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# HUMAN RIGHTS v. EXTRADITION: THE *SOERING* CASE

*Stephan Breitenmoser\* and Gunter E. Wilms\*\**

## A. INTRODUCTION

The European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup> is widely regarded as the most dynamic and effective of the various international human rights instruments. Its impact on the judiciary of the twenty-three Western European Member States,<sup>2</sup> as well as its pace-setting role for other international mechanisms for the protection of human rights,<sup>3</sup> has recently been

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1. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter "Convention"].

2. Member States include: Austria, Belgium, Cyprus, Denmark, Finland, Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. With the dramatic changes in Eastern Europe dismantling the Iron Curtain, there are negotiations already in progress between the Council of Europe and several Eastern European States regarding membership of the Council. These states are applying to become parties to the European Convention on Human Rights as a pre-condition to membership (article 66 of the Convention; articles 3 and 4 of the Statute of the Council of Europe). Thus, unlike other regional organizations such as the Organization of African Unity (OAU) and the Organization of American States (OAS), the Council of Europe restricts its membership to states committed to the rule of law and the enjoyment of human rights. See generally T. BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS* (Nutshell series 1988); C.C. MORRISON, JR., *THE DYNAMICS OF DEVELOPMENT IN THE EUROPEAN HUMAN RIGHTS CONVENTION SYSTEM* (1981); Robertson, *Council of Europe*, 6 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 86 (Bernhardt ed. 1983).

3. Because the American Convention on Human Rights and the Canadian Charter of Rights were influenced by the European Convention and utilize its language in part, both the American Court of Human Rights and the Canadian courts repeatedly refer to the European Convention and the judgments of its Court. See generally T. BUERGENTHAL, R. NORRIS, D. SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS, SELECTED PROBLEMS* (1982); Frowein, *Die Europäische und die Amerikanische Menschenrechtskonvention - Ein Vergleich*, in 7 *EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT* 442 (1980); C. GRAY, *JUDICIAL REMEDIES IN INTERNATIONAL LAW* 149-63 (1990); J. KOKOTT, *DAS INTERAMERIKANISCHE SYSTEM ZUM SCHUTZ DER MENSCHENRECHTE* (1986) (English summary: *THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS*). With regard to the Canadian Charter, see generally Cohné & Bagefsky, *The Canadian Charter of Rights and Freedoms and Public International Law*, 61 *CANADIAN L. REV.* 265 (1983); Clagdon, *The Application of International Human Rights Law by Canadian Courts*, 30 *BUFFALO L. REV.* 727 (1981); Williams, *Nationality, Double Jeopardy, Prescription and the Death Sentence as Bases for Refusing Extradition* (paper presented at the International Seminar on Extradition, December 4-9, 1989, organized by the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy) (soon to be published). See

confirmed by the unanimous judgment of the European Court of Human Rights<sup>4</sup> in *Soering v. United Kingdom*. In its judgment delivered on July 7, 1989,<sup>5</sup> the Court held that the United Kingdom would act in violation of article 3 of the Convention if it extradited the applicant to the United States, since he would there be faced with the possibility of being sentenced to death and experiencing the "death row phenomenon." Article 3 prohibits torture and inhuman or degrading treatment or punishment. The *Soering* judgment and the preceding report of the European Commission of Human Rights indicate, however, that other substantive and procedural guarantees in the European Convention may, under certain conditions, present obstacles to extradition.

The *Soering* decision is significant because it breaks new ground in the fields of human rights, extradition law, and the law of treaties, all of which attract great interest and controversy. In our opinion, however, the European Commission and Court of Human Rights did not open a Pandora's box<sup>6</sup> by applying human rights to extradition law. Rather, they continued to develop their own evolutionary jurisprudence in the areas of traditional and complex extradition law on the one hand, and modern concepts of the protection of human rights on the other. Nevertheless, in dealing with these problems, the *Soering* case is a further step in the right direction — moving extradition law away from (international) criminal law towards public international law and constitutional law.<sup>7</sup>

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also H. BANNUM & R. B. LILlich, MATERIALS ON HUMAN RIGHTS AND U.S. CONSTITUTIONAL LAW (1985).

4. The European Court of Human Rights [hereinafter the Court] is based, together with the Council of Europe, in Strasbourg, France, and has to be distinguished from the European Court of Justice of the European Economic Community (EEC), which has its seat in Luxembourg. The Court is called upon to give judgment in cases in which the European Commission of Human Rights [hereinafter the Commission] in the first instance has failed to secure a settlement. The cases are then referred to the Court by either the Commission or any state concerned (articles 47 and 48 of the Convention). The Court consists of a number of judges equal to that of member states of the Council of Europe (article 38 of the Convention). Like members of the Commission, the judges enjoy complete independence in the performance of their duties.

5. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), reprinted in 11 EUR. HUM. RTS. REP. 439 (1989), and in 28 I.L.M. 1063 (1989) (hereinafter *Soering Case*); 16 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 314 (1989) (with observations by D. Blumenwitz). The number of the case is 1/1989/161/217 - the first two ciphers indicate that it was the first case decided by the European Court of Human Rights in 1989. The last two numbers show the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding applications to the European Commission of Human Rights.

6. See C. Van Den Wyngaert, Applying Human Rights to Extradition: Opening Pandora's Box? (paper presented at the International Seminar on Extradition, December 4-9, 1989, organized by the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy) (soon to be published).

7. See O. LAGODNY, DIE RECHTSSTELLUNG DES AUSTZULIEFERNDEN IN DER BUNDESREPUBLIK DEUTSCHLAND 5 (1987); G. KREPPPEL, VERFASSUNGRECHTLICHE GRENZEN

Since this landmark case will have some accelerating effect on the future discussion of extradition law and the value of fundamental human rights in such proceedings, the following analysis should not be understood as a purely "Eurocentric" way of dealing with these issues. It should rather stimulate further discussion and multidisciplinary interaction between scholars and practitioners, whether they have a continental background or a common law background. Moreover, it is possible that this case will also have some impact on the further discussion of the death penalty in the United States.<sup>8</sup>

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DER AUSLIEFERUNG UND AUSWEISUNG UNTER BESONDERER BERÜCKSICHTIGUNG DER AUSLIEFERUNG BEI DROHENDER TODESSTRAFE (1965). With respect to the European Convention on Human Rights, see also K. SCHWAIGHOFER, AUSLIEFERUNG UND INTERNATIONALES STRAFRECHT (1988); Trechsel, *Grundrechtsschutz bei der internationalen Zusammenarbeit*, 14 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 69 (1987).

8. See AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY IN AMERICA (1987) (German ed.: TODESSTRAFE IN DEN USA (1989)); THE DEATH PENALTY IN AMERICA (H. Bedau 3d ed. 1982); E. VAN DEN HAAG & J. CONRAD, THE DEATH PENALTY: A DEBATE (1983); Pascucci, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129 (1984). See the Supreme Court's initial attempt to distance itself from the death penalty in *McGautha v. California*, 402 U.S. 183 (1971). Then, in *Furman v. Georgia*, 408 U.S. 238 (1972), the Court held that the existing system of distinguishing those who live from those who die was unconstitutional. Therefore, states with capital punishment had to elaborate a bifurcated capital trial scheme. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court approved state efforts and ruled that the death penalty was not, as such, an unconstitutionally "cruel and unusual punishment." See four recent cases decided in June, 1989: *South Carolina v. Gathers*, — U.S. —, 109 S. Ct. 2207 (1989) (for purposes of imposing the death penalty, defendant's punishment must be tailored to his personal responsibility and moral guilt; prosecutor engaged in improper argument during sentencing phase when he read at length from religious tract that victim was carrying and commented on personal qualities he inferred from victim's possession of religious tract and voter registration card); *Murray v. Giarrantano*, — U.S. —, 109 S. Ct. 2765 (1989) (neither Eighth Amendment nor Due Process clause requires states to appoint counsel for indigent death row inmates seeking state post-conviction relief); *Penry v. Lynaugh*, — U.S. —, 109 S. Ct. 2934 (1989) (executing mentally retarded people convicted of capital offenses is not categorically prohibited by the Eighth Amendment); *Stanford v. Kentucky/Wilkens v. Missouri*, — U.S. —, 109 S. Ct. 2969 (1989) (imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age did not violate evolving standards of decency, and did not constitute cruel and unusual punishment under the Eighth Amendment). It should be noted, however, that none of these four cases had been available at the time of the considerations of the European Court of Human Rights on the *Soering* case. While constitutional attacks on the death penalty have been unsuccessful since 1976 except under special circumstances (e.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976) (death penalty statutes failed to permit individualized sentencing); *Coker v. Georgia*, 433 U.S. 584 (1977) (the death penalty was disproportionate to the offense (rape)); *Eberheart v. Georgia*, 433 U.S. 917 (1977) (disproportionality in the case of kidnapping), the possibility still exists that the death penalty might be held by a state supreme court to be in violation of a state constitution (e.g., *People v. Anderson*, 6 Cal. 3d 628 (1972)). See Acker, *The Grand Jury and Capital Punishment: Rethinking the Role of an Ancient Institution Under the Modern Jurisprudence of Death*, 21 PAC. L.J. 31 (1989); Emanuel, *Guilty But Mentally Ill Verdicts and the Death Penalty: An Eighth Amendment Analysis*, 68 N.C. L. REV. 37 (1989); Enzinna & Gill, *Capital Punishment and the Incompetent: Procedures for Determining Competency to Be Executed after Ford v. Wainwright*, 41 U. FLA. L. REV. 115 (1989); Robinette, *Stanford v. Kentucky: Upholding Juvenile Capital Punishment—A Confirmation of Society's "Evolving Standards of Decency"?*, 92 W. VA. L. REV. 205 (1989); Semeraro, *The Process of Death: Reflections on Capital Punishment Issues in the Tenth Circuit Court of Appeals*, 66 DEN. U.L. REV. 563 (1989).

## B. THE SOERING CASE BEFORE THE STRASBOURG ORGANS

### I. Procedure<sup>9</sup>

The *Soering* case was decided by the Court on July 7, 1989. The Commission and the governments of the United Kingdom (U.K.) and the Federal Republic of Germany (F.R.G.) brought it to the Court according to the proscriptions of article 32, section 1,<sup>10</sup> and article 47<sup>11</sup> of the Convention. It was initiated by an application from Mr. Jens Soering, a German national, to the Commission on July 8, 1988 against the United Kingdom. On August 11, 1988, the president decided to indicate to the government of the United Kingdom that, according to Rule 36 of the Commission's Rules of Procedure,<sup>12</sup> it was undesirable to extradite Mr. Soering to the U.S. before the Commission had examined the application. The case was referred to the Court according to articles 44<sup>13</sup> and 48<sup>14</sup> as well as the declaration of the U.K. pursuant to article 46<sup>15</sup>, whereby it recognized the compulsory jurisdiction of the European Court of Human Rights.

