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Seventy-eighth session
14 July – 8 August 2003

VIEWS

Communication No. 829/1998

Submitted by:	Roger Judge (represented by counsel, Mr. Eric Sutton)
Alleged victim:	The author
State party:	Canada
Date of communication:	7 August 1998 (initial submission)
Document references:	- Special Rapporteur's rule 91 decision, transmitted to the State party on 20 August 1999 (not issued in document form) - CCPR/C/75/D/829/1998/Rev.1 – decision on admissibility dated 17 July 2002
Date of adoption of Views:	5 August 2002

On 5 August 2003, the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 829/1998. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

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

Seventy-eighth session

concerning

Communication No. 829/1998**

Submitted by:	Roger Judge (represented by counsel, Mr. Eric Sutton)
Alleged victim:	The author
State party:	Canada
Date of communication:	7 August 1998 (initial submission)

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

Meeting on 5 August 2002,

Having concluded its consideration of communication No. 829/1998, submitted to the Human Rights Committee on behalf of Mr. Roger Judge under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 7 August 1998, is Mr. Roger Judge, a citizen of the United States of America, at the time of the submission detained at Ste-Anne-des-Plaines,

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 85 of the Committee's rules of procedure, Ms. Ruth Wedgwood did not participate in adoption of the views.

An individual opinion signed by Committee member Mr. Rajsoomer Lallah is appended to the present document.

Québec, Canada, and deported to the United States on the day of submission, i.e. 7 August 1998. He claims to be a victim of violations by Canada of articles 6, 7, 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

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 1987, 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.

[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.

2.7 The author then petitioned the Superior Court of Québec, 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 Québec 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.

The complaint

3.1 The author claims that Canada imposed mental suffering upon him that amounts to cruel, inhuman and degrading treatment or punishment, having detained him for ten years while the certainty of capital punishment was hanging over his head at the conclusion of his sentence, and this constitutes a breach of article 7 of the Covenant. He argues that he suffered from the "death row phenomenon", during his detention in Canada. This is explained as a state of mental or psychological anguish, and, according to him, it matters little that he would not be executed on Canadian soil. The author claims that the State party had no valid sentencing objective since he was sentenced to death in any event, even though in another State party, and therefore only served to prolong the agony of his confinement while he awaited deportation and execution. It is also submitted that in this respect, the author was not treated with humanity and respect for the inherent dignity of the human person, in violation of article 10 of the Covenant.

3.2 The author claims that "by detaining [him] for ten years despite the fact that he faced certain execution at the end of his sentence, and proposing now to remove him to the United States, Canada has violated [his] right to life, in violation of article 6 of the Covenant."

3.3 The author also claims that, because of his status as a fugitive he is denied a full appeal in the United States, under Pennsylvanian law, and therefore by returning him to the United States Canada participated in a violation of article 14, paragraph 5, of the Covenant. In this regard, the author states that the trial judge made errors in instructing the jury, which would have laid the groundwork for appeals against both his conviction and sentence.

State party's observations on admissibility

4.1 The State party contends that the author's claims are inadmissible for failure to exhaust domestic remedies, failure to raise issues under the Covenant, failure to substantiate his claims and incompatibility with the Covenant.

4.2 On the issue of non-exhaustion with respect to the author's detention in Canada, the State party argues firstly that the author failed to raise his claims before the competent courts in Canada at the material times. Both during his 1988 sentencing hearing and on appeal of his convictions of robbery the author failed to complain, as he now alleges, that a 10-year sentence, in light of his convictions and sentences in the United States, constituted cruel treatment or punishment in violation of section 12 of the Canadian Charter of Rights and Freedoms. These arguments were not made until 1998, when the author's removal from Canada was imminent.

4.3 Secondly, the State party argues that the author failed to appeal to the Appeal Division of the National Parole Board of Canada or to challenge before the courts both the National Parole Board's decision not to release him before the expiration of his full sentence and the annual reviews of that decision. If he had been successful with these appeal avenues, he might have been released prior to the expiration of his sentence. Failure to pursue such remedies is clearly inconsistent with the author's position that Canada violated his Covenant rights in detaining him in Canada rather than removing him to the United States.

4. 4 Thirdly, the State party argues that if the author had wanted to be removed to the United States rather than continue to be detained in Canada, he could also have requested the Department of Citizenship and Immigration to intervene before the National Parole Board for the purposes of arguing that he be released and removed to the United States. Furthermore, he could have applied to have been transferred to Pennsylvania pursuant to the Transfer of Offenders Treaty between Canada and the United States of America on the Execution of Penal Sentences. In the State party's view, the author's failure diligently to pursue such avenues casts doubt on the genuineness of his assertion that he wanted to be removed to the United States, where he had been sentenced to death.

4.5 On the issue of non-exhaustion with respect to the author's request for a stay of the deportation order to the United States, the State party submits that the author failed to appeal the ruling of the Superior Court of Québec to the Court of Appeal. Contrary to the author's view, that this remedy would not be useful as it would be limited to the jurisdiction of the court rather than the merits of the case, the State party argues that the author's petition was dismissed for both procedural and substantive reasons, and, therefore, the Court of Appeal could have reviewed the judgement on the merits.

4.6 The State party contends that the author has failed to show that his detention and subsequent removal to the United States raise any issues under articles 6, 7, 10 or 14, paragraph 5 of the Covenant. If the Committee is of the opinion that these articles do apply to the instant case, the State party argues that the author has failed to substantiate any of these claims for the purposes of admissibility.

4.7 With respect to the alleged violation of articles 7 and 10, the State party argues that the author has not cited any authority in support of his proposition that the "death row phenomenon" can apply to a prisoner detained in an abolitionist State for crimes committed in that State, where that person has been previously sentenced to capital punishment in another State. The author was sentenced to imprisonment for robberies he committed in Canada and was not on death row in Canada. It is submitted, therefore, that the "death row phenomenon" does not apply in the circumstances and he has no claim under articles 7 and 10.

4.8 On the author's argument that the sentencing in Canada had no valid objective as he had been sentenced to death in the United States, the State party submits that the sentencing principle of retribution, denunciation and deterrence require the imposition of a sentence in Canada for crimes committed in Canada.

4.9 According to the State party, if fugitives in Canada facing the death penalty were not prosecuted and sentenced for crimes in Canada, this would lead to potential abuses. First, it would create a double standard of justice. Such fugitives would be immune from prosecution

while individuals not facing the death penalty would be prosecuted and sentenced, even though the crime committed in Canada was the same in both cases. Similarly, it would encourage lawlessness among such fugitives since in Canada they would be de facto immune from prosecution and imprisonment. In essence, fugitives sentenced to death for murder in the United States would be given a "carte blanche" to commit subsequent offences in Canada.

4.10 If the Committee were to find that the facts of this case do raise issues under articles 7 and 10, the State party submits that the author has not substantiated a violation of these articles for the purposes of admissibility. The State party argues that the Committee has on many occasions reiterated that lengthy detention on death row does not constitute a violation of articles 7 and 10 in the absence of some further compelling circumstances.[4] It states that the facts and circumstances of each case need to be examined, and that in the past the Committee has had regard to the relevant personal factors of the author, the specific conditions of detention on death row and whether the proposed method of execution is particularly abhorrent. No such circumstances apply in this case. Moreover, it states that, where the delay in awaiting execution is the fault of the accused, such as where he escapes custody, the accused cannot be allowed to take advantage of this delay. In this case, the delay arises from the author's own criminal acts, his escape and the robberies he committed in Canada.[5]

4.11 With respect to the alleged violation of article 6, the State party states that the author has provided no authority for his proposition that *detaining* an individual for crimes committed in that State despite the fact that the same person has been sentenced to death in another State raises an issue under article 6. The author was sentenced in Canada for robberies he committed there and is not facing the death penalty in Canada.

