

## **EXTRADITION, HUMAN RIGHTS, AND THE DEATH PENALTY: WHEN NATIONS MUST REFUSE TO EXTRADITE A PERSON CHARGED WITH A CAPITAL CRIME**

### I. INTRODUCTION

On June 17, 1994, O.J. Simpson disappeared for several hours with his passport and with several thousand dollars.<sup>1</sup> He had been charged with double murder by the State of California, offenses that made him eligible for the death penalty.<sup>2</sup> Although there are disputes about the motivations behind his disappearance which will likely be explored at his criminal trial, his brief disappearance raised some interesting questions: If he had fled to a State that had abolished capital punishment, say the Netherlands, would the Netherlands honor a United States extradition request and return him to face the death penalty? What if he fled to other States, like the United Kingdom, or Canada, that had abolished capital punishment for all non-military related offenses? Would he receive protection from the death penalty in one State but not in another? Does it matter that he is black and was charged with cross-racial killings? What, if any, treaties or international agreements limit the States' discretion to extradite, and what are the limits of the discretion when the death penalty is involved? This comment attempts to answer those questions.

Some human rights treaties prohibit extradition when it is foreseeable that the death penalty will be imposed in the State that is requesting extradition.<sup>3</sup> Some prohibit States from extraditing persons when it is foreseeable that those persons will face the death penalty in the State requesting extradition, such that the imposition of the sentence amounts to torture, inhuman or degrading treatment or punishment,<sup>4</sup> although there is a lack of uniformity over what treatment meets this definition.<sup>5</sup> This comment discusses the substantive and procedural rights that emanate from these human rights treaties afforded to persons in extradition proceedings. This comment also discusses new substantive and procedural rights that have arisen by implication to all persons in deportation or expulsion proceedings

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1. Henry Weinstein and Andrea Ford, *Delay of Trial and Bail Denied for Simpson*, L.A. TIMES, Oct. 20, 1994, at A1 (quoting Marcia Clark, Los Angeles County Deputy District Attorney, in her oral argument to the court opposing Mr. Simpson's motion to be released on bail).

2. Simpson was charged with murdering Nicole Brown Simpson and Ronald Lyle Goldman in violation of Cal. Penal Code § 187(a). *State of California v. O.J. Simpson*, Case No. BA097211, Felony Complaint for Arrest Warrant, Counts One and Two, June 17, 1994, available in LEXIS, News library, Hottop file. These criminal offenses made him eligible for the death penalty under Cal. Penal Code § 190.2(a)(3). *Id.*

3. See *infra* notes 42, 102-08, 160-62 and accompanying text.

4. See *infra* notes 42-45, 50-52, 175-84 and accompanying text.

5. See *infra* part IV. B.

in States that are parties to specific human rights treaties.

Part II discusses the general obligations that are imposed on States by their extradition treaties and international agreements. That part of the comment explains the discretionary powers that are typically available to a State that enable it to either refuse to extradite a person if the death penalty will be imposed on that person in the State that is requesting extradition or, in the alternative, condition the surrender of the person upon the receipt of assurances that the death penalty will not be imposed. The emergence of the abolition of the death penalty as a treaty-based human right, and the relevance of this human right in extradition decisions is also discussed.

Part III evaluates several decisions of courts and organizations that have interpreted significant human rights treaties. The first subdivision of part III evaluates *Soering v. United Kingdom*,<sup>6</sup> a seminal decision by the European Court of Human Rights<sup>7</sup> that articulated new substantive and procedural rights to persons in extradition proceedings; rights that emanate from a European human rights treaty.<sup>8</sup> The second subdivision of part III evaluates several decisions by the United Nations Human Rights Committee that effectively adopted significant aspects of the *Soering* decision by incorporating new substantive and procedural rights into the International Covenant on Civil and Political Rights.<sup>9</sup> These rights are afforded to persons in extradition proceedings and other persons unlawfully within the territory of a State that is a party to that treaty.

Part IV discusses the anticipated evolution of the law in this area. Specifically, the first subdivision of part IV evaluates the similarities of the decisions discussed in this comment and anticipates additional substantive rights that will be extended to persons in extradition proceedings. The remaining two subdivisions of part IV evaluate the merits of disputes that are likely to arise in national courts and treaty-based organizations that will arise out of extradition proceedings when the United States is requesting a person for the prosecution of a capital crime. The second subdivision analyzes the likelihood that many States will refuse to unconditionally honor an extradition request from United States because the person will possibly experience "death-row-phenomenon," a term that describes the prolonged anguish suffered while in post-conviction detention. The third subdivision analyzes the likelihood that one or more States will refuse to unconditionally honor an extradition request from United States due to the apparently racially disparate sentencing practices in the United States.

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6. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), reprinted in 11 Eur. H.R. Rep. 439 (1989), 28 I.L.M. 1063 (1989).

7. The European Court of Human Rights was established by the European Convention on the Protection of Human Rights and Fundamental Freedoms. See discussion *infra* note 49.

8. European Convention on the Protection of Human Rights and Fundamental Freedoms, done at Rome, on Nov. 4, 1950, 213 U.N.T.S. 221.

9. International Covenant on Civil and Political Rights, done at New York, on Dec. 19, 1966, 58 Fed. Reg. 45934 (1993), 999 U.N.T.S. 171.

Part V discusses the probable implications the implementation of the existing and anticipated substantive rights will have on State relations. Finally, this comment concludes that present and prospective extradition obligations create foreign relations incentives for States to accede to human rights treaties which obligate signatory States to abolish the death penalty.

## II. EXTRADITION TREATIES AND THE DEATH PENALTY

New developments in human rights treaty law make extradition a violation of those treaties when certain circumstances exist. The international "law of extradition"<sup>10</sup> is derived from a network of treaties, national laws, and State diplomatic practice which differ in detail but form a common pattern of law and procedure.<sup>11</sup> Extradition is not required by customary international law, and many States do not extradite except as bound to do so by treaty.<sup>12</sup> In the absence of an extradition treaty, States can theoretically extradite with unlimited discretion and lawfully achieve arbitrary results. For example, in the absence of a treaty, a State could not breach any international obligations if an extradition decision is based solely on the State's political motivation or is based on a summary or non-existent inquiry into the merits of the extradition request.

By operating within the terms of an extradition treaty, the requesting State<sup>13</sup> accepts the risk that the harboring State may, in its discretion, refuse to extradite and accepts the risk that the harboring State may, in its discretion, condition the extradition upon some act by the requesting State. The risk that the requesting State undertakes when it submits an extradition request is acceptable partially because extradition agreements place specifically enumerated limits on the harboring State's discretion to refuse the request.<sup>14</sup> Extradition agreements also limit the harboring State's discretion to impose conditions upon the honoring of the request.<sup>15</sup> In the absence of

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10. Extradition is the "surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender." BLACK'S LAW DICTIONARY 585 (6th ed. 1990).

11. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 475 cmt. a (1987).

12. *Id.*

13. The term "requesting State" is used in this article to describe the State requesting custody of a person for criminal prosecution, and "harboring State" is used to describe the State that has custody of the person.

14. Some of these exceptions arise as defenses to extradition. Examples include the political offense exception, offenses of a military character, offenses of a fiscal character, double jeopardy, applicability of a statute of limitations, extinction of the cause of action by amnesty or pardon, and immunity from prosecution. M. Cherif Bassiouni, *The United States Model*, in 2 INTERNATIONAL CRIMINAL LAW 413-17 (M. Cherif Bassiouni ed. 1986).

15. For example, the U.N. Model Treaty on Extradition enables a harboring State to seek assurances from the requesting State in only two sets of circumstances. First, that instrument allows a harboring State discretion to condition the surrender of a person upon the receipt of sufficient assurances from the requesting State that the death penalty will not be imposed or, if imposed, will not be carried out. The second condition, elaborated in footnote 12 of the treaty,

compelling circumstances,<sup>16</sup> States usually accept the risk of an adverse response and attempt to gain jurisdiction over fugitives through the operation of their extradition treaties.

While most extradition treaties are bilateral, multilateral treaty conventions have recently emerged.<sup>17</sup> Other limitations guiding a State's discretion to expel aliens include multilateral refugee conventions,<sup>18</sup> regional human rights conventions,<sup>19</sup> and thematic human rights instruments.<sup>20</sup>

International human rights law is derived from a network of United Nations resolutions, multilateral treaties, decisions of treaty-based organizations, and customary international law. Treaty-based human rights organizations<sup>21</sup> have played an important role in imposing new limits on States' discretion to extradite persons to other States. These controls have been imposed in the absence of explicit discretionary limits in the respective extradition treaties. This "incorporation" of "the law of extradition" into these treaties largely originated from decisions of treaty-based organizations where individual petitioners exercised their rights under the respective treaty and protocol provisions to petition those organizations for relief from

allows States to apply the same restriction to the imposition of a life, or indeterminate, sentence. Model Treaty on Extradition, *adopted* Dec. 14, 1990, art. 4(d), G.A. Res. 45/116, U.N. GAOR, 45th Sess., U.N. Doc. A/RES/45/116, *reprinted* in 30 I.L.M. 1407, 1412 (1991). *See infra* note 40.

16. *See* United States v. Alvarez-Machain, 112 S. Ct. 2188, 2190 (1992) (the United States kidnapped a Mexican citizen from Mexico to obtain jurisdiction for charges of murdering a United States law enforcement agent who was murdered in Mexico); United States v. Noriega, 746 F. Supp. 1506, 1511 (S.D. Fla. 1990) (the United States military invaded Panama to obtain jurisdiction over Panamanian General Manuel Antonio Noriega for federal drug charges); Helen Silving, *In re Eichman: A Dilemma of Law and Morality*, 55 AM. J. INT'L. 307, 311-12 (1961) (Nazi war criminal Adolph Eichman was abducted from Argentina to stand trial in Israel).

17. Model Treaty on Extradition, *adopted* Dec. 14, 1990, G.A. Res. 45/116, U.N. GAOR, 45th Sess., U.N. Doc. A/RES/45/116, *reprinted* in 30 I.L.M. 1407 (1991); Inter-American Convention on Extradition, *done* at Caracas, on Feb. 25, 1981, O.A.S. Doc. OEA/Ser.A/36 (SEPF), Pan-Am. T.S. 60, *reprinted* in 20 I.L.M. 723 (1981); European Convention on Extradition, *done* at Paris, on Dec. 13, 1957, 359 U.N.T.S. 273.

18. Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, art. 31, 360 U.N.T.S. 130, 150-51; Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 189 U.N.T.S. 137, 176; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

19. American Convention on Human Rights, *done* at San José, on Nov. 22, 1969, art. 22, 1144 U.N.T.S. 123, 151 (Freedom of Movement and Residence), Protocol (No. IV) to the European Convention for the Protection of Human Rights and Freedoms, Sept. 16, 1963, art. 4, Europ. T.S. No. 46 ("Collective expulsion of aliens is prohibited.").

20. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, *done* at New York, on Dec. 10, 1984, art. 3, U.N. Doc. A/RES/39/46, *reprinted* in 1984 U.N.Y.B. 813, 814, U.N. Sales No. E.87.I.1; International Covenant on Civil and Political Rights, *done* at New York, on Dec. 19, 1966, art. 13, 58 Fed. Reg. 45934, 45938 (1993), 999 U.N.T.S. 171, 176.

21. A treaty-based human rights organization is an organization expressly established by the language of a treaty. Treaties elaborate on the powers and functions of the treaty-based organizations. Treaty-based human rights organizations commonly assist States to give effect to the respective treaties and function as enforcement mechanisms by providing oversight over the State's implementation of the rights embodied in the treaties.

victimization.<sup>22</sup>

Few extradition treaties have been drafted that expressly prohibit extradition in circumstances where the fugitive would be executed in the requesting State. Instead, contemporary treaties usually give the harboring State the ability to exercise discretion to seek, as a condition for extradition, assurances from the requesting State that the death penalty will not be executed.<sup>23</sup>

To understand the evolution of extradition law as a component of human rights law, it is necessary to discuss the world trend toward abolishing the death penalty. South American States were generally the first States to abolish capital punishment. Venezuela abolished the death penalty in 1867, followed by Costa Rica (1882), Brazil (1889), and Ecuador (1897).<sup>24</sup> Panama has never had the death penalty since its independence in 1903.<sup>25</sup> With few exceptions,<sup>26</sup> Europe practiced the death penalty with vigor until the aftermath of World War II. For example, Germany's Peoples Court alone executed 4,951 people in a three year period during World War II.<sup>27</sup> Italy and the Federal Republic of Germany emerged as leaders in the international trend toward abolition in the aftermath of World War II.<sup>28</sup>

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22. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), reprinted in 11 Eur. H.R. Rep. 439 (1989), 28 I.L.M. 1063 (1989); *Kindler v. Canada*, Communication No. 470/1991, views adopted on July 30, 1993 (U.N. Human Rights Committee), reprinted in 14 HUM. RTS. L.J. 307 (1993); *Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (Views adopted on Nov. 5, 1993). See also *infra* note 112 (explaining the right to petition to the U.N. Human Rights Committee).

23. E.g., Extradition Treaty, June 8, 1972, U.S.-U.K, art. IV, 28 U.S.T. 227, 230, *infra* note 58 [hereinafter U.S.-U.K Extradition Treaty]; Extradition Treaty, Dec. 3, 1971, U.S.-Can., art. 6, 27 U.S.T. 983, 989, *infra* note 111 [hereinafter U.S.-Can. Extradition Treaty]. See also treaties cited *supra* note 39.

24. WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 5 (1993).

25. *Id.*

26. Portugal abolished the death penalty in 1867 and the Netherlands abolished the death penalty in 1870. *Id.*

27. INGO MÜLLER, HITLER'S JUSTICE THE COURTS OF THE THIRD REICH 143 (Deborah Lucas Schneider trans., 1991). The People's Court established by the National Socialist government had jurisdiction to prosecute treason and lesser internal security crimes. *Id.* at 140-42. The figure of 4,951 does not include those persons sentenced to lesser sentences but who were summarily executed by the Gestapo once in Gestapo prisons. *Id.* at 175-78. Cf. V. R. Berghahn, *The Judges Made Good Nazis*, N.Y. TIMES, Apr. 28, 1991, §7 (Book Review), at 3 (estimating that Germany's judges ordered the execution of 80,000 persons in Germany and its occupied territories during the National Socialist's twelve year period of constitutional governance).

28. Italy introduced a resolution in the United Nations Third Committee (Social, Humanitarian, and Cultural) which, if ratified, would have resulted in a General Assembly resolution calling for the worldwide abolition of the death penalty by the year 2000. *United Nations Package, Friday Highlights*, FED. NEWS SERV., Dec. 5, 1994, available in LEXIS, News Library, Curnws File. The resolution was defeated because Singapore amended it with a provision that stressed cultural diversity. *U.N. Panel Defeats Resolution on Capital Punishment*, REUTERS WORLD SERV., Dec. 10, 1994, available in LEXIS, News Library, Curnws File. Italy and other sponsors defeated the resolution because they viewed the amendment to be a denial of the universality of this and other human rights. *Id.* Germany played an active role in drafting the protocol to the European Convention which

The abolition of the death penalty has recently emerged as a treaty-based obligation of international human rights law.<sup>29</sup> As of the end of 1993, 47% of all countries (i.e., ninety countries) have abolished capital punishment *de facto* or *de jure*, or have limited its application to certain military offenses.<sup>30</sup> Although Western Europe and most of the Western Hemisphere have abolished the death penalty,<sup>31</sup> the United States of America remains a retentionist<sup>32</sup> country.

An early expression of the special treatment afforded to the death penalty in extradition proceedings was included in the 1935 Harvard Law School Draft Extradition Treaty. It provided: A requested State may make the extradition of any person conditional upon the receipt of satisfactory assurance that, in case of conviction, neither the death penalty, nor any cruel or unusual punishment, will be imposed upon him by the requesting State.<sup>33</sup>

By 1957, Western Europe had incorporated the uniqueness of capital punishment in the continent's model extradition law. This uniqueness was manifested in the European Convention on Extradition,<sup>34</sup> which reserved to member States the option of refusing to extradite under certain circumstances. Article 11 provided:

If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting party gives such assurance as the requested party considers sufficient that the death-penalty will not be carried out.<sup>35</sup>

This article was narrower in scope than the Harvard Draft Convention

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provides for the abolition of the death penalty. SCHABAS, *supra* note 24, at 228-38.

