HUMAN RIGHTS COMMITTEE

Cox v. Canada

Communication No. 539/1993

3 November 1993

CCPR/C/49/D/539/1993*

ADMISSIBILITY

Submitted by: Keith Cox [represented by counsel]

Alleged 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)

Date of present decision: 3 November 1993

Decision on admissibility **/

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 proceedings against the author, it is states 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

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 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 is 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 the United States government that if Mr. Cox were to be found guilty, the death penalty would not be applied ... 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 United 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, and consequently no such dilatory recourse has been taken ... all useful and 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 fundamental procedural safeguards, specifically by an impartial jury (the 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 formulated upon its ratification of the Covenant, in particular to article 6: "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing 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 that 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 the refusal of the Minister to seek assurances on the non-imposition 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 fact routinely seeks such 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 routinely 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 the suggestion in the absence of any serious evidence."

9.2 As to the State party's argument that extradition is intended to protect 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 support such a belief. Moreover, with regard to Canada's concern that if the United States does not give assurances, Canada would be unable to extradite and have to keep the criminal without trial, author's counsel argues that "a state government so devoted to the death penalty as a supreme punishment for an offender would surely prefer to obtain extradition and keep the offender in life imprisonment rather than to see the offender freed in Canada. I know of two cases where the guarantee was sought from the United States, one for 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 both cases the states willingly gave the guarantee. 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 is 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 places 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' 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 examination of the merits.

Issues and proceedings before the Committee

10.1 Before considering any claims 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 notes 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 notes that the State party has explicitly stated that it does not wish to express a view as to whether the author has exhausted domestic remedies and does not contest the admissibility of the communication on this ground. In the circumstances, basing itself on the information before it, the Committee concludes that the requirements of article 5, paragraph 2(b), of the Covenant have been met.

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 observes that the evidence submitted does 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 in incompatible with the Covenant. In this connection, the Committee recalls 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 of 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 considers that the remaining claim, that Canada violated the Covenant by deciding to extradite Mr. Cox without seeking assurances that the death penalty will not be imposed, or if imposed, will not be carried out, may raise issues under articles 6 and 7 of the Covenant which should be examined on the merits.

11. The Human Rights Committee therefore decides:

(a) that the communication is admissible in so far as it may raise issues under articles 6 and 7 of the Covenant;

(b) that, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it;

(c) that any explanations or statements received from the State party shall be communicated to the author and his counsel, with the request that any comments that they may wish to make should reach the Human Rights Committee, in care of the Centre for Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(d) that the State party shall be requested, under rule 86 of the Committee's rules of procedure, not to extradite Mr. Cox without seeking assurances that the death penalty will not be imposed or, if imposed, will not be carried out, while his communication is under consideration by the Committee. This requested does not imply a determination of the merits of the communication;

(e) that this decision shall be communicated to the State party, to the author and to his counsel.

*/ All persons handling this document are requested to respect and observe its confidential nature.

**/ The text of two individual opinions, signed by seven members of the Committee, is appended.

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

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.

3/ See the Committee's decisions in communications Nos. 35/1978 (Aumeeruddy-Cziffra et al. v. Mauritus, 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.

APPENDIX

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

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 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 is 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 in the case in which he has been charged have already been tried in the State of Pennsylvania, and sentences 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

B. Individual opinion by Mrs. Elizabeth Evatt

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 will be imposed.

As to article 7, his 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