The Absent Dialogue: Extradition and the *International Covenant on Civil and Political Rights*

By Joanna Harrington[*]

Extradition, as a cross-border act, inevitably involves both domestic and international law. For most states, the terms and conditions of extradition are governed by both treaty and statute, with the obligation to extradite flowing from an extradition treaty. Human rights treaties, however, are also relevant to extradition — most notably, the International Covenant on Civil and Political Rights (ICCPR), *which aims at securing a set of universal safeguards for the protection of all.*

For 30 years, the UN Human Rights Committee has adjudicated cases involving extradition under the ICCPR, *creating a body of jurisprudence that clearly identifies a human rights element to extradition. The author reviews this corpus of persuasive but non-binding decisions. Her analysis confirms that the human rights treaty imposes a limited but clear obligation on extraditing states; they must protect a fugitive from future serious ill treatment in the receiving state.*

The author is critical of the failure of the Supreme Court of Canada and the House of Commons to acknowledge this international extradition jurisprudence in domestic extradition proceedings. She questions why, when faced with a subject so inherently international, the domestic courts fail to acknowledge the decisions of the UN Human Rights Committee, particularly those involving Canada. For the author, this absence of dialogue is inconsistent with Canada's decision to grant individuals the right of international petition. The author seeks to improve the accessibility of international extradition jurisprudence and to increase awareness of its relevance, with the ultimate aim of prompting a true engagement by Canadian courts with a widely ignored body of case law.

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Introduction

Extradition is a form of inter-state cooperation used to secure the return of fugitive offenders to the states that have the greatest interest in the prosecution or punishment of their crimes. While the terms and conditions for extradition from a state are governed primarily by that state's domestic law, as an act of cross-border surrender, extradition has an inevitable international dimension. It also has an inevitable international *law* dimension, since the decision to extradite often flows from a legal obligation to do so based on a treaty commitment entered into by the extraditing and receiving states. This treaty-based obligation to extradite typically works in tandem with a state's statutory extradition law, making the true law of extradition an amalgam of international and domestic law.

But alongside this network of extradition treaties and special arrangements entered into by states to secure future guarantees of reciprocity, there also exists a network of international human rights treaties that prescribe a universal set of safeguards for the protection of all persons, regardless of citizenship or status. The human rights treaty of general application most relevant to extradition is the *International Covenant on Civil and Political Rights*.[1] In force since 1976, the *ICCPR*

1. 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*]. For the leading commentary, see Sarah Joseph, Jenny Schultz & Melissa Castan, *The International*

has a long association with extradition. Many of the cases brought for adjudication before the UN Human Rights Committee over the past thirty years have involved challenges to extradition on human rights grounds. These challenges have resulted in a body of jurisprudence, albeit non-binding in nature, clearly identifying a human rights dimension to extradition, with the *ICCPR* imposing a clear, but limited, obligation on a sending state to abstain from extraditing when there is a real and substantial risk of a future violation of the fugitive's right to life and right to be free from serious forms of ill-treatment. Coexisting with this obligation is a duty of inquiry, imposed on the domestic authorities of a state involved with extradition, to ensure that the most basic rights of a fugitive will be respected, after surrender, in the state receiving the fugitive.[2]

Covenant on Civil and Political Rights: Cases, Materials and Commentary, 2d ed. (Oxford: Oxford University Press, 2004). See also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: N.P. Engel, 1993); Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon, 1994); P.R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Brookfield, Vt.: Ashgate, 1998). See also Mark Freeman & Gibran van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) at 69-84.

2. The existence of this duty is supported by the international jurisprudence discussed herein and by the landmark judgment of the European Court of Human Rights in *Soering v. United Kingdom* (1989), 161 E.C.H.R. (Ser. A), esp. paras. 86-91, reprinted in (1989) 11 E.H.R.R. 439, (1989) 28 I.L.M. 1063, (1994) 98 I.L.R. 270 [*Soering*]. Domestically, several jurisdictions (most notably the United States) have traditionally adopted a "rule of non-inquiry" to preclude judicial consideration of the standards and fairness of another state's criminal justice system. See further, Jacques Semmelman, "Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings" (1991) 76 Cornell L. Rev. 1198. However, there remains some debate as to the current status of this rule: see John Quigley, "The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law" (1990) 15 N.C. J. Int'l L. & Com. Reg. 401 and, more recently, Williams M. Cohen, "Implementing the UN Torture Convention in U.S. Extradition Cases" (1998) 26 Denv. J. Int'l L. & Pol'y 517. Semmelman, however, remains unconvinced as explained in his comment on *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000) in (2001) 95 Am. J. Int'l L. 435. By contrast, European domestic courts have embraced a duty of inquiry under their respective domestic laws, as has the South African Constitutional Court. See *e.g. Venezia v. Ministero di Grazia e Giustizia*, No. 223 of 1996, 79 *Rivista di Diritto Internazionale* 815 (Const. Ct.) (Italy), discussed by Andrea Bianchi at (1997) 91 Am. J. Int'l L. 727; *Finucane v. McMahon*, [1990] I.R. 165

Oddly enough, almost all the leading international cases brought before the Human Rights Committee under the *ICCPR* with respect to extradition (and to some extent, deportation) have been brought against Canada. Despite this fact, no reference can be found in Canada's extradition jurisprudence to this international case law. That absence is all the more notable given the Government of Canada's vigorous defence of these challenges at the international level, as well as the clear emergence in Canadian law of a similar role for human rights in decisions to extradite.[3] Former Supreme Court Justice Gérard La Forest, writing extra-judicially, offers an assurance that:

> [W]e do not confine ourselves to polite references to the international agreements themselves, but examine with care the interpretations given to them *by international institutions* and domestic courts of many countries, as well as in the writings of learned authors.[4]

And yet, despite the litany of international sources cited by the Supreme Court of Canada in the leading extradition decision of *United States v. Burns*,[5] no mention is made of Canada's obligations under the *ICCPR*,[6] or of its associated extradition jurisprudence. Apart from a brief case summary, a similar silence with respect to the *ICCPR* and its role is found in the Canadian texts on extradition law,[7] and in the

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(S.C.) (Ireland); *Short v. Netherlands*, (1990) 76 Rechtspraak van der Week 358 (*Hoge Rand*) (The Netherlands), reprinted in (1991) 29 I.L.M. 1388 and *Mohamed v. President of Republic of South Africa*, [2001] 3 S. Afr. L.R. 893 (Const. Ct.), reprinted in (2006) 127 I.L.R. 468.

3. See further, Joanna Harrington, "The Role for Human Rights Obligations in Canadian Extradition Law" (2005) 43 Can. Y.B. Int'l L. 45 [Harrington, "Role for Human Rights"]. See also Paul Michell, "Domestic Rights and International Responsibilities: Extradition under the Canadian Charter" (1998) 23 Yale J. Int'l L. 141.

4. Gérard V. La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 Can. Y.B. Int'l L. 89 at 98 [emphasis added].

5. 2001 SCC 7, [2001] 1 S.C.R. 283, reprinted for an international audience in (2001) 40 I.L.M. 1034 and (2003) 124 I.L.R. 298 [*Burns*].

6. A passing reference is made to the *ICCPR*'s prohibition on the execution of juveniles.

7. See Gary Botting, *Canadian Extradition Law Practice* (Markham, ON: LexisNexis Butterworths, 2005) (containing a brief mention of the UN Human Rights Committee's views in *Judge v. Canada* at page 153, but no mention of the *ICCPR* in the section of the book devoted to identifying multilateral treaties relevant to extradition). See also Elaine

general guidance on extradition provided to federal prosecutors by the Canadian Department of Justice.[8] The House of Commons debates make no mention of Canada's involvement in the international proceedings in these extradition cases,[9] nor is it easy to find an official record of the Government of Canada's public response, if any, to the Human Rights Committee's findings in cases where Canada is found in violation of its international obligations.[10]

Thus the aim of this article is to provide a primer on the extradition jurisprudence decided at the international level under the *ICCPR* over the past thirty years, with a view to making this jurisprudence more accessible to policymakers, lawyers and judges. It is hoped that greater awareness of the relevance of the provisions of the *ICCPR*, and their interpretation by the UN Human Rights Committee, will lead to better

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F. Krivel, Thomas Beveridge & John W. Hayward, *A Practical Guide to Canadian Extradition* (Toronto: Carswell, 2002) (containing no mention in the table of contents or index of the *ICCPR*) and Anne Warner La Forest, *La Forest's Extradition to and from Canada*, 3d ed. (Aurora, ON: Canada Law Book, 1991) (although it is only fair to note that this last work predates the key extradition cases at both the domestic and international level).

8. Federal Prosecution Service, Department of Justice Canada, *The Federal Prosecution Service Deskbook* (Ottawa: Minister of Justice Canada, 2000) updated October 2005, online: The Federal Prosecution Service Deskbook <http://www.justice.gc.ca/en/dept/pub/fps/fpd/index.html> [*Deskbook*]. Part VIII of the *Deskbook* provides guidance on forms of "International Assistance" with a focus on extradition.

9. Mention has been made, however, in Canada's unelected Senate to two of the leading international extradition decisions under the *ICCPR*, one finding Canada in violation and the other finding Canada in compliance: *Debates of the Senate (Hansard)*, Vol. 137, No. 131 (22 April 1999) at 3129-32 (Hon. Serge Joyal), *Debates of the Senate*, Vol. 137, No. 135 (4 May 1999) at 3235-36 (Hon. A. Raynell Andreychuk) and *Debates of the Senate*, Vol. 137, No. 135 (4 May 1999) at 3242 (Hon. B. Alasdair Graham) [Graham, *Debates of the Senate*]. The last speaker held the office of "Leader of the Government" and from his statement, it would appear that the government's position was that the violation had remedied itself as a result of changes to the method of execution in California.

10. The decisions of the international treaty bodies concerning complaints against Canada are posted on the website of the Department of Canadian Heritage, but with no indication as to Canada's response: see Canadian Heritage Human Rights Program, online: <http://www.canadianheritage.gc.ca/progs/pdp-hrp/inter/decisions_e.cfm>. From the perspective of the man or woman on the street, the Departments of Justice or Foreign Affairs are the more obvious host for such information, given that these decisions concern Canada's legal obligations under an international treaty.

coherence between the obligations of extradition treaties and human rights treaties, with the latter serving a quasi-constitutional role within the international legal system akin to that served by a domestic bill of rights in the domestic legal order.[11] It is also hoped that this review will prompt a true engagement by Canadian domestic authorities with international extradition case law. Although it is only of persuasive force, this body of jurisprudence is, after all, the end result of an international process to which Canada has given its solemn consent by treaty. Moreover, such engagement could in turn assist the international tribunal with criticism by the domestic authorities, possibly prompting improvement in its work. This article begins with an outline of the legal regime established by the *ICCPR*, followed by a detailed review and analysis of the extradition challenges brought before the Human Rights Committee over the past 30 years. It ends with an attempt to reconcile a state's *ICCPR* and extradition obligations through an analysis of the key principles that have emerged from this jurisprudence in respect of the most common challenges to extradition.

I. The International Legal Regime Established by the *ICCPR*

The *ICCPR* was adopted by states in 1966 with the intention of codifying into international law the civil and political rights enshrined in the *Universal Declaration of Human Rights* adopted by the UN General Assembly in 1948.[12] Being an express agreement between states

11. The *ICCPR* is often described as being part of the "International Bill of Rights." See *e.g.* Louis Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981).

12. GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71. *The Universal Declaration of Human Rights* is "not a legal instrument," although "some of its provisions either constitute general principles of law or represent elementary considerations of humanity." Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) at 534-35. Sadly, many lawyers and jurists continue to cite the *Declaration* without mentioning the treaty that was drafted with the express intention of transforming the *Declaration*'s norms into treaty law. The treaty, but not the *Declaration*, offers the benefit of clarity with respect to the binding nature of its

designed to create binding obligations on the international legal plane, the *ICCPR* is clearly a treaty,[13] one that has garnered either ratification or accession[14] from 159 states, including Canada.[15] In light of this extensive ratification record, the rights protected by the *ICCPR* can rightly be said to "represent the basic minimum set of civil and political rights recognized by the world community."[16] They include the rights to life (Article 6),[17] liberty and security of person (Article 9), as well as the rights to humane treatment (Articles 7 and 10), equality (Article 26) and a fair trial (Article 14).

By ratifying the *ICCPR*, a state undertakes an obligation under international law "to respect and to ensure to all individuals within its territory and subject to its jurisdiction"[18] the rights guaranteed by the *ICCPR* and "to adopt such laws or other measures as may be necessary to give effect to the[se] rights."[19] The choice of means for meeting this obligation is a domestic matter for the state concerned; however, ratification also indicates a state's consent to the international monitoring mechanisms created by the *ICCPR* that provide for the supervision of the treaty's implementation. The supervisory body established by the states party to the *ICCPR* for this purpose is the Human Rights Committee, a body distinct from (but often confused with) the far more political (and now abolished) UN Commission on

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obligations under international law. A state's consent to these obligations is found in the act of treaty ratification.

13. Whether called "Convention," "Charter," "Covenant," "Pact" or "Statute," all such agreements between states are treaties if they reflect the will of the parties to be bound by their terms under international law. See further, Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000) at 19-24, 333.

14. Accession has the same legal effect as ratification, but is the term used when a state becomes bound to a treaty already negotiated and signed by other states. *Ibid.* at 81, 88.

15. Canada's treaty ratification record can now be verified online using the Government of Canada's Treaty Information website, online: Canada Treaty Information <http://www.treaty-accord.gc.ca/Main.asp>.

16. McGoldrick, *supra* note 1 at para. 1.34.

17. The qualified nature of this right, and its dispensation for states retaining the death penalty, is discussed below in Part III.