29. Protocol to the American Convention on Human Rights to Abolish the Death Penalty, *approved by* the O.A.S. General Assembly on June 8, 1990, Pan-Am. T.S. 73, *reprinted in* 29 I.L.M. 1447 (1990) [hereinafter ACHR Protocol] (entered into force Aug. 28, 1991); Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming At the Abolition Of The Death Penalty, *adopted on* Dec. 15, 1989, G.A. Res. 44/128, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/128, *reprinted in* 29 I.L.M. 1464 (1990) [hereinafter Second Optional Protocol] (entered into force July 11, 1991); Protocol No. 6 to the Convention For The Protection Of Human Rights And Fundamental Freedoms Concerning The Abolition of the Death Penalty, *done at* Strasbourg, on Apr. 28, 1983, Europ. T.S. 114, *reprinted in* 22 I.L.M. 538 (1983) [hereinafter Protocol No. 6] (entered into force Mar. 1, 1985).

30. Fifty-three countries have abolished the death penalty for all offenses and sixteen for all but exceptional offenses, such as wartime offenses. Twenty-one countries and territories have not executed anyone for at least ten years. AMNESTY INTERNATIONAL USA, AMNESTY INTERNATIONAL REPORT 1994, 23 (1994).

31. David Mazie, *Death Penalty Remains Alive Around the World, Arousing Strong Passions*, L.A. TIMES, Jan. 16, 1994, at A2 (quoting Amnesty International).

32. The term "retentionist" is used in this article to describe a State that continues to impose and execute death sentences.

33. *Harvard Law School Draft Extradition Treaty*, 29 AM. J. INT'L L. 21, 30 (Supp. 1935).

34. European Convention on Extradition, *supra* note 17.

35. *Id.*, art. 11, 359 U.N.T.S. at 282.

on Extradition because the European Convention on Extradition's article did not contain language that allowed the harboring State to refuse an extradition request in the absence of assurances from the requesting State that the person would not be subject to cruel or unusual punishment. This may have been omitted because all of the prospective parties to the Convention on Extradition were to be or were already parties to the European Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention).<sup>36</sup> The European Convention provided in article 3 that "[no] one shall be subjected to torture or to inhuman or degrading treatment or punishment."<sup>37</sup> However, the European Convention did not prohibit capital punishment.<sup>38</sup> Thus, the Convention on Extradition partially filled the void left by the European Convention.

Many bilateral treaties adopted provisions similar to article 11 of the European Convention on Extradition in the years following the drafting of that convention.<sup>39</sup> Ultimately a similar provision was included in the 1991 United Nations General Assembly Resolution on a Model Treaty on Extradition.<sup>40</sup>

Consonant with the South American abolition movement, the Inter-American treaty system has usually taken a more aggressive posture against capital punishment.<sup>41</sup> This aggressiveness was manifested in the 1981 Inter-American Convention on Extradition, which unconditionally prohibits the extradition of a person when the person will be punished "by the death penalty, by life imprisonment, or by degrading punishment" in the requesting

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36. European Convention on the Protection of Human Rights and Fundamental Freedoms, *supra* note 8.

37. *Id.*, art. 3, 213 U.N.T.S. at 224.

38. *Id.*, art. 2(1), 213 U.N.T.S. at 224, provides, "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally *save in the execution of a sentence by a court following his conviction of a crime for which this penalty is provided by law*" (emphasis added).

39. *E.g.*, Extradition Treaty, May 4, 1978, U.S.-Mex., art. 8, 31 U.S.T. 5059, 5065; U.S.-U.K Extradition Treaty, *supra* note 23, art. IV, *reprinted in infra* note 58; U.S.-Can. Extradition Treaty, *supra* note 23, art. 6, *reprinted in infra* note 111; Extradition Treaty, Jan. 21, 1971, U.S.-Arg., art. 8, 23 U.S.T. 3501, 3511; Extradition Treaty, Dec. 10, 1962, U.S.-Isr., art. VII, 14 U.S.T. 1707, 1710; Extradition Treaty, Jan. 13, 1962, U.S.-Braz., art. VI, 15 U.S.T. 2093, 2102. *See also* 135 Cong. Rec. 26128-29 (1989) (listing twenty U.S. extradition treaties with similar provisions).

40. Model Treaty on Extradition, *supra* note 17, art. 4(d), 30 I.L.M. at 1412, provides as an optional ground for refusing extradition: "If the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless the state gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out." Footnote 12 at the end of this paragraph provides: "Some countries may wish to apply the same restriction to the imposition of a life, or indeterminate, sentence."

41. *See* American Convention on Human Rights, *done at San José*, on Nov. 22, 1969, art. 4(2)(3), 1144 U.N.T.S. 123, 145, which provide in part, "[t]he application of [capital] punishment shall not be extended to crimes to which it does not presently apply," and "[t]he death penalty shall not be reestablished in states that have abolished it."

State.<sup>42</sup>

The Inter-American Convention on Extradition's prohibition of degrading punishment presaged the coverage provided later in the 1984 United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.<sup>43</sup> The Torture Convention obligates State Parties to refrain from extraditing a person to a requesting State when there exist substantial grounds for believing that the person is in danger of being subjected to torture.<sup>44</sup> However, the definition of torture excluded the "pain or suffering arising only from, inherent in or incidental to lawful sanctions."<sup>45</sup>

In a related vein, protection from the death penalty was implicitly excluded from the 1951 United Nations Convention Relating to the Status of Refugees ("Refugee Convention")<sup>46</sup> because the convention's object and purpose was to protect persons fleeing persecution, not prosecution.<sup>47</sup> More pointedly, in the event that a bona fide refugee had been convicted of a

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42. Inter-American Convention on Extradition, *supra* note 17, art. 9, 20 I.L.M. at 724, provides:

The States Parties shall not grant extradition when the offense in question is punishable in the requesting State by the death penalty, by life imprisonment, or by degrading punishment, unless the requested State has previously obtained from the requesting State, through the diplomatic channel, sufficient assurances that none of the above-mentioned penalties will be imposed on the person sought or that, if such penalties are imposed, they will not be enforced.

43. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, *done at* New York, on Dec. 10, 1984, U.N. Doc. A/RES/39/46, *reprinted in* 1984 U.N.Y.B. 813, U.N. Sales No. E.87.I.1 [hereinafter Torture Convention] (entered into force on June 26, 1987).

44. *Id.*, art. 3, 1984 U.N.Y.B. at 814, provides:

1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.

45. *Id.*, art. 1(1), 1984 U.N.Y.B. at 814.

46. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. *See* art. 1(F)(b), 189 U.N.T.S. at 156, providing that the terms of the Refugee Convention will not apply to a person when there are serious reasons to consider that "he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee." *See also* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 36, U.N. Doc. HCR/PRO/4 (1979) [hereinafter "REFUGEE HANDBOOK"] (para. 155) (defining a "serious" crime as a capital crime or a very grave punishable act).

47. *See* REFUGEE HANDBOOK, *supra* note 46, at 15 (para. 56), which provides "[i]t should be recalled that a refugee is a victim—or potential victim—of injustice, not a fugitive from justice."



particularly serious crime in the State of refuge, the Refugee Convention allows that State to expel the refugee in its discretion even if that person's life would be threatened as a consequence of expulsion.<sup>48</sup>

### III. NEW SOURCES OF CONTROL ON A STATE'S DISCRETION TO EXTRADITE

#### A. *The European Court of Human Rights*

On July 9, 1989, the European Court of Human Rights<sup>49</sup> altered the landscape of global extradition law. In *Soering v. United Kingdom*,<sup>50</sup> the Court unanimously held that a State Party's decision to extradite could, if implemented, give rise to a breach of article 3 of the European Convention, which prohibits torture, inhuman or degrading treatment or punishment.<sup>51</sup> This was remarkable because the relevant text of the European Convention

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48. Refugee Convention, *supra* note 46, art. 1(A)(2), 189 U.N.T.S. at 152-54 (Definition Of The Term "Refugee"). The term refugee applies to any person who,

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence . . . is unwilling to return to it.

*Id.* art. 33, 189 U.N.T.S. at 176 (Prohibition of Expulsion or Return ("Refoulement")), provides:

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

49. The European Court of Human Rights was established by the European Convention. The Court's purpose is to "ensure the observance of the engagements undertaken by the [signatory States]." European Convention, *supra* note 8, art. 19(2), 213 U.N.T.S. at 234. The jurisdiction of the Court extends to all cases concerning the interpretation and application of the European Convention which the State Parties or the European Commission of Human Rights refers to it. *Id.*, art. 45, 213 U.N.T.S. at 246. If a State Party has consented to article 25 of the European Convention, then the Commission may receive petitions from any person within the jurisdiction of that State. *Id.*, art. 25, 213 U.N.T.S. at 236. The Commission may refer the matter to the European Court, but typically does not do so until the Commission has published a decision or a friendly settlement between the parties. *Id.*, arts. 28(b), 31, 48, 213 U.N.T.S. at 238-44.

50. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 35 (1989) (para. 111). See generally, Richard B. Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128 (1991).

51. European Convention, *supra* note 8, art. 3, 213 U.N.T.S. at 224.

is silent on extradition.<sup>52</sup>

Jens Soering was wanted by the United States for charges of capital murder.<sup>53</sup> Soering, a West German national, and his Canadian girlfriend fled from Virginia to the United Kingdom soon after the girlfriend's Virginian parents were found murdered in 1985.<sup>54</sup> Both were arrested in the United Kingdom the next year in connection with "cheque fraud."<sup>55</sup> Based partially on Soering's admission of guilt which included evidence of premeditation, a Virginia grand jury indicted him for capital murder.<sup>56</sup> In August 1986, the United States requested Soering's extradition under the terms of the bilateral Extradition Treaty of 1972.<sup>57</sup> This treaty enables the harboring State to condition the extradition on the assurances that the death penalty will not be imposed in the requesting State if the harboring State does not provide for the death penalty in a similar case.<sup>58</sup> By the time the United States requested Soering's extradition, the United Kingdom had abolished the death penalty for all but certain military offenses.<sup>59</sup>

The United Kingdom's Secretary of State instituted extradition proceedings against Soering and requested the United States to assure that Soering would not face the death penalty.<sup>60</sup> The Virginia county attorney replied by merely certifying that a representation would be made to the sentencing judge that the United Kingdom wished that the death penalty would not be imposed or carried out.<sup>61</sup>

At the time of the murder, Soering was eighteen years of age<sup>62</sup> and two United Kingdom psychiatrists were of the opinion that he suffered from a

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52. *Id.* The European Convention is not wholly silent on extradition, since extradition is articulated as a permissible object of lawful arrest or detention. *Id.*, art. 5(1)(f), 213 U.N.T.S. at 226.

53. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 4 (para. 11).

54. *Id.* (paras. 11, 12).

55. *Id.* (para. 12).

56. *Id.* (para. 13).

57. *Id.* (para. 14); U.S.-U.K. Extradition Treaty, *supra* note 23, 28 U.S.T. at 235 (granting extradition for murder).

58. U.S.-U.K. Extradition Treaty, *supra* note 23, art. IV, 28 U.S.T. at 230, provides:

If the offence for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested party that the death penalty will not be carried out.

59. Lillich, *supra* note 50, at 129.

60. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 4 (paras. 14, 15).

61. *Id.* at 6 (para. 20) (Mr. Updike's sworn affidavit in his capacity as Attorney for Bedford County certified "that should Jens Soering be convicted of the offence of capital murder as charged in Bedford County, Virginia . . . a representation will be made in the name of the United Kingdom that the death penalty should not be imposed or carried out.")

62. *Id.* at 4 (para. 12).

mental condition known as *folie á deux*.<sup>63</sup> However, Soering's age and mental condition in this instance would not, as a matter of law, have prohibited Soering's execution in the United States.<sup>64</sup>

West Germany took an interest in the proceedings due to Soering's West German citizenship.<sup>65</sup> After the United States requested extradition, West Germany filed non-capital murder charges against Soering and requested his extradition from the United Kingdom.<sup>66</sup> The United Kingdom chose to grant the American request partially because West Germany lacked the subpoena power to establish sufficient evidence for a conviction of an admitted murderer.<sup>67</sup>

The United Kingdom's Secretary of State indicated satisfaction with the Virginia assurances by signing the warrant for Soering's surrender to the United States authorities.<sup>68</sup> Soering appealed this warrant directly to the European Commission on Human Rights<sup>69</sup> without challenging the warrant in British courts.<sup>70</sup> The United Kingdom stayed the surrender of Soering pending resolution of the matter.<sup>71</sup>

The European Court of Human Rights determined that the extradition of Soering to the United States would expose him to a real risk of treatment

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63. "Folie á deux" is a psychiatric syndrome, or abnormality of mind, where the person loses their identity and acts on the suggestion of another. The person's culpability for his or her actions are diminished but are not eliminated. "Folie á deux" is recognized in the United Kingdom to be a defense of "not guilty to murder but guilty of manslaughter." *Id.* at 6 (para. 21). The psychiatrists concluded that Soering suffered from this condition at the time of the murder and that he acted on the suggestion of his psychotic girlfriend. *Id.*

64. The week before the European Court of Human Rights issued the *Soering* decision, the United States Supreme Court held in two decisions that it was Constitutionally permissible to execute persons for crimes committed while at the age of sixteen or while mentally retarded but not "insane." *Stanford v. Kentucky*, 492 U.S. 361 (June 29, 1989); *Penry v. Lynaugh*, 492 U.S. 302 (June 29, 1989).

65. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 5 (paras. 16, 17).

66. *Id.* (para. 16).

67. *Id.* at 5-6 (paras. 16, 19). Germany could not establish a prima facie case for their anticipated proceedings if it were based solely on the strength of Soering's admission. *Id.* (para. 16). Another possible motivation for honoring the United States' request was to alleviate strains in the U.S.-U.K. relationship caused by publicity over U.K. extradition requests for suspected terrorists affiliated with the Irish Republican Army (IRA). One commentator has concluded that *Soering* was a "disaster" for the United Kingdom because the case's publicity impeded the U.K.'s diplomatic efforts to extradite IRA suspects from the United States. Robertson, *Extradition, Inhuman Treatment and the Death Penalty*, 154 JUST. PEACE 231, 232 (1990), reprinted in Lillich, *supra* note 50, at 143.

68. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 8 (para. 24).

69. The European Commission on Human Rights is an intermediate body which may receive petitions from individuals and may refer those petitions to the European Court of Human Rights. See discussion *supra* note 49.

70. *Id.* at 8 (para. 24), 23 (para. 76). The failure to challenge the warrant may have been a failure to exhaust local remedies and could therefore have rendered the complaint inadmissible by the European Commission or the European Court of Human Rights. The complaint may have been admissible because the British Courts did not have jurisdiction to stay Soering's surrender even if he had challenged the warrant. *Id.* at 11 (para. 35).

71. *Id.* at 8 (para. 24).

going beyond the threshold set by article 3.<sup>72</sup> Specifically, the violative treatment that Soering would be subjected to was “death-row-phenomenon.” Death-row-phenomenon is a highly controversial<sup>73</sup> doctrine that describes the prolonged mental suffering and anguish that a sentenced prisoner experiences while awaiting execution (six to eight years in Soering’s case).<sup>74</sup>

Since the Court’s holding was both aggressive and unanimous, it was necessarily compromised and narrow. In holding that a breach of article 3 could occur if extradition were carried out, the grounds for the Court’s decision rested on the existence of all of the following: (1) Soering’s age and (2) mental state at the time of the offense; (3) that Soering would spend six to eight years in post-sentence detention in harsh conditions with concomitant mental anguish; (4) that the legitimate purposes of extradition can be achieved by other means;<sup>75</sup> (5) the interest of all States in bringing fugitive offenders to justice; and (6) the recognition that a State’s becoming a safe-haven to fugitives is a threat to the receiving nation and tends to undermine the foundations of extradition.<sup>76</sup> The importance of including all the elements to reach a unanimous decision of a breach was underscored by the concurring opinion of Judge de Mayer, who, while joining in the Court’s finding of a breach, dissented on the latter two factors of the Court’s rationale because they left “too much room for unacceptable infringements of the fundamental rights of persons whose extradition is sought.”<sup>77</sup>

One of the striking elements of the Court’s decision was the way it incorporated the law of extradition into article 3. In finding an “inherent obligation not to extradite,” the Court observed that it would be incompatible with the

underlying values of the Convention, that ‘common heritage of political traditions, ideals, freedom and the rule of law’ to which the preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture.<sup>78</sup>

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72. *Id.* at 35 (para. 111).

73. See discussion *infra* part IV. B.

74. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 17 (para. 56).

75. The means the Court probably meant were West Germany’s alternative proceedings in which the death penalty would not be imposed and the possibility of sending Soering to the United States after obtaining satisfactory assurances from the United States’ prosecutors or diplomats that the death penalty would not be imposed.

76. *Id.* at 27 (para. 89), 35 (para. 111).