The Commission's request and the two governmental applications were aimed at obtaining a decision of the Court as to whether or not the facts of the case gave rise to a breach of the respondent State's obligations under article 3,<sup>16</sup> article 6,<sup>17</sup> and article 13<sup>18</sup> of the Con-

9. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 1, paras. 1-10.

10. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 32, § 1, 213 U.N.T.S. 221, 240:

If the question is not referred to the Court in accordance with Article 48 of this Convention within a period of three months from the date of the transmission of the Report to the Committee of Ministers, the Committee of Ministers shall decide by a majority of two-thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention.

11. *Id.* art. 47 ("The Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32.")

12. "The Commission or . . . the President may indicate to the parties any interim measure the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it." 1977 Bundesgesetzblatt [BGBl] II 1277 (W. Ger.).

13. *Id.* art. 44 ("Only the High Contracting Parties and the Commission shall have the right to bring a case before the Court.")

14. *Id.* art. 48 provides:

The following may bring a case before the Court, provided that the High Contracting Parties concerned, . . . , are subject to the compulsory jurisdiction of the Court . . . :

- (a) The Commission;
- (b) a High Contracting Party whose national is alleged to be a victim;
- (c) a High Contracting Party which referred the case to the Commission;
- (d) a High Contracting Party against which the complaint was lodged."

15. *Id.* art. 46 (1) ("Any of the High Contracting Parties may at any time declare that it recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.")

16. *Id.* art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment").

vention. In accordance with rule 33, section 3(d)<sup>19</sup> of the Rules of the Court, the applicant stated his desire to take part in the proceedings pending before the Court. Since the requirements of rule 50<sup>20</sup> were fulfilled, the case was referred to the plenary Court. The President of the Court granted leave to Amnesty International to submit written comments (rule 37, section 2).<sup>21</sup> The oral proceedings took place on April 24, 1989.

## II. *The Relevant Facts of the Case*

### 1. Particular Circumstances of the Case<sup>22</sup>

#### a. *Factual Background*

Mr. Jens Soering was born on August 1, 1966. At the time of the

17. The article states in relevant part:

(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.

*Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 35, 36, paras. 112-13.

18. Article 13 provides as follows: "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."

In its report to application 14038/88 adopted on January 19, 1989, the majority of the Commission, contrary to the Court, regarded this provision as being violated since it did not regard the remedies provided for by U.K. law in respect of the applicant's complaint under article 3 as being effective, as required by article 13 of the Convention. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 37-39, paras. 116-24; *Soering Case*, Eur. Comm'n H.R. 28-30, paras. 158-68 (1989) [hereinafter "Commission Report"].

19. The rule reads in part:

1. On receipt of an application or request, the Registrar shall transmit a copy thereof:

(b) to any Contracting Party mentioned in Article 48 of the Convention;

(c) to the Commission;

(d) to the person, non-governmental organisation or group of individuals who lodged the complaint with the Commission under Article 25 of the Convention.

3. When making the communications provided for in sub-paragraphs (b), (c) and (d) of paragraph 1, the Registrar shall invite:

(d) the person, non-governmental organisation or group of individuals who lodged the complaint with the Commission under Article 25 of the Convention to notify him within two weeks - whether he or it wishes to take part in the proceedings before the Court; - if so, of the name and address of the person appointed by him or in accordance with Rule 30.

1989 Bundesgesetzblatt [BGBl] II 956, 967 (W. Ger.).

20. It reads: "1. Where a case pending before a Chamber raises one or more serious questions affecting the interpretation of the Convention, the Chamber may, at any time during the proceedings, relinquish jurisdiction in favour of the plenary Court." *Id.* at 974.

21. It reads:

The President may, in the interest of the proper administration of justice, invite or grant leave to any Contracting State which is not a Party to the proceedings to submit written comments within a time-limit and on issues which he shall specify. He may also extend such an invitation or grant such leave to any person concerned other than the applicant.

*Id.* at 969.

22. Commission Report, *supra* note 18, at 4-7, paras. 18-36; *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 4-8, paras. 11-26.

judgment, he was detained in an English prison pending extradition to the United States to face charges of murder in the Commonwealth of Virginia. The homicides in question were committed in Bedford County, Virginia, in March, 1985. The victims, William R. Haysom and his wife, Nancy A. Haysom, were killed by multiple and massive stab and slash wounds to the neck, throat, and body. In October, 1985, Elizabeth Haysom and the applicant disappeared from Virginia but were arrested in England in April, 1986 for check fraud.

b. *Proceedings by United States' Authorities Leading to the Extradition Request*

During his detention in England, the applicant was interviewed by a police investigator from the Sheriff's Department of Bedford County. The investigator reported that the applicant had admitted to the killing, the motive being Miss Haysom's parents' opposition to the relationship between his and their daughter. The indictment charged him with capital murder of his girlfriend's parents and the separate non-capital murders of each. In August, 1986, the United States government requested the extradition of both the applicant and Miss Haysom.<sup>23</sup> Subsequently, Elizabeth Haysom was extradited to the United States and sentenced to ninety years' imprisonment for being an accessory to murder.

c. *Reaction of British authorities*

Mr. Soering was arrested subsequent to a warrant issued by a Magistrate at Bow Street Magistrates' Court. The British Embassy in Washington requested an assurance by the United States authorities not to impose the death penalty on Mr. Soering if he were extradited and convicted of the indicated crimes.<sup>24</sup> In response to this request, the Attorney-General of Bedford County, Virginia, James W. Updike, Jr., swore an affidavit with regard to the U.K.'s wishes.<sup>25</sup> During the proceeding before it, the Court was informed that Mr. Updike in-

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23. For the wording of the Extradition Treaty, see *infra* note 33.

24. The request reads:

Because the death penalty has been abolished in Great Britain, the Embassy has been instructed to seek assurance, in accordance with the terms of . . . the Extradition Treaty, that, in the event of Mr. Soering being surrendered and being 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.

Soering Case, 161 Eur. Ct. H.R. (ser. A), at 4-5, para. 15.

25. I hereby certify that should Jens Soering be convicted of the offense of capital murder as charged in Bedford County, Virginia . . . a representation will be made in the name of the

tended to seek the death penalty.<sup>26</sup>

d. *The Federal Republic of Germany's Extradition Request*

In an interview with a German prosecutor in December, 1986, the applicant stated *inter alia* that he had never had the intention of killing Mr. and Mrs. Haysom,<sup>27</sup> but that he remembered having inflicted wounds which must have had something to do with their eventual deaths. In March, 1987, the Government of the Federal Republic of Germany requested his extradition<sup>28</sup> under the Extradition Treaty of 1872,<sup>29</sup> after a local court in Bonn had issued a warrant against the applicant for the alleged murders. On April 23, 1987, the United States asked the United Kingdom to give preference to its demand for extradition. The U.K., however, informed Germany that it intended to grant the German request subject to "the receipt of satisfactory assurance of this matter" (*i.e.*, the death penalty) on May 20, 1987.

e. *The Extradition Procedure in the United Kingdom*

During the committal proceedings at the Bow Street Magistrates' Court before the Chief Stipendiary Magistrate on June 16, 1987, the United States presented evidence supporting its case against Mr. Soering.<sup>30</sup> On behalf of the applicant, a psychiatric report was presented which stated that Soering had suffered from a serious "abnormality of mind" at the time of the offence due to Miss Haysom's influence on

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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 carried out. Soering Case, 161 Eur. Ct. H.R. (ser. A), at 6, para. 20.

Contrary to the submissions of the United Kingdom, the Court did not regard this statement as being a satisfactory assurance within the meaning of article IV of the 1972 Extradition Treaty between the United Kingdom and the United States. *Id.* at 28, 30, para. 93, 98.

26. This approach played an important role in the Court's assessment of the likelihood of a treatment contrary to article 3 of the Convention. *See* Soering Case, 161 Eur. Ct. H.R. (ser. A), at 30, para. 98.

27. Soering Case, 161 Eur. Ct. H.R. (ser. A), at 5. This was one of the four reasons leading the United Kingdom government to the conclusion that the risk of a death sentence did not reach the sufficient level of likelihood to raise a question under article 3 of the Convention. *Id.* at 28. This argument was rejected by the Court. *See infra* note 28.

28. Contrary to the opinion of the United Kingdom and the majority of the Commission, the Court carefully weighed this request in light of the legitimate purpose of extradition in general against the risk of undergoing treatment awaiting execution of the death penalty, when assessing a possible breach of article 3. Soering Case, 161 Eur. Ct. H.R. (ser. A), at 34, para. 110. The Court followed Frowein's dissent in the Commission on this issue. Commission Report, *supra* note 18, at 32.

29. Treaty for the Mutual Surrender of Fugitive Criminals, May 14, 1872, United Kingdom — Federal Republic of Germany, *infra* note 42.

30. The evidence adduced referred mainly to the applicant's own admissions; *see text supra*, A.II.1.d.



him.<sup>31</sup> As a result, it precluded his full responsibility for the crime.<sup>32</sup>

The Chief Magistrate found the psychiatric evidence to be irrelevant for the issue before him and confirmed the detention pending extradition. Two applications of Mr. Soering to the Divisional Court, one for a writ of *habeas corpus* and the other for leave to apply for judicial review,<sup>33</sup> were refused, although Lord Justice Lloyd agreed "that the assurance leaves something to be desired."<sup>34</sup> The House of Lords rejected the applicant's petition for leave to appeal the Chief Magistrate's decision.

On August 3, the Secretary of State signed a warrant ordering the applicant's surrender to the United States' authorities,<sup>35</sup> thereby rejecting Mr. Soering's petition to refrain from an extradition order. From August to November, 1988, Mr. Soering stayed in a prison hospital under the special regime applied to suicide-risk prisoners.<sup>36</sup>

## 2. Relevant domestic law and practice in the United Kingdom<sup>37</sup>

### a. *Criminal law*

The penalty for murder in England is life imprisonment, and the death penalty cannot be imposed.<sup>38</sup> If the killings were committed in a state of abnormality of mind, substantially impairing responsibility, the person in question can be convicted of manslaughter.<sup>39</sup> Because the homicides were acts of foreigners abroad, however, English courts could not exercise criminal jurisdiction.

31. "Miss Haysom had a stupefying and mesmeric effect on Soering which led to an abnormal psychological state in which he became unable to think rationally . . ." Soering Case, 161 Eur. Ct. H.R. (ser. A), at 7, para. 21.

32. "In conclusion, it is my opinion that, at the time of the offences, Soering was suffering from an abnormality of mind which, in this country, would constitute a defence of 'not guilty to murder but guilty of manslaughter.'" Soering Case, 161 Eur. Ct. H.R. (ser. A), at 7, para. 21. The Court takes up this argument in the examination of the merits of the case. *See id.* at 33-34, paras. 108, 109.

33. This application was based on the submission that no reasonable Secretary of State could regard the above-mentioned assurance as satisfactory under article IV of the U.K. - U.S. Extradition Treaty. Extradition Treaty, June 8, 1872, United States—United Kingdom, art. 4, 28 U.S.T. 227, 230 T.I.A.S. No. 8468.

