant."

9.5 As to the concept of victim under the Optional Protocol, author's counsel contends that this is not a matter for admissibility but for the examination of the merits.

Issues and proceedings before the Committee:

10.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

10.2 With regard to the requirement of the exhaustion of domestic remedies, the Committee noted that the author did not complete the judicial phase of examination, since he withdrew the appeal to the Court of Appeal after being advised that it would have no prospect of success and, therefore, that legal aid would not be provided for that purpose. With regard to the ministerial phase, the author indicated that he did not intend to appeal the Minister's decision to surrender Mr. Cox without seeking assurances, since, as he asserts, further recourse to domestic remedies would have been futile in the light of the 1991 judgment of the Canadian Supreme Court in Kindler and Ng [2]. The Committee noted that the State party had explicitly stated that it did not wish to express a view as to whether the author had exhausted domestic remedies and did not contest the admissibility of the communication on this ground. In the circumstances, basing itself on the information before it, the Committee concluded that the requirements of article 5, paragraph 2(b), of the Covenant had been met.

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[2] The Supreme Court found that the decision of the Minister to extradite Mr. Kindler and Mr. Ng without seeking assurances that the death penalty would not be imposed or, if imposed, would not be carried out, did not violate their rights under the Canadian Charter of Rights and Freedoms.

10.3 Extradition as such is outside the scope of application of the Covenant (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"). Extradition is an important instrument of cooperation in the administration of justice, which requires that safe havens should not be provided for those who seek to evade fair trial for criminal offences, or who escape after such fair trial has occurred. But a State party's obligation in relation to a matter itself outside the scope of the Covenant may still be engaged by reference to other provisions of the Covenant [3]. In the present case 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. The Committee finds that the communication is thus not excluded from consideration ratione materiae .

10.4 With regard to the allegations that, if extradited, Mr. Cox would be exposed to a real and present danger of a violation of articles 14 and 26 of the Covenant in the United States, the Committee observed that the evidence submitted did not substantiate, for purposes of admissibility, that such violations would be a foreseeable and necessary consequence of extradition. It does not suffice to assert before the Committee that the criminal justice system in the United States is incompatible with the Covenant. In this connection, the Committee recalled its jurisprudence that, under the Optional Protocol procedure, it cannot examine in abstracto the compatibility with the Covenant of the laws and practice of a State. [4] For purposes of admissibility, the author has to substantiate that in the specific circumstances of his case, the Courts in Pennsylvania would be likely to violate his rights under articles 14 and 26, and that he would not have a genuine opportunity to challenge such violations in United States courts. The author has failed to do so. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

10.5 The Committee considered that the remaining claim, that Canada violated the Covenant by deciding to extradite Mr. Cox without seeking assurances that the death penalty would not be imposed, or if imposed, would not be carried out, may raise issues under articles 6 and 7 of the Covenant which should be examined on the merits.

11. On 3 November 1993, the Human Rights Committee decided that the communication was admissible in so far as it may raise issues under articles 6 and 7 of the Covenant. The Committee reiterated its request to the State party, under rule 86 of the Committee's rules of procedure, that the author not be extradited while the Committee is examining the merits of the communication.

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

12.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party maintains that the communication is inadmissible and

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[3] See the Committee's decisions in communications Nos. 35/1978 (Aumeeruddy-Cziffra *et al.* v. Mauritius , Views adopted on 9 April 1981) and 291/1988 (Torres v. Finland , Views adopted on 2 April 1990).

[4] Views in communication No. 61/1979, Leo Hertzberg *et al.* v. Finland , para. 9.3.

requests the Committee to review its decision of 3 November 1993. The State party also submits its response on the merits of the communication.

12.2 With regard to the notion of "victim" within the meaning of article 1 of the Optional Protocol, the State Party indicates that Mr. Keith Cox has not been convicted of any crime in the United States, and that the evidence submitted does not substantiate, for purposes of admissibility, that violations of articles 6 and 7 of the Covenant would be a foreseeable and necessary consequence of his extradition.

12.3 The State party explains the extradition process in Canada, with specific reference to the practice in the context of the Canada-United States Extradition Treaty. It elaborates on the judicial phase, which includes a methodical and thorough evaluation of the facts of each case. After the exhaustion of the appeals in the judicial phase, a second phase of review follows, in which the Minister of Justice is charged with the responsibility of deciding whether to surrender the person for extradition, and in capital cases, whether the facts of the particular case justify seeking assurances that the death penalty will not be imposed. Throughout this process the fugitive can present his arguments against extradition, and his counsel may appear before the Minister to present oral argument both on the question of surrender and, where applicable, on the seeking of assurances. The Minister's decision is also subject to judicial review. In numerous cases, the Supreme Court of Canada has had occasion to review the exercise of the ministerial discretion on surrender, and has held that the right to life and the right not to be deprived thereof except in accordance with the principles of fundamental justice, apply to ministerial decisions on extradition.

