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Extradition and the Death Penalty Exception in Canada: Resolving the *Ng* and *Kindler* Cases

SHARON A. WILLIAMS*

I. INTRODUCTION

Extradition law performs two distinct functions. In one respect, extradition law is a complex compendium of rules that assists states in returning fugitives to their criminal justice systems. This characterization views the extradition law and process as one of mutual assistance in criminal matters between states.¹ In another respect, extradition law provides the individual fugitive with protection through legal safeguards that ultimately may prevent his or her return to the requesting state.

The *Kindler*² and *Ng*³ cases bring the two competing functions of extradition law and process squarely into focus. Both cases address important questions concerning the appropriateness of extraditing from Canada, which abolished the death penalty in 1976, to the United States, a country in which thirty-seven states allow capital punishment. As the majority of Canada's extradition requests come from the United States, this question of the right balance between international cooperation and human rights issues is of the utmost importance.

The bases for the extradition requests in *Kindler* and *Ng* provide an understanding of the dilemma facing Canada in extradition cases where the fugitive is subject to the death penalty. John Joseph Kindler was convicted in Pennsylvania, in 1983, of first degree murder, criminal conspiracy, and kidnapping. The jury recommended the

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1. Reciprocity is a key issue with states having a mutuality of obligations. This is seen in the basic precept of extradition law that there be a threshold requirement of double criminality. As to reciprocity, see M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION, UNITED STATES LAW AND PRACTICE* 325 (1987); M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 314 (1974).

2. *United States v. Kindler*, 22 C.C.C.3d 90 (Qué S.C. 1985); *Kindler v. Crosbie*, [1987] 2 F.C. 145 (F.C.T.D); *Kindler v. Crosbie*, [1989] 2 F.C. 492 (F.C.A.).

3. *United States v. Ng*, 93 A.R. 204 (Q.B. 1988); *United States v. Ng*, 97 A.R. 241 (C.A. 1989).

death penalty. Because Kindler escaped from custody in September 1984, his sentence was never formally imposed. Kindler was arrested in Canada in 1985. Charles Chitat Ng was accused in California of twelve counts of murder, one count of attempted murder, two counts of conspiracy to commit murder, three counts of kidnapping, and one count of burglary, when he escaped from custody. He was apprehended in Canada in 1985.

This Article will focus on extradition based on Canada's Extradition Act.⁴ Canada does not extradite unless there is a treaty in force with the requesting state.⁵ Canada has the discretion to extradite to the United States in the *Kindler* and *Ng* cases. Alternatively, Canada may refuse to extradite unless competent authorities in the United States give assurances that the death penalty will not be imposed, or if imposed, will not be carried out. In many respects, this puts Canada on the horns of a dilemma: if assurances are not given, what are Canada's options? This Article addresses these options, using *Kindler* and *Ng* as the central cases in which Canadian courts have examined this issue.

Canada's procedure in extradition cases differs from that of the United States. Once the extradition judge, habeas corpus judge, court of appeal, and the Supreme Court of Canada have committed or upheld the committal of a fugitive for surrender, it is up to the Minister of Justice to decide whether surrender is appropriate. The Minister's decision may then be reviewed further by the courts if there are grounds to do so. The *Kindler* and *Ng* cases demonstrate the judicial and ministerial path of extradition in Canada. They are also notable

4. R.S.C. ch. E-23 (1985).

5. However, Canada will extradite without a treaty in two limited circumstances. One of these circumstances is when there is a special agreement with a foreign state pursuant to part II of the Extradition Act. Special agreements are far more limited than extradition treaties. For example, they apply only to crimes committed after the agreement has entered into force, whereas extradition treaties are, unless they provide expressly to the contrary, retrospective, as well as prospective, and contain a more detailed schedule of offenses. For an example of an express treaty limit on retrospectivity, see Extradition Agreement, Mar. 10, 1967, Canada-Israel, 1969 Can. T.S. No. 25, 722 U.N.T.S. 270. Canada entered into this type of special agreement for the first time with the Federal Republic of Germany in 1974. However, this was superseded by a later treaty. See Extradition Agreement, Sept. 30, 1979, Canada-West Germany, 1979 Can. T.S. No. 18. Note that the parties to this treaty will likely amend it in the near future to reflect German unification. In 1979, a part II agreement was signed with Brazil and, in 1985, with India. As of 1987, Canada has an extradition treaty with India.

The other limited circumstance in which Canada will extradite in the absence of a treaty is where the rendition of fugitives to or from the Commonwealth under the Fugitive Offenders Act is concerned. See Fugitive Offenders Act, R.S.C. ch. F-32 (1985).

for their examination of the death penalty and judicial review of the Minister of Justice's decision to extradite.

In order to put the *Kindler* and *Ng* cases into perspective, this Article first discusses the differences between treaty interpretation and statutory interpretation in the death penalty area and how this impacts on the death penalty issue. Secondly, in looking at the constitutional rights of the fugitive under Canadian law, this Article makes a detailed reference to a recent decision of the European Court of Human Rights, which has undoubted comparative and persuasive significance for *Kindler* and *Ng*. This Article then surveys the respective roles of the Minister of Justice and the judiciary in extradition matters in Canada, placing emphasis on the reviewability of the Minister's decision to extradite without seeking assurances in death penalty cases. Next, this Article considers the vital question of whether Canadian constitutional guarantees extend to penalties to be executed in a foreign sovereign state. It also considers whether the guarantees would be violated by extraditing in a death penalty case. Finally, this Article summarizes the approaches that Canada can take if the Supreme Court of Canada should hold that extradition cannot take place in the absence of assurances.

II. TREATY INTERPRETATION AND STATUTORY INTERPRETATION

In dealing with human rights, the death sentence, and Canadian extradition, it is important to note the differences in approach between interpretation of Canada's extradition treaties and the Extradition Act. These differences become apparent upon consideration of extradition's role in the overall scheme of law. From a purely international perspective, extradition is a treaty matter bearing directly on the rights and duties of states, thus, interstate cooperation is emphasized. From a domestic law perspective, extradition is viewed as part of the criminal process, and thus may be interpreted in a manner that emphasizes the fugitive's rights.

The fundamental rule of interpretation from the Vienna Convention on the Law of Treaties⁶ is to interpret treaties literally according to the ordinary meaning of the words used in the text.⁷ Treaties must

6. U.N. Doc. A/Conf. 39/27, (1969), reprinted in 8 I.L.M. 679 (1969) (instrument of accession deposited by Canada, October 14, 1970, pursuant to Order in Council, P.C. 1979-1339, entered into force January 27, 1980).

7. See *id.* art. 30.

also be interpreted in good faith (*pacta sunt servanda*)⁸ "which is at once psychological and ethical, requiring adherence to ordinary meaning and context."⁹ A treaty must be interpreted in a manner that is calculated to give it effect and content, rather than to deprive it of meaning.¹⁰

Applying these rules to extradition treaties, the courts in Canada and the United Kingdom have liberally interpreted such agreements in order to give effect to the treaty. As G.V. La Forest stated in *Extradition to and from Canada*,¹¹ "treaties should receive a fair and liberal meaning and . . . in extradition matters the ordinary technical rules of criminal law should apply to a limited extent."¹² In *Canada v. Schmidt*,¹³ Justice La Forest further stated:

I would add that the lessons of history should not be overlooked. Sir Edward Clarke instructs us that in the early 19th century the English judges, by strict and narrow interpretation, almost completely nullified the operation of the few extradition treaties then in existence. . . . Following the enactment of the *British Extradition Act, 1870*, . . . upon which ours is modelled, this approach was reversed. The present system of extradition works because courts give the treaties a fair and liberal interpretation with a view to fulfilling Canada's obligations, reducing the technicalities of criminal law to a minimum and trusting the courts in the foreign country to give the fugitive a fair trial . . .¹⁴

Under section 52 of the Canadian Charter of Rights and Freedoms¹⁵ ("Charter"), should a treaty provision, as implemented into Canadian law by the Extradition Act, violate a Charter right and not be saved by section 1 of the Charter, the provision will be struck down as would domestic legislation itself.¹⁶

8. *Id.* art. 26.

9. See S.A. WILLIAMS & A.L.C. DE MESTRAL, AN INTRODUCTION TO INTERNATIONAL LAW 359 (2d ed. 1987).

10. *Id.*; see also M. McDUGAL, H. LASSWELL & J.C. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 156 (1967).

11. G.V. LA FOREST, EXTRADITION TO AND FROM CANADA (2d ed. 1977).

12. *Id.* at 57.

13. [1987] 1 S.C.R. 500.

14. *Id.* at 524 (citations omitted).

15. Constitution Act, 1982, R.S.C. §§ 1-34 (1982) (enacted by the Canada Act, 1982 (U.K.) c.11, and proclaimed into force Apr. 17, 1982) [hereinafter Charter].

16. See *Schmidt*, [1987] 1 S.C.R. at 518 (La Forest, J.) ("There can be no doubt that the actions undertaken by the Government of Canada in extradition as in other matters are subject to scrutiny under the Charter . . ."); see also *id.* at 521-22 (referring to *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441).

In the United States, Professor Bassiouni has stated that:

[w]here a provision is capable of two interpretations, either of which would comport with the other terms of the treaty, the judiciary will choose the construction which is more liberal and would permit the relator's extradition, *because the purpose of the treaty is to facilitate extradition treaties between the parties to the treaty.*¹⁷

Further, he has written that "[a]t times the judiciary will interpret terms beyond their actual meaning to encompass their spirit and intent"¹⁸

This liberal approach of interpreting extradition treaties may be labelled "cooperative," as it responds to the mutual interests of states in having a flexible extradition process and reciprocal cooperation.¹⁹ Halsbury's Laws of England explains the liberal approach this way: "The words used in such [extradition] treaties are to be given their ordinary international meaning, general to lawyer and layman alike, and not a particular meaning which they may have attracted in certain branches of activity in England."²⁰

In *Belgium v. Postlewaite*,²¹ Lord Bridge addressed this issue, stating: "In my judgment those treaties ought to receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object and intent."²² Lord Bridge then went on to hold that "the court should not interpret any extradition treaty, unless so constrained by the language, in a way which would 'hinder the working and narrow the operation of most salutary international arrangements.'²³

Lord Bridge referred to a statement by Chief Justice Lord

17. M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 88 (1987) (emphasis added). See also *United States v. Wiebe*, 733 F.2d 549, 554 (8th Cir. 1984); *Brauch v. Raiche*, 618 F.2d 843 (1st Cir. 1980); *Matter of Sindona*, 584 F. Supp. 1437, 1447 (E.D.N.Y. 1984).

18. M.C. BASSIOUNI, *supra* note 17, at 89 (referring to L. OPPENHEIM, 1 *INTERNATIONAL LAW* 952-53 (8th ed. 1955)). This rule was applied in *Melia v. United States*, 667 F.2d 300 (2d Cir. 1981).

19. See Warbrick, *The Criminal Justice Act 1988: (1) the New Law on Extradition*, *CRIM. L. REV.* 4, 5 n.19 (1989); *Bozano v. France*, 111 Eur. Ct. H.R. (ser. A) (1987) (Schermers, J., dissenting).

20. HALSBURY'S LAWS OF ENGLAND 88, ¶ 216 (4th ed. 1977) (citing *Ex Parte Ecke*, reprinted in [1974] *CRIM. L. REP.* 102).

21. [1987] 2 All E.R. 985 (H.L.). The Judicial Committee of the Privy Council recently referred to this case as good authority for the liberal interpretation principle in *United States v. Bowe*, [1989] 3 All E.R. 315, 326.

22. [1987] 2 All E.R. at 991.

23. *Id.* (quoting *In re Arton* (No. 2), [1986] 1 Q.B. 509, 517).

