

Fordham International Law Journal

Volume 23, Issue 5

1999

Article 5

Bases for Refusing International Extradition Requests - Capital Punishment and Torture

Ved P. Nanda*

*

Copyright ©1999 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Bases for Refusing International Extradition Requests - Capital Punishment and Torture

Ved P. Nanda

Abstract

This Essay is an attempt to contribute to the scholarly investigation into how to reconcile the complementary and competing goals of protecting national security in the interest of law enforcement while still guaranteeing the protection of basic human rights of defendants. It focuses on two issues - capital punishment and torture - which form the bases for state refusal to extradite fugitives.

BASES FOR REFUSING INTERNATIONAL EXTRADITION REQUESTS—CAPITAL PUNISHMENT AND TORTURE

*Ved P. Nanda**

I. *THE PROBLEM*

International extradition serves an important function by providing a mechanism under which states cooperate with one another by surrendering to the requesting state a fugitive accused or convicted of a crime committed within the territory of the requesting state or having produced detrimental effects there. The process, usually embodied in bilateral treaties, plays a crucial role in international law enforcement and reflects the common interest of the world community in prosecuting serious crimes by ensuring that criminals do not find safe havens.

There is, however, an equally important complementary and competing common interest in guaranteeing the protection of basic human rights of defendants. The rapid development, indeed transformation, of international human rights law in the last four decades has lent credence and coherence to this special interest by providing it with content and specificity and by extending its reach and scope. At the beginning of the new millennium, individuals are able to invoke international and regional human rights norms on a wide variety of subjects ranging from the abolition of capital punishment and torture to the right to a fair trial and other fundamental freedoms. There is, also, an increasingly wider adherence by states who are parties to these norms.

Equally important, the rise of international terrorism has resulted in the strengthening of bilateral extradition treaties, especially in their exclusion of the political offense exception.¹ It is logical to expect that these complementary goals of protecting

* Vice Provost, John Evans University Professor, and Director of the International Legal Studies Program, University of Denver. This Essay is an adapted version of the presentation at the symposium, entitled "International Law Enforcement, Extradition, and Mutual Legal Assistance in the 21st Century," held at the Fordham University School of Law on January 22, 2000, under the auspices of the Fordham International Law Journal and the Fordham International Criminal Law Center.

1. *See, e.g.*, Supplementary Treaty Concerning the Extradition Treaty between the Government of the United States of America and the Government of the United King-

national security and furthering international cooperation in the interest of law enforcement on the one hand, and the protection of defendants' human rights on the other hand might collide and, in reality, they do. The problem of reconciling these competing common interests has appropriately begun to receive scholarly attention.² This Essay is an attempt in furtherance of that inquiry. It focuses on two important issues—capital punishment and torture—which form the bases for state refusal to extradite fugitives.

II. *CAPITAL PUNISHMENT*

In this section, I identify the challenge for the retentionist states posed by the growing trend toward abolition of capital punishment. Next, I present a survey of the current status of the death penalty issue in the international arena. This will be followed by a discussion of the emerging international legal norms on the abolition of the death penalty, the work of pertinent international and regional organizations, and state practices.

A. *The Challenge*

Due to a growing trend toward abolition of capital punishment,³ retentionist states, such as the United States, encounter resistance to their extradition requests from surrendering states that have abolished the death penalty. Consequently, this situation results in one of the following three possible outcomes: (1) letters from relevant legal representatives of the requesting state giving assurances that the death penalty will not be imposed; (2) bilateral extradition treaties explicitly including the promise from the requesting state not to apply the death penalty after the extradition; or (3) a refusal by the state to extradite. Indeed, clauses providing for assurances have become commonplace as part of model extradition treaties adopted by the United Nations and other international organizations.⁴

dom of Great Britain and Northern Ireland, June 25, 1985, U.S.-U.K., *as amended*, T.I.A.S. No. 12050, 24 I.L.M. 1105 (1985).

2. See, e.g., John Dugard & Christine Van Den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187 (1998).

3. See WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (Cambridge Univ. Press 2d ed. 1997).

4. See, e.g. European Convention on Extradition, Dec. 13, 1957, art. 11, 359

B. *The International Status of the Death Penalty*

At the end of the twentieth century, over half of all countries in the world had abolished the death penalty in law or practice.⁵ Amnesty International reports that, in recent years, an average of two countries annually have abolished the death penalty in law, or, having already done so for ordinary offenses, have proceeded to abolish it for all offenses. The total of abolitionist countries in law or practice stands at 106. This includes seventy states that have abolished the death penalty for all crimes, thirteen that have abolished it for ordinary crimes but allow it for exceptional crimes such as wartime crimes, and twenty-three countries that are *de facto* abolitionists, for, while retaining the death penalty for ordinary crimes, in practice they have not executed anyone during the past decade or more, or have made an international commitment not to carry out any executions.⁶ Ninety countries are considered retentionist and, while most have carried out executions during the past decade, the number of countries which actually execute prisoners in any one year is actually much smaller.⁷

U.N.T.S. 273, 282, E.T.S. 24 (1960); Inter-American Convention on Extradition, Feb. 25, 1981, art. 9, 20 I.L.M. 723, 724 (1981).

5. See Amnesty International, *The Death Penalty—List of Abolitionist and Retentionist Countries*, ACT 50/01/99, Revised Dec. 18, 1999 (visited Apr. 4, 2000) <<http://www.amnesty.org/ailib/intcam/dp/abrelist.htm>> (on file with the *Fordham International Law Journal*).

6. *Id.* The 70 states that have abolished the death penalty for all crimes are Andorra, Angola, Australia, Austria, Azerbaijan, Belgium, Bulgaria, Cambodia, Canada, Cape Verde, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Dominican Republic, East Timor, Ecuador, Estonia, Finland, France, Georgia, Germany, Greece, Guinea-Bissau, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Kiribati, Liechtenstein, Lithuania, Luxembourg, Macedonia, Marshall Islands, Mauritius, Micronesia, Moldova, Monaco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Palau, Panama, Paraguay, Poland, Portugal, Romania, San Marino, São Tomé and Príncipe, Seychelles, Slovak Republic, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland, Tuvalu, United Kingdom, Uruguay, Vanuatu, Vatican City State, and Venezuela. *Id.* The 13 that have abolished the death penalty for ordinary crimes only are Argentina, Bolivia, Bosnia-Herzegovina, Brazil, Cook Islands, Cyprus, El Salvador, Fiji, Israel, Latvia, Malta, Mexico, and Peru. *Id.* The 23 *de facto* abolitionist states are Albania, Bermuda, Bhutan, Brunei Darussalam, Central African Republic, Congo, Cote D'Ivoire, Djibouti, Gambia, Grenada, Madagascar, Maldives, Mali, Nauru, Niger, Papua New Guinea, Senegal, Sri Lanka, Suriname, Togo, Tonga, Turkey, and Western Samoa. *Id.*