12.4 With regard to the facts particular to Mr. Keith Cox, the State party reviews his submissions before the Canadian courts, the Minister of Justice (see paras. 6.2 and 6.3 supra) and before the Committee and concludes that the evidence adduced fails to show how Mr. Cox satisfies the criterion of being a "victim" within the meaning of article 1 of the Optional Protocol. Firstly, it has not been alleged that the author has already suffered any violation of his Covenant rights; secondly, it is not reasonably foreseeable that he would become a victim after extradition to the United States. The State party cites statistics from the Pennsylvania District Attorney's Office and indicates that since 1976, when Pennsylvania's current death penalty law was enacted, no one has been put to death; moreover, the Pennsylvania legal system allows for several appeals. But not only has Mr. Cox not been tried, he has not been convicted, nor sentenced to death. In this connection the State party notes that the two other individuals who were alleged to have committed the crimes together with Mr. Cox were not given death sentences but are serving life sentences. Moreover, the death penalty is not sought in all murder cases. Even if sought, it cannot be imposed in the absence of aggravating factors which must outweigh any mitigating factors. Referring to the Committee's jurisprudence in the Aumeeruddy-Cziffra case that the alleged victim's risk be "more than a theoretical possibility", the State party states that no evidence has been submitted to the Canadian courts or to the Committee which would indicate a real risk of his becoming a victim. The evidence submitted by Mr. Cox is either not relevant to him or does not support the view that his rights would be violated in a way that he could not properly challenge in the courts of Pennsylvania and of the United States. The State party concludes that since Mr. Cox has failed to substantiate, for purposes of admissibility, his allegations, the communication should be declared inadmissible under article 2 of the Optional Protocol.

13.1 As to the merits of the case, the State party refers to the Committee's Views in the Kindler and Ng cases, which settled a number of matters concerning the application of the Covenant to extradition cases.

13.2 As to the application of article 6, the State party relies on the Committee's view that paragraph 1 (right to life) must be read together with paragraph 2(imposition of the death penalty), and that a State party would violate paragraph 6, paragraph 1, if it extradited a person to face possible imposition of the death penalty in a requesting State where there was a real risk of a violation of paragraph 6, paragraph 2.

13.3 Whereas Mr. Cox alleges that he would face a real risk of a violation of article 6 of the Covenant because the United States "does not respect the prohibition on the execution of minors", the State party indicates that Mr. Cox is over 40 years of age. As to the other requirements of article 6, paragraph 2, of the Covenant, the State party indicates that Mr. Cox is charged with murder, which is a very serious criminal offence, and that if the death sentence were to be imposed on him, there is no evidence suggesting that it would not be pursuant to a final judgment rendered by a court.

13.4 As to hypothetical violations of Mr. Cox's rights to a fair trial, the State party recalls that the Committee declared the communication inadmissible with respect to articles 14 and 26 of the Covenant, since the author had not substantiated his allegations for purposes of admissibility. Moreover, Mr. Cox has not shown that he would not have a genuine opportunity to challenge such violations in the courts of the United States.

13.5 As to article 7 of the Covenant, the State party first addresses the method of judicial execution in Pennsylvania, which is by lethal injection. This method was recently provided for by the Pennsylvania legislature, because it was considered to inflict the least suffering. The State party further indicates that the Committee, in its decision in the Kindler case, which similarly involved the possible judicial execution by lethal injection in Pennsylvania, found no violation of article 7.

13.6 The State party then addresses the submissions of counsel for Mr. Cox with respect to alleged conditions of detention in Pennsylvania. It indicates that the material submitted is out of date and refers to recent substantial improvements in the Pennsylvania prisons, particularly in the conditions of incarceration of inmates under sentence of death. At present these prisoners are housed in new modern units where cells are larger than cells in other divisions, and inmates are permitted to have radios and televisions in their cells, and to have access to institutional programs and activities such as counselling, religious services, education programs, and access to the library.

13.7 With regard to the so-called "death row phenomenon", the State party distinguishes the facts of the Cox case from those in the Soering v. United Kingdom judgment of the European Court of Justice. The decision in Soering turned not only on the admittedly bad conditions in some prisons in the state of Virginia, but also on the tenuous state of health of Mr. Soering. Mr. Cox has not been shown to be in a fragile mental or physical state. He is neither a youth, nor elderly. In this connection, the State party refers to the Committee's jurisprudence in the Vuolanne v. Finland case, where it held that "the assessment of what constitutes inhuman or degrading treatment falling within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim." [5]

[5] Views in communication No. 265/1987, Vuolanne v. Finland, para. 9.2.

13.8 As to the effects of prolonged detention, the State party refers to the Committee's jurisprudence that the "death row phenomenon" does not violate article 7, if it consists only of prolonged periods of delay on death row while appellate remedies are pursued. In the case of Mr. Cox, it is not at all clear that he will reach death row or that he will remain there for a lengthy period of time pursuing appeals.

Author's comments :

14.1 In his comments on the State party's submission, counsel for Mr. Cox stresses that the state of Pennsylvania has stated in its extradition application that the death penalty is being sought. Accordingly, the prospect of execution is not so very remote.

14.2 With regard to article 7 of the Covenant, author's counsel contends that the use of plea bargaining in a death penalty case meets the definition of torture. "What Canada is admitting ... is that Mr. Cox will be offered a term of life imprisonment instead of the death penalty if he pleads guilty . In other words, if he admits to the crime he will avoid the physical suffering which is inherent in imposition of the death penalty."

14.3 As to the method of execution, author's counsel admits that no submissions had been made on this subject in the original communication . Nevertheless, he contends that execution by lethal injection would violate article 7 of the Covenant. He argues, on the basis of a deposition by Professor Michael Radelet of the University of Florida, that there are many examples of "botched" executions by lethal injection.

14.4 As to the "death row phenomenon", counsel for Mr. Cox specifically requests that the Committee reconsider its case law and conclude that there is a likely violation of article 7 in Mr. Cox's case, since "nobody has been executed in Pennsylvania for more than twenty years, and there are individuals awaiting execution on death row for as much as fifteen years."

14.5 Although the Committee declared the communication inadmissible as to articles 14 and 26 of the Covenant, author's counsel contends that article 6 of the Covenant would be violated if the death penalty were to be imposed "arbitrarily" on Mr. Cox because he is black. He claims that there is systemic racism in the application of the death penalty in the United States.