4.12 The State party contends that the author has failed to substantiate his claim that his *deportation* from Canada would violate article 6. It recalls the Committee's jurisprudence that "if a State party takes a decision relating to a person within its jurisdiction and the necessary and foreseeable consequences is that the person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant."[6] The State party also invokes the Committee's decision in *Reid v. Jamaica*, when it decided that the requirement of article 6 that a sentence of death may be "imposed in accordance with the law" implied that the procedural guarantees prescribed in the Covenant were observed.[7] According to the State party, if the procedural guarantees of the Covenant were observed, there is no violation of article 6. The only due process issue raised by the author was the narrower appeal of conviction and sentence allowed under Pennsylvanian law. In this respect, the State party contends that the author has not substantiated his claim that he was deprived of his right to review by a higher tribunal and it refers *mutatis mutandis* to its submissions on article 14, paragraph 5, (below).

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[4] The State party refers to the following cases *Pratt and Morgan v. Jamaica, Communication Nos. 210/1986, 225/1987, Barrett and Sutcliffe v. Jamaica, Communication Nos. 270/1988, 271/1988, Kindler v. Canada, Communication No. 470/1990, Views adopted on 30 July 1993, Johnson v. Jamaica, Communication No. 588/1994 and Francis v. Jamaica, Communication No. 606/1994.*

[5] The State party refers to *Pratt and Morgan,* supra, *Wallen and Baptiste (No. 2) (1994), 45 W.I.R. 405 at 436 (C.A., Trinidad & Tobago).*

[6] *Kindler,* supra.

[7] *Reid v. Jamaica, Communication No. 250/1987.*

4.13 On article 14, paragraph 5, of the Covenant, the State party presents several arguments to demonstrate that an issue under this article does not arise. Firstly, it contends that the author's complaint has its basis in the law of the United States, State of Pennsylvania and not in Canadian law. Therefore, the author has no *prima facie* claim against Canada.

4.14 Secondly, the State party contends that the author's right to review by a higher tribunal should be treated under article 6 and not separately under article 14. It argues that, given that the Committee interprets article 6, paragraph 2, as requiring the maintenance of procedural guarantees in the Covenant, including the right to review by the higher tribunal stipulated in article 14, paragraph 5, to the extent that this case raises issues under article 6, this right to review should be treated under article 6 only.

4.15 Thirdly, the State party argues that the author's detention in and removal from Canada does not raise an issue under article 14, as his incarceration for robberies committed in Canada did not have any necessary and foreseeable consequence on his right to have his convictions and sentences reviewed in Pennsylvania. It is also submitted that the author's removal did not have any necessary and foreseeable consequence on his appeal rights since the author's appeal had already taken place in 1991, while he was imprisoned in Canada.

4.16 The State party argues that, although in the United States a prisoner's rights may be adversely affected in the event that he escapes from custody, the author has failed to substantiate his claim that his right to review by a higher tribunal was violated. It encloses the judgement of the Supreme Court of Pennsylvania on the author's appeal, indicating that the Supreme Court of Pennsylvania is statutorily mandated to review all death sentences, in particular the sufficiency of the evidence to sustain a conviction for first degree murder. This statutory review was undertaken with respect to the author's case, on 22 October 1991, at which he was legally represented. The Supreme Court affirmed both the conviction and sentence. On the allegation that the trial judge committed errors in instructing the jury and that those errors had not be reviewed by the Supreme Court, the State party submits that even if the judge so erred, upon a realistic view of the evidence, a properly instructed jury could not have come to any other conclusion than that reached by the jury in the author's trial.

4.17 The State party further submits that two additional review recourses are available to the author in the United States. The first is a petition filed in the Court of Common Pleas under Pennsylvania's Post-Conviction Relief Act (PCRA) in which constitutional issues may be raised. The State party claims that the author has already filed a petition under this Act. The second is a petition for writ of habeas corpus filed in the District Court for the Eastern District of Pennsylvania. This court has the power to overturn the judgements of the courts of the Commonwealth of Pennsylvania, if it concludes that the conviction was pronounced in violation of rights guaranteed to criminal defendants under federal law. If the author is unsuccessful in both of these petitions, he may appeal to the higher courts and ultimately to the United States Supreme Court.

4.18 In addition, the State party submits that the author could petition the Governor of Pennsylvania for clemency or to have his sentence commuted to a less severe one. Prior flight does not preclude such an application. According to the State party, in light of the recourses available to a prisoner on death row, only two executions were carried out in Pennsylvania over the past thirty years.

4.19 Finally, with a view to admissibility of the communication as a whole, the State party argues that it is incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol, and article 5, paragraph 1 of the Covenant. It is submitted that the provisions of the Covenant should not be raised as a shield to criminal liability and the author should not be allowed to rely on the Covenant to support his argument that he should not have been prosecuted in Canada for crimes he committed there. Moreover, the Covenant should not be used by those who through their own criminal acts have voluntarily waived certain rights. The State party contends that the author's claims are contradictory. On the one hand, he claims that his removal from Canada to the United States violates articles 6 and 14, paragraph 5 of the Covenant, on the other, that his detention violates articles 7 and 10. Canada is alleged therefore, to violate the Covenant by removing him as well as not removing him.

State party's response on the merits

5.1. With respect to the allegation of a violation of articles 7 and 10, the State party submits that contrary to what is implied in the author's submissions, the "death row phenomenon" is not solely the psychological stress experienced by inmates sentenced to death, but relates also to other conditions including, the periodic fixing of execution dates, followed by reprieves, physical abuse, inadequate food and isolation.

5.2 With respect to the author's request for a stay of his deportation until such time as Canada received an extradition request and an assurance that the death penalty would not be carried out, the State party submits that the United States has no obligation to seek extradition of a fugitive nor to give such assurances. The Government of Canada cannot be expected to wait for such a request or to wait for the granting of such assurances before removing fugitives to the United States. The danger of a fugitive going unpunished, the lack of authority to detain him while waiting for an extradition request and the importance of not providing a safe haven for those accused of or found guilty of murder, militate against the existence of such an obligation. Moreover, the Minister of Citizenship and Immigration has a statutory obligation to execute a removal order as soon as reasonably practicable.

5.3 On the alleged violation of article 6 and the author's contention that errors were committed during his trial in Pennsylvania, which would have provided the basis for a appeal, the State party states that it is not for the Committee to review the facts and evidence of a trial unless it could be shown to have been arbitrary or a denial of justice.[8] It would be inappropriate to impose an obligation on it to review trial proceedings, particularly given that they occurred in the United States.

5.4 In relation to the allegation of a violation of article 14, paragraph 5, the State party submits that this article does not specify what type of review is required and refers to the Travaux Préparatoires of the Covenant, which it claims envisaged a broad provision that recognised the principle of a right to review while leaving the type of review procedure to be determined in accordance with their respective legal systems.[9]

[8] *McTaggart v. Jamaica, Communication No. 749/1997.*

[9] The State party refers to M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (Strasbourg: N.P. Engel, Publisher, 1993) at 266.

