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III. JURISPRUDENCE

ICCPR

- *Torres v. Finland* (291/1988), ICCPR, A/45/40 vol. II (2 April 1990) 96 (CCPR/C/38/D/291/1988) at paras. 6, 7.1 and 7.4.

  ...
  6. The Committee notes the author's allegation that Finland is in violation of article 7 of the Covenant for extraditing him to a country where there were reasons to believe that he might be subjected to torture. The Committee finds, however, that the author has not sufficiently substantiated his fears that he would be subject to torture in Spain.

  7.1 Three separate questions arise with respect to article 9, paragraph 4, of the Covenant:...(c) whether the application of the Extradition Act to the author entails any violation of this provision.
  ...
  7.4 With respect to the third question, the Committee notes that the Helsinki City Court reviewed the author's detention under the Extradition Act at two-week intervals. The Committee finds that such reviews satisfy the requirements of article 9, paragraph 4, of the Covenant.

- *García v. Ecuador* (319/1988), ICCPR, A/47/40 (5 November 1991) 290 (CCPR/C/43/D/319/1988) at paras. 2.1, 2.2, 2.4, 3, 5.2, 6.1 and 6.2.

  ...
  2.1 The author lived in the United States of America for 13 years until 1982, when he returned to Bogotá, Colombia, where he resided until July 1987. On 22 July 1987, he travelled to Guayaquil, Ecuador, with his wife. At around 5 p.m. the same day, while walking with his wife in the reception area of the Oro Verde Hotel, they were surrounded by 10 armed men, reportedly Ecuadorian police officers acting on behalf of Interpol and the United States Drug Enforcement Agency (D.E.A.), who forced them into a vehicle waiting in front of the hotel. He adds that he asked an Ecuadorian police colonel whether the Ecuadorian police (Policía Nacional Ecuatoriana) had any information about him; he was told that the police merely executed an "order" coming from the Embassy of the United States. After a trip of approximately one hour, they arrived at what appeared to be a private residence, where Mr. Cañón was separated from his wife.

  2.2 He claims to have been subjected to ill-treatment, which included the rubbing of salt

water into his nasal passages. He spent the night handcuffed to a table and a chair, without being given as much as a glass of water. At approximately 8 a.m. the next morning, he was taken to the airport of Guayaquil, where two individuals, who had participated in his "abduction" the previous day, identified themselves as agents of the D.E.A. and informed him that he would be flown to the United States on the basis of an arrest warrant issued against him in 1982.

...

2.4 After it had been ascertained that Mr. Cañón spoke and understood English, the so-called "Miranda rights" (after a landmark decision of the United States Supreme Court requiring criminal suspects to be informed of their right to remain silent, to obtain the assistance of a lawyer during interrogation, and that statements made by them may be used against them in court) were read out to him, and he was informed that he was detained by order of the United States Government. The author asked for permission to consult with a lawyer or to speak with the Colombian Consul at Guayaquil, but his request allegedly was turned down; instead, he was immediately made to board a plane bound for the United States.

...

3. The author submits that the facts described above constitute a violation of [article]...13...of the International Covenant on Civil and Political Rights. In particular, he contends that, in the light of the existence of a valid extradition treaty between the State party and the United States at the time of his apprehension, he should have been afforded the procedural safeguards provided for in said treaty.

...

5.2 As to the merits, the Human Rights Committee notes that the State party does not seek to refute the author's allegations, in so far as they relate to articles 7, 9 and 13 of the Covenant, and that it concedes that the author's removal from Ecuadorian jurisdiction suffered from irregularities.

6.1 The Human Rights Committee...finds that the facts before it reveal violations of articles 7, 9 and 13 of the Covenant.

6.2 In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to take measures to remedy the violations suffered by Mr. Cañón García. In this connection, the Committee has taken note of the State party's assurance that it is investigating the author's claims and the circumstances leading to his expulsion from Ecuador, with a view to prosecuting those held responsible for the violations of his rights.

- *Kindler v. Canada* (470/1991), ICCPR, A/48/40 vol. II (30 July 1993) 138 (CCPR/C/48/D/470/1991) at paras. 6.1, 6.2, 6.4-6.7, 13.1, 13.2, 14.1-14.6, 15.3 and 16.

...

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6.1 ...[E]xtradition as such is outside the scope of application of the Covenant, e/ but...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 f/...

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

...

6.4 The Committee observed that the Covenant does not prohibit capital punishment for the most serious crimes provided that certain conditions are met...

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

...

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

...

13.1 ...[W]hat is at issue is not whether Mr. Kindler's rights have been or are likely to be

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

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

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

> (a) Did the requirement under article 6, paragraph 1, to protect the right to life prohibit Canada from exposing a person within its jurisdiction to the real risk (that is to say, a necessary and foreseeable consequence) of losing his life in circumstances incompatible with article 6 of the Covenant as a consequence of extradition to the United States?
>
> (b) Did the fact that Canada had abolished capital punishment except for certain military offences require Canada to refuse extradition or request assurances from the United States, as it was entitled to do under article 6 of the Extradition Treaty, that the death penalty would not be imposed against Mr. Kindler?

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

14.3 The Committee notes that article 6, paragraph 1, must be read together with article 6,

paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Canada itself did not impose the death penalty on Mr. Kindler, but extradited him to the United States, where he faced capital punishment. If Mr. Kindler had been exposed, through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, that would have entailed a violation by Canada of its obligations under article 6, paragraph 1. Among the requirements of article 6, paragraph 2, is that capital punishment be imposed only for the most serious crimes, in circumstances not contrary to the Covenant and other instruments, and that it be carried out pursuant to a final judgment rendered by a competent court. The Committee notes that Mr. Kindler was convicted of premeditated murder, undoubtedly a very serious crime. He was over 18 years of age when the crime was committed. The author has not claimed before the Canadian courts or before the Committee that the conduct of the trial in the Pennsylvania court violated his rights to a fair hearing under article 14 of the Covenant.

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

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

14.6 While States must be mindful of the possibilities for the protection of life when exercising their discretion in the application of extradition treaties, the Committee does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances. The Committee notes that the extradition of Mr. Kindler would have violated Canada's obligations under article 6 of the Covenant, if the decision to extradite without assurances would have been taken arbitrarily or summarily. The evidence

before the Committee reveals, however, that the Minister of Justice reached a decision after hearing argument in favour of seeking assurances. The Committee further takes note of the reasons given by Canada not to seek assurances in Mr. Kindler's case, in particular, the absence of exceptional circumstances, the availability of due process, and the importance of not providing a safe haven for those accused of or found guilty of murder.

...

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

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

Notes

...

e/ Communication No. 117/198l (*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".

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

...

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

...

m/ European Court of Human Rights, judgement of 7 July 1989.

For dissenting opinions in this context, see Kindler v. Canada (470/1991), ICCPR, A/48/40 vol. II (30 July 1993) 138 (CCPR/C/48/D/470/1991) at Individual Opinion by Mr. Kurt Herndl and Mr.