Merits :

15. The Committee has taken note of the State party's information and arguments on admissibility, submitted after the Committee's decision of 3 November 1993. It observes that no new facts or arguments have been submitted that would justify a reversal of the Committee's decision on admissibility. Therefore, the Committee proceeds to the examination of the merits.

16.1 With regard to a potential violation by Canada of article 6 of the Covenant if it were to extradite Mr. Cox to face the possible imposition of the death penalty in the United States, the Committee refers to the criteria set forth in its Views on communications Nos. 470/1991 (Kindler v. Canada) and 469/1991 (Chitat Ng v. Canada). Namely, for States that have abolished capital punishment and are called to extradite a person to a country where that person may face the imposition of the death penalty, the extraditing State must ensure that the person is not exposed to a real risk of a violation of his rights under article 6 in the receiving State. In other words, if a State party to the Covenant 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. In this context,

the Committee also recalls its General Comment on Article 6 [6], which provides that while States parties are not obliged to abolish the death penalty, they are obliged to limit its use.

16.2 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, while not itself imposing the death penalty on Mr. Cox, is asked to extradite him to the United States, where he may face capital punishment. If Mr. Cox were to be exposed, through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, that would entail 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. Cox is to be tried for complicity in two murders, undoubtedly very serious crimes. He was over 18 years of age when the crimes were committed. The author has not substantiated his claim before the Canadian courts or before the Committee that trial in the Pennsylvania courts with the possibility of appeal would not be in accordance with his right to a fair hearing as required by the Covenant.

16.3 Moreover, the Committee observes that the decision to extradite Mr. Cox to the United States followed proceedings in the Canadian courts at which Mr. Cox's counsel was able to present argument. He was also able to present argument at the ministerial phase of the proceedings, which themselves were subject to appeal. 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 without assurances that the death penalty would not be imposed.

16.4 The Committee notes that Canada 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 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 domestic 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. The Committee notes the reasons given by Canada not to seek assurances in Mr. Cox's case, in particular, the absence of exceptional circumstances, the availability of due process in the state of Pennsylvania, and the importance of not providing a safe haven for those accused of or found guilty of murder.

16.5 While States parties must be mindful of the possibilities for the protection of life when exercising their discretion in the application of extradition treaties, the Committee finds that Canada's decision to extradite

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

without assurances was not taken arbitrarily or summarily. The evidence before the Committee reveals that the Minister of Justice reached a decision after hearing argument in favor of seeking assurances.

16.6 The Committee notes that the author claims that the plea bargaining procedures, by which capital punishment could be avoided if he were to plead guilty, further violates his rights under the Covenant. The Committee finds this not to be so in the context of the criminal justice system in Pennsylvania.

16.7 With regard to the allegations of systemic racial discrimination in the United States criminal justice system, the Committee does not find, on the basis of the submissions before it, that Mr. Cox would be subject to a violation of his rights by virtue of his colour.

17.1 The Committee has futher considered whether in the specific circumstances of this case, being held on death row would constitute a violation of Mr. Cox's rights under article 7 of the Covenant. While confinement on death row is necessarily stressful, no specific factors relating to Mr. Cox 's mental condition have been brought to the attention of the Committee. The Committee notes also that Canada has submitted specific information about the current state of prisons in Pennsylvania, in particular with regard to the facilities housing inmates under sentence of death, which would not appear to violate article 7 of the Covenant.

17.2 As to the period of detention on death row in reference to article 7, the Committee notes that Mr. Cox has not yet been convicted nor sentenced, and that the trial of the two accomplices in the murders of which Mr. Cox is also charged did not end with sentences of death but rather of life imprisonment. Under the jurisprudence of the Committee [7], on the one hand, every person confined to death row must be afforded the opportunity to pursue all possibilities of appeal, and, on the other hand, the State party must ensure that the possibilities for appeal are made available to the condemned prisoner within a reasonable time. Canada has submitted specific information showing that persons under sentence of death in the state of Pennsylvania are given every opportunity to avail themselves of several appeal instances, as well as opportunities to seek pardon or clemency. The author has not adduced evidence to show that these procedures are not made available within a reasonable time, or that there are unreasonable delays which would be imputable to the State. In these circumstances, the Committee finds that the extradition of Mr. Cox to the United States would not entail a violation of article 7 of the Covenant.

17.3 With regard to the method of execution, the Committee has already had the opportunity of examining the Kindler case, in which the potential judicial execution by lethal injection was not found to be in violation of article 7 of the Covenant.

18. The Committee, acting under article 5, paragraph 4, of the Optional Protocol, finds that the facts before it do not sustain a finding that the extradition of Mr. Cox to face trial for a capital offence in the United States would constitute a violation by Canada of any provision of the International Covenant on Civil and Political Rights.

[Adopted in English , French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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[7] Views in communications Nos. 210/1986 and 225/1987, Earl Pratt and Ivan Morgan v. Jamaica , para. 13.6; No. 250/1987, Carlton Reid v. Jamaica , para. 11.6; Nos. 270/1988 and 271/1988, Randolph Barrett and Clyde Sutcliffe v. Jamaica , para. 8.4; No. 274/1988, Loxley Griffith v. Jamaica , para. 7.4; No. 317/1988, Howard Martin v. Jamaica , para. 12.1; No. 470/1991, Kindler v. Canada , para. 15.2.