18. *ICCPR*, *supra* note 1, art. 2(1).

19. *Ibid.*, art. 2(2).

Human Rights established under the authority of the *UN Charter* in 1946.[20]

The Human Rights Committee is a treaty-based body whose composition, status and functions are dictated by the terms of the *ICCPR*.[21] According to that treaty, the Committee is an independent body of eighteen experts chosen from various legal systems and geographical regions[22] that meets three times a year to consider reports on the implementation measures taken by states.[23] It may also consider complaints (known in *ICCPR* parlance as "communications") from individuals (known as "authors") who claim to be victims of *ICCPR* violations.[24] However, the Committee's ability to consider such complaints is dependent on ratification by the state concerned of the (first) *Optional Protocol to the International Covenant on Civil and Political Rights*.[25] To date, 107 of the 159 states party to the *ICCPR* have ratified or acceded to the *ICCPR-OP1*, including Canada since May 19, 1976, thus ensuring that the Human Rights Committee is not bereft of individual complaints for its consideration.[26] A *Second Optional Protocol*

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20. The UN Commission on Human Rights was replaced in 2006 with a new Human Rights Council: *Human Rights Council*, GA Res. 60/251, UN GAOR, 60th Sess., Annex, Agenda Items 46 & 120, UN Doc. A/RES/60/251 (3 April 2006).

21. See generally Torkel Opsahl, "The Human Rights Committee" in Philip Alston, ed., *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992) at 369. See also the texts cited in *supra* note 1.

22. *ICCPR*, *supra* note 1, art. 28. The Human Rights Committee members need not be legally trained, although consideration must be given "to the usefulness of the participation of some persons having legal experience." *Ibid.* Many Human Rights Committee members have been former judges and professors of law, or diplomats with legal training. Once elected, the members of the Human Rights Committee are required to "serve in their personal capacity." *Ibid.*

23. *Ibid.*, art. 40.

24. The Human Rights Committee is also empowered to consider inter-state complaints provided the States Parties make a specific declaration to that effect. *Ibid.*, art. 41.

25. 16 December 1966, 999 U.N.T.S. 302, (1967) 6 I.L.M. 383 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR-OP1*].

26. The Human Rights Committee registered its 1000th communication in July 2001: *Report of the Human Rights Committee*, UN GAOR, 56th Sess., Supp. No. 40, UN Doc. A/56/40 (2001) at 12. As of 10 August 2006, there have been 123 cases lodged against Canada with the Human Rights Committee, with 21 cases proceeding to a determination on the merits. Canada has successfully defended its actions in 10 of the 21 cases. See

to the International Covenant on Civil and Political Rights[27] aimed at abolishing the death penalty was adopted in 1989 and has since been ratified by 59 states, including Canada.

Ratification of the *ICCPR-OP1* has in turn led to the development of a body of "jurisprudence" consisting of the declaratory "views" of the Human Rights Committee in individual cases as to whether a violation of the *ICCPR* has taken place.[28] The Human Rights Committee is not a court[29] and its views in individual cases are not binding judgments, but the Committee does decide cases in an adjudicative fashion, providing both the state and the complainant with the opportunity to present their case by way of written submission. It later makes a reasoned and definitive ruling on the issues in the complaint, and its views may acquire persuasive authority from the personal standing of the Committee members and their qualities of impartiality, objectivity and restraint. The Committee's views also assist with the general

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"Statistical Survey of individual complaints dealt with by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights," online: Office of the United Nations High Commissioner for Human Rights <http://www.ohchr.org/english/bodies/hrc/stat2.htm>.

27. 15 December 1989, 1642 U.N.T.S. 414, (1990) 29 I.L.M. 1465 (entered into force 11 July 1991, accession by Canada 25 November 2005) [*ICCPR-OP2*].

28. This jurisprudence is made freely available through the Treaty Body Database maintained by the Office of the UN High Commissioner for Human Rights, online: <http://www.unhchr.ch/tbs/doc.nsf>. Each individual case has its own unique reference number, and can be located by this number in the Treaty Body Database (see *e.g.* note 39 below. The reference number for *Kitok v. Sweden* is CCPR/C/33/D/197/1985). These cases are also officially reported in the annual *Report of the Human Rights Committee* presented to the UN General Assembly and published in the General Assembly's Official Records (GAOR). Human Rights Committee cases are also reported in the *International Human Rights Reports* (I.H.R.R.) series published by the University of Nottingham's Human Rights Law Centre, and significant views are reported in *International Law Reports* (I.L.R.), *Human Rights Law Journal* (H.R.L.J.) and, occasionally, *International Legal Materials* (I.L.M.). Free access to these cases is also provided by the World Legal Information Institute, online: <http://www.worldlii.org/int/cases/UNHRC/>, and by several university-based services, including the University of Minnesota's Human Rights Library, online: <http://www1.umn.edu/humanrts/hrcommittee/hrc-page.html>.

29. See *Tangiora v. Wellington District Legal Services Committee*, [2000] 1 W.L.R. 240, [2000] 1 N.Z.L.R. 17 (P.C.) (determining that the Human Rights Committee was not a "judicial authority" for the purposes of the New Zealand *Legal Services Act*).

interpretation and application of the *ICCPR* and provide a source of comparative case law relevant to the interpretation of other international rights instruments, as well as many domestic bills of rights, given the similarities between the rights protected. The *Canadian Charter of Rights and Freedoms*[30] was in fact adopted six years *after* Canada acceded to the *ICCPR* and the Government of Canada relies on the *Charter* to ensure the implementation within Canada of its obligations under the *ICCPR*.

In addition to the views it delivers in specific cases, the Human Rights Committee has drafted several "General Comments" that aim to provide states with further guidance on their legal obligations under the *ICCPR* but these are neither binding on states nor on the Committee.[31] These General Comments often explain the Committee's understanding of and approach to a substantive provision of the *ICCPR*. Since they represent the opinion of the body created to monitor the *ICCPR*'s implementation, they carry some practical authority, although they usually do not purport to be exhaustive or limitative. They can therefore be used as an additional resource,[32] with caution, when examining the impact of the *ICCPR* on a state's decision to extradite, although earlier General Comments are less detailed and less useful than more recent ones. However, not all General Comments have proved

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30. Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

31. The authority for making General Comments is said to arise from Article 40(4) of the *ICCPR*, *supra* note 1, which enables the Human Rights Committee to "transmit its reports, and such general comments as it may consider appropriate, to the States Parties." A statement of the Human Rights Committee's views on the nature and purpose of General Comments can be found in *Report of the Human Rights Committee*, UN GAOR, 36th Sess., Supp. No. 40, UN Doc. A/36/40 (1981) at annex VII. The Human Rights Committee has revised several of its earlier Comments. A regularly updated *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.7/Add.1 (4 May 2005), can be obtained from the Treaty Body Database, *supra* note 28.

32. The House of Lords recently referred to a General Comment in *Sepet v. Secretary of State for the Home Department*, [2003] UKHL 15, [2003] 1 W.L.R. 856, [2003] 3 All E.R. 304 at para. 13. The New Zealand courts have similarly shown no difficulty in receiving counsel referrals to General Comments. See *Zaoui v. Attorney-General* (2003), [2004] 2 N.Z.L.R. 339 at paras. 149-151 (H.C.), appealed on other grounds.

acceptable to all *ICCPR* states, and some are considered quite controversial — most notably General Comment 24 on reservations,[33] the content of which has been publicly acknowledged and criticized by the United Kingdom,[34] the United States[35] and France.[36] Both the U.K. and the U.S. have also declined to provide a right of individual petition to the Human Rights Committee and, unlike Canada, have chosen not to ratify or accede to the *ICCPR-OP1*.

II. The Early Extradition Cases Under the *ICCPR*

The Human Rights Committee held its first meeting in 1976. A review of the jurisprudence since that meeting demonstrates that challenges to a state's decision to extradite based on the rights guarantees of the *ICCPR* are not just a recent phenomenon. In fact, the second communication ever brought before the Committee involved an extradition challenge, and one against Canada. Since then, ten more challenges against extraditing states have been brought before the Committee, with varying degrees of success. These cases are best analyzed in three groups: the early cases brought during the Committee's first 15 years; the "Canadian trilogy" involving three significant complaints lodged against Canada in the early 1990s; and the post-trilogy extradition cases.

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33. *Report of the Human Rights Committee*, UN GAOR, 50th Sess., Supp. No. 40, UN Doc. A/50/40, vol. 1 (1995) annex V. See further, Catherine J. Redgwell, "Reservations to Treaties and Human Rights Committee General Comment No. 24(52)" (1997) 46 I.C.L.Q. 390.

34. See "Observations by the United Kingdom on General Comment No. 24" in *Report of the Human Rights Committee*, UN GAOR, 50th Sess., Supp. No. 40, UN Doc. A/50/40, vol. 1 (1995) annex VI.B, reprinted in (1996) 3 I.H.R.R. 261.

35. See "Observations by the United States of America on General Comment No. 24" in *Report of the Human Rights Committee*, UN GAOR, 50th Sess., Supp. No. 40, UN Doc. A/50/40, vol. 1 (1995) annex VI.A, reprinted in (1996) 3 I.H.R.R. 265.

36. See "Observations by France on General Comment No. 24 on Reservations to the ICCPR" in *Report of the Human Rights Committee*, UN GAOR, 51st Sess., Supp. No. 40, UN Doc. A/51/40, vol. 1 (1995) annex VI, reprinted in (1997) 4 I.H.R.R. 6.

In the Committee's first 15 years, five cases involved claims against extraditing states. Admittedly, each is of limited utility as the proceedings were hampered to some extent by the novelty of the international petition process. Their existence, however, confirms a long-perceived link between extradition and human rights, and a brief review of their findings helps to understand the evolution of the Committee's position.

The first extradition case before the Human Rights Committee involved the now-infamous[37] extradition in December 1976 of aboriginal activist Leonard Peltier from Canada to the United States to face charges for the shooting of two federal agents on the Pine Ridge Indian Reservation in South Dakota.[38] Peltier was later convicted of these offences in 1977 and remains in prison in the United States. In his claim before the Human Rights Committee, Peltier alleged that he had been extradited on the basis of false affidavits procured by the U.S. authorities. His allegation later gained strength when a key witness, Myrtle Poor Bear, recanted her statements, claiming she had been coerced into lying by agents of the FBI. But Peltier also challenged the legality of his extradition on the grounds that the shootings had taken place on sovereign Indian territory and that the offence was of a political nature because of his involvement in the American Indian Movement for National Liberation. These claims were strategically unwise from a legal point of view since they deflected the attention of a nascent international body from his stronger claim.

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37. See *e.g.* The Case of Leonard Peltier, online: <http://www.freepeltier.org/> and the Leonard Peltier Defense Committee, online: <http://www.leonardpeltier.net/>. See also *Incident at Oglala: The Leonard Peltier Story*, DVD (Carolco International and Spanish Fork Motion Picture Co, 1992), a film by Michael Apted, produced by Robert Redford. For further background, see Dianne L. Martin, "Unredressed Wrong: The Extradition of Leonard Peltier from Canada" in Susan C. Boyd *et al.*, eds., *(Ab)Using Power: The Canadian Experience* (Halifax: Fernwood, 2001) at 214-35 and Dianne L. Martin, "Extradition, The Charter and Due Process: Is Procedural Fairness Enough?" (2002) 16 Sup. Ct. L. Rev. (2d) 161.

38. Given its vintage, this case cannot be found online in the Treaty Body Database, *supra* note 28. It is, however, reported as *L.P. v. Canada*, Communication No. 2/1976, in *Selected Decisions under the Optional Protocol*, vol. 1 (New York: United Nations, 1985) 21.

In support of his claims, Peltier invoked several *ICCPR* provisions, including Article 1 on the right to self-determination and Article 13 providing certain safeguards in relation to expulsion, but the applicability of these provisions to extradition was never discussed by the Human Rights Committee. Instead, the Committee gave the claims short shrift, declaring the communication inadmissible on the grounds that it was partly incompatible with the *ICCPR*, partly abusive, partly directed at the United States and not Canada, and partly concerned with events that took place prior to the treaty's entry into force for Canada in 1976.[39] The Committee also found that Peltier had not exhausted all of his domestic remedies since he had not appealed his case to the Supreme Court of Canada.[40]

Remaining concerns about the legality of Peltier's 1976 extradition eventually prompted the Canadian Department of Justice to undertake an internal review of his file in 1994. The results of this review, and the conclusion that Peltier had been lawfully extradited, were released to the public in 1999.[41] A brief mention is made in the released materials of Peltier's unsuccessful proceedings before the Human Rights Committee, although the report at one point confuses the Committee (or "HRC") with the UN Commission on Human Rights (or "CHR" according to UN acronyms). The assumption that the Committee and the Commission are one and the same is a common mistake made by

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39. The Human Rights Committee has since determined that Article 1, being a collective right, is non-justiciable within a regime intended to address individual complaints: *Kitok v. Sweden*, Communication No. 197/1985, UN Doc. CCPR/C/33/D/197/1985, *Report of the Human Rights Committee*, UN GAOR, 43d Sess., Supp. No. 40, UN Doc. A/43/40 (1988) annex VII.G (views adopted 27 July 1988), reprinted in (1994) 96 I.L.R. 637.

40. Peltier had appealed his case to the Federal Court of Appeal, but because these proceedings were in the nature of a judicial review, new evidence showing the previous evidence to be false was declared inadmissible: *Re Peltier*, [1977] 1 F.C. 118. An appeal to the Supreme Court of Canada was attempted after Peltier's surrender to the United States and dismissed on 22 June 1989: [1989] S.C.C.A. No. 207 (QL).