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Waleed Sadi, 154 at paras. 4-7 and 12, Individual Opinion by Mr. Bertil Wennergren, 157, Individual Opinion by Mr. Rajsoomer Lallah, 160, Individual Opinion by Mr. Fausto Pocar, 163, Individual Opinion by Mrs. Christine Chanet, 164 and Individual Opinion by Mr. Francisco Jose Aguilar Urbina, 167 at paras. 1-4 and 9-25.

See also:

- *Ng v. Canada* (469/1991), ICCPR, A/49/40 vol. II (5 November 1993) 189 (CCPR/C/49/D/469/1991) at paras. 6.1, 6.2, 13.2, 13.5, 14.1, 14.2 and 15.1-15.7.
- *Cox. v. Canada* (539/1993), ICCPR, A/50/40 vol. II (31 October 1994) 105 (CCPR/C/52/D/539/1993) at paras. 16.4, and 17.3.

- *Ng v. Canada* (469/1991), ICCPR, A/49/40 vol. II (5 November 1993) 189 (CCPR/C/49/D/469/1991) at paras. 16.1-16.5, 17 and Individual Opinion by Mr. Bertil Wennergren, 209.

  ...

  16.1 In determining whether, in a particular case, the imposition of capital punishment constitutes a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row and whether the proposed method of execution is particularly abhorrent. In the instant case, it is contented that execution by gas asphyxiation is contrary to internationally accepted standards of humane treatment, and that it amounts to treatment in violation of article 7 of the Covenant. The Committee begins by noting that whereas article 6, paragraph 2, allows for the imposition of the death penalty under certain limited circumstances, any method of execution provided for by law must be designed in such a way as to avoid conflict with article 7.

  16.2 The Committee is aware that, 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; on the other hand, article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes. None the less, the Committee reaffirms, as it did in its General Comment 20(44) on article 7 of the Covenant that, when imposing capital punishment, the execution of the sentence "must be carried out in such a way as to cause the least possible physical and mental suffering". n/

  16.3 In the present case, the author has provided detailed information that execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes. The State party had the opportunity to refute these allegations on the facts; it has failed to do so. Rather, the State party has confined itself to arguing that in the absence of a norm of international law

which expressly prohibits asphyxiation by cyanide gas, "it would be interfering to an unwarranted degree with the internal laws and practices of the United States to refuse to extradite a fugitive to face the possible imposition of the death penalty by cyanide gas asphyxiation".

16.4 In the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of "least possible physical and mental suffering", and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant. Accordingly, Canada, which could reasonably foresee that Mr. Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7, failed to comply with its obligations under the Covenant, by extraditing Mr. Ng without having sought and received assurances that he would not be executed.

16.5 The Committee need not pronounce itself on the compatibility with article 7 of methods of execution other than that which is at issue in this case.

17. The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by Canada of article 7 of the Covenant.

...

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Notes

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n/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI.A, General Comment 20 (44), para. 6.

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...

D. Individual Opinion by Mr. Bertil Wennergren (partly concurring)

...

I do share the Committee's views, formulated in paragraphs 16.1 to 16.5, that Canada failed to comply with its obligations under the Covenant by extraditing Mr. Ng to the United States, where, if sentenced to death, he would be executed by means of a method that amounts to a violation of article 7. In my view, article 2 of the Covenant obliged Canada not merely to seek assurances that Mr. Ng would not be subjected to the execution of a death sentence but also, if it decided none the less to extradite Mr. Ng without such assurances, as was the case, to at least secure assurances that he would not be subjected to the execution of the death sentence by cyanide gas asphyxiation.

Article 6, paragraph 2, of the Covenant permits courts in countries which have not abolished the death penalty to impose the death sentence on an individual if that individual has been found guilty of a most serious crime, and to carry out the death sentence by execution. This

exception from the rule of article 6, paragraph 1, applies only *vis-à-vis* the State party in question, not *vis-à-vis* other States parties to the Covenant. It therefore did not apply to Canada as it concerned an execution to be carried out in the United States.

By definition, every type of deprivation of an individual's life is inhuman. In practice, however, some methods have by common agreement been considered as acceptable methods of execution. Asphyxiation by gas is definitely not to be found among them. There remain, however, divergent opinions on this subject. On 21 April 1992, the Supreme Court of the United States denied an individual a stay of execution by gas asphyxiation in California by a seven-to-two vote. One of the dissenting justices, Justice John Paul Stevens, wrote:

> "The barbaric use of cyanide gas in the Holocaust, the development of cyanide agents as chemical weapons, our contemporary understanding of execution by lethal gas and the development of less cruel methods of execution all demonstrate that execution by cyanide gas is unnecessarily cruel. In light of all we know about the extreme and unnecessary pain inflicted by execution by cyanide gas."

Justice Stevens found that the individual's claim had merit.

In my view, the above summarizes in a very convincing way why gas asphyxiation must be considered as a cruel and unusual punishment that amounts to a violation of article 7. What is more, the State of California, in August 1992, enacted a statute law that enables an individual under sentence of death to choose lethal injection as the method of execution, in lieu of the gas chamber. The statute law went into effect on 1 January 1993. Two executions by lethal gas had taken place during 1992, approximately one year after the extradition of Mr. Ng. By amending its legislation in the way described above, the State of California joined 22 other States in the United States. The purpose of the legislative amendment was not, however, to eliminate an allegedly cruel and unusual punishment, but to forestall last-minute appeals by condemned prisoners who might argue that execution by lethal gas constitutes such punishment. Not that I consider execution by lethal injection acceptable either from a point of view of humanity, but - at least - it does not stand out as an unnecessarily cruel and inhumane method of execution, as does gas asphyxiation. Canada failed to fulfil its obligation to protect Mr. Ng against cruel and inhuman punishment by extraditing him to the United States (the State of California), where he might be subjected to such punishment. And Canada did so without seeking and obtaining assurances of his non-execution by means of the only method of execution that existed in the State of California at the material time of extradition.

For dissenting opinions in this context, see Ng v. Canada (469/1991), ICCPR, A/49/40 vol. II (5 November 1993) 189 (CCPR/C/49/D/469/1991) at Individual Opinion by Messrs. A. Mavrommatis

and W. Sadi, 209, Individual Opinion by Mr. Rajsoomer Lallah, 209, Individual Opinion by Mr. Kurt Herndl, 210 at paras. 1-21, Individual Opinion by Mr. Nisuke Ando, 215, Individual Opinion by Mr. Francisco José Aguilar Urbina, 216 at para. 11 and Individual Opinion by Ms. Christine Chanet, 220.

- *Cox v. Canada* (539/1993), A/50/40 vol. II (31 October 1994) 105 (CCPR/C/52/D/539/1993) at paras. 10.4, 16.1-16.3, 17.1, 17.2, 18 and Individual Opinion by Messrs. Kurt Herndl and Waleed Sadi (concurring), 121.

  ...

  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.31/ 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.

  ...

  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 (*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 33/, 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...

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.

...

17.1 The Committee has further 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 36/, 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.

...

18. The Committee...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.
...

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Notes

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31/ Views in Communication No. 61/1979, *Leo Hertzberg et al. v. Finland*, para. 9.3.