Widgery in *Ex parte Beese*,²⁴ in which Lord Widgery held that because an extradition treaty is a contract between two sovereign states, it should be construed as if it were a domestic statute.²⁵ However, in applying that principle, Lord Bridge held that state parties to bilateral extradition treaties enter into reciprocal rights and duties for the purpose of bringing to justice those who have committed grave crimes. Therefore, to "apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve this purpose."²⁶ Thus, in *Postlewaite*, Lord Bridge indicated that courts should look for the underlying intention of the contracting parties when interpreting a treaty provision.²⁷

This emphasis on interstate cooperation in interpreting treaties may be seen as conflicting with the protective function of extradition law. One commentator has suggested that:

[t]he conflict between the cooperative and protective functions of extradition law creates a certain tension, something exacerbated by the different views among states about the exact place of extradition in the criminal process. To the extent that extradition is seen [as] simply part of the process of gaining custody of the fugitive, the protections appropriate are relatively slight and the matter may be regarded as administrative rather than judicial.²⁸

The protective side of extradition procedure clearly emphasizes the penal law aspects of extradition and provides protective safeguards for the fugitive.²⁹ In contrast, *Postlewaite* illustrates a preference for the cooperative approach. This preference is also seen in other fairly recent extradition cases dealing with evidentiary issues,³⁰ the political offense exception,³¹ and the double criminality rule.³²

24. [1973] 1 W.L.R. 969.

25. See *Postlewaite*, [1987] 2 All E.R. at 991 (quoting *Ex Parte Beese*, [1973] 1 W.L.R. 969, 973).

26. *Id.* at 992.

27. See *id.*

28. Warbrick, *supra* note 19, at 5-6 (footnotes omitted).

29. For a recent case in which the European Court of Human Rights held that deportation from France to Switzerland in certain circumstances involved a violation of article 5(1)(f) of the European Convention on Human Rights, see *Bozano v. France*, 111 Eur. Ct. H.R. (ser. A) (1987).

30. See, e.g., *Ex parte Rees*, [1986] 2 All E.R. 321 (H.L.); *In re Muir*, T.L.R. (Dec. 11, 1987).

31. See, e.g., *Ex parte Cheng*, [1973] 2 All E.R. 204 (H.L.); *Keane v. Governor of Brixton Prison* [1971] 1 All E.R. 1163.

32. See, e.g., *Denmark v. Nielsen*, [1984] 2 All E.R. 81; *United States v. McCaffery*, [1984] 2 All E.R. 570.

It appears that the courts in Canada, the United Kingdom, and the United States generally emphasize the cooperative intent of state parties to extradition treaties when interpreting treaty provisions. However, when a domestic statute is in question, the courts are more protective. When the courts interpret extradition legislation, such as the Extradition Act, they stress the penal aspects. When the courts find ambiguities, they seem to construe them in favor of the fugitive.³³ For example, in *Ex parte Cheng*,³⁴ Lord Simon stated that "the positive powers [to extradite] under the Act should be given a restrictive construction and the exceptions from those positive powers a liberal construction."³⁵ He further stated that "[s]ince the common law, as so often, favours the freedom of the individual, the rules enjoining strict construction of a penal statute or of a provision in derogation of liberty merely reinforce the presumptions against change in the common law."³⁶

It must be reemphasized that should a treaty obligation or the Extradition Act itself violate a Charter right, the offending article or section will have no force or effect, unless it falls within the reasonableness limitation of section 1. It is fundamental that international treaty expediency not take precedence over a Charter right.

III. THE DEATH SENTENCE EXCEPTION AND THE FUGITIVE IN CANADA

Several of Canada's extradition treaties, including the 1976 treaty with the United States³⁷ and those with Austria,³⁸ Israel,³⁹ Germany,⁴⁰ and Sweden,⁴¹ provide that where an extraditable offense is punishable by death under the laws of the requesting state, and the laws of the requested state do not allow such punishment for that

33. See, e.g., *In re Aronson*, [1989] 3 W.L.R. 436, 466; see also Extradition Act, 1989, 17 HALSBURY'S STATUTES OF ENGLAND AND WALES (ANNOTATED), ch. 33, 33/2.

34. [1973] 2 All E.R. 204 (H.L.).

35. *Id.* at 217.

36. *Id.*

37. Treaty on Extradition, Dec. 3, 1971, United States-Canada, art. 6, 27 U.S.T. 983, T.I.A.S. No. 8237 [hereinafter United States-Canada Extradition Treaty]. Cf. European Convention on Extradition, Nov. 29, 1965, art. II, 597 U.N.T.S. 338. The Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders (1990) recently recommended that the Model Treaty on Extradition likewise contain such an article.

38. Extradition Agreement, Canada-Austria, 1969 Can. T.S. No. 24.

39. Extradition Agreement, Mar. 10, 1967, Canada-Israel, 1969 Can. T.S. No. 25, 722 U.N.T.S. 270.

40. See *supra* note 5 and accompanying text.

41. Extradition Agreement, Canada-Sweden, 1976 Can. T.S. No. 8.

offense, the requested state may refuse extradition unless the requesting state provides sufficient assurances that the death penalty shall not be imposed, or if imposed, shall not be carried out.

The Extradition Act does not deal with the question of penalties. However, two observations are pertinent. First, section 3 of the Extradition Act provides that if any sections of the Act conflict with the articles of one of Canada's extradition treaties, the treaty will prevail.⁴² This is an exception to the usual rule in Canada that the domestic statute will take precedence. However, as was indicated previously, should such treaty provisions run counter to the individual guarantees provided by the Charter of Rights and Freedoms,⁴³ the Charter provisions will prevail.⁴⁴

The second observation is that even though the Act does not specifically address the Minister of Justice's refusal to extradite on the ground that a requesting state may impose the death penalty, it is still important to note that a broad interpretation of the specialty rule would encompass this question. A broad interpretation would also provide a ground upon which the fugitive and the requested state could challenge an extradition agreed to on the basis of assurances that the death penalty would not be carried out. Bassiouni suggests that if the requested state wishes to impose the condition, it must explicitly indicate so when granting the extradition request.⁴⁵ If it does not do so, the requesting state may consider it only as "a recommendation for leniency."⁴⁶ Bassiouni concludes that "[i]t is not yet well established if such a condition is binding on the requesting state, as it may be considered an infringement of its sovereignty. However, if the requesting state accepts the condition, it would become part of the principle of specialty."⁴⁷

A full discussion of the specialty rule is not possible within the confines of this Article, but it must be emphasized that the specialty rule is central to the extradition process, as it protects the fugitive from unexpected charges and, it is submitted, unexpected penalties

42. Extradition Act, R.S.C. ch. E-23, § 3 (1985).

43. Constitution Act, 1982, R.S.C. §§ 1-34 (1982).

44. *Id.* § 52.

45. M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND UNITED STATES LAW AND PRACTICE 366 (1987) (citing *In re Cortés*, [1934] A.D. 356 (Camara Federal de la Capital, Argentina)).

46. *Id.* (citing *In re Oberbichler*, [1934] 7 A.D. 354 (Corte cass., Italy)).

47. *Id.*

once extradited.⁴⁸ It also protects the requested state from abuse of its extradition processes.⁴⁹

The issue of the death penalty exception is not only of academic interest to Canada. Canada and the United States have a long-standing extradition basis. The majority of the extradition requests directed to Canada come from the United States, a country in which many states have not abolished the death penalty. Thus, Canada has an interest in the efficacy of the extradition process and in continued cooperation in criminal matters, including extradition. Nevertheless, the human rights protections of fugitives detained in Canada cannot be denied. Canada therefore faces the difficult task of striking the appropriate balance between cooperation with the United States and protection of the fugitives' rights.

The following section will analyze whether the Minister of Justice's decision to extradite without sufficient assurances can be overruled.

IV. EXTRADITION AND THE DEATH PENALTY: A VIOLATION OF SECTIONS 7 AND 12 OF THE CHARTER OF RIGHTS AND FREEDOMS?

The heart of this debate on extradition centers on whether sections 7 and 12 of the Charter apply to cases in which adverse consequences will result to the extradited individual because of punishment imposed in the requesting state. There are two main issues that must be addressed. The first issue is the intraterritorial or extraterritorial scope of the Charter in relation to such cases. The second issue consists of two parts: 1) Is a decision of the Minister of Justice to extra-

48. The rule requires that once the requested state surrenders the fugitive, the requesting state may only prosecute him or her for the offense for which extradition was granted, unless the fugitive has had a reasonable opportunity to leave the requesting state. This rule may be found in domestic legislation such as section 33 of the Extradition Act or in bilateral or multi-lateral extradition treaties. It is, however, a matter of debate whether it can be classified as a rule of customary international law, and may thus be raised by the fugitive even where a statutory or treaty provision is absent. In support of this view, see Hart & Poncet, *Rapport sur le principe de la specialité en matière d'extradition*, REVUE INTERNATIONALE DE DROIT PÉNAL (forthcoming). Also, note the view expressed by Justice La Forest in *Parisien v. The Queen*, [1988] 1 S.C.R. 950, 957, where he stated that "this is seen by some as a customary rule of international law, but it seems to me to arise out of a proper construction of the treaty." See also Feller, *Reflections on the Nature of the Specialty Principle in Extradition Relations*, 12 ISR. L. REV. 466, 487.

49. As to both the fugitive and the requested state being beneficiaries of this rule, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 477(b)(1987).

dite to a state which retains the death penalty a violation of section 12 of the Charter in that the fugitive will be subjected to cruel and unusual treatment or punishment? 2) If extradition is not viewed as directly contrary to section 12, will section 7 still be violated to the extent that extradition in such circumstances will deprive the fugitive of the right to life, liberty, and security of the person? Thus, the basic question here is whether the decision to extradite conforms to the principles of fundamental justice.

In probing these questions, it will be useful to first analyze the recent decision of the European Court of Human Rights in *Soering v. United Kingdom*⁵⁰ and its holding on a parallel question.

A. *The Impact of the Soering Case*

Decisions of the European Court of Human Rights based on the European Convention for the Protection of Human Rights and Fundamental Freedoms⁵¹ ("European Convention") and its relevant protocols are not binding on Canada because, as a non-European country, Canada is not and cannot be a member of the Council of Europe under its current constitution.⁵² However, since the Canadian Charter of Rights and Freedoms utilizes, in part, the language of the European Convention, the decisions of the European Court of Human Rights most certainly have persuasive value in Canada. Already, Canadian courts, including the Supreme Court of Canada, have had occasion to refer to the Convention and the European Court's decisions. Additionally, on August 19, 1976, the International Covenant on Civil and Political Rights⁵³ and First Optional Protocol⁵⁴ went into force in Canada. Likewise, Canadian courts have not been reticent in citing applicable Covenant articles to assist them in interpreting similar language in Charter cases.⁵⁵

50. 161 Eur. Ct. H.R. (ser. A) (1989).

51. Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

52. Member states are: Austria, Belgium, Cyprus, Denmark, Finland, Germany, France, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. It has been suggested that several Eastern European states are now in the process of applying to become parties to the Convention, as a pre-condition for membership in the Council of Europe. See Breitenmoser & Wilms, *Human Rights v. Extradition: The Soering Case*, 11 MICH. J. INT'L L. 845 n.2 (1990). The Council of Europe restricts its membership to those states that are committed to the rule of law and the enjoyment of human rights and freedoms. *Id.*

53. 1976 Can. T.S. No. 47.