77. *Id.* at 41-42 (de Mayer, J., concurring). Judge de Mayer was of the opinion that “[w]hen a person’s right to life is involved, no requested State can be entitled to allow a requesting State to do what the requested State is not itself allowed to do.” *Id.* Judge de Mayer determined that if a State’s domestic law prohibits the imposition of the death penalty for the crime concerned, the State may not put the person in a position to receive the death penalty by the hands of another State. *Id.*

78. *Id.* at 26 (para. 88). The language the European Court employed is nearly identical to the text of the Torture Convention’s article 3, paragraph 1 (*supra* note 44).

Since the express language of the European Convention is silent on extradition, it can be argued that the United Kingdom never consented to have its extradition considerations subjected to any restriction arising from that convention. This is especially apparent in light of the United Kingdom's ratification of the Torture Convention, which expressly imposes a control on State discretion in extradition considerations;<sup>79</sup> through its ratification of the Refugee Convention, which imposes express controls on a State's discretion to expel members of a specifically defined class of persons (i.e., "refugees");<sup>80</sup> through its non-signing of the European Convention on Extradition, which imposes express controls on a State's discretion in extradition considerations;<sup>81</sup> and (arguably) through its non-signing of Protocol No. 6 to the European Convention, which expressly prohibits a State from implementing the death penalty and imposes implicit controls on a State's discretion in extradition considerations.<sup>82</sup> The Court cited no evidence of the United Kingdom's extradition practice nor *opinio juris* that supported a finding that the United Kingdom had, by customary international law, obligated itself to refuse to extradite under any circumstances.

The Court justified its expansion of the European Convention by noting that interpretations of the rights and freedoms guaranteed by the European Convention had to be consistent with the "general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society."<sup>83</sup> The Court discussed the importance of article 3 protections by noting that they were non-derogable<sup>84</sup> in times of war or other national emergency and were thus enshrined as one of the "fundamental values of the democratic societies making up the Counsel of Europe."<sup>85</sup> It also noted that the right was found in other instruments in similar terms and was generally recognized as an international standard.<sup>86</sup>

While it is significant that article 3 protections are held in high regard and possess a universal quality, those factors do not appear to substantiate or justify the Court's interpretation of the European Convention. The Court's

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79. See *supra* notes 43-45 and accompanying text.

80. See *supra* notes 46-48 and accompanying text.

81. European Convention on Extradition, *supra* note 17.

82. See *infra* text accompanying notes 99-108.

83. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 26 (para. 87) (referring to *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 1 Eur. H.R. Rep. 711, (para. 53)). Cf. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (Marshall, C.J.) ("we must never forget that it is a constitution we are expounding," (discussing the different treatment that must be afforded a constitution as compared to legislation)).

84. A non-derogable right is a right that cannot be violated by a State when there is a public emergency which threatens the life of the State. See, e.g., American Convention on Human Rights, *supra* note 41, art. 27, 1144 U.N.T.S. at 152; Covenant, *supra* note 9, art. 4, 58 Fed. Reg. at 45935, 999 U.N.T.S. at 174; European Convention, *supra* note 8, art. 15, 213 U.N.T.S. at 232.

85. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 26 (para. 88).

86. *Id.*

incorporation of extradition law into the European Convention was an extremely bold assertion of power, especially when an alternative instrument, the Torture Convention, was expressly applicable and binding on the United Kingdom.<sup>87</sup>

Also noteworthy was the Court's finding that a breach would occur if Soering were to be exposed to death-row-phenomenon as opposed to death by electrocution, which was the means of execution that Soering would have faced in Virginia.<sup>88</sup> The record did not reveal whether evidence was presented to the Court or Commission of the suffering that may be experienced through death by electrocution. However, evidence was available because there had been a widely publicized execution in Alabama in which the decedent received three charges of 1900 volts over the span of nine minutes. At one point, smoke and flames erupted from his temple and leg.<sup>89</sup> The Court simply concluded that the Virginia scheme had been judicially determined to not constitute cruel and unusual punishment.<sup>90</sup>

The Court evaluated the death-row-phenomenon claim and not the electrocution methodology ostensibly because the former claim had not been considered by the United States Supreme Court<sup>91</sup> and the latter claim had

87. Torture Convention, *supra* note 43, art. 3, reprinted in *supra* note 44 (prohibiting extradition of a person where there are substantial grounds for believing that he would be in danger of being subjected to torture). The United Kingdom ratified the Torture Convention without qualification on December 8, 1988. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1993 at 180, U.N. Doc. ST/LEG/SER.E/12, U.N. Sales No. E.94.V.11 (1994).

88. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 15 (para. 48).

89. AMNESTY INTERNATIONAL, USA: THE DEATH PENALTY 15 (1986) (referring to the execution of John Louis Evans); *Triple Jeopardy*, N. Y. TIMES, Apr. 26, 1983, at A22 (the Governor refused Evans' lawyer's plea to halt the proceedings after the second charge of electricity). See also *Glass v. Louisiana*, 471 U.S. 1080, 1086-88 (1985) (Brennan, J., dissenting):

Witnesses routinely report that, when the switch is thrown, the condemned prisoner "cringes," "leaps," and "fights the straps with amazing strength." "The hands turn red, then white, and the cords of the neck stand out like steel bands." The prisoner's limbs, fingers, toes, and face are severely contorted. The force of the electrical current is so powerful that the prisoner's eyeballs sometimes pop out and "rest on [his] cheeks." The prisoner often defecates, urinates, and vomits blood and drool.

"The body turns bright red as its temperature rises," and the prisoner's "flesh swells and his skin stretches to the point of breaking." Sometimes the prisoner catches on fire, particularly "if [he] perspires excessively." Witnesses hear a loud and sustained sound "like bacon frying," and "the sickly sweet smell of burning flesh" permeates the chamber. This "smell of frying human flesh in the immediate neighbourhood of the chair is sometimes bad enough to nauseate even the Press representatives who are present." In the meantime, the prisoner almost literally boils: "the temperature in the brain itself approaches the boiling point of water," and when the postelectrocution autopsy is performed "the liver is so hot that doctors have said that it cannot be touched by the human hand." The body frequently is badly burned and disfigured. (alterations in original) (footnotes omitted).

90. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 15 (para. 48) (referring to *Stamper v. Commonwealth*, 220 Va. 260 (1979), *cert. denied*, 445 U.S. 972 (1980)).

91. *Id.* at 17 (para. 56).

been rejected by the Supreme Court of Virginia.<sup>92</sup> However, the death-row-phenomenon claim was rejected in the United States several years before<sup>93</sup> and has been part of the debate in the American judiciary for over one hundred years.<sup>94</sup> One possible explanation for the Court's choice to focus on the death-row-phenomenon claim instead of the electrocution claim is that the Court purposely chose a characteristic that was common to all American executions, lengthy post conviction detention. If so, the Court probably suspected that this characteristic was unlikely to be modified prior to abolition in the United States.

Additionally, the European Court of Human Rights rejected the argument in *Soering* that the death penalty was a breach *per se* of the article 2 right to life.<sup>95</sup> It noted that most State Parties had generally abolished the death penalty by law or by practice since the European Convention went into effect. It reasoned, however, that article 2, paragraph 1, recognized the legality of the death penalty and that the State Parties chose to obligate themselves to abolition by drafting and acceding to Protocol No. 6 to the European Convention<sup>96</sup> and not through the interpretations of the Court or Commission.<sup>97</sup> Accordingly, the right to life provision in the European Convention did not bar *Soering's* extradition.<sup>98</sup>

Protocol Number 6 provides for the non-derogable<sup>99</sup> abolition of the

92. *Id.* at 15 (para. 48).

93. *People v. Chessman*, 52 Cal. 2d 467 (1959), *cert. denied*, 361 U.S. 925, *reh'g denied*, 361 U.S. 941 (1960).

94. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 288 (1972) (Brennan, J.) ("[M]ental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"); *Ex parte Medley*, 134 U.S. 160, 172 (1890) (Miller, J.) ("[W]hen a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it . . . as to the precise time when his execution shall take place"). *Compare with Harrison v. United States*, 392 U.S. 219, 221 n.4 (1968) (eight years between arrest and sentencing was not unconstitutional where the delay resulted from the need to assure careful review of an unusually complex case); *Andrews v. Shulsen*, 600 F. Supp. 408, 431 (D. Utah 1984), *aff'd* 802 F.2d 1256 (10th Cir. 1986), *cert. denied*, 485 U.S. 919, *reh'g denied*, 485 U.S. 1015 (1988) (accepting the petitioners' argument would be a "mockery of justice" given that the delay was attributable more to the petitioner's actions than to the state's).

95. European Convention, *supra* note 8, art. 2(1), *reprinted in supra* note 38; *Soering*, 161 Eur. Ct. H.R. (ser. A) at 31 (para. 103). *But cf. de Mayer, J., concurring, id.* at 41-42. (Judge de Mayer was of the opinion that the imposition of the death penalty in time of peace was a breach *per se* of the European Convention's right to life. Judge de Mayer determined that capital punishment was not consistent with the present state of European civilization and that the second sentence of article 2(1), was "overridden by the development of legal conscience and practice.")

96. Protocol No. 6, *supra* note 29.

97. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 31 (para. 103).

98. *Id.* at 31-32 (paras. 102-104).

99. Protocol No. 6, *supra* note 29, art. 3, 22 I.L.M at 539, provides, "No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention." Article 15 of the European Convention allows for the derogation of certain rights in time of war or other public emergency threatening the life of the nation. European Convention, *supra* note 8, art.

death penalty<sup>100</sup> with an optional reservation that allows retention for military offenses.<sup>101</sup> After *Soering* was decided, the Supreme Court of the Netherlands held that the Netherlands' would breach its obligations under article 1 of Protocol No. 6 if it surrendered a fugitive when the death penalty may result.<sup>102</sup> In that case, the court also determined that the Netherlands was simultaneously obligated to hand over the fugitive to United States authorities<sup>103</sup> by operation of the NATO Status of Forces Agreement.<sup>104</sup> It resolved the conflict by employing a balancing test: "The interest of the fugitive not to be put to death takes precedence over the interest of the State to fulfill its obligations under the NATO Status Treaty."<sup>105</sup> Thus, the high court of the Netherlands concluded that the law of extradition was incorporated into article 1 of Protocol No. 6, and its importance was deemed to outweigh the express obligations arising from a conflicting treaty of

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15, 213 U.N.T.S. at 232-34.

100. Protocol No. 6, *supra* note 29, art. 1, 22 I.L.M. at 539, provides: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

101. Protocol No. 6, *supra* note 29, art. 2, 22 I.L.M. at 539, provides: "A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war. . . ."

102. Judgment of Mar. 30, 1990, Hoge Raad der Nederlanden [highest court] (Neth.), translated in Leonard H.W. van Sandick, *The Netherlands: Opinion of the Advocaat-Generaal and Supreme Court Decision in the Netherlands v. Short*, 29 I.L.M. 1375, 1388 (para. 3.3) (1990). See generally Major John E. Parkerson, Jr. & Major Steven J. Lepper, *International Decisions: Short v. Kingdom of the Netherlands*, 85 AM. J. INT'L L. 698 (1991). Charles Short, a United States sergeant stationed in the Netherlands, murdered his Turkish wife in March 1988. Parkerson, *supra* at 699. Dutch military police apprehended Short and obtained a confession. *Id.* Handing American military personnel over to American military authorities would have been the proper procedure to follow pursuant to the NATO Status of Forces Agreement. *Id.* at 700. However, since the military police were aware that Short would be a candidate for the death penalty under the United States Uniform Code of Military Justice, they sought guidance from higher authorities prior to releasing him to the Americans. *Id.* A District Court subsequently ordered the Dutch Secretary State of Justice to negotiate a guarantee from the United States that the death penalty would not be imposed on Short as a precondition to extradition. van Sandick, *supra* at 1388 (para. 1.1).

The Commander-in-Chief of the United States Air Forces in Europe refused to give assurances that the death penalty would not be imposed on Short, citing policy and legal reasons. Parkerson, *supra* at 702. (Parkerson noted that the United States has more troops deployed overseas than any other nation, and that the "thread" that holds the "far flung force together is military discipline—discipline that can be enforced only through the Uniform Code of Military Justice." *Id.*) Eventually the Dutch Criminal courts found that jurisdiction to prosecute was lacking and the Civil courts refused to allow Short to be handed over to the Americans. *Id.* at 700.

103. van Sandick, *supra* note 102, at 1388-89 (para. 3.1).

104. Agreement Relating to the Stationing of Armed Forces, Aug. 13, 1954, U.S.-Neth., para. 3, 6 U.S.T. 103 annex.

105. van Sandick, *supra* note 102, at 1389 (para. 3.5). *But cf.* Gomez v. U.S. District Court, 112 S. Ct. 1652 (1992). The state of California's "strong interest in proceeding with its judgment [to execute]" outweighed Robert Alton Harris' interest in manipulating the justice system. *Id.* The Court did not recognize Harris' interest in avoiding death by a possibly cruel and unusual procedure (i.e., death by cyanide gas asphyxiation), nor did it address the merits of the claim of cruel and unusual punishment. The case was allowed to proceed on the merits in Federal District Court after Harris' execution where it was held that death by cyanide gas violates the Eighth and Fourteenth Amendments to the United States Constitution. *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994).



substantial importance to the Netherlands.<sup>106</sup>

Although the Court relied on *Soering*, the legality of the method of the execution as imposed in the United States (e.g., the threat of death-row-phenomenon) was not considered by the court in reaching its decision. Today, most State Parties that accept the jurisdiction of the European Court are also parties to Optional Protocol No. 6 to the European Convention.<sup>107</sup> Since the Netherlands's decision, States that are parties to Protocol No. 6 have routinely refused extradition requests that do not provide adequate assurances that the death penalty will not be imposed.<sup>108</sup>

In light of the above, the *Soering* decision can be interpreted as providing a new source of control over a State's discretion to extradite. The European Court determined that the European Convention is the source of substantive and procedural rights for persons in extradition proceedings in States that are parties to the European Convention. Specifically, the European Convention provides that persons in extradition proceedings are guaranteed relief from extradition if there is a real risk that they will be subjected to treatment in another jurisdiction that amounts to torture, cruel, inhuman or degrading treatment or punishment. This relief consists of the withholding of extradition until adequate assurances are obtained from the requesting State that the person will not be subject to such treatment. It is probable that relief could also be granted in the form of honoring a competing extradition request from a State where there is not a real risk of

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106. In the aftermath of the Court's decision, the American prosecutors determined that the elements of capital-murder did not exist and requested custody of Short for a non-capital murder trial. Parkerson, *supra* note 102, at 702. This request was granted. *Id.* Parkerson described this as a "dangerous precedent," and a "threat to the administration of U.S. military justice overseas." *Id.* at 699-702.

If the American request had not been issued nor granted, Short would have been released by the Netherlands. This would have resulted because the high Court upheld the District Court decision which determined that the Netherlands criminal courts lacked jurisdiction. Short's release would have been compelled because the high Court did not remand the case back to the Criminal Courts for a redetermination of that matter. See van Sandick, *supra* note 102, at 1389 (para. 4).

107. The following States have become parties to Protocol No. 6 as of Jan. 1, 1994: Austria, Slovakia Federal Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, and Switzerland. Those States that have signed but not ratified Protocol No. 6 include Belgium, Estonia, Greece, and Slovenia. Those Counsel of Europe States that have not signed the protocol include Bulgaria, Cyprus, Ireland, Lithuania, Poland, Romania, Turkey, and the United Kingdom. Jean-Bernard Marie, *International Instruments Relating to Human Rights*, 15 HUM. RTS. L.J. 51, 56 (1994); AMNESTY INTERNATIONAL USA, AMNESTY INTERNATIONAL REPORT 1994 351 (1993).

108. See *Denmark Refuses to Extradite Egyptian "Terrorist,"* Agence France Presse, Mar. 3, 1994, available in LEXIS, News Library, Curwns File. Denmark's Justice Minister Erling Olsen told the parliament that Denmark could not extradite political refugee Talat Fouad Kassam because it was a signatory to international conventions outlawing the extradition of suspects who faced the death penalty at home. Kassam was sentenced to death in absentia for treason, armed attacks, and possession of weapons. See also, *Murder Suspect Extradited From France Arrives in Texas*, Agence France Presse, Nov. 5, 1993, available in LEXIS, News Library, Curwns File. Joy Davis Aylor was extradited from France to Texas after U.S. federal and Texas authorities gave adequate assurances that she would not be executed.

the person receiving improper treatment. Implicit in the Court's decision is the right of a person in extradition proceedings to have the opportunity to present evidence that the person would be subjected to this prohibited treatment. Further, the Court's decision implicitly compels the harboring State to consider that evidence when deciding whether to extradite.