...

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

...

36/ Views in communications Nos. 210/1986 and 225/1987, *Morgan v. Jamaica*, para. 13.6; No. 250/1987, *Reid v. Jamaica*, para. 11.6; Nos. 270/1988 and 271/1988, *Barrett and Sutcliffe v. Jamaica*, para. 8.4; No. 274/1988, *Griffiths v. Jamaica*, para. 7.4; No. 317/1988, *Martin v. Jamaica* , para. 12.1; No. 470/1991, *Kindler v. Canada*, para. 15.2.

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Individual Opinion by Messrs. Kurt Herndl and Waleed Sadi

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.

...

...[W]e 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. 35/

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." 36/ 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 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." 39/ 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.

Notes

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35/ Oppenheim, International Law, 1992 edition, Vol. 1, p. 1271.

36/ This corresponds to the principle of interpretation known as *in dubio mitius*. Ibid., p. 1278.

...

39/ 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.

For dissenting opinions in this context, see Cox. v. Canada (539/1993), ICCPR, A/50/40 vol. II (31 October 1994) 105 (CCPR/C/52/D/539/1993) at Individual Opinion by Mrs. Rosalyn Higgins, Messrs. Laurel Francis, Kurt Herndl, Andreas Mavrommatis, Birame Ndiaye and Waleed Sadi, 119, Individual Opinion by Mrs. Elizabeth Evatt, 120, Individual Opinion by Mr. Tamar Ban, 124, Individual Opinion by Messrs. Francisco José Aguilar Urbina and Fausto Pocar, 126, Individual Opinion by Ms. Christine Chanet, 126, Individual Opinion by Mr. Rajsoomer Lallah, 128, and Individual Opinion by Mr. Bertil Wennergren, 129.

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- *Weiss v. Austria* (1086/2002), ICCPR, A/58/40 vol. II (3 April 2003) 375 (CCPR/C/77/D/1086/2002) at paras. 1.1, 1.2, 2.1-2.3, 2.8, 2.11-2.14, 2.16, 7.1, 7.2, 9.2-9.4, 9.6, 10.1 and 11.1.

1.1 The author of the communication, initially dated 24 May 2002, is Sholam Weiss, a citizen of the United States of America and Israel, born on 1 April 1954. At the time of submission, he was detained in Austria pending extradition to the United States of America ("the United States")...

1.2 On 24 May 2002, the Committee, acting through its Special Rapporteur for new communications, pursuant to Rule 86 of the Committee's rules of procedure, requested the State party not to extradite the author until the Committee had received and addressed the State party's submission on whether there was a risk of irreparable harm to the author, as alleged by counsel. On 9 June 2002, the State party, without having made any submissions to the Committee, extradited the author to the United States.

...

2.1 In a trial beginning on 1 November 1998 in the District Court of Florida, the author was tried on numerous charges of fraud, racketeering and money laundering. He was represented throughout the trial by counsel of his choice. On 29 October 1999, as jury deliberations were about to begin, the author fled the courtroom and escaped. On 1 November 1999, the author was found guilty on all charges. Following submissions from the prosecution, and the author's counsel in opposition, as to whether sentencing should proceed in his absence, the Court ultimately sentenced him *in absentia* on 18 February 2000 to 845 years' imprisonment (with possibility to reduce it, in the event of good behaviour, to 711 years (sic)) and pecuniary penalties in excess of US$ 248 million.

2.2 The author's counsel lodged a notice of appeal within the ten-day time limit stipulated by law. On 10 April 2000, the United States Court of Appeals for the Eleventh Circuit rejected the motion of the author's counsel to defer dismissal of the appeal, and dismissed it on the basis of the "fugitive disentitlement" doctrine. Under this doctrine, a court of appeal may reject an appeal lodged by a fugitive on the sole grounds that the appellant is a fugitive. With that decision, the criminal proceedings against the author were concluded in the United States.1/

2.3 On 24 October 2000, the author was arrested in Vienna, Austria, pursuant to an international arrest warrant, and on 27 October 2000 transferred to extradition detention. On 18 December 2000 the United States submitted a request to the Austrian authorities for the author's extradition. On 2 February 2001, the investigating judge of the Vienna Regional Criminal Court...recommended that the Vienna Upper Regional Court...being the court of first and last instance concerning the admissibility of an extradition request, hold the author's extradition admissible.

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...

2.8 On 8 May 2002, the Upper Regional Court...found that the author's extradition was admissible on all counts except that of "perjury while a defendant" (for which the author had been sentenced to 10 years imprisonment). In conformity with the Supreme Court's decision, the Court concluded that the author had enjoyed a fair trial and that his sentence would not be cruel, inhuman or degrading. It did not address the issue of the author's right to an appeal. On 10 May 2002, the Minister of Justice allowed the author's extradition to the United States, without reference to any issues as to the author's human rights.3/

...

2.11 On 24 May, the author...petitioned the Administrative Court, challenging the Minister's decision to extradite him and seeking an injunction to stay the author's extradition, pending decision on the substantive challenge. The stay was granted and referred to the Ministry of Justice and the Vienna Regional Criminal Court.

2.12 On 26 May, an attempt was made to surrender the author. After a telephone call by the ranking officer of the airport police to the president of the Administrative Court, the author was returned to a detention facility in light of the stay issued by the Administrative Court and the author's poor health. On 6 June 2002, the investigating judge of the Vienna Regional Criminal Court considered the Administrative Court to be "incompetent" to entertain any proceedings or to bar implementation of the extradition, and directed that the author be surrendered. On 9 June 2002, the author was transferred by officials of the author's prison and of the Ministries of Justice and the Interior, to the jurisdiction of United States military authorities at Vienna airport, and returned to the United States.

2.13 At the time the author was extradited, two sets of proceedings remained pending before the Constitutional Court, neither of which had suspensive effect under the State party's law. Firstly, on 25 April 2002, the author had lodged a constitutional motion attacking the constitutionality of various provisions of the State party's extradition law, as well as of the extradition treaty with the United States, in particular its treatment of judgment *in absentia*. Secondly, on 17 May 2002, he had lodged a "negative competence challenge"... to resolve the question whether the issue of a right to an appeal must be resolved by administrative decision or by the courts, as both the Upper Regional Court as well as the Minister of Justice had declined to deal with the issue.

2.14 On 13 June 2002, the Administrative Court decided, given that the author had been removed in violation of the Court's stay on execution, that the proceedings had been deprived of any object and suspended them. The Court observed that the purpose of its order to stay extradition was to preserve the rights of the author pending the main proceedings, and that as a result no action could be taken to the author's detriment on the basis of the Minister's challenged decision. As a consequence, the author's surrender had no sufficient legal basis.

...

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2.16 On 12 December 2002, the Constitutional Court decided in the author's favour, holding that the Upper Regional Court should examine all admissibility issues concerning the author's human rights, including issues of a right to an appeal. Thereafter, the Minister's formal decision to extradite should consider any other issues of human dignity that might arise. The Court also found that the author's inability, under the State party's extradition law, further to challenge a decision of the Upper Regional Court finding his extradition admissible was contrary to rule of law principles and unconstitutional.