54. *Id.*

55. See S.A. WILLIAMS & A.L.C. DE MESTRAL, *supra* note 9, at 34-35; Claydon, *The International Law of Human Rights and Canadian Courts*, Proceedings of the 1981 Conference

The recent unanimous judgment of the European Court of Human Rights in *Soering v. United Kingdom*⁵⁶ is therefore of great importance. *Soering* involved an extradition request by the United States to the United Kingdom for the fugitive Jens Soering, on charges of capital murder.⁵⁷ Following his committal for surrender by the extradition judge, Soering applied for a writ of habeas corpus and for leave to apply for judicial review.⁵⁸ Both applications were refused by the Divisional Court.⁵⁹ The case eventually went to the European Court of Human Rights, and the judgment rendered on July 7, 1989, will, as two commentators have aptly stated, "have some accelerating effect on the future discussion of extradition law and the value of human rights in such proceedings"⁶⁰

1. The Facts of the *Soering* Case

Jens Soering, a German national, was born on August 1, 1966.⁶¹ The United States' extradition request stemmed from two murders committed in Virginia in March 1985.⁶² The victims, William and Nancy Haysom, died from multiple and massive slash wounds to the neck, throat, and body.⁶³ They were the parents of Jens Soering's girlfriend, Elizabeth Haysom, a Canadian citizen.⁶⁴ Both Soering and Elizabeth Haysom were students at the University of Virginia.⁶⁵ In October 1985, they disappeared from Virginia, but were arrested in April 1986, in England, for check fraud.⁶⁶

In June 1986, a police investigator from Virginia interviewed Soering in England.⁶⁷ The investigator recorded in a sworn affidavit that Soering had admitted the killings.⁶⁸ His motive was that he was

of the C.C.I.L. 2; Cohen & Bayefsky, *The Canadian Charter of Rights and Freedoms and Public International Law*, 61 CAN. B. REV. 265 (1983); Green, *The Canadian Charter of Rights and International Law*, 20 CAN. Y.B. INT'L L. 3 (1982).

56. 161 Eur. Ct. H.R. (ser. A) (1989). See also the affirmation of *Soering* in *The Netherlands v. Short*, translated from the Dutch and reprinted in 29 I.L.M. 1375 (Neth. HR 1990).

57. *Soering*, 161 Eur. Ct. H.R. ¶ 13.

58. *Id.* ¶ 22.

59. *Id.*

60. Breitenmoser & Wilms, *supra* note 52, at 847; see also Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128, 141 (1991).

61. *Soering*, 161 Eur. Ct. H.R. ¶ 11.

62. *Id.* ¶ 12.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Soering*, 161 Eur. Ct. H.R. ¶ 12.

67. *Id.* ¶ 13.

68. *Id.*

in love with Elizabeth Haysom, but her parents were opposed to the relationship.⁶⁹ The United States requested the extradition of Soering and Elizabeth Haysom in August 1986.⁷⁰ Soering was charged with two counts of capital murder and two counts of the separate non-capital murders of the parents.⁷¹ The United Kingdom surrendered Elizabeth Haysom to the United States in May 1987.⁷² In August 1987, she pleaded guilty as an accessory to the murder of her parents and was sentenced to ninety years imprisonment.⁷³

Soering was arrested on September 12, 1987, following the issue of a warrant by a magistrate at Bow Street Magistrate's Court.⁷⁴ The British Embassy in Washington requested an assurance from United States authorities that the death penalty would not be utilized, based on article IV of the Extradition Treaty.⁷⁵ The request read as follows:

Because the death penalty has been abolished in Great Britain, the Embassy has been instructed to seek an assurance, in accordance with the terms of . . . the Extradition Treaty, that, in the event of Mr. Soering being surrendered and convicted of the crimes for which he has been indicted . . . , the death penalty, if imposed, will not be carried out.

Should it not be possible on constitutional grounds for the United States government to give such an assurance, the United Kingdom authorities ask that the United States government undertake to recommend to the appropriate authorities that the death penalty should not be imposed or, if imposed, should not be executed.⁷⁶

The Federal Republic of Germany, the state of Soering's nationality, also requested his extradition.⁷⁷ In the United Kingdom, the Director

69. *Id.*

70. *Id.* ¶ 14. The United States made its requests under the Extradition Treaty of June 8, 1972, between the United States and the United Kingdom, 28 U.S.T. 227, 230, T.I.A.S. No. 8468.

71. *Soering*, 161 Eur. Ct. H.R. ¶ 12.

72. *Id.* ¶ 13.

73. *Id.*

74. *Id.*

75. *Id.* This article is drafted in terms similar to article 6 of the United States-Canada Extradition Treaty.

76. *Soering*, 161 Eur. Ct. H.R. ¶ 15.

77. *Id.* ¶ 16. It should be noted that most civil law states use the nationality basis of criminal jurisdiction extensively. See Castel & Williams, *The Extradition of Canadian Citizens and Sections 1 and 6(1) of the Canadian Charter of Rights and Freedoms*, 25 CAN. Y.B. INT'L L. 263 (1987).

Extradition between the Federal Republic of Germany and the United Kingdom is governed by the 1872 Treaty for the Mutual Surrender of Fugitive Criminals, as amended by an

of Public Prosecutions advised the Secretary of State that, although the German request showed that German courts had jurisdiction over the crime, the evidence submitted did not amount to a prima facie case,⁷⁸ and an extradition magistrate in the United Kingdom therefore would not commit the fugitive for surrender to Germany.⁷⁹ The German government's only evidence was the admissions made by Soering to a German prosecutor who interviewed Soering in a British prison.⁸⁰ In a letter to the Director of the United States Justice Department Office of International Affairs, Criminal Division, the Attorney of Bedford County, Virginia, wrote that witnesses from the United States could not be compelled to appear in a German criminal court.⁸¹ Accordingly, the United States concluded that the British should give preference to its request, rather than the German request.⁸²

The United Kingdom informed the Federal Republic of Germany on May 20, 1987 that, as it had received the United States' request first, and because prima facie evidence supported the United States' request, the court would continue to consider that request in the usual way.⁸³ The United Kingdom also stressed that surrender to the United States would be conditioned on its providing satisfactory assurances regarding the death penalty.⁸⁴ Subsequently, the Attorney of Bedford County transmitted an affidavit to the United Kingdom under the cover of a diplomatic note, which stated:

I hereby certify that should Jens Soering be convicted of the offence of capital murder as charged in Bedford County, Virginia . . . a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or

Agreement of 1960 and an Exchange of Notes of 1978. *See Soering*, 161 Eur. Ct. H.R. ¶ 31. These agreements are incorporated into United Kingdom law by Orders in Council (the Federal Republic of Germany (Extradition) Order 1960, S.I. 1960/1375 and the Federal Republic of Germany (Extradition) (Amendment) Order 1978, S.I. 1978/1403). *See id.*

78. *Soering*, 161 Eur. Ct. H.R. at ¶ 16. Note that the test for a prima facie case is "whether, if the evidence before the Magistrate stood alone at the trial, a reasonable jury properly directed could accept it and find a verdict of guilty." *See id.* ¶ 32 (quoting *Schtraks v. Israel*, [1964] A.C. 556).

79. *Id.* ¶ 16.

80. *Id.*

81. *Id.* ¶ 17.

82. *Id.*

83. *Soering*, 161 Eur. Ct. H.R. ¶ 19.

84. *Id.*

carried out.⁸⁵

This assurance appears to address only the second paragraph of the United Kingdom's request for assurances.

2. The Court Proceedings in the United Kingdom

During the committal proceedings, which took place on June 16, 1987, at the Bow Street Magistrates' Court,⁸⁶ the Chief Magistrate committed Soering to await the Secretary of State's order for extradition to the United States.⁸⁷ Soering subsequently applied to the Divisional Court for a writ of habeas corpus and for leave to apply for judicial review.⁸⁸ Although the Divisional Court refused both applications,⁸⁹ the interim proceedings merit further consideration.

In support of his application for judicial review, Soering argued that the United States' assurances concerning the death penalty were worthless and that no reasonable Secretary of State could have regarded them as satisfying article IV of the Extradition Treaty.⁹⁰ Lord Lloyd agreed with Soering that "the assurance leaves something to be desired."⁹¹ He further stated:

Article IV of the Treaty contemplates an assurance that the death penalty will not be carried out. That must presumably mean an assurance by or on behalf of the Executive Branch of Government, which in this case would be the Governor of the Commonwealth of Virginia. The certificate sworn by Mr. Updike, far from being an assurance on behalf of the Executive, is nothing more than an undertaking to make representations on behalf of the United Kingdom to the judge. I cannot believe that this is what was intended when the Treaty was signed.⁹²

Lord Lloyd therefore did not give much weight to the assurance. He stated, however, that on account of the federal nature of the United States, it might have been difficult to get more.⁹³ He refused to grant review because the claim was premature; the Secretary of State had

85. *Id.* ¶ 20. The Attorney of Bedford County repeated this assurance in a subsequent affidavit. *Id.*

86. *Id.* ¶ 21.

87. *Id.*

88. *Soering*, 161 Eur. Ct. H.R. ¶ 22.

89. *Id.*

90. *Id.*

91. *Id.*

92. *See id.*

93. *Soering*, 161 Eur. Ct. H.R. ¶ 22.

not yet decided whether the assurance was satisfactory.⁹⁴ This position is in keeping with the Canadian decisions in *United States v. Kinder*⁹⁵ and *United States v. Ng*,⁹⁶ in which the courts refused to grant review until an administrative decision had been made.

On June 30, 1988, the House of Lords rejected Soering's petition for leave to appeal.⁹⁷ Following the Secretary of State's rejection of the fugitive's request that he exercise his discretion not to make the order for surrender, Soering was ordered surrendered to the United States.⁹⁸ Instead of seeking review of the Secretary of State's administrative decision,⁹⁹ Soering turned to the European Court of Human Rights in Strasbourg.¹⁰⁰

94. *Id.*

95. 22 C.C.C.3d 90 (Qué. S.C. 1985); [1987] 2 F.C. 145 (F.C.T.D.); [1989] 2 F.C. 492 (F.C.A.).

96. 93 A.R. 204 (Q.B. 1988); 97 A.R. 241 (1989) (C.A. 1989).

97. *Soering*, 161 Eur. Ct. H.R. ¶ 23.

98. *Id.* ¶ 24.

99. In a judicial review proceeding before a British Court, Soering could have asked for review of the decision to extradite on the grounds that it was tainted with illegality, irrationality, or procedural impropriety. See *Council of Civil Service Unions v. Minister for the Civil Service*, [1984] 3 All E.R. 935, 937 (C.A.). In determining what constituted "irrationality," the so-called "Wednesbury principles" of reasonableness would have been used. See *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.). The test in an extradition case is whether "no reasonable Secretary of State could have made an order for return in the circumstances." *Soering*, 161 Eur. Ct. H.R. ¶ 35. This could be viewed from the perspective of acceptance of the assurance and whether there was a serious risk of inhuman or degrading treatment if returned. See *id.*

According to *Ex parte Bugdaycay*, [1987] 1 All E.R. 940, which dealt with a refusal to grant asylum, courts will strictly apply the principles of reasonableness in cases where an applicant's life is at risk.

[T]he court must . . . be entitled to subject an administrative decision to the most rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.

[1987] 1 All E.R. 940, 952. In *Ex parte Bugdaycay*, Lord Templeman added, "[i]n my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process." *Id.* at 956.

Additionally, the British courts will not review any decision of the Secretary of State merely because he or she failed to consider the question of breach of the European Convention on Human Rights. See *Ex parte Kirkwood*, [1984] 2 All E.R. 390 (Q.B.).

100. See *Soering*, 161 Eur. Ct. H.R. ¶ 1. It should be noted that the United Kingdom has ratified the European Convention on Human Rights, but has not enacted implementing legislation. Warbrick, *Reasonableness and the Decision to Extradite: In re Kirkwood*, 1984 PUB. L. 539, 543 (stating that the argument that a treaty has no effect in the domestic legal system until implemented "should not carry the same weight in relation to assessing an exercise of a ministerial power"). But see *Malone v. Commissioner of Police*, [1979] 2 All E.R. 620, 638 (C.D.) (orthodox view that a ratified but nonimplemented treaty is not part of the domestic law).