5.5 The State party reiterates that the author's case was fully reviewed by the Supreme Court of Pennsylvania. It submits that, although originally in Pennsylvania a defendant who escaped custody was held to have forfeited his right to a full appellate review, the Supreme Court of this state has recently departed from this position, holding that a fugitive should be allowed to exercise his post-trial rights in the same manner as he would have done had he not become a fugitive. This is dependent, the State party clarifies, on whether the fugitive returns on time to file post-trial motions or an appeal. It also notes that filing deadlines are subject to exceptions which allow for late filing.[10]

The author's comments on State party's response on admissibility and the merits

6.1 In relation to the State party's arguments on non-exhaustion of domestic remedies with respect to the author's detention in Canada, the author submits that it was not until 1993, almost 5 years after his robbery convictions, that he was ordered deported. He argues that he could have been granted early parole for the purposes of deportation to the United States and as such could not have known in 1988 that Canada would see fit to detain him for the full 10 years of his sentence. Furthermore, the author could not have known in 1988 that although the United States was willing to seek extradition, it would not do so "as the eventual deportation of the author to the United States appeared less problematic."

6.2 On the question of an appeal to the National Parole Board, including appeals of the annual reviews, the author submits that appeals of this nature would have been ineffective as, based on the evidence, the Board could only find that "if released" the author would likely cause, inter alia, serious harm to another person prior to expiry of sentence. However, as in reality the author would not have been released on completion of two-thirds of his sentence, but would have been turned over to the Canadian immigration services to be deported, the prison authorities should not have submitted the author's case to the Parole Board for review in the first place. Once seized with the case, the Board could not refuse to rule on the risk of harm, were the author to be released.

6.3 On the issue of the possibility of applying for transfer to the United States pursuant to the Transfer of Offenders Treaty, the author argues that the consent of both States parties is necessary for such a transfer and that Canada would never have agreed considering its refusal to deport him before he had served his full term of imprisonment. Further, the author argues that the onus should not be on him to pursue legal remedies, all of which he considers would have been futile, to hasten his return to the jurisdiction where he was sentenced to death.

6.4 With respect to a possible appeal of the author's request for a stay of the deportation order from the Superior Court of Québec, the author submits that this decision was rendered orally on 6 August 1998, at approximately 20:00. The Government of Canada removed the author in the early hours of 7 August 1998, before any appeal could be launched. Therefore, any appeal would have been moot and futile because the very subject of the proceedings was no longer within Canadian jurisdiction.

6.5 The author reiterates that the judge of the Superior Court declined jurisdiction to stay the deportation because the Federal Court had refused to intervene. He argues that although the

[10] The State party refers to *Commonwealth* of *Pennsylvania v. Deemer, 705 A. 2d 627 (Pa. 1997)*

judge went on to analyse the case on the merits he should not have done so, having declined jurisdiction and that an appeal, had it not been moot, would have been limited to the question of whether he ought to have declined jurisdiction and not whether he had made a case that his rights under the Canadian Charter of Rights and Freedoms had been violated.

6.6 The author contests the State party's argument on incompatibility and states that the theory that *if* the author's crimes in Canada had gone unpunished a precedent would have been set whereby those subject to execution in one state could commit crimes with impunity in another state, is inherently flawed. On the contrary, the author argues that if death row inmates knew that they would be prosecuted for crimes in Canada this would encourage them to commit such crimes there in order to serve a prison sentence in Canada and prolong their life or indeed commit murder in Canada and stave off execution in the United States indefinitely. If the author had been "removed by way of extradition following apprehension in Canada in 1988, he would have had little in the way of arguments to put forth."

6.7 The author contests the State party's arguments on the merits. He confirms that he has no authority for the proposition that detention in Canada for crimes committed in Canada can constitute death row confinement as there is no such recorded instance. The author submits that the mental anguish that characterises death row confinement began with his apprehension in Canada in 1988 and "will only end upon his execution in the United States."

6.8 The author rejects as misinterpretation, the State party's point that the decision in Pratt and Morgan[11] is authority for the proposition that a prisoner cannot complain where delay is due to his own fault such as an "escape from custody". He concedes that the period when he was at large is not computed as part of the delay but this period began from the point of apprehension by the Canadian authorities. He further submits that he was not detained in Canada because of his escape but rather because he was prosecuted and convicted of robbery.

6.9 On the State party's reference to the conditions of detention in the Special Handling Unit, the author submits that this is the only super-maximum facility of its kind in Canada, and that he was subjected to "abhorrent living conditions". He also submits that the National Parole Board's decision to hold him for the full 10 years of his sentence and the subsequent annual reviews maintaining this decision constituted a form of reprieve, albeit temporary, from his return to the United States where he was to be executed. In this regard, the author refers to the discussion of this issue in Pratt and Morgan (Privy Council), where Lord Griffith commented on the anguish attendant upon condemned prisoners who move from impending execution to reprieve.

6.10 The author argues that to remove him to a jurisdiction which limits his right to appeal violates article 14, paragraph 5, of the Covenant, and submits that article 6 of the Covenant should be read together with article 14, paragraph 5. On the issue of the Supreme Court of Pennsylvania's review of his case, the author maintains that the Court refused to entertain any claims of error at trial and, therefore, reviewed the evidence and decided to uphold the conviction and sentence. Issues such as the propriety of jury instructions are excluded from this type of review.

[11] *Pratt and Morgan v. Jamaica*, supra.

6.11 Without wishing the Committee to consider the transcripts of the murder trial, the author also refers to alleged errors that occurred during the course of his trial that could have changed the outcome of the case. He refers to a question from the jury which sought to clarify the difference between 1st and 3rd degree murder and manslaughter. The jury's request was not answered, as the author's attorney could not be located. When the attorney appeared the next day, the jury was ready to deliver a verdict without receiving an answer to the request for clarification. A verdict of 1st degree murder was then returned.

6.12 The author submits that while a mechanism allowing limited review might be viewed as acceptable in cases in which non-capital crimes have been committed, he contends that this is wholly unacceptable where the defendant's life hangs in the balance, and when he is barred from having any claim of error at trial reviewed.

6.13 On the possibility of seeking relief under the PCRA, the author confirms that he did indeed seek relief by filing such a motion after he was deported to the United States. This motion was dismissed on 21 July 1999, and by reference to the previous case of *Commonwealth v. Kindler*, it was argued that the author's fugitive status had disqualified him from seeking such relief. The author further submits that as his application for relief under the PCRA was dismissed, he cannot seek federal habeas corpus relief, as PCRA relief was refused on the basis of the failure to respect a State statute.

6.14 On the possibility of a request to the Governor of Pennsylvania to seek commutation of his sentence to life, the author argues that the Governor is an elected politician who has no mandate to engage in an independent, neutral review of judicial decisions. It is submitted that his/her function in this respect "does not satisfy the requirements of articles 14(5) and 6 of the Covenant".

Committee's consideration admissibility

7.1 At its 75th session, the Committee considered the admissibility of the communication. It ascertained that the same matter was not being examined under another international procedure of international investigation or settlement.

7.3 As regards the author's complaint relating to prison conditions in Canada, the Committee found that the author had not substantiated this claim, for purposes of admissibility.