34. The Commission and Court share this point of view. *See* Commission Report, *supra* note 18, at 20-21, paras. 114-21; Soering Case, 161 Eur. Ct. H.R. (ser. A), at 29-30, paras. 97, 98.

35. In assessing whether article 3 of the Convention could be applied to this case, the Court finds that "this decision, albeit as not implemented yet, directly affects him." Soering Case, 161 Eur. Ct. H.R. (ser. A), at 27, para. 92.

36. Psychiatric evidence of March, 1989 attested to his dread of the violence which he expected to experience in "death row" and the peril of committing suicide. Soering Case, 161 Eur. Ct. H.R. (ser. A), at 8, para. 25.

37. Commission Report, *supra* note 18, at 7-8, paras. 37-45; Soering Case, 161 Eur. Ct. H.R. (ser. A), at 9, paras. 27-38.

38. Murder Act (Abolition of the Death Penalty) 1965, ch. 71, sec. 1.

39. Homicide Act, 1957, 5&6 Eliz. 2, ch. 11, sec. 2.

b. *Extradition*

Extradition between the United Kingdom and the United States is governed by the Extradition Treaty of June 8, 1972,<sup>40</sup> as amended by a Supplementary Treaty of June 25, 1982 and an exchange of notes of August 19-20, 1986.<sup>41</sup>

The extradition arrangements between the Federal Republic of Germany and the United Kingdom are governed by the Treaty of May 14, 1872 for the Mutual Surrender of Fugitive Criminals, as amended on February 23, 1960 and September 25 and 27, 1978.<sup>42</sup> These agreements have been incorporated into the law of the United Kingdom.<sup>43</sup>

After receiving an extradition request, the Secretary of State may, by order, require a magistrate to issue a warrant for the arrest of the fugitive criminal.<sup>44</sup> Extradition proceedings include a hearing before a magistrate<sup>45</sup> who must be satisfied that there is sufficient evidence to put the accused on trial; a *prima facie* case must be made out against him before he can be committed.<sup>46</sup>

Section 11 of the Extradition Act provides a possibility for the committed to challenge committal proceedings by way of application of *habeus corpus* with leave to the House of Lords.<sup>47</sup> Section 12 of the

40. Article I of the Treaty reads:

Each Contracting Party undertakes to extradite to the other, in the circumstances and subject to the conditions specified in this Treaty, any person found in its territory who has been accused or convicted of any offense [specified in the Treaty and including murder], committed within the jurisdiction of the other Party.

EXTRADITION TREATY, *supra* note 33, art. 1.

41. All these arrangements have been incorporated in U.K. law. See United States of America (Extradition) Order 1976, S.I. 1976, No. 2144; United States of America (Extradition Amendment) Order 1986, S.I. 1986, No. 2020.

42. 1872 Reichsgesetzblatt [RGBl] 229 (W. Ger.); as amended Feb. 23, 1960, 1960 Bundesgesetzblatt [BGBl] II 2192 (W. Ger.), and Sept. 27, 1978, 1978 Bundesgesetzblatt [BGBl] II 1488 (W. Ger.).

43. See Federal Republic of Germany (Extradition) Order 1960, S.I. 1960, No. 1375; Federal Republic of Germany (Extradition Amendment) Order 1978, S.I. 1978, No. 1403.

44. Extradition Act 1870, §§ 7, 8.

45. Section 10 of the Extradition Act of 1870 provides that if "such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the . . . magistrate shall commit him to prison . . ."

46. "[T]he proper test for the magistrate to apply [is] whether, if this evidence stood alone at the trial, a reasonable jury properly directed could accept it and find a verdict of guilty." See *Schtraks v. Government of Israel*, 1964 A.C. 556, 580.

47. In its report, the Commission pointed out that, as far as the realm of the Court's examination is concerned, "it is clear that the courts can only examine the question whether the extradition procedures were properly conducted in accordance with the law of the United Kingdom and cannot examine the applicant's allegations as to the treatment he would be exposed to in the United States." Commission Report, *supra* note 18, at 30, para. 164. It concluded: "This remedy is not, therefore, an effective remedy for purposes of this provision (i.e., Article 13 of the Convention)." *Id.*

1870 Act provides for the release of a prisoner, if not surrendered, at the conclusion of such proceedings or within two months of committal, unless sufficient cause is shown to the contrary. Under section 11 of the 1870 Act, the Secretary of State has the discretion not to sign the surrender warrant.<sup>48</sup> His decision may override those of the courts. After having exhausted the remedies by way of application for *habeas corpus*, every prisoner has the right to petition the Secretary of State for the aforementioned purpose. The latter is bound to take account of fresh evidence.<sup>49</sup> The prisoner may challenge the Secretary of State's decision to reject his petition, as well as the decision to sign the warrant, on the grounds that the Secretary's exercise of discretion is tainted with illegality, irrationality, or procedural impropriety.<sup>50</sup> Irrationality is determined on the basis of the so-called "Wednesbury principles of reasonableness."<sup>51</sup> Applied to the present case, the "Wednesbury test" would be twofold: first, whether the reliance on the assurance given by the requesting State is reasonable;<sup>52</sup> and second, whether there was a serious risk of inhuman or degrading treatment so that no reasonable Secretary of State could make a decision to surrender the person in question.<sup>53</sup>

In a case decided by the House of Lords,<sup>54</sup> it was pointed out that the *Wednesbury* principles require strict scrutiny of a Secretary of State's decision in a case where the life of the applicant is at risk.<sup>55</sup> Failure to consider the European Convention on Human Rights alone cannot be the basis for reviewing a Secretary of State's decision.<sup>56</sup> The courts lack jurisdiction to issue interim injunctions against the Crown in judicial review proceedings.<sup>57</sup>

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48. *Atkinson v. United States*, 1971 A.C. 197.

49. *Schtraks v. Government of Israel*, 1964 A.C. at 596.

50. *Council of Civil Service Unions and Others v. Minister for the Civil Service*, 3 All E.R. 935 (C.A. 1984).

51. *See Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, 1 K.B. 223 (C.A. 1948).

52. *See* Lord Justice Lloyd's statement at para. 22 of the Judgement: "... I am far from being persuaded that such a decision [i.e., the Secretary of State's acceptance of the assurance as satisfactory] would have been irrational in the *Wednesbury* sense." *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 8, para. 22.

53. This argument was forwarded by the United Kingdom Government. *See Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 10-11, para. 35. The Commission maintained the adverse opinion. Commission Report, *supra* note 18, at 30, para. 166.

54. *Bugdaycay v. Secretary of State*, [1987] 1 All E.R. 940.

55. *Id.* at 952. Lord Bridge stated: "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."

56. *Regina v. Secretary of State, ex parte Kirkwood*, 1 W.L.R. 913 (Q.B.D. 1984).

57. *Kirkwood Case*, 37 Eur. Comm'n H.R. 158 (1984); *The Times* (London), May 19, 1989.

Pursuant to article IV of the Extradition Treaty between the United Kingdom and the United States,<sup>58</sup> it is the Secretary of State's practice to accept an assurance by the prosecuting authorities that a representation will be made to the judge at the time of the sentencing. This representation will usually convey that the United Kingdom wishes that the death penalty neither be imposed nor carried out.<sup>59</sup>

Article X of the Extradition Treaty between the United Kingdom and the United States deals with concurrent requests for extradition with regard to a single person.<sup>60</sup>

### 3. Relevant Domestic Law in the Commonwealth of Virginia<sup>61</sup>

#### a. *The law relating to murder*

Section 18.2-31 of the Virginia Code of 1950 defines eight types of homicide as capital murder, including the "willful, deliberate and premeditated killing of more than one person as part of the same act or transaction."<sup>62</sup> Capital murder is punishable as a Class 1 felony, for which the punishment is "death or imprisonment for life."<sup>63</sup> Murder which is not "capital murder" is classified as murder in either the first

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The Court stated that notwithstanding the courts' formal lack of jurisprudence in this aspect "... there is no suggestion that in practice a fugitive would ever be surrendered before his application to the Divisional Court and any eventual appeal therefrom had been determined." *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 39, para. 123.

58. Article IV reads:

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

Extradition Treaty, *supra* note 33, art. 4.

59. See Statement of the former Minister of State at the Home Office, Mr. David Mellor, Hansard, 10 March 1987, Coll. 955. The United Kingdom reached the conclusion that the assurance received at the very least significantly reduced the risk of a capital sentence either being imposed or carried out. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 28, para. 93. Nevertheless, the Attorney General conceded at the public hearing that if Mr. Soering were extradited to the United States there was "some risk," which was "more than merely negligible," that the death penalty would be imposed. *Id.* The Court reached the conclusion that the mere information concerning the United Kingdom's wishes did not eliminate the risk of the death penalty being imposed. *Id.* at 30, para. 98.

60. It provides as follows:

If the extradition of a person is requested concurrently by one of the Contracting Parties and by another State or States, . . . , the requested Party shall make its decision, in so far as its law allows, having regard to all the circumstances, including the provisions in this regard in any agreements in force between the requested Party and the requesting State, the relative seriousness and place of commission of the offence.

61. Commission Report, *supra* note 18, at 9-13, paras. 46-76; *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 13-21, paras. 39-70.

62. VA. CODE ANN. § 18.2-31(g) (1950).

63. *Id.* § 18.2-10(a).

or second degree.<sup>64</sup> First degree murder is punishable as a Class 2 felony, requiring imprisonment for life or not less than twenty years.<sup>65</sup> Murder in the second degree,<sup>66</sup> a Class 3 felony, is punishable by a term of five to twenty years.<sup>67</sup>

### b. Sentencing procedure

The sentencing procedure in capital murder cases in Virginia is separate from the determination of guilt. The jury, or judge sitting without a jury, may hear all relevant evidence of mitigation while evidence of aggravation is limited by statute.<sup>68</sup> The death sentence may be imposed only if the prosecution provides evidence of at least one of two aggravating circumstances — future dangerousness<sup>69</sup> or vile-ness.<sup>70</sup> Even if one or more of the statutory aggravating circumstances are proved, the sentencing body still remains free to fix a life sentence instead of death with regard to the mitigating factors<sup>71</sup> or for reasons of mercy.<sup>72</sup> The Virginia death penalty statutory scheme and the death penalty itself have been held to be constitutional.<sup>73</sup>

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64. *Inter alia* a wilful, deliberate and premeditated killing. Commission Report, *supra* note 18, at 9, para. 50.

65. Punishment of imprisonment for life or for any term not less than twenty years. VA. CODE ANN., § 10.2-10(b).

66. *Id.* § 18.2-32.

67. *Id.* § 18.2-10(c).

68. *Id.* § 19.1-264.4.

69. This exists if there is a probability that the defendant would commit "criminal acts of violence" in the future, thereby constituting a continuing threat to society. *Id.* § 19.2-264.2.