...

7.1 The Committee finds, in the circumstances of the case, that the State party breached its obligations under the Protocol, by extraditing the author before the Committee could address the author's allegation of irreparable harm to his Covenant rights. In particular, the Committee is concerned by the sequence of events in this case in that, rather than requesting interim measures of protection directly upon an assumption that irreversible harm could follow the author's extradition, it first sought, under rule 86 of its rules of procedure, the State party's views on the irreparability of harm. In so doing, the State party could have demonstrated to the Committee that extradition would not result in irreparable harm.

7.2 Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.

...

9.2 As to the author's claim that the pronouncement *in absentia* of his conviction and sentence resulted in a violation of article 14 of the Covenant, the Committee notes that in the present case, the author and his legal representatives were present throughout the trial, as arguments and evidence were advanced, and that thus the author self-evidently had notice that judgment, and in the event of a conviction, sentence would be passed. In such circumstances, the Committee, referring to its jurisprudence,25/ considers that no question of a violation of the Covenant by the State party can arise on the basis of the pronouncement of the author's conviction and sentence in another State.

9.3 As to the author's claim that by operation of the "fugitive disentitlement" doctrine he was denied a full appeal, the Committee notes that, on the information before it, it appears that the author - by virtue of being extradited on fewer than all the charges for which he was initially sentenced - will, according to the rule of specialty, be re-sentenced. According to information supplied to the State party, such a re-sentencing would entitle the author fully to appeal his conviction and sentence. The Committee thus need not consider whether the "fugitive disentitlement" doctrine is compatible with article 14, paragraph 5, or whether extradition to a jurisdiction where an appeal had been so denied gives rise to an issue under the Covenant in respect of the State party.

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9.4 As to whether the State party's extradition of the author to serve a sentence of life imprisonment without possibility of early release violates articles 7 and 10 of the Covenant, the Committee observes, as set out in its preceding paragraph, that the author's conviction and sentence are not yet final, pending the outcome of the re-sentencing process which would open the possibility to appeal against the initial conviction itself. Since conviction and sentence have not yet become final, it is premature for the Committee to decide, on the basis of hypothetical facts, whether such a situation gave rise to the State party's responsibility under the Covenant.

...

9.6 Concerning the author's claim that, in the proceedings before the State party's courts, he was denied the right to equality before the law, the Committee observes that the author obtained, after submission of the case to the Committee, a stay from the Administrative Court to prevent his extradition until the Court had resolved the author's challenge to the Minister's decision directing his extradition. The Committee observes that although the order to stay was duly communicated to the relevant officials, the author was transferred to United States jurisdiction after several attempts, in violation of the Court's stay. The Court itself, after the event, observed that the author had been removed from the country in violation of the Court's stay on execution and that there was no legal foundation for the extradition; accordingly, the proceedings had become moot and deprived of object in the light of the author's extradition, and would not be further pursued. The Committee further notes that the Constitutional Court found that the author's inability to appeal an adverse judgment of the Upper Regional Court, in circumstances where the Prosecutor could, and did, appeal an earlier judgment of the Upper Regional Court finding the author's extradition inadmissible, was unconstitutional. The Committee considers that the author's extradition in breach of a stay issued by the Administrative Court and his inability to appeal an adverse decision of the Upper Regional Court, while the Prosecutor was so able, amount to a violation of the author's right under article 14, paragraph 1, to equality before the courts, taken together with the right to an effective and enforceable remedy under article 2, paragraph 3, of the Covenant.

10.1 The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Austria of article 14, paragraph 1 (first sentence), taken together with article 2, paragraph 3, of the Covenant. The Committee reiterates its conclusion that the State party breached its obligations under the Optional Protocol by extraditing the author before allowing the Committee to address whether he would thereby suffer irreparable harm, as alleged.

11.1 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In the light of the circumstances of the case, the State party is under an obligation to make such representations to the United States' authorities as may be required to ensure that the author does not suffer any consequential breaches of his rights under the Covenant, which would flow from the

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State party's extradition of the author in violation of its obligations under the Covenant and the Optional Protocol. The State party is also under an obligation to avoid similar violations in the future, including by taking appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected.

_____

Notes

1/ The author relies for this proposition on a decision of another United States District Court in *United States v Bakhtiar* 964 F Supp 112. That case held that, when a person was extradited on fewer charges than s/he had been convicted of, the original conviction and sentence remained intact, but an application for habeas corpus would lie against the executive once sentence had been served in respect of the extraditable offences...

...

3/ The author provides the terms of the Treaty which provide: "Convictions in absentia.

> "If the person sought has been found guilty in absentia, the executive authority of the Requested State may refuse extradition unless the Requesting State provides it with such information or assurances as the Requested State considers sufficient to demonstrate that the person was afforded an adequate opportunity to present a defence or that there are adequate remedies or additional proceedings available to the person after surrender."

...

25/ See, for example, *Maleki v. Italy*, [Case No. 699/1996, Views adopted on 15 July 1999].

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- *Judge v. Canada* (829/1998), ICCPR, A/58/40 vol. II (5 August 2003) 76 (CCPR/C/78/D/829/1998) at paras. 2.1-2.8, 10.2-10.7, 11, 12 and Individual Opinion by Mr. Rajsoomer Lallah (concurring), 103.

...

2.1 On 15 April 1987, the author was convicted on two counts of first-degree murder and possession of an instrument of crime, by the Court of Common Pleas of Philadelphia, Pennsylvania. On 12 June 987, he was sentenced to death, by electric chair. He escaped from prison on 14 June 1987 and fled to Canada.1/

2.2 On 13 July 1988, the author was convicted of two robberies committed in Vancouver, Canada. On 8 August 1988, he was sentenced to 10 years' imprisonment. The author appealed his convictions, but on 1 March 1991, his appeal was dismissed.

2.3 On 15 June 1993, the author was ordered deported from Canada. The order was

conditional as he had announced his intention to claim refugee status. On 8 June 1994, he withdrew his claim for refugee status, at which point the deportation order became effective.

2.4 On 26 January 1995, on recommendation of the Correctional Services of Canada, his case was reviewed by the National Parole Board which ordered him detained until expiry of his sentence, i.e. 8 August 1998.2/

2.5 On 10 November 1997, the author wrote to the Minister of Citizenship and Immigration requesting ministerial intervention with a view to staying the deportation order against him, until such time as a request for extradition from the United States authorities might be sought and received in his case. If removed under the Extradition Treaty, Canada could have asked for assurances from the United States that he not be executed. In a letter, dated 18 February 1998, the Minister refused his request.3/

2.6 The author applied to the Federal Court of Canada for leave to commence an application for judicial review of the Minister's refusal. In this application, the author requested a stay of the implementation of the deportation order until such time as he would be surrendered for extradition, and a declaration that his detention in Canada and deportation to the United States violated his rights under the Canadian Charter. The author's application for leave was denied on 23 June 1998. No reasons were provided and no appeal is possible from the refusal to grant leave.