7.4 On the issue of an alleged violation of articles 7 and 10 of the Covenant in connection with the author's detention in Canada with the prospect of capital punishment awaiting him in the United States upon serving his term of imprisonment in Canada, the Committee noted that the author was not confined to death row in Canada, but serving a ten year sentence for robbery. Consequently, he had failed to raise an issue under articles 7 and 10 in this respect and this part of the communication was found to be inadmissible under articles 2 and 3 of the Optional Protocol.

7.5 As to the alleged violation of article 6 for *detaining* the author in Canada for crimes committed therein, the Committee considered that he had not substantiated, for purposes of admissibility, how his right to life was violated by his *detention* in Canada for crimes committed there. This aspect of the communication was declared inadmissible under article 2 of the Optional Protocol.

7.6 The State party had argued that the author could not avail himself of the Optional Protocol to complain about his *deportation to the United States*, as he had not appealed his request for a stay of the deportation order from the Superior Court of Québec to the Court of Appeal and therefore had not exhausted domestic remedies. The Committee observed the author's response, that an appeal would have been ineffective as the Court of Appeal would only have dealt with the issue of jurisdiction and not with the merits of the case, and that the State party removed the author within hours of the Superior Court's decision, thereby rendering an attempt to appeal this decision moot. The Committee noted that the State party had not contested the speed with which the author was deported, after the decision of the Superior Court and, therefore, irrespective of whether the author could have appealed his case on the merits, found that it would be unreasonable to expect the author to appeal such a case after his deportation, the very act which was claimed to violate the Covenant. Accordingly, the Committee did not accept the State party's argument that this part of the communication was inadmissible for failure to exhaust domestic remedies.

7.7 As regards the author's claim under article 14, paragraph 5, of the Covenant, and that Canada violated article 6 by deporting him, the Committee observed that the author had the *right* under Pennsylvanian law to a full appeal against his conviction and sentence. Furthermore, the Committee noted that, according to the documents provided by the parties, while the extent of the appeal was limited after the author had become a fugitive, his conviction and sentence were reviewed by the Supreme Court of Pennsylvania, which has a statutory obligation to review all death penalty cases. According to these documents, the author was represented by counsel and the Court reviewed the evidence and law as well as the elements required to sustain a first-degree murder conviction and capital punishment. In these particular circumstances, the Committee found that the author had not substantiated, for purposes of admissibility, his claim that his right under article 14, paragraph 5, was violated and that, therefore, his deportation from Canada entailed a violation by Canada of article 6 of the Covenant.

7.8 Notwithstanding its decision that the claim based on article 14, paragraph 5, was inadmissible, the Committee considered that the facts before it raised two issues under the Covenant that were admissible and should be considered on the merits:

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?

2. The State party had conceded that the author was deported to the United States before he could exercise his right to appeal the rejection of his application for a stay of his deportation before the Québec Court of Appeal. As a consequence the author was not able to pursue any further remedies that might be available. By deporting the author to a State in which he was under sentence of death before he could exercise all his rights to challenge that deportation, did the State party violate his rights under articles 6, 7 and 2 of the Covenant?

The Committee concluded that, given the seriousness of these questions, the parties should be afforded the opportunity to comment on them before the Committee expressed its Views on

the merits. The parties were requested to provide information on the current procedural situation of the author in the United States and on any prospective appeals he might be able to pursue. The State party was requested to supplement its submissions in relation to the above questions and request for information as soon as possible, but in any event within three months of the date of transmittal of the admissibility decision. Any statements received from the State party were to be communicated to the author, who would be requested to respond within two months.

The State party's response on the merits pursuant to the Committee's request

8.1 By note verbale of 15 November 2002, the State party responded to the questions and request for further information by the Committee.

1. Whether Canada violated the Covenant by failing to seek assurances that the death penalty would not be carried out

8.2 The State party refers to article 6, paragraph 1, which declares that every human being has the right to life and guarantees that no one shall be arbitrarily deprived of his or her life. It submits that with respect to the imposition of the death penalty, article 6, paragraph 2, specifically permits its application in those countries which have not abolished it, but requires that it be imposed in a manner that respects the conditions outlined in article 6.

8.3 Article 6 does not explicitly refer to the situation where someone is extradited or removed to another state where that person is subject to the imposition of the death penalty. However, the State party notes that the Committee has held that "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."[12] The Committee has thus found that article 6 applies to the situation where a State party seeks to extradite or remove an individual to a state where he/she faces the death penalty.

8.4 Article 6 allows States parties to extradite or remove an individual to a state where they face the death penalty as long as the conditions respecting the imposition of the death penalty in article 6 are met. The State party argues that the Committee, in the instant case, does not seem to question whether the imposition of the death penalty in the United States meets the conditions prescribed in article 6.[13] Rather, the Committee asked whether Canada violated the Covenant by failing to seek assurances that the death penalty would not be carried out against the author.

[12] *Kindler v. Canada*, supra, *Ng v. Canada, Communication No. 469/1991, Views adopted on 5 November 1993, Cox v. Canada, Communication No. 539/1993, Views adopted on 31 October 1994, G.T. v. Australia, Communication No. 706/1996, Views adopted on 4 November 1997.*

[13] According to the State party, with respect to the conditions under which the death penalty is applied in the State of Pennsylvania, the Committee found in paragraph 7.7 of its decision on admissibility that the author had the right under Pennsylvanian law to a full appeal against his conviction and sentence and that the conviction and sentence were reviewed by the Supreme Court of Pennsylvania. The Committee held that the author's claim based on article 14, paragraph 5 was inadmissible.

8.5 According to the State party, article 6 and the Committee's General Comment 14 on article 6[14] are silent on the issue of seeking assurances, and no legal authority supports the proposition that abolitionist states must seek assurances as a matter of international law. The State party submits that to subsume such a requirement under article 6 would represent a significant departure from accepted rules of treaty interpretation, including the principle that a treaty should be interpreted in light of the intention of the states parties as reflected in the terms of the treaty.[15]

8.6 The State party recalls that the Committee has considered several communications respecting the extradition or removal of individuals from Canada to states where they face the death penalty. In none of these cases did the Committee raise concerns about the absence of seeking assurances. Furthermore, the State party observes that, the Committee has on previous occasions rejected the proposition that an abolitionist state that has ratified the Covenant is necessarily required to refuse extradition or to seek assurances that the death penalty would not be applied. In *Kindler v. Canada*,[16] the Human Rights Committee asked, "Did the fact that Canada had abolished capital punishment…require Canada to refuse extradition or request assurances from the United States…that the death penalty would not be imposed against Mr. Kindler". The State party notes the Committee's statement in this regard that it "does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances." These comments were repeated in the Committee's views in *Ng v. Canada*[17] and *Cox v. Canada.*[18]

8.7 As to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty pursuant to which States parties are required to take all necessary measures to abolish the death penalty within their jurisdictions, the State party refers to the Committee's finding that for States parties to the Second Optional Protocol, its provisions are considered as additional provisions to the Covenant and in particular article 6.[19] It submits that the instrument is silent on the issue of extradition or removal to face the death penalty, including whether assurances are required. The State party expresses no view on whether this instrument can be interpreted as imposing a requirement that assurances be sought, but emphasizes that it is not currently a party to the Second Optional Protocol. Therefore, its actions may only be scrutinized under the provisions of the Covenant.