70. This is assumed when the crime was "outrageously or wantonly vile, horrible or inhuman" in that it involved torture, depravity of mind or an aggravated battery to the victim. *Id.*

The Court reaches the conclusion that, with regard to the case law, see *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979); *Edmonds v. Commonwealth*, 229 Va. 303, 329 S.E.2d 807, *cert. denied*, 474 U.S. 975 (1985) (one neck wound can satisfy the test, if savagely and methodically inflicted), the 'horrible and brutal circumstances of the killings' would presumably satisfy the test of "vileness." *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 29, para. 95.

71. They include the following:

(i) the defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, or (v) the age of the defendant at the time of the commission of the capital offense.

VA. CODE ANN. § 19.2-264.4(B).

72. *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979).

73. *Id.*; *Turner v. Bass*, 753 F.2d 342 (4th Cir. 1985); *Briley v. Bass*, 750 F.2d 1238 (4th Cir. 1984); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972 (1980).

c. *Insanity, mental disorders, and diminished responsibility*<sup>74</sup>

Whereas the law of Virginia does not generally recognize a defense of diminished capacity,<sup>75</sup> a plea of insanity at the time of the offense is a bar to conviction.<sup>76</sup> Where no insanity defense is interposed, the defendant's mental condition is only considered at the guilt stage.<sup>77</sup>

d. *Appeals in capital cases*<sup>78</sup>

The Supreme Court of Virginia automatically reviews, normally within a period of six months, every case in which a capital sentence has been passed.<sup>79</sup> Since 1977, there has been only one case in which the Court has reduced a death sentence to life imprisonment. The prisoner, of course, may apply to the U.S. Supreme Court for *certiorari* review of the decision of the Supreme Court of Virginia. He may then begin collateral attacks upon the conviction and the sentence in *habeas corpus* proceedings in State and Federal courts. At each stage, he may seek a stay of execution. The average time between trial and execution in Virginia is six to eight years, the delay being primarily due to the strategy of convicted prisoners to prolong the appeal proceedings as much as possible.

e. *Authorities involved in the death penalty procedure*<sup>80</sup>

A Commonwealth's Attorney for each county in Virginia is elected every four years.<sup>81</sup> He is independent in the discharge of his duty.<sup>82</sup> The Governor of the Commonwealth of Virginia has an unrestricted power to "commute capital punishment,"<sup>83</sup> but no sentences have been commuted since the death penalty was reinstated in 1977.

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74. Commission Report, *supra* note 18, at 11-12, paras. 67-73; Soering Case, 161 Eur. Ct. H.R. (ser. A), at 15-16, paras. 49-51.

75. *Stamper v. Commonwealth*, 228 Va. 707, 324 S.E.2d 682 (1985).

76. *See, e.g., Thompson v. Commonwealth*, 193 Va. 704, 70 S.E.2d 284 (1952); *Godley v. Commonwealth*, 2 Va. App. 249 (1986); *Price v. Commonwealth*, 228 Va. 452, 323 S.E.2d 106 (1984).

77. *Le Vasseur v. Commonwealth*, 225 Va. 564, 304 S.E.2d 644 (1983), *cert. denied*, 464 U.S. 1063 (1984); *supra* note 72.

78. Commission Report, *supra* note 18, at 11-12, paras. 67-73; Soering Case, 161 Eur. Ct. H.R. (ser. A), at 16, paras. 52-56.

79. VA. CODE ANN. § 17-110.1 (1950).

80. Soering Case, 161 Eur. Ct. H.R. (ser. A), at 18-19, paras. 58-60.

81. *See* VA. CONST. art. VII, § 4.

82. *See* VA. CODE ANN. § 2.1-124 (1987).

83. VA. CONST. art. V, § 12.

f. *Legal assistance for appeals*<sup>84</sup>

The United States Supreme Court ruled that neither the Eighth Amendment nor the Due Process clause requires states to appoint counsel for indigent death row inmates seeking state post-conviction relief.<sup>85</sup>

g. *Prison conditions in Mecklenburg Correctional Center*<sup>86</sup>

The majority of people on "death row" in Virginia are detained in Mecklenburg Correctional Center, a modern maximum security institution. The size of a death row inmate's cell is ten feet by 7 1/2 feet. Prisoners have approximately six to 7 1/2 hours of recreation per week, which they can spend in the two recreation yards in the death row area. Inmates are allowed to leave their cells to receive visitors, to consult the law library, or to attend the prison infirmary. In addition, death row inmates are given one hour of "out of cell" time in the morning, which they spend in a common area called "the pod." When prisoners move around the prison, they are handcuffed with special shackles around the waist. Routine searches are conducted of the entire institution on a quarterly basis as a security precaution. During such times, which are called "lockdowns" and last approximately one week, prisoners are confined to their cells. They may receive medical care outside of their cells when deemed necessary by medical staff, and, upon request, they may visit the law library and speak to their attorneys. Lockdowns may also be ordered on the basis of information relating to a planned disturbance, hostage situation, or escape.

A death row prisoner is moved to the "death house" next to the death chamber fifteen days before he is due to be executed. During this period, he is under surveillance twenty-four hours a day. He is isolated and has no light in his cell, whereas the lights outside are permanently illuminated. A prisoner who utilizes all appeals procedures can be placed in the death house several times.

h. *The giving and effect of assurance in relation to the death penalty*<sup>87</sup>

In the United States, the competence in matters concerning extra-

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84. Commission Report, *supra* note 18, at 12-13, paras. 74-76. Soering Case, 161 Eur. Ct. H.R. (ser. A), at 18, para. 57.

85. *Murray v. Giarratano*, — U.S. —, 109 S.Ct. 2767 (1989) (at the time of the judgment, this case was still pending).

86. Commission Report, *supra* note 18, at 13, paras. 77-81; Soering Case, 161 Eur. Ct. H.R. (ser. A), at 19, paras. 61-68.

87. Soering Case, 161 Eur. Ct. H.R. (ser. A), at 21, para. 69.

dition lies with the federal, not the state, authorities. In an extradition case where an offense against state law is concerned, the federal authorities have no legally binding power over the states to provide an assurance that the death penalty will not be carried out. In a situation such as *Soering*, the sentencing judge could consider the representation made on behalf of the British Government.<sup>88</sup> Additionally, it would be open for the Governor of Virginia to take into account the wishes of the British Government.<sup>89</sup> These options, however, are purely discretionary.

#### 4. Mutual assistance in criminal matters<sup>90</sup>

In the Federal Republic of Germany, American witnesses can appear voluntarily before a court and the German authorities will pay their expenses. Furthermore, upon a letter rogatory or a request by a foreign court, a United States federal court may order a person to give testimony or a statement for use in a proceeding in a foreign tribunal.<sup>91</sup>

#### 5. Relevant law and practice in the Federal Republic of Germany<sup>92</sup>

German criminal law applies to acts committed by German nationals abroad if the act is punishable by the law of the place where the offense is committed.<sup>93</sup> Murder is punishable by life imprisonment.<sup>94</sup> The death penalty has been abolished under the Constitution.<sup>95</sup> Under the terms of the Juvenile Court Act (1953) as amended,<sup>96</sup> the judge will, under certain conditions,<sup>97</sup> treat the accused as a juvenile and apply the relevant provisions of the act accordingly. The sentence for murder in the latter case would be juvenile imprisonment for a maximum of ten years or, under certain conditions, of indeterminate duration.<sup>98</sup> The maximum sentence for a person as defined by section 1(3)

88. See *supra* note 25.

89. See *supra* note 78 and accompanying text.

90. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 21, para. 70.

91. 28 U.S.C. § 1782 (1982).

92. Commission Report, *supra* note 18, at 14, paras. 82-88; *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 21-22, paras. 71-75.

93. STRAFGESETZBUCH [StGB] § 7(2) (W. Ger.).

94. *Id.* § 211 (1).

95. GRUNDGESETZ [GG] art. 102 (W. Ger.).

96. The act applies to juveniles (people from fourteen to eighteen years of age) and, under certain conditions, to adolescents (persons from eighteen to twenty-one years of age); see *infra* note 98. See also German Juvenile Court Act § 1(3) (1953).

97. *Id.* § 105(1).

98. *Id.* §§ 18, 19, 105(3).



of the Juvenile Court Act is fifteen years' imprisonment.<sup>99</sup>

German Criminal law provides for a "not guilty" defense of excluded capacity,<sup>100</sup> and for the possibility of reduced punishment where the offender's responsibility was diminished.<sup>101</sup> The German-United States Extradition Treaty of June 20, 1978,<sup>102</sup> in force since August 29, 1980, contains a provision essentially corresponding to article IV of the United Kingdom-United States Extradition Treaty.<sup>103</sup> The Government of the Federal Republic of Germany stated in evidence that it would not have deemed an assurance of the kind given by the U.S. Government in the present case<sup>104</sup> to be adequate, and would have refused extradition.

### III. *Finding of the Convention Organs as to the Law*

*First Question: Would the extradition of the applicant to the United States of America in the circumstances of the present case constitute treatment contrary to article 3 of the Convention?*

#### 1. Opinion of the Commission<sup>105</sup>

##### a. *Majority Opinion*

The applicant complained under article 3 of the Convention that, if extradited to the United States of America, he would run the risk of being sentenced to death and thereby being exposed to the "death row phenomenon" pending the exhaustion of collateral state and federal appeals. He submitted that the exceptional delay in carrying out the death penalty in Virginia constitutes inhuman and degrading treatment and punishment contrary to this provision. The respondent Government contended that the applicant does not, in reality, run this risk.

##### i. General Principles<sup>106</sup>

The Commission recalled from its case law that a person's deportation or extradition may give rise to an issue under article 3 of the Convention where there are serious reasons to believe that the individ-

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99. *See id.* § 106 (1).

100. STAFGESETZBUCH [StGB] § 20 (W. Ger.).

101. *Id.* §§ 21, 49(1)-(2).

102. Treaty of Extradition, June 20, 1978, United States — West Germany, 32 U.S.T. 1485, T.I.A.S. No. 9785.

103. *Supra* note 58.

104. *See supra* note 25.

105. Commission Report, *supra* note 18, at 15-31, paras. 89-170.

106. Commission Report, *supra* note 18, at 16-19, paras. 94-109.

ual will be subjected, in the receiving State, to treatment contrary to that article.<sup>107</sup> It stressed that the removal of a person will only under exceptional circumstances give rise to an issue under article 3, and that the burden lies on the applicant to substantiate his fear that he will be exposed to treatment or punishment falling under that article.<sup>108</sup> Referring to article 1 of the Convention,<sup>109</sup> the Commission stated that the basis of State responsibility in such cases lies in the exposure of a person, through deportation or extradition, to inhuman or degrading treatment in another country. It supports its approach by decisions of national courts<sup>110</sup> and article 3 of the United Nations Convention Against Torture.<sup>111</sup>

The Commission defined its task in this context as having to assess the existence of a serious danger for the person deported or extradited, or whose deportation or extradition is imminent. The Commission then clarified the relationship between articles 2<sup>112</sup> and 3 of the Convention. Article 2 of the Convention expressly permits the imposition of the death penalty under certain circumstances, whereas the 6th Protocol to the Convention<sup>113</sup> provides for the abolition of the death penalty. The latter has neither been signed nor ratified by the United Kingdom and thus has, according to the Commission, no relevance with regard to the United Kingdom's obligations in the present case. The Commission recalled its statements in the *Kirkwood* case that, notwithstanding article 2 of the Convention, the manner and circum-

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107. See *Altun v. Federal Republic of Germany*, 36 Eur. Comm'n H.R. 209 (1983); *M. v. France*, 41 Eur. Comm'n H.R. 103 (1984); see also *Kirkwood v. United Kingdom*, 37 Eur. Comm'n H.R. 158 (1984).

