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HUMAN RIGHTS COMMITTEE
Forty-ninth session

VIEWS

Communication No. 469/1991

Submitted by:	Charles Chitat Ng [represented by counsel]
Victim:	The author
State party:	Canada
Date of communication:	25 September 1991 (initial submission)
Documentation references:	Prior decisions - Special Rapporteur's combined rule 86/rule 91 decision, transmitted to the State party on 26 September 1991 (not issued in document form) - CCPR/C/46/D/469/1991 (Decision to join consideration of admissibility and merits, dated 28 October 1992)
Date of adoption of Views:	5 November 1993

On 5 November 1993, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol, in respect of communication No. 469/1991. The text of the Views is appended to the present document.

[Annex]

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

ANNEX

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

concerning

Communication No. 469/1991 */

Submitted by: Charles Chitat Ng [represented by counsel]

Victim: The author

State party: Canada

Date of communication: 25 September 1991 (initial submission)

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

Meeting on 5 November 1993,

Having concluded its consideration of communication No. 469/1991, submitted to the Human Rights Committee on behalf of Mr. Charles Chitat Ng under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

The facts as submitted by the author:

1. The author of the communication is Charles Chitat Ng, a British subject, born on 24 December 1960 in Hong Kong, and resident of the United States of America, at the time of his submission detained in a penitentiary in Alberta, Canada, and on 26 September 1991 extradited to the United States. He claims to be a victim of a violation of his human rights by Canada because of his extradition. He is represented by counsel.

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*/ The texts of 8 individual opinions, signed by 9 Committee members, are appended to the present document.

2.1 The author was arrested, charged and convicted, in 1985, in Calgary, Alberta, following an attempted store theft and shooting of a security guard. In February 1987, the United States formally requested the author's extradition to stand trial in California on 19 criminal counts, including kidnapping and 12 murders, committed in 1984 and 1985. If convicted, the author could face the death penalty.

2.2 In November 1988, a judge of the Alberta Court of Queen's Bench ordered the author's extradition. In February 1989 the author's habeas corpus application was denied, and on 31 August 1989 the Supreme Court of Canada refused the author leave to appeal.

2.3 Article 6 of the Extradition Treaty between Canada and the United States provides:

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

Canada abolished the death penalty in 1976, except for certain military offences.

2.4 The power to seek assurances that the death penalty will not be imposed is discretionary, and is conferred on the Minister of Justice pursuant to section 25 of the Extradition Act. In October 1989, the Minister of Justice decided not to seek these assurances.

2.5 The author subsequently filed an application for review of the Minister's decision with the Federal Court. On 8 June 1990, the issues in the case were referred to the Supreme Court of Canada, which rendered judgement on 26 September 1991. It found that the author's extradition without assurances as to the imposition of the death penalty did not contravene Canada's constitutional protection for human rights nor the standards of the international community. The author was extradited on the same day.

The complaint:

3. The author claims that the decision to extradite him violates articles 6, 7, 9, 10, 14 and 26 of the Covenant. He submits that the execution of the death sentence by gas asphyxiation, as provided for under California statutes, constitutes cruel and inhuman treatment or punishment *per se*, and that the conditions on death row are cruel, inhuman and degrading. He further alleges that the judicial

procedures in California, in as much as they relate specifically to capital punishment, do not meet basic requirements of justice. In this context, the author alleges that in the United States racial bias influences the imposition of the death penalty.

The State party's initial observations and the author's comments :

4.1 The State party submits that the communication is inadmissible ratione personae , loci and materiae .

4.2 It is argued that the author cannot be considered a victim within the meaning of the Optional Protocol, since his allegations are derived from assumptions about possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States. The State party refers in this connection to the Committee's Views in communication No. 61/1979 [1], where it was found that the Committee "has only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant".

4.3 The State party indicates that the author's allegations concern the penal law and judicial system of a country other than Canada. It refers to the Committee's inadmissibility decision in communication No. 217/1986 [2], where the Committee observed "that it can only receive and consider communications in respect of claims that come under the jurisdiction of a State party to the Covenant". The State party submits that the Covenant does not impose responsibility upon a State for eventualities over which it has no jurisdiction.

4.4 Moreover, it is submitted that the communication should be declared inadmissible as incompatible with the provisions of the Covenant, since the Covenant does not provide for a right not to be extradited. In this connection, the State party quotes from the Committee's inadmissibility decision in communication No. 117/1981 [3]: "There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country." It further argues that even if extradition could be found to fall within the scope of protection of the Covenant in exceptional

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[1] Leo Hertzberg *et al.* v. Finland , Views adopted on 2 April 1982, paragraph 9.3.

[2] H.v.d.P. v. the Netherlands , declared inadmissible on 8 April 1987, paragraph 3.2.

[3] M.A. v. Italy , declared inadmissible on 10 April 1984 , paragraph 13.4.

circumstances, these circumstances are not present in the instant case.

4.5 The State party further refers to the United Nations Model Treaty on Extradition [4], which clearly contemplates the possibility of extradition without conditions by providing for discretion in obtaining assurances regarding the death penalty in the same fashion as is found in article 6 of the Canada-United States Extradition Treaty. It concludes that interference with the surrender of a fugitive pursuant to legitimate requests from a treaty partner would defeat the principles and objects of extradition treaties and would entail undesirable consequences for States refusing these legitimate requests. In this context, the State party points out that its long, unprotected border with the United States would make it an attractive haven for fugitives from United States justice. If these fugitives could not be extradited because of the theoretical possibility of the death penalty, they would be effectively irremovable and would have to be allowed to remain in the country, unpunished and posing a threat to the safety and security of the inhabitants.

4.6 The State party finally submits that the author has failed to substantiate his allegations that the treatment he may face in the United States will violate his rights under the Covenant. In this connection, the State party points out that the imposition of the death penalty is not *per se* unlawful under the Covenant. As regards the delay between the imposition and the execution of the death sentence, the State party submits that it is difficult to see how a period of detention during which a convicted prisoner would pursue all avenues of appeal, can be held to constitute a violation of the Covenant.

5.1 In his comments on the State party's submission, counsel submits that the author is and was himself actually and personally affected by the decision of the State party to extradite him and that the communication is therefore admissible *ratione personae*. In this context, he refers to the Committee's Views in communication No. 35/1978 [5], and argues that an individual can claim to be a victim within the meaning of the Optional Protocol if the laws, practices, actions or decisions of a State party raise a real risk of violation of rights set forth in the Covenant.

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[4] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990; see General Assembly resolution 45/116, annex.

[5] *S. Aumeeruddy-Cziffra et al. v. Mauritius*, Views adopted on 9 April 1981, paragraph 9.2.

5.2 Counsel further argues that, since the decision complained of is one made by Canadian authorities while the author was subject to Canadian jurisdiction, the communication is admissible *ratione loci*. In this connection, he refers to the Committee's Views in communication No. 110/1981 [6], where it was held that article 1 of the Covenant was "clearly intended to apply to individuals subject to the jurisdiction of the State party concerned *at the time of the alleged violation* of the Covenant" (emphasis added).

5.3 Counsel finally stresses that the author does not claim a right not to be extradited; he only claims that he should not have been surrendered without assurances that the death penalty would not be imposed. He submits that the communication is therefore compatible with the provisions of the Covenant. He refers in this context to the Committee's Views on communication No. 107/1981 [7], where the Committee found that anguish and stress can give rise to a breach of the Covenant; he submits that this finding is also applicable in the instant case.

The Committee's admissibility considerations and decision :

6.1 During its 46th session in October 1992, the Committee considered the admissibility of the communication. It observed that extradition as such is outside the scope of application of the Covenant [8], but that a State party's obligations in relation to a matter itself outside the scope of the Covenant may still be engaged by reference to other provisions of the Covenant [9]. The Committee noted that the author does not claim that extradition as such violates the Covenant, but rather that the particular circumstances related to the effects of his extradition would raise issues under specific provisions of the Covenant. Accordingly, the Committee found that the communication was thus not excluded *ratione materiae*.

6.2 The Committee considered the contention of the State party that

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[6] *Antonio Viana Acosta v. Uruguay*, Views adopted on 29 March 1984, paragraph 6.

[7] *Almeida de Quinteros v. Uruguay*, Views adopted on 21 July 1983, paragraph 14.

[8] Communication No. 117/1981 (*M.A. v. Italy*), paragraph 13.4: "There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country".

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

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

6.3 The Committee therefore considered itself, in principle, competent to examine whether the State party is in violation of the Covenant by virtue of its decision to extradite the author under the Extradition Treaty of 1976 between the United States and Canada, and the Extradition Act of 1985.

6.4 The Committee observed that pursuant to article 1 of the Optional Protocol the Committee may only receive and consider communications from individuals subject to the jurisdiction of a State party to the Covenant and to the Optional Protocol "who claim to be victims of a violation by that State party of any of their rights set forth in the Covenant". It considered that in the instant case, only the consideration on the merits of the circumstances under which the extradition procedure, and all its effects, occurred, would enable the Committee to determine whether the author is a victim within the meaning of article 1 of the Optional Protocol. Accordingly, the Committee found it appropriate to consider this issue, which concerned the admissibility of the communication, together with the examination of the merits of the case.