8.8 The State party argues that at the time of the author's removal, 7 August 1998, there was no domestic legal requirement, that Canada was required to seek assurances from the United States that the death penalty would not be carried out against him. While the Supreme Court of Canada had not ruled on this issue in the immigration context, they had dealt with it in

[14] HRI/GEN/1/Rev6.
[15] The State party refers to Article 31 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27 (1969) which states that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Article 31 requires that the ordinary meaning of the terms of a provision of the treaty be the primary source for interpreting its meaning. The context of a treaty for the purposes of interpreting its provisions includes any subsequent agreement or practise of states parties that confer an additional meaning to the provision (art. 31, paragraphs 2 and 3).
[16] Supra
[17] Supra
[18] Supra
[19] *G. T. v Australia*, supra

relation to extradition, finding, in the cases of *Kindler v. Canada (Minister of Justice),*[20] and *Reference Re Ng Extradition.*[21], that providing the Minister with discretion as to whether to seek assurances that the death penalty would not be carried out and the decision to extradite Kindler and Ng without seeking assurances did not violate the Canadian Constitution.[22]

8.9 It further argues that a State party's conduct must be assessed in light of the law applicable at the time when the alleged treaty violation took place: at the time of the author's removal there was no international legal requirement requiring Canada to seek assurances that the death penalty would not be carried out against Roger Judge. It submits that this is evidenced by the Committee's interpretation of the Covenant in *Kindler*, *Ng* and *Cox (supra).* In addition, the United Nation's Model Treaty on Extradition[23] does not list the absence of assurances that the death penalty will not be carried out as a "mandatory ground for refusal" to extradite an individual but it is listed as an "optional ground for refusal". Finally, it submits that whether abolitionist states should be required to seek assurances in all cases when removing individuals to countries where they face the death penalty is a matter of state policy but not a legal requirement under the Covenant.

8.10 On the question of whether removing the author to a state where he was under a sentence of death without seeking assurances violates article 7 of the Covenant, the State party submits that the Committee has held that extradition or removal to face capital punishment, within the parameters of article 6, paragraph 2, does not *per se* violate article 7.[24] It also notes the Committee's finding that there may be issues that arise under article 7 in connection with the death penalty depending on the "personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent".[25]

8.11 The State party argues that, in the instant case, the Committee rejected as inadmissible any claims respecting the author's personal factors, conditions of detention on death row or the method of execution. The only issue that is raised is whether Canada's failure to seek assurances that the death penalty will not be applied violates the author's rights under article 7. The State party argues that if the imposition of the death penalty within the parameters of article 6, paragraph 2, does not violate article 7, then the failure of a state to seek assurances that the death penalty will not be applied cannot violate article 7. To hold otherwise would mean that the imposition of the death penalty within the parameters of article 6, paragraph 2, by State X, would not constitute torture, cruel, inhuman or degrading treatment or punishment, but that a state which extradites to State X without seeking assurances that the death penalty would not be applied, would be found to have placed the individual at a real risk of torture, cruel, inhuman or degrading treatment or punishment. In the State party's view, this amounts to an untenable interpretation of article 7. For these reasons, the State party asserts that it is not in violation of article 7 for having removed Roger Judge to the United States without seeking assurances.

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[20] [1991] 2 S.C.R. 779.
[21] [1991] 2 S.C.R. 858.
[22] Ibid., at page 840.
[23] U.N. Doc A/RES/45/116, adopted 14 December 1990.
[24] *Kindler v. Canada*, supra.
[25] *Kindler v. Canada*, supra.

8.12 The State party submits that article 2, paragraph 3, of the Covenant requires States parties to ensure that any person whose rights or freedoms have been violated under the Covenant, have an effective remedy, that claims of rights violations can be heard before competent authorities and that any remedies be enforced. The State party relies on its submissions on articles 6 and 7 and asserts in light of those arguments, that it did not violate the author's rights or freedoms under the Covenant. Canada's obligations under article 2, paragraphs 3(a) and (c), thus do not arise in this case.

8.13 Furthermore, the State party submits that individuals who claim violations of their rights and freedoms, can have such claims determined by competent judicial authorities and if such claims are substantiated, be provided an effective remedy. More particularly, it argues, that the issue of whether it was required to seek assurances that the death penalty not be applied to the author could have been raised before domestic courts.[26]

> 2. Did the removal of the author to a state in which he was under sentence of death before he could exercise all his rights to challenge that removal violate the author's rights under articles 6, 7 and 2 of the Covenant

8.14 The State party relies, *mutatis mutandis,* on its previous submissions with respect to the first question posed by the Committee. In particular, its argument that article 6 and the Committee's relevant General Comment[27] are silent on the issue of whether a state is required to allow an individual to exercise all rights of appeal prior to removing them to a state where they have been sentenced to death. No legal authority has been found for this proposition and finding such a requirement under article 6 would represent a significant departure from accepted rules of treaty interpretation. In the State party's view, articles 6, paragraph 4, and 14, paragraph 5, provide important safeguards for the State party seeking to impose the death penalty[28] but do not apply to a State Party that removes or extradites an individual to a State where they have been sentenced to death.

8.15 The State party explains that Section 48 of the Immigration Act[29] stipulates that a removal order must be executed as soon as reasonably practicable subject to statutory or judicial stays. That is, where there are no stays on its execution, a removal order is a mandatory one which the Minister is legally bound to execute as soon as reasonably practicable, having little discretion in this regard. In the present case, the State party submits that, none of the statutory stays available under sections 49 and 50 of the Immigration Act applied to the author, and his requests for a judicial stay were dismissed by the reviewing courts.

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[26] The State party refers to Canadian Charter of Rights and Freedoms, s. 24(1) which, in a similar manner to the Covenant, protects individuals' right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (s. 7) and the right "not to be subjected to any cruel and unusual treatment or punishment" (s.12). Anyone who claims that his or her rights or freedoms have been infringed may apply to a competent court to obtain such remedy as the court considers just and appropriate in the circumstances.

[27] Supra

[28] In the instant case, the Committee found that the author's claim of a violation of a right to an appeal under Article 14, paragraph 5, of the Covenant was not substantiated for the purposes of the admissibility of the communication (at para. 7.7).

[29] This provision has been repealed and replaced by a similar provision in the Immigration and Refugee Protection Act.

8.16 The State party argues that the application for leave to commence an application for judicial review of the Minister's response that he was unable to defer removal including a lengthy memorandum of argument was considered by the Federal Court and denied. Similarly, the Superior Court of Québec considered the author's petition for the same relief dismissing it for both procedural and substantive reasons. Neither court found sufficient reason to stay removal. If the State party were to grant stays on removal orders until all levels of appeal could be exhausted, it argues that this would mean that individuals, such as the author, who committed serious crimes, would remain in Canada for significantly longer periods, which would result in lengthy delays on removals with no guarantee that serious criminals, such as the author, could be held in detention throughout the appeal process.[30]

8.17 On whether there has been a violation of article 7 in this regard, the State party relies, *mutatis mutandis,* on its previous submissions with respect to the first question posed by the Committee. In particular, if the imposition of the death penalty within the parameters of article 6, paragraph 2, does not violate article 7, then the failure of a state to allow an individual the possibility of exercising all judicial recourses prior to removal to the state imposing the death penalty cannot be a violation of article 7. The State party argues that the crucial issue is whether a State party imposing the death penalty has met the standards set out in article 6 and other relevant provisions of the Covenant and not whether the State party removing an individual to a State where he is under sentence of death has provided that individual with sufficient opportunity for judicial review of the decision to remove.