108. See *X. v. United Kingdom*, 29 Eur. Comm. H.R. 48 (1980).

109. Article 1 provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

110. See, e.g., Judgment of Nov. 3, 1982, Tribunal Fédéral, 108 AFT II 408, 411; Judgment of Jan. 16, 1985, Tribunal Fédéral, 111 AFT IV 12.

111. Article 3 provides that:

1. No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

U.N. Doc. A/Res./39/46, 39 U.N. GAOR Supp. (No. 51) at 197, 198 U.N. Doc. A/39/51 (1984).

112. Article 2 reads:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

113. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Nov. 4, 1950, Europ. T. S. No. 114.

stances under which the death penalty is implemented could raise an issue under article 3.<sup>114</sup>

Next, the Commission reiterated the definition of "inhuman and degrading treatment" in the meaning of article 3 of the Convention.<sup>115</sup> With regard to the duty of the Convention organs to provide for an efficacious protection of the applicant's rights,<sup>116</sup> it concluded that the anticipatory nature of the applicant's allegation does not bar the claim.

Subsequently, the Commission assessed the risk of the applicant's exposure to the death penalty.<sup>117</sup> Notwithstanding the applicant's claimed mental condition at the moment of the crime,<sup>118</sup> one could not, according to the Commission, exclude the possibility that the death penalty would be imposed for three primary reasons. First, the applicant has admitted to committing the offense.<sup>119</sup> Second, establishing the circumstances of "vileness" with relation to the manner in which the homicides were committed would appear to be uncontroverted,<sup>120</sup> and third, Virginia law does not recognize an insanity defense.<sup>121</sup> Also, the assurance provided by the Attorney of Bedford County was not regarded as excluding any risk since the sentencing judge is not obliged to accept the representations made to him on behalf of the United Kingdom Government. Additionally, further diplomatic representations in the form of an appeal for clemency would not remove the risk of the applicant being exposed to the death row phenomenon.<sup>122</sup>

In a third step, the Commission assessed the severity of treat-

114. The Commission reached this result by reemphasizing the fundamental importance of article 3 within the Convention, being underlined by its bald and absolute terms, and article 15, paragraph 2, which excludes any derogation from it. See *Kirkwood v. United Kingdom*, 37 Eur. Comm'n H.R. 158 (1984).

115. "The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical. Further, treatment may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience." *Ireland v. United Kingdom*, 19 Y.B. EUR. CONV. ON HUM. RTS. 512 (1976).

The Court stressed that:

[I]ll treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 65 (1978). See *Tyrer Case*, 26 Eur. Ct. H.R. (ser. A) 4 (1978).

116. See *Klass Case*, 28 Eur. Ct. H.R. (ser. A) 18 (1978).

117. Commission Report, *supra* note 18, at 19-21, paras. 110-21.

118. See *supra* note 31 and accompanying text.

119. *Supra* text, section A.II.1.b.

120. For the case law regarding the definition of "vileness," see *supra* note 70.

121. See *supra* note 74 and accompanying text.

122. In this context, the Commission referred to its findings in the *Kirkwood* case, 37 Eur. Comm'n H.R. 158, 188.

ment.<sup>123</sup> In scrutinizing the length of detention on death row, the majority of the Commission concluded that the length of time spent on death row did not attain a degree of severity envisaged by article 3 of the Convention. It based this result on four factors: (a) the contention that, except for the automatic appeal procedure to the Virginia Supreme Courts,<sup>124</sup> delays are brought about by the applicant's exercise of the rights of appeal; (b) the fact that these procedures concerning appeal were intended to protect human life and to exclude the arbitrary imposition of the death penalty;<sup>125</sup> (c) the applicant's opportunity to challenge the "death row phenomenon" as violating the Eighth Amendment of the United States Constitution; and (d) a majority of the Commission agreed that the applicant's age and mental condition<sup>126</sup> when the offense was committed would be properly taken into account under Virginia law by the judge and the jury under separate sentencing procedures.<sup>127</sup> Therefore, no question of inhuman treatment could arise in this respect.<sup>128</sup>

In considering the detention conditions in Mecklenburg Correctional Center<sup>129</sup> and the execution procedures in the light of article 3, the majority concluded that they did not attain a level of severity which would violate this provision.<sup>130</sup> The Commission conceded that the conditions on "death row" must be tense and stressful, but regarded them as being justified by a higher level of security required for inmates sentenced to death. Furthermore, regarding execution by electrocution, the Commission followed the Virginia Supreme Court in rejecting the argument that electrocution would constitute cruel or inhuman punishment contrary to the Eighth Amendment of the United States Constitution.<sup>131</sup>

The majority of the Commission did not regard the applicant's possible extradition to the Federal Republic of Germany as a factor to

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123. Commission Report, *supra* note 18, at 21-25, paras. 122-43. It emphasized that its task is to "examine the machinery of justice to which the applicant will be subjected and to establish whether there are any aggravating factors which might indicate arbitrariness or unreasonableness in its operation." *Id.*; *Kirkwood v. United Kingdom*, 37 Eur. Comm'n H.R. 158, 189.

124. *See supra* text accompanying note 79.

125. It quoted in this context its findings in the *Kirkwood* case: "In these circumstances the tradition of the rule of law which underlies the principles of the Convention requires painstaking thoroughness in the examination of any case the effects of which will be so irremediably decisive for the appellant in question." *Kirkwood v. United Kingdom*, 37 Eur. Comm'n H.R. 158, 188 (1984).

126. *Cf. supra* note 31 and accompanying text.

127. *See supra* text accompanying notes 62-67.

128. Commission Report, *supra* note 18, at 23-24, paras. 131-34.

129. *See supra* text accompanying note 85.

130. Commission Report, *supra* note 18, at 24, paras. 135-43.

131. *See supra* note 72 and accompanying text.

be taken into consideration when assessing a possible breach of article 3 of the Convention.<sup>132</sup> It reached this conclusion by defining its task under article 3 as one of assessing the existence of an objective danger. Also, article 1 of the Convention<sup>133</sup> does not allow any distinction for reasons of nationality.

In its conclusion, the majority of the Commission pointed out that the delays in the appeal procedure are mainly due to the inmate's own voluntary action in pursuing state and federal appeals.<sup>134</sup> Furthermore, the death penalty scheme in Virginia has as its fundamental purpose the avoidance of an arbitrary imposition of the death penalty and protection of the prisoner's right to life. Finally, it repeated its findings concerning the relevance of the applicant's age and mental condition at the time of the commission of the offense under Virginia law.<sup>135</sup>

#### b. *Separate Opinions*

##### i. *Mr. J.A. Frowein — dissenting*<sup>136</sup>

Mr. Frowein regarded the alternative of extraditing the applicant to the Federal Republic of Germany as being a relevant factor in the assessment of an alleged violation of article 3. He concluded that this provision was violated and argued that the extradition of a person to a country where the death penalty will probably be applied requires a specific justification if there are other alternatives open, since under article 2 of the Convention<sup>137</sup> the death penalty can only be imposed for the most serious crimes. Otherwise, it must be regarded as inhuman punishment. In the present case, he concluded, such a justification cannot be found.

Second, Mr. Frowein stated that the applicant could be extradited to the Federal Republic of Germany, where he could face trial without the possibility of being sentenced to death,<sup>138</sup> without the United Kingdom's breaking the U.K.-U.S. Extradition Treaty. Lastly, Mr. Frowein concluded that a formal assurance not to seek or impose capital punishment — although envisaged by article IV of the British - U.S. Extradition Treaty<sup>139</sup> — was lacking.

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132. Commission Report, *supra* note 18, at 25, paras. 144-50.

133. Article 1 states: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the convention."

134. Commission Report, *supra* note 18, at 26-27, paras. 151-53.

135. See *supra* note 126 and accompanying text.

136. Commission Report, *supra* note 18, at 32.

137. For the wording of article 2, see *supra* note 112.

138. For the relevant provisions of German criminal law, see *supra* notes 93-95 and accompanying text.

139. For the wording of article IV, see *supra* note 58.

ii. *Mr. S. Trechsel — dissenting*<sup>140</sup>

Mr. Trechsel took the view that, on the basis of an evaluation of all the circumstances of the case, the extradition of the applicant to the United States would constitute a violation of article 3. In reaching this conclusion, he pointed out that “death row” would require the applicant to live for six to eight years in a stressful and tense environment under humiliating conditions, exposed to constant uncertainty as to his fate. He rejected the majority’s argument that the delay was mostly due to the applicant’s own initiative, since a prisoner could not reasonably be expected to fail to pursue a remedy which might avoid or postpone his being killed. Additionally, in Mr. Trechsel’s view, the person being executed after the elapse of the delay, being twenty-six to twenty-eight years of age, is a different person from the one who committed the deed at eighteen years of age. Furthermore, Mr. Trechsel elaborated on the issue of the applicant’s diminished responsibility at the time of committing the act.<sup>141</sup> Read together with the lack of any rule of law preventing the imposition of the death penalty in a case of diminished responsibility,<sup>142</sup> the punishment by death would, in his opinion, be disproportionate and unjust, thereby violating article 3 of the Convention.<sup>143</sup> Finally, Mr. Trechsel referred to the possibility of extradition to the Federal Republic of Germany, a solution which he felt would still support the legitimate purpose of extradition — the prevention of crime.

When all of these factors were combined, Mr. Trechsel concluded, extraditing the applicant to the United States would constitute inhuman treatment contrary to article 3.

iii. *Mr. H. Danelius, joined by Mr. G. Jorundsson and Mr. H. Vandenberghe — dissenting*<sup>144</sup>

Whereas these members of the Commission agreed largely with the majority’s opinion,<sup>145</sup> they concluded that the applicant’s young age would violate article 3 if he were extradited to the United States. In Mr. Danelius’ opinion, the crucial factor which made the present case

140. Commission Report, *supra* note 18, at 33-35.

141. See *supra* note 31 and accompanying text.

142. For the provisions of Virginia Law concerning this question, see *supra* note 74 and accompanying text.

143. In this context, he referred to the judgment of the European Court of Human Rights in the Weeks Case, 114 Eur. Ct. H.R. (ser. A), at 25 (1987).