7. *Id.* The 90 retentionist states are Afghanistan, Algeria, Antigua and Barbuda, Armenia, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Chad, Chile, China, Comoros, Democratic Republic of Congo, Cuba, Dominica, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Ghana,

C. *Emerging International Legal Norms*

Several international human rights treaties address the issue of capital punishment. To illustrate, the International Covenant on Civil and Political Rights⁸ (or “Civil and Political Rights Covenant”), adopted by the U.N. General Assembly in 1966, proclaims in Article 6 “the inherent right to life” of every human being. This article establishes restrictions and safeguards on the death penalty in countries which have not abolished it. In such countries, a “sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime This penalty can only be carried out pursuant to a final judgement rendered by a competent court.”⁹ It explicitly states that a “[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”¹⁰ Nothing in the article “shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the [Covenant].”¹¹ In 1989, the U.N. General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights¹² (or “Second Optional Protocol”) acknowledging a worldwide effort to abolish capital punishment

Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Laos, Lebanon, Lesotho, Liberia, Libya, Malawi, Malaysia, Mauritania, Mongolia, Morocco, Myanmar, Nigeria, North Korea, Oman, Pakistan, Palestinian Authority, Philippines, Qatar, Russian Federation, Rwanda, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and Grenadines, Saudi Arabia, Sierra Leone, Singapore, Somalia, South Korea, Sudan, Swaziland, Syria, Taiwan, Tajikistan, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United States of America, Uzbekistan, Vietnam, Yemen, Yugoslavia, Zambia, and Zimbabwe. *Id.*

8. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14, 999 U.N.T.S. 171, 176-77, 6 I.L.M. 368, 372-73 (1967)

9. *Id.* art. 6(2), 6 I.L.M. at 370.

10. *Id.* art. 6(5), 6 I.L.M. at 370.

11. *Id.* art. 6(6), 6 I.L.M. at 370.

12. Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR 3d Comm., 44th Sess., Annex, Agenda Item 98, U.N. Doc. A/44/128 (1989) [hereinafter Second Protocol]. As of November 20, 1999, there are 40 state parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (“Second Protocol”), while three states have signed but not yet ratified it. See also Amnesty International, *Ratifications of International Treaties on the Death Penalty*, ACT 50/03/98, Revised Nov. 20, 1999 (visited Apr. 6, 2000) <<http://www.amnesty.org/ailib/intcam/dp/rats.htm>> (on file with the *Fordham International Law Journal*) [hereinafter *Ratifications of International Treaties*].

for all purposes and obligating each state party to "take all necessary measures to abolish the death penalty within its jurisdiction."¹³

The American Convention on Human Rights¹⁴ (or "Convention") forbids capital punishment for "political offenses or related common crimes,"¹⁵ and prohibits the execution of "persons who, at the time the crime was committed, were under eighteen years of age or over seventy years of age" and pregnant women.¹⁶ The Convention mandates that "countries that have not abolished the death penalty [may impose it] only for the most serious crimes" and are not to extend such punishment "to crimes to which it does not presently apply."¹⁷ It further mandates that the death penalty "shall not be reestablished in states that have abolished it."¹⁸ Subsequently, in 1990, the General Assembly of the Organization of American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty¹⁹ ("Protocol"). Referring to the recognition of the right to life and restrictions on the application of the death penalty in Article 4 of the American Convention on Human Rights, the Protocol obligates states that are parties to it not to "apply the death penalty in their territory to any person subject to their jurisdiction."²⁰ The parties are, however, allowed to declare at the time of ratification or accession that "they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature."²¹

The Convention on the Rights of the Child,²² adopted by the U.N. General Assembly in 1989, obligates state parties to

13. Second Protocol, *supra* note 12, art. 1(2).

14. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, 9 I.L.M. 673 (1970).

15. *Id.* art. 4(4), 1144 U.N.T.S. at 145.

16. *Id.* art. 4(5), 1144 U.N.T.S. at 146.

17. *Id.* art. 4(2), 1144 U.N.T.S. at 145.

18. *Id.* art. 4(3), 1144 U.N.T.S. at 145.

19. Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Organization of American States, O.A.S.T. No. 73 (1990), *adopted by* Res. 1042, 20th Sess., June 8, 1990, 29 I.L.M. 1447 (1990).

20. *Id.* art. 1, 29 I.L.M. at 1448.

21. *Id.* art. 2, 29 I.L.M. at 1448.

22. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/736 (1989), 28 I.L.M. 1448.

"recognize that every child has the inherent right to life."²³ It also ensures that "[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."²⁴ No "reservation incompatible with the object and purpose" of the Convention on the Rights of the Child is allowed.²⁵

Europe remains in the forefront of the global movement to abolish the death penalty. The European Convention for the Protection of Human Rights and Fundamental Freedoms²⁶ ("European Convention on Human Rights"), which entered into force in 1953, recognized capital punishment as an exception to the right to life.²⁷ Yet European states acknowledged in 1985 the trend toward abolition of capital punishment by adopting Protocol No. 6 to the European Convention Concerning the Abolition of the Death Penalty²⁸ ("Protocol No. 6"). Protocol 6 calls for the abolition of the death penalty in times of peace, explicitly stating that "[t]he death penalty shall be abolished. No one shall be condemned to such penalty or executed."²⁹ Its preamble recalls the genesis of Protocol No. 6 in recognizing that several member states of the Council of Europe experienced an evolution which "expresses a general tendency in favor of abolition of the death penalty." While Protocol No. 6 allows the parties to impose death sentences for acts committed in wartime or imminent threat of war,³⁰ it does not permit any reservation to its provisions.³¹

In 1994, the Parliamentary Assembly of the Council of Eu-

23. *Id.* art. 6(1), 28 I.L.M. at 1460.

24. *Id.* art. 37, 28 I.L.M. at 1470.

25. *Id.* art. 51, 28 I.L.M. at 1475-76.

26. Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter European Convention].

27. *Id.* art. 2, 213 U.N.T.S. at 224.

28. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, E.T.S. 114, entered into force Mar. 1, 1985, 22 I.L.M. 539 (1983) [hereinafter Protocol No. 6]. As of November 20, 1999, there are 33 state parties to Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty ("Protocol No. 6"). *Ratifications of International Treaties, supra* note 12. Six states have signed but not yet ratified it. *Ratifications of International Treaties, supra*.

29. Protocol No. 6, *supra* note 28, art. 1, 22 I.L.M. at 539.

30. *Id.* art. 2, 22 I.L.M. at 539.

31. *Id.* art. 4, 22 I.L.M. at 540.

rope (or "Assembly") called upon Member States that had not ratified Protocol No. 6 to do so,³² and stated a willingness to ratify Protocol No. 6 as a prerequisite for membership in the Council of Europe. In a recommendation, the Assembly called upon the Committee of Ministers to draft an additional protocol to the European Convention on Human Rights. Under this protocol, the death penalty would be abolished both in peace and war-time, and it would obligate the parties not to reintroduce it at all.³³ This recommendation proposed the establishment of a control mechanism to obligate states, where the death penalty is still permissible, to set up a commission for abolishing it. As the proposed commission continued its work, a moratorium on all executions would be in effect. Especially pertinent for this Essay is a provision in the recommendation that binds all state parties not to extradite any person to a state where he may be subject to capital punishment and the extreme conditions on "death row."