2.7 The author then petitioned the Superior Court of Quebec, whose jurisdiction is concurrent with that of the Federal Court of Canada, for relief identical to that sought before the Federal Court. On 6 August 1998, the Superior Court declined jurisdiction given that proceedings had already been undertaken in the Federal Court, albeit unsuccessfully.

2.8 The author contends that, although the ruling of the Superior Court of Quebec could be appealed to the Court of Appeal, it cannot be considered an effective remedy, as the issue would be limited to the jurisdiction of the court rather than the merits of the case.

...

Question 1. As Canada has abolished the death penalty, did it violate the author's right to life under article 6, his right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment under article 7, or his right to an effective remedy under article 2, paragraph 3, of the Covenant by deporting him to a State in which he was under sentence of death without ensuring that that sentence would not be carried out?

10.2 In considering Canada's obligations, as a State party which has abolished the death penalty, in removing persons to another country where they are under sentence of death, the Committee recalls its previous jurisprudence in *Kindler v. Canada,*35/ that it does not consider that the deportation of a person from a country which has abolished the death

penalty to a country where he/she is under sentence of death amounts *per se* to a violation of article 6 of the Covenant. The Committee's rationale in this decision was based on an interpretation of the Covenant which read article 6, paragraph 1, together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. It considered that as Canada itself had not imposed the death penalty but had extradited the author to the United States to face capital punishment, a State which had not abolished the death penalty, the extradition itself would not amount to a violation by Canada unless there was a real risk that the author's rights under the Covenant would be violated in the United States. On the issue of assurances, the Committee found that the terms of article 6 did not necessarily require Canada to refuse to extradite or to seek assurances but that such a request should at least be considered by the removing State.

10.3 While recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights - the right to life - and in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised. The Committee is mindful of the fact that the above-mentioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in States which have retained the death penalty, a broadening consensus not to carry it out. Significantly, the Committee notes that since *Kindler* the State party itself has recognized the need to amend its own domestic law to secure the protection of those extradited from Canada under sentence of death in the receiving State, in the case of *United States v. Burns.* There, the Supreme Court of Canada held that the government *must* seek assurances, in all but exceptional cases, that the death penalty will not be applied prior to extraditing an individual to a state where he/she faces capital punishment. It is pertinent to note that under the terms of this judgement, "Other abolitionist countries do not, in general, extradite without assurances."36/ The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.

10.4 In reviewing its application of article 6, the Committee notes that, as required by the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Paragraph 1 of article 6, which states that "Every human being has the inherent right to life...", is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so protect in all circumstances. Paragraphs 2 to 6 of article 6 are evidently included to avoid a reading of the first paragraph of article 6, according to which that paragraph could be understood as abolishing the death penalty as such. This construction of the article is

reinforced by the opening words of paragraph 2 ("In countries which have not abolished the death penalty...") and by paragraph 6 ("Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."). In effect, paragraphs 2 to 6 have the dual function of creating an exception to the right to life in respect of the death penalty and laying down limits on the scope of that exception. Only the death penalty pronounced when certain elements are present can benefit from the exception. Among these limitations are that found in the opening words of paragraph 2, namely, that only States parties that "have not abolished the death penalty" can avail themselves of the exceptions created in paragraphs 2 to 6. For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.

10.5 The Committee acknowledges that by interpreting paragraphs 1 and 2 of article 6 in this way, abolitionist and retentionist States parties are treated differently. But it considers that this is an inevitable consequence of the wording of the provision itself, which, as becomes clear from the *Travaux Préparatoires*, sought to appease very divergent views on the issue of the death penalty, in an effort at compromise among the drafters of the provision. The Committee notes that it was expressed in the *Travaux* that, on the one hand, one of the main principles of the Covenant should be abolition, but on the other, it was pointed out that capital punishment existed in certain countries and that abolition would create difficulties for such countries. The death penalty was seen by many delegates and bodies participating in the drafting process as an "anomaly" or a "necessary evil". It would appear logical, therefore, to interpret the rule in article 6, paragraph 1, in a wide sense, whereas paragraph 2, which addresses the death penalty, should be interpreted narrowly.

10.6 For these reasons, the Committee considers that Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author's right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out. The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author.

10.7 As to the State party's claim that its conduct must be assessed in the light of the law applicable at the time when the alleged treaty violation took place, the Committee considers that the protection of human rights evolves and that the meaning of Covenant rights should in principle be interpreted by reference to the time of examination and not, as the State party

has submitted, by reference to the time the alleged violation took place. The Committee also notes that prior to the author's deportation to the United States the Committee's position was evolving in respect of a State party that had abolished capital punishment (and was a State party to the Second Optional Protocol to the International Covenant on Human Rights, aiming at the abolition of the death penalty), from whether capital punishment would subsequent to removal to another State be applied in violation of the Covenant to whether there was a real risk of capital punishment as such (communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997 and communication No. 706/1996, *G.T. v. Australia*, Views adopted on 4 November 1997). Furthermore, the State party's concern regarding possible retroactivity involved in the present approach has no bearing on the separate issues to be addressed under question 2 below.

...

11. The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by Canada of articles 6, paragraph 1 alone and, read together with 2, paragraph 3, of the International Covenant on Civil and Political Rights.

12. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy which would include making such representations as are possible to the receiving state to prevent the carrying out of the death penalty on the author.

Notes

1/ The author states that the mode of execution was subsequently changed to execution by lethal injection.

2/ As later explained by the State party, pursuant to the Corrections and Conditional Release Act, a prisoner in Canada is entitled to be released after having served two thirds of his sentence (i.e. the statutory release date). However, the Correctional Services of Canada reviews each case, through the National Parole Board, to determine whether, if released on the statutory release date, there are reasonable grounds to believe that the released prisoner would commit an offence causing death or serious harm. Correctional Services of Canada did so find with respect to the author.

3/ As later explained by the State party and evidenced in the documentation provided, the Minister informed the author that there was no provision under sections 49 and 50 of the Immigration Act to defer removal pending receipt of an extradition request or order. However, in the event that an extradition request was received by the Minister of Justice, the removal order would be deferred pursuant to paragraph 50(1)(a) of the Immigration Act. An extradition request was never received.

...

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35/ [*Kindler v. Canada*, Communication No. 470/1990, Views adopted on 30 July 1993].

36/ [*United States v. Burns*, [2001] S.C.J. No. 8].

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...

Individual Opinion of Mr. Rajsoomer Lallah (concurring)

I entirely agree with the Committee's revision of the approach which it had adopted in *Kindler v. Canada* in relation to the correct interpretation to be given to the "inherent right to life" guaranteed under article 6 (1) of the Covenant. This revised interpretation is well explicated in paragraphs 10.4 and 10.5 of the present Views of the Committee. I wish, however, to add three observations.