144. Commission Report, *supra* note 18, at 35.

145. With respect to the applicant’s risk of being sentenced to death; the relation between article 2 and 3 of the Convention and the irrelevance of his possible extradition to the Federal Republic of Germany, see *supra* notes 114, 132 and accompanying text.

distinguishable from the similar *Kirkwood* case<sup>146</sup> was the applicant's young age and his mental condition when the offense was committed. Although article 2 of the Convention does not delineate an age limit, contrary to the International Covenant for Civil and Political Rights<sup>147</sup> and the American Convention on Human Rights,<sup>148</sup> the dissenting members explained this difference as stemming from the later adoption<sup>149</sup> of those agreements, rather than by disagreement on the substantive issue. This, together with the applicant's abnormality of mind at the time of the crime, lead to the conclusion that extradition to the United States would infringe upon article 3.

iv. *Mr. J.C. Soyer and Mr. A. Wetzel — concurring*<sup>150</sup>

Mr. Soyer and Mr. Wetzel denied that the applicant ran a risk of being sentenced to death. Even if he did, they argued, article 3 would not be violated. The death penalty scheme in Virginia, and also on the federal level, complied with the requirements and the provisions of the Convention, and in particular with article 2. In addition, the delay leading to the death row phenomenon is primarily based on the inmate's own initiative. Furthermore, these concurring members opposed what they regarded as an unreasonable effect of such an interpretation of the Convention, since it would lead to the undesirable effect of excluding the imposition of the death sentence in a State not party to the Convention, whereas the latter itself expressly allowed capital punishment. Conclusively, they stated that the conditions on death row, severe though they are, were to be regarded as being proportional to the crimes committed.

v. *Mrs. J. Liddy — concurring*<sup>151</sup>

Mrs. Liddy focused on the question whether the risk of severe treatment was serious. With respect to the assurance received by the United Kingdom from the United States Government and its evaluation by the respondent State's Government, she concluded that no such risk would arise.

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146. See *supra* note 107.

147. See International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 6, para. 5, 999 U.N.T.S. 171, 175.

148. O.A.S. Official Records OEA/Ser.K/XVI/I.1, art. 4, § 5 Document 65, Rev. 1, Corr. 2, reprinted in 9 I.L.M. 673. See Convention on the Rights of the Child, art. 37(a), 44 U.N. GAOR, at 17, U.N. Doc. A/RES/44/25 (1989).

149. The Covenant was adopted in 1966, the American Convention in 1969, and the European Convention on Human Rights in 1950.

150. Commission Report, *supra* note 18, at 38.

151. Commission Report, *supra* note 18, at 39.

## 2. Opinion of the Court

### a. *Majority Opinion*<sup>152</sup>

#### i. Applicability of article 3 in cases of extradition

The Court first stated that the decision by a Contracting State to extradite a fugitive may give rise to an issue under article 3 where substantial grounds have been shown that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country under such circumstances, the extraditing state would incur responsibility.

The court also pointed out that article 1 of the Convention does not extend the scope of the Convention beyond the jurisdiction of the States which have adopted it. Furthermore, the Court stated the beneficial purpose of extradition should be taken into consideration when the ambit of the Convention, and of article 3 in particular, are to be determined. The Court recalled the character of the Convention as an instrument for the protection of human beings, thus requiring an interpretation of its provisions which makes its safeguards practical and effective.<sup>153</sup> Referring to the importance of the rights protected by article 3,<sup>154</sup> it found that this provision contains an inherent obligation not to extradite a person to a country where he would be faced with a real risk of exposure to inhuman or degrading treatment, or punishment proscribed by that article.

Although it is normally not for the Convention institutions to pronounce on potential violations of the Convention, the irreparable nature of the accused's potential risk in a case where a violation of article 3 is at stake requires such steps to be taken.<sup>155</sup>

The Court also assessed the degree of the risk of Mr. Soering being sentenced to death and exposed to the death row phenomenon. It reached the conclusion that, notwithstanding the possible applicability of four of the five facts in mitigation expressly mentioned in the Code of Virginia<sup>156</sup> and the "assurance" obtained by the Commonwealth's

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152. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 24-35, paras. 81-111.

153. It recalled its findings in *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. B) 90 (1978), as well as in the *Artico Case*, 37 Eur. Ct. H.R. (ser. A) 16 (1980), and the *Kjeldsen, Busk Madsen & Pedersen Case*, 23 Eur. Ct. H.R. (ser. A) 27 (1976).

154. In this context, the Court cited the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 111, as well as article 7 of the International Covenant on Civil and Political Rights, *supra* note 147, and article 5, section 2 of the American Convention on Human Rights, *supra* note 148, which contain provisions similar to article 3 of the Convention.

155. The Court stressed the requirement of an effective protection of the rights safeguarded by this provision.

156. *See supra* note 71.



Attorney,<sup>157</sup> the risk was significant. The Court referred to the brutal circumstances of the killings<sup>158</sup> which presumably would be sufficient to establish the "vileness" of the crime,<sup>159</sup> and the firm stance the national authority took with regard to the prosecution of Mr. Soering.<sup>160</sup> Another crucial factor in this context was the absence of any direction which could be given to the Commonwealth's Attorney.

ii. The risk of exposure to the "death row phenomenon" as a breach of article 3

In clarifying the relation between articles 2 and 3 of the Convention, the Court reached the same conclusion as the Commission.<sup>161</sup>

With regard to the 6th Protocol of the Convention,<sup>162</sup> the Court stressed that the intention of the Contracting Parties in 1983 was not to create a new automatic obligation for all Contracting Parties to the Convention, *i.e.*, to abolish the death penalty. Rather, the Parties intended to allow each State to choose the moment when such action should be undertaken.

The Court concluded by stating that the manner in which the death penalty is imposed or executed, the personal circumstances of the condemned person, a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are all factors to be considered when assessing a possible infringement upon article 3.

With regard to the length of detention awaiting execution,<sup>163</sup> the majority of the court conceded that the remedies available in Virginia<sup>164</sup> would ensure that the ultimate sanction would not be imposed unlawfully or arbitrarily. Notwithstanding the well-intentioned character of these appeal procedures, however, the result is the condemned person's exposure to the conditions on death row for many years, and to the mounting tension of living "in the ever-present shadow of death."<sup>165</sup> As to the conditions on death row,<sup>166</sup> the Court found

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157. See *supra* note 25. The Court stated: "... objectively it cannot be said that the undertaking to inform the judge at the sentencing stage of the wishes of the United Kingdom eliminates the risk of the death penalty being imposed." Soering Case, 161 Eur. Ct. H.R. (ser. A), at 30, para. 98.

158. See *supra* text, section A.II.1.

159. For the definition and the relevant case law, see *supra* note 70.

160. See *supra* note 26 and accompanying text.

161. See *supra* note 114.

162. See *supra* note 113 and accompanying text.

163. See *supra* note 114.

164. See *supra* note 113 and accompanying text.

165. Soering Case, 161 Eur. Ct. H.R. (ser. A), at 33, para. 106.

them severe, especially the protracted period to which the inmates are subjected.

The applicant's age and mental condition at the time of the deed were also considered relevant factors under article 3. Although Virginia law recognizes these factors, and serves to prevent arbitrary decisions, these considerations do not, according to the majority of the Court, outweigh the relevance of the two factors mentioned.

Contrary to the majority of the Commission,<sup>167</sup> the Court weighed the argument of the applicant's possible extradition and trial in the Federal Republic of Germany in light of article 3, since this possibility would serve the legitimate purpose of extradition, and avoid the risk of the applicant's exposure to the death row phenomenon. Accordingly, it constituted an important element in the Court's assessment of whether the extradition procedure was to be considered "proportional."

Acknowledging the positive features of the Virginia death penalty scheme, the Court conclusively stated that the above-mentioned factors would give rise to a breach of article 3 if the applicant was to be extradited to the United States.

b. *Judge De Meyer — concurring*<sup>168</sup>

Judge De Meyer did not only regard the applicant's possible extradition as a violation of article 3 of the Convention, but argued that it would violate his right to life. According to De Meyer, no requested State can be entitled to allow a requesting State to do what the requested State itself is not allowed to do. The United Kingdom would be precluded from extraditing the applicant to the United States, since the former has abolished the death penalty whereas the latter has not. Secondly, the fact that no European States extradite fugitives under similar circumstances should mean, in De Meyer's opinion, that such a practice would be repugnant to European standards of justice, and thereby contrary to the public order of Europe.<sup>169</sup>

No absolute assurance to refrain from imposing capital punishment could be made. Hence, the applicant's extradition to the United States would violate his right to life.

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166. See *supra* note 86 and accompanying text.

167. See *supra* note 132; see also Frowein's dissent, *supra* note 136 and accompanying text.

168. Soering Case, 161 Eur. Ct. H.R. (ser. A), at 41.

169. Judge De Meyer refers to the provisions of the International Covenant on Civil and Political Rights and the American Convention on Human Rights and to the decision of the French Conseil d'Etat in the Fidan Case, 1987 Recueil Dalloz Sirey [D.S. Jur.] 305.

*Second Question: Would the extradition of the applicant constitute a breach of article 6, paragraph 3(c) of the Convention due to the absence of legal aid in the State of Virginia to pursue various State and Federal appeals?*

1. Opinion of the Commission

a. *Majority opinion*<sup>170</sup>

The applicant claimed that the absence of legal aid under Virginia law to fund collateral state and federal appeals would violate article 6, section 3(c) of the Convention.

The Commission held unanimously that this was an issue entirely within the United States' jurisdiction and therefore not within the responsibility of the United Kingdom.

b. *Mr. Trechsel — concurring*<sup>171</sup>

Mr. Trechsel pointed out that a question under article 6 could be raised in an extradition case if the proceedings in the requesting State were to be considered as unfair. Since this had not been shown in the present case, he concurred with the majority.

2. Opinion of the Court<sup>172</sup>

The Court reached the same conclusion as Mr. Trechsel in his concurring opinion.<sup>173</sup> The applicant's complaint under article 6 regarding to the extradition proceedings in the United Kingdom<sup>174</sup> was not part of the Commission's decision on admissibility and hence the Court did not have jurisdiction to entertain the matter.

*Third Question: Does the applicant have an effective remedy under the law of the United Kingdom in respect of his complaint under article 3 as required by article 13 of the Convention?*

1. Opinion of the Commission<sup>175</sup>

At first, the Commission found article 13 of the Convention<sup>176</sup> ap-

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170. Commission Report, *supra* note 18, at 27-28, paras. 155-57.

171. *Id.* at 35.

172. Soering Case, 161 Eur. Ct. H.R. (ser. A), at 35-37, paras. 112-15.

173. It recalled its statement in the Colozza Case, 89 Eur. Ct. H.R. (ser. A) 12 (1985), that the right of fair trial in criminal proceedings, as embodied in article 6 of the Convention, holds a prominent place in a democratic society. Soering Case, 161 Eur. Ct. H.R. (ser. A), at 36, para. 113.