41. See Department of Justice Canada, Press Release, "Release of Materials Concerning the Extradition of Leonard Peltier" (15 October 1999), online: Department of Justice Canada <http://www.justice.gc.ca/en/news/nr/1999/pelt.html>. Concerns continued to persist. See *e.g.* Kim Lunman, "MPs call for probe of Peltier extradition" *The Globe and Mail* (20 November 2002) A6.

lawyers and judges alike, and likely contributes to the Committee's lack of impact.

Eight years later, the Human Rights Committee faced a second extradition case, *M.A. v. Italy*, involving a 27-year-old Italian citizen and right-wing political militant who had been extradited from France to complete a prison sentence for "reorganising the dissolved fascist party."[42] M.A.'s family claimed that the court proceedings taken against him had been unfair and politically biased, and challenged his extradition on the basis that he had been convicted of a political offence. The Human Rights Committee ruled that the complaint was inadmissible. Since Italy had signed the *ICCPR-OP1* after the trial and sentencing had taken place, the Human Rights Committee was precluded on jurisdictional grounds from considering the merits of much of the complaint. However, on the matter of M.A.'s extradition from France, which had occurred post-ratification, the Human Rights Committee held that the complaint was without foundation. Thus the complaint was dismissed as inadmissible, with no mention made of the political nature of the offence, and with the Human Rights Committee placing some emphasis on the fact that "[t]here is no provision of the *ICCPR* making it unlawful for a State Party to seek extradition of a person from another country."[43] This holding was significant as Canada would later rely on it in its submissions in subsequent cases before the Committee.[44]

Six years later, the Human Rights Committee faced another challenge to extradition in *Torres v. Finland*,[45] concerning the extradition from Finland to Spain of a Spanish citizen wanted for armed robbery and membership in a terrorist group. Torres claimed that he would be tortured on return to Spain, invoking in an extradition context the guarantee in Article 7 of the *ICCPR* that "no one shall be

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42. Communication No. 117/1981, *Report of the Human Rights Committee*, UN GAOR, 39th Sess., Supp. No. 40, UN Doc. A/39/40 (1985) annex XI.V at para 1.2 (views adopted 10 April 1984), reprinted in (1989) 79 I.L.R. 242 [*M.A. v. Italy*].

43. *Ibid.* at para. 13.4.

44. See below at Part III.

45. Communication No. 291/1988, UN Doc. CCPR/C/38/D/291/1988, *Report of the Human Rights Committee*, UN GAOR, 45th Sess., Supp. No. 40, UN Doc. A/45/40 (1990) annex IX.K (views adopted 2 April 1990) [*Torres*].

subjected to torture or to cruel, inhuman or degrading treatment or punishment."[46] The novelty of his claim, at least before the Human Rights Committee,[47] was the argument that Finland, rather than Spain, was in violation of the *ICCPR* for authorizing extradition to a country where the individual might be subjected to torture. In response, Finland denied any wrongdoing, taking the position that Article 7 could not cover extradition. In its views on the complaint, the Human Rights Committee ruled that Torres had not "sufficiently substantiated his fears that he would be subjected to torture in Spain"[48] and found no violation of Article 7,[49] but in doing so implicitly rejected Finland's absolutist position that Article 7 could not apply to extradition.

A few months after *Torres*, the Human Rights Committee faced a fourth challenge to extradition in *Giry v. Dominican Republic*.[50] Giry was a French resident of Saint-Barthélemy who had been prevented by the Dominican authorities from taking an intended flight to Saint-Barthélemy. He was instead flown to Puerto Rico where he was arrested, and later convicted, for conspiracy to import cocaine into the United States (Puerto Rico being within U.S. jurisdiction). In his complaint before the Human Rights Committee, Giry alleged that the Dominican Republic had violated Articles 9, 12 and 13 of the *ICCPR* by detaining him at the airport, depriving him of his right to liberty of movement and subjecting him to an illegal expulsion. The Dominican Republic denied the claim, initially taking the position that Giry had been legally deported on the basis of an extradition treaty with the

46. *ICCPR*, *supra* note 1.

47. The argument was not novel within the European regional human rights regime, which had first embraced this principle in the early 1960s, influenced to some extent by German court decisions of the mid-1950s: see *Nazih-al-Kuzbari v. Federal Republic of Germany*, No. 1802/63, (1963) 10 Eur. Comm'n H.R.C.D. 26 and *X c. L'Autriche et la Yougoslavie*, No. 2143/64, (1964) 14 Eur. Comm'n H.R.C.D. 15.

48. *Torres*, *supra* note 45 at para. 6.

49. *Ibid.* at paras. 7.1-7.2. The Human Rights Committee did, however, find a violation of Article 9(4) because Torres was unable to challenge his detention before a court prior to extradition.

50. Communication No. 193/1985, UN Doc. CCPR/C/39/D/193/1985, *Report of the Human Rights Committee*, UN GAOR, 45th Sess., Supp. No. 40, UN Doc. A/45/40 (1990) annex IX.C (views adopted 20 July 1990), reprinted in (1994) 95 I.L.R. 321 [*Giry*].

United States, but later claiming that he was expelled for reasons of national security.

Although Giry cited several *ICCPR* provisions in his communication, the Human Rights Committee observed that the facts of the case raised issues under Article 13, and limited its views accordingly.[51] Article 13 provides that:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.[52]

While this provision speaks only of "expulsion," the Human Rights Committee expressly held that extradition comes within its scope,[53] thereby confirming its earlier General Comment that Article 13 "is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise."[54] It also found the Dominican Republic to be in violation of Article 13, since no documents were furnished to show that Giry had been expelled "in accordance with the law." It was clear that Giry had not been afforded an opportunity to submit reasons against his expulsion, nor had a competent authority reviewed his case. Thus, the Human Rights Committee concluded that "States are fully entitled vigorously to protect their territory against the menace of drug dealing by entering into extradition treaties with other States." [55] But, the Committee went

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51. *Ibid.* at para. 5.4. Four members of the Human Rights Committee disagreed, holding that the case should have been considered in relation to Articles 9 and 12, and not Article 13, on the basis that Giry's arrest and detention at the airport and his forcible transfer to Puerto Rico should have been regarded as unlawful and arbitrary arrest and a deprivation of his liberty.

52. *Supra* note 1.

53. *Giry, supra* note 50 at para. 5.5.

54. See General Comment 15, *Report of the Human Rights Committee*, UN GAOR, 41st Sess., Supp. No. 40, UN Doc. A/41/40 (1986) annex VI at para. 9.

55. *Giry, supra* note 50 at para. 5.5.

on to hold that the "practice under such treaties must comply with Article 13 of the Covenant . . . ."[56]

Two years later, in the fifth case in the early series, the Human Rights Committee had an opportunity to comment on what was acceptable practice under an extradition treaty but declined to do so. In *Cañón Garcia v. Ecuador*,[57] an allegation was made that agents of the U.S. Drug Enforcement Agency had forcibly abducted a Columbian drug trafficker from Ecuador to stand trial in the United States, thereby bypassing the extradition treaty between the two states. In his complaint before the Committee, Cañón Garcia argued that Ecuador had violated its *ICCPR* obligations by not affording him the safeguards provided by the extradition treaty. Ecuador, however, conceded that irregularities had occurred, and so the Committee, having accepted the concession, declined to comment further.

III. The Canadian Trilogy of *Kindler*, *Ng* and *Cox* at the International Level

Three communications submitted against Canada in the early 1990s gave the Human Rights Committee its first real opportunity to examine fully the role for a state's *ICCPR* obligations in matters of extradition. The cases were *Kindler v. Canada*,[58] *Ng v. Canada*,[59] and *Cox v. Canada*.[60] Each case concerned the extradition from Canada to the

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56. *Ibid.*

57. Communication No. 319/1988, UN Doc. CCPR/C/43/D/319/1988, *Report of the Human Rights Committee*, UN GAOR, 47th Sess., Supp. No. 40, UN Doc. A/47/40 (1992) annex X (views adopted 5 November 1991), noted in (1994) 95 I.L.R. 327.

58. Communication No. 470/1991, UN Doc. CCPR/48/D/470/1991, Report of the Human Rights Committee, UN GAOR, 48th Sess., Supp. No. 40, UN Doc. A/48/40, vol. 2 (1993) annex XII.U (views adopted 30 July 1993), reprinted in (1994) 98 I.L.R. 426, (1993) 14 H.R.L.J. 307, (1994) 1 I.H.R.R. 98 [*Kindler*].

59. Communication No. 469/1991, UN Doc. CCPR/49/D/469/1991, *Report of the Human Rights Committee*, UN GAOR, 49th Sess., Supp. No. 40, UN Doc. A/49/40, vol. 2 (1994) annex IX.CC (views adopted 5 November 1993), reprinted in (1994) 98 I.L.R. 479, (1994) 15 H.R.L.J. 149, (1994) 1 I.H.R.R. 161 [*Ng*].

60. Communication No. 539/1993, UN Doc. CCPR/C/52/D/539/1993, *Report of the Human Rights Committee*, UN GAOR, 50th Sess., Supp. No. 40, UN Doc. A/50/40, vol.

United States of an escaped fugitive charged with serious crimes. However, unlike the early cases where substantive human rights issues were overshadowed by questions of inadmissibility and insufficient evidence, the Canadian cases were documented and argued fully, thus enabling the Human Rights Committee to focus on the effect of the *ICCPR* on a state's decision to extradite, including a decision made pursuant to an extradition treaty. The Committee was also assisted in its efforts by the fact that the Supreme Court of Canada had considered fully the issues at stake,[61] and by the landmark decision of the European Court of Human Rights in *Soering v. United Kingdom*,[62] which had raised similar issues under the (European) *Convention for the Protection of Human Rights and Fundamental Freedoms*,[63] a regional equivalent to the *ICCPR*. The resulting views of the Human Rights Committee are among its most interesting[64] and most controversial, as evidenced by the unusual number of separate opinions in each case.

The *Kindler* case concerned the extradition of an American citizen who had escaped from Pennsylvania to Canada after his conviction for the murder of a witness to another crime he had committed. A death sentence had been recommended by the jury, but Canada was in practice an abolitionist state and, under its extradition treaty with the United States, could insist on the receipt of assurances that the death penalty would not be imposed as a condition of extradition.[65] In this

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2 (1995) annex X.M (views adopted 31 October 1994), reprinted in (1995) 114 I.L.R. 348, (1994) 15 H.R.L.J. 410, (1995) 2 I.H.R.R. 307 [*Cox*].

61. See *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 [*Kindler v. Canada*] and *Reference re Ng Extradition*, [1991] 2 S.C.R. 858.

62. *Soering, supra* note 2.

63. 4 November 1950, 213 U.N.T.S. 221, E.T.S. No. 5 (entered into force 3 September 1953) [*ECHR*].

64. As also recognized in Margaret De Merieux, "Extradition as the Violation of Human Rights: The Jurisprudence of the International Covenant on Civil and Political Rights" (1996) 14 Neth. Q.H.R. 23. See also William A. Schabas, "*Soering*'s Legacy: The Human Rights Committee and the Judicial Committee of the Privy Council Take a Walk Down Death Row" (1994) 43 I.C.L.Q. 913.

65. Article 6 of the *United States of America and Canada Treaty on Extradition*, 3 December 1971, 1041 U.N.T.S. 57, Can. T.S. 1976 No. 3 (entered into force 22 March 1976), as amended by an Exchange of Notes done on 28 June 1974 and 9 July 1974, provides: "When the offense for which extradition is requested is punishable by death

case, however, the Minister of Justice chose not to even seek such assurances, and Kindler was eventually extradited without them after a lengthy and unsuccessful battle in the Canadian courts.

On the day before his extradition, Kindler filed a communication with the Human Rights Committee claiming that Canada's decision to extradite was in violation of Articles 6, 7, 9, 14 and 26 of the *ICCPR*. Article 6 protects the right to life; Article 7 prohibits the imposition of cruel and inhuman treatment; Article 9 protects the right to liberty and security of the person and prohibits arbitrary arrest and detention; Article 14 provides for various fair trial rights; and Article 26 is an anti-discrimination provision. Kindler contended that the death penalty in itself was cruel and inhuman treatment, as well as the conditions he would face on death row. He also claimed that judicial procedures used in Pennsylvania for capital cases did not meet the basic requirements of justice. Although he was white, Kindler further alleged a general racial bias in the imposition of the death penalty.

Yet despite an interim measures request from the Human Rights Committee asking Canada to stay all domestic proceedings while the international complaint was pending,[66] the extradition went ahead. Canada would later challenge both the admissibility and the merits of Kindler's complaint on the basis that Canada could not be held responsible for eventualities over which it had no jurisdiction. Canada also claimed that extradition *per se* was beyond the scope of the *ICCPR* and that the *ICCPR* did not provide for a right not to be extradited,

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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."