7. On 28 October 1992, the Human Rights Committee therefore decided to join the question of whether the author was a victim within the meaning of article 1 of the Optional Protocol to the consideration of the merits. The Committee expressed its regret that the State party had not acceded to the Committee's request under rule 86, to stay extradition of the author.

The State party's further submission on the admissibility and the merits of the communication:

8.1 In its submission, dated 14 May 1993, the State party elaborates on the extradition process in general, on the Canada-United States extradition relationship and on the specifics of the present case. It also submits comments with respect to the admissibility of the communication, in particular with respect to article 1 of the Optional Protocol.

8.2 The State party recalls that "extradition exists to contribute to the safety of the citizens and residents of States. Dangerous criminal offenders seeking a safe haven from prosecution or punishment are removed to face justice in the State in which their crimes were committed. Extradition furthers international cooperation in criminal justice matters and strengthens domestic law enforcement. It is meant to be a straightforward and expeditious process. Extradition seeks to balance the rights of fugitives with the need for the protection of the residents of the two States parties to any given extradition treaty. The extradition relationship between Canada and the United States dates back to 1794.... In 1842, the United States and Great Britain entered into the Ashburton-Webster Treaty which contained articles governing the mutual surrender of criminals.... This treaty remained in force until the present Canada-United States Extradition Treaty of 1976."

8.3 With regard to the principle aut dedere aut judicare the State party explains that while some States can prosecute persons for crimes committed in other jurisdictions in which their own nationals are either the offender or the victim, other States, such as Canada and certain other States in the common law tradition, cannot.

8.4 Extradition in Canada is governed by the Extradition Act and the terms of the applicable treaty. The Canadian Charter of Rights and Freedoms, which forms part of the constitution of Canada and embodies many of the rights protected by the Covenant, applies. Under Canadian law extradition is a two step process, the first involving a hearing at which a judge considers whether a factual and legal basis for extradition exists. The person sought for extradition may submit evidence at the judicial hearing. If the judge is satisfied on the evidence that a legal basis for extradition exists, the fugitive is ordered committed to await surrender to the requesting State. Judicial review of a warrant of committal to await surrender can be sought by means of an application for a writ of habeas corpus in a provincial court. A decision of the judge on the habeas corpus application can be appealed to the provincial court of appeal and then, with leave, to the Supreme Court of Canada. The second step in the extradition process begins following the exhaustion of the appeals in the

judicial phase. The Minister of Justice is charged with the responsibility of deciding whether to surrender the person sought for extradition. The fugitive may make written submissions to the Minister and counsel for the fugitive, with leave, may appear before the Minister to present oral argument. In coming to a decision on surrender, the Minister considers a complete record of the case from the judicial phase, together with any written and oral submissions from the fugitive, and while the Minister's decision is discretionary, the discretion is circumscribed by law. The decision is based upon a consideration of many factors, including Canada's obligations under the applicable treaty of extradition, facts particular to the person and the nature of the crime for which extradition is sought. In addition, the Minister must consider the terms of the Canadian Charter of Rights and Freedoms and the various instruments, including the Covenant, which outline Canada's international human rights obligations. Finally, a fugitive may seek judicial review of the Minister's decision by a provincial court and appeal a warrant of surrender, with leave, up to the Supreme Court of Canada. In interpreting Canada's human rights obligations under the Canadian Charter, the Supreme Court of Canada is guided by international instruments to which Canada is a party, including the Covenant.

8.5 With regard to surrender in capital cases, the Minister of Justice decides whether or not to request assurances to the effect that the death penalty should not be imposed or carried out on the basis of an examination of the particular facts of each case. The Canada-United States Extradition Treaty was not intended to make the seeking of assurances a routine occurrence but only in circumstances where the particular facts of the case warrant a special exercise of discretion.

8.6 With regard to the abolition of the death penalty in Canada, the State party notes that "certain States within the international community, including the United States, continue to impose the death penalty. The Government of Canada does not use extradition as a vehicle for imposing its concepts of criminal law policy on other States. By seeking assurances on a routine basis, in the absence of exceptional circumstances, Canada would be dictating to the requesting State, in this case the United States, how it should punish its criminal law offenders. The Government of Canada contends that this would be an unwarranted interference with the internal affairs of another State. The Government of Canada reserves the right ... to refuse to extradite without assurances. This right is hold in reserve for use only where exceptional circumstances exist. In the view of the Government of Canada, it may be that evidence showing that a fugitive would face certain of foreseeable violations of the Covenant would be one example of exceptional circumstances which would warrant the special measure of seeking assurances under article 6. However, the evidence presented by Ng during the

extradition process in Canada (which evidence has been submitted by counsel for Ng in this communication) does not support the allegations that the use of the death penalty in the United States generally, or in the State of California in particular, violates the Covenant."

8.7 The State party also refers to article 4 of the United Nations Model Treaty on Extradition, which lists optional, but not mandatory, grounds for refusing extradition: "(d) 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." Similarly, article 6 of the Canada-United States Extradition Treaty provides that the decision with respect to obtaining assurances regarding the death penalty is discretionary.

8.8 With regard to the link between extradition and the protection of society, the State party submits that Canada and the United States share a 4,800 kilometre unguarded border, that many fugitives from United States justice cross that border into Canada and that in the last twelve years there has been a steadily increasing number of extradition requests from the United States. In 1980 there were 29 such requests; by 1992 the number had increased to 88. "Requests involving death penalty cases are a new and growing problem for Canada ... a policy of routinely seeking assurances under article 6 of the Canada-United States Extradition Treaty will encourage even more criminal law offenders, especially those guilty of the most serious crimes, to flee the United States for Canada. Canada does not wish to become a haven for the most wanted and dangerous criminals from the United States. If the Covenant fetters Canada's discretion not to seek assurances, increasing numbers of criminals may come to Canada for the purpose of securing immunity from capital punishment."

9.1 With regard to Mr. Ng's case, the State party recalls that he challenged the warrant of committal to await surrender in accordance with the extradition process outlined above, and that his counsel made written and oral submissions to the Minister to seek assurances that the death penalty would not be imposed. He argued that extradition to face the death penalty would offend his rights under section 7 (comparable to articles 6 and 9 of the Covenant) and section 12 (comparable to article 7 of the Covenant) of the Canadian Charter of Rights and Freedoms. The Supreme Court heard Mr. Ng's case at the same time as the appeal by Mr. Kindler, an American citizen who also faced extradition to the United States on a capital

charge[10], and decided that their extradition without assurances would not violate Canada's human rights obligations.

9.2 With regard to the admissibility of the communication, the State party once more reaffirms that the communication should be declared inadmissible ratione materiae because extradition per se is beyond the scope of the Covenant. A review of the travaux préparatoires reveals that the drafters of the Covenant specifically considered and rejected a proposal to deal with extradition in the Covenant. In the light of the negotiating history of the Covenant, the State party submits that "a decision to extend the Covenant to extradition treaties or to individual decisions pursuant thereto, would stretch the principles governing the interpretation of human rights instruments in unreasonable and unacceptable ways. It would be unreasonable because the principles of interpretation which recognize that human rights instruments are living documents and that human rights evolve over time cannot be employed in the face of express limits to the application of a given document. The absence of extradition from the articles of the Covenant when read with the intention of the drafters must be taken as an express limitation."

9.3 The State party further contends that Mr. Ng has not submitted any evidence that would suggest that he was a victim of any violation in Canada of rights set forth in the Covenant. In this context, the State party notes that the author merely claims that his extradition to the United States was in violation of the Covenant, because he faces charges in the United States which may lead to his being sentenced to death if found guilty. The State party submits that it satisfied itself that the foreseeable treatment of Mr. Ng in the United States would not violate his rights under the Covenant.

10.1 On the merits, the State party stresses that Mr. Ng enjoyed a full hearing on all matters concerning his extradition to face the death penalty. "If it can be said that the Covenant applies to extradition at all ... an extraditing State could be said to be in violation of the Covenant only where it returned a fugitive to certain or foreseeable treatment or punishment, or to judicial procedures which in themselves would be a violation of the Covenant." In the present case, the State party submits that since Mr. Ng's trial has not yet begun, it was not reasonably foreseeable that he would be held in conditions of incarceration that would violate rights under the Covenant or that he would in fact be put to death. The State party points out that if convicted and sentenced to death, Mr. Ng is entitled to many avenues of appeal in the United States and that he can petition for clemency; furthermore, he is

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[10] See communication No. 470/1991, Kindler v. Canada, Views adopted on 30 July 1993.

entitled to challenge in the courts of the United States the conditions under which he is held while his appeals with respect to the death penalty are outstanding.