3. The Application Before the European Court of Human Rights

The European Court of Human Rights took jurisdiction over the case following an application by Soering to the European Commission on Human Rights.¹⁰¹ The Commission indicated that the United Kingdom could not extradite Soering until the Commission had examined the application and the case had been referred to the European Court of Human Rights.¹⁰² The Commission brought the case before the court on January 25, 1989.¹⁰³ The purpose of the Commission's request and the two subsequent governmental applications of the United Kingdom and the Federal Republic of Germany was to obtain a decision as to whether the United Kingdom breached its obligations under articles 3, 6, and 13 of the European Convention.¹⁰⁴

The court unanimously held that, due to the particular circumstances of Soering's case, there would be a violation of article 3 if the decision to extradite to the United States was implemented. Additionally, the court held that there was no jurisdiction to entertain the complaint under article 6.3(c) and no violation under article 13.¹⁰⁵

101. Application no. 14038/88 of July 8, 1988, pursuant to art. 25 of the Convention.

102. *Soering*, 161 Eur. Ct. H.R. (ser. A) ¶ 4. The court did this in accordance with Rule 36 of the Court's Rules of Procedure. *Id.*

103. *Id.* ¶ 1. The case was also brought before the Court by the United Kingdom on January 30, 1989, and by the Federal Republic of Germany on February 3, 1989. *Id.*

104. *Id.* Pursuant to Rule 33 section 3(d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings before the court. *Id.* ¶ 2. Articles 3, 6, and 13 provide, respectively:

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 6

.....

(3) Everyone charged with a criminal offence has the following minimum rights:

.....

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require

Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

European Convention, *supra* note 51.

105. It should be noted that the Commission's Report annexed to the judgment indicates that the Commission believed there was a breach of article 13 (7-4 vote), but no breach of article 3 (6-5 vote) or article 6.3(c) (unanimous). *Soering*, 161 Eur. Ct. H.R. ¶ 1. With respect to the vote on article 3, the Commission declined to find that a period of years on death row, caused by the accused's right to pursue several avenues of appeal, attained the degree of severity required. This Article will discuss the court's reasoning in the sections that follow, as it is currently of great comparative interest to Canada.

B. Applicability of Sections 7 and 12 of the Canadian Charter of Rights in Extradition Cases

1. Respective Roles of the Minister of Justice and the Judiciary

To date, Canadian courts have taken the view that the Minister of Justice has the discretion to deny extradition in cases where the death penalty is a possibility. There is an essential difference between an extradition judge's committal for surrender and the Minister of Justice's decision to surrender. First, the extradition judge can only receive evidence relevant to his or her function under the Extradition Act.¹⁰⁶ In *Argentina v. Mellino*,¹⁰⁷ Justice La Forest stated that "the sole purpose of an extradition hearing is to ensure that the evidence establishes a prima facie case that the extradition crime has been committed."¹⁰⁸ Justice La Forest also stressed that the extradition judge and hearing play a modest role in the overall process, barring statutory or treaty exceptions.¹⁰⁹

Second, neither the Extradition Act, nor a treaty, authorizes the extradition judge to adjudicate or hear evidence on the death penalty issue. This is to be contrasted with the extradition judge's authority to take evidence concerning the political offense exception pursuant to section 15 of the Extradition Act.¹¹⁰ In *United States v. Ng*,¹¹¹ the Alberta Court of Appeal recently held that the death sentence could be distinguished from the political offense exception because political offense "evidence is . . . of a much different character than evidence which goes to the exercise of a ministerial discretion and the inclusion of a specific empowering provision militates strongly against our implying one."¹¹² Earlier, in *United States v. Kindler*,¹¹³ the court similarly held that any question of non-extradition by reason of the death penalty is to be decided by the Minister of Justice.¹¹⁴

These decisions interpreting the Extradition Act and bilateral

106. Extradition Act, R.S.C. ch. E-23, § 18 (1985).

107. 33 C.C.C.3d 334, 349 (1987) (S.C.C.) (extradition case dealing not with the death penalty, but with section 11 of the Charter).

108. *Id.*

109. *See id.*; see also *Canada v. Schmidt*, [1987] 1 S.C.R. 500, 519.

110. *See* Extradition Act, R.S.C. ch. E-23, § 15 (1985).

111. 97 A.R. 241 (C.A. 1989) (upholding the extradition judge's decision).

112. *Id.* at 243.

113. 22 C.C.C.3d 90 (Qué. S.C. 1985). See also *Bouthillier v. United States*, No. 500-36-00813 (Qué S.C. Feb. 1, 1991), a case in which Justice Pinard held that a decision as to whether a minimum punishment of imprisonment was cruel and unusual was within the province of the executive, subject to judicial review.

114. *See* *United States v. Kindler*, 22 C.C.C.3d 90 (Qué S.C. 1985).

treaty provisions are correct. Under the Canadian system, the judiciary and the executive serve distinct functions. The extradition judge's role is to ascertain whether all of the extradition requirements are satisfied, such as the crime being extraditable, double criminality, and sufficiency of evidence. After the Minister of Justice receives an extradition judge's decision to commit for surrender, he or she makes the determination about extraditing the fugitive.¹¹⁵ In exercising his or her discretion to extradite, the Minister may take into account a wide variety of matters. Thus, at the ministerial stage, the fugitive may present to the Minister evidence on the death penalty issue in the form of oral and written argument.¹¹⁶

Following a decision by the Minister of Justice to extradite with or without assurances concerning the death penalty, a fugitive may seek judicial review.¹¹⁷ This gives the fugitive a protracted period between the initial extradition judge's committal for surrender and review of the Minister of Justice's decision by the Federal Court, Trial Division, Court of Appeal, and the Supreme Court of Canada.¹¹⁸

A long-awaited decision on the issue of extradition and the death penalty appears to be forthcoming, as the Governor in Council has recently referred this issue to the Supreme Court of Canada.¹¹⁹ The questions presented to the Supreme Court of Canada for hearing and consideration are: 1) Would the surrender by Canada of an extradition fugitive to the United States, to stand trial for willful or deliberate murder for which the penalty upon conviction may be death, constitute a breach of the fugitive's rights guaranteed under the Charter of Rights and Freedoms? 2) Did the Minister of Justice, in deciding pursuant to article 6 of the United States-Canada Extradition Treaty to surrender the fugitive Ng without seeking assurances from the United States that the death penalty would not be imposed on Ng or, if imposed, that it would not be executed, commit any of the errors of law and jurisdiction alleged by the extraditee?¹²⁰

115. Extradition Act, R.S.C. ch. E-23, § 25 (1985).

116. In *Kindler*, the Minister of Justice declined to hear *viva voce* evidence by Kindler himself, because he thought that it would be improper for a Minister of Justice to reconsider a fugitive's credibility.

117. See *Operation Dismantle, Inc. v. The Queen*, [1985] 1 S.C.R. 441.

118. New legislation is needed in Canada to update the Extradition Act. This must include streamlining the extradition review process and the judicial review of the Minister of Justice's decision because there is too much duplication.

119. By Order-in-Council P.C. 1990-1082, dated June 7, 1990, promulgated pursuant to section 53(1) of the Supreme Court Act, R.S.C. ch. S-26 (1985).

120. *Id.* Oral hearing before the Supreme Court of Canada took place on February 21,

In terms of procedure, the *Kindler* case has gone the extradition route. In that case, the Minister of Justice decided to surrender without seeking assurances, and Kindler sought review by the Federal Court, Trial Division.¹²¹ The court refused to quash the Minister's decision.¹²² An appeal to the Federal Court of Appeal likewise failed.

In *Ng*, the extradition judge committed Ng for surrender. The Alberta Court of Appeal upheld her decision. The Minister of Justice, as in *Kindler*, decided to surrender without seeking assurances. Unlike *Kindler*, however, *Ng* has not gone through the federal court review process. The outcome of this Supreme Court of Canada case may clarify a number of extradition matters that are currently uncertain.

2. Extraterritorial or Intraterritorial Application of the Charter

In deciding whether Canada may extradite Kindler and Ng, the Supreme Court of Canada must consider whether sections 7 and 12 of the Charter may be applied extraterritorially to conduct by other states with the effect of prohibiting extradition, or whether their scope is intraterritorial to Canada. If the latter perspective is taken, can these sections prevent extradition on the basis that, by extraditing, Canada would allow a violation of rights that would be protected under the Charter in Canada? To date, none of the justices on the Supreme Court of Canada have suggested extraterritorial application. In *Canada v. Schmidt*, Justice La Forest stated that "there cannot be any doubt that the *Charter* does not govern the actions of a foreign country. In particular the *Charter* cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted."¹²³ The crux of the matter, therefore, is deciding what constitutes intraterritorial application.

1991. The judgment was reserved. Justice Cory of the Supreme Court of Canada has stated two related constitutional questions:

Is s. 25 of the *Extradition Act*, . . . to the extent that it permits the Minister of Justice to order the surrender of a fugitive for a crime for which the fugitive may be or has been sentenced to death in the foreign state without first obtaining assurances from the foreign state that the death penalty will not be imposed, will not be executed, inconsistent with ss. 7 or 12 of the *Canadian Charter of Rights and Freedoms*?

If the answer to question 1 is in the affirmative, is s. 25 of the *Extradition Act*, . . . a reasonable limit of the rights of a fugitive within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*, and therefore not inconsistent with the *Constitution Act, 1982*?

121. *Kindler v. Crosbie*, [1987] 2 F.C. 145, 148-49.

122. *Id.* at 156-57.

123. [1987] 1 S.C.R. 500, 518.

The specific issue is whether Canada should apply the Charter to extradition cases in which the death penalty exists in the requesting state. Because Canada has abolished the death penalty, the question is whether the imposition of the death penalty would deny the fugitive the right to life, liberty, and security of the person, or would subject the fugitive to cruel and unusual treatment or punishment in violation of the Charter.

In *Schmidt*, the Supreme Court of Canada noted that "[t]he pre-eminence of the Constitution must be recognized . . ."¹²⁴ Justice La Forest stated that:

[T]he treaty, the extradition hearing in this country and the exercise of the executive discretion to surrender a fugitive must all conform to the requirements of the Charter, including the principles of fundamental justice

. . . .
 . . . The real question is whether the fugitive in the circumstances of this case would, by virtue of her proposed extradition, be deprived of this right in a manner that did not conform to the principles of fundamental justice.

. . . .
 I have no doubt either that in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances. To make the point, I need only refer to a case that arose before the European Court on Human Rights, *Altun v. Germany* . . . where it was established that prosecution in the requesting country might involve the infliction of torture. Situations falling far short of this may well arise where the nature of the criminal proceedings or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7.¹²⁵

The main focus in each case is whether the surrender of a fugitive offends the basic demands of justice. In *United States v. Allard*,¹²⁶

124. *Id.* at 520.

125. *Id.* at 520-22. For a review of *Altun v. Germany*, 5 E.H.R.R. 611 (1983), which dealt with an alleged violation of article 3 of the European Convention, see Drezemczewski, *Aliens and the European Rights Convention: A General Survey*, 2 NOTRE DAME INT'L & COMP. L.J. 99, 114-22 (1984).

126. [1987] 1 S.C.R. 564.

Justice La Forest stated:

[T]he only question that really arises, in this case, is whether the respondents will face a situation in the United States such that the mere fact of the Canadian government surrendering the respondents . . . constitutes an infringement of fundamental justice To arrive at the conclusion that the surrender of the respondents would violate the principles of fundamental justice, it would be necessary to establish that the respondents would face a situation that is simply unacceptable.¹²⁷

Justice La Forest clearly set forth the Canadian Supreme Court's position when he stated in *Schmidt* that "the Courts must be extremely circumspect so as to avoid interfering unduly in decisions that involve the good faith and honour of [Canada] in its relations with other states. In a word, judicial intervention must be limited to cases of real substance."¹²⁸

In this age of easy travel, the potential for a fugitive's escape from justice is readily apparent. It is essential that the extradition system be effective. In *Schmidt*, Justice La Forest stated that what is needed is a process of surrender that is

untrammelled by excessive technicality or fastidious demands that foreign systems comply with [Canadian] constitutional standards. A decision to surrender . . . cannot be faulted as fundamentally unjust because the operation of the foreign law in the particular circumstances has not been subjected to scrutiny to see if it will conform to the standards of our system of justice.¹²⁹

Justice La Forest's position therefore appears to be that the Charter should not be given extraterritorial application in extradition cases,

127. *Id.* at 572. Note also his statement that the role of the courts to review the minister's decisions must be exercised with caution. *See id.*

128. [1987] 1 S.C.R. 500, 523. Note also Justice La Forest's statement that "the courts should only intervene in compelling circumstances." *Id.* at 528.