Subsequently, the Assembly reaffirmed its opposition to the death penalty and its earlier position regarding a moratorium on executions and its willingness to ratify Protocol No. 6 as prerequisites for all states joining the Council of Europe.³⁴ In October 1997, at the Second Summit of the Council of Europe, the Heads of State or Government adopted a declaration on the topic of capital punishment, with several leaders insisting upon the importance of abolition of the death penalty as a central human rights goal of the Council of Europe.³⁵

The European Union is also actively involved with the topic. In October 1997 it adopted the Treaty of Amsterdam,³⁶ which

32. EUR. PARL. ASS. RES. 1044 (1994) on the abolition of the death penalty in Europe, 25th sitting, Doc. 7154 (Oct. 4, 1994); see also William A. Schabas, *International Law and Abolition of the Death Penalty: Recent Developments*, 4 ILSA J. INT'L & COMP. L. 535, 554-58 (1998) (reporting on Council of Europe's activities aimed at abolition of death penalty).

33. EUR. PARL. ASS. RECOMM. 1246 (1994) on the abolition of the death penalty in Europe, 25th sitting (Oct. 4, 1994).

34. EUR. PARL. RES. 1097 (1996) on the abolition of the death penalty in Europe, 24th sitting (June 28, 1996); see also EUR. PARL. RECOMM. 1302 (1996) on the abolition of the death penalty in Europe, 24th sitting (June 28, 1996); Schabas, *supra* note 32, at 556.

35. See Schabas, *supra* note 32, at 557.

36. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam] (amending Treaty on European Union ("TEU"), Treaty establishing the European Community ("EC Treaty"), Treaty

underpins the abolition of the death penalty in all member states of the European Union.³⁷ The Treaty of Amsterdam entered into force on May 1, 1999.³⁸ In a declaration by the Presidency on behalf of the European Union on the fiftieth Anniversary of the Council of Europe, the particular importance attached by the EU to Protocol No. 6 was especially underlined.³⁹ The declaration called upon all members of the Council of Europe "to abide by their commitment to establish moratoria on executions, to be consolidated by complete abolition of the death penalty."⁴⁰

The European Parliament has also adopted resolutions and declarations calling upon Member States to totally abolish the death penalty and urging the United Nations to adopt a "binding decision imposing a general moratorium on the death penalty."⁴¹ Finally, on the occasion of the fiftieth Anniversary of the Universal Declaration on Human Rights, the European Union declared that "[w]ith the entry into force of the Treaty of Amsterdam, respect for human rights and fundamental freedoms will be a condition for accession to the European Union, and a serious and persistent breach of these rights may lead to a suspension of rights of a Member State."⁴²

As mentioned above, the U.N. General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights in 1989. It should be noted, however, that the movement at the United Nations to ban capital punish-

establishing the European Coal and Steel Community ("ECSC Treaty"), and Treaty establishing the European Atomic Energy Community ("Euratom Treaty") and renumbering articles of TEU and EC Treaty).

37. *Id.*, O.J. C 340/1, at 145-72 (1997); see also Schabas, *supra* note 32, at 559; Dorean Marguerite Koenig, *A Death Penalty Primer: Reviewing International Human Rights Development & the ABA Resolution for a Moratorium on Capital Punishment in Order To Inform Debates in U.S. State Legislatures*, 4 *ILSA J. INT'L & COMP. L.* 513, 521-22 (1998).

38. *Information on the Entry into Force of the Amsterdam Treaty*, SPICERS (EUR.), May 1, 1999, available in 1999 WL 9070014.

39. *Declaration by the Presidency on Behalf of the European Union on the 50th Anniversary of the Council of Europe*, Pesc/99/46, May 5, 1999 (visited Apr. 19, 2000) <http://europa.eu.int/comm/dg1a/daily/05_99/pesc_99_46.htm> (on file with the *Fordham International Law Journal*).

40. *Id.*

41. Schabas, *supra* note 32, at 558-59.

42. *Declaration of the European Union on the Occasion of the 50th Anniversary of the Universal Declaration on Human Rights*, Pesc/98/149, Dec. 10, 1998 (visited Apr. 19, 2000) <http://europa.eu.int/comm/dg1a/daily/12_98/pesc_98_149.htm> (on file with the *Fordham International Law Journal*).

ment worldwide has been underway since the late 1960s. In 1968, the General Assembly adopted a resolution declaring the objective of gradually but progressively restricting the range of offenses punishable by death.⁴³ Since, however, there are still many retentionist countries, the General Assembly has yet to adopt a resolution calling for complete abolition of the death penalty or even a global moratorium on executions.

In 1994, the U.N. General Assembly's Social, Humanitarian, and Cultural Committee, by a vote of forty-four to thirty-six, with seventy-four abstentions, rejected a draft General Assembly resolution calling for a worldwide moratorium on capital punishment and for a global ban on the death penalty by the year 2000.⁴⁴ At the fifty-fourth Session of the General Assembly, the Third Committee took no action on another draft resolution calling for a worldwide moratorium on executions.⁴⁵ The resolution's seventy-three co-sponsors were led by the European Union, and its seventy-four opponents sponsoring amendments were led by Egypt and Singapore. The opponents invoked Article 2, paragraph 7, of the U.N. Charter, mandating non-intervention in "matters which are essentially within the domestic jurisdiction of any State,"⁴⁶ and affirmed that every State has an inalienable right to choose its political, economic, social, and cultural systems, without interference in any form by another State. The two sides could not reach an agreement and no action was taken, leaving open the possibility of raising the matter again at the General Assembly at a subsequent session.

The U.N. Commission on Human Rights (or "UNCHR") has, however, taken action at its last several sessions. At the UNCHR's 1997 session, a resolution calling for a moratorium on the death penalty and stating that the "abolition of the death

43. See Capital Punishment, Agenda Item 59, U.N. GAOR, 23d Sess., U.N. Doc. A/7243; see also Capital Punishment, G.A. Res. 2393, U.N. GAOR, 23d Sess., U.N. Doc. A/Res./2393 (XXIII) (1968).

44. See Request for the Inclusion of an Additional Item in the Agenda of the Forty-Ninth Session, Capital Punishment, U.N. GAOR, 49th Sess., U.N. Docs. A/49/234, A/49/234/Add.1, A/49/234/A.2 (1994); see also Human Rights Questions, Capital Punishment, G.A. Third Comm., Agenda Item 100, 54th Sess., U.N. Doc. A/C.3/49/SR.61 (1995); Schabas, *supra* note 32, at 545-48.