66. Upon receipt of a communication, but before the adoption of views, the Human Rights Committee may request a State to take interim measures in order to avoid irreparable damage to the complainant: see Rule 92 (then Rule 86) of the *Rules of Procedure of the Human Rights Committee*, UN Doc. CCPR/C/3/Rev.8 (2005). Canada took the position that such requests were non-binding and opted for immediate extradition. For further discussion and criticism of Canada's position, see Joanna Harrington, "Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection" (2003) 48 McGill L.J. 55 [Harrington, "Punting Terrorists"].

citing *M.A. v. Italy*[67] for support.[68] Canada also maintained[69] that its extradition treaty with the United States was in conformity with international standards as evidenced by the fact that the UN Model Treaty on Extradition included an optional, rather than mandatory clause on death penalty assurances.[70]

On July 31, 1992, the Human Rights Committee, with two members dissenting,[71] declared Kindler's complaint admissible, but only under Articles 6 and 7 of the *ICCPR*.[72] Article 6 protects the right to life but with an explicit exception in Article 6(2) for states retaining the death penalty for the most serious crimes, while Article 7 prohibits the use of torture and other forms of serious ill treatment. Since Canada had abolished the death penalty for all but certain military offences, Kindler argued that Article 6 prohibited Canada from extraditing an individual without assurances that the death penalty would not be imposed.[73] He also complained about the discriminatory, cruel, inhuman and degrading character of the death penalty and the conditions on death row, alleging that Canada had violated Article 7 in extraditing him to face such conditions. Canada, however, maintained that neither Article 6 nor Article 7 prohibited the death penalty, and further noted that no exceptional circumstances had been evidenced by Kindler to warrant what it viewed as the "special measure of seeking assurances."[74] Canada also argued that it could not impose its penal policies on another state

67. *Supra* note 42.

68. *Kindler, supra* note 58 at para. 4.4.

69. *Ibid.* at para. 4.5.

70. There is no universally applicable extradition treaty. Instead, the UN has opted for the endorsement of a *Model Treaty on Extradition* with the text found in UN Doc. A/RES/45/116 (1990), (1991) 30 I.L.M. 1407. *Complementary Provisions to the Model Treaty on Extradition* have since been adopted: UN Doc. A/RES/52/88 (1998).

71. Committee members Kurt Herndl and Waleed Sadi would have declared the communication inadmissible on the grounds that it raised "only remote issues under the Covenant." While both agreed that the Human Rights Committee, in exceptional circumstances, could examine matters directly linked with a State Party's compliance with an extradition treaty, it found the link in this case "much too tenuous." *Kindler, supra* note 58.

72. *Ibid.* at para. 7.

73. *Ibid.* at para. 10.2.

74. *Ibid.* at para. 8.6.

and emphasized the importance of extradition as a tool in preventing Canada from becoming a safe haven for fugitive criminals from a country with which it shared a very lengthy and partially unguarded border.

The Human Rights Committee released its views on the merits of Kindler's international claim in July 1993. In an opinion clearly favouring the eventual abolition of the death penalty,[75] the Committee confirmed 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 itself may be in violation of the Covenant."[76] However, applying this principle to the facts of *Kindler*, the Committee found no violation and held that Canada was not required by Article 6(1) to seek assurances before extraditing Kindler. The Committee made note of the fact that Kindler had been convicted of a serious crime, committed when he was over 18 years of age, and that he had made no claim against the fairness of his trial.[77] It also observed that he was extradited only after an extensive review of his case in the Canadian courts and after the Minister of Justice had heard further submissions from his counsel.[78] Nevertheless, the Committee did suggest that a state that has abolished capital punishment should, in exercising a permitted discretion under an extradition treaty, give serious consideration to its own chosen policy concerning the death penalty.[79] Further, the Committee noted that Canada would have violated Article 6 had "the decision to extradite without assurances . . . been made arbitrarily or summarily."[80] Canada had, however, given the matter careful consideration and the Human Rights Committee appeared to agree with Canada's reasons for not seeking assurances, "specifically, the absence of exceptional personal

75. *Ibid.* at para. 14.2.

76. *Ibid.* at para. 13.2 [emphasis added].

77. *Ibid.* at para. 14.3. Kindler would later successfully challenge his death sentence in the U.S. courts on the grounds that the jury instructions had been flawed. *Kindler v. Horn*, 291 F. Supp. 2d 323 (E.D. Pa. 2003).

78. *Kindler*, *supra* note 58 at paras. 14.4 and 14.6.

79. *Ibid.* at para. 14.5.

80. *Ibid.* at para. 14.6.

circumstances, the availability of due process [in the U.S.] and the importance of not providing a safe haven . . . " for criminals in Canada.[81]

Five members of the Human Rights Committee dissented from the majority's view that there had been no violation of Article 6, emphasizing the fundamental and absolute nature of Canada's obligation to protect the right to life under Article 6(1). The dissenters, writing five separate opinions, essentially disagreed with what they considered to be an expansive interpretation of the death penalty exception or "dispensation" for retentionist states in Article 6(2) and further held that Canada, as an abolitionist state, could not be permitted to use Article 6(2) to reintroduce the death penalty indirectly or to subject persons to the risk of such a penalty through extradition. The Human Rights Committee would later return to these points in the case of *Judge v. Canada* in 2002–2003, as discussed below.[82]

As for the claim under Article 7, the Human Rights Committee held that this provision must be read with Article 6(2), which made it clear that the death penalty was not prohibited under the *ICCPR*. Accordingly, capital punishment by itself did not violate Article 7.[83] The Committee also took the view, as it had done in previous death penalty cases, that "prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies,"[84] thus requiring an examination of the facts of each case to reveal a violation, if any, of Article 7. The Committee then undertook such an examination in *Kindler*, taking care to distinguish Kindler's age and mental state, the conditions of his future detention on death row, and the proposed method of execution (lethal injection) from the circumstances that had led the European Court of Human Rights to find a violation in

81. *Ibid.*
82. See Part IV below.
83. *Kindler*, *supra* note 58 at para. 15.1.
84. *Ibid.* at para. 15.2.

Soering.[85] In the result, the Committee concluded that no violation of Article 7 had occurred. Canada had defended its position successfully at both the domestic and international level, although no mention can be found of the international decision in the House of Commons debates or in subsequent judicial proceedings, including the case of *Burns* wherein the Supreme Court of Canada overruled the *Kindler* position.[86]

The second case in the trilogy is the *Ng* case, which like *Kindler*, concerned the extradition of an American[87] fugitive from Canada. However in *Ng*, the fugitive had fled *before* standing trial in California on 19 counts of murder and kidnapping. As one of America's most notorious serial killers, Charles Ng would likely receive a death sentence, but like Kindler, he was extradited without a death penalty assurance after an extensive review of his case in the Canadian courts and by the Minister of Justice. The key factual difference in Ng's case was the method of his future execution as California at that time carried out a death sentence by means of gas asphyxiation.[88]

Having exhausted his domestic law options, Ng, like Kindler, complained to the Human Rights Committee, claiming violations of Articles 6, 7, 9, 10, 14 and 26 of the *ICCPR*.[89] Ng maintained that the method of execution constituted cruel and inhuman treatment in violation of Article 7, that the conditions on death row also violated Article 7 and that California's judicial procedures in capital cases did not meet the standards of justice required by the *ICCPR*. He also alleged

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85. *Supra* note 2. Soering was 18 years old and suffered from a psychiatric condition at the time of the murders underpinning the request for his extradition.

86. *Burns*, *supra* note 5. Although the Court claimed in *Burns* (at para. 144) that Kindler had been rightly extradited, many view the *Burns* decision as effectively over-ruling Kindler — a position with which the Court now appears to agree. See *R. v. Henry*, [2005] 3 S.C.R. 609 at para. 44.

87. Ng was in fact a British subject, born in Hong Kong, but with permanent residency in the United States.

88. By the time Ng's case came before the Human Rights Committee, California had amended its law to allow the condemned to choose lethal injection in lieu of gas, as noted in the separate opinion of Bertil Wennergren in *Ng*, *supra* note 59.

89. Ng invoked the same provisions as Kindler with the addition of Article 10 as a result of complaints about the conditions of his detention in Canada and alleged irregularities committed by Canadian prison authorities. These claims were, however, declared inadmissible on the grounds of non-exhaustion of domestic remedies. *Ibid.*

that racial bias influenced the imposition of the death penalty in the United States. Canada responded by disputing Ng's claim on the same grounds as in the *Kindler* complaint.

In views adopted in November 1993, the Human Rights Committee cleared Canada of a violation of Article 6, reiterating the view taken a few months earlier in *Kindler* that the right to life guarantee in the *ICCPR* did not automatically preclude extradition where a fugitive was likely to face capital punishment, even if the sending state had abolished such punishment under its law.[90] The Human Rights Committee further held, as in *Kindler*, that no exceptional circumstances existed on which to find a violation, noting that Ng stood accused of very serious crimes, allegedly committed when he was over 18, and no evidence was presented to convince the Committee that Ng's future trial in California would not meet the standards of fairness required by the *ICCPR*. His allegations of racial bias were also dismissed as being "advanced in respect of purely hypothetical events."[91] The Committee also took comfort from the fact that Ng's claims had received extensive judicial and executive review in Canada,[92] and it accepted Canada's reasons for not seeking assurances, namely "the absence of special circumstances, the availability of due process and of appeal against conviction and the importance of not providing a safe haven" for criminals in Canada.[93]

However, Canada was found in violation of the international prohibition on cruel and inhuman treatment. In determining whether the future imposition of capital punishment post-extradition constituted a violation of Article 7 of the *ICCPR*, the Human Rights Committee held that regard had to be paid to the fugitive's personal factors, "the specific conditions of detention on death row and whether the proposed method of execution was particularly abhorrent."[94] Relying on the test set out in its General Comment on Article 7 that a death sentence "must be carried out in such a way as to cause the least possible physical and

90. *Ng*, *supra* note 59 at para. 15.6. Committee members Pocar, Lallah, Wennergren, Aguilar Urbina and Chanet again dissented as they had done in *Kindler*.
91. *Ibid.* at para. 15.3.
92. *Ibid.* at paras. 15.4 and 15.6.
93. *Ibid.* at para. 15.6.
94. *Ibid.* at para. 16.1.

mental suffering,"[95] the Committee concluded, with four members dissenting,[96] that execution in Ng's case would constitute cruel and inhuman treatment because gas asphyxiation caused prolonged suffering and did not result in a quick death.[97]

Canada was therefore found in violation of Article 7 of the *ICCPR* for extraditing Ng without assurances when it was reasonably foreseeable that if sentenced to death, he would be executed in a way that amounted to cruel and inhuman treatment. Canada, however, could do nothing to rectify this breach since Ng was no longer within its jurisdiction, having been extradited to the United States in 1991.[98]

A review of the subsequent Canadian parliamentary and judicial records suggests that the Human Rights Committee's finding in *Ng* has in essence been ignored. No mention was made in the House of Commons of the Human Rights Committee's views, and no statement of either regret or rebuttal was issued by the Government of Canada. This stands in contrast with the statements made in the House of Commons when Ng's extradition was authorized by the Supreme Court of Canada.[99] The judicial record is similarly silent, the Supreme Court of

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95. General Comment 20, *Report of the Human Rights Committee*, UN GAOR, 47th Sess., Supp. No. 40, UN Doc. A/47/40 (1994) annex VI, replacing General Comment 7, *Report of the Human Rights Committee*, UN GAOR, 37th Sess., Supp. No. 40, UN Doc. A/37/40 (1982) annex V.

96. Committee members Ando, Herndl, Mavrommatis and Sadi maintained that this particular method of execution did not violate Article 7 but accepted that Article 7 imposed certain limits on the method of execution. Mavrommatis and Sadi, for example, suggested that death by stoning would violate Article 7. *Ng*, *supra* note 59 at appendix B.

97. Evidence was presented to the Human Rights Committee that asphyxiation by gas cyanide could take over ten minutes. *Ibid.* at para. 11.10.

98. Katherine Bishop, "Canada Extradites Suspect in California Slayings" *The New York Times* (27 September 1991) A16. Ng was extradited within hours of the Supreme Court of Canada's judgment authorizing his surrender.

99. Not one, but two parliamentary statements were made to "applaud" and "commend" the Supreme Court of Canada for its decision authorizing Ng's, as well as Kindler's, extradition: *House of Commons Debates*, No. 3 (26 September 1991) at 2774 (Bill Domm); House of Commons Debates, No. 3 (27 September 1991) at 2833 (Bill Attewell). According to press reports, "[w]hen the decision was announced in the House of Commons, members of . . . [the] government applauded vigorously." Dan Morain, "Canada Sends Accused Killer Ng Back to US" *The Los Angeles Times* (27 September 1991) A3. It would appear from a statement made some seven years later, and made in the

Canada making no mention in subsequent extradition cases of the finding by an international tribunal that its authorization of Ng's extradition was in breach of Canada's international human rights treaty obligations.

Cox[100] completes the Human Rights Committee's Canadian extradition trilogy. Like the other two cases, *Cox* concerned the extradition without assurances of an American fugitive to stand trial on murder charges, although the risk of a death sentence upon conviction was not as great since Cox's alleged accomplices had received prison terms. Like Kindler and Ng, Cox alleged that his extradition would violate Articles 6, 7, 14 and 26 of the *ICCPR*, claiming that if he were extradited and then sentenced to death, the conditions of his confinement on death row would expose him to the "death row phenomenon." However, unlike Kindler and Ng, Cox was black, and he also claimed that "the way death penalties are pronounced in the United States generally discriminates against black people."[101]

Despite the views adopted by the Human Rights Committee in *Kindler* and *Ng*, Canada again claimed that the complaint was inadmissible on the grounds that extradition was beyond the scope of the *ICCPR*, referring to the *travaux préparatoires* to show that the treaty's drafters specifically rejected a proposal to include extradition in the *ICCPR* since it would cause difficulties in relation to existing treaties and bilateral arrangements.[102] However, Canada also recognized, in the alternative, that in exceptional circumstances the Human Rights

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unelected second chamber, that the Government of Canada viewed the subsequent finding of a violation before the Human Rights Committee as having been overtaken by later events. See Graham, *Debates of the Senate*, *supra* note 9.