10.2 With regard to the imposition of the death penalty in the United States, the State party recalls that article 6 of the Covenant did not abolish capital punishment under international law:

> "In countries which have not abolished the death penalty, the sentence of death may still be imposed for the most serious crimes in accordance with law in force at the time of the commission of the crime, not contrary to the provisions of the Covenant and not contrary to the Convention on the Prevention and Punishment of the Crime of Genocide. The death penalty can only be carried out pursuant to a final judgment rendered by a competent court. It may be that Canada would be in violation of the Covenant if it extradited a person to face the possible imposition of the death penalty where it was reasonably foreseeable that the requesting State would impose the death penalty under circumstances which would violate article 6. That is, it may be that an extraditing State would be violating the Covenant to return a fugitive to a State which imposed the death penalty for other than the most serious crimes, or for actions which are not contrary to a law in force at the time of commission, or which carried out the death penalty in the absence of or contrary to the final judgment of a competent court. Such are not the facts here ... Ng did not place any evidence before the Canadian courts, before the Minister of Justice or before the Committee which would suggest that the United States was acting contrary to the stringent criteria established by article 6 when it sought his extradition from Canada.... The Government of Canada, in the person of the Minister of Justice, was satisfied at the time the order of surrender was issued that if Ng is convicted and executed in the State of California, this will be within the conditions expressly prescribed by article 6 of the Covenant."

10.3 Finally, the State party observes that it is "in a difficult position attempting to defend the criminal justice system of the United States before the Committee. It contends that the Optional Protocol process was never intended to place a State in the position of having to defend the laws or practices of another State before the Committee."

10.4 With respect to the issue whether the death penalty violates article 7 of the Covenant, the State party submits that "article 7 cannot be read or interpreted without reference to article 6. The Covenant must be read as a whole and its articles as being in harmony.... It may be that certain forms of execution are contrary to article 7. Torturing a person to death would seem to fall into

this category as torture is a violation of article 7. Other forms of execution may be in violation of the Covenant because they are cruel, inhuman or degrading. However, as the death penalty is permitted within the narrow parameters set by article 6, it must be that some methods of execution exist which would not violate article 7."

10.5 As to the method of execution, the State party submits that there is no indication that execution by cyanide gas asphyxiation, the chosen method in California, is contrary to the Covenant or to international law. It further submits that no specific circumstances exist in Mr. Ng's case which would lead to a different conclusion concerning the application of this method of execution to him; nor would execution by gas asphyxiation be in violation of the Safeguards Guaranteeing Protection of Those Facing the Death Penalty, adopted by the Economic and Social Council in Resolution 1984/50.

10.6 Concerning the "death row phenomenon", the State party submits that each case must be examined on its specific facts, including the conditions in the prison in which the prisoner would be held while on "death row", the age and the mental and physical condition of the prisoner subject to those conditions, the reasonably foreseeable length of time the prisoner would be subject to those conditions, the reasons underlying the length of time and the avenues, if any, for remedying unacceptable conditions. It is submitted that the Minister of Justice and the Canadian courts examined and weighed all the evidence submitted by Mr. Ng as to the conditions of incarceration of persons sentenced to death in California:

> "The Minister of Justice ... was not convinced that the conditions of incarceration in the State of California, considered together with the facts personal to Ng, the element of delay and the continuing access to the courts in the State of California and to the Supreme Court of the United States, would violated Ng's rights under the Canadian Charter of Rights and Freedoms or under the Covenant. The Supreme Court of Canada upheld the Minister's decision in such a way as to make clear that the decision would not subject Ng to a violation of his rights under the Canadian Charter of Rights and Freedoms."

10.7 With respect to the question of the foreseeable length of time Mr. Ng would spend on death row if sentenced to death, "[t]here was no evidence before the Minister or the Canadian courts regarding any intentions of Ng to make full use of all avenues for judicial review in the United States of any potential sentence of death. There was no evidence that either the judicial system in the State of California or the Supreme Court of the United States had serious problems of backlogs or other forms of institutional delay which would likely be a continuing problem when and if Ng is held to await

execution." In this connection, the State party refers to the Committee's jurisprudence that prolonged judicial proceedings to not per se constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners [11]. The State party contends that it was not reasonably foreseeable on the facts presented by Mr. Ng during the extradition process in Canada that any possible period of prolonged detention upon his return to the United States would result in a violation of the Covenant, but that it was more likely that any prolonged detention on death row would be attributable to Mr. Ng pursuing the many avenues for judicial review in the United States.

Author's and counsel's comments on the State party's submission :

11.1 With regard to the extradition process in Canada, counsel points out that a fugitive is ordered committed to await surrender when the Judge is satisfied that a legal basis for extradition exists. Counsel emphasizes, however, that the extradition hearing is not a trial and the fugitive has no general right to cross-examine witnesses. The extradition judge does not weigh evidence against the fugitive with regard to the charges against him, but essentially determines whether a prima facie case exists. Because of this limited competence, no evidence can be called pertaining to the effects of the surrender on the fugitive.

11.2 As regards article 6 of the Extradition Treaty, counsel recalls that when the Treaty was signed in December 1971, the Canadian Criminal Code still provided for capital punishment in cases of murder, so that article 6 could have been invoked by either contracting State. Counsel submits that article 6 does not require assurances to be sought only in particularly "special" death penalty cases. He argues that the provision of the possibility to ask for assurances under article 6 of the Treaty implicitly acknowledges that offences punishable by death are to be dealt with differently, that different values and traditions with regard to the death penalty may be taken into account when deciding upon an extradition request, and that an actual demand for assurances will not be perceived by the other party as unwarranted interference with the internal affairs of the requesting State. In particular, article 6 of the Treaty is said to "... allow the requested State ... to maintain a consistent position: if the death penalty is rejected within its own borders ... it could negate any responsibility for exposing a fugitive through surrender, to the risk of imposition of

[11] Communications Nos. 210/1986 and 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica), Views adopted on 6 April 1989; and Nos. 270/1988 and 271/1988 (Randolph Barrett and Clyde Sutcliffe v. Jamaica), Views adopted on 30 March 1992.

that penalty or associated practices and procedures in the other State". It is further submitted that "it is very significant that the existence of the discretion embodied in article 6, in relation to the death penalty, enables the contracting parties to honour both their own domestic constitutions and their international obligations without violating their obligations under the bilateral Extradition Treaty".

11.3 With regard to the link between extradition and the protection of society, counsel notes that the number of requests for extradition by the United States in 1991 was 17, whereas the number in 1992 was 88. He recalls that at the end of 1991, the Extradition Treaty between the United States and Canada was amended to the effect that inter alia taxation offences became extraditable; ambiguities with regard to the rules of double jeopardy and reciprocity were removed. Counsel contends that the increase in extradition requests may be attributable to these 1991 amendments. In this context, he submits that at the time of the author's surrender, article 6 of the Treaty had been in force for 15 years, during which 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 executed. It is therefore submitted that the State party's fear that routine requests for assurances would lead to a flood of capital defendants is unsubstantiated. Counsel finally argues that it is inconceivable that the United States would have refused article 6 assurances had they been requested in the author's case.

11.4 As regards the extradition proceedings against Mr. Ng, counsel notes that his Federal Court action against the Minister's decision to extradite the author without seeking assurances never was decided upon by the Federal Court, but was referred to the Supreme Court to be decided together with Mr. Kindler's appeal. In this context, counsel notes that the Supreme Court, when deciding that the author's extradition would not violate the Canadian constitution, failed to discuss criminal procedure in California or evidence adduced in relation to the death row phenomenon in California.

11.5 As to the State party's argument that extradition is beyond the scope of the Covenant, counsel argues that the travaux préparatoires do not show that the fundamental human rights set forth in the Covenant should never apply to extradition situations: "Reluctance to include an express provision on extradition because the Covenant should 'lay down general principles' or because it should lay down 'fundamental human rights and not rights which are corollaries thereof' or because extradition was 'too complicated to be included in a single article' simply does not bespeak an intention to narrow or stultify those 'general principles' or 'fundamental human rights' or evidence a consensus that these general principles should never apply to extradition situations."

11.6 Counsel further argues that, already during the extradition proceedings in Canada, the author suffered from anxiety because of the uncertainty of his fate, the possibility of being surrendered to California to face capital charges, the likelihood that he would be "facing an extremely hostile and high security reception by California law enforcement agencies", and that he must therefore be considered a victim within the meaning of article 1 of the Optional Protocol. In this context, the author submits that he was aware "that the California Supreme Court had, since 1990, become perhaps the most rigid court in the country in rejecting appeals from capital defendants".

11.7 The author refers to the Committee's decision of 28 October 1992 and submits that, in the circumstances of his case, the very purpose of his extradition without seeking assurances was to foreseeably expose him to the imposition of the death penalty and consequently to the death row phenomenon. In this connection, counsel submits that the author's extradition was sought upon charges which carry the death penalty, and that the prosecution in California never left any doubt that it would indeed seek the death penalty. He quotes the Assistant District Attorney in San Francisco as saying that: "there is sufficient evidence to convict and send Ng to the gas chamber if he is extradited...".