### B. *The United Nations Human Rights Committee*

The Human Rights Committee has been slow to incorporate the law of extradition into the International Covenant on Civil and Political Rights ("Covenant").<sup>109</sup> The Committee recognized the possibility of incorporating extradition into various provisions of the Covenant in *K.C. v. Canada*.<sup>110</sup> There, the Superior Court of Quebec, Canada, ordered "K.C.," a citizen of the United States, to be extradited to the United States pursuant to a U.S. request and to the U.S.-Canada extradition treaty.<sup>111</sup> Canada was a party to the Covenant, and the Human Rights Committee had jurisdiction to consider K.C.'s petition because Canada was a party to the Covenant's First Optional Protocol.<sup>112</sup>

Although Canada had abolished the death penalty (except for certain military offenses) in 1976,<sup>113</sup> the Canadian court ordered K.C.'s extradition without obtaining assurances from the United States that the death penalty would not be imposed.<sup>114</sup> One issue presented before the Committee was whether Canada, in deciding to extradite the American applicant without

109. International Covenant on Civil and Political Rights, *supra* note 9. The Human Rights Committee was established by article 28 of the Covenant. The Human Rights Committee reviews the implementation of the rights recognized in the Covenant. The Committee's functions are specified in articles 28 to 43 and in article 45 of the Covenant. *Id.*, 58 Fed. Reg. 45934, 45938-40, 999 U.N.T.S. 171, 179-84.

110. *K.C. v. Canada*, Communication No. 468/1992, Decision on admissibility of July 29, 1992, *reprinted in* 13 HUM. RTS. L.J. 352 (1992).

111. *Id.* at 352-53 (paras. 1 to 2.2); U.S.-Can. Extradition Treaty, *supra* note 23, art. 6, 27 U.S.T. at 989, provides:

When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offence, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed.

112. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1993 at 124, 158, U.N. Doc. ST/LEG/SER.E/12, U.N. Sales No. E.94.V.11 (1994). (First) Optional Protocol to the International Covenant on Civil and Political Rights, *done at* New York, on Dec. 19, 1966, 999 U.N.T.S. 171. The object and purpose of the First Optional Protocol is to allow individual persons who claim to be victims of violations of the rights set forth in the Covenant to submit communications to the Human Rights Committee for consideration. *Id.*, art. 1, 999 U.N.T.S. at 302.

113. *Kindler v. Canada (Minister of Justice)*, 2 S.C.R. 779, 792 (1991) (Sopinka, J., dissenting).

114. *K.C.*, 13 HUM. RTS. L.J. at 353 (para. 2.2).

assurances, breached article 6 *juncto* 26<sup>115</sup> because the United States allegedly impose death sentences in a way which discriminates against black people.<sup>116</sup> The second issue was whether Canada breached article 7<sup>117</sup> because the applicant would be exposed to death-row-phenomenon.<sup>118</sup>

Although the Canadian Supreme Court had recently held that Canada could extradite death-eligible fugitives<sup>119</sup> without assurances,<sup>120</sup> the Committee held that K.C.'s claim was inadmissible because K.C. had not exhausted the available domestic remedies.<sup>121</sup> The Committee did recognize the possibility of incorporating extradition into the Covenant by deciding that K.C. could bring the issue before the Committee after exhausting local remedies.<sup>122</sup>

The Committee next addressed the issue of extradition and the right to life in *Kindler v. Canada*.<sup>123</sup> Joseph Kindler, a citizen of the United States, was convicted of murder and kidnapping in Pennsylvania, and a jury recommended the death penalty.<sup>124</sup> He escaped from detention before formal sentencing and fled to Canada where he remained undetected for

115. Covenant, *supra* note 9, art. 6(1), 58 Fed. Reg. at 45935, 999 U.N.T.S. at 174, provides: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

*Id.*, art. 26, 58 Fed. Reg. at 45938, 999 U.N.T.S. at 179, provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

116. *K.C.*, 13 HUM. RTS. L.J at 353 (para. 3).

117. Covenant, *supra* note 9, art. 7, 58 Fed. Reg. at 45935, 999 U.N.T.S. at 175, provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

118. *K.C.*, 13 HUM. RTS. L.J at 353 (para. 3).

119. The term "death-eligible fugitive" is used in this article to describe a person that has committed or is charged with committing a serious non-political crime in a retentionist jurisdiction, and the sentence for that crime can result in the imposition of the death penalty. This person is still liable for prosecution or punishment and may or may not be within the territory of the retentionist jurisdiction. Such a person would not be a refugee by the current application of the Refugee Convention, *supra* note 46, art. 1.F(a), 189 U.N.T.S. at 156.

120. *Kindler v. Canada* (Minister of Justice), 2 S.C.R. 779 (1991); *Re Ng Extradition*, 2 S.C.R. 858 (1991). K.C.'s communication to the Human Rights Committee was dated February 24, 1994. (*K.C.*, 13 HUM. RTS. L.J at 352 (para. 1)).

121. *K.C.*, 13 HUM. RTS. L.J at 353 (paras. 4, 6(a)). Specifically, the Committee adopted Canada's observations that the applicant could have or already had availed himself of appellate relief and could petition the Minister of Justice to seek the requested assurances.

122. *Id.* (para. 6(c)).

123. *Kindler v. Canada*, Communication No. 470/1991, views adopted on July 30, 1993, *reprinted in* 14 HUM. RTS. L.J. 307 (1993) (*Kindler's* application was decided to be admissible on July 31, 1992, two days after *K.C.* was decided to be inadmissible).

124. *Id.* at 307-08 (paras. 1 to 2.1); *Kindler v. Canada* (Minister of Justice), 2 S.C.R. 779, 794 (1991) (Cory, J., dissenting).

several months.<sup>125</sup> After his seizure by Canadian authorities, the Canadian Minister of Justice chose to surrender Kindler to the United States pursuant to the bilateral extradition treaty without seeking assurances that the death penalty would not be imposed.<sup>126</sup>

In 1991, the Canadian Supreme Court held that it was not a violation of the Canadian Charter of Rights and Freedoms<sup>127</sup> nor a violation of Canada's international obligations<sup>128</sup> to send Kindler back to the United States without seeking assurances that the death penalty would not be imposed.<sup>129</sup> Kindler was released to United States marshalls the same day, despite a request by Kindler's lawyers to stay the release pending a determination by the Human Rights Committee.<sup>130</sup>

A divided Committee held that Canada did not breach any Covenant obligations by releasing Kindler without obtaining assurances and without waiting for a determination by the Committee.<sup>131</sup> Several Covenant articles were alleged to be breached, but many of them were summarily dismissed as there were inadequate facts alleged to support a claim of breach.<sup>132</sup> The Committee's decision was bifurcated between two issues: whether the Committee had jurisdiction to render a decision,<sup>133</sup> and whether Canada breached its Covenant obligations when it extradited Kindler without obtaining assurances that the death penalty would not be sought or carried out.<sup>134</sup>

The Committee took an aggressive stance on the incorporation of the law

125. *Kindler*, 14 HUM. RTS. L.J. at 308 (para. 2.1); *Kindler v. Canada* (Minister of Justice), 2 S.C.R. at 794 (Cory, J., dissenting).

126. *Kindler*, 14 HUM. RTS. L.J. at 308 (para. 2.3); *Kindler v. Canada* (Minister of Justice), 2 S.C.R. at 796 (Cory, J., dissenting).

127. CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), secs. 7, 12.

128. The dissenting opinion of Cory, J. referred to Canada's accession to the United Nations Charter, its vote in favor of the Universal Declaration of Human Rights, its accession to the Covenant and its (First) Optional Protocol, its accession to the Torture Convention, its vote in favor of a United Nations Economic and Social Council resolution affirming the goal of abolition of capital punishment, and Canada's vote in favor of the Covenant's Second Optional Protocol. *Kindler v. Canada* (Minister of Justice), 2 S.C.R. at 807-09 (Cory, J., dissenting). The judgment of La Forest, J., noted that these instruments collectively fall short of establishing the abolition of the death penalty as an international norm. *Id.* at 833-34. La Forest, J., observed that the U.S.-Can. Extradition Treaty, like the U.N. Model Treaty on Extradition, clearly contemplates the possibility of unconditional extradition under such circumstances as those found in *Kindler's* case. *Id.*

129. *Kindler v. Canada* (Minister of Justice), 2 S.C.R. 779 (1991) (Plurality, 4 - 3). See generally, William A. Schabas, *International Decisions, Kindler v. Canada* (Minister of Justice), *Re Ng Extradition*, 87 AM. J. INT'L. 128 (1993).

130. *Kindler*, 14 HUM. RTS. L.J. at 308-314 (paras. 2.4, 17).

131. *Id.* at 314 (para. 18).

132. For example, *Kindler*, who is white, alleged that the United States capital sentencing system was racially biased, but did not substantiate how the bias would have affected him. *Id.* at 308 (para. 3).

133. *Id.* at 309-10 (paras. 6.1 to 7).

134. *Id.* at 310-14 (paras. 8.1 to 18).

of extradition into the Covenant, although it did not phrase the issue in terms of incorporation. The Committee discussed its earlier determination of the admissibility of Kindler's communication.<sup>135</sup> There, the Committee determined that it was clear that the *travaux préparatoires*<sup>136</sup> revealed that article 13 was not intended to detract from normal extradition arrangements.<sup>137</sup> Article 13 provides procedural rights relating to the expulsion of aliens who are lawfully within the territory of a State Party.<sup>138</sup> Despite the clear absence of extradition considerations from this or any other article of the Covenant, the Committee observed that "whether an alien is required to leave the territory through expulsion or extradition, the general guarantees of article 13 in principle apply, *as do the requirements of the Covenant as a whole.*"<sup>139</sup> In support of this conclusion, the Committee noted that Canada had already allowed Kindler to avail himself of the Canadian courts, including the Supreme Court of Canada.<sup>140</sup> The Committee thus incorporated elements of extradition law into the Covenant by extending the Covenant's procedural and substantive rights to aliens<sup>141</sup> that are *unlawfully* in the territory of a State Party and are subject to expulsion.<sup>142</sup> This holding should encourage refugees and asylum applicants in a Covenant State Party to petition for Covenant-derived protections should the Refugee Convention

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135. *Id.* at 309 (para. 6.6).

136. *Travaux préparatoires* is a term of art that refers to the preparatory work of a treaty, and is like a legislative history. See generally Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31-33, 1155 U.N.T.S. 331, 340, reprinted in 8 I.L.M. 679, 691-93 (1969), 63 AM. J. INT'L L. 875, 885-86 (1969) (law governing the interpretation of treaties).

137. *Kindler*, 14 HUM. RTS. L.J. at 309 (para. 6.6).

138. Covenant, *supra* note 9, art. 13, 58 Fed. Reg. at 45938, 999 U.N.T.S. at 176, provides:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be presented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

139. *Kindler*, 14 HUM. RTS. L.J. at 309 (para. 6.6) (emphasis added).

140. *Id.*

141. This decision was not unanimous: two members of the Committee believed that the existence of other extradition conventions precluded the Committee from admitting any requests to review extradition cases except in exceptional circumstances. *Id.*, app. A, 14 HUM. RTS. L.J. at 315 (Opinions of Mr. Herndl and Mr. Sadi). These Committee members hypothesized that an exceptional circumstance would arise if there was an arbitrary extradition to a country where there are substantial grounds for believing that a person would be subjected to torture. *Id.*

142. The class of aliens that are unlawfully in the territory of a State Party and are subject to expulsion is larger than the class of persons subject to extradition. See, e.g., 8 U.S.C. § 1251(a)(1)(B), which provides for the deportation of the class of aliens that (unlawfully) entered the territory of the United States without inspection.

fail to provide sufficient protection from expulsion or return (“*refoulement*”).<sup>143</sup>

In its discussion of the merits, the Committee first acknowledged that, “[i]f a State Party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk<sup>144</sup> that his or her rights under the Covenant will be violated in another jurisdiction, the State Party itself may be in violation of the Covenant.”<sup>145</sup>

In assessing whether the death-row-phenomenon associated with capital punishment constitutes a breach of article 7, the Committee reaffirmed its earlier decisions that “prolongued judicial proceedings do not *per se* constitute cruel, inhuman and degrading treatment, even if they can be a source of mental strain for the convicted person.”<sup>146</sup> It also noted that “prolonged periods of detention under a strict custodial regime on death row could not necessarily be considered to constitute cruel, inhuman, and degrading treatment if the convicted person is merely availing himself of

143. See, e.g., Refugee Convention, *supra* note 46, art. 1(F)(b), 189 U.N.T.S. at 156, which provides that fugitives from prosecution of serious non-political crimes are not afforded the protections of the Refugee Convention. See also, REFUGEE HANDBOOK, *supra* note 46, at 36 (para. 155), which suggests that, in this context, a serious crime is a capital crime or very grave punishable act. In applying this exclusion clause, the State employs a balancing test between the nature of the offense committed and the degree of persecution feared. *Id.* at 36-37 (paras. 154-156). It is possible that there will be instances where the application of the balancing test would result in an expulsion or return which is permissible by the Refugee Convention but impermissible by the substantive guarantees of the Covenant.

See also Refugee Convention, *supra* note 46, art. 33, reprinted in *supra* note 48, which allows for the expulsion or return (“*refoulement*”) of a refugee even if that person’s life or freedom would be threatened if that person, after having been convicted of a particularly serious crime in the harboring State, constitutes a danger to the community of his country of refuge. Article 33 has been given force in the United States through operation of 8 U.S.C. § 1253(h). See *INS v. Stevic*, 467 U.S. 407 (1984). This statute provides for the non-discretionary withholding of deportation for aliens whose life or freedom would be threatened in the country to which they would be returned on account of race, religion, nationality, membership in a particular social group, or political opinion. This withholding of deportation is not available to aliens that have been convicted of an “aggravated felony” in the United States. 8 U.S.C. § 1253(h)(2). The definition of “aggravated felony” was recently expanded to include certain theft offenses, child pornography offenses, fraud offenses, tax offenses, commercial alien smuggling offenses, and other nonviolent crimes. IMMIGRATION AND NATIONALITY TECHNICAL CORRECTIONS ACT OF 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305. Once deportability is established in evidentiary proceedings, the alien is precluded from presenting evidence of any prospectively harmful treatment in the designated country of deportation. *Matter of K—, I. & N. Int. Dec. 3163* (1991), see also 8 C.F.R. § 236.3(c) and 8 C.F.R. § 242.17(c)(4) (1994) (administrative regulations governing evidentiary proceedings conducted by Immigration Judges in deportation and exclusion proceedings, respectively); 8 C.F.R. § 208.16(c) and § 208.24(b)(3) (1994) (administrative regulations governing evidentiary proceedings conducted by Asylum Officers); IMMIGRATION AND NATIONALITY TECHNICAL CORRECTIONS ACT OF 1994, Pub. L. No. 103-416, § 224, 108 Stat. 4305 (enables a federal district court to order deportation at the time of criminal sentencing).

144. The Committee defined a “real risk” as a “necessary and foreseeable consequence.” *Kindler*, 14 HUM. RTS. L.J. at 313 (para. 14.1(a)).

145. *Id.* at 313 (para. 13.2).

146. *Kindler*, 14 HUM. RTS. L.J. at 309 (para. 6.4) (quoting Earl Pratt and Ivan Morgan v. Jamaica, para. 13.6, Communication Nos. 210/1986 and 225/1987, Apr. 6, 1989).

appellate remedies.”<sup>147</sup> The Committee observed that “the facts and circumstances of each case need to be examined” in any article 7 analysis.<sup>148</sup>

In evaluating whether the imposition of capital punishment violates article 7, the Committee articulated a new test. The Committee noted that it would consider the relevant personal factors regarding the victim, the specific conditions on death row, and whether the proposed method of execution is particularly abhorrent.<sup>149</sup> The Committee then distinguished *Kindler*’s case from that of the judgment of the European Court of Human Rights in *Soering*.<sup>150</sup> In determining that Canada did not breach article 7, the Committee noted that the facts differed as to the age and mental state of the offender,<sup>151</sup> noted the absence of evidence submitted that describe Pennsylvania prison conditions, noted the lack of evidence which would indicate the effects of the prospective post-sentence detention, and noted the absence of a simultaneous extradition request by an abolition State.<sup>152</sup>

*Kindler* also argued that Canada breached its obligations under article 6, paragraph 1,<sup>153</sup> when it extradited him to the United States. Specifically, he argued that since Canada had abolished capital punishment, article 6 required Canada to refrain from doing indirectly what it could not do directly.<sup>154</sup> He further argued that article 6, paragraph 2,<sup>155</sup> only applies to countries that have not abolished the death penalty.<sup>156</sup>

The Committee rejected *Kindler*’s argument that article 6 prohibited Canada from indirectly implementing capital punishment through extradition<sup>157</sup> by noting that Canada was not a party to the Second Optional

147. *Id.* (citing *Randolph Barrett & Clyde Sutcliffe v. Jamaica*, Communications Nos. 270/1988 and 271/1988 (1992), para. 8.4).