100. Cox had submitted an earlier communication, but this was declared inadmissible on the grounds of non-exhaustion of domestic remedies since his case was then before the Quebec Court of Appeal. *K.C. v. Canada*, Communication No. 486/1992, UN Doc. CCPR/C/45/D/486/1992, *Report of the Human Rights Committee*, UN GAOR, 47th Sess., Supp. No. 40, UN Doc. A/47/40 (1992) annex X.DD (decision adopted 29 July 1992), reprinted in (1992) 13 H.R.L.J. 352. Cox later abandoned his Quebec appeal, considering it futile in light of the Canadian jurisprudence at the time, and submitted a new communication to the Human Rights Committee.

101. *Cox*, *supra* note 60 at para. 3.

102. *Ibid.* at paras. 5.1 and 7.1.

Committee could examine questions relating to extradition.[103] Canada then proceeded to set an example to other states by marshalling much evidence to show the absence of such circumstances in Cox's case, including detailed evidence and statistics about the U.S. criminal justice system. Canada also argued that the evidence submitted by Cox did not show that it was reasonably foreseeable that the treatment he would receive in the United States would violate his rights under the *ICCPR*.[104]

A majority of the Human Rights Committee found Cox's communication admissible but later dismissed his complaint on the merits on the basis of the *Kindler* and *Ng* "real risk" or "necessary and foreseeable consequence" test. No exceptional circumstances were found to persuade the Human Rights Committee that Canada was in violation of Article 6.[105] Cox stood accused of two very serious crimes, allegedly committed when he was over 18, and he had failed to substantiate his claim that his trial would not meet the standards of fairness required by the *ICCPR*. His allegations of systemic racial discrimination in the U.S. criminal justice system were also dismissed as being unsubstantiated.[106] As for the Article 7 claim, the Human Rights Committee took note of the detailed information submitted by Canada with respect to Pennsylvania's prison conditions[107] and further noted the remoteness of the death penalty risk since Cox's accomplices had received life sentences.[108] The Committee also affirmed its ruling in *Kindler* that execution by lethal injection would not violate Article 7.[109] As a result, Canada's extradition of Cox without assurances was held to be *ICCPR*-compliant due in part to Canada's engagement (albeit in the alternative) with the Committee's jurisprudence.

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103. *Ibid.* at para. 5.1.

104. *Ibid.* at para. 7.3.

105. Committee members Pocar, Lallah, Wennergren, Aguilar Urbina and Chanet again dissented as they had done in *Kindler* and *Ng*. *Ibid.* at appendix B.

106. *Ibid.* at para. 16.7.

107. *Ibid.* at para. 17.1.

108. *Ibid.* at para. 17.2.

109. *Ibid.* at para. 17.3.

IV. The Post-Trilogy Case Law Under the *ICCPR*

Since the trilogy's conclusion in 1994, the Human Rights Committee has received only three complaints against extraditing states. However, it has received several complaints against deporting or expelling states, with the applicants invoking the extradition trilogy's "necessary and foreseeable consequence" test as a means to bar their removal on human rights grounds. The Human Rights Committee has agreed with this extension of the trilogy's principles, but it has declined to either support or decry state requests for a narrow construction of the trilogy test, as is exemplified by the deportation cases of *A.R.J. v. Australia*[110] and *T. v. Australia*.[111] Australia has also argued that only a real risk of a breach of the most fundamental of human rights should serve as a reason to bar expulsion, with a breach of due process rights to qualify in only the most exceptional cases. The Human Rights Committee, however, has felt no need to address these submissions, avoiding the issue by finding the claims of a real risk to be unsubstantiated.

A.R.J. v. Australia concerned the future deportation of an Iranian citizen who had applied unsuccessfully for refugee status on the ground that a conviction in Australia for drug-related offences would subject him, upon return to Iran, to a real risk of being retried before the Islamic Revolutionary Courts, without the benefit of counsel and with the likelihood of a death sentence being imposed. Before the Human Rights Committee, A.R.J. argued that Australia was in breach of the right to life and the guarantee against ill-treatment in the *ICCPR*, as well as several rights relating to a fair trial. He further claimed a violation of

110. Communication No. 692/1996, UN Doc. CCPR/C/60/D/692/1996, *Report of the Human Rights Committee*, UN GAOR, 52d Sess., Supp. No. 40, UN Doc. A/52/40, vol. 2 (1997) annex VI.T (views adopted 28 July 1997), reprinted in (1998) 5 I.H.R.R. 693 [*A.R.J. v. Australia*].

111. Communication No. 706/1996, UN Doc. CCPR/C/61/D/706/1996, *Report of the Human Rights Committee*, UN GAOR, 53d Sess., Supp. No. 40, UN Doc. A/53/40, vol. 2 (1998) annex XI.U (views adopted 4 November 1997), reprinted in (1998) 5 I.H.R.R. 737 [*T. v. Australia*].

the *ICCPR-OP2*,[112] to which Australia was also a party. In response, Australia took the view that A.R.J. had failed to meet the "necessary and foreseeable consequence" test established in the Canadian extradition trilogy, claiming that it was extremely unlikely that Iran would retry and sentence an Iranian citizen who had already served a lengthy sentence abroad for a drug-related offence,[113] although it was conceded that he might be exposed to 20 to 74 lashes under the *Islamic Penal Code*.[114] In making its submissions, Australia clearly relied upon and engaged with the Human Rights Committee's extradition jurisprudence. But Australia also encouraged the adoption of a narrow construction of the Canadian trilogy test so as to allow for "an interpretation of the Covenant which balances the principle of State Party responsibility embodie[d] in Article 2 (as interpreted by the Committee) and the right of a State Party to exercise its discretion as to whom it grants a right of entry."[115]

As for the fair trial complaints, Australia denied the application of the principle of double jeopardy as between two states, disputed A.R.J.'s contention that he would not have counsel and further submitted that a sending state obligation did not arise with respect to most due process rights[116] (presumably because many procedural breaches can be remedied on appeal or do not affect a trial's overall fairness).

The Human Rights Committee in essence agreed with Australia, holding that A.R.J. had failed to establish that he faced a real risk of a rights violation upon being deported to Iran. However, having found on the facts that Iran had shown no intention to prosecute, the Committee was also saved from making any determination with respect to Australia's submission that the real risk test did not apply to the due process guarantees of the *ICCPR*. It also declined to make a ruling on Australia's call for a narrow construction of the trilogy test.

Australia later repeated its arguments in the case of *T. v. Australia*, concerning the claim of a convicted heroin trafficker who feared he

112. *Supra* note 27.
113. *A.R.J. v. Australia*, *supra* note 110 at para. 4.6.
114. *Ibid.* at para. 4.10.
115. *Ibid.* at para. 4.2.
116. *Ibid.* at para. 4.12.

would face a mandatory death penalty if deported to Malaysia. T.'s arguments against his deportation were similar to those raised by A.R.J., but with the addition of a family rights claim since T. had married an Australian citizen and had become a stepfather to his wife's sons. T.'s primary claim, however, rested on the right to life guarantee in the *ICCPR*, as modified by Australia's accession to the *ICCPR-OP2*. Australia responded by again relying upon the "necessary and foreseeable" aspect of the trilogy test, taking the position that T. had failed to substantiate his claim. It also repeated its call for a narrow construction of that test, suggesting that those facing expulsion must be "required to demonstrate that a prospective violation can be foreseen and is inevitable and that there is a clear causal link between the decision of the expelling State and the future violation by the receiving State."[117] Australia also restated its contention that the trilogy's principles only extended in exceptional circumstances to due process guarantees.

Again the Human Rights Committee found no violation, holding that no real risk had been established, although the decision was not unanimous. While the majority found no evidence of an intention on the part of Malaysia to prosecute, one Committee member felt that Australia had failed to address the issue of whether the reasons for deportation were "weighty enough to legitimize the adverse consequences" of removal for the family.[118] Two other Committee members rested their views on the mandatory nature of the Malaysian death penalty and the possibility of a prosecution for possessing in Malaysia, the drugs that had been imported into Australia.[119]

However, for the purposes of this study the most significant post-trilogy case is that of *Judge v. Canada*,[120] an extradition-by-deportation or "disguised extradition" case. This case, considered by the Human Rights Committee in 2002 and eventually decided in 2003, has in essence overturned the *Kindler* decision on the application of the right to life

117. *T. v. Australia*, *supra* note 111 at para. 5.8.

118. See the opinion of Martin Scheinin appended to *ibid.*

119. See the opinions of Eckart Klein and David Kretzmer appended to *ibid.*

120. Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998, *Report of the Human Rights Committee*, UN GAOR, 58th Sess., Supp. No. 40, UN Doc. A/58/40, vol. 2 (2003) annex V.G (views adopted 5 August 2003), reprinted in (2003) 42 I.L.M. 1214, (2004) 11 I.H.R.R. 125 [*Judge*].

guarantee. *Judge* concerned the return from Canada to the United States of a wanted fugitive who had been convicted of murder and sentenced to death before his escape. After his capture, and the service in Canada of a ten-year prison sentence for robbery, Canada decided to deport Judge to the U.S. rather than extradite him, without any assurances concerning the death penalty. On the day of his deportation, Judge lodged a complaint with the Human Rights Committee invoking Articles 6, 7, 10 and 14 of the *ICCPR*.

The Human Rights Committee focused the complaint on whether by deporting Judge without first obtaining some sort of assurance that he would not face a death sentence, Canada (as an abolitionist state) had violated Judge's right to life, his right not to be subjected to serious ill-treatment and his right to an effective remedy.[121] Canada took the position that there was no legal authority requiring an abolitionist state to seek such assurances, noting in support the wording of Article 6, the Human Rights Committee's past jurisprudence and the silence of the Committee's General Comments on this point. Canada also noted that it was not (as yet) a party to the *ICCPR-OP2*. In response, Judge drew attention to the holding in *Kindler* that a decision to extradite without assurances could be a violation of the *ICCPR* if the decision was taken arbitrarily or summarily, suggesting that Canada's side-stepping of the extradition process in this case qualified since deportation offered no opportunity to raise the question of assurances.

The Human Rights Committee agreed with Judge, but went further on the grounds that *Kindler* had been decided "some ten years ago" and that "since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in states which have retained the death penalty, a broadening consensus not to carry it out."[122] The Committee also noted that even within Canada the law had evolved with the Supreme Court coming to the view, albeit within the context of extradition, that death penalty assurances must be sought in all but exceptional cases.[123] Accepting that abolitionist and

121. *Ibid.* at para. 7.8.
122. *Ibid.* at para. 10.3.
123. *Burns*, *supra* note 5 at paras. 8 and 65.

retentionist states are to be treated differently, the Human Rights Committee concluded:

> For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.[124]

Canada was thus found in violation of Article 6 of the *ICCPR* for deporting Judge without ensuring that the death penalty would not be carried out. It mattered not to the Human Rights Committee that Canada had not ratified the *ICCPR-OP2*.[125] Canada was also found to have violated Article 6 by quickly executing the deportation order and thereby precluding Judge from availing himself of the opportunity to appeal.

The significance of the *Judge* decision was not missed by Human Rights Committee member Christine Chanet, who appended an individual opinion, noting that the approach taken was one "which I advocated and had wished to see applied in the *Kindler* case; indeed that was the basis of the individual opinion I submitted in that case."[126] Similarly, Committee member Rajsoomer Lallah wrote his own individual opinion agreeing with "the Committee's revision of the approach which it had adopted in *Kindler*."[127] But Chanet also expressed concern about the majority's implied acceptance, at the admissibility stage in *Judge*, that it could consider arguments based on Article 14 of the *ICCPR*. This raised again the question of whether the "real risk" test applied beyond violations of the right to life and the prohibition on torture and ill-treatment to include violations of the right to a fair trial.

Eight months later, the Human Rights Committee decided its first post-trilogy extradition case, *Weiss v. Austria*,[128] concerning the

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124. *Judge*, *supra* note 120 at para. 10.4 [emphasis in original].
125. *Ibid.* at para. 10.6.
126. *Ibid.* at appendix 1.B.
127. *Ibid.* appended to majority view.
128. Communication No. 1086/2002, UN Doc. CCPR/C/77/D/1086/2002, *Report of the Human Rights Committee*, UN GAOR, 58th Sess., Supp. No. 40, UN Doc. A/58/40,

extradition from Austria to the United States of an American-Israeli citizen who had escaped while on trial for fraud, racketeering and money laundering. After his escape, Weiss was convicted and sentenced *in absentia* in the U.S. to a prison term of 845 years, with the possibility of a reduction to 711 years for good behaviour, as well as pecuniary penalties in excess of US$248 million. In response, Weiss argued — initially before the European Court of Human Rights,[129] and then before the Human Rights Committee — that his extradition to face what amounted to an "exceptional and grotesque punishment" was in breach of the prohibition on inhuman treatment. He also invoked his fair trial rights, given the *in absentia* aspect of the sentencing.

The Human Rights Committee declined to rule on the merits of Weiss' claim on the grounds that the conviction and sentencing were not yet final, pending the outcome of a promised re-sentencing process to take place post-extradition. Thus, the Committee held that it was "premature" to decide, on the basis of what were described as "hypothetical facts," whether extradition to face such a sentence gave rise to extraditing state responsibility under the *ICCPR*.[130] This is surprising since the sentence, even if "hypothetical," was surely of such an excessive length that a supervisory body accustomed to making "General Comments" as guidance to states could have made some statement about its appropriateness. One might also have expected evolving views about "life-means-life" imprisonment to have evoked some comment from the Human Rights Committee, similar to that made in *Judge*, given that the length of the sentence equated to a sentence of death in prison. But no comment was made, nor was there any discussion of the foreseeable consequence test from *Kindler*, *Ng* and *Cox* and nor were there any individual opinions rendered.