11.8 In this context, counsel quotes from the judgment of the European Court of Human Rights in the Soering case: "In the independent exercise of his discretion, the Commonwealth's attorney has himself decided to seek and persist in seeking the death penalty because the evidence, in his determination, supports such action. If the national authority with responsibility for prosecuting the offence takes such a firm stance, it is hardly open to the court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the 'death row phenomenon'." Counsel submits that, at the time of extradition, it was foreseeable that the author would be sentenced to death in California and therefore be exposed to violations of the Covenant.

11.9 Counsel refers to several resolutions adopted by the General Assembly of the United Nations [12] in which the abolition of the death penalty was considered desirable. He further refers to Protocol 6 of the European Convention on Human Rights and to the Second Optional Protocol to the International Covenant on Civil and Political Rights: "[O]ver the last fifty years there has been a progressive and increasingly rapid evolution away from the death penalty. That evolution has led almost all Western democracies to abandon it". He argues that this development should be taken into account when

[12] GA Res. 2857(XXVI), GA Res. 32/61, GA Res. 37/192.

interpreting the Covenant.

11.10 As to the method of execution in California, cyanide gas asphyxiation, counsel argues that it constitutes inhuman and degrading punishment within the meaning of article 7 of the Covenant. He notes that asphyxiation may take up to twelve minutes, during which condemned persons remain conscious, experience obvious pain and agony, drool and convulse and often soil themselves (reference is made to the execution of Robert F. Harris at San Quentin Prison in April 1992). Counsel further argues that, given the cruel character of this method of execution, a decision of Canada not to extradite without assurances would not constitute a breach of its Treaty obligations with the United States or undue interference with the latter's internal law and practices. Furthermore, counsel notes that cyanide gas execution is the sole method of execution in only three States in the United States (Arizona, Maryland and California) and that there is no evidence to suggest that it is an approved means of carrying out judicially mandated executions elsewhere in the international community.

11.11 As to the death row phenomenon, the author emphasizes that he intends to make full use of all avenues of appeal and review in the United States, and that his intention was clear to the Canadian authorities during the extradition proceedings. As to the delay in criminal proceedings in California, counsel refers to estimates that it would require the Californian Supreme Court 16 years to clear the present backlog in hearing capital appeals. The author reiterates that the judgments of the Supreme Court in Canada did not in any detail discuss evidence pertaining to capital procedures in California, conditions on death row at San Quentin Prison or execution by cyanide gas, although he presented evidence relating to these issues to the Court. He refers to his Factum to the Supreme Court, in which it was stated: "At present, there are approximately two hundred and eighty inmates on death row at San Quentin. The cells in which inmates are housed afford little room for movement. Exercise is virtually impossible. When a condemned inmate approaches within three days of an execution date, he is placed under twenty-four hour guard in a range of three stripped cells. This can occur numerous times during the review and appeal process.... Opportunity for exercise is very limited in a small and crowded yard. Tension is consistently high and can escalate as execution dates approach. Secondary tension and anguish is experienced by some as appeal and execution dates approach for others. There is little opportunity to relieve tension. Programs are extremely limited. There are no educational programs. The prison does little more than warehouse the condemned for years pending execution.... Death row inmates have few visitors, and few financial resources, increasing their sense of isolation and hopelessness. Suicides occur and are attributable to the conditions, lack of programs, extremely inadequate psychiatric and physiological care and the tension, apprehension, depression and

despair which permeate death row".

11.12 Finally, the author describes the circumstances of his present custodial regime at Folsom Prison, California, conditions which he submits would be similar if convicted. He submits that whereas the other detainees, all convicted criminals, have a proven track record of prison violence and gang affiliation, he, as a pre-trial detainee, is subjected to far more severe custodial restraints than any of them. Thus, when moving around in the prison, he is always put in full shackles (hand, waist and legs); forced to keep leg irons when showering; not allowed any social interaction with the other detainees; given less than five hours per week of yard exercise; and continuously facing hostility from the prison staff, in spite of good behaviour. Mr. Ng adds that unusual and very onerous conditions have been imposed on visits from his lawyers and others working on his case; direct face-to-face conversations with investigators have been made impossible, and conversations with them, conducted over the telephone or through a glass window, may be overheard by prison staff. These restrictions are said to seriously undermine the preparation of his trial defence. Moreover, his appearances in Calaveras County Court are accompanied by exceptional security measures: for example, during every court recess, the author is taken from the courtroom to an adjacent jury room and placed, still shackled, into a three foot by four foot cage, specially built for the case. The author contends that no pre-trial detainee has ever been subjected to such drastic security measures in California.

11.13 The author concludes that the conditions of confinement have taken a heavy toll on him, physically and mentally. He has lost much weight, suffers from sleeplessness, anxiety, and other nervous disorders. This situation, he emphasizes, has foreclosed "progress toward preparation of a reasonably adequate defence".

Further submission from the author and State party's reaction thereto:

12.1 In an affidavit dated 5 June 1993, signed by Mr. Ng and submitted by his counsel, the author provides detailed information about the conditions of his confinement in Canada between 1985 and his extradition in September 1991. He notes that following his arrest on 6 July 1985, he was kept at the Calgary Remand Center in solitary confinement under a so-called "suicide watch", which meant 24 hour camera supervision and the placement of a guard outside the bars of the cell. He was only allowed one hour of exercise each day in the Center's "mini-yard", on "walk alone status" and accompanied by two guards. As the extradition process unfolded in Canada, the author was transferred to a prison in Edmonton; he complains about "drastically more severe custodial restrictions" from February 1987

to September 1991, which he links to the constant and escalating media coverage of the case. Prison guards allegedly began to tout him, he was kept in total isolation, and contact with visitors was restricted.

12.2 Throughout the period 1987-1991, the author was kept informed about progress in the extradition process; his lawyers informed him about the "formidable problems" he would face if returned to California for prosecution, as well as about the "increasingly hostile political and judicial climate in California towards capital defendants generally". As a result, he experienced extreme stress, sleeplessness and anxiety, all of which were heightened as the dates of judicial decisions in the extradition process approached.

12.3 Finally, the author complains about the deceptions committed by Canadian prison authorities following the release of the decision of the Canadian Supreme Court on 26 September 1991. Thus, instead of being allowed to contact counsel after the release of the decision and to obtain advice about the availability of any remedies, as agreed between counsel and a prison warden, he claims that he was lured from his cell, in the belief that he would be allowed to contact counsel, and thereafter told that he was being transferred to the custody of United States marshals.

12.4 The State party objects to these new allegations as they "are separate from the complainant's original submission and can only serve to delay consideration of the original communication by the Human Rights Committee". It accordingly requests the Committee not to take these claims into consideration.

Review of admissibility and consideration of merits :

13.1 In his initial submission, author's counsel alleged that Mr. Ng was a victim of violations of articles 6, 7, 9, 10, 14, and 26 of the Covenant.

13.2 When the Committee considered the admissibility of the communication during its 46th session and adopted a decision relating thereto (decision of 28 October 1992), it noted that the communication raised complex issues with regard to the compatibility with the Covenant, ratione materiae , of extradition to face capital punishment, in particular with regard to the scope of articles 6 and 7 of the Covenant to such situations and their application in the author's case. It noted however that questions about the issue of whether the author could be deemed a "victim" within the meaning of article 1 of the Optional Protocol remained, but considered that only consideration on the merits of all the circumstances under which the extradition procedure, and all its effects, occurred, would enable the Committee to determine whether Mr. Ng was indeed a

victim within the meaning of article 1. The State party has made extensive new submissions on both admissibility and merits and reaffirmed that the communication is inadmissible because "the evidence shows that Ng is not the victim of any violation in Canada of rights set out in the Covenant". Counsel, in turn, has filed detailed objections to the State party's affirmations.

13.3 In reviewing the question of admissibility, the Committee takes note of the contentions of the State party and of counsel's arguments. It notes that counsel, in submissions made after the decision of 28 October 1992, has introduced entirely new issues which were not raised in the original communication, and which relate to Mr. Ng's conditions of detention in Canadian penitentiaries, the stress to which he was exposed as the extradition process proceeded, and alleged deceptive manoeuvres by Canadian prison authorities.