45. Question of the Death Penalty, G.A. Third Comm., Agenda Item 116(a), 54th Sess., U.N. Doc. A/C.3/54/L.8/Rev.1 (1999).

46. U.N. CHARTER, June 26, 1945, art. 2(7), 59 Stat. 1031, 1037, T.S. No. 993, 3 Bevans 1153.

penalty contributes to the enhancement of human dignity and to the progressive development of human rights" was adopted by a vote of twenty-seven in favor and eleven against, with fourteen abstaining.⁴⁷ The resolution was further strengthened in 1998 by a call for a restriction of offenses for which the death penalty could be imposed and a moratorium on executions, eventually leading to the abolition of the death penalty.⁴⁸ Subsequently, at its 1999 session, the Human Rights Commission urged all states that still maintain the death penalty not to impose it for crimes committed by a person below eighteen years of age or on a person suffering from any form of mental disorder, not to execute any person so long as any related legal procedure, at national or international level, is pending, to restrict progressively the number of offenses for which the death penalty may be imposed, and to establish a moratorium on executions, with a view to abolishing completely the death penalty.⁴⁹

Another promising development was the call in November 1999 by the African Commission on Human and Peoples' Rights ("African Commission") for a moratorium on executions.⁵⁰ At its meeting in Kigali, Rwanda, this commission urged

all States parties to the African Charter on Human and Peoples' Rights that still maintain the death penalty to comply fully with their obligations under the treaty and to ensure that persons accused of crimes for which the death penalty is a competent sentence are afforded all the guarantees in the African Charter.

It further called upon all state parties that still maintain the death penalty to "a) limit the imposition of the death penalty only to the most serious crimes; b) consider establishing a moratorium on executions, especially in cases where there may not have been full compliance with international standards for a fair trial; and c) reflect on the possibility of abolishing the death

47. Question of the Death Penalty, Commission on Human Rights Resolution 1997/12, U.N. Doc. E/CN.4/RES/1997/12 (1997).

48. Question of the Death Penalty, Commission on Human Rights, Draft Resolution, U.N. Doc. E/CN.4/1998/L.12 (1998).

49. Question of the Death Penalty, Commission on Human Rights Resolution 1999/61, U.N. Doc. E/CN.4/RES/1999/61 (1999). Res. 1999/61, U.N. Doc. E/CN.4/1999/61 (Apr. 28, 1999).

50. See Amnesty International, *Death Penalty News*, ACT 53/05/99, Dec. 99 (visited Apr. 10, 2000) <<http://www.amnesty.org/ailib/aipub/1999/ACT/5300599.htm>> (on file with the *Fordham International Law Journal*).

penalty.”⁵¹

D. *The Work of International and Regional Organizations and State Practice*

The trend toward abolition of the death penalty notwithstanding, there is not sufficient state practice and *opinio juris* for the abolition of the death penalty that has developed as customary international law. Thus, a general proposition prohibiting extradition to a country still retaining capital punishment cannot be maintained. It is worth noting, however, that the entire European region has taken a strong stand on the issue. Consequently, the United States faces resistance from several countries in Europe to its extradition requests. More specifically, case law from the European Commission of Human Rights and Court of Human Rights is evolving. Another abolitionist state, Canada, which permits the death penalty only in the case of certain military offenses, has also developed a rich jurisprudence on extradition in capital cases. In addition, the U.N. Committee on Human Rights (or “Committee”) has addressed the question on various occasions. A brief discussion of a few selected decisions by these bodies follows.

1. The U.N. Committee on Human Rights

The Committee, established under Article 28 of the Civil and Political Rights Covenant, has had several occasions to address the subject of capital punishment in situations involving requests for extradition. Since the Committee’s function is related to parties’ compliance with the Civil and Political Rights Covenant, the specific issues it has addressed in the context of extradition are: (1) whether extradition of an individual to a country where he or she would face the death penalty would constitute violation by the sending state of its obligations under the Civil and Political Rights Covenant, and (2) whether the “death row phenomenon” is in itself a violation of the Civil and Political Rights Covenant. A few complaints under the Second Optional Protocol procedure and the Committee’s views on a few other communications will be discussed here.

In *Kindler v. Canada*,⁵² the fugitive, who was extradited by

51. *Id.*

52. *Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/

Canada to the United States, claimed that the decision to extradite him violated several articles of the Civil and Political Rights Covenant, including Articles 6 and 7, since he was likely to be executed in the United States. The Committee held that Article 6 of the Civil and Political Rights Covenant did not prohibit capital punishment but, as Article 6(2) restricted the circumstances in which capital punishment might be imposed. In other words, if Kindler "had been exposed, through extradition from Canada, to a real risk of violation of Article 6, paragraph 2, in the United States, that would have entailed a violation by Canada of its obligations under Article 6, paragraph 1."⁵³

The pertinent facts were that Joseph Kindler, a citizen of the United States, was convicted of capital murder and kidnapping by a court in Pennsylvania, where executions were carried out by lethal injection. He was sentenced to death by a jury, but prior to sentencing he escaped from custody and fled to Canada. The United States sought his extradition. The 1976 Canada-United States Extradition Treaty states that Canada may refuse extradition unless the United States provides sufficient assurances that "the death penalty shall not be imposed, or if imposed shall not be executed."⁵⁴

Kindler requested Canada to seek those assurances from the United States. The Canadian Minister of Justice declined to do so, and Kindler lost on appeal to the Federal Court. Further appeals to the Court of Appeal and eventually to the Supreme Court of Canada were rejected and he was extradited to the United States.⁵⁵ He then submitted his communication to the Committee.

The Committee first decided that the communication

470/1991 (1993), 98 I.L.R. 426 (1994); *see also* *Kindler v. Canada*, [1991] 2 S.C.R. 779 (Can.).

53. *Kindler*, 98 I.L.R. at 446.

54. Extradition Treaty, Dec. 3, 1971, U.S.-Canada, art. 6, 27 U.S.T. 983, 989 [hereinafter U.S.-Canada Extradition Treaty]. This states that:

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

Id.