8.18 With respect to article 2, paragraph 3 of the Covenant, the State party submits that it has not violated any of the author's Covenant rights as he enjoyed sufficient judicial review of his removal order, prior to his removal to the United States, including review of whether the removal would violate his human rights.

8.19 On the author's current situation in the United States, the State party submits that it has been informed by the Philadelphia District Attorney's Office, State of Pennsylvania that the author is currently incarcerated in a state penitentiary, and that no execution date has been set for him.

8.20 On 23 May 2002, the Supreme Court of Pennsylvania denied the author's application for post conviction relief. The author has recently filed a petition for habeas corpus in the Federal District Court. An adverse decision rendered by the District Court can be appealed to the Federal Court of Appeals for the Third Circuit. This may be followed by an appeal to the U.S. Supreme Court. If the author's federal appeals are denied, an application for clemency can be filed with the State Governor. In addition, the State party reiterates that, according to the state of Pennsylvania, there have only been three persons executed since the reintroduction of the death penalty in 1976.

[30] The State party further explains that under the former Immigration Act and the new Immigration and Refugee Protection Act, the Minister could argue in favour of detention during the appeal process based on the grounds that the person was likely to pose a danger to the public, or unlikely to appear for removal. The reasons for detention would be reviewed by an independent decision-maker. The Minister however, would not be able to guarantee the continued detention of the person and the longer the period of detention, the more likely that the individual would be released into the public.

8.21 Without prejudice to any of the preceding submissions, the State party apprises the Committee of domestic developments that have occurred since the events at issue in this case. On 15 February 2001, the Supreme Court of Canada held, in *United States v. Burns,*[31] that the government must seek assurances, in all but exceptional cases, that the death penalty would not be applied prior to extraditing an individual to a state where they face capital punishment. The State party submits that Citizenship and Immigration Canada is considering the potential impact of this decision on immigration removals.

The author's response on the merits pursuant to the Committee's request

9.1 By letter of 24 January 2003, the author responded to the request for information by the Committee and commented on the State party's submission. He submits that by relying on the decision in *Kindler v. Canada*[32], in its argument that in matters of extradition or removal, the Covenant is not necessarily breached by an abolitionist state where assurances that the death penalty not be carried out are not requested, the State party has misconstrued not only the facts of *Kindler* but the effect of the Committee's decision therein.

9.2 Firstly, the author argues that *Kindler* dealt with extradition as opposed to deportation. He recalls the Committee's statement that there would have been a violation of the Covenant "if the decision to extradite without assurances would have been taken arbitrarily or summarily". However, since the Minister of Justice considered Mr. Kindler's arguments prior to ordering his surrender without assurances, the Committee could not find that the decision was made "arbitrarily or summarily". The case currently under consideration concerns deportation, which lacks any legal process under which the deportee may request assurances that the death penalty not be carried out.

9.3 Secondly, the author reiterates that he petitioned the Canadian courts to declare that his removal by deportation would violate his rights under the Canadian Charter of Rights and Freedoms, so as to suspend his removal from Canada and "force" the United States to request his extradition, at which point he could have requested the Minister of Justice to seek assurances that the death penalty not be carried out. As the Minister of Justice has no such power under the deportation process, the State party was able to exclude the author from the protections afforded by the extradition treaty and no review of the appropriateness of requesting assurances was ever carried out. The author submits that the United States would have requested his extradition and encloses a letter, dated 3 February 1994, from the Philadelphia District Attorney's Office, exhibited with the author's proceedings in Canada, indicating that it will initiate extradition proceedings if necessary. Any refusal by the Minister to require assurances could then have been reviewed through the domestic court system. In "sidestepping" the extradition process and returning the author to face the death penalty, the State party is said to have violated the author's rights under articles 6, 7, and 2 (3) of the Covenant, as unlike Kindler, it did not consider the merits of assurances.

9.4 As to whether the State party violated his rights by deporting him before he could exercise all his rights to challenge his deportation, the author submits that the State party's interpretation of its obligations are too restrictive and that death penalty cases require special consideration. By removing him within hours after the Superior Court of Québec's decision

[31] Neutral citation 2001 SCC 7. [2001] S.C.J No. 8.
[32] Supra

(handed down late evening), it is argued that the State party ensured that the civil rights issues raised by the author could not benefit from any appellate review.

9.5 The author argues that this restrictive approach is contrary to the wording of the General Comment on article 2 which States "…The Committee considers it necessary to draw the attention of State parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that State parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction." By deporting the author to ensure that he could not avail himself of his right of appeal, not only did the State party violate article 2, paragraph 3, of the Covenant, but the spirit of this general comment.

9.6 The author submits that the Minister has some discretion, under section 48 of the Immigration Act and is not under an obligation to remove him "immediately". Also, domestic jurisprudence recognises that the Minister has a duty to exercise this discretion on a case-by-case basis. He refers to the case of *Wang v. The Minister of Citizenship & Immigration*[33], where it was held that "the discretion to be exercised is whether or not to defer to another process which may render the removal order ineffective or unenforceable, the object of that process being to determine whether removal of that person would expose him to a risk of death or other extreme sanction". According to this principle, the author believes that he should not have been deported until he had had an opportunity to avail himself of appellate review. It is submitted that had his right to appeal not been curtailed by his deportation, his case would still have been in the Canadian judicial system when the Supreme Court of Canada determined, in *United States of America v. Burns*[34], that except in exceptional cases, assurances must be requested in all cases in which the death penalty could otherwise be imposed, and he would have benefited from it.

9.7 On the State party's argument (paragraph 8.13) that "the issue of whether Canada was required to seek assurances that the death penalty not be applied to Roger Judge could have been raised before domestic courts", the author submits that the State party misconstrued his legal position. The author's proceedings in Canada were intended to result in a stay of his deportation, so as to compel the United States to seek extradition, and only at this point could the issue of assurances have been raised.

9.8 On the author's current legal position, it is contested that no execution date has been set. It is submitted that a Death Warrant was signed by the Governor on 22 October 2002, and his execution scheduled for 10 December 2002. However, his execution has since been stayed, pending habeas corpus proceedings before the Federal District Court.

Issues and proceedings before the Committee

10.1 The Human Rights Committee has examined the communication in light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

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

[33] [2001] FCT 148 (March 6, 2001).
[34].Supra

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 abovementioned 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 judgment, "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

[35] Supra
[36] Supra

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.

Question 2. The State party had conceded that the author was deported to the United States before he could exercise his right to appeal the rejection of his application for a stay of his deportation before the Québec Court of Appeal. As a consequence the author was not able to pursue any further remedies that might be available. By deporting the author to a State in which he was under sentence of death before he could exercise all his rights to challenge that deportation, did the State party violate his rights under articles 6, 7 and 2, paragraph 3 of the Covenant?

10.8 As to whether the State party violated the author's rights under articles 6, and 2, paragraph 3, by deporting him to the United States where he is under sentence of death, before he could exercise his right to appeal the rejection of his application for a stay of deportation before the Québec Court of Appeal and, accordingly, could not pursue further available remedies, the Committee notes that the State party removed the author from its jurisdiction within hours after the decision of the Superior Court of Québec, in what appears to have been an attempt to prevent him from exercising his right of appeal to the Court of Appeal. It is unclear from the submissions before the Committee to what extent the Court of Appeal could have examined the author's case, but the State party itself concedes that as the author's petition was dismissed by the Superior Court for procedural and substantive reasons (see para. 4.5 above), the Court of Appeal could have reviewed the judgment on the merits.