13.4 These fresh allegations, if corroborated, would raise issues under articles 7 and 10 of the Covenant, and bring the author within the ambit of article 1 of the Optional Protocol. While the wording of the decision of 28 October 1992 would not have precluded counsel from introducing them at this stage of the procedure, the Committee, in the circumstances of the case, finds that it need not address the new claims, as domestic remedies before the Canadian courts were not exhausted in respect of them. It transpires from the material before the Committee that complaints about the conditions of the author's detention in Canada or about alleged irregularities committed by Canadian prison authorities were not raised either during the committal or the surrender phase of the extradition proceedings. Had it been argued that an effective remedy for the determination of these claims is no longer available, the Committee finds that it was incumbent upon counsel to raise them before the competent courts, provincial or federal, at the material time. This part of the author's allegations is therefore declared inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

13.5 It remains for the Committee to examine the author's claim that he is a "victim" within the meaning of the Optional Protocol because he was extradited to California on capital charges pending trial, without the assurances provided for in Article 6 of the Extradition Treaty between Canada and the United States. In this connection, it is to be recalled that (a) California had sought the author's extradition on charges which, if proven, carry the death penalty; (b) the United States requested NG's extradition on those capital charges; (c) the extradition warrant documents the existence of a prima facie case against the author; (d) United States prosecutors involved in the case have stated that they would ask for the death penalty to be imposed; and (e) the State of California, when intervening before the Supreme Court of Canada, did not disavow the prosecutors' position. The Committee considers that these facts

raise questions with regard to the scope of articles 6 and 7, in relation to which, on issues of admissibility alone, the Committee's jurisprudence is not dispositive. As indicated in the case of Kindler v. Canada [13], only an examination on the merits of the claims will enable the Committee to pronounce itself on the scope of these articles and to clarify the applicability of the Covenant and Optional Protocol to cases concerning extradition to face the death penalty.

14.1 Before addressing the merits of the communication, the Committee observes that what is at issue is not whether Mr. Ng's rights have been or are likely to be violated by the United States, which is not a State party to the Optional Protocol, but whether by extraditing Mr. Ng to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant. States parties to the Covenant will also frequently be parties to bilateral treaty obligations, including those under extradition treaties. A State party to the Covenant must ensure that it carries out all its other legal commitments in a manner consistent with the Covenant. The starting point for consideration of this issue must be the State party's obligation, under article 2, paragraph 1, of the Covenant, namely, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most essential of these rights.

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

15.1 With regard to a possible violation by Canada of article 6 of the Covenant by its decision to extradite Mr. Ng, two related questions arise:

(a) Did the requirement under article 6, paragraph 1, to protect the right to life prohibit Canada from exposing a person within its jurisdiction to the real risk (i.e. a necessary and foreseeable consequence) of being sentenced to death and losing his life in circumstances incompatible with article 6 of the Covenant as a consequence of extradition to the United States?

(b) Did the fact that Canada had abolished capital punishment except for certain military offences require Canada to refuse extradition or request assurances from the United States, as it was entitled to do under article 6 of the Extradition Treaty, that the

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[13] See communication 470/1991, Views adopted on 30 July 1993 , paragraph 12.3.

death penalty would not be imposed against Mr. Ng?

15.2 Counsel claims that capital punishment must be viewed as a violation of article 6 of the Covenant "in all but the most horrendous cases of heinous crime; it can no longer be accepted as the standard penalty for murder." Counsel, however, does not substantiate this statement or link it to the specific circumstances of the present case. In reviewing the facts submitted by author's counsel and by the State party, the Committee notes that Mr. Ng was convicted of committing murder under aggravating circumstances; this would appear to bring the case within the scope of article 6, paragraph 2, of the Covenant. In this connection the Committee recalls that it is not a "fourth instance" and that it is not within its competence under the Optional Protocol to review sentences of the courts of States. This limitation of competence applies *a fortiori* where the proceedings take place in a State that is not party to the Optional Protocol.

15.3 The Committee notes that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Canada did not itself charge Mr. Ng with capital offences, but extradited him to the United States, where he faces capital charges and the possible **[**and foreseeable **]** imposition of the death penalty. If Mr. Ng had been exposed, through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, this 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, under circumstances not contrary to the Covenant and other instruments, and that it be carried out pursuant to a final judgment rendered by a competent court. The Committee notes that Mr. Ng was extradited to stand trial on 19 criminal charges, including 12 counts of murder. If sentenced to death, that sentence, based on the information which the Committee has before it, would be based on a conviction of guilt in respect of very serious crimes. He was over eighteen years when the crimes of which he stands accused were committed. Finally, while the author has claimed before the Supreme Court of Canada and before the Committee that his right to a fair trial would not be guaranteed in the judicial process in California, because of racial bias in the jury selection process and in the imposition of the death penalty, these claims have been advanced in respect of purely hypothetical events, and nothing in the file supports the contention that the author's trial in the Calaveras County Court would not meet the requirements of article 14 of the Covenant.

15.4 Moreover, the Committee observes that Mr. Ng was extradited to the United States after extensive proceedings in the Canadian courts, which reviewed all the charges and the evidence available

against the author. In the circumstances, the Committee concludes that Canada's obligations under article 6, paragraph 1, did not require it to refuse Mr. Ng's extradition.

15.5 The Committee notes that Canada has itself, except for certain categories of military offences, abolished capital punishment; it is not, however, a party to the Second Optional Protocol to the Covenant. As to issue (b) in paragraph 15.1 above, namely whether the fact that Canada has generally abolished capital punishment, taken together with its obligations under the Covenant, required it to refuse extradition or to seek the assurances it was entitled to seek under the Extradition Treaty, the Committee observes that abolition of capital punishment does not release Canada of its obligations under extradition treaties. However, it should be expected that, when exercising a permitted discretion under an extradition treaty (namely, whether or not to seek assurances that the death penalty would not be imposed) a State party which itself abandoned capital punishment gives serious consideration to its own chosen policy. The Committee notes, however, that Canada has indicated that the possibility to seek assurances would normally be exercised where special circumstances existed; in the present case, this possibility was considered and rejected.

15.6 While States must be mindful of their obligation to protect the right to life when exercising their discretion in the application of extradition treaties, the Committee does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances. The Committee notes that the extradition of Mr. Ng would have violated Canada's obligations under article 6 of the Covenant, if the decision to extradite without assurances had been taken summarily or arbitrarily. The evidence before the Committee reveals, however, that the Minister of Justice reached his decision after hearing extensive arguments in favour of seeking assurances. The Committee further takes note of the reasons advanced by the Minister of Justice, in his letter dated 26 October 1989 addressed to Mr. Ng's counsel, in particular, the absence of exceptional circumstances, the availability of due process and of appeal against conviction, and the importance of not providing a safe haven for those accused of murder.

15.7 In the light of the above, the Committee concludes that Mr. Ng is not a victim of a violation by Canada of article 6 of the Covenant.

16.1 In determining whether, in a particular case, the imposition of capital punishment constitutes a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent. In the instant case, it is contented that execution by

gas asphyxiation is contrary to internationally accepted standards of humane treatment, and that it amounts to treatment in violation of article 7 of the Covenant. The Committee begins by noting that whereas article 6, paragraph 2, allows for the imposition of the death penalty under certain limited circumstances, any method of execution provided for by law must be designed in such a way as to avoid conflict with article 7.

16.2 The Committee is aware that, by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant; on the other hand, article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes. Nonetheless, the Committee reaffirms, as it did in its General Comment 20[44] on article 7 of the Covenant (CCPR/C/21/Add.3, paragraph 6) 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".

16.3 In the present case, the author has provided detailed information that execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes. The State party had the opportunity to refute these allegations on the facts; it has failed to do so. Rather, the State party has confined itself to arguing that in the absence of a norm of international law which expressly prohibits asphyxiation by cyanide gas, "it would be interfering to an unwarranted degree with the internal laws and practices of the Unites States to refuse to extradite a fugitive to face the possible imposition of the death penalty by cyanide gas asphyxiation".

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

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

17. The Human Rights Committee, acting under article 5, paragraph 4, of the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a

violation by Canada of article 7 of the Covenant.

18. The Human Rights Committee requests the State party to make such representations as might still be possible to avoid the imposition of the death penalty and appeals to the State party to ensure that a similar situation does not arise in the future.

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

APPENDIX

Individual opinions under rule 94, paragraph 3, of the Human Rights Committee's rules of procedure, concerning the Committee's Views on communication No. 469/1991 (Charles Chitat Ng v. Canada)

A. Individual opinion by Mr. Fausto Pocar (partly dissenting, partly concurring and elaborating)

I cannot agree with the finding of the Committee that in the present case, there has been no violation of article 6 of the Covenant. The question whether the fact that Canada had abolished capital punishment except for certain military offences required its authorities to refuse extradition or request assurances from the United States to the effect that the death penalty would not be imposed on Mr. Charles Chitat Ng, must in my view receive an affirmative answer.

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

Regarding the claim under article 7, I agree with the Committee that there has been a violation of the Covenant, but on different grounds. I subscribe to the observation of the Committee that "by

definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant". Consequently, a violation of the provisions of article 6 that may make such treatment, in certain circumstances, permissible, entails necessarily, and irrespective of the way in which the execution may be carried out, a violation of article 7 of the Covenant. It is for these reasons that I conclude in the present case there has been a violation of article 7 of the Covenant.

Fausto Pocar

[English original]

B. Individual opinion by Messrs. A. Mavrommatis and W. Sadi (dissenting)

We do not believe that, on the basis of the material before us, execution by gas asphyxiation could constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant. A method of execution such as death by stoning, which is intended to and actually inflicts prolonged pain and suffering, is contrary to article 7.