174. See Soering Case, 161 Eur. Ct. H.R. (ser. A), at 36, para. 114.

175. Commission Report, *supra* note 18, at 28-30, paras. 158-68.

176. For the wording of article 13, see *supra* note 18.

plicable, because Mr. Soering presented an arguable claim under article 3 of the Convention.<sup>177</sup> The Commission denied the effectiveness of the *habeas corpus* procedure<sup>178</sup> and the judicial review procedure following the Secretary of State's extradition order<sup>179</sup> for purposes of article 13. It maintained the opinion that, in neither of the procedures, could courts examine the applicant's allegations as to the treatment he would face in the United States.

The Commission also concluded that the right to petition to the Secretary of State did not meet the requirements of article 13 for lack of independence of the Secretary of State.

In conclusion, the Commission found that the aggregation of these remedies did not cure the imperfection of each of them.

## 2. Opinion of the Court<sup>180</sup>

As to the applicability of article 13, the Court reached the same result as the Commission.<sup>181</sup> The crucial argument for the Court's view that no violation of article 13 existed was its conclusion that the "reasonableness test" applied in English courts<sup>182</sup> included — in extradition cases — a scrutiny of the risk of inhuman or degrading treatment which the extradited person would have to face in the requesting State.<sup>183</sup>

*Fourth Question: How does article 50 of the Convention apply to the case at hand?*<sup>184</sup>

The Court granted the applicant just compensation in terms of full recovery of his costs and expenses<sup>185</sup> in application of article 50<sup>186</sup> of the Convention.

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177. For the requirements under Article 13 set up by the European Court of Human Rights, see its judgment in *Silver and Others*, 61 Eur. Ct. H.R. (ser. A) 42 (1983).

178. *See supra* note 47.

179. *See supra* note 50 and accompanying text.

180. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 37-39, paras. 116-24.

181. *See Boyle and Rice*, 131 Eur. Ct. H.R. (ser. A) 23 (1988).

182. *See supra* note 51.

183. *See supra* note 53.

184. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 39-40, paras. 125-28.

185. They amounted to £26,752.80 and 5,030.60 French francs, plus any chargeable value-added tax. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 40.

186. Article 50 reads:

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

#### IV. *Sequel to the Judgement*

According to a note in the German press, the British Government ordered Mr. Soering's surrender to the United States after having obtained an assurance from the United States' judicial authorities that the death penalty would not be imposed.<sup>187</sup>

### C. A DISCUSSION OF THE *SOERING* CASE

#### I. *The Effectiveness of the Strasbourg Proceedings*

Before analyzing the report and judgment of the two Strasbourg organs, we must emphasize some formal and practical aspects of the Strasbourg proceedings. First, in the *Soering* case, the European Court of Human Rights followed the jurisprudence of the Commission in extradition cases and showed for the third time<sup>188</sup> in its thirty years of practice<sup>189</sup> its willingness not only to react after a problem of

187. *Frankfurter Allgemeine Zeitung*, Aug. 3, 1989, at 7. However, the press-note did not give any information on either the wording or the author of the assurance. See Press Communiqué of the Council of Europe C (90) 42, Mar. 3, 1990, at 2:

The Government of the United Kingdom subsequently gave the Committee of Ministers the following information about the measures taken in consequence of the Court's judgment:

The Government of the United Kingdom in a diplomatic note of 28 July 1989 informed the United States authorities that the extradition of the applicant on charges of capital murder or any other offence the penalty for which may include the imposition of the death penalty was refused. The applicant would be surrendered on the basis that he would not be proceeded against for any offence other than the two counts of first degree murder including any lesser offence.

The Authorities of the United States of America confirmed in a diplomatic note of 31 July 1989 that in light of the applicable provisions of the 1972 Extradition treaty, United State's law would prohibit the applicant's prosecution in Virginia for the offence of capital murder.'

In Resolution DH (90) 8 of 12 March 1990, the Committee of Ministers declared, after having taken note of the above-mentioned information, that it had exercised its functions under Article 34 of the Convention.

Article 54 reads: "The judgment of the court shall be transmitted to the Committee of Ministers which shall supervise its execution."

188. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 24-27, paras. 81-91 (1989). Already in the cases of secret telephone tapping and the directly affective criminal legislation of homosexuality, the Strasbourg organs pronounced on the existence of such potential violations of the Convention: *Klass Case*, 28 Eur. Ct. H.R. (ser. A) para. 34 (1978); *Malone Case*, 82 Eur. Ct. H.R. (ser. A) 18, para. 64 (1984); *Norris Case*, 142 Eur. Ct. H.R. (ser. A), at 10-13, paras. 28-38 (1988). Judge Valticos wrote a dissenting opinion in which Judges Gölücklü, Matscher, Walsh, Bernhardt, and Carillo Salcedo joined. *Id.* at 19. See V. BERGER, *CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS: 1960-1987*, at 100, 257 (1989). With regard to rule 36 of the Commission's Rules of Procedure, see Commission Report, *supra* note 18, at 1, paras. 3-4. *Sudre, Extradition et Peine de Mort: Arrêt Soering de la Cour Européenne des Droits de l'homme*, 94 *Recueil des Cours* 103, 105, 111 (1990).

189. After the foundation of the Council of Europe in 1949 and the signature of the European Convention on Human Rights by fifteen European countries, this Convention came into force on September 3, 1953. The European Commission of Human Rights was created in 1954 and the Right of Individual Petition came into force in 1955. The European Court of Human Rights was not established before 1959. F. JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1975); L. MIKAELSON, *EUROPEAN PROTECTION OF HUMAN RIGHTS* (1980).

human rights had occurred, but also its competence of jurisdiction in special categories of cases with imminent risks of infringements upon the Convention and, therefore, its ability to *prevent* a violation of human rights.<sup>190</sup> As the Commission put it, the issue in such extradition proceedings is of an anticipatory nature and the "conclusion on the question of whether there is a breach of the Convention must necessarily be a conditional one based on the decision to extradite to the United States."<sup>191</sup>

Second, the *Soering* case represented the first occasion in which a Government not associated with the earlier proceedings before the Commission had recourse to article 48 (b) of the Convention. Article 48 enables "a High Contracting Party whose national is alleged to be a victim" of a violation of the Convention to "bring a case before the Court."<sup>192</sup>

Third, although the judgments of the European Court — unlike the judgments of the European Court of Justice of the EEC<sup>193</sup> — do not have a direct effect on municipal law, the British Government was nevertheless obliged to observe the terms of the decision by the Court as part of its obligations as a party to the Convention.<sup>194</sup> Public opinion and political pressure may also have been a reason why the United Kingdom abided by the decision.<sup>195</sup> Until now, all 169 judgments of the European Court have been duly respected.<sup>196</sup>

Fourth, the efficacy of the European Convention on Human Rights machinery was illustrated in the *Soering* case by the short time of the decision-making process: the entire proceedings before the European Commission and Court of Human Rights were completed in just *one year*.<sup>197</sup>

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190. On January 26, 1989, following requests for an interim measure made by the Commission and the applicant, the Court issued an indication to the Government of the United Kingdom that it would be advisable not to extradite the applicant pending the outcome of the proceedings before the Court. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 2, para 4 (1989).

191. Commission Report, *supra* note 18, at 19, para. 108.

192. *See supra* note 14. Sudre, *supra* note 188, at 106.

193. *See supra* note 4. In contrast to the European Court of Human Rights, the judgments of the supranational Court of Justice of the EEC are directly applicable and enforceable according to the municipal law of the concerned member states. Treaty Establishing the European Economic Community, *opened for signature* Mar. 25, 1987, arts. 187-92, 298 U.N.T.S. 11.

194. Article 53 provides: "The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties."

195. *See supra* note 187.

196. Council of Europe/European Court of Human Rights: Survey of activities 1959-1989 (1990).

197. Mr. Soering's application against the United Kingdom was lodged with the European Commission of Human Rights on July 8, 1988 and declared admissible on November 10, 1988 (*Jens Soering v. United Kingdom*, No. 14038/88, Press Communiqué C(88) 125, Nov. 16, 1988). After the adoption of the Commission's report on January 19, 1989, the case was referred to the

## II. *The Applicability of the European Convention on Human Rights to Extradition Proceedings*

At first glance, three provisions of the Convention refer to extradition, expulsion and deportation:<sup>198</sup> article 5, section 1(f) of the Convention,<sup>199</sup> and article 3, section 1, and article 4 of Protocol IV.<sup>200</sup> These provisions were not relevant in the *Soering* case. Secondly, "no right not to be extradited is as such protected by the Convention."<sup>201</sup> Thus, both the Commission and the Court started their deliberations by stating that if an extradition has adverse consequences on the enjoyment of Convention rights, it can involve the obligations of a Contracting State under the relevant Convention guarantee provided that the consequences are not too remote.<sup>202</sup>

As the case law shows,<sup>203</sup> this important introductory remark is not new at all. It implicitly says that every coercive act by an authority in extradition proceedings which will have an effect on the extraditee<sup>204</sup> can be considered a serious interference with the

Court by the Commission on January 25, 1989 by the Government of the United Kingdom on January 30, 1989 and by the Government of the Federal Republic of Germany on February 3, 1989. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 1, para. 1. On July 7, 1989, the Court delivered its judgment. *Sudre*, *supra* note 188, at 105.

198. For the purposes of this article, these notions and legal institutions can be discussed without distinction. *See* art. 5, § 1(f), *infra* note 198; P. VAN DIJK & G. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 198, 291-92 (1984); Frowein & Peukert, *Eurpäische Menschenrechts-Komention*, EMRK-KOMMENTAR, art. 3, marginal notes 18-24 (1985); *Sudre*, *supra* note 188, at 121. Villiger, *Expulsion and the Right to Respect for Private and Family Life (Article 8 of the Convention) - An Introduction to the Commission's Case-law*, in *PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION, STUDIES IN HONOUR OF G.J. WIARDA* 657 (1988); Vogler, *The Scope of Extradition in the Light of the European Convention on Human Rights*, in *PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION, STUDIES IN HONOUR OF J. WIARDA* 663 (1988).

199. Article 5, § 1(f) states as follows: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (f) the lawful arrest or detention of a person . . . against whom action is being taken with a view to deportation or extradition."

200. Article 3, § 1 provides: "No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national." Article 4 provides: "Collective expulsion of aliens is prohibited." The European Court mentioned only article 5, § 1 (f). *See Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 25, para. 85.

201. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 25, para. 85. With regard to the three above-mentioned provisions, it is not quite correct to say that "(t)he Convention does not contain any provision explicitly limiting the scope of extradition." Vogler, *supra* note 198, at 663.

202. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 25, para. 85; Commission Report, *supra* note 18, at 16, para. 94.