First, while it is encouraging to note, as the Committee does in paragraph 10.3 of the present Views, that there is a broadening international consensus in favour of the abolition of the death penalty, it is appropriate to recall that, even at the time when the Committee was considering its views in *Kindler* some 10 years ago, the Committee was quite divided as to the obligations which a State party undertakes under article 6 (1) of the Covenant, when faced with a decision as to whether to remove an individual from its territory to another State where that individual had been sentenced to death. No less than five members of the Committee dissented from the Committee's Views, precisely on the nature, operation and interpretation of article 6(1) of the Covenant. The reasons which led those five members to dissent were individually expressed in separate individual opinions...

My second observation is that other provisions of the Covenant, in particular, articles 5 (2) and 26, may be relevant in interpreting article 6 (1), as noted in some of the individual opinions.

It is also encouraging that the Supreme Court of Canada has held that in similar cases assurances must, as the Committee notes, be obtained, subject to exceptions. I wonder to what extent these exceptions could conceptually be envisaged given the autonomy of article 6(1) and the possible impact of article 5(2) and also article 26 which governs the legislative, executive and judicial behaviour of States parties. That, however, is a bridge to be crossed by the Committee in an appropriate case.

- *Everett v. Spain* (961/2000), A/59/40 vol. II (9 July 2004) 436 at paras. 2.1-2.3, 6.4, 6.6 and 7.

...

2.1 The author arrived in Spain from the United Kingdom in 1983 and settled in Marbella

with his wife. On 5 July 2000, he was arrested by the police pursuant to an extradition request from the United Kingdom based on a robbery alleged to have taken place in London in 1983, and on his alleged involvement in narcotics trafficking.

2.2 The author applied for provisional release. On 8 July 2000, Magistrates' Court No. 6 ruled that he should remain in provisional detention. The author appealed to the same court, arguing that he was a sick man and 70 years of age, and that he could not flee from justice because he had no identity documents. The court rejected his appeal in a judgement dated 20 July 2000. The author appealed to the First Criminal Division of the High Court, but his application was rejected on 10 October 2000. He also submitted an application for *amparo* to the Constitutional Court, but this was rejected on 16 November 2000.

2.3 The author's extradition was granted in a decision of the First Criminal Division dated 20 February 2001. The author submitted an appeal for reconsideration, which was rejected on 18 May 2001. The author again applied to the Constitutional Court for *amparo*, but his appeal was denied on 22 June 2001.

...

6.4 Recalling its earlier case law the Committee considers that although the Covenant does not require that extradition procedures be judicial in nature, extradition as such does not fall outside the protection of the Covenant. On the contrary, several provisions, including articles 6, 7, 9 and 13, are necessarily applicable in relation to extradition. Particularly, in cases where, as in the current one, the judiciary is involved in deciding about extradition, it must respect the principles of impartiality, fairness and equality, as enshrined in article 14, paragraph 1, and also reflected in article 13 of the Covenant. Nevertheless, the Committee considers that even when decided by a court the consideration of an extradition request does not amount to the determination of a criminal charge in the meaning of article 14. Consequently, those of the author's claims that relate to specific provisions in paragraphs 2 and 3 of article 14, are incompatible *ratione materiae* with the provisions in question and hence inadmissible pursuant to article 3 of the Optional Protocol...

...

6.6 The Committee notes that the author alleges that the United Kingdom requested his extradition on the basis of an alleged conspiracy to fraudulently evade the prohibition on the import of drugs and that the initial charge considered by the State party was that of having imported quantities of hashish, for which the prison sentence was not more than one year, so that it was not appropriate to grant extradition. In the Committee's opinion, the correctness of the decision to extradite to the United Kingdom, which could be contested in the light of article 2, paragraph 1, of the European Convention on Extradition and the Law on Passive Extradition, is beyond the scope of any particular provision of the Covenant. For this reason, the Committee considers that this part of the communication is inadmissible *ratione materiae*.

EXTRADITION

7. Consequently, the Committee decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;
...

CAT

- *Chipana* v. *Venezuela* (110/1998), CAT, A/54/44 (10 November 1998) 96 at paras. 6.2-6.4, 7 and 8.

...
6.2 The question that must be elucidated by the Committee is whether the author's extradition to Peru would violate the obligation assumed by the State party under article 3 of the Convention not to extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

6.3 The Committee must then decide whether there are well-founded reasons for believing that the author would be in danger of being subjected to torture on her return to Peru. In accordance with article 3, paragraph 2, of the Convention, the Committee should take account, for the purpose of determining whether there are such grounds, of all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. However, the existence of a pattern of this nature does not in itself constitute a sufficient reason for deciding whether the person in question is in danger of being subjected to torture on her return to this country; there must be specific reasons for believing that the person concerned is personally in danger. Similarly, the absence of this pattern does not mean that a person is not in danger of being subjected to torture in her specific case.

6.4 When considering the periodic reports of Peru, A/50/44, paras. 62-73, and A/53/44, paras. 197-205, the Committee received numerous allegations from reliable sources concerning the use of torture by law enforcement officials in connection with the investigation of the offences of terrorism and treason with a view to obtaining information or a confession. The Committee therefore considers that, in view of the nature of the accusations made by the Peruvian authorities in requesting the extradition and the type of evidence on which they based their request, as described by the parties, the author was in a situation where she was in danger of being placed in police custody and tortured on her return to Peru.

7. In the light of the above, the Committee...considers that the State party failed to fulfil its obligation not to extradite the author, which constitutes a violation of article 3 of the

Convention.

8. Furthermore, the Committee is deeply concerned by the fact that the State party did not accede to the request made by the Committee...that it should refrain from expelling or extraditing the author while her communication was being considered by the Committee and thereby failed to comply with the spirit of the Convention. The Committee considers that the State party, in ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with it in good faith in applying the procedure. Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee.

- *P.E. v. France* (193/2001), CAT, A/58/44 (21 November 2002) 135 (CAT/C/29/D/193/2001) at paras. 2.1-2.4, 2.6-2.9, 2.13 and 6.2-6.7.

...
2.1 In November 1996, 2/ the complainant was arrested in the Landes region in the company of her partner, Juan Luis Agirre Lete, during a French customs check, and placed in pre-trial detention in Paris. Following her arrest, she was sentenced to 30 months' imprisonment on 23 February 1999 on charges of participating in a conspiracy as an alleged member of the Basque separatist organization, Euskadi Ta Askatasuna (ETA). 3/

2.2 As soon as she was arrested, the Spanish authorities made a first request for her extradition, but the request was later withdrawn on grounds of mistaken identity. A second request for extradition was lodged by the Spanish authorities a year later, alleging cooperation with an armed group, on the basis of evidence that was claimed to be questionable but was given a favourable reception by the French authorities.

2.3 A third request for extradition 4/ was lodged by Spain on the basis of a statement made by a certain Mikel Azurmendi Penagarikano, who was arrested in Seville on 21 March 1998 by the Spanish Civil Guard and who is alleged to have suffered a variety of treatments in breach of the Convention while being held. The complainant adds that Mr. Azurmendi's partner was arrested at the same time as he was and also suffered treatment in breach of the Convention.