55. *See Kindler*, 98 I.L.R. at 430-31 (outlining facts of this case).

might raise issues under Articles 6 and 7 of the Civil and Political Rights Covenant and hence found it admissible. On the merits, it referred to its prior General Comments on Article 6, under which the parties are obliged to limit the use of the death penalty and which point to the desirability of abolition of the death penalty. The Committee also acknowledged the trend toward abolition and the evolution of international law in this regard.⁵⁶

The Committee read Article 6, paragraphs 1 and 2, together, and said, as to the claim under Article 6:

Canada itself did not impose the death penalty on Mr. Kindler, but extradited him to the United States, where he faced capital punishment. If Mr. Kindler had been exposed, through extradition from Canada, to a real risk of a violation of Article 6, paragraph 2, in the United States, that would have entailed a violation by Canada of its obligations under Article 6, paragraph 1. Among the requirements of Article 6, paragraph 2, is that capital punishment be imposed only for the most serious crimes, in circumstances not contrary to the Covenant and other instruments, and that it be carried out pursuant to a final judgment rendered by a competent court. The Committee notes that Mr. Kindler was convicted of premeditated murder, undoubtedly a very serious crime. He was over 18 years of age when the crime was committed. The author has not claimed before the Canadian courts or before the committee that the conduct of the trial in the Pennsylvania court violated his rights to a fair hearing under Article 14 of the Covenant.⁵⁷

The Committee further observed that the Canadian courts had undertaken extensive proceedings before extraditing Kindler, reviewing all of the evidence submitted concerning his trial and conviction. Consequently, it held that Canada's obligations arising under Article 6 did not require Canada to refuse Kindler's extradition. As Canada had promised to exercise its discretion to seek assurances under "exceptional circumstances" and had given careful consideration before deciding not to seek such assurances in this case, the Committee held that Article 6 did not "necessarily require Canada to refuse to extradite or to seek assurances."⁵⁸ Since the decision to extradite without assur-

56. *Id.* at 445.

57. *Id.* at 446.

58. *Id.* at 446-47.

ances was not taken by Canada “arbitrarily or summarily,” in the light of the reasons given by Canada—“the absence of exceptional circumstances, the availability of due process, and the importance of not providing a safe haven for those accused of or found guilty of murder”—the Committee held that Canada did not violate its obligations under Article 6.

Addressing the “death row” phenomenon associated with capital punishment and whether it constituted a violation under Article 7, the Committee referred to its prior jurisprudence that “prolonged periods of detention under a severe custodial regime cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies.”⁵⁹ It reiterated that “the facts and the circumstances of each case need to be examined to see whether an issue under Article 7 arises.”⁶⁰ The relevant factors would include the author’s personal aspects, the specific conditions of his detention on death row, and the proposed method of execution. The Committee distinguished the facts of the judgment of the European Court of Human Rights in *Soering v. United Kingdom*,⁶¹ which is discussed below,⁶² and held that no violation under Article 7 had occurred. It should also be noted that there were several individual dissenting opinions concluding that Canada was in violation of its obligations under Article 6.⁶³

In a companion case from Canada, *Ng v. Canada*,⁶⁴ the author of the communication was a British subject born in Hong Kong and arrested in Canada. The United States requested his extradition to stand trial in California on charges that included twelve counts of murder for which, if convicted, he faced a possible death sentence. In California, executions were carried out by means of asphyxiation in a gas chamber. After a Canadian court decided that Ng was subject to extradition, the Minister of Justice of Canada ordered that he should be extradited and de-

59. *Id.* at 447.

60. *Id.*

61. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), 98 I.L.R. 270 (1989).

62. *See infra* notes 81-93.

63. *Kindler v. Canada*, 98 I.L.R. 426, 451-72 (1994).

64. *Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994), 98 I.L.R. 473 (1994).

terminated not to seek assurances from the United States that he would not be executed. On appeal, the Supreme Court of Canada held that extradition in those circumstances was lawful. In his communication to the Committee, Ng claimed that Canada's decision to extradite him violated several articles of the Civil and Political Rights Covenant, including Articles 6 and 7. Specifically on Article 7, he contended that California's means of execution constituted inhuman and degrading treatment or punishment, contrary to the Covenant's Article 7. Similarly, he claimed that the conditions on death row in California violated Article 7.

Rejecting Canada's argument that the communication should be declared inadmissible, the Committee considered the admissibility issue together with its examination of the merits of the case.⁶⁵ It held, on the same rationale as in the *Kindler* communication, that there was no violation of Article 6. As to the claim under Article 7, however, the Committee held that execution by gas asphyxiation did constitute a violation. It stated that:

by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of Article 7 of the Covenant; on the other hand, Article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes. Nonetheless, the Committee reaffirms as it did in its General Comment 20[44] on Article 7 of the covenant (CCPR/C/21/Add.3, paragraph 6) that, when imposing capital punishment, the execution of the sentence ". . . must be carried out in such a way as to cause the least possible physical and mental suffering."⁶⁶

On the basis of the information provided to the Committee—that "execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes"—it concluded that such execution would not meet the test of "least possible physical and mental suffering," and thus constitutes cruel and inhuman treatment, in violation of Article 7.⁶⁷ Consequently, the Committee held that, since Canada could reasonably foresee that, if sentenced to die, Ng would be executed by these means, which amounted to a violation of Article 7, Can-

65. *Id.* at 487.

66. *Id.* at 503.

67. *Id.* at 504.

ada had "failed to comply with its obligations under the Covenant, by extraditing Mr. Ng without having sought and received assurances that he would not be executed."⁶⁸

In *Reid v. Jamaica*,⁶⁹ Reid, the author of the communication and a Jamaican citizen, was charged with murder in the course of an armed robbery, convicted, and sentenced to die in 1985. His appeal was dismissed in 1986. He claimed that the imposition of the death sentence, in the way in which it was imposed, was a violation of Article 6 and that the delay in the sentence of death amounted to cruel and inhuman punishment in violation of Article 7. After declaring the communication admissible in March 1989, the Committee held in July 1990 that since Reid was denied effective representation at the appellate proceedings and since no further appeal against the sentence was available, a violation of Article 6 of the Civil and Political Rights Covenant had occurred.⁷⁰ It said that legal assistance must be made available to a convicted prisoner under the sentence of death both at the trial in the court of first instance and in all appellate proceedings.⁷¹ The Committee referred to its prior General Comment 6[16]. This had stated that the Civil and Political Rights Covenant's mandate that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Civil and Political Rights Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal."⁷²

Since in this case the requirements for fair trial were not met, the Committee concluded that the right protected under Article 6 had been violated. As to the Article 7 claim, the Committee reiterated its earlier views that "prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for convicted prisoners."⁷³ Acknowledging, however, that the situation

68. *Id.*

69. *Reid v. Jamaica*, Communication No. 250/1987, U.N. Human Rights Committee, July 20, 1990, 98 I.L.R. 357 (1994).

70. *Id.* at 366-67.

71. *Id.*

72. *Id.* at 367.

73. *Id.*

may be different in cases involving capital punishment and knowing that it would be necessary to assess the circumstances of each case, the court nevertheless did not find a violation of Article 7.⁷⁴

In *Wright v. Jamaica*,⁷⁵ the Committee found that since the final sentence of death was given without legal representation for the preliminary hearing, without due respect for the requirement that an accused be tried without undue delay, and since there was no effective representation on appeal, there was consequently a violation of Article 6 of the Civil and Political Rights Covenant. Similar views have been expressed by the court in other cases, as well.⁷⁶ In another complaint involving Jamaica, *Peart v. Jamaica*, the Committee reiterated its views on a state's obligation to meet the fair trial requirements contained in the Civil and Political Rights Covenant's Article 14 in a capital case:

The imposition of a sentence of death upon conclusion of a trial in which the provision of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6. The provision that a death sentence may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that the procedural guarantees therein prescribed must be preserved, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal.⁷⁷

As to what is meant by the most serious crime under Article 6, paragraph 2 of the Civil and Political Rights Covenant, in 1995 the Committee expressed its view in a complaint involving Zambia. In that case, the complainant had been sentenced to death for aggravated robbery when no one had been either killed or wounded. The Committee decided that the mandatory imposition of the death penalty under these circumstances was

74. *Id.*

75. *Wright v. Jamaica*, Communication No. 459/1991, U.N. Doc. CCPR/C/55/D/459/1991, ¶ 10.6 (1995).