129. *Id.* at 523-24. It is interesting to note that in *Neely v. Henkel* (No. 1), 180 U.S. 109 (1901), the United States Supreme Court reconciled guarantees under the United States Constitution with extradition to Cuba. Writing for the Court, Justice Harlan stated that "those [constitutional] provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." *Id.* at 122. *See also* *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972); *Gallina v. Fraser*, 177 F. Supp. 856 (D. Conn. 1959), *aff'd*, 278 F.2d (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960) (adding some qualifications based upon procedures or punishment too antipathetic to the court's sense of decency); M.C. BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: PROCEDURE* 405, 417 ("The constitutional provision against 'cruel and unusual treatment' has not been recognized as applicable to extradition proceedings but the Secretary of State can use 'Executive Discretion' to refuse surrender of the individual or allow conditional surrender.").

except in cases involving exceptional circumstances that shock the conscience.¹³⁰

Justice Lamer, in a separate judgment in *Schmidt*, agreed with Justice La Forest.¹³¹ However, he also stated that the Charter applies intraterritorially to extradition cases in Canada because a fugitive qualifies as one "charged with an offence."¹³² Justice Wilson concurred in the unanimous disposition of the appeal in *Schmidt*, but she did not concur in Justice La Forest's reasoning. Justice Wilson saw no question of applying the Charter extraterritorially and held that the fugitive can plead the Charter in extradition proceedings.¹³³ She referred to *Harbhajan Singh v. Minister of Employment and Immigration*¹³⁴ and stressed that it is the process in Canada that must comply with fundamental justice.¹³⁵

Even though *Harbhajan Singh* concerned deportation from Canada, it is still instructive because the Supreme Court of Canada held that section 7 applies to everyone who is physically present in Canada. Thus, in terms of extradition, this case would seem to suggest that a fugitive is entitled to be treated in accordance with the principles of fundamental justice. Should a fugitive claim that the Minister of Justice has not acted reasonably because assurances have not been asked for or received in satisfactory form pursuant to article 6 of the United States-Canada Extradition Treaty,¹³⁶ *Harbhajan Singh* coupled with *Operation Dismantle, Inc. v. The Queen*¹³⁷ should proffer

130. See *Schmidt*, [1987] 1 S.C.R. at 522. This view is consistent with the decision of Justice Pratte in the Federal Court of Appeal case of *Sukhwart Singh v. Minister of Employment and Immigration*, [1983] 2 F.C. 347 (F.C.A.). In that case, the court held that section 7 of the Charter only applies to the deprivation of rights by Canadian officials applying Canadian law and not to the deprivation of such rights by the fugitive's own country. *Id.*; see *Schmidt*, [1987] 1 S.C.R. at 522.

131. See *Schmidt*, [1987] 1 S.C.R. at 530.

132. See *id.* This position is strange because the fugitive has not been charged in Canada, but in the foreign state. Justice Wilson had reservations about Justice Lamer's opinion on this point. See *id.* at 535.

133. See *id.* at 531. It should be noted that Justice Wilson actually used the term "Canadian citizen" rather than "fugitive," but it is possible that this was because the fugitive, Susan Schmidt, was a Canadian citizen.

134. [1985] 1 S.C.R. 177.

135. See *Schmidt*, [1987] 1 S.C.R. at 532. It cannot be overlooked that Justice Wilson took a contrary approach in *Sukhwart Singh*, [1983] 2 F.C. 347 (F.C.A.). Although she did not specifically state that she disagreed with the validity of the majority's opinion in that case, Justice Rouleau has described Justice Wilson's view as being "at odds with that adopted by the latter, and thus must be considered to strongly imply that the passage quoted can no longer be considered to be good law." See *Kindler v. MacDonald*, [1985] 1 F.C. 676, 701 (F.C.T.D.).

136. United States-Canada Extradition Treaty, *supra* note 37.

137. See *supra* note 16 and accompanying text.

grounds for judicial review.

Justice Wilson reasoned in *Schmidt* that a fugitive does not plead the Charter sections "as a defence in the projected trial [in the foreign state], but as a defence to the extradition court's grant of an order [The] argument in a nutshell is that the extradition court would be violating [the Charter] if it made such an order."¹³⁸

Apparently, the justices of the Supreme Court of Canada view the Charter's scope differently. Justice La Forest will only apply Charter rights to criminal prosecutions in Canada.¹³⁹ In his view, the courts should only apply the Charter to prevent extradition in exceptional cases.¹⁴⁰ To him, the issue is whether the "shocking of the conscience" element of section 7 is met in cases where the potential penalty in the foreign state is one that has been abolished in Canada or can be classified as cruel and unusual punishment.¹⁴¹

Justices Wilson and Lamer clearly take a different view from Justice La Forest, although for different reasons. Based on *Harbhajan Singh*¹⁴² and *Schmidt*,¹⁴³ Justice Wilson apparently disagrees with Justice La Forest's reasoning that certain Charter provisions do not apply simply because the extradition process is not a criminal prosecution in Canada. In Justice Wilson's opinion, the Charter does apply, not as an extraterritorial application, but because it must be given effect in Canada. In her view, the extradition process must conform with the section 7 requirement of fundamental justice for "everyone," and the potential extraditee is classifiable as "everyone" under section 7. Justice Wilson has eloquently explained the intraterritorial scope of the Charter in this way:

The effect is right here in Canada, in the Canadian proceedings, although it will, of course, have repercussions abroad If the participation of a Canadian court or the Canadian Government is required in order to facilitate extradition so that suspected criminals may be brought to justice in other countries, it seems to me that we must face up to the question whether such persons have the benefit of the *Charter* or not *in the Canadian proceedings*.¹⁴⁴

138. See *Schmidt*, [1987] 1 S.C.R. at 531.

139. See *id.* at 500 (concerning sections 7 and 11(h) of the Charter); *Argentina v. Mellino*, [1987] 1 S.C.R. 536 (concerning sections 7 and 11(b) of the Charter); *United States v. Allard*, [1987] 1 S.C.R. 465 (concerning sections 7 and 11(b) of the Charter).

140. See, e.g., *Altun v. Germany*, 5 E.H.R.R. 611 (1983).

141. See *Smith v. R.*, 40 D.L.R.4th 435, 436 (1987) (S.C.C.).

142. [1985] 1 S.C.R. 177.

143. [1987] 1 S.C.R. 500.

144. *Id.* at 532-33.

Arguably, the better view is that the Charter does apply to extradition proceedings, and courts should allow fugitives to plead it.¹⁴⁵ The next part of this Article analyzes the central issue of whether a fugitive may successfully raise sections 12 and 7 of the Charter in the death sentence context. This Article suggests that Justice Wilson's analysis regarding the general applicability of the Charter to extradition cases, combined with a section by section analysis of whether certain sections apply subject to section 1, is preferable.

3. Section 12

The *Soering* case provides an interesting approach to the question of cruel and unusual treatment or punishment. In that case, the European Court of Human Rights considered article 3 of the European Convention on Human Rights, which deals with inhuman and degrading treatment, and found that "an individual may not be surrendered out of the protective zone of the Convention without the certainty that the safeguards which he would enjoy are as effective as the Convention standard."¹⁴⁶

The United Kingdom argued that article 3 did not apply to acts occurring outside of its territorial jurisdiction. In particular, it argued that the court would strain the language of article 3 intolerably if it held that, by surrendering a fugitive, the extraditing state has "subjected" him or her to any treatment or punishment in the receiving state.

The United Kingdom also argued that an extension of article 3 to the matters at issue in *Soering* would conflict with the norms of international judicial process, in that it would involve adjudication of the internal affairs of states that are not parties to the Convention and/or

145. However, this could depend on which sections are utilized. Some provisions, such as section 11(b) dealing with delay, would be difficult to justify as applicable when the only delay is that of a foreign authority. *But cf.* *Argentina v. Mellino*, [1987] 1 S.C.R. 536, 559 (Lamer J.) (holding that in a preliminary inquiry in Canada, section 11(b) would apply). Section 11 deals with delay caused by Canadian authorities. *Id.* at 561. Justice Wilson confronted this issue in *Mellino* when she stated that applying section 11(b) would interfere with international comity, as Canadian courts cannot demand reasons for a delay from a foreign government. *Id.* She reasoned that:

[A]n assessment of the reasonableness or otherwise of a delay presupposes the right to demand an explanation for it. If this right is not there, no assessment can be made. It cannot be determined whether the foreign delay was reasonable or not. That delay cannot therefore be considered under s. 11(b).

Id. This type of analysis is particularly appropriate to the question of whether section 12 applies directly to extradition.

146. *See Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 82 (1989).

proceedings before the institutions of the Council of Europe. Additionally, the United Kingdom argued that such an application would entail grave difficulties in evaluation and proof regarding the legal system and the conditions of treatment and punishment in the requesting state. Finally, the United Kingdom argued that there would be a serious risk of harm to the contracting state, which "is obliged to harbour the protected person, and leaves criminals untried, at large and unpunished."¹⁴⁷

The European Court of Human Rights held that "the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards in other states."¹⁴⁸ However, the court went on to state that "[t]hese considerations cannot absolve the Contracting Parties from responsibility under Article 3 *for all and any foreseeable consequences of extradition suffered outside their jurisdiction.*"¹⁴⁹

Just as the European Court in *Soering* held that in interpreting the European Convention, "regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms,"¹⁵⁰ one can say that the Canadian Charter of Rights guarantees similar rights and freedoms in Canada. Courts must interpret and apply both the Convention and the Charter so as to make their safeguards practical and effective.¹⁵¹

The European Court stated that the Convention institutions usually do not consider potential violations of the Convention. However, there is an exception when extradition will violate article 3 by reason of foreseeable consequences in the foreign state. After all, once the person is extradited, there is no going back.

The central issue here is whether the potential imposition or carrying out of the death penalty in a foreign state is a violation of the right not to be subjected to cruel or unusual treatment or punishment. This is an extremely difficult question. In *Soering*, the European Court did not address whether the death sentence per se violated this

147. *Id.* ¶ 83.

148. *Id.* ¶ 86(1).

149. *Id.* ¶ 86(3) (emphasis added). Warbrick, *Coherence and the European Court of Human Rights: The Adjudicative Background to the Soering Case*, 11 MICH. J. INT'L L. 1073, 1092 (1990) takes the view that this is a negative duty contingent upon the assessment of likelihood of damage.

150. *See Soering*, 161 Eur. Ct. H.R. ¶ 87 (citing *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) ¶ 239 (1978)). Note also *The Netherlands v. Short*, 29 I.L.M. 1375 (1990).

151. *See Soering*, 161 Eur. Ct. H.R. ¶ 87.

right. Rather, the court viewed the fugitive's subjection to the so-called "death-row phenomenon" as the applicable question. The court was of the view that, under the terms of the Convention, there can be no exceptions made to article 3, and that no derogation is permissible in time of war or national emergency under article 15.¹⁵² Thus, article 3 "enshrines one of the fundamental values of the democratic societies making up the Council of Europe."¹⁵³ Article 7 of the International Covenant on Civil and Political Rights,¹⁵⁴ to which Canada is a party, and article 5(2) of the American Convention on Human Rights¹⁵⁵ also guarantee this right. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁵⁶ which Canada ratified in 1987, offers the same guarantee.

To determine whether a potential punishment violates the fundamental right not to be subjected to cruel and unusual punishment, it is necessary to look at each case on an individual basis. Both the European Convention and the Canadian Charter strive for a balance between the interests of the community and the rights of the individual. In each case, it is necessary to consider the ramifications of nonextradition and whether it is in the interests of justice to obtain the fugitive via extradition.¹⁵⁷ Courts must take these factors into account, for inhuman, cruel, and degrading treatment or punishment cannot be looked at in a vacuum.