148. *Id.* at 314 (para. 15.2). Covenant, *supra* note 9, art. 7, *reprinted in supra* note 117, provides in relevant part that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

149. *Kindler*, 14 HUM. RTS. L.J. at 314 (para. 15.3).

150. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

151. *Kindler* was approximately twenty two years old at the time of his conviction and was thirty years old at the time of his extradition. He did not allege to be suffering from any adverse mental state. *Kindler*, 14 HUM. RTS. L.J. at 307 (paras. 1 to 2.1).

152. *Id.* at 314 (para. 15.3).

153. Covenant, *supra* note 9, art. 6(1), *reprinted in supra* note 115, provides in relevant part that “[n]o one shall be arbitrarily deprived of life.”

154. *Kindler*, 14 HUM. RTS. L.J. at 312 (para. 10.1).

155. Covenant, *supra* note 9, art. 6(2), 58 Fed. Reg. at 45935, 999 U.N.T.S. at 174, provides in relevant part that “sentence[s] of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant . . . .”

156. *Id.*

157. However, five of its eighteen members believed Canada was in breach of the right to life provision when it extradited *Kindler* under the theory that once a State Party abolished the death penalty, article 6 prohibits that party from reintroducing it through the process of extradition. *Kindler*, apps. B to F, 14 HUM. RTS. L.J. at 316-23 (Opinions of Mr. Wennergren, Mr. Lallah, Mr. Pocar, Ms. Chanet, and Mr. Urbina).

Protocol, which expressly prohibits a State from implementing the death penalty.<sup>158</sup> The Committee observed that Canada's general abolition of capital punishment did not release Canada of its obligations under extradition treaties.<sup>159</sup> The Committee merely observed that, "it is in principle to be expected that . . . a State which has itself abandoned capital punishment would give serious consideration to its own chosen policy" when deciding whether or not to seek assurances that capital punishment will not be imposed as a condition to extradition.<sup>160</sup> In light of the Committee's recognition that a State Party may be in violation of the Covenant if it extradites a person to another jurisdiction and in light of the Committee's reliance on the fact that Canada is not a party to the Second Optional Protocol, it appears likely that the Human Rights Committee would hold that the Second Optional Protocol imposes an obligation on State Parties to prohibit extradition when there is a real risk that the death penalty would be imposed.

The Committee hypothesized that had Kindler been exposed, through extradition, to a real risk of a violation of the Convention's article 6, paragraph 2,<sup>161</sup> in the United States, Canada would have violated its obligations under article 6, paragraph 1.<sup>162</sup> However, the Committee concluded that there was not a breach in this instance because Kindler did not allege that he received an unfair trial in Pennsylvania.<sup>163</sup> Thus, the Committee could not find that he would be arbitrarily deprived of his life in Pennsylvania. The Committee also hypothesized that Canada would have breached article 6 had Canada decided to send Kindler to the United States arbitrarily or summarily,<sup>164</sup> but there was no breach because Kindler enjoyed extensive proceedings in the Canadian Courts.<sup>165</sup>

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158. Second Optional Protocol, *supra* note 29, art. 1(1), 29 I.L.M. at 1467, provides: "No one within the jurisdiction of a State Party to the present Protocol shall be executed." This protection is to apply as an additional provision of the Covenant, is subject to individual petition to the Human Rights Committee through the First Optional Protocol, and is non-derogable. *Id.*, arts. 5, 6, 29 I.L.M. at 1468.

159. *Kindler*, 14 HUM. RTS. L.J. at 314 (para. 14.5).

160. *Id.*

161. Covenant, *supra* note 9, art. 6(2), *reprinted in supra* note 155.

162. *Kindler*, 14 HUM. RTS. L.J. at 314 (para. 14.3):

If Mr. Kindler had been exposed, through extradition from Canada, to a real risk of violation of article 6, paragraph 2, in the United States, that would have entailed a violation by Canada of its obligations under article 6, paragraph 1. Among the requirements of article 6, paragraph 2, is that capital punishment be imposed only for the most serious crimes, in circumstances not contrary to the Covenant and other instruments, and that it be carried out pursuant to a final judgment rendered by a competent court. . . . The author has not claimed . . . that the conduct of the trial in the Pennsylvania court violated his rights to a fair hearing under article 14 of the Covenant.

163. *Id.*

164. *Id.* at 314 (para. 14.6).

165. *Id.* at 314 (para. 14.4).



No Committee members were of the opinion that the Covenant's article 6 right to life provision prohibits executions. The Human Rights Committee reasoned that the Covenant's prohibition against torture must be read in light of the provisions of article 6, which enumerate permissible applications of the death penalty.<sup>166</sup> However, the Committee held out the possibility of eventually finding the death penalty incompatible with the prohibition against torture when it noted "the evolution of international law and the trend towards abolition, as illustrated by the adoption by the United Nations General Assembly of the Second Optional Protocol[.]"<sup>167</sup>

Lastly, the Committee expressed regret that Canada expelled Kindler after it had received a request to stay that action by the Special Rapporteur.<sup>168</sup> Only one member took the view that Canada breached article 26<sup>169</sup> for expelling the applicant with the knowledge that a communication had been submitted to the Committee.<sup>170</sup>

A few months later the Committee held in *Ng v. Canada* that Canada had breached its Covenant obligations when it extradited Charles Ng, a British subject born in Hong Kong, to the United States without obtaining assurances that the death penalty would not be carried out.<sup>171</sup> Charles Ng was accused of kidnapping, torturing, and killing at least twelve people in a horrific manner.<sup>172</sup> There was substantial evidence of Ng's identity and of his premeditation.<sup>173</sup> The amount of evidence and the severity of the crime make it very probable that Ng will be sentenced to death in California.<sup>174</sup>

Like *Kindler*, one issue in *Ng* was whether a State Party is in violation of article 7 of the Covenant when it extradites a person within its jurisdiction and there is a real risk that the person would be subjected to torture, cruel, inhuman, or degrading treatment or punishment in another jurisdiction.<sup>175</sup> However, Charles Ng's case was different than Joseph Kindler's because Ng

166. *Id.* at 314 (para. 15.1) (capital punishment carried out within the parameters of article 6, paragraph 2, does not constitute a breach *per se* of the article 7 prohibition against torture); see generally, *id.* at 314 (para. 14.5) (noting that Canada is not a party to the Covenant's Second Optional Protocol).

167. *Id.* at 314 (para. 14.2).

168. *Id.* at 314 (para. 17). A Special Rapporteur is a single individual of recognized international standing. United Nations Special Rapporteurs perform a variety of tasks, including studying and reporting human rights problems, receiving complaints about past or impending human rights violations, and issuing appeals to governments.

169. Covenant, *supra* note 9, art. 26, *supra* note 115, establishes the equal protection of the law.

170. *Kindler*, app. F, para. 24, 14 HUM. RTS. L.J. at 323 (Opinion of Mr. Urbina).

171. *Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (Views adopted on Nov. 5, 1993).

172. *Id.* at para. 2.1.

173. See Dan Morain, *Canada Sends Accused Killer Ng Back to U.S.*, L.A. TIMES, Sept. 27, 1991 (at the time of extradition, police had gathered 2,000 pieces of evidence, including torn pieces of clothing, jewelry and a grisly video tape of a woman being sexually attacked).

174. *Ng* at para. 11.7. Ng has not undergone a trial nor sentencing as of the date of publication.

175. Covenant, *supra* note 9, art. 7, reprinted in *supra* note 117; *Ng* at para. 16.1.

was extradited to California on capital charges pending trial,<sup>176</sup> whereas Kindler had been convicted of a capital offense and had fled from the United States immediately before formal sentencing.<sup>177</sup> Also, at the time of all of Ng's Canadian proceedings, California's sole method of execution was death by cyanide gas asphyxiation,<sup>178</sup> whereas at the time of all of Kindler's Canadian proceedings, Pennsylvania's method of execution was death by lethal injection.<sup>179</sup>

The Committee began its analysis of whether the imposition of capital punishment violates article 7 by restating the test articulated in *Kindler*: it would consider the relevant personal factors regarding the victim, the specific conditions on death row, and whether the proposed method of execution is particularly abhorrent.<sup>180</sup> However, unlike *Kindler*, the Committee did not then discuss the former two factors but instead elaborated on the last factor. It noted that, when imposing capital punishment, the execution of the sentence "must be carried out in such a way as to cause the least possible physical and mental suffering."<sup>181</sup> The Committee noted the uncontested assertion that death by cyanide gas asphyxiation may cause prolonged suffering and agony which may take over ten minutes,<sup>182</sup> and decided that such a method of execution would not meet its test of "least possible physical and mental suffering."<sup>183</sup> Thus, the Committee concluded that Canada breached its Covenant obligations when it extradited Ng without receiving adequate assurances that he would not be executed by cyanide gas.<sup>184</sup>

One significant aspect of the Ng decision was the lack of consideration the Committee afforded to the "safe-haven" argument in its analysis of

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176. *Ng* at para. 13.5.

177. *See supra* notes 124-25 and accompanying text.

178. California amended its statutes in 1992 to allow the convict to choose between death by cyanide gas asphyxiation and death by lethal injection. Death by cyanide gas asphyxiation will be imposed if a convict refuses to choose. CAL. PENAL CODE § 3604(b) (Deering 1994) ("If a person under sentence of death does not choose either lethal gas or lethal injection, . . . the penalty of death shall be imposed by lethal gas.")

179. *Kindler*, 14 HUM. RTS. L.J. at 311 (para. 9.7).

180. *Ng* at para. 16.1.

181. *Id.* at para. 16.2 (quoting the Committee's General Comment 20[44] on article 7 of the Covenant (CCPR/C/21/Add.3, para. 3)).

182. *Id.* at para. 16.3; Telephone Interview with Don W. MacLeod, Canadian counsel for Charles Ng (Feb. 3, 1994). Mr. MacLeod emphasized the importance of an affidavit by an eyewitness to the Robert Alton Harris execution, Mr. Russell Stetler. Mr. Stetler wrote in a declaration for a related domestic trial: "I watched his head as it circled, bobbed and jerked, fell forward and then slowly reared back. Harris moaned, strained against the straps, convulsed repeatedly, and flushed as his heart pumped poisoned blood. Six or more times Harris seemed dead, only to return to life and suffer before our eyes again." Richard Barbieri, *Death Knell For the Gas Chamber?*, THE RECORDER, Oct. 21, 1993, at 1.

183. *Ng* at para. 16.4.

184. *Id.*

capital punishment.<sup>185</sup> The Committee's approach was more aggressive than the *Soering* Court's finding of a breach of article 3 of the European Convention. In *Soering*, the European Court of Human Rights tied its finding of a breach to the facts and circumstances of the particular case, to the existence of alternative means of achieving the legitimate purposes of extradition, and to the recognition that a State's becoming a safe-haven to fugitives is a threat to the receiving nation and tends to undermine the foundations of extradition.<sup>186</sup>

In contrast to the *Soering* Court, the Human Rights Committee disregarded the threat posed to Canada in becoming a safe-haven for fugitives. Although there is dubious evidence to support Canada's concerns,<sup>187</sup> its concerns remain very real. Entry into Canada from America is much easier than was access to the abolition States of Europe at the time of the *Soering* decision.<sup>188</sup> There is a 4,800 kilometer unguarded border between Canada and the United States with vast expanses of territory where a fugitive could enter Canada without inspection.<sup>189</sup> The Committee nonetheless excluded the safe-haven argument from its analysis.

Since the *Ng* decision requires the requested State to determine if a fugitive faces a "real risk" of treatment in contravention of the Covenant in

185. The policy against establishing a "safe-haven" was one of the reasons the Canadian Supreme Court allowed the extradition of Kindler and Ng to proceed without assurances. The other reasons were that abolition was not yet a norm of international law, the Canadian Charter did not proscribe the death penalty, and the legislature proscribed the death penalty for Canadians but did not mandate that extradition of a non-Canadian fugitive be conditioned on the receipt of assurances. *Kindler v. Canada (Minister of Justice)*, 2 S.C.R. at 782.

186. See *supra* text accompanying note 76.

187. Canada asserted that the number of fugitives entering Canadian territory had been steadily increasing in the last twelve years. *Ng* at para. 8.8. Canada alleged that there were 29 extradition requests from the United States in 1980 but by 1992 that figure had increased to 88. *Id.* Canada's further asserted that "[r]equests involving death penalty cases are a new and growing problem for Canada . . ." *Id.* (quoting Canada's submission).

*Ng*, through counsel, raised substantial doubt about the validity of the inferences from those statistics. *Ng* noted that the number of extradition requests from the United States in 1991 was 17. *Id.* para. 11.3. *Ng* attributed the large increase the next year to an amendment to the Canada-U.S. Extradition Treaty to the effect that, inter alia, taxation offenses became extraditable and ambiguities regarding double jeopardy and reciprocity were removed. *Id.* Further, *Ng* noted that since the time of the adoption of the U.S.-Can. Extradition Treaty, the Canadian Minister of Justice had been called upon to make no more than three decisions on whether or not to ask for assurances that the death penalty would not be imposed or implemented. *Id.*

188. *Soering* was decided by the European Court of Human Rights on July 9, 1989. The access points to the European State Parties that were abolition States were severely restricted at that time: the Berlin Wall (and the rest of the "iron curtain") was still in existence, so most abolition State Parties were then isolated from retentionist States by the "iron curtain" (a guarded border) and the surrounding seas and oceans. Serge Schmemmann, *Clamor in the East: East Germany Opens Frontier to the West for Migration or Travel*, N.Y. TIMES, Nov. 10, 1989, at A1. The Berlin Wall "fell" on November 9, 1989. *Id.* Thus, the access points to these States at the time of the *Soering* decision were limited in number (e.g., airport terminals and shipyards) and were routinely subject to inspection by the States' immigration agencies. This isolation put a severe burden on fugitives attempting to enter those States without inspection or detection by local immigration agencies.

189. *Ng* at para. 8.8.

the requesting State, there flows from this another significant aspect of the *Ng* and *Kindler* decisions: the Covenant obligates the harboring State to assess the requesting State's penal system in order to determine its compliance with Covenant provisions.

These decisions effectively obligate every State Party to become a human rights forum, where grievances against the penal systems of other States can be assessed by Covenant State Parties.<sup>190</sup> In comparison, this is a potentially heavier burden on States than that imposed by the Refugee Convention when a State is assessing the existence of "persecution."<sup>191</sup> There, the competent authorities of the harboring State are not called upon to pass judgment on conditions in the applicant's country of origin, but the authorities are merely required to have a knowledge of the conditions of the applicant's country of origin in order to assess the credibility of the applicant's claim of persecution.<sup>192</sup>

#### IV. FUTURE CLAIMS CHALLENGING EXTRADITION REQUESTS

##### A. *Anticipated Guidelines for Determining What Will Amount to Impermissible Treatment in the Requesting State*

The Human Rights treaties mentioned above have been extended to prohibit the extradition of a person when there is some degree of likelihood that the fugitive will experience harmful treatment in the requesting State. If this harmful treatment were perpetrated by actors of the harboring State, it would constitute a violation of a non-derogable<sup>193</sup> treaty right. For example, the European Court of Human Rights held that the extradition of Soering would expose him to death-row-phenomenon;<sup>194</sup> death row phenomenon is violative of European Convention article 3, a non-derogable

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190. The obligation to assess whether there is a real risk that the person will be subjected to Covenant-proscribed treatment is not necessarily limited to alleged violations of article 6 or article 7, nor is the inquiry limited to death-eligible fugitives. The *Kindler* and *Ng* decisions imply that a State Party is obligated to consider whether there is a real risk that the person will be subjected to any treatment in contravention of the Covenant. *Kindler*, 14 HUM. RTS. L.J. at 313 (para. 13.2) (*see supra* text accompanying note 145); *Ng* at para. 14.2. Thus, a black fugitive who has fled from a State where he is wanted for a non-capital drug-related offense could challenge the decision to extradite based on an allegation that the requesting State's drug related penal code is implemented with a racial bias that is in contravention of article 26. *See generally*, Sam Vincent Meddis, *Is The Drug War Racist?: Disparities Suggest the Answer is Yes*, USA TODAY, July 23, 1993, at 1A (even though the majority of drug traffickers are white, blacks are more likely to be arrested for drug related crimes).