76. See Markus G. Schmidt, *Universality of Human Rights and the Death Penalty—The Approach of the Human Rights Committee*, 3 ILSA J. INT'L & COMP. L. 477, 481-82 (1997).

77. *Peart v. Jamaica*, Communications Nos. 464/1991 & 482/1991 (*Peart v. Jamaica*), views adopted on July 19, 1995 at 44, U.N. Doc. CCPR/C/54/D/464/1991 & 482/1991 (1995).

incompatible with Article 6, paragraph 2.⁷⁸

Finally, the Committee's comments on the report of the United States and criticizing the application of the death penalty are noteworthy. The Committee expressed concern:

about the excessive number of offences punishable by the death penalty in a number of States, the number of death sentences handed down by the courts, and the long stays on death row which, in specific instances, may amount to a breach of article 7 of the Covenant. It deplores the recent expansion of the death penalty under federal law and the re-establishment of the death penalty in certain states. It also deplores provisions in the legislation of a number of states which allow the death penalty to be pronounced for crimes committed by persons under 18 and the actual instances where such sentences have been pronounced and executed. It also regrets that, in some cases, there appears to have been lack of protection from the death penalty of those mentally retarded.⁷⁹

2. The European Commission of Human Rights and the European Court of Human Rights

These two bodies have considered limitations on extradition based upon death row conditions. Through case law they have developed jurisprudence on the often miserable conditions of detention pending execution—the “death row phenomenon”—as conceivably violating human rights of convicts. While the European Convention on Human Rights permits limitations on the right to life, and thus allows for the death penalty in specified circumstances,⁸⁰ Article 3 contains a prohibition against inhuman and degrading treatment. This latter provision has been applied against death row conditions in prisons of the United States, most notably in *Soering v. United Kingdom*.⁸¹ In that case, the accused Soering, a German national arrested in Great Britain, was charged with murder in Virginia and faced the death

78. *Lubuto v. Zambia*, Communication No. 390/1990, U.N. Doc. CCPR/C/55/D/390/1990/Rev.1 (1995).

79. Annual Report of the Human Rights Committee, UN GAOR, Vol. 1, Annex I, at 54, U.N. Doc. A/50/40 (1995).

80. See European Convention, *supra* note 26, § 1, art. 2 (permitting limitations on right to life).

81. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), 98 I.L.R. 270 (1989).

penalty if extradited to the United States and convicted in Virginia.

In an earlier case, *Kirkwood v. United Kingdom*,⁸² the Commission had found inadmissible the application for a finding that detention on California's death row was inhuman and degrading. The reason was that the applicant had not sufficiently demonstrated that the conditions were covered by the terms of Article 3 of the European Convention on Human Rights, which states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."⁸³ In *Soering*, however, the European Court of Human Rights' examination of the circumstances did indeed lead to the conclusion that the United Kingdom would be in violation of its European Convention on Human Rights obligation to protect Soering's human rights if it extradited the accused. The court considered four factors that contributed to its decision, primarily the length of time likely to be spent by an inmate in detention before his execution and the conditions on death row themselves. The court also considered Soering's age, his mental state, and the possibility of his extradition to Germany rather than the United States for prosecution.

The court said that the meaning of "inhuman or degrading treatment or punishment" will depend upon all the circumstances of the case. It added that "[i]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."⁸⁴ It responded to the U.K. charge that, while the possible punishment to be imposed upon Soering was, in the final analysis, uncertain, the "common and legitimate interest of all States in bringing fugitive criminals to justice" should require "a very high degree of risk, proved beyond reasonable doubt, that ill-treatment will actually occur" before the court would allow refusal of the extradition.⁸⁵ However, although the United Kingdom was not ultimately responsible for the actions of the Virginia authorities, the court stated, it was still responsible as a party within its own obligations under Article 8 "for all and any foreseeable con-

82. See *Kirkwood v. United Kingdom*, App. No. 14038/88, 37 Eur. Comm'n H.R. Dec. & Rep. 158 (1984).

83. European Convention, *supra* note 26, art. 3, 213 U.N.T.S. at 224.

84. *Soering*, 98 I.L.R. at 302-03.

85. *Id.* at 299.

sequences of extradition suffered outside [its] jurisdiction."⁸⁶
The court said:

It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article. . . .

In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.⁸⁷

Recognizing that an appreciable amount of the extended time in detention was often accountable to a convict himself, the court noted, however, that

just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in

86. *Id.* at 301.

87. *Id.* at 303.

the ever-present shadow of death.⁸⁸

Noting the severity of the conditions that inmates often suffer in such detention for an average of six to eight years,⁸⁹ regardless that such extended time was often "largely of the prisoner's own making,"⁹⁰ the court found that Britain's extradition of Soering to the United States without firm assurances that the death penalty would not be applied would violate the Great Britain's obligations under Article 3.

The court's position is worth quoting:

It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.⁹¹

Subsequently, the U.K. government received the needed assurances, Soering was extradited and convicted, but no death penalty was imposed.⁹² In a concurring opinion Judge de Meyer went further in expressing his view that extradition from an abolitionist state to a retentionist state will *per se* violate the European Convention on Human Rights obligations. In his words,

In the circumstances of the present case, the applicant's extradition to the United States would subject him to the risk of being sentenced to death, and executed, in Virginia . . . for a crime for which that penalty is not provided by the law of the United Kingdom.

When a person's right to life is involved, no requested

88. *Id.* at 310.

89. *Id.* at 311.

90. *Id.* at 310.

91. *Id.* at 302.

92. See Richard B. Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128, 141 (1991).

State can be entitled to allow a requesting State to do what the requested State is not itself allowed to do.

If, as in the present case, the domestic law of a State does not provide the death penalty for the crime concerned, that State is not permitted to put the person concerned in a position where he may be deprived of his life for that crime at the hands of another State.⁹³

It should, however, be noted that this viewpoint has not found support among other judges on the court.