2.4 While in custody, Mikel Azurmendi is reported to have made two statements under duress to the Civil Guard on 23 and 24 March 1998. In these statements, which are said to contain many contradictions and implausibilities, the complainant was implicated, with some 30 others, as a member of ETA's "Madrid Commando", and accused of carrying out, together with others, surveillance and checks on the route taken in Madrid by a van belonging to the

general staff of the Spanish air force, with the aim of carrying out an act of violence, and of participating, together with others, in the preparation of an explosive device placed on board a vehicle that was used by other members of the commando in an attempted act of violence on 25 January 1994. The complainant nevertheless maintains that she had long since left Madrid at the time of the events.

...

2.6 At the end of his period in custody, on 25 March 1998, Mr. Azurmendi appeared before examining magistrate No. 6 of the National High Court in Madrid. He lodged a complaint relating to the torture to which he had been subjected during his time in custody and retracted his earlier statements. This complaint is still being investigated.

2.7 While in Madrid prison, Mr. Azurmendi was also examined by the prison medical services, and a court-ordered medical report was delivered on 18 October 1998. These medical reports and the testimony of a number of detainees arrested on the same day as Mr. Azurmendi corroborate his allegations of torture and ill-treatment.

2.8 After the complainant had been implicated in the statements made by Mr. Azurmendi on 23 and 24 March 1998, the Spanish procurator's office stipulated that proceedings against the complainant would be subject to the evidence. As the results were negative, Mr. Ismael Moreno Chamaro, central examining magistrate No. 2 attached to the National High Court in Madrid, issued an order on 29 October 1998 that the complainant should be imprisoned and committed for trial. On that basis, the judge issued a request for the extradition of the complainant on 22 December 1998. By means of a note verbale dated 10 March 1999, the Spanish Government, through its embassy, requested the French authorities to extradite the complainant. On 15 June 1999, she was placed in detention pending extradition in Fresnes prison. The request for extradition was heard in public session on 24 May 2000 by the first indictment division of the Paris Court of Appeal which, on 21 June 2000, ruled partially 5/ in favour of extradition in respect of the acts described by Spain as 19 attempted terrorist murders.

2.9 The complainant emphasizes that the request for extradition did not contain a copy of the statement that Mr. Azurmendi made on 25 March 1998 to the examining magistrate of the National High Court. In that regard, the complainant's counsel argued before the indictment division of the Paris Court of Appeal that it was unacceptable that, since the charges carried very severe prison terms, the requesting State had not mentioned the statement in which Mr. Azurmendi retracted everything that he had said and also stated that he did not know the complainant.

...

2.13 On 29 September 2000, the French Government issued a decree granting extradition of the complainant to the Spanish authorities. On 3 January 2001, the complainant appealed against the decree to the Council of State...The Council of State rejected this appeal by a

decision dated 7 November 2001. The complainant was handed over to the Spanish authorities on the same day.

...

6.2 The Committee notes the complainant's allegations concerning the circumstances in which Mr. Azurmendi's statements were made, the evidence that she adduced in support of the allegations and the arguments put forward by the parties concerning the obligations of States parties under article 15 of the Convention.

6.3 The Committee considers in this regard that the generality of the provisions of article 15 derive from the absolute nature of the prohibition of torture and imply, consequently, an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture. The Committee finds that the statements at issue constitute part of the evidence of the procedure for the extradition of the complainant, and for which the State party is competent. In this regard, in the light of the allegations that the statements at issue, which constituted, at least in part, the basis for the additional extradition request, were obtained as a result of torture, the State party had the obligation to ascertain the veracity of such allegations.

6.4 The Committee notes that the French authorities, both judicial and administrative, examined the complainant's allegations and found that they had not been sufficiently substantiated. The Committee also notes that Mr. Azurmendi's complaint concerning the treatment to which he was allegedly subjected during custody is still being considered by the Spanish judicial authorities, which are expected to rule, at the end of the judicial proceedings, on whether Mr. Azurmendi's confession was obtained in an unlawful manner. The Committee considers that only this judicial ruling should be taken into consideration, and not the simple retraction by Mr. Azurmendi of a confession which he had previously signed in the presence of counsel.

6.5 The Committee reiterates in this regard that it is for the courts of the States parties to the Convention, and not the Committee, to evaluate facts and evidence in a particular case. It is for the appellate courts of States parties to the Convention to examine the conduct of the trial, unless it can be ascertained that the manner in which the evidence was evaluated was clearly arbitrary or amounted to a denial of justice, or that the trial judge had clearly violated his obligation of impartiality.

6.6 The Committee, bearing in mind that it is for the author to demonstrate that her allegations are well founded, considers that, on the basis of the facts before it, it cannot conclude that it has been established that the statements at issue were obtained as a result of torture.

6.7 Accordingly, the Committee is of the opinion that the facts before it do not enable it to

establish that there has been a violation of article 15 of the Convention.

_____

Notes

...

2/ The complainant does not specify the exact date of her arrest.

3/ In this regard, the complainant stresses that her relations with her partner have always remained strictly at the personal level.

4/ This is the request referred to by the State party as an "additional request" - see paragraphs 4.4 ff.

5/ The State party explains in its observations (see paragraphs 4.1 ff.) why the ruling is partially in favour of extradition.

_____

- *G. K. v. Switzerland* (219/2002), CAT, A/58/44 (7 May 2003) 177 (CAT/C/30/D/219/2002) at paras. 1.1, 2.1-2.3, 2.6, 2.8 and 6.3-6.12.

...

1.1 The complainant is G. K., a German national, born on 12 January 1956, at the time of the submission of the complaint held at the police detention centre at Flums (Switzerland), awaiting extradition to Spain. She claims that her extradition to Spain would constitute a violation by Switzerland of articles 3 and 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. She is represented by counsel.

...

2.1 In 1993, the complainant worked as a language teacher in Barcelona, Spain, where she became involved with one Benjamin Ramos Vega, a Spanish national. During that time, the complainant and Mr. Ramos Vega both rented apartments in Barcelona, one at Padilla Street, rented on 21 April 1993 in Mr. Ramos Vega's name, and one at Aragón Street, rented on 11 August 1993 in the complainant's name for the period of one year. According to counsel, the complainant had returned to Germany by October 1993.

2.2 On 28 April 1994, Felipe San Epifanio, a convicted member of the "Barcelona" commando of the Basque terrorist organization Euskadi Ta Askatasuna (Basque Fatherland and Liberty) (ETA), was arrested by Spanish police in Barcelona. The judgement of the Audiencia Nacional, dated 24 September 1997, sentencing him and other ETA members to prison terms states that, upon his arrest, Mr. San Epifanio was thrown to the floor by several policemen after he had drawn a gun, thereby causing him minor injuries which reportedly healed within two weeks. Based on his testimony, the police searched the apartment at

Padilla Street a/ on 28 April 1994, confiscating firearms and explosives stored there by the commando. Subsequent to this search, Mr. Ramos Vega left Spain for Germany.