191. Refugee Convention, *supra* note 46. In order to comply with the article 33 prohibition of expulsion or return ("refoulement") of refugees, States must determine whether a person is a refugee within the meaning of article 1. *See id.*, arts. 1, 33, *reprinted in supra* note 48. Suggested procedures for the determination of refugee status are elaborated in the Refugee Handbook. REFUGEE HANDBOOK, *supra* note 46, at 45-49 (paras. 189-205).

192. REFUGEE HANDBOOK, *supra* note 46, 12-13 (para. 42) (1979).

193. *See supra* note 84.

194. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 35 (para. 111).

right.<sup>195</sup> The Supreme Court of the Netherlands held that extraditing a fugitive when he may subsequently be sentenced to death was a violation of article 1 of Protocol No. 6;<sup>196</sup> this paragraph, which provides that no one shall be sentenced to death, is a non-derogable right.<sup>197</sup> The Human Rights Committee stated that there would have been a violation if Kindler had been executed in a manner inconsistent with the right to life provisions in Covenant article 6;<sup>198</sup> article 6 is a non-derogable right.<sup>199</sup> The Human Rights Committee held that the extradition of Ng was a violation because it was foreseeable that he would be executed in a manner inconsistent with Covenant article 7;<sup>200</sup> article 7 is a non-derogable right.<sup>201</sup>

In light of these decisions, it is possible to foresee which substantive rights will be afforded to persons in future extradition proceedings. It appears that persons in extradition proceedings are protected from expulsion if they would endure treatment which would amount to a violation of a non-derogable treaty right in the requesting State. Other non-derogable rights include freedom from slavery and servitude;<sup>202</sup> freedom from the sentence of death for crimes committed by persons that are below eighteen years of age;<sup>203</sup> freedom from being subjected to medical or scientific experimentation without free consent;<sup>204</sup> freedom from imprisonment for inability to fulfill contractual obligations;<sup>205</sup> freedom from prosecution of *ex post facto* criminal offenses;<sup>206</sup> and the freedoms of thought, conscience, and religion.<sup>207</sup> Finally, the Covenant prohibits the derogation of any right if that derogation involves "discrimination solely on the ground of race, colour, sex, language, religion, or social origin."<sup>208</sup>

However, the procedural rights that these treaties afford to persons in extradition proceedings appear to be derogable in time of war or public emergency. That is, if there is a public emergency in the harboring State,

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195. European Convention, *supra* note 8, art. 15, 213 U.N.T.S. at 232-34.

196. van Sandick, *supra* note 102, at 1389 (para. 3.3).

197. Protocol No. 6, *supra* note 29, art. 3, reprinted in *supra* note 99.

198. *Kindler*, 14 HUM. RTS. L.J. at 314 (para. 14.3), *supra* note 162.

199. Covenant, *supra* note 9, art. 4(2), 58 Fed. Reg. at 45935, 999 U.N.T.S. at 174.

200. *Ng* at para. 16.4.

201. Covenant, *supra* note 9, art. 4(2), 58 Fed. Reg. at 45935, 999 U.N.T.S. at 174.

202. *See, e.g.*, Covenant, *supra* note 9, art. 8(1), 2, 58 Fed. Reg. at 45936, 999 U.N.T.S. at 175 (by operation of art. 4(2)); European Convention, *supra* note 8, art. 4(1), 213 U.N.T.S. at 224, by operation of art. 15, 213 U.N.T.S. at 232. Note, however, that these treaties allow States to impose sentences of hard labor as a lawful form of punishment for crimes, regardless of the existence of a public emergency.

203. Covenant, *supra* note 9, art. 6(5), 58 Fed. Reg. at 45935, 999 U.N.T.S. at 175 (by operation of art. 4(2)).

204. *Id.*, art. 7, 58 Fed. Reg. at 45935, 999 U.S.T. at 175 (by operation of art. 4(2)).

205. *Id.*, art. 11, 58 Fed. Reg. at 45936, 999 U.S.T. at 176 (by operation of art. 4(2)).

206. *Id.*, art. 15, 58 Fed. Reg. at 45937, 999 U.S.T. at 177 (by operation of art. 4(2)).

207. *Id.*, art. 18, 58 Fed. Reg. at 45937, 999 U.S.T. at 178 (by operation of art. 4(2)).

208. *Id.*, art. 4(1), 58 Fed. Reg. at 45935, 999 U.S.T. at 174.

it is likely that the harboring State can permissibly exercise its discretion to extradite in an arbitrary and summary manner. This conclusion is substantiated by the Human Rights Committee's decision in *Kindler*, where the Committee determined that its jurisdiction to render its decision was rooted in the procedural rights embodied in Covenant article 13,<sup>209</sup> a derogable right.<sup>210</sup> The procedural rights appear to be derogable in the European Convention system because some procedural rights afforded to persons in extradition or deportation proceedings in the European Convention are derogable.<sup>211</sup>

The following two divisions of this part of the comment will analyze the attributes of the United States capital sentencing practices that may be subject to adjudication in extradition proceedings where the United States is requesting a fugitive for prosecution of a capital crime.

### B. Extradition to the United States Would Result in Impermissible Death-Row-Phenomenon

As noted earlier, the European Court of Human Rights formulated a narrow definition of when the extradition of a person facing a real risk of experiencing death-row-phenomenon would constitute a breach of the European Convention's article 3.<sup>212</sup> The Court has not decided a case which reaffirms or redefines its narrow formulation of death row phenomenon since that decision, as abolitionist State Parties that are not parties to the relevant Protocols have routinely refused to grant extradition requests or have withheld extradition until adequate assurances have been received.<sup>213</sup> In

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209. *Kindler*, 14 HUM. RTS. L.J. at 309 (para. 6.6).

210. Covenant, *supra* note 9, art. 13, reprinted in *supra* note 138. Article 13 is derogable by implication because it is not included in the article 4 list of non-derogable treaty provisions.

211. European Convention, *supra* note 8, art. 5(1)(f), 213 U.N.T.S. at 226, provides for the deprivation of liberty of persons "with a view to deportation or extradition," provided that the deprivation is "in accordance with a procedure prescribed by law." This right against arbitrary arrest is derogable. *Id.* art. 15, 213 U.N.T.S. at 232-34.

212. See *supra* text accompanying note 76.

213. See, e.g., Portugal's treatment of Yeung Yuk-leung. Yeung Yuk-leung was in the custody of Macau authorities and the People's Republic of China requested his extradition for charges of murder. *Macau Sends Man Back to Murder Trial*, S. CHINA MORNING POST (Hong Kong), Mar. 2, 1994, available in LEXIS, News Library, Cumws File. An official with a Chinese news agency proffered assurances that he would not be executed in China, but the next day the official publicly denied that he had made those assurances. *Id.* The Macau High Court permitted his extradition to the People's Republic of China to face charges for capital murder after the Macau High Court obtained assurances that the death penalty would not be imposed. *Id.*

After receiving notice from Mr. Pedro Redinha, Yeung Yuk-leung's counsel, the European Commission requested the Portuguese authorities to halt Yeung Yuk-leung's imminent surrender pending the Commission's examination of the matter. *European Rights Commission Stops Macao's Move to Extradite Dissidents*, BBC SUMMARY OF WORLD BROADCASTS, July 11, 1994, available in LEXIS, News Library, Cumws File. The Constitutional Court of Lisbon blocked the extradition pending an evaluation of the matter. *Portuguese Court Blocks Extradition From Macau to China*, REUTERS WORLD SERV., July 12, 1994, available in LEXIS, News Library, Cumws File. The extradition is still enjoined pending an assessment by the Supreme Court of

light of the uniformity of State practice and the evidence of *opinio juris*,<sup>214</sup> it is likely that the Court would eliminate all elements of the *Soering* holding from consideration other than the duration of post-sentencing detention. That is, it would not consider age, mental state, etc. to be relevant to finding a breach of article 3.

The Human Rights Committee has been more hostile to article 7 claims of death-row-phenomenon. The Committee recognizes that death-row-phenomenon could theoretically amount to a breach of article 7, but would disregard those delays caused by the applicant seeking appellate review.<sup>215</sup> In determining the existence of a such a breach, the Committee would examine the relevant personal factors about the person (including the existence of an extradition request from an abolition party), the conditions on death row, and whether the proposed method of execution is "particularly abhorrent."<sup>216</sup>

Since the Committee operates under the penumbra of the United Nations, the Committee would likely grow less hostile to an alleged breach of the Covenant caused by death-row-phenomenon once the doctrine begins to crystallize into customary international law. There have been recent high court decisions in this area.

The Supreme Court of Zimbabwe recently had occasion to survey the jurisprudence of the British Commonwealth countries and of the United States with respect to the issue.<sup>217</sup> That court was confronted with a group of claims from sentenced individuals who had their appeals properly dismissed but had been awaiting their executions for periods ranging from nineteen to fifty-two months.<sup>218</sup> No date was ever established for their executions, and the sentences could be carried out on any arbitrary day without prior notice.<sup>219</sup>

After comparing the international jurisprudence, the Court held that the treatment amounted to death-row-phenomenon and was a violation<sup>220</sup> of the Zimbabwe constitution, which provides that "[no] person shall be subjected

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Lisbon as of the date of publication.

214. See, e.g., *Earl Pratt and Another v. Attorney-General for Jamaica and Another*, [1994] 2 App. Cas. 1 (1993), reprinted in 14 HUM. RTS. L.J. 338 (1993) (Judicial Committee of the Privy Council, London, held in appellate review that post-sentencing detention in excess of five years without more constitutes death-row-phenomenon that is inhuman or degrading punishment or treatment).

215. *Barrett and Sutcliffe v. Jamaica*, para. 8.4, Communication Nos. 270/1988 and 271/1988 (1992); *Kindler*, 14 HUM. RTS. L.J. 309 (para. 6.4). *Contra Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), where death row phenomenon was found likely to occur even though the delay would be caused by the convict's use of the appellate process.

216. *Kindler*, 14 HUM. RTS. L.J. 314 (para. 15.3).

217. *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General*, 14 HUM. RTS. L.J. 323 (1993).

218. *Id.* at 324.

219. *Id.* at 324-25.

220. *Id.* at 336.

to torture or to inhuman or degrading punishment or other such treatment."<sup>221</sup> Although the post-sentencing delay was caused by the government and not by the convicts' use of the appellate process, the opinion concluded with an observation that the result would have been the same if the delay was solely attributable to the applicant's use of appellate review.<sup>222</sup> It determined that the mental anguish that would arise would be offensive to the Constitution regardless of the source of the delay.<sup>223</sup> The court ordered the death sentences vacated.<sup>224</sup>

The Judicial Committee of the Privy Council, London, has recently formulated a bright line rule that post-sentencing detention exceeding five years constitutes inhuman or degrading punishment or treatment.<sup>225</sup> The Privy Council is the highest appellate court of the Commonwealth and is composed of jurists from several member States.<sup>226</sup> In the consolidated cases under review, the post-sentencing delay was caused by both the government of Jamaica and by the applicants.<sup>227</sup> However, the opinion concluded that the result would be the same if the five year delay was solely attributable to the applicants' use of judicial process.<sup>228</sup>

Prior to reaching the Privy Council, the applicants had lodged communications with both the Inter-American Commission on Human Rights and with the Human Rights Committee.<sup>229</sup> The Commission rejected the submission of unfair trial proceedings but recommended sentence commutation for humanitarian reasons.<sup>230</sup> The Human Rights Committee held in a seminal ruling that prolonged judicial proceedings do not constitute a breach *per se* of article 7, and that delays caused by the applicant's use of appellant procedures will not substantiate a claim.<sup>231</sup> The Privy Council's opposing ruling on the same issue that was presented to the Human Rights Committee

221. ZIMB. CONST. (Constitution Act, 1990), ch. III (The Declaration of Rights), sec. 15(1).

222. *Catholic Commission*, 14 HUM. RTS. L.J. at 335.

223. *Id.*

224. *Id.* at 337.

225. *Pratt v. Jamaica*, [1994] 2 App. Cas. at 35.

226. The decisions of the Privy Council are the governing precedent to all Commonwealth States that recognize the Privy Council's right of appeal. Many States have terminated the right of appeal to the Privy Council, including Canada, India, Pakistan, and Nigeria. Thus, the Privy Council's holding will be persuasive but not binding on Canada and these other States when the issue is presented in extradition cases. *Pratt v. Jamaica*, 14 HUM. RTS. L.J. at 338 (publisher's comments).

227. *Pratt v. Jamaica*, [1994] 2 App. Cas. at 22.

228. *Id.* at 35.

229. *Id.* at 22.

230. *Id.* at 22 (the petition was rejected on Oct. 3, 1984).

231. *Pratt, Robinson and Morgan v. Jamaica*, Communication Nos. 210/1986, 223/1987, 225/1987 (Apr. 6, 1989) (this decision was issued three months after the European Commission found death-row-phenomenon in *Soering* and was issued three months before the European Court found a breach in *Soering*). The Committee did find a breach of article 7 on the grounds that a ten hour delay in reporting a stay of an imminent execution caused needless anguish. The Privy Council believed that the Committee's decision was based on uncontroverted but erroneous facts that the Committee assumed to be true. *Pratt v. Jamaica*, [1994] 2 App. Cas. at 25-26.



by the same applicants illustrates the controversial nature of claims involving "death-row-phenomenon." Like the Human Rights Committee, the Privy Council decides human rights issues for many abolitionist and retentionist States. Should the Human Rights Committee persist in adhering to its jurisprudence, it appears that it will be increasingly isolated in its treatment of this issue.

### C. Racially Disparate Capital Sentencing Practices Considered To Be A Breach Of International Law

#### 1. International Human Rights Norms

Article 26 of the Covenant provides that "[a]ll persons are . . . entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color . . . or other status."<sup>232</sup> While this article is theoretically derogable in time of public emergency, the article that permits derogation of some rights is conditioned so that derogation is prohibited if involves "discrimination solely on the ground of race . . . ."<sup>233</sup> This right to equal protection of the law is included in several other United Nations instruments and regional conventions<sup>234</sup> and has been recognized as a *jus cogens* norm of international law.<sup>235</sup>

232. Covenant, *supra* note 9, art. 26, *reprinted in supra* note 115.

233. *Id.*, art. 4, 58 Fed. Reg. at 45935, 999 U.N.T.S. at 174.

234. *See, e.g.*, UNITED NATIONS CHARTER art. 1(3) (purpose of United Nations includes "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race"); Charter of the Organization of American States, *done at Bogota*, Apr. 30, 1948, art. 5(j), 2 U.S.T. 2394, 2418, 119 U.N.T.S. 3, 54 ("The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex"); American Convention on Human Rights, *supra* note 41, art. 24, 1144 U.N.T.S. at 151 ("All persons . . . are entitled, without discrimination, to equal protection of the law"); International Convention on the Elimination of All Forms of Racial Discrimination, *done at New York*, on Mar. 7, 1966, art. 5(a), 660 U.N.T.S. 195, 220 ("right to equal treatment before the tribunals and all other organs administering justice"); European Convention, *supra* note 8, art. 14, 213 U.N.T.S. at 232 ("the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as . . . race, colour, . . . [or] association with a national minority. . . ."); Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, art. 7, U.N. Doc. A/810 (1948) ("All . . . are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration"); and American Declaration on the Rights and Duties of Man, art. II, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965) ("All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor").

235. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 (1987). A *jus cogens* norm of international law "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, *supra* note 136, art. 53, 1155 U.N.T.S. at 344. These international norms are also known as peremptory norms of general international law. *Id.*

The importance of the right to equal protection of the law was demonstrated by its explicit incorporation into the United Nations Model Treaty on Extradition.<sup>236</sup> It provides that “[extradition] shall not be granted . . . if the requested State has substantial grounds for believing . . . that that person’s position may be prejudiced [on account of that person’s race].”<sup>237</sup> The Inter-American Convention on Extradition includes a similar provision.<sup>238</sup>

In light of the treatment that “equal protection” has been afforded in international instruments, a court or treaty organization would likely hold that a harboring State cannot extradite a fugitive if there is a real risk that the fugitive will encounter unequal protection of the law in the requesting State and that unequal protection will result in severe consequences for the person.

Due to the heightened attention afforded the death penalty by international organizations<sup>239</sup> and the restrictions that States have imposed on the implementation of the death penalty,<sup>240</sup> it is highly probable that various human rights treaties would obligate a harboring State to refuse to extradite

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236. Model Treaty on Extradition, *supra* note 17.

237. *Id.*, art. 3, 30 I.L.M. at 1411-12, provides:

Extradition shall not be granted in any of the following circumstances:

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(b) If the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person’s position may be prejudiced for any of those reasons;

.....

(f) If the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the [Covenant], article 14[.]

238. Inter-American Convention on Extradition, *supra* note 17, art. 4(5), 20 I.L.M. at 724, provides: “Extradition shall not be granted [when], from the circumstances of the case, it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons.”