In *Soering*, the European Court of Human Rights concentrated on whether Soering risked being sentenced to death if he was extradited to Virginia. Following an affirmative answer to that question, the court declared that the actual source of the inhuman or degrading punishment was Soering's subjection to the "death row phenomenon."

152. *Id.* ¶ 88.

153. *Id.*

154. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 172 [hereinafter International Covenant]. *Cf. id.* art. 6(2) (regarding the death sentence); Universal Declaration of Human Rights, 1948 G.A. Res. 217 (III), 2 U.N. GAOR 135, U.N. Doc. A/810 at 71.

155. O.A.S. Official Records OEA/Ser. K/XVI/1.I, Doc. 65, Rev. 1, CORR. 2, Jan. 7, 1970 [hereinafter American Convention].

156. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 23 U.N. GAOR 395. Canada ratified this convention on June 24, 1987 and amended its criminal code at section 245.4 to ensure compliance. *See* MULTICULTURALISM AND CITIZENSHIP CANADA, OUTLAWING AN ANCIENT EVIL: TORTURE (1989).

157. *Soering*, 161 Eur. Ct. H.R. ¶ 89.

Any discussion of what constitutes cruel or unusual treatment or punishment must occur within certain parameters. Specifically, there must be established a threshold level of the severity of the treatment. In *Soering*, the court stated that its assessment of the minimum level depends on all the circumstances of the case. These circumstances include the context and nature of the punishment, the manner and method of its execution, its duration, its physical or mental effects, and, in certain cases, the age and mental health of the person,¹⁵⁸ all of which taken together, would constitute cruel and unusual treatment or punishment. However, it must be understood that capital punishment is not prohibited under the European Convention, the International Covenant on Civil and Political Rights, or the American Convention on Human Rights.¹⁵⁹ This is clearly the reason that *Soering* did not argue that the death penalty itself violates article 3. The European Court of Human Rights was satisfied that although article 3 does not prohibit the death penalty, subsequent practice in national penal policy could establish the state parties' agreement to abrogate the exception in article 2(1), and thus remove the limitation on article 3.¹⁶⁰

Protocol 6 to the European Convention does just this, in providing for the abolition of the death penalty in time of peace.¹⁶¹ It came into force in March 1985, and thirteen states, not including the United Kingdom, have ratified the protocol. It should also be noted

158. *Id.* ¶ 100. See also *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) ¶ 162 (1976); *Tyler Case*, 26 Eur. Ct. H.R. (ser. A) ¶¶ 29-30 (1978).

159. See European Convention, *supra* note 51, art. 2(1); International Covenant, *supra* note 154, art. 6; American Convention, *supra* note 155, arts. 4(2), (3). Note, however, that the Human Rights Committee under the International Covenant expressed its opinion that the ultimate aim of the International Covenant was to abolish the death penalty. See Bossuyt, *The Administration of Justice and the Human Rights of Detainees, Elaboration of a Second Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, ECOSOC Doc. E/CN.4/Sub.2/1987/20, at 6 (1987) [hereinafter Bossuyt]. For an account of the death penalty in general, see *id.*; AMNESTY INTERNATIONAL, *WHEN THE STATE KILLS* (1989); AMNESTY INTERNATIONAL, *THE DEATH PENALTY* (1987); see also Report of the Secretary General of the United Nations on Capital Punishment, ECOSOC Doc. E/1985/43 (1985).

160. *Soering*, 161 Eur. Ct. H.R. This interpretation would nullify article 2(1), and would not read the convention as a whole, harmonizing its provisions. See *Klass v. Federal Republic of Germany*, 28 Eur. Ct. H.R. (ser. A) ¶ 68 (1978).

161. E.T.S. No. 14. Note that in *The Netherlands v. Short*, 29 I.L.M. 1375 (1990), the Netherlands had ratified Protocol 6. Note also the concurring opinion of Judge de Meyer in *Soering*, where he held that the death penalty does not per se violate European human rights law.

that a narrow United Nations General Assembly vote in December 1989 adopted a Second Optional Protocol to the International Covenant aimed at abolishing the death penalty, except during wartime.¹⁶² A 1990 Protocol to the American Convention included similar provisions.¹⁶³ However, because Protocol 6 and the Covenant amendment can only obligate those ratifying states, they cannot be interpreted as generally applying to all states.

Thus, under the European Convention, American Convention, and International Covenant systems, the death penalty is not prohibited. This does not mean, however, that individuals cannot raise the provisions on cruel and inhuman treatment or punishment. The answer lies in, among other things, how the sentence is to be imposed or executed, the sentence's proportionality to the crime committed, and the conditions of detention before sentence execution.

In *Soering*, the European Court of Human Rights held that, based on the particular facts of the case, the United Kingdom's decision to return Soering to the United States, where he would face the "death-row phenomenon," violated article 3.¹⁶⁴ Soering had argued that: he would be exposed to increasing tension and psychological trauma because of delays in appeal and review procedures in Virginia; his life and mental state would not necessarily be taken into account by the judge or jury in determining his sentence; on "death row" he would become a victim of violence and sexual abuse because of his age, color, and nationality; and he would suffer from the constant threat of the death sentence being carried out.

Additionally, Soering claimed that he would not oppose deportation or extradition to the Federal Republic of Germany, where the death penalty had been abolished. He argued that the refusal of the United Kingdom to allow such a deportation or extradition accentuated the disproportionality of the Secretary of State's decision. The United Kingdom viewed this alternative destination as immaterial

162. G.A. Res. 44/128, *reprinted in* 29 I.L.M. 1464 (1990), approved Dec. 15, 1989, by a vote of 59 to 26, with 48 abstentions. It will come into force upon ratification by 10 states. Canada voted in favor of the amendment, but has not yet signed, ratified, or acceded. See also Bossuyt, *supra* note 159, at 27, where he lists the replies of abolitionist states to the then proposed Second Optional Protocol. Canada is said to have believed in the merit of the protocol and "[t]here was no doubt that the United Nations would be honoring human dignity by enshrining the principle of abolition of the death penalty in an international instrument." See *Soering*, 161 Eur. Ct. H.R. ¶¶ 88, 137.

163. Adopted by O.A.S. General Assembly by Res. 1042 of June 8, 1990, *reprinted in* 29 I.L.M. 1447 (1990).

164. *Soering*, 161 Eur. Ct. H.R. ¶ 105.

and that consideration of it would lead to a double standard whereby a fugitive with an alternate destination would have European Convention protection, but others would not.¹⁶⁵ The court found the United Kingdom's argument to have weight, but it concluded that sending Soering to Germany would remove the danger of his avoiding prosecution and punishment and would protect him from the "intense and protracted suffering on death row."¹⁶⁶ Accordingly, the court held that the alternative destination was an important factor in its balancing of interests and in the proportionality of the United Kingdom's extradition decision.¹⁶⁷ For these reasons, the European Court unanimously concluded that the United Kingdom's extradition of Soering to the United States would expose Soering to a risk that would exceed the limitations of article 3.

Although Canada is not bound by the European Convention, the United Kingdom's concerns in *Soering* are similar to those of Canada in *Ng* and *Kindler*. The *Soering* decision is therefore instructive to the Supreme Court of Canada. *Soering*, however, should be distinguished from *Kindler* and *Ng* because Canada has no alternative destination to which it can send the fugitives. There are no other states that claim a legitimate basis of jurisdiction over the fugitives' offenses or that seek their extradition. Canada itself cannot prosecute them because their offenses were committed *in toto* outside of Canada, and they do not fall within any exceptions for extraterritorial bases of jurisdiction contained in the Canadian Criminal Code. Thus, in weighing the relevant factors as the European Court of Human Rights did, the Supreme Court of Canada must give great weight to the lack of an alternate destination in determining the proportionality and reasonableness of the Minister of Justice's decision.

Of the two cases, only *Kindler* has offered analysis on section 12 of the Charter. Following the Minister of Justice's decision to extradite without seeking assurances on January 17, 1986, *Kindler* applied under section 18 of the Federal Court Act¹⁶⁸ for review of the decision by the Federal Court, Trial Division. The trial division dismissed the application, holding, *inter alia*, that the question whether the death sentence constitutes cruel and unusual punishment could not be ruled on at that point.¹⁶⁹ In a subsequent appeal, the Appeal Division dealt

165. *Id.* ¶ 110.

166. *Id.*

167. *Id.*

168. R.S.C. ch. F-7, § 18 (1985).

169. *See Kindler v. Crosbie*, [1987] 2 F.C. 145 (F.C.T.D.).

with two issues: the scope of section 12 and whether the death penalty *per se* constitutes cruel and unusual punishment.¹⁷⁰ Justice Pratte concluded:

I find it impossible to say that the death penalty is, in itself, a cruel and unusual punishment that is forbidden by section 12 of the Charter [S]ection 12 . . . limits the freedom of action of Canadian authorities but does not govern the actions of foreign countries. In deciding to surrender a fugitive to a foreign country for trial and punishment in accordance with its laws for an offence committed there, the Canadian Minister of Justice cannot be said, in my view, to subject the fugitive to any cruel and unusual punishment or treatment.¹⁷¹

Interestingly, Justice Pratte further provided that this would be the case even if the fugitive could be subjected to cruel and unusual punishment, because a foreign state rather than Canada would be imposing the objectionable punishment.¹⁷²

Justice Marceau agreed with Justice Pratte in denying the appeal and held that "it cannot be said that capital punishment, however imposed and for whatever crime, is inevitably cruel and unusual within the meaning of section 12 of the Charter."¹⁷³ In his opinion, Justice Marceau referred to the Supreme Court of Canada's decision in *Miller v. The Queen*¹⁷⁴ in which the court held that Canada's previously existing death penalty provision did not constitute cruel and unusual punishment in violation of paragraph 2(b) of the Canadian Bill of Rights.¹⁷⁵ Cogently explaining the basic notion of cruel and unusual punishment, he stated:

[A] punishment may be cruel and unusual, either because the unnecessary infliction of pain or degradation it involves makes it inherently and absolutely so, or else because its disproportion to the gravity of the crime committed makes it become so. Capital punishment is not more inherently cruel and unusual today than it was

170. *Kindler v. Crosbie*, [1989] 2 F.C. 492 (F.C.A.).

171. *Id.* at 498-99.

172. *See id.* at 499. This latter statement is contrary to Justice La Forest's view as expressed in *Schmidt* and *Mellino*, because the nature of the foreign state's criminal penalties may shock the conscience or be unacceptable, and therefore be tied into section 7 of the Charter. Regardless, Justice Pratte's holding that the death sentence does not violate section 12 of the Charter is the important segment of his opinion.

173. *Id.* at 500.

174. [1977] 2 S.C.R. 680.

175. *See Kindler*, [1989] 2 F.C. at 500-01 (construing Canadian Bill of Rights, Appendix III, § 2(b) (1970)).

twelve years ago: there is no more unavoidable infliction of pain involved. And I do not think that society's standards of decency have evolved in the interim to the point where capital punishment would now appear disproportionate to the gravity of any crime, however revolting and outrageous.¹⁷⁶

Justice Marceau's opinion also referred to the House of Commons' recent vote on June 29, 1987, on the reinstatement of Canada's death penalty, which had been abolished in 1976.¹⁷⁷ The vote was 148 against reinstatement to 127 in favor.¹⁷⁸ Justice Marceau did not take this majority vote to mean, however, that society views capital punishment as "an outrage to the public conscience or as a degradation to human dignity."¹⁷⁹ Rather, his view was that the taking of the vote attested to the contrary.¹⁸⁰ To him, the majority vote showed that the death penalty went beyond what was necessary to achieve the goals sought by criminal punishment in Canada, and that possible alternatives existed.¹⁸¹

Justices Pratte and Marceau both dealt with the death sentence per se and did not address the death-row phenomenon question.¹⁸² However, it is submitted that the death penalty is a more difficult issue and was the one the European Court did not address. Justice Marceau acknowledged that the way a sentence is carried out, or its disproportionality to the crime involved, may render a death sentence, in certain cases, contrary "to our notions of decency and therefore in direct conflict with the prescriptions of the Charter."¹⁸³

Justice Hugessen, dissenting, took an approach that was similar to that of Justice Wilson in *Schmidt* regarding the application of the Charter. He held that extradition involves the application of Canadian law with treaties forming an integral part of domestic Canadian law.¹⁸⁴ Thus, the Canadian government and the courts cannot "turn

176. *Id.* Note that in *Smith v. The Queen*, 34 C.C.C.3d 97 (1987), Justice Lamer held that section 12 is only concerned with the *effect* of a punishment, and the process by which it is imposed is not of great relevance. *Id.* at 141.