APPENDICES

A. INDIVIDUAL OPINIONS APPENDED TO THE COMMITTEE'S DECISION ON ADMISSIBILITY OF 3 NOVEMBER 1993

1. Individual opinion by Mrs. Rosalyn Higgins, co-signed by Messrs. Laurel Francis, Kurt Herndl, Andreas Mavrommatis, Birame Ndiaye and Waleed Sadi (dissenting)

We believe that this case should have been declared inadmissible. Although extradition as such is outside the scope of the Covenant (see M.A. v. Italy, communication No. 117/1981, decision of 10 April 1984, paragraph 13.4), the Committee has explained, in its decision on communication No. 470/1991 (Joseph J. Kindler v. Canada, Views adopted on 30 July 1993), 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.

But here, as elsewhere, the admissibility requirements under the Optional Protocol must be met. In its decision on Kindler, the Committee addressed the issue of whether it had jurisdiction, ratione loci, by reference to article 2 of the Optional Protocol, in an extradition case that brought into play other provisions of the Covenant. It observed that "if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that the person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant" (paragraph 6.2).

We do not see on what jurisdictional basis the Committee proceeds to its finding that the communication is admissible under articles 6 and 7 of the Covenant. The Committee finds that the communication is inadmissible by reference to article 2 of the Optional Protocol (paragraph 10.4) insofar as claims relating to fair trial (article 14) and discrimination before the law (article 26) are concerned. We agree. But this negative finding cannot form a basis for admissibility in respect of articles 6 and 7. The Committee should have applied the same test ("foreseeable and necessary consequences") to the claims made under articles 6 and 7, before simply declaring them admissible in respect of those articles. It did not do so - and in our opinion could not have found, in the particular circumstances of the case, a proper legal basis for jurisdiction had it done so.

The above test is relevant also to the admissibility requirement, under article 1 of the Optional Protocol, that an author be a "victim" of a violation in respect of which he brings a claim. In other words, it is not always necessary that a violation already have occurred for an action to come within the scope of article 1. But the violation that will affect him personally must be a "necessary and foreseeable consequence" of the action of the defendant State.

It is clear that in the case of Mr. Cox, unlike in the case of Mr. Kindler, this test is not met. Mr. Kindler had, at the time of the Canadian decision to extradite him, been tried in the United States for murder, found guilty as charged and recommended to the death sentence by the jury. Mr. Cox, by contrast, has not yet been tried and a fortiori has not been found guilty or recommended to the death penalty. Already it is clear that his extradition would not entail the possibility of a "necessary and foreseeable consequence of a violation of his rights" that would require examination on the merits. This failure to meet the test of "prospective victim" within the meaning of

article 1 of the Optional Protocol is emphasized by the fact that Mr. Cox's two co-defendants i n the case in which he has been charged have already been tried in the State of Pennsylvania, and sentenced not to death but to a term of life imprisonment.

The fact that the Committee - and rightly so in our view - found that Kindler raised issues that needed to be considered on their merits, and that the admissibility criteria were there met, does not mean that every extradition case of this nature is necessarily admissible. In every case, the tests relevant to articles 1, 2, 3 and 5, paragraph 2, of the Optional Protocol must be applied to the particular facts of the case.

The Committee has not at all addressed the requirements of article 1 of the Optional Protocol, that is, whether Mr. Cox may be considered a "victim" by reference to his claims under articles 14, 26, 6 or 7 of the Covenant.

We therefore believe that Mr. Cox was not a "victim" within the meaning of article 1 of the Optional Protocol, and that his communication to the Human Rights Committee is inadmissible.

The duty to address carefully the requirements for admissibility under the Optional Protocol is not made the less necessary because capital punishment is somehow involved in a complaint.

For all these reasons, we believe that the Committee should have found the present communication inadmissible.

Rosalyn Higgins
Laurel Francis
Kurt Herndl
Andreas Mavrommatis
Birame Ndiaye
Waleed Sadi

[Original: English]

2. Individual opinion by Mrs. Elizabeth Evatt (dissenting)

For his claim to be admissible, the author must show that he is a victim. To do this he must submit facts which support the conclusion that his extradition exposed him to a real risk that his rights under articles 6 and 7 of the Covenant would be violated (in the sense that the violation is necessary and foreseeable). The author in the present case has not done so.

As to article 6, the author is, of course, exposed by his extradition to the risk of facing the death penalty for the crime of which he is accused. But he has not submitted facts to show a real risk that the imposition of the death penalty would itself violate article 6, which does not exclude the death penalty in certain limited circumstances. Furthermore, his accomplices in the crime he is charged with were sentenced to life imprisonment, a factor which does not support the contention that the author's extradition would expose him to a "necessary and foreseeable" risk that the death penalty will be imposed.

As to article 7, the claim that the author has been exposed to a real risk of a violation of this provision by his extradition is based on the death row phenomenon (paragraph 8.2); the author has not, however, submitted facts which, in the light of the Committee's jurisprudence, show that there is a real risk of violation of this article if he is extradited to the United States. Furthermore, since, in my opinion, the author's extradition does not expose him to a real risk of being sentenced to death, his extradition entails a fortiori no necessary and foreseeable consequence of a violation of his rights while on death row.

For these reasons I am of the view that the communication is inadmissible under articles 1 and 2 of the Optional Protocol.

Elizabeth Evatt

[Original: English]

B. INDIVIDUAL OPINIONS APPENDED TO THE COMMITTEE'S VIEWS

1. Individual opinion by Messrs. Kurt Herndl and Waleed Sadi (concurring)

We concur with the Committee's finding that the facts of the instant case do not reveal a violation of either article 6 or 7 of the Covenant.