The fair trial claim concerning the *in absentia* nature of the U.S. proceedings was also dismissed. The Human Rights Committee noted that Weiss continued to have his legal representatives present at the trial, but also held that "no question of a violation of the Covenant by the

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vol. 2 (2003) annex VI.FF (views adopted 3 April 2003), reprinted in (2003) 10 I.H.R.R. 685 [*Weiss*].

129. *Weiss v. Austria*, no. 74511/01, [2002] VI E.C.H.R. 1 at 4.

130. *Weiss*, *supra* note 128 at para. 9.4.

State Party can arise on the basis of the pronouncement of the author's conviction and sentence in another State."[131] Austria was, however, found in violation for having extradited Weiss while his case was pending before the Human Rights Committee, illustrating the stricter view now taken under the *ICCPR* with respect to interim measures.[132] But while the extradition took place, the promised re-sentencing never did,[133] putting into question any presumptions about the reliability of extradition on assurance.

Only two extradition cases have been lodged with the Human Rights Committee since *Weiss*, and both have been ruled inadmissible. In one case, a fair trial claim was attempted on the grounds that the fugitive would receive a lesser sentence if tried in the sending state.[134] In the other, a family rights claim was made on the grounds that the fugitive's extradition would leave an elderly wife alone and in hospital.[135] In the first case, the Committee avoided the fair trial claim by noting the hypothetical nature of the sentencing proceedings, while in the second case, it used the opportunity to confirm that "extradition as such does not fall outside the protection of the Covenant," noting specifically that Articles 6, 7, 9 and 13 are "necessarily applicable in relation to extradition." However, it further held that the consideration of an extradition request, even when decided by a court, "does not amount to the determination of a criminal charge in the meaning of Article 14," and thus does not trigger the various fair trial guarantees found in Articles 14(2) and (3) of the *ICCPR*.[136] The Committee also found the

131. *Ibid.* at para. 9.2.

132. Compare with Canada's earlier views on interim measures requests in *Kindler* and *Ng*. See text associated with note 66 above. On the evolution of this stricter view, see Harrington, "Punting Terrorists", *supra* note 66.

133. Bruce Zagaris, "U.S. Court denies U.S. Government Weiss Resentence Motion Despite Austrian Conditions" (2002) 18:10 *International Enforcement Law Reporter* 402.

134. *Piscioneri v. Spain*, Communication No. 956/2000, UN Doc. CCPR/C/78/D/956/2000, *Report of the Human Rights Committee*, UN GAOR, 58th Sess., Supp. No. 40, UN Doc. A/58/40, vol. 2 (2003) annex VI.M (decision adopted 7 August 2003).

135. *Everett v. Spain*, Communication No. 961/2000, UN Doc. CCPR/C/81/D/961/2000, *Report of the Human Rights Committee*, UN GAOR, 59th Sess., Supp. No. 40, UN Doc. A/59/40, vol. 2 (2004) annex X.F (decision adopted 9 July 2004) [*Everett*].

136. *Ibid.* at para. 6.4.

family rights claim to be inadmissible, holding that "while deprivation of liberty may affect personal relationships to a certain extent, that does not in itself entail a violation of the Covenant."[137]

Thus, the cases of *Ng* and *Kindler*, as modified by *Judge*, mark the high point for the Human Rights Committee's extradition jurisprudence, with the right to life and the prohibition on serious forms of ill treatment being the accepted grounds for challenging extradition under the *ICCPR*. None of these cases has received more than the barest comment in Canada. After *Judge*, Canada's national newspaper reported that:

> [a] United Nations committee has ruled Canada shirked its international responsibilities when it deported a convicted killer to the United States in 1998 even though he faced a death sentence. The UN Human Rights Committee dismissed Canada's arguments that its decision to deport Roger Judge didn't constitute cruel and unusual punishment under the Charter of Rights.[138]

This is the full extent of the commentary that can be found.

V. Reconciling the *ICCPR* and Extradition Obligations

A. A Present Violation for an Anticipated Breach

It was once thought that extradition as such was beyond the scope of a human rights treaty, since such treaties contain no right *not* to be extradited, nor an absolute right *to* asylum. Moreover, with respect to at least the *ICCPR*, the treaty's drafters had intended expressly to exclude extradition from the treaty's scope, as pointed out by counsel for Canada in the submissions in *Kindler*,[139] *Ng*[140] and *Cox*.[141] But the

137. *Ibid.* at para. 6.5.
138. "Canada in Brief: Canadian deportation inappropriate, UN rules" *The Globe and Mail* (28 August 2003) A7.
139. *Supra* note 58 at para. 9.2.
140. *Supra* note 59 at para. 9.2.
141. *Supra* note 60 at para. 9.4.

Human Rights Committee's extradition jurisprudence also demonstrates that matters apparently falling outside the scope of a human rights treaty may nonetheless engage that treaty's application if the anticipated consequences attract serious human rights concerns. In 2004, the Human Rights Committee rephrased this point, holding that "extradition as such does not fall outside the protection of the Covenant" and in fact noting that "several provisions, including Articles 6, 7, 9 and 13, are necessarily applicable in relation to extradition."[142] Thus, while an extradition treaty may govern the terms and conditions of an act of surrender, that treaty's occupation of the extradition field does not preclude a role for the human rights obligations of another treaty, particularly one intended by states to operate within the international legal order as an international bill of rights.

The international case law on extradition also addresses the issue of extraterritoriality, raised as a concern by the domestic courts because of the fact that the human rights violation, if it does take place, occurs beyond the borders of the extraditing state.[143] Pursuant to the terms of both the *ICCPR* and the *ICCPR-OP1*, a State Party is required to guarantee the rights within the treaty to all persons "within its territory" and "subject to its jurisdiction," respectively.[144] But the Human Rights Committee held in *Kindler*[145] that even though extradition involves the surrender of an individual from one jurisdiction to another, "if a State Party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State Party itself may be in violation of the

142. *Everett*, *supra* note 135 at para. 6.4.

143. McLachlin J., as she then was, in *Kindler v. Canada*, *supra* note 61 at 846, suggests that applying the domestic guarantee against cruel and inhuman treatment directly to the act of surrender "is to overshoot the purpose of the guarantee and to cast the net of the *Charter* broadly in extraterritorial waters."

144. *ICCPR*, *supra* note 1, art. 2(1) and *ICCPR-OP1*, *supra* note 25, art. 1.

145. Only two members dissented on this point. Kurt Herndl and Waleed Sadi favoured limiting this test to exceptional circumstances where reasonable cause has been shown to believe that an extraditee's basic human rights would be violated if extradited. *Kindler*, *supra* note 58 at appendix A.

Covenant."[146] If this were not so, a state's duties under the *ICCPR* would be negated by the surrender of a person to a state where treatment contrary to the *ICCPR* was certain to occur or was the very purpose behind the surrender.[147]

In this respect, the decisions of the Committee in *Kindler*, *Ng* and *Cox* complement the decision of the European Court of Human Rights in *Soering*,[148] the latter case having been cited by the Supreme Court of Canada in the domestic proceedings in *Kindler v. Canada*,[149] and more recently in *Burns*.[150] Both international institutions have taken the position that the foreseeability of a serious future breach of an individual's fundamental rights leads to a violation of the human rights treaty commitments of the sending state, even when those consequences take place within a state that is not bound by the standards of the human rights treaty being invoked. And yet, while reference is made by the Supreme Court of Canada in *Burns* to the position taken by the European Court of Human Rights, a court that cannot bind a non-European state such as Canada, no mention is made of the international case law on extradition under the *ICCPR*, including that directly involving Canada. This is so despite a willingness in *Burns* to cite several international sources in support of a perceived "international trend" towards the abolition of the death penalty.

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146. *Ibid.* at para. 6.2.

147. *Ibid.*; *Ng*, *supra* note 59 at para. 6.2.

148. *Supra* note 2. The *Soering* decision has prompted much commentary on the subject of extradition and human rights: see *e.g.* Stephan Breitenmoser and Gunter E. Wilms, "Human Rights v. Extradition: The *Soering* Case" (1990) 11 Mich. J. Int'l L. 845, Richard B. Lillich, "The *Soering* Case" (1991) 85 Am. J. Int'l L. 128, Michael O'Boyle, "Extradition and Expulsion under the European Convention on Human Rights: Reflections on the *Soering* Case" in James O'Reilly, ed., *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Dublin: Round Hall, 1992) 93; Michael P. Shea, "Expanding Judicial Scrutiny of Human Rights in Extradition Cases after *Soering*" (1992) 17 Yale J. Int'l L. 85; Christine Van den Wyngaert, "Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?" (1990) 39 I.C.L.Q. 757. See also John Dugard & Christine Van den Wyngaert, "Reconciling Extradition with Human Rights" (1998) 92 Am. J. Int'l L. 187.

149. *Supra* note 61 at 856.

150. *Supra* note 5 at paras. 53, 119, 137.

But the real issue for debate within extradition law is not whether a sending state can be held responsible for a real risk of a rights violation in the receiving state, but *which rights* may be used to ground such a challenge. This is a crucial point, as there is no right against extradition *per se*. If too many rights can be used to ground a challenge to extradition, the result is tantamount to the creation of a right against extradition *per se*. This may explain why the Human Rights Committee has not granted admissibility to a complaint against surrender on any right other than the right to life and the right to be free from torture and other forms of serious ill-treatment, although the European Court of Human Rights has suggested that in an exceptional case, a flagrant denial of the right to a fair trial could also bar extradition.[151] Some States Parties to the *ICCPR* have engaged with this debate by suggesting that only the most fundamental of human rights should form the basis for a challenge to a state's decision to surrender,[152] with irreparability or non-derogability being possible indicators of what is a "most fundamental" human right. Unfortunately, from the perspective of clarity, the Human Rights Committee has declined to provide a definitive response, although in a General Comment adopted in 2004 on the nature of a state's responsibility under Article 2(1),[153] the Committee may have opened the door, if only a bare crack, to the argument that rights other than those to life and humane treatment may ground a challenge to extradition. According to this General Comment:

> [T]he article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, *such as* that contemplated by Articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[154]

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151. *Soering*, *supra* note 2 at para. 113.

152. See the arguments of Australia in *A.R.J. v. Australia*, *supra* note 110 at para. 4.12 and *T. v. Australia*, *supra* note 111 at para. 5.13.

153. General Comment 31, *Report of the Human Rights Committee*, UN GAOR, 59th Sess., Supp. No. 40, UN Doc. A/59/40, vol. 1 (2004) annex III (views adopted 29 March 2004).

154. *Ibid.* at para. 12 [emphasis added].

As a result, there may be room for dialogue as between the international body and the domestic authorities of the States Parties to the *ICCPR* with respect to the identification of the rights that may ground a human rights challenge to extradition.

B. Right to Life Challenges to Extradition

The Human Rights Committee regards the right to life as "the most fundamental"[155] of all human rights and, as established in the Canadian trilogy, it can be used as the basis for challenging a sending state's decision to extradite in circumstances where the fugitive offender will face the death penalty in the receiving state. While no violation of the right to life was found on the facts of *Kindler*, *Ng* and *Cox*, the views of the Committee clearly indicate that a violation could be established if a state extradites an individual where there is a real risk of a violation of the express restrictions in Article 6, or where the decision to extradite was taken arbitrarily or summarily. Thus, even before the *Judge* decision of 2003,[156] States Parties to the *ICCPR* were given two broad categories within which to test a proposed extradition's compliance with the right to life: the restrictions category and the arbitrary conduct category.

The restrictions category takes into account the specific wording of Article 6, which on examination reveals four restrictions of significance. These restrictions limit a State Party's ability to extradite to a death penalty state, even when the other state is not a party to these restrictions, by determining the content of the extraditing state's obligation to ensure respect for the right to life. The restrictions are derived from Article 6(2), which reserves imposition of the death penalty to only "the most serious crimes"; Article 6(4), which requires anyone sentenced to death to have a right to seek pardon or commutation; and Article 6(5), which prohibits the death penalty for "crimes committed by persons below eighteen years of age" and for pregnant women. Article 6 also, by extension, requires the sending state to make inquiries about the criminal justice system of the other state so as to ensure that these obligations are met. In my view, this duty of

155. *T. v. Australia*, *supra* note 111 at para. 8.1.

156. *Supra* note 120.

inquiry is the key means for reconciling the obligations of an extradition treaty with those of a human rights treaty.

Prior to the adoption of views in *Judge*, it was also argued that a fifth restriction existed for those states that were party to the *ICCPR-OP2*, since this additional treaty in essence amended the right to life in Article 6 so as to abolish the death penalty absolutely. Support for this view can be found in *Kindler*, *Ng* and *Cox*, which were predicated on the fact that Article 6 limited but did not abolish the death penalty. Support can also be found in *T. v. Australia*, where the Human Rights Committee referred to the provisions of the *ICCPR-OP2* as additional grounds on which a violation could be based had the complainant in that case met the foreseeable and necessary consequence test.[157] But in *A.R.J. v. Australia*, the Human Rights Committee stated that it "[did] not consider that the terms of [A]rticle 6 necessarily require[d] Australia to refrain from deporting an individual to a state which retains capital punishment,"[158] even though Australia was a party to the *ICCPR-OP2*.

Thankfully *Judge* has now clarified this point, with the Human Rights Committee taking the position that extradition from a country which has abolished the death penalty to a country that has not, is now a violation *per se* of Article 6; it matters not whether the abolitionist state has ratified the *ICCPR-OP2*.[159] There are thus two permitted interpretations of Article 6 according to the body established by states to give such guidance. For abolitionist states, the correct interpretation of Article 6 is one solely based on Article 6(1) and does not admit of any exceptions since those are only applicable, in the words of Article 6(2), "[i]n countries which have not abolished the death penalty." By definition, an abolitionist state cannot make possible, even indirectly, an individual's execution. This means that an abolitionist state cannot extradite a fugitive to a retentionist state without first ensuring, by inquiry, that the death sentence will not be carried out. But for retentionist states, the right to life is correctly interpreted so as to include the obligations set out in Articles 6(2), 6(4) and 6(5), which allow for the continued use of the death penalty subject to the four

157. *T. v. Australia*, *supra* note 111 at paras. 8.3 and 8.5.