Every known method of judicial execution in use today, including execution by lethal injection, has come under criticism for causing prolonged pain or the necessity to have the process repeated. We do not believe that the Committee should look into such details in respect of execution such as whether acute pain of limited duration or less pain of longer duration is preferable and could be a criterion for a finding of violation of the Covenant.

A. Mavrommatis
W. Sadi

[English original]

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

For the reasons I have already given in my separate opinion in the case of J. J. Kindler v. Canada (communication No. 470/1991) with regard to the obligations of Canada under the Covenant, I would conclude that there has been a violation of article 6 of the Covenant. If only for that reason alone, article 7 has also, in my opinion, been violated.

Even at this stage, Canada should use its best efforts to provide a remedy by making appropriate representations, so as to ensure that, if convicted and sentenced to death, the author would not be executed.

Rajsoomer Lallah

[English original]

D. Individual opinion by Mr. Bertil Wennergren (partly dissenting, partly concurring)

I do not share the Committee's Views with respect to a non-violation of article 6 of the Covenant, as expressed in paragraphs 15.6 and 15.7 of the Views. On grounds that I have developed in detail in my individual opinion concerning the Committee's Views on communication No.470/1991 (Joseph John Kindler v. Canada) Canada did, in my view, violate article 6, paragraph 1, of the Covenant by consenting to extradite Mr. Ng to the United States without having secured assurances that he would not, if convicted and sentenced to death, be subjected to the execution of the death sentence.

I do share the Committee's Views, formulated in paragraphs 16.1 to 16.5, that Canada failed to comply with its obligations under the Covenant by extraditing Mr. Ng to the United States where, if sentenced to death, he would be executed by means of a method that amounts to a violation of article 7. In my view, article 2 of the Covenant obliged Canada not merely to seek assurances that Mr. Ng would not be subjected to the execution of a death sentence but also, if it decided nonetheless to extradite Mr. Ng without such assurances, as was the case, to at least secure assurances that he would not be subjected to the execution of the death sentence by cyanide gas asphyxiation.

Article 6, paragraph 2, of the Covenant permits courts in countries which have not abolished the death penalty to impose the death sentence on an individual if that individual has been found guilty of a most serious crime, and to carry out the death sentence by execution. This exception from the rule of article 6, paragraph 1, applies only vis-à-vis the State party in question, not vis-à-vis other States parties to the Covenant. It therefore did not apply to Canada as it concerned an execution to be carried out in the United States.

By definition, every type of deprivation of an individual's life is inhuman. In practice, however, some methods have by common agreement been considered as acceptable methods of execution. Asphyxiation by gas is definitely not to be found among them. There remain, however, divergent opinions on this subject. On 21 April 1992, the Supreme Court of the United States denied an individual a stay of execution by gas asphyxiation in California by a 7:2 vote. One of the dissenting justices, Justice John Paul Stevens, wrote: "The barbaric use of cyanide gas in the Holocaust, the development of cyanide agents as chemical weapons, our contemporary understanding of execution by lethal gas, and the development of less cruel methods of execution all demonstrate that execution by cyanide gas is unnecessarily cruel. In light of all we know about the extreme and unnecessary pain inflicted by execution by cyanide gas", Justice Stevens found that the individual's claim had merit.

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

Bertil Wennergren

[English original]

E. Individual opinion by Mr. Kurt Herndl (dissenting)

1. While I do agree with the Committee's finding that there is no violation of article 6 of the Covenant in the present case, I do not share the majority's findings as to a possible violation of article 7. In fact, I completely disagree with the conclusion that Canada which - as the Committee's majority argue in paragraph 16.4 of the Views - "could reasonably foresee that Mr. Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7", has thus "failed to comply with its obligations under the Covenant by extraditing Mr. Ng without having sought and received guarantees that he would not be executed".

2. The following are the reasons for my dissent:

I. Mr. Ng cannot be regarded as victim in the sense of article 1 of the Optional Protocol .

3. The issue of whether Mr. Ng can or cannot be regarded as a victim was left open in the decision on admissibility (decision of 28 October 1992). There the Committee observed that pursuant to article 1 of the Optional Protocol it may only receive and consider communications from individuals subject to the jurisdiction of a State party to the Covenant and to the Optional Protocol "who claim to be victims of a violation by that State party of any of their rights set forth in the Covenant". In the present case, the Committee concluded that only the consideration on the merits of the circumstances under which the extradition procedure, and all its effects, occurred, would enable it to determine whether the author was a victim within the meaning of article 1 of the Optional Protocol. Accordingly the Committee decided to join the question of whether the author is a victim to the consideration of the merits. So far so good.

4. In its Views, however, the Committee does no longer address the issue of whether Mr. Ng is a victim. In this connection the following reasoning has to be made.

5. As to the concept of victim, the Committee has in recent decisions recalled its established jurisprudence, based on the admissibility decision in the case of E.W. *et al.* v. the Netherlands (case No. 429/1990) where the Committee declared the relevant communication inadmissible under the Optional Protocol. In the case mentioned the Committee held that "for a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or

that such an effect is imminent".

6. In the Kindler case (No. 470/1991) the Committee has, in its admissibility decision (decision of 31 July 1992), somewhat expanded on the notion of victim by stating that while a State party clearly is not required to guarantee the rights of persons within another jurisdiction, if such a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that this person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. To illustrate this the Committee referred to the "handing over of a person to another State ... where treatment contrary to the Covenant is certain or is the very purpose of the handing over " (paragraph 6.4). In the subsequent decision on the merits of the Kindler case (decision of 30 July 1993) the Committee introduced the concept of "real risk". The Committee stated that "if a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party may be in violation of the Covenant" (paragraph 13.2).

7. The case of Mr. Ng apparently meets none of these tests: neither can it be argued that torture or cruel, inhuman or degrading treatment or punishment (in the sense of article 7 of the Covenant) in the receiving state is the necessary and foreseeable consequence of Mr. Ng's extradition, nor can it be maintained that there would be a real risk of such a treatment.

8. Mr. Ng is charged in California with 19 criminal counts, including kidnapping and 12 murders, committed in 1984 and 1985. However, he has so far not been tried, convicted or sentenced. If he were convicted, he would still have various opportunities to appeal his conviction and sentence through state and federal appeals instances, up to the Supreme Court of the United States. Furthermore, given the nature of the crimes allegedly committed by Mr. Ng it is completely open at this stage whether or not the death penalty will be imposed, as a plea of insanity could be entered and might be successful.

9. In their joint individual opinion on the admissibility of a similar case (not yet made public) several members of the Committee, including myself, have again emphasized that the violation that would affect the author personally in another jurisdiction must be a necessary and foreseeable consequence of the action of the defendant State. As the author in that case had not been tried and, a fortiori, had not been found guilty or recommended to the death penalty, the dissenting members of the Committee were of the view that the test had not been met.

10. In view of what is explained in the preceding paragraphs the same consideration would hold true for the case of Mr. Ng who thus cannot be regarded as victim in the sense of article 1 of the Optional Protocol .

II. There are no secured elements to determine that execution by gas asphyxiation would in itself constitute a violation of article 7 of the Covenant .

11. The Committee's majority is of the view that judicial execution by gas asphyxiation, should the death penalty be imposed on Mr. Ng, would not meet the test of the "least possible physical and mental suffering", and thus would constitute cruel and inhuman treatment in violation of article 7 of the Covenant (paragraph 16.4). The Committee's majority thus attempts to make a distinction between various methods of execution.

12. The reasons for the assumption that the specific method of execution currently applied in California would not meet the above mentioned test of the "least possible physical and mental suffering" - this being the only reason given to substantiate the finding of a violation of article 7 - is that "execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes" (paragraph 16.3).

13. No scientific or other evidence is quoted in support of this dictum. Rather, the onus of proof is placed on the defendant State which, in the majority's view, had the opportunity to refute the allegations of the author on the facts, but failed to do so. This view is simply incorrect.

14. As the fact sheets of the case show, the remarks by the Government of Canada on the sub-issue "Death Penalty as a Violation of Article 7" total two and a half pages. In those remarks the Government of Canada states i.a. the following:

> "While it may be that some methods of execution would clearly violate the Covenant, it is far from clear from a review of the wording of the Covenant and the comments and jurisprudence of the Committee, what point on the spectrum separates those methods of judicial execution which violate article 7 and those which do not".

15. This argument is in line with the view of Prof. Cherif Bassiouni who, in his analysis of what treatment could constitute "cruel and unusual punishment", comes to the following conclusion:

> "The wide divergence in pennological theories and standards of treatment of offenders between countries is such that no uniform standard exists ... the prohibition against cruel and unusual punishment can be said to constitute a general principle of international law because it is so regarded by the legal system of civilized nations, but that alone does not give it a sufficiently defined content bearing on identifiable applications capable of more than general recognition" (Cherif Bassiouni, International Extradition and World Public Order: Leyden-Dobbs Ferry, 1974, p. 465).