In our opinion, however, it would have been more consistent with the Committee's jurisprudence to set aside the decision on admissibility of 3 November 1993 and to declare the communication inadmissible under articles 1 and 2 of the Optional Protocol, on grounds that the author does not meet the "victim" test established by the Committee. Bearing in mind that Mr. Cox has not been tried, let alone convicted or sentenced to death, the hypothetical violations alleged appear quite remote for the purpose of considering this communication admissible.

However, since the Committee has proceeded to an examination of the merits, we would like to submit the following considerations on the scope of articles 6 and 7 of the Covenant and their application in the case of Mr. Keith Cox.

Article 6

As a starting point, we would note that article 6 does not expressly prohibit extradition to face capital punishment. Nevertheless, it is appropriate to consider whether a prohibition would follow as a necessary implication of article 6.

In applying article 6, paragraph 1, of the Covenant, the Committee must, pursuant to article 31 of the Vienna Convention on the Law of Treaties, interpret this provision *in good faith* in accordance with the ordinary meaning to be given to the terms in their context. As to the ordinary meaning of the words, a prohibition of extradition is not apparent. As to the context of the provision, we believe that article 6, paragraph 1, must be read in conjunction with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes; part of the context to be considered is also the fact that a large majority of States -- at the time of the drafting of the Covenant and still today -- retain the death penalty. One may not like this objective context, it must not be disregarded.

Moreover, the notion *in good faith* entails that the intention of the parties to a treaty should be ascertained and carried out. There is a general principle of international law according to which no State can be bound without its consent. States parties to the Covenant gave consent to certain specific obligations under article 6 of the Covenant. The fact that this provision does not address the link between the protection of the right to life and the established practice of States in the field of extradition is not without significance.

Had the drafters of article 6 intended to preclude all extradition to face the death penalty, they could have done so. Considering that article 6 consists of six paragraphs, it is unlikely that such an important matter would have been left for future interpretation. Nevertheless, an issue under article 6 could still arise if extradition were granted for the imposition of the death penalty in breach of article 6, paragraphs 2 and 5. While this has been recognized by the Committee in its jurisprudence (see the Committee's Views in communication No. 469/1991 (Ng v. Canada) and No. 470/1990 (Kindler v. Canada)), the yardstick with which a possible breach of article 6, paragraphs 2 and 5, has to be measured, remains a restrictive one. Thus, the extraditing State may be deemed to be in violation of the Covenant only if the necessary

and foreseeable consequence of its decision to extradite is that the Covenant rights of the extradited person will be violated in another jurisdiction.

In this context, reference may be made to the Second Optional Protocol, which similarly does not address the issue of extradition. This fact is significant and lends further support to the proposition that under international law extradition to face the death penalty is not prohibited under all circumstances. Otherwise the drafters of this new instrument would surely have included a provision reflecting this understanding.

An obligation not to extradite, as a matter of principle, without seeking assurances is a substantial obligation that entails considerable consequences, both domestically and internationally. Such consequences cannot be presumed without some indication that the parties intended them. If the Covenant does not expressly impose these obligations, States cannot be deemed to have assumed them. Here reference should be made to the jurisprudence of the International Court of Justice according to which interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain [8].

Admittedly, since the primary beneficiaries of human rights treaties are not States or governments but human beings, the protection of human rights calls for a more liberal approach than that normally applicable in the case of ambiguous provisions of multilateral treaties, where, as a general rule, the "meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties." [9] Nonetheless, when giving a broad interpretation to any human rights treaty, care must be taken not to frustrate or circumvent the ascertainable will of the drafters. Here the rules of interpretation set forth in article 32 of the Vienna Convention on the Law of Treaties help us by allowing the use of the *travaux préparatoires*. Indeed, a study of the drafting history of the Covenant reveals that when the drafters discussed the issue of extradition, they decided not to include any specific provision in the Covenant, so as to avoid conflict or undue delay in the performance of existing extradition treaties (E/CN.4/SR.154, paras. 26-57).

It has been suggested that extraditing a person to face the possible imposition of the death sentence is tantamount, for a State that has abolished capital punishment, to reintroducing it. While article 6 of the Covenant is silent on the issue of reintroduction of capital punishment, it is worth recalling, by way of comparison, that an express prohibition of reintroduction of the death penalty is provided for in article 4(3) of the American Convention on Human Rights, and that Protocol 6 to the European Convention does not allow for derogation. A commitment not to reintroduce the death penalty is a laudable one, and surely in the spirit of article 6, paragraph 6, of the Covenant. But certainly this is a matter for States parties to consider before they assume a binding obligation. Such obligation may be read into the Second Optional Protocol, which is not subject to derogation. But, as of November 1994, only 22 countries have become parties -- Canada has not signed or ratified it. Regardless, granting a request to extradite a foreign national to face capital punishment in another jurisdiction cannot be equated to the reintroduction of the death penalty.

Moreover, we recall that Canada is not itself imposing the death

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[8] Oppenheim, International Law, 1992 edition, Vol. 1, p. 1271.

[9] This corresponds to the principle of interpretation known as in dubio mitius. Ibid., p. 1278.

penalty, but merely observing an obligation under international law pursuant to a valid extradition treaty. Failure to fulfil a treaty obligation engages State responsibility for an internationally wrongful act, giving rise to consequences in international law for the State in breach of its obligation. By extraditing Mr. Cox, with or without assurances, Canada is merely complying with its obligation pursuant to the Canada-U.S. Extradition Treaty of 1976, which is, we would note, compatible with the United Nations Model Extradition Treaty.