10.9 The Committee recalls its decision in *A. R. J. v. Australia*[37], a deportation case where it did not find a violation of article 6 by the returning state as it was not foreseeable that he would be sentenced to death and "because the judicial and immigration instances seized of the case heard extensive arguments" as to a possible violation of article 6. In the instant case, the Committee finds that, by preventing the author from exercising an appeal available to him under domestic law, the State party failed to demonstrate that the author's contention that his deportation to a country where he faces execution would violate his right to life, was sufficiently considered. The State party makes available an appellate system designed to safeguard any petitioner's, including the author's, rights and in particular the most fundamental of rights – the right to life. Bearing in mind that the State party has abolished capital punishment, the decision to deport the author to a state where he is under sentence of death without affording him the opportunity to avail himself of an available appeal, was taken arbitrarily and in violation of article 6, together with article 2, paragraph 3, of the Covenant.
10.10. Having found a violation of article 6, paragraph 1 alone and, read together with article 2, paragraph 3 of the Covenant, the Committee does not consider it necessary to address whether the same facts amount to a violation of article 7 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Canada of articles 6, paragraph 1 alone

[37] Supra

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.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The Committee is also requested to publish the Committee's Views.

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

Individual opinion by Committee member Mr. Nisuko Ando concerning Committee's admissibility decision on communication No. 829/1998 (Judge v. Canada) adopted on 17 July 2002

With regret, I must point out that I am unable to share the Committee's conclusion set forth in paragraph 7.8 in which it draws attention of both the author and the State party and requests them to address the two issues mentioned therein which relate to articles 6, 7 and 2 of the Covenant.

In its decision on admissibility of the communication the Committee makes clear that the communication is inadmissible as far as it relates to issues under articles 7, 10 (para. 7.4), article 6 (para. 7.5) and article 14 (5) (para. 7.7), and yet the Committee concludes that the facts presented by the author raise the two issues mentioned above. It is my understanding that in the present communication both the author and the State party have presented their cases in view of the Committee's earlier jurisprudence on Case No. 470/1991 (J. Kindler v. Canada), because in those two communications the relevant facts are very similar or almost identical. The Committee's line of argument in the present communication also suggests this. Under the circumstances I consider it illogical for the Committee to state that the communication is inadmissible in matters relating to articles 7, 10, 6 and 14 (5), on the one hand, but that it raises issues under articles 6, 7 and 2, on the other, unless it specifies how these apparent contradictions are to be solved. A mere reference to "the seriousness of these questions" (para. 7.8) does not suffice: Hence, this individual opinion!

(Signed): Mr. Nisuke Ando

Individual opinion submitted by Mrs. Christine Chanet concerning Committee's admissibility decision on communication No. 829/1998 (Judge v. Canada) adopted on 17 July 2002

Unlike its position in the case of Kindler v. Canada, in this case the Committee directly addresses the fundamental question of whether Canada, having abolished the death penalty, violated the author's right to life under article 6 of the Covenant by extraditing him to a State where he faced capital punishment, without ascertaining that that sentence would not in fact be carried out.

I can only subscribe to this approach, which I advocated and had wished to see applied in the Kindler case; indeed, that was the basis of the individual opinion I submitted in that case.

In my view, asking that question obviates the need for a response such as the Committee gives in this case concerning a violation by Canada of article 14, paragraph 5, of the Covenant.

The position adopted by the Committee on this point implies that it declares itself competent to consider the author's arguments concerning a possible violation of article 14, paragraph 5, of the Covenant, as a result of irregularities in the proceedings taken against the author in the United States, a position identical to that adopted in the Kindler case (para. 14.3).

In my view, while the Committee can declare itself competent to assess the degree of risk to life (death sentence) or to physical integrity (torture), it is less obvious that it can base an opinion that a violation has occurred in a State party to the Covenant on a third State's failure to observe a provision of the Covenant.

Taking the opposite position would amount to requiring a State party that called into question respect for human rights in its relations with a third State to be answerable for respect by that third State for all rights guaranteed by the Covenant vis-à-vis the person concerned.

And why not? It would certainly be a step forward in the realization of human rights, but legal and practical problems would immediately arise.

What is a third State, for example? What of States non-parties to the Covenant? What of a State that is party to the Covenant but does not participate in the procedure? Does the obligation of a State party to the Covenant in its relations with third States cover all the rights in the Covenant or only some of them? Could a State party to the Covenant enter a reservation to exclude implementation of the Covenant from its bilateral relations with another State?

Even setting aside the complex nature of the answers to these questions, applying the "maximalist" solution in practice is fraught with problems.

For while the Committee can ascertain that a State party has not taken any undue risks, and may perhaps give an opinion on the precautions taken by the State party to that

end, it can never really be sure whether a third State has violated the rights guaranteed by the Covenant if that State is not a party to the procedure.

In my view, therefore, the Committee should in this case have refrained from giving an opinion with respect to article 14, paragraph 5, and should have awaited a reply from the State party on the fundamental issue of expulsion by an abolitionist State to a State where the expelled individual runs the risk of capital punishment, since the terms in which the problem of article 14, paragraph 5, is couched will vary depending whether the answer to the first question is affirmative or negative.

For if an abolitionist State cannot expel or extradite a person to a State where that person could be executed, the issue of the regularity of the procedure followed in that State becomes irrelevant.

If, on the other hand, the Committee maintains the position adopted in the Kindler case, it will need to make a thorough study of the problem of States parties' obligations under the Covenant in their relations with third States.

(Signed): Ms. Christine Chanet

Individual opinion by Committee member Mr. Hipólito Solari-Yrigoyen concerning Committee's admissibility decision on communication No. 829/1998 (Judge v. Canada) adopted on 17 July 2002 (dissenting)

I disagree with regard to the present communication on the grounds set forth below:

The Committee is of the view that the author's counsel has substantiated for the purposes of admissibility, his allegation that the State party has violated his right to life under article 6 and article 14, paragraph 5, of the Covenant by deporting him to the United States, where he has been sentenced to death, and that his claim is compatible with the Covenant. The Committee therefore declares that this part of the communication is admissible and should be considered on the merits.

Committee's consideration of the merits

With regard to a potential violation by Canada of article 6 of the Covenant for having deported the author to face the imposition of the death penalty in the United States, the Committee refers to the criteria set forth in its prior jurisprudence. Namely, for States that have abolished capital punishment and that extradite a person to a country where that person may face the imposition of a death penalty, the extraditing State must ensure itself that the person is not exposed to a real risk of a violation of his rights under article 6 of the Covenant.38

The Committee notes that the State party's argument in the present communication, that several additional review recourses were available to the author, such as filing a petition in the Court of Common Pleas under Pennsylvania's Post-Conviction Relief Act, filing a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania, making a request to the Governor of Pennsylvania for clemency, and appealing to the Pennsylvania Supreme Court. The Committee observes that the automatic review of the author's sentence by the Pennsylvania Supreme Court took place in absentia, when the author was in prison in Canada. Although the author was represented by counsel, the Supreme Court did not undertake a full review of the case, nor did it review the sufficiency of evidence, possible errors at trial, or propriety of sentence. A review of this nature is not compatible with the right protected under article 14, paragraph 5, of the Covenant, which calls for a full evaluation of the evidence and the court proceedings. The Committee considers that such limitations in a capital case amount to a denial of a fair trial, which is not compatible with the right protected under article 14, paragraph 5, of the Covenant, and that the author's flight from the United States to avoid the death penalty does not absolve Canada from its obligations under the Covenant. In the light of the foregoing, the Committee considers the State party accountable for the violation of article 6 of the Covenant as a consequence of the violation of article 14, paragraph 5.