158. *Supra* note 110 at para. 6.13.

159. *Judge*, *supra* note 120 at para. 10.6.

restrictions discussed above. Thus, a retentionist state can extradite to another retentionist state, provided it makes the appropriate enquiries to ensure respect for the four restrictions.

As for the second category of concern, that of arbitrariness, this is derived from the express words of Article 6(1): "No one shall be arbitrarily deprived of his life." Canada was able to avoid a finding of arbitrariness in the extradition trilogy by showing that it gave full and careful consideration to its own policy of abolition when considering whether to seek assurances about the death penalty. However, with the adoption of views in *Judge*, full and careful consideration is not enough. An abolitionist state is now obliged to seek assurances that the death penalty will not be carried out in order to avoid a *per se* violation of its own obligation to ensure respect for the right to life. Arbitrariness can, however, still be an applicable standard of measuring compliance for retentionist states, ensuring, for example, that fugitives are afforded access to any available appeals process.

C. Fair Treatment Challenges to Extradition

It is also clear under international law that an extraditing state cannot send an individual to face a real or substantial risk of torture or other form of cruel, inhuman or degrading treatment or punishment in the state requesting the extradition. This obligation is absolute and non-derogable. It finds legal support with respect to torture in Article 3 of the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[160] and with respect to all forms of serious ill-treatment, including torture, in Article 7 of the *ICCPR*. It is further supported by the jurisprudence associated with these provisions and the Human Rights Committee's General Comment 20.[161] The key question, however, is what constitutes torture or cruel and inhuman

160. 10 December 1984, 1465 U.N.T.S. 85, (1984) 23 I.L.M. 1027, as amended by (1985) 24 I.L.M. 535, Can. T.S. 1987 No. 36 (entered into force 26 June 1987, ratification by Canada 24 June 1987) [*UNCAT*].

161. *Report of the Human Rights Committee*, UN GAOR, 47th Sess., Supp. No. 40, UN Doc. A/47/40 (1994) annex V1.

treatment within the meaning of the prohibition so as to qualify as a bar on extradition.

The international case law on extradition to face the "death row phenomenon" offers some guidance, as well as the prospect for dialogue given that the Human Rights Committee has held, in contrast to the European Court of Human Rights,[162] that prolonged detention on death row does not, of itself, constitute a violation of the prohibition on inhuman and degrading treatment. But the Human Rights Committee has also emphasized that each case must be examined on its facts with due regard to the personal factors of the fugitive, the specific conditions of the anticipated detention and the proposed method of the sentence.[163] Thus, age and mental capacity, as well as prison conditions in general, may ground a challenge to extradition on the basis of a real risk of future mistreatment, as would abhorrent methods of execution, such as gas asphyxiation, for extradition as between retentionist states.[164]

This case law also suggests that extradition to states that impose sentences of amputation or corporal punishment should be barred. The Human Rights Committee's views in *A.R.J. v. Australia* showed some discomfort with the future prospect of 20 to 74 lashes, notwithstanding the conclusion that the risk of such a sentence had not been shown to meet the foreseeability test.[165] States, however, may take comfort in the sheer reticence of the Human Rights Committee to express any discomfort in *Weiss* concerning a prison sentence of 845 years,[166] and in the fact that an unfair treatment claim against extradition has been made

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162. *Soering*, *supra* note 2.

163. *Kindler*, *supra* note 58 at paras. 15.2-15.3; *Ng*, *supra* note 59 at para. 16.1.

164. *Ng*, *ibid.*

165. *A.R.J. v. Australia*, *supra* note 110 at para. 6.14. In other cases, the Human Rights Committee has held that corporal punishment *per se* constitutes prohibited treatment: *Higginson v. Jamaica*, Communication No. 792/1998, UN Doc. CCPR/C/74/D/792/1998, *Report of the Human Rights Committee*, UN GAOR, 57th Sess., Supp. No. 40, UN Doc. A/57/40, vol. 2 (2002) annex IX.Q (views adopted 28 March 2002), reprinted in (2002) 9:4 I.H.R.R. 959, and *Sooklal v. Trinidad and Tobago*, Communication No. 928/2000, UN Doc. CCPR/C/73/D/928/2000, *Report of the Human Rights Committee*, UN GAOR, 57th Sess., Supp. No. 40, UN Doc. A/57/40, vol. 2 (2002) annex IX.FF (views adopted 25 October 2001), reprinted in (2002) 9:1 I.H.R.R. 31 (both cases concerned with sentences of whipping).

166. *Weiss*, *supra* note 128 at para. 9.4.

successfully in only one case, *Ng*, and even then on very narrow grounds.

Nevertheless, the potential to challenge extradition on the basis of future ill-treatment has been expressly acknowledged by the Human Rights Committee,[167] with such challenges also benefiting from Article 10 of the *ICCPR*, which guarantees "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Unlike Article 7, Article 10 is a derogable right thus open to restriction during an emergency. Still, Article 10 is viewed by the Human Rights Committee as "a fundamental and universally applicable rule,"[168] the application of which cannot be dependent on a state's material resources.[169] Thus, prisons in poor and rich states alike must meet certain minimum standards with respect to such matters as lighting, heating, ventilation, bedding, food, healthcare and hygiene. These standards are found in several non-binding international instruments that are given effect by the Human Rights Committee through Article 10.[170] Disciplinary practices, including the use of solitary confinement, must also meet these minimum standards, as must an inmate's ability to access information about his or her rights. Thus, in theory, extradition to face a real risk of prison conditions and practices that fall below these standards could be found in breach of Article 10 or Article 7 in conjunction with Article 10.

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167. *Everett*, *supra* note 135.

168. See General Comment 21, *Report of the Human Rights Committee*, UN GAOR, 47th Sess., Supp. No. 40, UN Doc. A/47/40 (1994) annex VI.B at para. 4, replacing General Comment 9 in *Report of the Human Rights Committee*, UN GAOR, 37th Sess., Supp. No. 40, UN Doc. A/37/40 (1982) annex V.

169. *Ibid.*

170. The Human Rights Committee suggests in its General Comment (*ibid.* at para. 5) that these standards can be found in the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978), and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982). See also Nigel S. Rodley, *The Treatment of Prisoners under International Law*, 2d ed. (Oxford: Clarendon Press, 1999).

D. *Fair Procedure and Fair Trial Challenges to Extradition*

As established in *Giry*,[171] acknowledged in *Kindler*,[172] and confirmed by the Human Rights Committee in its General Comment 15 on the position of aliens under the *ICCPR*,[173] extradition proceedings must comply with the rights respecting expulsion guaranteed by Article 13. This is so even though a plain reading of Article 13 suggests that the provision applies only to aliens "lawfully in the territory of a State Party," while most fugitives wanted for extradition have escaped prosecution or prison by entering another state both illegally and covertly. Nevertheless, the Human Rights Committee has included Article 13 in its list of provisions "necessarily applicable in relation to extradition,"[174] and it is understood that while Article 13 should not detract from what the Committee has called "normal extradition arrangements," the "general guarantees of Article 13 in principle apply."[175] This ensures a level playing field with the more sophisticated criminals who obtain permission to enter a foreign state to conduct legitimate activities as a cover for their criminal operations.

However, Article 13 provides for procedural protections only; it does not provide substantive grounds for opposing extradition.[176] Thus, Article 13 provides protection against arbitrary extraditions. It ensures that fugitives are afforded the opportunity to submit reasons against their extradition and to have their cases reviewed by a competent authority, unless the State Party is prevented from doing so by compelling reasons of national security. This latter abrogation of the right is expressly included in the wording of Article 13. But so long as a state's extradition procedure includes these basic rights, and has a basis

171. *Supra* note 50.

172. *Supra* note 58 at para. 6.6.

173. Found in *Report of the Human Rights Committee*, UN GAOR, 41st Sess., Supp. No. 40, UN Doc. A/41/40 (1986) annex VI.

174. *Everett*, *supra* note 135 at para. 6.4.

175. *Kindler*, *supra* note 58 at para. 6.6.

176. *Stewart v. Canada*, Communication No. 538/1993, UN Doc. CCPR/C/58/D/538/1993, *Report of the Human Rights Committee*, UN GAOR, 52d Sess., Supp. No. 40, UN Doc. A/52/40 vol.2 (1997) annex VI.G at para. 5.1 (views adopted 1 November 1996), reprinted in (1999) 115 I.L.R. 318, (1997) 4 I.H.R.R. 418.

in domestic law, there will likely be no violation of Article 13 absent the sort of egregious circumstances found in cases like *Giry*.[177]

Persons detained, including those arrested for extradition, may also seek protection from treaty provisions designed to protect liberty rights and prohibit arbitrary arrest and detention. This general right may also contain specific guarantees, such as those in Article 9 of the *ICCPR*, which provide for the prompt production of reasons upon arrest, a trial within a reasonable time, and a decision on the lawfulness of detention without delay. Although the Human Rights Committee accepts that some parts of Article 9 apply only to persons charged with criminal offences, "the rest, and in particular the important guarantees laid down in paragraph 4, *i.e.* the right to control by a court of the legality of detention, applies to all persons deprived of their liberty by arrest or detention."[178] Article 9 may therefore apply to extradition, providing persons detained for extradition with the right to have the lawfulness of their detention determined by a court.

This provision in essence codifies the common law right to *habeas corpus*, although Article 9, and in particular Article 9(4), has been successfully invoked in only one extradition case, that of *Torres*.[179] Notably, in that case, the extraditee was detained by the security police through means that meant he could not challenge the lawfulness of his detention before a court. In all other extradition cases where Article 9 has been invoked, including *Kindler*, *Ng* and *Cox*, the complaint has not survived preliminary challenges to admissibility. Without admissibility, the claim does not proceed for a determination on the merits. As a result, no firm guidelines exist as to the correct approach under international law to Article 9 in an extradition case, but a challenge will likely be unsuccessful if the detention was made pursuant to some specified legal basis.[180] As for the issue of delay in determining legality,

177. *Supra* note 50 at para. 5.5.

178. General Comment 8, *Report of the Human Rights Committee*, UN GAOR, 37th Sess., Supp. No. 40, UN Doc. A/37/40 (1982) annex V at para. 1.

179. *Supra* note 45.

180. The onus will likely be on the state to specify the legal basis of the detention: *Domukovsky v. Georgia*, Communication No. 623/1995, UN Doc. CCPR/C/62/D/623/1995, *Report of the Human Rights Committee*, UN GAOR, 53d Sess., Supp. No. 40, UN Doc. A/53/40, vol.

the Human Rights Committee has shown some timidity in declining to set precise deadlines, opting instead for an assessment on a case-by-case basis.[181]

This leaves the more general right to a fair and public trial before an independent and impartial tribunal, found in all major international human rights instruments, as the remaining basis for a fair trial challenge to extradition. The Human Rights Committee has recently confirmed that "in cases where . . . the judiciary is involved in deciding about extradition, it must respect the principles of impartiality, fairness and equality,"[182] as enshrined in Article 14(1) and reflected, according to the Committee, in Article 13.[183] However, it is also clear from the Canadian extradition trilogy, and in particular *Cox*,[184] that it will not suffice to simply assert that the criminal justice system of an extradition partner state is incompatible with the *ICCPR*. Such claims cannot be made *in abstracto* and evidence must be marshalled to show that a real risk of trial unfairness exists in the receiving state as a necessary and foreseeable consequence of extradition. This also means, given the composite nature of the right to a fair trial, a fugitive must show that there is no genuine opportunity to challenge, and correct on appeal, any particular incidents of trial unfairness, thus making a fair trial challenge to extradition very difficult. The one exception — that concerning the admission of evidence obtained by torture[185]— is rationalized more as a deterrent to the commission of torture than support for a fair trial exception to extradition.

As for specific aspects of the right to a fair trial, detailed in separate paragraphs in Article 14, it is the view of the Human Rights Committee that "even when decided by a court the consideration of an extradition request does not amount to the determination of a criminal charge in

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2 (1998) annex XI.M at para. 18.2 (views adopted 6 April 1998), reprinted in (1999) 6 I.H.R.R. 55.

181. *Torres*, *supra* note 45 at para. 7.3.

182. *Everett*, *supra* note 135 at para. 6.4.

183. *Ibid.*

184. *Supra* note 60 at para. 10.4.

185. Article 15 of *UNCAT*, *supra* note 160, obliges a State Party to "ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture. . . ."

the meaning of Article 14."[186] Consequently, the rights of persons charged with a criminal offence found in Articles 14(2) and (3), including the right to be tried in one's presence, cannot ground an international human rights challenge to extradition.[187] A similar hesitancy has been expressed by the Human Rights Committee with respect to the right to an appeal found in Article 14(5) of the *ICCPR*, with Committee member Christine Chanet stating in *Judge*:

> [W]hile the Committee can declare itself competent to assess the degree of risk to life (death sentence) or to physical integrity (torture), it is less obvious that it can base an opinion that a violation has occurred in a State Party to the Covenant on a third State's failure to observe a provision of the Covenant.[188]

To hold otherwise would make the sending state accountable for another state's record *vis-à-vis* a much larger catalogue of rights in the *ICCPR* and Chanet expresses concern about the legal and practical problems that would arise. The same logic may also explain the non-application of Article 14(7), which provides that "no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." It is the position of the Human Rights Committee that Article 14(7) "prohibits double jeopardy only with regard to an offence adjudicated in a given state," and not as between the national jurisdictions of two or more states.[189]

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186. *Everett*, *supra* note 135 at para. 6.4.