Finally, it has been suggested that Canada may have restricted or derogated from article 6 in contravention of article 5 (2) of the Covenant (the "savings clause", see Manfred Nowak's CCPR Commentary, 1993, pp. 100 et seq.). This is not so, because the rights of persons under Canadian jurisdiction facing extradition to the United States were not necessarily broader under any norm of Canadian law than in the Covenant and had not been finally determined until the Supreme Court of Canada issued its 1991 judgments in the Kindler and Ng cases. Moreover, this determination was not predicated on the Covenant, but rather on the Canadian Charter of Rights and Freedoms.

Article 7

The Committee has pronounced itself in numerous cases on the issue of the "death row phenomenon" and has held that "prolonged 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." [10] We concur with the Committee's reaffirmation and elaboration of this holding in the instant decision. Furthermore we consider that prolonged imprisonment under sentence of death could raise an issue under article 7 of the Covenant if the prolongation were unreasonable and attributable primarily to the State, as when the State is responsible for delays in the handling of the appeals or fails to issue necessary documents or written judgments. However, in the specific circumstances of the Cox case, we agree that the author has not shown that, if he were sentenced to death, his detention on death row would be unreasonably prolonged for reasons imputable to the State.

We further believe that imposing rigid time limits for the conclusion of all appeals and requests for clemency is dangerous and may actually work against the person on death row by accelerating the execution of the sentence of death. It is generally in the interest of the petitioner to remain alive for as long as possible. Indeed, while avenues of appeal remain open, there is hope, and most petitioners will avail themselves of these possibilities, even if doing so entails continued uncertainty. This is a dilemma inherent in the administration of justice within all those societies that have not yet abolished capital punishment.

Kurt Herndl
Waleed Sadi

[10] Views on communications Nos. 210/1986 and 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica) adopted on 6 April 1989, paragraph 13.6. This holding has been reaffirmed in some ten subsequent cases, including Nos. 270/1988 and 271/1988 (Randolph Barrett & Clyde Sutcliffe v. Jamaica), adopted on 30 March 1992, paragraph 8.4, and No. 470/1991 (Kindler v. Canada), adopted on 30 July 1993, paragraph 15.2.

[Original: English]

2. Individual opinion by Mr. Tamar Ban (partly concurring, partly dissenting)

I share the Committee's conclusion that the extradition of Mr. Cox by Canada to the United States to face the possible imposition of the death penalty, under the specific circumstances of this case, would not constitute a violation of article 6 of the Covenant, and that judicial execution by lethal injection would not per se constitute a violation of article 7.

I cannot accept the Committee's position, however, that the prospects for Mr. Cox being held for a long period of time on death row, if sentenced to death, would not amount to a violation of his rights under article 7 of the Covenant.

The Committee based its finding of non violation of article 7, regarding the "death row phenomenon" on the following arguments: (1) prison conditions in the state of Pennsylvania have been considerably improved in recent times; (2) Mr. Cox has not yet been convicted nor sentenced, the trial of his two accomplices did not end with sentence of death; (3) no evidence has been adduced to show that all possibilities for appeal would not be available within a reasonable time, or that there would be unreasonable delays which would be imputable to the state (supra, paragraphs 17.1 and 17.2).

Concerning the prison conditions in Pennsylvania, the State party, Canada, has in fact shown that substantial improvements in the condition of incarceration of inmates under death sentence have taken place in that state (paragraph 13.6). The measures taken are said to consist mainly of the improvement of the physical conditions of the inmates.

Although I accept the notion that physical conditions play an important role when assessing the overall situation of prison inmates on death row, my conviction is that the decisive factor is rather psychological than physical; a long period spent in awaiting execution or the granting of pardon or clemency necessarily entails a permanent stress, an ever increasing fear which gradually fills the mind of the sentenced individual, and which, by the very nature of this situation, amounts - depending on the length of time spent on death row - to cruel, inhuman and degrading treatment, in spite of every measure taken to improve the physical conditions of the confinement.

Turning now to the second argument, that Mr. Cox has not yet been convicted nor sentenced, and that he therefore has no claim under article 7 (since only de facto sentenced-to-death convicts are in a situation to assert a violation of their rights not to be exposed to torture, cruel, inhuman or degrading treatment), I believe this argument is irrelevant when looking into the merits of the case. It could have been raised, and indeed, the State party did raise it during the admissibility procedure, but it was not honoured by the Committee. I would like to note that the Committee has taken a clear stand in its earlier jurisprudence on the responsibility of States parties for their otherwise lawful decisions to send an individual within their jurisdiction into another jurisdiction, where that person's rights would be violated as a necessary and foreseeable consequence of the decision (e.g. Committee's Views in the Kindler case, paragraph 6.2). I will try to show below, discussing the third argument, that in the present case the violation of Mr. Cox's rights following his extradition is necessary and foreseeable.

Concerning the third argument, the Committee held that the author adduced no evidence to show that all possibilities for appeal against the death sentence would not be available in the state of Pennsylvania within a

reasonable time, or that there would be unre asonable delays imputable to that state, as a result of which Mr. Cox could be exposed at length to the "death row phenomenon".

I contest this finding of the Committee. In his submission of 18 September 1994, counsel for Mr. Cox contended that "nobody has been executed in Pennsylvania for more than twenty years, and there are individuals awaiting execution on death row for as much as fifteen years."

In its submission of 21 October 1994, the State party - commenting on several statements made by counsel in his above mentioned submission of 18 September - remained silent on this point. In other words, it did not challenge or contest it in any way. In my opinion this lack of response testifies that the author has adduced sufficient evidence to show that appeal procedures in the state of Pennsylvania can last such a long time, which cannot be considered as reasonable.