239. *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, E.S.C. Res. 1984/50 (with Annex), reprinted in 1984 U.N.Y.B. 709-10 [hereinafter ECOSOC Res. 1984/50] (endorsed by U.N.G.A. Res. 39/118); *Report of the Human Rights Committee*, 1982 U.N. Doc. A/37/40, 93-94. General comment 6(16) d/(article 6), paragraph 6:

[Covenant article 6] refers generally to abolition in terms which strongly suggest (paras. 2(2) and (6)) that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life within the meaning of article 40, and should as such be reported to the Committee. The Committee notes that a number of States have already abolished the death penalty or suspended its application. Nevertheless, States’ reports show that progress made towards abolishing or limiting the application of the death penalty is quite inadequate.

See also treaties cited *supra* note 29.

240. See treaties cited *supra* note 29.

a person when there is a real risk that the person would suffer from unequal protection of capital sentencing in the requesting State. In support of this conclusion, the United States Supreme Court once stated that the imposition of a severer punishment on a slave than on a free person for the same offense was an "incident" of slavery.<sup>241</sup>

## 2. Capital Sentencing Practices in the United States

Statistical evidence tends to prove that the capital sentencing system in the United States is implemented in a racially discriminatory manner against black persons. The United States Department of Justice reported that, by the end of 1992, 59% of those under the sentence of death were white while 40% were black.<sup>242</sup> During this same period the black population in the United States was only about 12%.<sup>243</sup> A recent report released by former U.S. Representative Don Edwards focused on the prosecution of the federal "drug kingpin" law<sup>244</sup> and revealed that of those cases in which the death penalty was sought, 78% were black defendants, although approximately 75% of all (capital and non-capital) drug trafficking convicts were white.<sup>245</sup>

There is also statistical evidence of a "race of victim" bias in the nation's capital sentencing system.<sup>246</sup> After surveying twenty eight studies published by non-governmental organizations, the United States Congress' General Accounting Office concluded in 1990 that those who murdered whites were found more likely to be sentenced to death than those who

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241. Civil Rights Cases, 109 U.S. 3, 22 (1883), provides:

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary *incidents*. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. *Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offences.* . . . (emphasis added).

242. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN, CAPITAL PUNISHMENT 1992 1 (Dec. 1993) [hereinafter BJS BULLETIN].

243. STAFF OF HOUSE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS, 103 Cong., 2d Sess., REPORT ON RACIAL DISPARITIES IN FEDERAL DEATH PENALTY PROSECUTIONS, 1988-1994 6 (1994) [hereinafter STAFF REPORT] (The report was prepared for Rep. Don Edwards by the majority staff of the subcommittee and was not reviewed or approved by other members of the subcommittee).

244. 21 U.S.C.S. § 848(e)-(q) (Law. Co-op. 1993).

245. STAFF REPORT, *supra* note 243, at 2 (referring to U.S. DEP'T. OF JUSTICE STATISTICS, SPECIAL REPORT: PROSECUTING CRIMINAL ENTERPRISES 6, Table 10 (convictions 1987-90) (1993)).

246. U.S. GEN. ACCT. OFF., PUB. NO. GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5, *reprinted in* 137 Cong. Rec. S8271-73 (daily ed. June 20, 1991) [hereinafter GAO REPORT] (report to the Senate and House Committees on the Judiciary).

murdered blacks.<sup>247</sup> The "race of victim" influence was consistent in all States analyzed and was found at all stages of the criminal justice system.<sup>248</sup> This bias emerged strongest in the prosecutorial discretion to charge a defendant with a capital offense and to proceed to trial rather than plea bargain.<sup>249</sup> A subsequent survey by a non-governmental organization revealed that 84% of the victims in death penalty murder cases were white even though 50% of all murder victims were black.<sup>250</sup>

### 3. The State of Law in the United States

The United States Supreme Court was first confronted with the issue of racial discrimination in its capital sentencing practice in *McCleskey v. Kemp*.<sup>251</sup> A black defendant who was convicted of killing a white policeman presented as evidence a comprehensive statistical study of the sentencing system in Georgia.<sup>252</sup> The study took into account some 230 nonracial factors which might legitimately influence a sentencer, and revealed that juries were more likely to spare a defendant's life if the victim was black.<sup>253</sup> The study further demonstrated that blacks who kill whites were sentenced to death "at nearly 22 times the rate of blacks who kill blacks, and more than 7 times the rate of whites who kill blacks."<sup>254</sup>

The *McCleskey* Court assumed the study to be accurate for the purpose of reaching a judgment.<sup>255</sup> The Court held the evidence was not sufficient to find a violation of the Equal Protection Clause of the Constitution<sup>256</sup> because the study did not show that the *defendant* received an unfair trial.<sup>257</sup> In order for the appellant to show that he had suffered unconstitutional discrimination, he would have to prove that the "decisionmakers in *his* case acted with [a racially] discriminatory purpose."<sup>258</sup> Also, since "discretion is essential to the criminal justice process," the Court "[demanded] exceptionally clear proof" for a determination that the discretion

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247. *Id.*

248. *Id.*

249. *Id.*

250. DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY 2 (1993).

251. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

252. *Id.* at 286.

253. *Id.* at 325 (Brennan, J., dissenting).

254. *Id.* at 327 (Brennan, J., dissenting).

255. *Id.* at 292 n.7.

256. U.S. CONST. amend. XIV, § 1.

257. *McCleskey*, 481 U.S. at 292.

258. *Id.* No convict in the United States has ever successfully challenged their death sentence by proving a "discriminatory purpose" existed in prosecutorial discretion. *But cf.* *Segar v. Smith*, 738 F.2d 1249, 1278 (D.C. Cir. 1984) (emphasizing that disparate impact theory of discrimination is critical to eradication of discrimination and in developing opportunities for minorities and women), *cert. denied sub. nom. Meese v. Segar*, 471 U.S. 1115 (1985).

had been abused.<sup>259</sup> The statistical study was held not to be “exceptionally clear proof.”<sup>260</sup> Arguably, the Court implied that the study would be admissible evidence and that a less stringent test for discrimination would be adopted if Congress passed requisite legislation.<sup>261</sup> No convict has ever met the *McCleskey* standard of proof, and Congress has refused to pass the requisite legislation even though it has been proposed several times.<sup>262</sup>

#### 4. The Inter-American System

The Inter-American Commission on Human Rights<sup>263</sup> was presented

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259. *McCleskey*, 481 U.S. at 297.

260. *Id.*

261. In determining that the statistical evidence used in support of the *McCleskey* Equal Protection claim was insufficient to support an inference that the decisionmakers in *McCleskey*'s case acted with discriminatory purpose, the Court distinguished *McCleskey*'s case from cases arising under Title VII of the Civil Rights Act, where statistical evidence is accepted as proof of discriminatory intent. *See id.* at 292-97. The Court noted that an important difference between the cases in which it had accepted statistics as proof of discriminatory intent and the *McCleskey* case was that, in Title VII contexts, the decisionmaker has an opportunity to explain the statistical disparity. *Id.* at 296. In *McCleskey*, the State had “no practical opportunity to rebut the” study. *Id.* The Court’s reasoning and its references to past Congressional legislation arguably amount to an implication that the Court would place greater weight on statistical studies if Congress promulgated legislation which specifically allowed the States an opportunity to rebut the studies.

262. *See, e.g.*, Racial Justice Act, H.R. 4017, 103d Cong., 2d Sess. (1994), which would have enabled “the use of [statistical] evidence showing a consistent pattern of racially biased sentences in death penalty cases.” Letter from U.S. Representative Don Edwards, Vice Chairman, Committee on the Judiciary, to Craig Roeckes, Staff Writer, *California Western Law Review* (Mar. 25, 1994) (on file with the California Western Law Review). The legislation would have invalidated sentences on a showing that the race of the defendant and/or victim was a “statistically significant factor” in decisions to seek or impose the death penalty. H.R. 4017 § 2921(b). Such a showing would have established a rebuttable presumption against the government. *Id.* § 2921(e). Each case would presumably have been tried on a county-by-county basis by individual defendants. This might not have provided relief to minority convicts who were improperly sentenced in a county with a small population of convicts because it may not have been possible to conduct a statistically reliable study in a small county.

Similar legislation has been consistently proposed in the United States House of Representatives and Senate since 1988. Proponents of the bills (including Prof. David Baldus, the co-author of the study used in *McCleskey*) stated that the permitted studies would *supplement* individualized allegations and denied that the bill would mandate quotas or would mandate the de facto abolition of the death penalty. 137 Cong. Rec. S8273-74 (daily ed. June 20, 1991). Leading opposition members (*e.g.*, Sen. J. Helms) stated that the bill would remove the individualized treatment afforded every defendant, would mandate quotas, and would provide for the de facto abolition of the death penalty in the several states. 137 Cong. Rec. S8671, S8676 (daily ed. June 26, 1991).

263. The Inter-American Commission on Human Rights was established by the Protocol of Amendment to the Charter of the Organization of American States, *done at* Buenos Aires, Feb. 27, 1967, art. 112, 21 U.S.T. 607, 691, Pan-Am. T.S. 1A. The Inter-American Commission’s functions, competence, and procedures are established in Chapter VII of the American Convention on Human Rights, *supra* note 41, arts. 34-51, 1144 U.N.T.S. at 153-57. Its main function is “to promote respect for and defense of human rights.” *Id.*, art. 41, 1144 U.N.T.S. at 154. Any State that is a member of the Organization of American States (OAS) and any person or organization within an OAS member State may lodge petitions with the Inter-American Commission that allege violations of the American Convention on Human Rights. *Id.*, art. 44, 1144 U.N.T.S. at 155. The Inter-American Commission and States that are parties to the

with a claim by a United States convict that essentially challenged the *McCleskey* ruling.<sup>264</sup> In that case, Willie Celestine, a black United States citizen, was tried and executed in Louisiana for the rape and murder of an elderly white woman.<sup>265</sup> A central issue was whether Celestine's treatment by the Louisiana criminal justice system was racially discriminatory such that the United States breached its obligations under articles I and II of the American Declaration of the Rights and Duties of Man.<sup>266</sup> Celestine's evidence consisted of two statistical surveys similar to those presented to the United States Supreme Court in *McCleskey*.<sup>267</sup> Celestine also challenged the Supreme Court's exclusion of statistical evidence and the Court's discriminatory-purpose standard.<sup>268</sup> Celestine did not challenge the death penalty as a breach *per se* of the right to life established in the American Declaration of the Rights and Duties of Man, probably because that issue was resolved in previous decisions.<sup>269</sup>

Had Celestine established a *prima facie* case, the United States would have had the burden to prove that their sentencing system was not racially discriminatory.<sup>270</sup> The Commission implicitly acknowledged that when there is a *prima facie* allegation that a State has breached a norm of *jus cogens*, the burden of proof shifts to the State to establish that there has not been a breach.<sup>271</sup> The Commission was willing to acknowledge that equal protection is a norm of *jus cogens*, but was persuaded by the United States' argument that "[a]n entire criminal justice system cannot be proved invalid by mere citations to statistical studies without more."<sup>272</sup> The Commission concluded that statistical evidence alone was insufficient to establish a *prima facie* case.<sup>273</sup> The Commission observed that even if statistical evidence

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American Convention on Human Rights have the right to submit cases to the Inter-American Court of Human Rights for final judgment. *Id.*, arts. 61, 67, 1144 U.N.T.S. at 159-160. The Inter-American Court of Human Rights was established by the Chapter VIII of the American Convention on Human Rights. *Id.*, arts. 52-69, 1144 U.N.T.S. at 157-60.

264. *Celestine v. United States*, Case No. 10031, Inter-Am. C.H.R. 292 (1989).

265. *Id.* at 292.

266. *Id.*; American Declaration on the Rights and Duties of Man, *supra* note 243, art. I ("Every human being has the right to life, liberty, and the security of his person"); *Id.*, art. II, *supra* note 243 (provides that all persons are equal before the law).

267. *Celestine*, Inter-Am. C.H.R. at 296.

268. *Id.* at 296-98.

269. *See Riley v. Jamaica*, Case No. 3102, Inter-Am. C.H.R. 89 (1981), where the Commission held that the American Convention on Human Rights does not prohibit the death penalty. The Commission has consistently followed this determination and has consistently recommended the Government of Jamaica to suspend executions, commute death sentences, and to consider the abolition of the death penalty. *See, e.g., Cuthbert v. Jamaica*, Case No. 9190, Inter-Am. C.H.R. 60 (1986). Note that there is an optional protocol aimed at the abolition of the death penalty. ACHR Protocol, *supra* note 29.

270. *See Celestine*, Inter-Am. C.H.R. at 312.

271. *Id.*

272. *Id.* (quoting Government's brief). Note, however, that Celestine was challenging Louisiana's capital sentencing practices, not an "entire criminal justice system."

273. *Id.* at 312.

were somehow sufficient, Celestine's case wasn't necessarily supported by the statistics presented because the applicant was convicted and sentenced by a unanimous jury that contained several black members, the applicant perpetrated a particularly heinous crime, and this very case had already been reviewed for racial bias by the Louisiana Supreme Court.<sup>274</sup> Since a *prima facie* claim did not exist, the Commission did not address the propriety of the *McCleskey* discriminatory-purpose standard.<sup>275</sup>

It is difficult to foresee how the Inter-American Commission on Human Rights or the Inter-American Court of Human Rights<sup>276</sup> would decide the case of a black fugitive challenging extradition to the United States. Neither body has published a decision in at least ten years which discusses extradition and its place in the regional human rights instruments.

### 5. The Human Rights Committee

The Human Rights Committee has received and will likely continue to receive communications from persons alleging that they should not be extradited from a State Party to the United States because the United States' capital sentencing system is implemented in a racially discriminatory manner against black persons.<sup>277</sup> Each person claimed that the State Party's decision to extradite without receiving adequate assurances contravened Covenant article 26.<sup>278</sup>

The first published decision was *K.C. v. Canada*.<sup>279</sup> There, the communication was inadmissible due to the applicant's failure to exhaust domestic remedies.<sup>280</sup> The Committee decided that K.C. could reapply

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274. *Id.* at 310-12.

275. *Id.* It is possible that the Commission could reconsider this holding by noting the special consideration that has been given to the death penalty subsequent to *Celestine*. Soon after *Celestine* was decided, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty was approved by the General Assembly of the Organization of American States and the Second Optional Protocol was approved by the United Nations General Assembly. See treaties cited *supra* note 29. The special attention afforded capital punishment by the international community is evidence of its unique character. By noting the unique character of capital punishment, the Commission could entertain statistical studies of the racial disparities in the requesting State's capital sentencing system *without* opening the door to invalidating a State's "entire criminal justice system" by a statistical study.

276. The Inter-American Court of Human Rights is established by Chapter VIII of the American Convention on Human Rights, *supra* note 41, arts. 52-69, 1144 U.N.T.S. at 157-60. Only the States Parties and the Commission have the right to submit a case to the Court. *Id.*, art. 61, 1144 U.N.T.S. at 159.

277. *K.C. v. Canada*, Communication No. 468/1992, Decision on admissibility of July 29, 1992, reprinted in 13 HUM. RTS. L.J. 352 (1992); *Kindler v. Canada*, Communication No. 470/1991, views adopted on July 30, 1993, reprinted in 14 HUM. RTS. L.J. 307 (1993), and *Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1993).

278. Covenant, *supra* note 9, art. 26, reprinted *supra* note 115.

279. *K.C. v. Canada*, Communication No. 468/1992, Decision on admissibility of July 29, 1992, reprinted in 13 HUM. RTS. L.J. 352 (1992).

280. *Id.* at 353 (paras. 5.3 to 6(a)).

after exhausting his domestic remedies.<sup>281</sup> Unfortunately, it is difficult to assess the strength of the claim because the decision did not state the ethnicity of the applicant.

The issue was next addressed in *Kindler*<sup>282</sup> and *Ng*,<sup>283</sup> respectively. *Kindler*, who was white, failed to state how the alleged racial disparities in the United States' sentencing system would affect him.<sup>284</sup> *Ng*'s allegations of alleged racial disparities were noted but otherwise ignored by the Committee, possibly because a breach was found on other grounds.<sup>285</sup>

If an equal protection claim is presented by a person in extradition proceedings and if that claim is ignored by the requested State, then the Committee would probably decide the case on the merits.<sup>286</sup> However, it is unlikely that a requested State would ignore the claim because the practice of the Human Rights Committee has been to assume as true those claims that are well attested but unrebutted by the State Party.<sup>287</sup> Thus, if a requested State were to acquiesce, the State would be at risk of an adverse decision by the Committee.

281. *Id.* at 353 (para. 6(c)).