Since the *Soering* case, the European Commission on Human Rights has, in several cases, interpreted the *Soering* judgment. No major departure, however, has been reached from the reasoning and outcome of that decision.⁹⁴

3. State Practice

Canada and several countries in Europe have addressed the death penalty issue in connection with requests from the United States to extradite the fugitive. Initially, as mentioned earlier, the Canadian Supreme Court in *Kindler* and *Ng*⁹⁵ had stated that extradition to face the death penalty is not a violation of the Canadian Charter. Hence extradition to the United States, even without assurances that the death penalty would not be imposed or executed, was allowed. In a later case, *U.S. v. Burns and Rafay*,⁹⁶ however, the British Columbia Court of Appeal overruled the Canadian Minister of Justice's decision authorizing extradition in a capital case without seeking an assurance from the United States that capital punishment would not be imposed.⁹⁷

Burns and Rafay, both Canadians and eighteen years of age at the time of the crime, murdered Rafay's parents and sister in the State of Washington in the United States, after which they fled to Canada. The state charged them with aggravated first degree murder, which is a capital crime. The majority said that since Burns' and Rafay's return to Canada would be impossible if

93. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), 98 I.L.R. 270, 319-20 (1989) (de Mayer, J., concurring).

94. See Schabas, *supra* note 32, at 563-65.

95. *Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994), 98 I.L.R. 473 (1994).

96. *United States of America v. Burns and Rafay*, [1997] 116 C.C.C.3d 524, 536 (B.C.C.A.).

97. See Schabas, *supra* note 32, at 567-70.

they were put to death, a right granted to them under Section 6(1) of the Canadian Charter of Rights of Freedom, which states that "Every citizen of Canada has the right to enter, remain in and leave Canada,"⁹⁸ they should not be extradited. In the words of Justice Donald, who wrote for the majority, "[b]y handing over the applicants to the American authorities without an assurance, the Minister will maximally, not minimally, impair the applicants' rights of citizenship."⁹⁹ The case is pending before the Canadian Supreme Court. In March 1999, the court heard the arguments.¹⁰⁰ However, as one of the nine justices subsequently retired and the chief justice was to retire shortly thereafter, in October 1999 the court called for another hearing in the case.¹⁰¹ Further delays have occurred.¹⁰²

In *The Netherlands v. Short*,¹⁰³ the district court at The Hague enjoined The Netherlands from delivering the defendant, a U.S. serviceman, to U.S. authorities before negotiating with them a guarantee that the death penalty would not be imposed.¹⁰⁴ Short had confessed to murdering his wife. If extradited to the United States, he would be then subject to the death penalty under the U.S. Uniform Code of Military Justice. On appeal by The Netherlands, the court of appeal overruled the district court. On further appeal to the supreme court, the Advocate General gave an opinion on the dilemma faced by The Netherlands insofar as there were two incompatible treaty obligations contained in the North Atlantic Treaty Organization ("NATO") Status of Forces Agreement¹⁰⁵ ("Status Agreement") on the one hand and the European Convention on Human Rights and its Protocol No. 6 on the other.

In that opinion, the Advocate General discussed the NATO Status Agreement, under which the primary right to exercise jurisdiction over Short was with the United States as the sending

98. Constitution Act 1982, C.R.C., ch. 6, § 1 (1982) (Can.).

99. Schabas, *supra* note 32, at 568.

100. *Canada Court Considers Extradition*, SEATTLE TIMES, Mar. 23, 1999, at B4.

101. Louis T. Corsaletti, *Canadian High Court Calls for New Hearing in Rafay Case—Two Charged with '94 Bellevue Slayings*, SEATTLE TIMES, Oct. 26, 1999, at B1.

102. Louis T. Corsaletti, *New Delay in Rafay-Burns Extradition*, SEATTLE TIMES, Feb. 9, 2000, at B1.

103. *The Netherlands v. Short*, 29 I.L.M. 1375 (1990) (Neth.).

104. *Id.* at 1378.

105. The North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67.

state, since the alleged crime was exclusively directed against the person of a member of the serviceman's family. He further discussed the reach of the European Convention on Human Rights and the Optional Protocol and its legislative history, the *Soering* judgment, and Article 30 of the Vienna Convention on Treaties,¹⁰⁶ under which there is no ranking between treaties, and opined that the NATO Status Agreement does not provide a directly applicable rule, whereas the European Convention on Human Rights, Articles 2 and 3, combined with Article 1 of Protocol No. 6, are directly applicable rules, and hence the latter should prevail.¹⁰⁷ Thus he concluded that The Netherlands should not hand over Short. The court followed his opinion, overruled the court of appeal, and granted the injunction, affirming the decision of the district court.¹⁰⁸

Similarly, the Swiss court in the case of *Dharmarajah*,¹⁰⁹ which involved a request from the Sri Lankan government for extradition of a Tamil fugitive, obtained not only a guarantee that the death penalty would not be imposed but also several other assurances, including a promise to accord to Dharmarajah the rights enumerated in the European Convention on Human Rights. Even then, the Swiss refused to extradite him.

The French Conseil d'Etat considered the issue in connection with a request by Turkey for the extradition of a fugitive for murder and attempted murder in *Fidan*.¹¹⁰ In light of Protocol No. 6, the court held that it would be contrary to French *ordre public* to extradite Fidan since any guarantees given by the Turkish government, required under the extradition treaty, would not be binding upon the independent courts.¹¹¹

In May 1999, the French Supreme Court rejected an appeal by U.S. fugitive Ira Einhorn, who was convicted in Philadelphia for the murder of his girlfriend in 1977, setting the stage for his extradition to the United States.¹¹² He fled the United States in

106. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27 (1969), 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969).

107. *Id.* at 1386.

108. *Id.* at 1389.

109. See *Dharmarajah v. Ministere Public Federal, Arrêts du Tribunal Federal Suisse* [ATF] 107 Ib 68 (1981), cited in GEOFF GILBERT, TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW—EXTRADITION AND OTHER MECHANISMS 167-68 (1998).

110. See *Fidan*, 100 I.L.R. 662 (1997), cited in GILBERT, *supra* note 109, at 167.

111. See *Fidan*, 100 I.L.R. at 663-64.

112. See *French Court Rejects Appeal on Extradition*, N.Y. TIMES, May 28, 1999, at A18;

1981, shortly before his trial in Pennsylvania, and was later tried, convicted, and sentenced *in absentia* to life in prison. After many years, Einhorn was found and arrested in France, which guarantees a new trial for a suspect convicted *in absentia*, since convictions *in absentia* violate principles of the European Convention on Human Rights and are not valid under French law. The French Court of Appeals, without any explanation, decided to free Einhorn.¹¹³ Subsequently, the Pennsylvania legislature passed a law allowing for new trials under certain circumstances for persons tried and sentenced *in absentia*. A second round of his arrest by French authorities and the U.S. request for extradition followed. The French Appeals Court agreed to his extradition on the condition that he would be tried again in Philadelphia and the death penalty would not be imposed if he was convicted.¹¹⁴

In 1997, the Italian Constitutional Court faced a challenge by Pietro Venezia to the Italian Ministry of Justice's decree permitting him to be extradited to the United States where he was under indictment for murder in Florida. The court in *Venezia v. Ministero di Grazia & Giustizia*¹¹⁵ looked beyond the question of sufficiency of the assurances given in a *note verbale* by the U.S. Department of State, through its Embassy in Rome, that the death penalty would not be imposed or inflicted upon Venezia, to find that the statutes on which the Italian government would have proceeded to extradite him¹¹⁶ were in fact unconstitu-

see also Steven Levy, *Getting Away with It*, NEWSWEEK, Dec. 15, 1997, at 58; David Osborne, *Hunt for the Unicorn*, INDEPENDENT (LONDON), Feb. 13, 1999, at 12; Matthew W. Henning, *Extradition Controversies: How Enthusiastic Prosecutions Can Lead to International Incidents*, 22 B.C. INT'L & COMP. L. REV. 347, 367-72 (1999).