The Committee has noted the State party's argument that there was no law under which it could have detained the author on expiry of his sentence and therefore had to deport him. The Committee takes the view that this response is unsatisfactory for three reasons,

[38] Communication No. 692/1996, A.R.J. v Australia; No. 706/1996, T. v. Australia; No. 470/1991, Kindler v. Canada; No. 469/1991, Chitat Ng v. Canada and No. 486/1992, Cox v. Canada.

namely: (1) Canada deported the author knowing that he would not have the right to appeal in a capital case; (2) the speed with which Canada deported the author did not allow him the opportunity to appeal the decision to remove him; and (3) in the present case, Canada took a unilateral decision and therefore cannot invoke its obligations under the Extradition Treaty with the United States, since at no time did the United States request the extradition.

The Committee, acting under article 5, paragraph 4, of the Optional Protocol finds that Canada has violated its obligations under article 2 of the Covenant to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant because, when it deported the author to the United States, it did not take sufficient precautions to ensure that his rights under article 6 and to article 14, paragraph 5, of the Covenant would be fully observed.

The Human Rights Committee requests the State party to do everything possible, as a matter of urgency to avoid the imposition of the death penalty or to provide the author with a full review of his conviction and sentence. The State party has the obligation to ensure that similar violations do not occur in the future.

Bearing in mind that by signing the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish these Views.

(Signed): Mr. Hipólito Solari-Yrigoyen

Individual Opinion of Committee Member 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 which are appended to this separate opinion as A, B, C, D and E. In the case of the separate opinion at E, only the fact that appears most relevant is reproduced (paragraph 19 to 25).

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.

(Signed): Rajsoomer Lallah

APPENDIX

Individual opinions submitted pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's views on communication No. 470/1991 (Joseph Kindler v. Canada)

A. Individual opinion submitted by Mr. Bertil Wennergren (dissenting)

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

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

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

Article 6, paragraph 2, makes an exception for States parties that have not abolished the death penalty. The Covenant permits them to continue applying the death penalty. This "dispensation" for States parties should not be construed as a justification for the deprivation of the life of individuals, albeit lawfully sentenced to death, and does not make the execution of a death sentence strictly speaking legal. It merely provides a possibility for States parties to be released from their obligations under articles 2 and 6 of the Covenant, namely to respect

and to ensure to all individuals within their territory and under their jurisdiction the inherent right to life without any distinction, and enables them to make a distinction with regard to persons having committed the "most serious crime(s)".

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

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

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

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

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

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

B. Wennergren

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

B. **Individual opinion submitted by Mr. Rajsoomer Lallah** (dissenting)

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

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

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

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

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

3.1 Article 6(1) of the Covenant proclaims that everyone has the inherent right to life. It requires that this right shall be protected by law. It also provides that no one shall be arbitrarily deprived of his life. Undoubtedly, in pursuance of article 2 of the Covenant, domestic law will normally provide that the unlawful violation of that right will give rise to penal sanctions as well as civil remedies. A State party may further give appropriate protection to that right by outlawing the deprivation of life by the State itself as a method of punishment where the law previously provided for such a method of punishment. Or, with the same end in view, the State party which has not abolished the death penalty is required to restrict its application to the extent permissible under the remaining paragraphs of article 6, in particular, paragraph 2. But, significantly, paragraph 6 has for object to prevent States from invoking the limitations in article 6 to delay or to prevent the abolition of capital punishment. And Canada has decided to abolish this form of punishment for civil, as opposed to military, offences. It can be said that, in so far as civil offences are concerned, paragraph 2 is not

applicable to Canada, because Canada is not a State which, in the words of that paragraph, has not abolished the death penalty.

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

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

3.4 A further question arises under article 6(1), which requires that no one shall be arbitrarily deprived of his life. The question is whether the granting of the same and equal level of respect and protection is consistent with the attitude that, so long as the individual is within Canada's territory, that right will be fully respected and protected to that level, under Canadian law viewed in its total effect even though expressed in different enactments (penal law and extradition law), whereas Canada might be free to abrogate that level of respect and protection by the deliberate and coercive act of sending that individual away from its territory to another State where the fatal act runs the real risk of being perpetrated. Could this inconsistency be held to amount to a real risk of an "arbitrary" deprivation of life within the terms of article 6(1) in that unequal treatment is in effect meted out to different individuals within the same jurisdiction? A positive answer would seem to suggest itself as Canada, through its judicial arm, could not sentence an individual to death under Canadian law whereas Canada, through its executive arm, found it possible under its extradition law to extradite him to face the real risk of such a sentence.

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

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

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

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

R. Lallah

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

C. **Individual opinion submitted by Mr. Fausto Pocar** (dissenting)

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

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

F. Pocar

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

D. Individual opinion submitted by Mrs. Christine Chanet (dissenting)

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

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

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

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

That is not so in the present case.

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

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

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

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

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

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

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

The second error consists in regarding as an authorization to re-establish the death penalty in a country which has abolished it what is merely an implicit recognition of its existence. This is an extensive interpretation which runs counter to the proviso in paragraph 6 of article 6 that "nothing in this article shall be invoked ... to prevent the abolition of capital

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

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

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

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

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

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

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

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

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

Ch. Chanet

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

E. Dissenting opinion by Mr. Francisco Jose Aguilar Urbina

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

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

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

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

23. One final aspect to be dealt with is the way in which Mr. Kindler was extradited, no notice being taken of the request that the author should not be extradited prior to the Committee forwarding its final views on the communication to the State party **(v)** made by the Special Rapporteur on New Communications under rule 86 of the rules of procedure of

the Human Rights Committee. On ratifying the Optional Protocol, Canada undertook, with the other States parties, to comply with the procedures followed in connection therewith. In extraditing Mr. Kindler without taking into account the Special Rapporteur's request, Canada failed to display the good faith which ought to prevail among the parties to the Protocol and the Covenant.

24. Moreover, this fact gives rise to the possibility that there may also have been a violation of article 26 of the Covenant. Canada has given no explanation as to why the extradition was carried out so rapidly once it was known that the author had submitted a communication to the Committee. By its censurable action in failing to observe its obligations to the international community, the State party has prevented the enjoyment of the rights which the author ought to have had as a person under Canadian jurisdiction in relation to the Optional Protocol. In so far as the Optional Protocol forms part of the Canadian legal order, all persons under Canadian jurisdiction enjoy the right to submit communications to the Human Rights Committee so that it may hear their complaints. Since it appears that Mr. Kindler was extradited on account of his nationality **(w)** and in so far as he has been denied the possibility of enjoying its protection in accordance with the Optional Protocol, I find that the State party has also violated article 26 of the Covenant.

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

San Rafael de Escazú, Costa Rica, 12 August 1993
Geneva, Switzerland, 25 October 1993 (Revision)

[Done in Spanish]