While fully accepting the Committee's jurisprudence to the effect that every person sentenced to death must be afforded the opportunity to pursue all possibilities of appeal in conformity with article 6, paragraph 4 - a right the exercise of which, in capital cases, necessarily entails a shorter or longer stay on death row - I believe that in such cases States parties must strike a sound balance between two requirements: on the one hand all existing remedies must be made available, but on the other hand - with due regard to article 14, paragraph 3(c) - effective measures must be taken to the effect that the final decision be made within a reasonable time to avoid the violation of the sentenced person's rights under article 7.

Bearing in mind that in the state of Pennsylvania inmates face the prospect of spending a very long time - sometimes 15 years - on death row, the violation of Mr. Cox's rights can be regarded as a foreseeable and necessary consequence of his extradition. For this reason I am of the opinion that the extradition of Mr. Cox by Canada to the United States without reasonable guarantees would amount to a violation of his rights under article 7 of the Covenant.

I would like to make it clear that my position is strongly motivated by the fact that by Mr. Cox's surrender to the United States, the Committee would lose control over an individual at present within the jurisdiction of a State party to the Optional Protocol.

Tamar Ban

[Original: English]

3. Individual opinion by Messrs. Francisco José Aguilar Urbina and Fausto Pocar (dissenting)

We cannot agree with the finding 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 request assurances from the United States to the effect that the death penalty would not be imposed on Mr. Keith Cox and to refuse extradition unless clear assurances to this effect are given, must in our view receive an affirmative answer.

Regarding the death penalty, it must 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 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 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. Accordingly, a State party that has abolished the death penalty is in our view under the legal obligation, under article 6, paragraph 1, of the Covenant, not to reintroduce it. This obligation must refer both to a direct reintroduction within the State party's jurisdiction, as well as to an indirect one, as is the case when the State acts - through extradition, expulsion or compulsory return - in such a way that an individual within is territory and subject to its jurisdiction may be exposed to capital punishment in another State. We therefore conclude that in the present case there has been a violation of article 6 of the Covenant.

Regarding the claim under article 7, we cannot agree with the Committee that there has not been a violation of the Covenant. As the Committee observed in its Views on communication No. 469/1991 (*Charles Chitat Ng v. Canada*), "by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant", unless the execution is permitted under article 6, paragraph 2. Consequently, a violation of the provisions of article 6 that may make such treatment, in certain circumstances, permissible, entails necessarily, and irrespective of the way in which the execution may be carried out, a violation of article 7 of the Covenant. It is for these reasons that we conclude in the present case there has been a violation of article 7 of the Covenant.

Francisco José Aguilar Urbina
Fausto Pocar

[Original: English]

4. Individual opinion by Ms. Christine Chanet (dissenting)

Comme dans le cas Kindler, pour répondre aux questions relatives à l'article 6 du Pacte, le Comité, afin de conclure à une non-violation par le Canada de ses obligations au titre de cet article, est contraint à une analyse conjointe des paragraphes 1 et 2 de l'article 6 du Pacte.

Rien ne permet d'affirmer qu'il s'agit là d'une interprétation correcte de l'article 6. En effet, chaque paragraphe des articles du Pacte doit pouvoir s'interpréter isolément, sauf indication contraire expressément mentionnée dans le texte lui-même ou se déduisant de la rédaction de celui-ci.

Tel n'est pas le cas en l'espèce.

La nécessité dans laquelle s'est trouvé le Comité de prendre les deux paragraphes à l'appui de son argumentation montre à l'évidence que chaque paragraphe pris isolément conduisait à une conclusion contraire, c'est-à-dire la constatation d'une violation.

Selon le paragraphe 1 de l'article 6, nul ne peut être arbitrairement privé du droit à la vie; ce principe est absolu et ne souffre aucune exception.

Le paragraphe 2 de l'article 6 commence par les termes "Dans les pays où la peine de mort n'a pas été abolie..." Cette formule appelle une série de remarques:

- Elle est négative, elle ne vise pas les pays dans lesquels la peine de mort existe, mais ceux dans lesquels elle n'a pas été abolie. L'abolition est la règle, le maintien de la peine capitale, l'exception.

- Le paragraphe 2 de l'article 6 ne concerne que les pays dans lesquels la peine de mort n'a pas été abolie et exclut ainsi l'application du texte aux pays qui ont aboli la peine de mort.

- Enfin, une série d'obligations sont imposées par le texte à ces Etats.

Dès lors, en se livrant à une interprétation "conjointe" des deux premiers paragraphes de l'article 6 du Pacte, le Comité commet, à mon sens, trois erreurs de droit:

- Une erreur, lorsqu'il applique à un pays qui a aboli la peine de mort, le Canada, un texte exclusivement réservé par le Pacte, et ce de manière expresse et dépourvue d'ambiguïtés, aux Etats non abolitionnistes.

- La deuxième erreur, en considérant comme une autorisation de rétablir la peine de mort dans un pays qui l'aurait abolie, la simple reconnaissance implicite de son existence. Il s'agit là d'une interprétation extensive qui se heurte au démenti apporté par le paragraphe 6 de l'article 6 en vertu duquel "aucune disposition du présent article ne peut être invoquée à l'encontre de l'abolition de la peine capitale". Cette interprétation, restrictive de droits, se heurte également aux dispositions de l'article 5, paragraphe 2, du Pacte selon lequel "Il ne peut être admis aucune restriction ou dérogation aux droits fondamentaux de l'homme reconnus ou en vigueur dans tout Etat

partie au présent Pacte, en application de lois, de conventions, de règlements ou de coutumes, sous prétexte que le présent Pacte ne les reconnaît pas ou les reconnaît à un moindre degré". L'ensemble de ces textes interdit à un Etat de se livrer à une application distributive de la peine de mort. Rien dans le Pacte ne contraint un Etat à l'abolition, mais s'il a choisi d'abolir la peine capitale, le Pacte lui fait interdiction de la rétablir de manière arbitraire, fût-ce indirectement.