2.3 The Juzgado Central de Instrucción No. 4 de Madrid issued an arrest warrant, dated 23 May 1994, against both Mr. Ramos Vega and the complainant on suspicion of collaboration with ETA as well as possession of firearms and explosives. A writ was issued on 6 February 1995 by the same examining judge indicting the complainant and Mr. Ramos Vega for having rented, "under their name, the apartments at Padilla and Aragón streets, respectively, places which served as a refuge and for the hiding of arms and explosives, which the members of the commando had at their disposal for carrying out their actions".b/

...

2.6 The complainant was arrested by Swiss police when crossing the Austrian-Swiss border at St. Margrethen on 14 March 2002, on the basis of a Spanish search warrant dated 3 June 1994. She was provisionally detained, pending a final decision on her extradition to Spain. During a hearing on 20 March 2002, she refused to consent to a simplified extradition procedure. By diplomatic note of 22 April 2002, the Government of Spain submitted an extradition request to the State party, based on an international arrest warrant dated 1 April 2002, issued by the Juzgado Central de Instrucción No. 4 at the Audiencia Nacional. This warrant is based on the same charges as the original arrest warrant and the writ of indictment against both the complainant and Mr. Ramos Vega.

...

2.8 By decision of 8 August 2002, the Federal Office of Justice granted the Spanish extradition request, subject to the condition that the complainant would not be tried for having committed the alleged offences for political motives and that the severity of the punishment would not to be increased on the basis of such motive...

...

6.3 The Committee recalls that during the consideration of the fourth periodic report submitted by Spain under article 19 of the Convention, it noted with concern the dichotomy between the assertion of the Government that, isolated cases apart, torture and ill-treatment do not occur in Spain, and the information received from non-governmental sources which is said to reveal instances of torture and ill-treatment by the State security and police forces.n/ It also expressed concern about the fact that *incommunicado* detention for up to a maximum of five days has been maintained for specific categories of particularly serious offences, given that during this period, the detainee has no access to a lawyer or to a doctor of his choice, nor is he/she able to contact his family.o/ The Committee considered that the *incommunicado* regime facilitates the commission of acts of torture and ill-treatment.p/

6.4 Notwithstanding the above, the Committee reiterates that its primary task is to determine whether the individual concerned would personally risk torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient

grounds for determining that the particular person would be in danger of being subjected to torture upon his/her return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

6.5 As to the complainant's personal risk of being subjected to torture following extradition to Spain, the Committee has noted the complainant's arguments that the Spanish extradition request was based on false accusations; that, as an ETA suspect, she was at a personal risk of being tortured during *incommunicado* detention, in the absence of access to a lawyer of her choice during that time; that other persons had been subjected to torture in circumstances that she considers to be similar to her case; and that consular protection by Germany as well as the prior designation of a lawyer constituted protection against possible abuse during *incommunicado* detention in theory only. It has equally noted the State party's submission that, in addition to the above-mentioned protection, the international attention drawn to the complainant's case, as well as the possibility for her to claim torture or ill-treatment by the Spanish authorities before the Committee and other international instances, constitute further guarantees preventing Spanish police from subjecting her to such treatment.

6.6 Having regard to the complainant's reference to the Committee's views in the case of Josu Arkauz Arana, the Committee observes that the specific circumstances of that case, which led to the finding of a violation of article 3 of the Convention, differ markedly from the circumstances in the present case. The deportation of Josu Arkauz Arana "was effected under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police, without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer".g/ By contrast, the complainant's extradition to Spain was preceded by a judicial review by the Swiss Federal Tribunal of the decision of the Federal Office of Justice to grant the Spanish extradition request. The Committee notes that the judgement of the Federal Court, as well as the decision of the Federal Office, both contain an assessment of the risk of torture that the complainant would be exposed to following an extradition to Spain. The Committee, therefore, considers that, unlike in the case of Josu Arkauz Arana, the legal guarantees were sufficient, in the complainant's case, to avoid placing her in a situation where she was particularly vulnerable to possible abuse by the Spanish authorities.

6.7 The Committee observes that possible inconsistencies in the facts on which the Spanish extradition request was based cannot as such be construed as indicating any hypothetical intention of the Spanish authorities to inflict torture or ill-treatment on the complainant, once the extradition request was granted and executed. Insofar as the complainant claims that the State party's decision to extradite her violated articles 3 and 9 of the European Convention on Extradition of 1957, the Committee observes that it is not competent *ratione materiae* to

pronounce itself on the interpretation or application of that Convention.

6.8 Lastly, the Committee notes that, subsequent to the complainant's extradition to Spain, it has received no information on torture or ill-treatment suffered by the complainant during *incommunicado* detention. In the light of the foregoing, the Committee finds that the complainant's extradition to Spain did not constitute a violation by the State party of article 3 of the Convention.

6.9 With regard to the alleged violation of article 15 of the Convention, the Committee has noted the complainant's arguments that, in granting the Spanish extradition request, which was, at least indirectly, based on testimony extracted by torture from Felipe San Epifanio, the State party itself had relied on this evidence, and that article 15 of the Convention applied not only to criminal proceedings against her in Spain, but also to the extradition proceedings before the Swiss Federal Office of Justice as well as the Federal Court. Similarly, the Committee has noted the State party's submission that the admissibility of the relevant evidence was a matter to be decided by the Spanish courts.

6.10 The Committee observes that the broad scope of the prohibition in article 15, proscribing the invocation of any statement which is established to have been made as a result of torture as evidence "in any proceedings", is a function of the absolute nature of the prohibition of torture and implies, consequently, an obligation for each State party to ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction, including extradition proceedings, have been made as a result of torture.r/

6.11 At the same time, the Committee notes that, for the prohibition in article 15 to apply, it is required that the statement invoked as evidence be "established to have been made as a result of torture". As the complainant herself stated, criminal proceedings initiated by Felipe San Epifanio against his alleged torturers were discontinued by the Spanish authorities. Considering that it is for the complainant to demonstrate that her allegations are well founded, the Committee concludes that, on the basis of the facts before it, it has not been established that the statement of Mr. San Epifanio, made before Spanish police on 28 April 1994, was obtained by torture.

6.12 The Committee reiterates that it is for the courts of the States parties to the Convention, and not for the Committee, to evaluate the facts and evidence in a particular case, unless it can be ascertained that the manner in which such facts and evidence were evaluated was clearly arbitrary or amounted to a denial of justice. The Committee considers that the State party's decision to grant the Spanish extradition request does not disclose a violation by the State party of article 15 of the Convention.

...

EXTRADITION

Notes

a/ Apparently, the apartment was rented but not inhabited by Mr. Ramos Vega.

b/ Translation by the secretariat.

...

n/ See chap. III, para. 60 of [*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 44* (A/58/44)].

o/ [*Ibid*.], See chap. III, para. 62...

p/ *Ibid*.

q/ *Josu Arkauz Arana v. France*, [Communication No. 63/1997, Views adopted on 9 November 1999. *Official Records of the General Assembly, Fortieth Session, Supplement No. 44* (A/55/44), annex VIII, sect. A], para. 11.5.

r/ See *P. E. v. France*, Communication No. 193/2001, in section A of annex VI to [*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 44* (A/58/44)].