113. See Levy, *supra* note 112, at 60.

114. See Anne Swardson, *French Court Allows Extradition of Fugitive in U.S. Killing*, WASH. POST, Feb. 19, 1999, at A17.

115. *Venezia v. Ministero di Grazia e Giustizia*, Corte coste, 27 June 1996, 79 RIVISTA DI DIRITTO INTERNAZIONALE 815 (1996); Andrea Bianchi, *U.S.-Italy Extradition Treaty—Challenge Regarding Constitutionality—Protection of Fundamental Human Rights, Including Right to Life—Prohibition of Death Penalty in Requested Party's Constitution—Inadmissibility of Assurances That Death Penalty Shall Be Imposed or Enforced*, 91 AM. J. INT'L L. 727 (1997).

116. *Id.* at 727-28. Article 698 of the Italian Code of Criminal Procedure and the Italian domestic statute incorporating Article IX of the U.S.-Italy Extradition Treaty both provide that:

[W]hen the offense for which extradition is requested is punishable by death under the laws of the requesting Party, extradition shall be refused, unless the requesting Party provides such assurances as the requested Party considers suf-

tional. The Italian Constitution protects fundamental human rights and prohibits the death penalty.¹¹⁷

Venezia had first appealed the Ministry of Justice's decree to the Court of Cassation, which held that the U.S. assurances were appropriate and sufficient. Thus, in the court's words, in these circumstances, "[T]he sanction of the death penalty is non-existent or, at least, non-effective."¹¹⁸ The Constitutional Court, which finally considered the matter, ruled that under no circumstances would Italy extradite an individual to a country where the death penalty exists. The relevant issue for the court's consideration was whether the assurances of the requesting state were adequate to protect the values enshrined in the Italian Constitution. Under the Italian Constitution, the ideal of the right to life is preeminent and requires absolute protection. It states in Article 2 that "[t]he Republic recognizes and guarantees the inviolable rights of man, both as an individual and as a member of the social groups in which one's personality finds expression, and it requires the performance of imperative political, economic, and social duties."¹¹⁹ Under article 27, paragraph 4, "[t]he death penalty is not admitted save in cases specified by military laws in time of war."¹²⁰

E. *Appraisal*

With the adoption of Protocol No. 6 and the Second Optional Protocol to the Civil and Political Rights Covenant, state practice is much more demanding of assurances that the death penalty will not be imposed prior to allowing extradition to the United States. Even Canada, which has traditionally not considered assurances from the United States necessary for extradition purposes, is now likely to demand such assurances.

III. TORTURE

The jurisprudence of the European Court of Human Rights clearly demonstrates that extradition will be refused if there is a

ficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

Id. at 727.

117. *Cost.* arts. 2, 27 (It.).

118. Bianchi, *supra* note 115, at 729.

119. *Id.* at 728 n.2, *citing* *Cost.* art. 2 (It.).

120. *Id.*, *citing* *Cost.* art. 27(4) (It.).

real risk that the fugitive, if surrendered, will be subject to torture. The rationale is that the 1984 U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹²¹ prohibits the extradition as well as the deportation of a person to a state "where there are substantial grounds for believing that he would be in danger of being subjected to torture"¹²² and allows no derogation. Hence, the seminal case on torture is a deportation case, *Chahal v. United Kingdom*,¹²³ in which the European Court of Human Rights held that since there was a real risk of Chahal being subjected to treatment contrary to Article 3 of the European Convention on Human Rights if he were returned to India, the U.K. order for his deportation to India would, if executed, give rise to a violation of Article 3.

Chahal was an Indian Sikh who had entered the United Kingdom illegally and had been detained for deportation, but feared for his safety if returned to India, because of his earlier Sikh separatist activities. He complained to the European Commission of Human Rights. They concluded that his deportation would result in violation of Article 3.¹²⁴ The European Commission of Human Rights stressed that "the guarantees of Article 3 are of an absolute character, permitting no exception."¹²⁵

The European Court of Human Rights referred to its "well established" case law on Article 3 that "where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country," there is an implied obligation not to expel the person in question to that country.¹²⁶ The court stated that "[i]t should not be inferred from the Court's remarks [about] the risk of undermining the foundations of extradition" in the *Soering* judgment "that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibil-

121. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), 23 I.L.M. 1027, *as modified* in 24 I.L.M. 535 (1985).

122. *Id.* art. 3(1), 1465 U.N.T.S. at 114.

123. *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413 (1997).

124. *Id.* at 446.

125. *Id.* at 443.

126. *Id.* at 455.

ity under Article 3 is engaged."¹²⁷ It assessed Chahal's risk of ill-treatment, and, rejecting the U.K. arguments based on its security considerations, and, notwithstanding India's assurances, concluded that the contemplated deportation to India would be a violation of Article 3.¹²⁸

CONCLUSION

The practice of refusing international extradition requests on the ground of torture has become customary in international law. The death penalty, however, raises debatable issues. In any event, the trend toward abolition of the death penalty is clear. Consequently, the United States will increasingly confront difficulties in obtaining extradition of fugitives from the European states and Canada. Abducting the criminals and taking them back to the United States for trial is not an appropriate response.¹²⁹ Although the United States has entered into several bilateral treaties, which contain clauses allowing a country to ask for an assurance that the death penalty will not be imposed,¹³⁰ even if there is no provision for such assurances to be given, in the interest of comity the United States should show sensitivity for other countries' values on this very fundamental issue and voluntarily give those assurances.

127. *Id.* at 457.

128. *Id.* at 458-64.

129. *See* *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (holding that respondent's forcible abduction does not prohibit his trial in U.S. court for violation of criminal laws of United States); *see also* Mary K. Martin, *A One-Way Ticket Back to the United States: The Collision of International Extradition Law and the Death Penalty*, 11 *CAP. DEF. J.* 243 (1999).

130. *See* Extradition Treaty, June 8, 1972, U.S.-U.K., art. 4, 28 U.S.T. 227, 230; Extradition Treaty, Oct. 13, 1983, U.S.-Italy, art. 9, 35 U.S.T. 3023, 3031; U.S.-Canada Extradition Treaty, *supra* note 54, art. 6, 27 U.S.T. at 989.