16. In its submission the Government of Canada furthermore stressed that "none of the methods currently in use in the United States is of such a nature as to constitute a violation of the Covenant or any other norm of international law. In particular, there is no indication that cyanide gas asphyxiation, which is the method of judicial execution in the State of California, is contrary to the Covenant or international law". Finally, the Government of Canada stated that it had examined "the method of execution for its possible effect on Ng on facts specified to him" and that it came to the conclusion that "there are no facts with respect to Ng which take him out of the general application outlined". In this context the Government made explicit reference to the "Safeguards Guaranteeing Protection of Those Facing the Death Penalty" adopted by the Economic and Social Council in resolution 1984/50 and endorsed by the General Assembly in resolution 39/118. The Government of Canada has thus clearly taken into account a number of important elements in its assessment of whether the method of execution in California might constitute inhuman or degrading treatment.

17. It is also evident from the foregoing that the defendant State has examined the whole issue in depth and did not deal with it in the cursory manner suggested in paragraph 16.3 of the Committee's Views. The author and his counsel were perfectly aware of this. Already in his letter of 26 October 1989 addressed to the author's counsel the Minister of Justice of Canada stated as follows:

> "You have argued that the method employed to carry out capital punishment in California is cruel and inhuman, in itself. I have given consideration to this issue. The method used by California has been in place for a number of years and has found acceptance in the courts of the United States".

18. Apart from the above considerations which in my view demonstrate that there is no agreed or scientifically proven standard to determine that judicial execution by gas asphyxiation is more cruel and inhuman than other methods of judicial execution, the plea of the author's counsel contained in his submission to the

Supreme Court of Canada (prior to Ng's extradition) which was made available to the Committee, in favour of "lethal injection" (as opposed to "lethal gas") speaks for itself.

19. The Committee observes in the present Views (paragraph 15.3) - and it has also held in the Kindler case (paragraph 6.4) - that the imposition of the death penalty (although, if I may add my personal view on this matter, capital punishment is in itself regrettable under any point of view and is obviously not in line with fundamental moral and ethic principles prevailing throughout Europe and other parts of the world) is still legally permissible under the Covenant. Logically, therefore, there must be methods of execution that are compatible with the Covenant. Although any judicial execution must be carried out in such a way as to cause the least possible physical and mental suffering (see the Committee's General Comment 20(44) on article 7 of the Covenant), physical and mental suffering will inevitably be one of the consequences of the imposition of the death penalty and its execution. To attempt to establish categories of methods of judicial executions, as long as such methods are not manifestly arbitrary and grossly contrary to the moral values of a democratic society, and as long as such methods are based on a uniformly applicable legislation adopted by democratic processes, is futile, as it is futile to attempt to quantify the pain and suffering of any human being subjected to capital punishment. In this connection I should also like to refer to the considerations advanced in paragraph 9 of the joint individual opinion submitted by Mr. Waleed Sadi and myself in the Kindler case (decision of 30 July 1993, Appendix).

20. It is therefore only logical that I also agree with the individual opinion expressed by a number of members of the Committee and attached to the present Views. Those members conclude that the Committee should not go into details in respect of executions as to whether acute pain of limited duration or less pain of longer duration is preferable and could be a criterion for the finding of a violation.

21. The Committee's finding that the specific method of judicial execution applied in California is tantamount to cruel and inhuman treatment and that accordingly Canada violated article 7 of the Covenant by extraditing Mr. Ng to the United States, is therefore in my view without a proper basis.

III. In the present case the defendant State, Canada, has done its level best to respect its obligations under the Covenant.

22. A final word ought to be said as far as Canada's obligations under the Covenant are concerned.

23. While recent developments in the jurisprudence of international organs entrusted with the responsibility of ensuring that individuals' human rights are fully respected by state authorities, suggest an expansion of their monitoring role (see e.g. the judgment of the European Court of Human Rights in the Soering case, paragraph

85; see in this context also the remarks on the expanded notion of "victim", paragraph 6 supra), the issue of the extent to which in the area of extradition a State party to an international human rights treaty must take into account the situation in a receiving state, still remains an open question. I should, therefore, like to repeat what I stated together with Mr. Waleed Sadi in the joint individual opinion in the Kindler case (decision of 30 July 1993, Appendix). The same considerations are applicable in the present case.

24. We observed in paragraph 5 of the joint individual opinion that as the allegations of the author concerned hypothetical violations of his rights in the United States (after the legality of the extradition had been tested in Canadian Courts, including the Supreme Court of Canada), and unreasonable responsibility was being placed on Canada by requiring it to defend, explain or justify before the Committee the United States system of administration of justice. I continue to believe that such is indeed unreasonable. Both at the level of the judiciary as well as at the level of administrative proceedings, Canada has given all aspects of Mr. Ng's case the consideration they deserve in the light of its obligations under the Covenant. It has done what can reasonably and in good faith be expected from a State party.

Kurt Herndl

[English original]

F. Individual opinion by Mr. Nisuke Ando (dissenting)

I am unable to concur with the views of the Committee that "execution by gas asphyxiation ... would not meet the test of 'least possible physical and mental suffering' and constitutes cruel and inhuman [punishment] in violation of article 7 of the Covenant" (paragraph 16.4). In the view of the Committee "the author has provided detailed information that execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over ten minutes" (paragraph 16.3). Thus, the swiftness of death seems to be the very criterion by which the Committee has concluded that execution by gas asphyxiation violates article 7.

In many of the States parties to the Covenant where death penalty has not been abolished, other methods of execution such as hanging, shooting, electrocution or injection of certain materials are used. Some of them may take longer time and others shorter than gas asphyxiation, but I wonder if, irrespective of the kind and degree of suffering inflicted on the executed, all those methods that may take over ten minutes are in violation of article 7 and all others that take less are in conformity with it. In other words I consider that the criteria of permissible suffering under article 7 should not solely depend on the swiftness of death.

The phrase "least possible physical and mental suffering" comes from the Committee's General Comment 20 on article 7, which states that the death penalty must be carried out in such a way as to cause the least possible physical and mental suffering. This statement, in fact, implies that there is no method of execution which does not cause any physical or mental suffering and that every method of execution is bound to cause some suffering.

However, I must admit that it is impossible for me to specify which kind of suffering is permitted under article 7 and what degree of suffering is not permitted under the same article. I am totally incapable of indicating any absolute criterion as to the scope of suffering permissible under article 7. What I can say is that article 7 prohibits any method of execution which is intended for prolonging suffering of the executed or causing unnecessary pain to him or her. As I do not believe that gas asphyxiation is so intended, I cannot concur with the Committee's view that execution by gas asphyxiation violates article 7 of the Covenant.

Nisuke Ando

[English original]

G. Individual opinion by Mr. Francisco José AGUILAR URBINA (dissenting)

I. Extradition and the protection afforded by the Covenant

1. In analysing the relationship between the Covenant and extradition, I cannot agree with the Committee that "extradition as such is outside the scope of application of the Covenant" [1]. I consider that it is remiss - and even dangerous, as far as the full enjoyment of the rights set forth in the Covenant is concerned - to make such a statement. In order to do so, the Committee relies on the pronouncement in the Kindler case to the effect that since "it is clear from the travaux préparatoires that it was not intended that article 13 of the Covenant, which provides specific rights relating to the expulsion of aliens lawfully in the territory of a State party, should detract from normal extradition arrangements", [2] extradition would remain outside the scope of the Covenant. In the first place, we have to note that extradition, even though in the broad sense it would amount to expulsion, in a narrow sense would be included within the procedures regulated by article 14 of the Covenant. Although the procedures for ordering the extradition of a person to the requesting State vary from country to country, they can roughly be grouped into three general categories: (1) a purely judicial procedure, (2) an exclusively administrative procedure, or (3) a mixed procedure involving action by the authorities of two branches of the State, the judiciary and the executive. This last procedure is the one followed in Canada. The important point, however, is that the authorities dealing with the extradition proceedings constitute, for this specific case at least, a "tribunal" that applies a procedure which must conform to the provisions of article 14 of the Covenant.

2.1. The fact that the drafters of the International Covenant on Civil and Political Rights did not include extradition in article 13 is quite logical, but on that account alone it cannot be affirmed that their intention was to leave extradition proceedings outside the protection afforded by the Covenant. The fact is, rather, that extradition does not fit in with the legal situation defined in article 13. The essential difference lies, in my opinion, in the fact that this rule refers exclusively to the expulsion of "an alien lawfully in the territory of a State party". [3]

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[1] Views, para. 6.1.

[2] Views on communication No. 470/1991, Joseph John Kindler v. Canada, para. 6.6 (emphasis added).

[3] International Covenant on Civil and Political Rights, art. 13.