187. See also *Weiss*, *supra* note 128 at para. 9.2.

188. *Judge*, *supra* note 120 at appendix 1.B.

189. *A.P. v. Italy*, Communication No. 204/1986, UN Doc. CCPR/C/31/D/204/1986, *Report of the Human Rights Committee*, UN GAOR, 43d Sess., Supp. No. 40, UN Doc. A/43/40 (1988) annex VIII.A at para. 7.3 (decision adopted 2 November 1987); *A.R.J. v. Australia*, *supra* note 110 at para. 6.4.

E. Other Human Rights Challenges to Extradition

The jurisprudence of the Human Rights Committee further suggests that family rights, in the sense of the right of the family unit to be free from arbitrary and unlawful interference and the right of the family unit to receive protection by the state, are an unlikely basis for successfully challenging extradition, even by a fugitive with established ties in the extraditing state. Such a claim would rely on Articles 17 and 23 of the *ICCPR*. But "while deprivation of liberty may affect personal relationships to a certain extent, [this] does not in itself entail a violation of" a human rights treaty.[190] The case law establishes that the mere fact that one member of a family is entitled to remain in the state while another member of a family is required to leave does not necessarily constitute an unlawful interference with family rights.[191] To establish a violation, the interference with family life must be shown to be either unlawful or arbitrary, with the latter leading to a balancing exercise that weighs the significance of the state's reasons for removal against the adverse consequences such a removal imposes on family life.[192] Given this test, it is unlikely that the impact on family life would shield a parent from extradition in light of the significance attached to criminal law enforcement as a reason for surrender.

The last right worth noting is that of equality. Article 26 of the *ICCPR* guarantees that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law."[193] This provision was invoked in *Ng*, *Cox* and *Kindler* to challenge an alleged racial bias in the U.S. criminal justice system with respect to the imposition of the death penalty. In all three cases, the challenges were

190. *Everett*, *supra* note 135 at para. 6.5.

191. *Winata v. Australia*, Communication No. 930/2000, UN Doc. CCPR/C/72/D/930/2000, *Report of the Human Rights Committee*, UN GAOR, 56th Sess., Supp. No. 40, UN Doc. A/56/40, vol. 2 (2001) annex X.T at para. 7.1 (views adopted 26 July 2001), reprinted in (2001) 8 I.H.R.R. 956; *Madafferi v. Australia*, Communication No. 1011/2001, UN Doc. CCPR/C/81/D/1011/2001, *Report of the Human Rights Committee*, UN GAOR, 59th Sess., Supp. No. 40, UN Doc. A/59/40, vol. 2 (2004) annex IX.Y at para. 9.7 (views adopted 28 July 2004), reprinted in (2005) 12 I.H.R.R. 111 [*Madafferi*].

192. See the separate dissenting opinion of Martin Scheinin in *T. v. Australia*, *supra* note 111. See also *Madafferi*, *ibid.* note 191 at para. 9.8.

193. *Supra* note 1.

declared inadmissible in light of the material made available to the Committee to support the claim. As with claims under Article 14, a claim under Article 26 on racial, religious, political or "any other grounds" cannot simply assert that the criminal justice system of the state requesting extradition is discriminatory. Thus while a claim is possible, the message from the Human Rights Committee to applicants is that convincing evidence is needed to show that discrimination against the fugitive in the receiving state flows as a necessary and foreseeable consequence of the extradition. This evidence may well be available today with respect to a link between racism and capital punishment.

However, another application for Article 26 in extradition matters has been advanced in the dissenting opinions of Committee members Lallah and Chanet who argued in *Kindler* and *Ng* that a claim of discrimination could be based on the difference and inequality between the treatment awaiting a fugitive in the receiving state and the treatment he would receive for the same offence in the extraditing state. As Lallah explained in his dissenting opinion in *Kindler*: "[D]ifferent and unequal treatment may be said to have been meted out to Mr. Kindler when compared with the treatment which an individual having committed the same offence would receive in Canada."[194] This position is surely incorrect since extradition law has never imposed an obligation of equivalence with respect to sentencing. Provided the sentence is not of a kind that attracts concern under the prohibition on inhuman and degrading treatment, mere differences in sentencing practices do not suffice as valid human rights grounds for refusing extradition.

Conclusion

As this review has demonstrated, fugitives wanting to challenge extradition do not "win" easily at the international level. Much of the international case law supports and validates the decisions made by states to extradite. Nevertheless, the bedrock principle has been established: a state's decision to extradite can attract consequences for that state under an international human rights treaty even if (or perhaps, especially when) the

194. *Supra* note 58 at appendix C, para. 5.

state requesting the extradition is a not a party to the human rights treaty being invoked, and even if the obligation to extradite is supported by an extradition treaty. The test for finding such a violation is whether the anticipated consequences of the extradition to the individual concerned constitute a real and substantial risk that flows as a necessary and foreseeable consequence from the decision to extradite, with the grounds for such a violation being limited, at least internationally, to the right to life and the right to be free from serious forms of ill-treatment such as torture. Canada's domestic jurisprudence, by contrast, has rejected the cruel and inhuman treatment basis for a human rights exception to extradition, preferring instead to rely on a more ephemeral right to "fundamental justice" crafted from section 7 of the *Charter*.[195] Yet the rationale for such an exception, at least from the international perspective, is clearly based on the exceptional nature of the right being invoked — it being a right that admits of few or no exceptions, and one that is non-derogable even in times of emergency.

In reconciling an extradition treaty obligation with a human rights treaty obligation, it is also clear that the international human rights treaty, at least in the view of the international body created by states to ensure its supervision, has a certain quasi-constitutional character within the international legal order that requires states to carry out their international law commitments, including their extradition treaty commitments, in a manner consistent with the human rights obligations imposed by the human rights treaty. This leads to an obligation being imposed on the domestic authorities within a state to inquire into the human rights consequences of a decision to extradite. This duty of inquiry extends to both the executive branch and the courts of a sending state since both are involved in authorizing the act of surrender. Courts must no longer avoid the consideration of the human rights consequences of an extradition, at least with respect to future risks of torture and other forms of serious ill-treatment, out of fear of interfering with Canada's international relations — relations that are predicated on respect for human rights. And yet, despite the pursuit of several significant Canadian extradition cases at the international level, there remains no discussion of either Canada's obligations under the

195. As discussed in Harrington, "Role for Human Rights", *supra* note 3.

ICCPR, or the resulting international extradition jurisprudence, in the judgments of Canada's courts or in the public record of the proceedings of the House of Commons.

It cannot be because these decisions are inaccessible or unknown. *Both* the domestic and international decisions in the *Kindler* and *Ng* cases have been cited by the South African Constitutional Court.[196] The New Zealand Supreme Court has had no difficulty in referring in its judgments to the views of the Human Rights Committee, including those in *Kindler*,[197] albeit that these views carry only persuasive weight. Brief cites to a Committee view can also be found in the decisions of the Privy Council acting as the highest court for both the Bahamas,[198] and Trinidad and Tobago.[199] It would be peevish to suggest that the Supreme Court of Canada has ignored the *ICCPR*'s case law because of the finding of a violation in *Ng*. At the same time, it cannot be pretended that the Court has no knowledge of these decisions,[200] although there may be a lack of citation, or accurate citation, to the Committee's views by counsel appearing before the Canadian courts.[201] There may also be a need for training with respect to international human rights databases.

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196. *State v. Makwanyane*, [1995] 3 S. Afr. L.R. 391, (1995) 6 B. Const. L.R. 665, reprinted in (1995) 127 I.L.R. 321 at paras. 63-67 (Const. Ct.) [*Makwanyane*].

197. *Zaoui v. Attorney-General (No. 2)*, [2006] 1 N.Z.L.R. 289 at para. 79 (N.Z.S.C.).

198. *Higgs v. Minister of National Security*, [1999] U.K.P.C. 55, [2000] 2 A.C. 228, [2000] 2 W.L.R. 1368 at para. 84.

199. *Boodram v. Baptiste*, [1999] U.K.P.C. 30, [1999] 1 W.L.R. 1709 at para 2.

200. In an article chastising the U.S. Supreme Court for failing to take part in the international dialogue on rights by not citing the decisions of foreign courts and "the various decisions written by United Nations and European human rights decision-making bodies," former Supreme Court Justice Claire L'Heureux-Dubé assures us that "jurists around the world are increasingly trained in international human rights law." Claire L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" (1998-99) 34 Tulsa L.J. 15 at 40 and 24 respectively.

201. A passing reference is made by the Supreme Court to several Committee views in the spanking case of *Canadian Foundation for Children, Youth and the Law v. Canada A.G.*, [2004] 1 S.C.R. 76 at para. 33, but the Court does not even provide the case names, thus treating the Committee's views as just another UN report. A better example of a Supreme Court citation, and engagement, with a Committee view, can be found in the hate speech case of *R. v. Keegstra*, [1990] 3 S.C.R. 697 at paras. 70 and 211, but this case was decided in 1990, leaving over a decade of silence in the "dialogue" embraced by Justice L'Heureux-Dubé. L'Heureux-Dubé, *supra* note 200.

This lack of engagement within Canada with the views of the Human Rights Committee in matters of extradition stands in contrast with recent writings suggesting a general openness in Canada to dialogue with international tribunals.[202] In raising this issue, I do not dispute the possible occurrence of such transnational dialogues, much talked about in recent American scholarship,[203] but I question whether, in the Canadian context, one can simply assume that they take place as between courts and quasi-judicial international tribunals given the absence of dialogue in significant cases such as those concerning extradition. Perhaps the reason for the Court's silence is simply its greater familiarity with, and a greater respect for, the work product of international tribunals such as the European Court of Human Rights. But if this is so, greater interaction with the decisions of the Human Rights Committee could serve to encourage improvement in their reasons. The Committee has, after all, shown its openness to considering the jurisprudential contributions of the Supreme Court of Canada, as evidenced by its express reference to *Burns* in its views in *Judge*.

A more subtle rationale for the apparent silence of the Court with respect to the extradition jurisprudence of the Human Rights Committee

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202. See *ibid.* See also Kent Roach, "Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States" (2006) 4 Int'l J. Const. L. 347 at 367, in which he states: "Anglophone merchants subsequently made successful complaints of discrimination to the United Nations Human Rights Committee illustrating that, in Canada, the dialogue between courts and legislatures is not confined to the domestic level." The author's enthusiasm is somewhat tempered in Kent Roach, "Constitutional, Remedial, and International Dialogues about Rights: The Canadian Experience" (2004-05) 40 Tex. Int'l L.J. 537 at 553-64. For recognition of the dialogic prospects that exist as between the British Parliament, the Judicial Committee of the House of Lords and the European Court of Human Rights, see Joanna Harrington, "The British Approach to Interpretation and Deference in Rights Adjudication" (2004) 23 Sup. Ct. L. Rev. (2d) 269 at 297, reprinted in Grant Huscroft & Ian Brodie, eds., *Constitutionalism in the Charter Era* (Toronto: LexisNexis, 2004).

203. See further, Anne-Marie Slaughter, "A Typology of Transjudicial Communication" (1994–1995) 29 U. Rich. L. Rev. 99, Anne-Marie Slaughter, "Judicial Globalization" (1999–2000) 40 Va. J. Int'l L. 1103, and Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44 Harv. Int'l L.J. 191. See also Norman Dorsen, "The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer" (2005) 3 Int'l J. Const. L. 519.

may be a supreme court's sense of being supreme, with finality (albeit fallible) being a goal worthy of protection for the coherence of the domestic legal system. A court that serves as the domestic "last word" may not wish to telegraph even a suggestion of ceding jurisdiction to an international body that appears to serve as some sort of final court of appeal on the international plane, even if its holdings are non-binding and recommendatory. Although there is an argument that the Court's silence may be the correct response given the absence of even an implied provision in Canadian law requiring the domestic consideration of the Committee's case law,[204] there is also the concern about coherence between Canada's obligations on the international and domestic planes. It is not a question of whether the Human Rights Committee is a partner worthy of dialogue, but a question of respect for Canada's decision to allow individuals the right of international petition — a right that means nothing if there is no discussion afterwards of the eventual outcome. This right of international petition should also mean that Canada is entitled to rely on international approval for its position when it "wins" at the international level. Dialogue theories transposed to the international arena need to address these concerns, while also recognizing the absence of dialogue in a field as inherently international as extradition. It would also be wise when criticizing others not to overplay our perceived "internationalism" — at least not without recognizing, or questioning, why this internationalism has not extended to the cases involving Canada before the UN Human Rights Committee.

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204. By contrast, s. 2(1) of the Human Rights Act 1998, (U.K.), c. 42, requires the British courts to "take into account" the decisions of the European Court of Human Rights, while s. 39(1) of the *Constitution of the Republic of South Africa 1996*, No 108 of 1996, provides that a court, tribunal or forum in South Africa "must consider international law" and "may consider foreign law." The South African Constitutional Court has expressly confirmed that this obligation extends to the case law of the UN Human Rights Committee. *Makwanyane*, *supra* note 196 at para. 35. The preamble to the *New Zealand Bill of Rights Act 1990*, 1990/109, clearly states that one of its purposes is "to affirm New Zealand's commitment to the *International Covenant on Civil and Political Rights*," thus providing an implied mandate for the New Zealand courts to consider the *ICCPR* and its associated jurisprudence. These mandates, whether express or implied, go further than the long-standing common law presumption favouring the interpretation of legislation in conformity with international law.