282. *Kindler v. Canada*, Communication No. 470/1991, views adopted on July 30, 1993, reprinted in 14 HUMAN RIGHTS L.J. 307 (1993).

283. *Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1993).

284. *Kindler*, 14 HUMAN RIGHTS L.J. at 308 (para. 3).

285. See *Loveless v. Canada*, para. 18, Communication No. 24/1977, U.N. Doc. CCPR/C/OP/1 (1981) ("[I]n view of this finding [a breach of article 27], the Committee does not consider it necessary to examine whether the same facts also show separate breaches of the other rights involved").

286. See, e.g., *Ng*. There, the Human Rights Committee decided the merits of the claim that death by cyanide gas asphyxiation amounted to a breach of Covenant article 7, even though "the judgments of the Supreme Court in Canada did not in any detail discuss the evidence pertaining to . . . execution by cyanide gas, although [Ng] presented evidence . . . to the Court." *Id.* para. 11.11.

287. *Blier v. Uruguay*, para. 11.2, Doc. A/37/40, reprinted in DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE 149 (1991), provides:

It is implicit in article 4(2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, especially when such allegations are corroborated by evidence submitted by the author of the communication, and to furnish the Committee the information available to it. In cases where the author has submitted to the Committee allegations supported by substantial witness testimony, as in this case, and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.

It should be noted that the Committee may be unwilling to impose this burden of proof on the harboring State because that State does not have the relevant information about the requesting State exclusively within its control. However, the Committee may request the relevant information from the requesting State by operation of the State reporting system if the requesting State is a party to the Covenant, and the Committee may impose this burden of proof onto the requesting State in order to formulate a decision about the communication. See *supra* note 291 and accompanying text.



It is possible to foresee how the Committee would assess an equal protection communication if it were submitted by a black person whose extradition is sought by the United States for a capital offense. The Committee has requested States to provide statistical studies and has relied on those studies in reaching decisions.<sup>288</sup> The Committee may be less reluctant to request Canada to initiate a study of the American capital sentencing system due to the widely available and comprehensive reports that have been published or adopted by the United States government.<sup>289</sup> It could then consider the claimed breach of article 26 of the Covenant on the merits of the communication.<sup>290</sup> Claims of reporting bias could be avoided if the State Party or the petitioner were to rely on those United States government reports that tabulate racial and non-racial factors in sentencing. Alternatively, the Committee may use the information it receives directly from the United States government through the State reporting system to assess the merits of the equal protection claim.<sup>291</sup>

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288. See *Loveless* paras. 8(a), 9.2. The Committee found the State Party in breach of Covenant article 27.

289. See, e.g., GAO REPORT, *supra* note 246; BJS BULLETIN, *supra* note 242; STAFF REPORT, *supra* note 243.

290. As of July 1992, the Committee had not decided a case on the merits which alleged that a breach of article 26 arose from the imposition of facially neutral legislation which resulted in racially disparate effects. The leading cases involving article 26 have dealt with express legislative distinctions. The Committee evaluated those legislative distinctions and found a breach when the legislative discrimination was not based on "reasonable and objective criteria." *Broeks v. Netherlands*, Communication No. 172/1984, *reprinted in* MCGOLDRICK, *supra* note 287, at 165, and *Zwaan-de Vries v. Netherlands*, Communication No. 182/1984, *reprinted in* MCGOLDRICK, *supra* at 165, 9 HUM. RTS. L.J. 256-59 (1988) (breach because unemployment benefits were allocated differently between married men and married women); see also, *Danning v. Netherlands*, Communication No. 180/1984, *reprinted in* MCGOLDRICK, *supra* at 165, 9 HUM. RTS. L.J. 259-60 (1988) (no breach when unemployment benefits were allocated differently between unmarried cohabitants and married cohabitants because unmarried cohabitants are not subject to "the full extent of the duties and obligations incumbent on married couples."); *Stalla Costa v. Uruguay*, Communication No. 198/1985, *reprinted in* 9 HUM. RTS. L.J. 261-262 (1988) (no breach because distinctions were promulgated to remedy victims of past breaches of article 25 of the Covenant).

The Committee published General Comment 18/37 on Non-Discrimination in 1989 which developed in general terms the principles enunciated in these cases. Manfred Nowak, *The Activities of the UN-Human Rights Committee: Developments from 1 August 1989 through 31 July 1992*, 14 HUM. RTS. L.J. 11-12 (1993). The Committee first noted the explicit non-discrimination provisions articulated in Covenant articles 2, 3, 4, 14, 20, 23, 24, 25, and 26. The Committee then defined "discrimination" as implying any distinction, exclusion, restriction, or preference based on any ground listed in those articles which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. *Id.* The Committee stated that article 26 "prohibits discrimination in law or in fact in any field regulated and protected by public authorities." *Id.* (emphasis added) (quoting the Committee).

291. Article 40 of the Covenant provides that State Parties are obligated to submit reports as requested by the Committee. These reports describe the measures the States have adopted which give effect to rights contained in the Covenant and on the progress made in the enjoyment of those rights. Covenant, *supra* note 9, art. 40, 58 Fed. Reg. at 45939, 999 U.N.T.S. at 181. The United States submitted its first report in September, 1994. U.S. DEP'T. OF STATE, PUB. NO. 10200, CIVIL AND POLITICAL RIGHTS IN THE UNITED STATES: INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. HUMAN RIGHTS COMMITTEE UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1994). See *supra* note 287 for

If the Committee were to decide that Covenant article 26 is breached because a State Party grants an extradition request without seeking assurances when there is a real risk that the fugitive would be subjected to racially discriminatory sentencing in the United States, then every State Party to the Covenant would be obligated to become a "safe-haven" for certain death-eligible black fugitives wanted in the United States.<sup>292</sup> Safe-haven States would be obligated to withhold extradition until adequate assurances are obtained from the United States. Such a condition would continue until the United States corrected its practice through federal common law or through the implementation of remedial legislation.

Former United States Supreme Court Justice Blackmun recently concluded that the United States' capital sentencing system, as currently administered, violates the U.S. Constitution because it is unfair and fraught with arbitrariness, discrimination, caprice, and mistake.<sup>293</sup> In his concluding remarks, he stated:

Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital-sentencing scheme. I am not optimistic that such a day will come. I am much more optimistic, though, that this Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness "in the infliction of [death] is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether. . . ."<sup>294</sup>

In light of the substantial evidence of racially disparate sentencing practices combined with the lack of remedial measures, it is probable that the Human Rights Committee or another body will eventually conclude that extradition to face the death penalty in the United States amounts to a breach of article 26 (or like protections from racially prejudicial treatment). If

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a discussion of the consequences of failing to respond to an alleged breach.

292. A similar analysis would apply to a finding of gender discrimination against men in capital sentencing. Such a finding would turn State Parties into safe havens for all male death-eligible fugitives. For claims involving gender discrimination that were denied by United States courts by following the reasoning of *McCleskey*, see, e.g., *Richmond v. Lewis*, 948 F.2d 1473, 1490-91 (9th Cir. 1991), *rev'd on other grounds* 493 U.S. 1051 (1990) (unsuccessful gender discrimination claim based on statistical evidence that showed that there were no female convicts on Arizona's death row, although approximately 10% of homicide convicts were female); *Harris v. Pulley*, 885 F.2d 1354, 1375 (9th Cir. 1989) (same as *Richmond*, but here there were no female convicts sentenced to death in California during a four year period, although 4.3% of homicide convicts were female).

293. *Callins v. Collins*, 114 S. Ct. 1127, 1129 (1994) (Blackmun, J., dissenting).

Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and, despite the effort of the states and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. . . . (citation omitted).

294. *Id.*, 114 S. Ct. at 1138 (alteration in original) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 442 (1980) (Marshall, J., concurring)).

Justice Blackmun was correct, it is likely that no United States imposed remedy short of abolition will permit the body to reverse its finding.

## V. IMPLICATIONS

There is a global trend toward the abolition of the death penalty, and States have recognized abolition to be an aspect of international human rights law. The recent incorporation of the "law of extradition" into human rights treaty law appears to be a by-product of the trend toward abolition.

Abolition States that are parties to human rights conventions and abolition protocols are burdened with formidable obligations: to become safe-havens for a class of potentially violent fugitives and to experience diplomatic tension with a requesting State that desires to impose the death penalty.

States that are parties to the conventions but are not parties to the abolition protocols are burdened with a different dilemma: either scrutinize the requesting State's criminal justice practices or become a safe-haven to every death-eligible fugitive. Harboring States that choose the former will experience heightened diplomatic tension with the requesting State. Harboring States that choose the latter will likely receive an increased number of fugitives.

Harboring States that choose to scrutinize each fugitive's claim create the risk that each claim could result in an international incident. Since each fugitive has an incentive to challenge the practices of the requesting State in the compulsory extradition proceedings, the harboring State would be obligated to determine if the requesting State's criminal justice system is defective and, if so, to become a safe-haven to all similarly situated fugitives from those requesting States.<sup>295</sup> This will occur with increasing regularity as the trend toward abolition continues. This trend has already been characterized by a tightening of the procedural guarantees afforded death-eligible persons, by expanding the scope of inhuman-treatment protections, by expanding the class of persons who are immune from the death penalty<sup>296</sup> and may include application of equal protection restrictions if future challenges are successful. Each extradition request that is refused based on one of these general categories would be a source of heightened diplomatic tension and each refusal could become a well publicized incident in each State.

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295. For example, today *all* Covenant State Parties must become a safe-haven for fugitives from Maryland (which mandates death by cyanide gas asphyxiation as the sole means of execution) and possibly from Arizona (which allows death by cyanide gas asphyxiation and death by lethal injection). It is possible that all State Parties will become safe-havens for all black fugitives from the United States, from Florida, or from Bay County, Florida. If the latter, every retentionist county in America has the potential of being put on trial in a State Party's administrative proceedings.

296. *See, e.g.*, ECOSOC Res. 1984/50 § 3, *supra* note 239 (prohibiting the execution of retarded persons, juvenile offenders, new mothers, and pregnant women).

The primary reason that a State Party would choose to become a safe-haven for selective categories of death-eligible fugitives as opposed to becoming a safe-haven for all such fugitives is the desire to avoid receiving increased numbers of death-eligible fugitives. If a State were to become a safe-haven for all death-eligible fugitives, the number of fugitives that a State receives would increase as knowledge of that State's policy disseminated to the class of death-eligible persons who have avoided arrest but are physically present in retentionist States. However, even if a State were to rigidly adhere to a selective expulsion schedule, the number of fugitives received would probably increase because unsophisticated persons would be prone to flee based on an incomplete understanding of the law or based on a poorly communicated rumor. It is therefore difficult to foresee whether the selective safe-haven policy would have a significant deterrent effect on fugitives when compared to becoming a safe-haven for all death-eligible fugitives. On balance, a State wishing to comply with its international human rights obligations would probably find it more desirable to become a safe-haven for all death-eligible fugitives as opposed to the alternative's high comparative diplomatic costs<sup>297</sup> and low comparative deterrent value.

The availability of safe-haven States will have a secondary effect in retentionist States. While the impact on public opinion and State government practice is difficult to foresee, other events are reasonably foreseeable. An "underground railroad" could develop in retentionist States comprised of one or more of the following: a toll-free telephone service offered by foreign non-governmental organizations; a religious organization's well publicized policy to offer confidential advice, shelter or transportation to fugitives; individual attorneys who may accept the risks of counseling a client to flee; or a clandestine market in smuggling fugitives. It is also foreseeable that the stress on safe-haven States could induce them to actively encourage retentionist States to abolish the death penalty, conceivably through economic or other dealings<sup>298</sup> with the retentionist State.

It is likely that the treaty-based organizations will use the State reporting system<sup>299</sup> to further the trend toward the abolition of the death penalty. For example, the United States will likely endure close scrutiny from the

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297. Consider a comparison between two possible scenarios. In the first, Canada refuses the surrender of all fugitives unless it obtains assurances that the death penalty will not be imposed because Canada has abolished the death penalty as a matter of public policy. In the second, Canada refuses to surrender black fugitives to Georgia unless it obtains assurances because Canada made a factual determination that Georgia's capital sentencing system is a form of racial discrimination in violation of a *jus cogens* norm of international law. The former scenario would probably result in substantially less diplomatic tension than the latter.

298. A State could conceivably pay for an educational advertising campaign in a retentionist jurisdiction. This could be done on a State's own initiative or could be a remedy imposed by a treaty-based organization pursuant to a finding of a State's breach of a convention.

299. See *supra* note 291.

Human Rights Committee for expanding its use of the death penalty,<sup>300</sup> executing juvenile offenders<sup>301</sup> and mentally retarded persons,<sup>302</sup> and using apparently racially disparate sentencing and execution practices.<sup>303</sup>

## VI. CONCLUSION

The European Convention and the Covenant have now been interpreted as a source of procedural and substantive rights for a person in extradition proceedings in a State Party. The procedural rights that these treaties provide appear to be derogable in time of war or public emergency. The enjoyment of these procedural and substantive rights operate to impose limits on a State's discretion to extradite a person.

States that are parties to the European Convention and the Covenant are now obligated to refrain from extraditing a person when there is a real risk that the person will experience treatment which would amount to a violation of a few specific non-derogable treaty rights in the requesting State. Thus far, those treaty rights include the prohibition of torture, cruel, inhuman and degrading treatment or punishment, although there is a lack of uniformity over what constitutes such treatment. Another non-derogable treaty right which provides absolute protection from the death penalty is the obligation to abolish the death penalty when the harboring State is a party to an abolition treaty. Finally, the non-derogable provisions in the right to life against arbitrary and summary executions provide absolute protection from the death penalty. It is probable that these discretionary controls will also be applied when a fugitive challenges an extradition order and proves that there is a real risk that the person will receive treatment that is violative of some other non-derogable right, as well.

For example, it is probable that States that are parties to any one of several human rights treaties will be found to be obligated to refuse to send

300. In 1994, the federal government added dozens of offenses that are punishable by death. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 60001-60026, 108 Stat. 1796, 1959-82 (1994). In addition, the number of death sentences announced and the number of executions carried out in federal and state jurisdictions has been increasing in the years since the death penalty's reintroduction in 1976. BJS BULLETIN, *supra* note 242. *Contra*, the Human Rights Committee's General comments 6(16), *supra* note 239, which call for a reduction in the number of death eligible offenses and call for a reduction in the sentencing and carrying out of the death penalty.

301. The United States executes persons for crimes committed at the age of sixteen. *Stanford v. Kentucky*, 492 U.S. 361 (1989). *See generally*, AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY AND JUVENILE OFFENDERS (1991). *Contra* Roach & Pinkerton v. United States, Case No. 9647, Inter-Am. C.H.R. 147, 8 HUM. RTS. L.J. 345 (1987) (the application of the death penalty on juvenile offenders decided to be a breach of a *jus cogens* norm of international law by the Inter-American Commission on Human Rights).

302. *See, e.g.*, ECOSOC Res. 1984/50 § 3, *supra* note 239, which provides: "Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane." *But cf.* *Penry v. Lynaugh*, 492 U.S. 302 (1989) (allowing the execution of mentally retarded persons).

303. *See* discussion *supra* part IV. C.

black fugitives to the United States to be executed if the current capital-sentencing practices in the United States are determined to violate the non-derogable prohibitions against racial discrimination.<sup>304</sup>

Finally, these present and prospective extradition obligations create foreign relations incentives for States that have presently abolished the death penalty to choose to accede to human rights treaties which obligate signatory states to abolish the death penalty.

Today's fugitives will gain absolute protection from the death penalty if it crystallizes into a breach *per se* of the right to life.<sup>305</sup> Should that occur, all harboring States will be obligated to refuse to extradite fugitives when there is a real risk that the death penalty will be imposed in the requesting State.

Craig R. Roecks\*

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304. *Id.*

305. For a discussion of the use of death penalty as a breach *per se* of the international right to life, see *Kindler v. Canada (Minister of Justice)*, 2 S.C.R. 779, 807-810, 829-830 (1991) (Cory, J., dissenting); *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 41-42 (1989) (de Mayer, J., concurring); and *SCHABAS*, *supra* note 24. For a discussion of the abolition of the death penalty in general terms, see *Callins v. Collins*, 114 S. Ct. 1127, 1128-38 (1994) (Blackmun, J., dissenting); *Gregg v. Georgia*, 428 U.S. 153, 231 (1976) (Marshall, J., dissenting); *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 240-57 (1972) (Douglas, J., concurring); *Furman v. Georgia*, 408 U.S. 238, 314-74 (1972) (Marshall, J. concurring); *Kindler v. Canada (Minister of Justice)*, 2 S.C.R. 779, 799-807 (1991) (Cory, J., dissenting).

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