- La troisième erreur commise par le Comité dans la décision est la conséquence des deux premières. En effet, considérant le Canada comme implicitement autorisé par l'article 6(2) du Pacte à, d'une part, rétablir la peine capitale et, d'autre part, à l'appliquer dans certains cas, le Comité, comme s'il s'agissait d'un pays non abolitionniste, soumet le Canada à la vérification des obligations imposées aux Etats non abolitionnistes: peine applicable aux crimes les plus graves, jugement prononcé au terme d'un procès équitable, etc...

Cette analyse montre que selon le Comité, en extradant M. Cox vers les Etats-Unis, le Canada qui a aboli la peine de mort sur son territoire, l'a rétablie "par procuration" à l'égard de personnes placées sous sa juridiction.

Je partage cette analyse mais, à la différence du Comité, j'estime que ce comportement n'est pas autorisé par le Pacte.

De plus, après avoir ainsi rétabli la peine de mort par procuration, le Canada limite son application à une certaine catégorie de personnes: celles qui sont extradables vers les Etats-Unis.

Le Canada reconnaît son intention de pratiquer ainsi afin de ne pas constituer un refuge pour les délinquants venant des Etats-Unis. Son intention se manifeste par son abstention à solliciter des assurances selon lesquelles la peine de mort ne serait pas exécutée en cas d'extradition vers les Etats-Unis, comme le lui permet son traité bilatéral d'extradition avec ce pays.

C'est donc délibérément que lorsqu'il extrade des personnes dans la situation de M. Cox, le Canada les expose à l'application de la peine capitale dans l'Etat requérant.

En agissant ainsi, le choix opéré par le Canada à l'égard d'une personne relevant de sa juridiction selon qu'elle soit extradable vers les Etas-Unis ou non, constitue une discrimination en violation des articles 2(1) et 26 du Pacte.

Un tel choix portant sur le droit à la vie et laissant celui-ci "in fine" entre les mains du gouvernement qui pour des raisons de politique pénale décide ou non de solliciter des assurances que la peine de mort ne sera pas exécutée constitue une privation arbitraire du droit à la vie interdite par l'article 6(1) du Pacte et en conséquence, une méconnaissance par le Canada de ses engagements au titre de cet article du Pacte.

Christine Chanet

[Original: French]

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

By declining to seek assurances that the death penalty would not be imposed on Mr. Cox or, if imposed, would not be carried out, Canada violates, in my opinion, its obligations under article 6, paragraph 1, of the Covenant, read in conjunction with articles 2, 5 and 26. The reasons which lead me to this conclusion were elaborated in my individual opinion on the Views in the case of Joseph Kindler v. Canada (Communication No. 470/1991).

I would add one further observation. The fact that Mr. Cox has not yet been tried and sentenced to death, as Mr. Kindler had been when the Committee adopted its Views on his case, makes no material difference. It suffices that the offence for which Mr. Cox faces trial in the United States carries in principle capital punishment as a sentence he faces under the law of the United States. He therefore faces a charge under which his life is in jeopardy.

Rajsoomer Lallah

[Original: English]

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

I do not share the Committee's Views about a non-violation of article 6 of the Covenant, as set out in paragraph 16.2 and 16.3 of the Views. On grounds which I developed in detail in my individual opinion concerning the Committee's Views on communication 470/1991 (Joseph John Kindler v. Canada), Canada did, in my opinion, violate article 6, paragraph 1, of the Covenant; it did so when, after the decision to extradite Mr. Cox to the United States had been taken, the Minister of Justice ordered him surrendered without assurances that the death penalty would not be imposed or, if imposed, would not be carried out.

As to whether the extradition of Mr. Cox to the United States would entail a violation of article 7 of the Covenant because of the so-called "death row phenomenon" associated with the imposition of a capital sentence in the case, I wish to add the following observations to the Committee's Views in paragraphs 17.1 and 17.2. The Committee has been informed that no individual has been executed in Pennsylvania for over twenty years. According to information available to the Committee, condemned prisoners are held segregated from other prisoners. While they may enjoy some particular facilities, such as bigger cells, access to radio and television sets of their own, they are nonetheless confined to death row awaiting execution for years. And this not because they avail themselves of all types of judicial appellate remedies, but because the State party does not consider it appropriate, for the time being, to proceed with the execution. If the State party considers it necessary, for policy reasons, to have resort to the death penalty as such but not necessary and not even opportune to carry out capital sentences, a condemned person's confinement to death row should, in my opinion, last for as short a period as possible, with commutation of the death sentence to life imprisonment taking place as early as possible. A stay for a prolonged and indefinite period of time on death row, in conditions of particular isolation and under the threat of execution which might by unforeseeable changes in policy become real, is not, in my opinion, compatible with the requirements of article 7, because of the unreasonable mental stress that this implies.

Thus, the extradition of Mr.Cox might also be in violation of article 7. However, there is not enough information in this case about the current practice of the Pennsylvania criminal justice and penitentiary system to allow any conclusion along the lines indicated above. What has been developed above remains hypothetical and in the nature of principles.

Bertil Wennergren

[Original: English]