177. *See Kindler*, [1989] 2 F.C. at 501. The death penalty had not been used since 1962.

178. *Id.*

179. *Id.* at 500-01.

180. *Id.* at 501.

181. *Id.*

182. *See Kindler*, [1989] 2 F.C. at 492. Note that the Privy Council addressed the matter of delay in executing the death penalty in *Abbott v. Attorney General for Trinidad & Tobago*, [1979] 1 W.L.R. 1342 and *Riley v. Attorney General of Jamaica*, [1982] 1 W.L.R. 557, 3 All E.R. 469. *See also* D. PANNICK, *JUDICIAL REVIEW OF THE DEATH PENALTY* ch. 4 (1982).

183. *Kindler*, [1989] 2 F.C. at 502.

184. *Id.* at 506.

a blind eye to what is going to happen once the fugitive is surrendered."¹⁸⁵ With respect to section 12, he was of the opinion that contemporary Canadian society views the death penalty as unacceptable.¹⁸⁶

It is worthwhile to note that in 1987, the Supreme Court of Canada, in *Smith v. The Queen*,¹⁸⁷ struck down the Narcotic Control Act's¹⁸⁸ seven-year minimum term of imprisonment for importing narcotics, as violative of section 12 of the Charter.¹⁸⁹ The court viewed the term as qualitatively acceptable, but quantitatively grossly disproportionate. Justice Lamer, with the other justices concurring on this issue, made it clear that some categories of punishment are unacceptable because they will "outrage [our] standards of decency."¹⁹⁰ The criteria enunciated by Justice Lamer may prelude his analysis of the death penalty/extradition matter:

[T]he determination of whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles, and whether there exist valid alternatives to the punishment imposed, are all guidelines which, without being determinative in themselves, help to assess whether the punishment is grossly disproportionate.¹⁹¹

In *Kindler*, Justice Hugessen concluded that the only penal purpose served by the death penalty was the incapacitation of the executed criminal. He found this to be as unacceptable as some states' practice of cutting off a thief's hand. Thus, his position was that because a valid and acceptable alternative exists—presumably, assurances being given—the death sentence has no merit and is grossly disproportionate.

The United States has dealt with the death penalty issue in nu-

185. *Id.*

186. *Id.* at 508.

187. [1987] 1 S.C.R. 1045.

188. R.S.C. ch. N-1, § 5(2) (1970).

189. *See Smith*, [1987] 1 S.C.R. at 1081.

190. *Id.* at 1073-74. Justice Lamer referred to corporal punishment, lobotomization, and castration as examples. *Id.* at 1074.

191. *Id.* The basis for this type of balancing can be found in Justice McIntyre's dissent in *R. v. Miller & Cockriell*, 63 D.L.R.3d 193 (B.C.C.A. 1975), in which he stated that imposing a sentence with no value was impermissible because it neither protected society by deterring criminal behavior nor served any other social purpose. *See also Smith*, [1987] 1 S.C.R. at 1082. Such a punishment, in Justice McIntyre's view, would be cruel and unusual. He believed that capital punishment was not justified by any deterrent effect, and that "it would be cruel and unusual to impose the ultimate penalty on the mere chance that it may have a deterrent effect." *Miller & Cockriell*, 63 D.L.R.3d at 193.

merous cases. In *Gregg v. Georgia*,¹⁹² the United States Supreme Court held that the death penalty did not *per se* constitute cruel and unusual punishment contrary to the eighth amendment of the United States Constitution. More recently, in *South Carolina v. Gathers*,¹⁹³ the Court held that, for the purposes of imposing the death penalty, a court must tailor the defendant's punishment to his or her personal responsibility and moral guilt.¹⁹⁴

The Supreme Court of Canada will have to decide whether courts can apply section 12 directly or in conjunction with section 7 in death sentence/extradition cases. If it finds that courts can apply section 12 directly, the court must also decide whether the death penalty is cruel and unusual *per se*, and whether a convicted person's wait on death row for an undetermined period of time, with all of its psychological and physical ramifications, in and of itself constitutes cruel and unusual punishment or treatment.¹⁹⁵ It is submitted that the death row phenomenon argument, which results from delay in execution, must be read in light of the fact that it occurs because the convicted person has extensive rights of review.

If the court finds section 12 directly applicable and *prima facie* violated by a future imposition of the death sentence, then according to *Smith*, it will be on account of gross disproportionality.¹⁹⁶ When a Charter right is violated, the authority in question has the burden "to salvage the legislative provision."¹⁹⁷ It is beyond the scope of this Article to entertain a detailed analysis of section 1 of the Charter,¹⁹⁸ but suffice to say that the criteria set out by Chief Justice Dickson in *R. v. Oakes*¹⁹⁹ must be met in order to discharge this burden. The objective must be of sufficient importance to warrant overriding the

192. 428 U.S. 156 (1976). Thirty-seven states in the United States permit capital punishment. See *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Furman v. Georgia*, 408 U.S. 238 (1972). See also Bassiouni, Lahey & Sang, *La Peine de mort aux Etats-Unis—L'état de la question en 1972*, 1 REVUE DE SCIENCE CRIMINELLE ET LE DROIT COMPARÉ 24 (1973).

193. 490 U.S. 805 (1989).

194. *Id.* at 810 (citing *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

195. Undoubtedly, the requesting state will argue that because any possible cruel or unusual treatment or punishment will occur outside of Canada, section 12 does not apply. However, this argument conflicts with the European Court of Human Rights' decision in *Soering*.

196. See *Richmond v. Lewis*, 921 F.2d 933 (9th Cir. 1990).

197. *Smith*, [1987] 1 S.C.R. at 1079.

198. For such an analysis by this author, see Castel & Williams, *supra* note 77. Section 1 provides: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." *Smith*, [1987] 1 S.C.R. at 1079.

199. [1986] 1 S.C.R. 103, 138.

Charter right. Clearly, the Canadian Supreme Court has already recognized this with respect to extradition in *United States v. Cotroni*.²⁰⁰ However, a party invoking section 1 must show proportionality between the measures adopted and the objective in question. That party must also show that the means impair "as little as possible" the right or freedom, and that the effects of the measures and the objective are proportionate.

It should be noted that Justices Le Dain and McIntyre held in *Smith* that once section 12 is prima facie violated, it cannot be saved by section 1. This was also the approach in Justice Hugessen's dissent in *Kindler*.²⁰¹ It is this author's opinion that this view of the absolute nature of section 12 is in error. There is no nonderogation provision in the Charter. The rights contained in the Charter are not absolute, but are to be evaluated in light of section 1.

If, however, the Supreme Court of Canada decides that section 12 is not directly applicable because the treatment and punishment will occur abroad, section 12 will still be relevant to the court's analysis of section 7 of the Charter. In *R. v. Herbert*,²⁰² the Supreme Court of Canada held that "the scope of a fundamental principle of justice under s. 7 cannot be defined without reference to the other rights enunciated in [the portion of the Charter dealing with legal rights]."²⁰³

4. Section 7

The extradition cases decided since the enactment of the Charter show that the decision of the Minister of Justice to surrender a fugitive must conform with section 7, and thus, the principles of fundamental justice.²⁰⁴ This raises the issue of whether the Minister of Justice acts reasonably when he or she does not ask for assurances or accepts insufficient assurances as to the death penalty. In both *Kindler* and *Ng*, the Minister of Justice did not ask for assurances. Is this in keeping with the principles of fundamental justice?

Section 7 implies that life, liberty, and security of the person are rights that may be derogated if such is in accordance with the principles of fundamental justice. Thus, section 7 does not automatically

200. [1989] 1 S.C.R. 1469.

201. [1989] 2 F.C. 492, 504.

202. [1990] 2 S.C.R. 151.

203. *Id.* at 176. See also *In re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, 502.

204. See, e.g., *Schmidt*, [1987] 1 S.C.R. at 500; *Mellino*, 33 C.C.C.3d at 334; *Allard & Charette*, [1987] 1 S.C.R. at 564.

prohibit extradition to a state that retains the death penalty. In assessing whether the Minister of Justice has complied with the principles of fundamental justice in extraditing without seeking assurances, the Supreme Court of Canada will look at three interrelated issues. First, the court must decide what standard it should use to determine whether the Minister of Justice acted fairly and reasonably in exercising his or her discretion. Second, if the Minister of Justice decides that section 12 *prima facie* violates section 7, the court must decide if extradition will result in a breach of the principles of fundamental justice. Third, in such an event, the court must then decide whether section 1 nevertheless allows for extradition.

As to the first issue, the Federal Court, Trial Division, held in *Kindler* that the Minister of Justice's decision was an administrative decision involving an exercise of discretion, subject to the requirements of natural justice.²⁰⁵ Justice Rouleau agreed with the Minister's counsel that "the object of the *Extradition Act* is to provide for the return of fugitive offenders to the country in which the offence was committed. . . . The courts have recognized the broad nature of [the Minister's] discretion."²⁰⁶

In *Kindler*, Justice Rouleau adroitly summed up the Minister's duty to act fairly in his reference to *Nicholson v. Haldimand-Norfolk Regional Board*.²⁰⁷ In *Nicholson*, the Supreme Court of Canada emphasized that one of the essential components of the duty to act fairly is the disclosure of the grounds upon which an adverse decision is made.²⁰⁸ Based thereon, Justice Rouleau stated in *Kindler* that if the decision required the exercise of discretion, the reasons given should demonstrate two things: the decision-maker's recognition that a choice existed and the factors considered in making the choice.²⁰⁹ It is important to note that Justice Rouleau balanced these requirements against the practical notion that it would be an unjustifiable burden to require "elaborate and overly-scrupulous reasons."²¹⁰ According to Justice Rouleau, the Minister's decision must fairly and accurately assess the situation from the perspectives of both the fugitive and the Canadian people.²¹¹

205. [1987] F.C. 145, 155.

206. *Id.* at 156.

207. [1979] 1 S.C.R. 311, *cited in* *Kindler v. Crosbie*, [1987] 2 F.C. 145, 154.

208. *See id.*

209. *Kindler*, [1987] 2 F.C. at 154.

210. *Id.*

211. *Id.* at 155; *see also* *Idziak v. Minister of Justice* (No. 2), 53 C.C.C.3d (Ont. H.C.