2.2. Extradition is a kind of "expulsion" that goes beyond what is contemplated in the rule. Firstly, extradition is a specific procedure, whereas the rule laid down in article 13 is of a general nature; however article 13 merely stipulates that expulsion must give rise to a decision in accordance with law, and even - in cases where there are compelling reasons of national security - it is permissible for the alien not to be heard by the competent authority or to have his case reviewed. Secondly, whereas expulsion constitutes a unilateral decision by a State, grounded on reasons that lie exclusively within the competence of that State - provided that they do not violate the State's international obligations, such as those under the Covenant - extradition constitutes an act based upon a request by another State. Thirdly, the rule in article 13 relates exclusively to aliens who are in the territory of a State party to the Covenant, whereas extradition may relate both to aliens and to nationals; indeed, on the basis of its discussions the Committee has considered the practice of expelling nationals (for example, exile) in general (other than under extradition proceedings) to be contrary to article 12. [4] Fourthly, the rule in article 13 relates to persons who are lawfully in the territory of a country; in the case of extradition, the individuals against whom the proceedings are initiated are not necessarily lawfully within the jurisdiction of a country; on the contrary - and especially if it is borne in mind that article 13 leaves the question of the lawfulness of the alien's presence to national law - in a great many instances persons who are subject to extradition proceedings have entered the territory of the requested State illegally, as in the case of the author of the communication.

3. Although extradition cannot be considered to be a kind of expulsion within the meaning of article 13 of the Covenant, this does not imply that it is excluded from the scope of the Covenant. Extradition must be strictly adapted in all cases to the rules laid down in the Covenant. Thus the extradition proceedings must follow the rules of due process as required by article 14 and, furthermore, their consequences must not entail a violation of any other provision. Therefore, a State cannot allege that extradition is not covered by the Covenant in order to evade the responsibility that would devolve upon it for the possible absence of protection of the possible victim in a foreign jurisdiction.

II. The extradition of the author to the United States of America

[4] In this connection, see the summary records of th e Committee's recent discussions regarding Zaire and Burundi, in relation to the expulsion of nationals, and Venezuela in relation to th e continuing existence, in criminal law, of exile as a penalty2.

4. In this particular case, Canada extradited the author of the communication to the United States of America, where he was to stand trial on 19 criminal counts, including 12 murders. It will have to be seen - as the Committee stated in its decision on the admissibility of the communication - whether Canada, in granting Mr. Ng's extradition, exposed him, necessarily and foreseeably, to a violation of the Covenant.

5. The same State party argued that "the author cannot be considered a victim within the meaning of the Optional Protocol, since his allegations are derived from assumptions about possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States". [5] Although it is impossible to predict a future event, it must be understood that whether or not a person is a victim depends on whether that event is foreseeable - or, in other words, on whether, according to common sense, it may happen, in the absence of exceptional events that prevent it from occurring - or necessary - in other words, it will inevitably occur, unless exceptional events prevent it from happening. The Committee itself, in concluding that Canada had violated article 7, [6] found that the author of the communication would necessarily and foreseeably be executed. For that reason, I shall not discuss the issue of foreseeability and necessity except to say that I agree with the views of the majority.

6. Now, with regard to the exceptional circumstances mentioned by the State party, [7] the most important aspect is that, according to the assertions of the State party itself, they refer to the application of the death penalty. In my opinion, the vital point is the link between the application of the death penalty and the protection given to the lives of persons within the jurisdiction of the Canadian State. For those persons, the death penalty constitutes in itself a special circumstance. For that reason - and in so far as the death penalty can be considered as being necessarily and foreseeably applicable - Canada had a duty to seek assurances that Charles Chitat Ng would not be executed.

7. The problem that arises with the extradition of the author of the communication to the United States without any assurances having been requested is that he was deprived of the enjoyment of his rights under the Covenant. Article 6, paragraph 2, of the Covenant, although it does not prohibit the death penalty, cannot be understood as an unrestricted authorization for it. In the first

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[5] Views, para. 4.2 (emphasis added).

[6] Views, para. 17.

[7] Views, para. 4.4.

place, it has to be viewed in the light of paragraph 1, which declares that every human being has the inherent right to life. It is an unconditional right admitting of no exception. In the second place, it constitutes - for those States which have not abolished the death penalty - a limitation on its application, in so far as it may be imposed only for the most serious crimes. For those States which have abolished the death penalty it represents an insurmountable barrier. The spirit of this article is to eliminate the death penalty as a punishment, and the limitations which it imposes are of an absolute nature.

8. In this connection, when Mr. Ng entered Canadian territory he already enjoyed an unrestricted right to life. By extraditing him without having requested assurances that he would not be executed, Canada denied him the protection which he enjoyed and exposed him necessarily and foreseeably to being executed in the opinion of the majority of the Committee, which I share in this regard. Canada has therefore violated article 6 of the Covenant.

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

10. I have to insist that Canada has misinterpreted article 6, paragraph 2, and that, when it abolished the death penalty, it became impossible for it to apply that penalty directly in its territory, except for the military offences for which it is still in force, or indirectly through the handing over to another State of a person who runs the risk of being executed or who will be executed.

Since it abolished the death penalty, Canada has to guarantee the right to life of all persons within its jurisdiction, without any limitation.

11. With regard to the possible violation of article 7 of the Covenant, I do not concur with the Committee's finding that "In the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of least possible physical and mental suffering' and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant". [8] I cannot agree with the view that the execution of the death penalty constitutes cruel and inhuman treatment only in these circumstances. On the contrary, I consider that the death penalty as such constitutes treatment that is cruel, inhuman and degrading and hence contrary to article 7 of the International Covenant on Civil and Political Rights. Nevertheless, in the present case, it is my view that the consideration of the application of the death penalty is subsumed by the violation of article 6 and I do not find that article 7 of the Covenant has been specifically violated.

12. One final aspect to be dealt with is the way in which Mr. Ng was extradited. No notice was taken of the request made by the Special Rapporteur on New Communications, under rule 86 of the rules of procedure of the Human Rights Committee, that the author should not be extradited while the case was under consideration by the Committee. [9] On ratifying the Optional Protocol, Canada undertook, with the other States parties, to comply with the procedures followed in connection therewith. In extraditing Mr. Ng without taking into account the Special Rapporteur's request, Canada failed to display the good faith which ought to prevail among the parties to the Protocol and the Covenant.

13. Moreover, this fact gives rise to the possibility that there may also have been a violation of article 26 of the Covenant. Canada has given no explanation as to why the extradition was carried out so rapidly once it was known that the author had submitted a communication to the Committee. By its action in failing to observe its obligations to the international community, the State party has prevented the enjoyment of the rights which the author ought to have had as a person under Canadian jurisdiction in relation to the Optional Protocol. In so far as the Optional Protocol forms part of the Canadian legal order, all persons under Canadian jurisdiction enjoy the right to submit communications to the Human Rights Committee so that it may hear their complaints.

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[8] Views, para. 16.4.

[9] Rules of procedure of the Human Rights Committee, rule 86.

Since it appears that Mr. Charles Chitat Ng was extradited on account of his nationality [10] and in so far as he has been denied the possibility of enjoying its protection in accordance with the Optional Protocol, I find that the State party has also violated article 26 of the Covenant.

[10] The various passages in the Reply which refer to the relations between Canada and the United States, the 4,800 kilometres of unguarded frontier between the two countries and the growing number of extradition applications by the United States to Canada should be taken into account. The State party has indicated that United States fugitives cannot be permitted to take the non-extradition of the author in the absence of assurances as an incentive to flee to Canada. In this connection, the arguments of the State party were identical to those put forward in relation to communication No. 470/1991.

14. In conclusion, I find Canada to be in violation of article 5, paragraph 2, and articles 6 and 26 of the International Covenant on Civil and Political Rights.

San Rafael de Escazú, Costa Rica
1 December 1993

[Spanish original]

H. Individual opinion of Ms. Christine Chanet (dissenting)

As regards the application of article 6 in the present case, I can only repeat the terms of my separate opinion expressed in the Kindler case (No. 470/1991).

Consequently, I am unable to accept the statement, in paragraph 16.2 of the decision, that "article 6, paragraph 2, permits the imposition of capital punishment". In my view, the text of the Covenant "does not authorize" the imposition, or restoration, of capital punishment in those countries which have abolished it; it simply sets conditions with which the State must necessarily comply when capital punishment exists.

Drawing inferences from a de facto situation cannot in law be assimilated to an authorization.

As regards article 7, I share the Committee's conclusion that this provision has been violated in the present case.

However, I consider that the Committee engages in questionable discussion when, in paragraph 16.3, it assesses the suffering caused by cyanide gas and takes into consideration the duration of the agony, which it deems unacceptable when it lasts for over 10 minutes.

Should it be concluded, conversely, that the Committee would find no violation of article 7 if the agony lasted nine minutes?

By engaging in this debate, the Committee finds itself obliged to take positions that are scarcely compatible with its role as a body monitoring an international human rights instrument.

A strict interpretation of article 6 along the lines I have set out previously which would exclude any "authorization" to maintain or restore the death penalty, would enable the Committee to avoid this intractable debate on the ways in which the death penalty is carried out in the States parties.

Christine Chanet

[French original]