The Minister's administrative discretion under article 6 of the United States-Canada Extradition Treaty is subject to judicial control over the executive.²¹² The Minister's discretion only arises after a court has committed the fugitive for surrender. In order to determine whether the Minister of Justice has acted lawfully and fairly, a court must look to the scope and objective of the Extradition Act.²¹³ Justice Rouleau, in *Kindler*, held that "in the absence of a blatant error in law going to jurisdiction, a court should not review a decision of this nature on its merits."²¹⁴

Concerning article 6, Justice Rouleau stated that "the decision of the Minister . . . is essentially a policy one and the determination of whether assurances should be sought from the United States is a matter wholly within the Minister's discretion."²¹⁵ He further stated that the Minister's consideration of Canadian public interests, specifically the government's wish to discourage fugitives from seeking refuge in Canada, was a policy decision that did not constitute "an error in law."²¹⁶ This "discouragement" was necessary because of Canada's basically territorial approach to criminal jurisdiction. Thus, unless the Canadian government amends the criminal code to allow prosecution in Canada on bases other than the territorial principle recognized in *R. v. Libman*,²¹⁷ Canada will be in an impossible position. In *Kindler*, Justice Rouleau found that the fugitive had "been availed of all the fairness to which he was entitled."²¹⁸ In his view, the Minister had reached a rational conclusion.²¹⁹

The Federal Court of Appeal has also dealt with this issue. For instance, Judge Pratte held that section 7's reference to the principles of fundamental justice does not only apply to rules of procedure. Thus, a decision consonant with all of the rules of procedure may nevertheless violate the principles of fundamental justice. The resulting issue is whether the exercise of discretion is fundamentally unjust. Judge Pratte, referring to the judgment of Justice La Forest in *Schmidt*, stated that "a ministerial decision to surrender a fugitive to

1989), *aff'd*, 72 O.R.2d 480 (Ont. C.A. 1990) (holding that the *Kindler* standard was correct and that it was met in the case at bar).

212. See, e.g., *Kindler v. Crosbie*, [1987] 2 F.C. 145, 155 (F.C.T.D.).

213. *Id.* at 155-56.

214. *Id.* at 156.

215. *Id.* at 157.

216. *Id.*

217. [1985] 2 S.C.R. 178 (S.C.C.).

218. *Kindler*, [1987] 2 F.C. at 157.

219. See *id.*

a country where he would be tortured would be said to be fundamentally unjust and violate section 7.”²²⁰ Judge Pratte found that the decision to extradite Kindler was not fundamentally unjust because, as section 7 expressly recognizes, deprivation of the right to life is not in itself contrary to the principles of fundamental justice.²²¹

In *Kindler*, Judge Marceau posited that the duty to seek assurances under article 6 of the Treaty would be a compulsory duty, rather than a discretionary one, if the death sentence constituted a cruel and unusual punishment *per se* under section 12. He also alluded to *Allard & Charette*,²²² a case in which Justice La Forest discussed the courts’ Charter right to review the Minister’s decision, but warned that courts should exercise this function with caution. Specifically, Justice La Forest stated that “[o]ur international obligations are involved here and the executive obviously has the primary responsibility in this area.”²²³ Justice Marceau concluded by assessing the impact of the Canadian Supreme Court trilogy, and stated that the court’s various references to “caution” and the “pre-eminent position” of the executive mean that:

[F]or the Court to intervene, it does not suffice that the situation facing the fugitive in his country would not be in full accordance with the prescriptions of the Charter. . . . It would be necessary that the situation “sufficiently shocks the conscience” . . . and be “simply unacceptable” . . . *regardless of the Canadian context.*²²⁴

Thus, Justice Marceau also concluded that the treaty required the Minister of Justice to refuse to surrender a fugitive only if the treatment to which the fugitive was likely to be subjected upon return was “inherently and absolutely contrary to section 12.”²²⁵ In all other situations, the Minister’s decision was within his discretion, and his assessment was based on the circumstances of the case.²²⁶

The major issue that will confront the Supreme Court of Canada regarding the death sentence is the nature of judicial review of the Minister of Justice’s discretionary power under the Extradition Act and article 6 of the treaty. Some British cases provide insight into such review. In *Council of Civil Service Unions v. Minister for the*

220. [1989] 2 F.C. 492, 498.

221. *See id.*

222. [1987] 1 S.C.R. 564, 572-73.

223. *Id.* at 573.

224. *Kindler*, [1989] 2 F.C. at 503 (citations omitted).

225. *Id.* at 504.

226. *See id.*

Civil Service,²²⁷ Lord Diplock classified three grounds upon which a court may impugn an administrative decision: illegality, irrationality, and procedural impropriety.²²⁸

According to Lord Diplock, *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*²²⁹ most succinctly articulated the irrationality ground.²³⁰ As applied to extradition matters, the *Wednesbury* test is whether a reasonable Minister of Justice could *not* have ordered the extradition under such circumstances. A court may inquire whether the Minister considered all of the relevant factors.²³¹ In *Council of Civil Service Unions*, Lord Diplock stated that the test "applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."²³²

In *Bugdaycay v. Secretary of State*,²³³ an immigration case dealing with a claim to asylum, Lord Bridge acknowledged the limitations of the *Wednesbury* principles, but stated that the court, in reviewing an administrative decision, must subject it to the most rigorous examination "to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines."²³⁴ Lord Bridge emphasized that "[t]he most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."²³⁵

These English cases clearly indicate that a Minister should not extradite a fugitive without assurances regarding the nonapplication of the death penalty, unless the Minister is able to rationalize his or her decision based on all of the pertinent factors. This view is particularly relevant to an assessment of the extraditions in *Ng* and *Kindler*.

227. [1984] 3 All E.R. 935 (H.L.).

228. *Id.* at 950-51. The British court left open other grounds of judicial review, the most likely being proportionality. *Id.* at 950.

229. [1948] 1 K.B. 223 (C.A.).

230. *Council of Civil Service Unions*, [1984] 3 All E.R. at 951.

231. See Price, *Human Rights, Death Row and Administrative Law Remedies*, 34 INT'L CRIM. L.Q. 162 (1985).

232. [1984] 3 All E.R. at 951.

233. [1987] 1 All E.R. 940.

234. *Id.* at 952.

235. See also *id.* at 956 (Lord Templeman's similar view). As to judicial review of the Australian Attorney General's decision to extradite, see Hempel & Etheridge v. A.G., 29 A. Crim. R. 133 (F.C. 1987).

The foregoing analysis of section 12 is pertinent to the issue of whether Canada's extradition of a fugitive to a state that imposes the death penalty violates the principles of fundamental justice. Even if section 12 is not directly applicable because the treatment or punishment will occur abroad, it is still relevant in assessing the reasonableness of the decision to extradite, and in analyzing section 7. As this Article previously indicated, in assessing whether the death penalty constitutes cruel and unusual treatment or punishment, the *Smith*²³⁶ case seems particularly helpful. Some of the pertinent questions include: Is the death sentence grossly disproportionate? Additionally, as Justice La Forest asked in *Allard*,²³⁷ would the fugitive face a totally unacceptable situation in the foreign state; or, as he asked in *Schmidt*,²³⁸ do the criminal penalties or procedures in the requesting state sufficiently shock the conscience so as to result in a violation of section 7? In *In re B.C. Motor Vehicle Act*,²³⁹ Justice Lamer held that the Charter rights contained in sections 8 through 14 "address specific deprivations of the right to life, liberty and security of the person in breach of the principles of fundamental justice" and, as such, are violations of section 7.²⁴⁰ If the court categorizes the death penalty as punishment in accordance with the law of the requesting state, and not necessarily cruel and unusual, this will constitute a crucial finding in the court's ultimate decision.

Neither the European Convention nor the International Covenant prohibit the death sentence per se. Rather, both documents only prohibit cruel and unusual punishment. Only if the court equates cruel and unusual punishment with the death penalty will there be a violation of section 7. The Supreme Court of Canada has been willing to look to these international instruments for assistance in interpreting the Charter.²⁴¹ Thus, the distinction in the Covenant between the prohibition of cruel, inhuman, and degrading treatment or punishment in article 7, and the allowance of the death penalty for the most serious crimes in article 6(2), is important. As to the Covenant itself, the United Nations Committee on Human Rights concluded that cap-

236. See *supra* notes 187-91 and accompanying text.

237. See *supra* notes 126-27 and accompanying text.

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

239. [1985] 2 S.C.R. 486.

240. *Id.* at 502.

241. *E.g.*, *Slaight Commission Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1056-57; *Smith v. The Queen*, [1987] 1 S.C.R. 1045; see also W.A. SCHABAS, *INTERNATIONAL HUMAN RIGHTS LAW AND THE CANADIAN CHARTER* (1991).

ital punishment is not a violation of article 6(2) in *Pratt & Morgan v. Jamaica*.²⁴² Additionally, the death penalty is not considered to be "torture" within the definition contained in article 1(1) of the Torture Convention.

V. CONCLUSION

The propriety of extraditing a convicted or alleged murderer in a death penalty case, especially where a *prima facie* case is readily available, is a difficult issue. However, as this Article demonstrates, several matters require immediate attention. First, it is imperative that the Minister of Justice exercise his or her discretion to extradite under section 25 reasonably. From an international cooperation perspective, the need to honor Canada's treaty obligations will necessarily play a part in the determination. From the Canadian perspective, an important factor is the lack of an alternative extradition destination for Ng and Kindler. Deportation, too, may prove impossible.²⁴³ Moreover, the Canadian Criminal Code restricts prosecution in Canada. The Minister's decision to surrender must take into consideration this Canadian context, as well as the public interest and the circumstances in the requesting state.

If the Supreme Court of Canada holds that extradition is reasonable in cases like *Ng* and *Kindler*, the court will, in effect, allow Canada to extradite even when assurances are not given by the requesting country. If the court does not take this view, Canada has two options. The first option is to do what the United Kingdom did in *Soering* following the European Court's decision.²⁴⁴ In that case, the United States agreed to prosecute Soering only on the noncapital charges, with the result that if the court found him guilty, he would face a maximum penalty of life imprisonment without the possibility of parole. If the United States truly wants to extradite fugitives for the purpose of prosecution, this is a possible solution and Canada must indicate this strongly to the United States. If the United States is prepared to compromise in this way with some states, why not with Canada? The second option is for Canada to amend its Criminal Code to provide for Canada's prosecution of capital cases in which

242. Communications Nos. 210/1986 and 225/1987 (6 April 1989) in Report of the Human Rights Committee, U.N. General Assembly, Off. Rec. 44th Session, Supp. No. (A/44/40) at 231, ¶ 215.

243. Certainly, this would be true in a case where the fugitive is a Canadian citizen.

244. This compromise also occurred in the *Short* case, 29 I.L.M. 1375 (1990).

extradition is not possible. Regardless of an individual's moral or religious stance on the death penalty, either of these solutions would prove acceptable.

A dangerous option to both individual human rights and state sovereignty remains: the forcible return of the fugitive by illegal means.²⁴⁵ If extradition becomes impossible, Canada may see an increase in kidnappings and forcible returns of fugitives to the United States.²⁴⁶ This possibility is far from remote. Recently, United States law enforcement officers and private bounty hunters have operated beyond the United States borders. Additionally, United States courts have refused to relinquish jurisdiction over the trial of such cases.²⁴⁷ This is not an acceptable situation, as it violates both state sovereignty and individual civil liberties. It must be prevented from becoming an increasingly used alternative to extradition.

245. See Williams, *Criminal Law—Jurisdiction—Illegal Arrest—Due Process—Violation of International Law*, 53 CAN. B. REV. 404 (1975); Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law* in INTERNATIONAL LAW AT A TIME OF PERPLEXITY (Y. Dinstein 1989), reprinted in F.A. MANN, FURTHER STUDIES IN INTERNATIONAL LAW 339 (1990); Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444 (1990); Lowenfeld, *Kidnapping by Government Order: A Follow Up*, 84 AM. J. INT'L L. 712 (1990); see also Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886); United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988), cert. granted, 109 S. Ct. 1741 (1989); Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1979); United States v. Lira, 515 F.2d 68 (2d Cir. 1975); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); United States v. Herrera, 504 F.2d 859 (5th Cir. 1974); Matta-Ballasteros ex rel. Stolar v. Henman, 697 F. Supp. 1040 (S.D. Ill. 1988), aff'd, 896 F.2d 255 (7th Cir. 1990); United States v. Yunis, 681 F. Supp. 909 (D.D.C. 1988).

246. See Van den Wyngaert, *Applying Human Rights to Extradition: Opening Pandora's Box?*, REVUE INTERNATIONALE DE DROIT PENAL (forthcoming).

247. See United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). Initial optimism concerning this case proved to be ill-founded.