203. The Court referred to the Abdulaziz, Cabales & Balkandali Case, 94 Eur. Ct. H.R. (ser. A) 24, paras. 59-60 (1985), in relation to rights in the field of immigration; i.e., article 8 of the Convention. *See Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 25, para. 85. The Commission referred to its decisions *Altun v. Federal Republic of Germany*, 36 Eur. Comm'n H.R. 209 (1983), *M. v. France*, 41 Eur. Comm'n H.R. 103 (1984), and *Kirkwood v. United Kingdom*, 37 Eur. Comm'n H.R. 158 (1984). *See Commission Report*, *supra* note 18, at 16, para. 94.

204. For example, the (provisional) detention or other coercive measures of mutual judicial

fundamental and human rights of the person extradited. Thus, the Commission in the *Kirkwood* case held that:

although extradition and the right of asylum are not, as such, among the matters governed by the Convention. . . the Contracting States have nevertheless accepted to restrict the free exercise of their powers under general and international law, including the power to control the entry and exit of aliens, to the extent and within the limits of the obligations which they have assumed under the Convention.<sup>205</sup>

The recognition of extradition as an interference with fundamental and human rights has nothing to do with including new rights in the European Convention on Human Rights. Therefore, the same principle applies with regard to other (coercive) measures taken by a public authority with "consequences adversely affecting the enjoyment of a Convention right."<sup>206</sup> For instance, even though there is no right to reside in a particular country guaranteed by the Convention,<sup>207</sup> an expulsion or extradition order might infringe upon the right to respect for family life.<sup>208</sup> Consequently, any interference with the exercise of that right must be in accordance with the law and "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."<sup>209</sup> Therefore, in our opinion,

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assistance, such as interrogation of witnesses or seizure of objects, and, of course, the surrender itself.

205. *Kirkwood v. United Kingdom*, 37 Eur. Comm'n H.R. 158, 183 (1984) (quoting *X v. Austria & Yugoslavia*, 1964 Y.B. EUR. CONV. ON HUM. RTS. 314, 328).

206. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 25, para. 85.

207. *Family X v. United Kingdom*, 30 Eur. Comm'n H.R. 232, 234 (1982), with further references.

208. For instance, article 8 was violated in a case where a Moroccan national was expelled from the Netherlands after his divorce from his Dutch wife (breach of the applicants' right to respect for family life and of the parental rights of the expelled). The refusal of a residence permit and the resulting expulsion was considered by the Strasbourg organs as preventing the applicants from maintaining regular contact with each other, although such contacts were essential as the child was very young. With regard to the particular circumstances, the Court considered "that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued." *Berehab v. Netherlands*, 138 Eur. Ct. H.R. (ser. A) para. 29 (1988). In a new application declared admissible by the Commission, a Moroccan national who was deported from Belgium after being sentenced to prison "stresses that all his close relatives (father, mother and their seven other children) are still in Belgium, that his real mother tongue is French, that he speaks only a few words of Arabic and that most of the members of his family have acquired Belgian nationality." *M. v. Belgium*, Press Communiqué of the Council of Europe, DH(89)3, Apr. 12, 1989, at 10-11. After having found that the expulsion was made purely for security reasons and did not fulfil the requirement of proportionality the Commission brought this violation of article 8 before the Court. Press Communiqué of the Council of Europe, B(90)3, Feb. 2, 1990, at 8. See *X v. The Federal Republic of Germany*, 27 Eur. Comm'n H.R. 243 (1981). *Sudre, supra* note 188, at 110-11.

209. Convention, *supra* note 1, art. 8, § 2. For further discussion of article 8, see S. Breitenmoser, *Der Schutz der Privatsphäre gemäss Art. 8*; EMRK: DAS RECHT AUF ACHTUNG DES



every intrusion into the private sphere, as defined by the jurisprudence of the Strasbourg organs, which may occur in extradition cases is *per se* an interference with this guarantee and must be justified under article 8, section 2 of the Convention.

Regarding this theoretical analysis of coercive measures issued by a public authority as interferences with other rights guaranteed in the Convention, it is not correct to conclude that "via article 3 certain rights and freedoms which are not included as such in the Convention may be brought under its protection, or at any rate the argument that they are implicitly protected by the Convention may thus be consolidated."<sup>210</sup> As we have just seen, not only may article 3 of the Convention be infringed by extradition, but also article 8<sup>211</sup> or, as in the *Soering* case, articles 6 and 13. Therefore, neither the Commission nor the Court should have included and narrowed these preliminary considerations on the applicability of the Convention under the heading of article 3. Instead, these general problems occurring in deportation or extradition cases should have been dealt with in preliminary and separate legal passages in the *Soering* case.

### III. *The Responsibility of the Extraditing State under the European Convention on Human Rights*

According to article 1 of the Convention, "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Like the applicability of the Convention in general, this territorial limit on the reach of the Convention should have been discussed under a separate subheading at the beginning of the deliberations.<sup>212</sup> Given such a formal separation from the substantive guarantee of article 3, it would be much easier to understand that the responsibility of the United Kingdom in the *Soering* case was a general one, and had nothing to do with an extraterritorial application of European moral standards and perceptions with regard to the death penalty. Instead, this responsibility

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PRIVAT-UND FAMILIENLEBENS, DER WOHNUNG UND DES BRIEFVERKEHRS 112-15 (1986); VAN DIJK & VAN HOOF, *supra* note 198, at 291-93; FROWEIN & PEUKERT, *supra* note 198, at marginal notes 23-25; VILLIGER, *supra* note 198, at 657-62.

210. VAN DIJK & VAN HOOF, *supra* note 198, at 298.

211. The European Court itself referred to immigration and thus to article 8 of the Convention. *Soering* Case, 161 Eur. Ct. H.R. (ser. A), at 25, para. 85. See *supra* note 208.

212. The subheading "Applicability of Article 3 in Cases of Extradition" should have been divided into "Applicability of the Convention in Cases of Extradition" and "Responsibility of the Respondent Government," and both should have been placed before the heading "Alleged Breach of Article 3."

arises with regard to all rights guaranteed in articles 2-14 of the Convention.

In addition, such a general framework would also have provided a suitable opportunity to discuss the possibility of extraditing the applicant to the Federal Republic of Germany. It is indeed surprising that this alternative was not recognized at all by the majority of the Commission and that the Court mentioned it only as the last of the four aggravating circumstances for the assessment of the required severity under article 3 of the Convention.<sup>213</sup> Only the German member in the Commission, Professor Frowein, dedicated his dissenting opinion to this question, and was assisted by another dissenting opinion, that of Professor Trechsel of Switzerland. Their view may be supported for several reasons.

First, given the two different questions of responsibility at stake for the British Government, a more general approach to the problem of responsibility and a more profound discussion of the possibility of extraditing the applicant to the Federal Republic of Germany is justified and in fact necessary. On one hand, there is an extradition treaty between the United Kingdom and the United States. If the United Kingdom does not abide by its obligations deriving from this treaty, it clearly becomes responsible under public international law, provided that the United States also fulfils its obligation and "gives assurances satisfactory to the requesting Party that the death penalty will not be carried out."<sup>214</sup> Alternatively, if the conditions in the requesting state involve the serious risk of a violation of one of the rights guaranteed under the European Convention on Human Rights, "a decision to deport, extradite or expel an individual to face such conditions incurs the responsibility under article 1 of the Convention of the contracting State which so decides."<sup>215</sup>

Second, these contradictory questions of responsibility raise the general problem of a conflict between treaties. This important issue requires that there also be a separate and thorough examination of issues outside the scope of article 3. In the present case, because of the lack of sufficient assurances by the Commonwealth's Attorney for

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213. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 34, para. 110.

214. Extradition Treaty Between the United Kingdom and the United States, *supra* note 33, art. 4; *cf.* European Convention on Extradition, art. 11, 359 U.N.T.S. 273, 282 (1960), which states:

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

215. *Kirkwood v. United Kingdom*, 37 Eur. Comm'n. H.R. 158, 183 (1984).

Bedford County not to impose or to carry out the death penalty,<sup>216</sup> there was no actual conflict between the two treaties. Therefore, the Strasbourg organs neither had to consult the Vienna Convention on the Law of Treaties of 1969<sup>217</sup> nor did they have to rely on the principle of *jus cogens*.<sup>218</sup> In fact, it cannot be said that the Court in the *Soering* case implicitly affirmed the prevailing of a (regional) human rights treaty *per se* over extradition treaties.<sup>219</sup> Only if such a conflict between different treaties arises will the following questions have to be answered: (a) whether a human rights treaty always supersedes extradition treaties and (b) whether a death row phenomenon of up to eight years is prohibited by *jus cogens*.<sup>220</sup>

Third, it is also confusing to mix the question of responsibility with that of the substantive rights guaranteed under the Convention. Since the scope of these guarantees and their possible limitations are different in character and nature, a combination of these two different problems involves a systematical mistake. Moreover, since article 3 is of a fundamental and absolute character, a balance of different state interests cannot be considered "of any importance for the issue under article 3 whether the applicant could also be extradited to another

216. See European Convention on Extradition, *supra* note 214.

217. U.N. Doc.A/CONF. 39/27 (1966), reprinted in 63 AM. J. INT'L LAW 875 (1969) and in 25 I.L.M. 543 (1986) (signed at Vienna, May 23, 1969; entered into force January 27, 1980; not in force for the United States). See *id.*, art. 53:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Rosenne, *Vienna Convention on the Law of Treaties*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 525 (Bernhardt ed. 1983); I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (2d ed. 1984).

218. Frowein, *Jus Cogens*, 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 327 (R. Bernhardt ed. 1984); Frowein & Kuhner, *Drohende Folterung als Asylgrund und Grenze für Auslieferung und Ausweisung*, 43 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT 538 (1983). Gaja, *Jus Cogens Beyond the Vienna Convention*, 172 *Recueil des Cours* 271 (1981); L. HANNIKAINEN, *PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS* (1988).

219. For such a conclusion, the wording in para. 87 of the *Soering* judgment, *supra* note 5, at 25, is too general.

220. In such a discussion it will then have to be decided whether *jus cogens* can be derived from the (regional) European Convention on Human Rights and whether there is an obligation *erga omnes* not to extradite a fugitive to a country where he would face the death row phenomenon or even the death penalty. See J.A. FROWEIN, *DIE VERPFLICHTUNGEN ERGA OMNES IM VOLKERRECHT UND IHRE DURCHSETZUNG, VOLKERRECHT ALS RECHTSORDNUNG, INTERNATIONALE GERICHTSBARKEIT, MENSCHENRECHTE, Festschrift für H. Mosler* 241 (1983); Gaja, *Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts*, in *INTERNATIONAL CRIMES OF STATES* 151-60 (Weiler, Cassese, Spinedi eds. 1989); T. MERON, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS* 173-202 (1986). T. MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 188-201 (1989).

country."<sup>221</sup>

Fourth, the Court briefly mentioned the importance of fighting international crime in general and the particular role of extradition in this context.<sup>222</sup> Since this goal of international co-operation and mutual judicial assistance is indeed of paramount value, and could have been achieved by the possibility of extradition to West Germany, the fact that Soering would not have gotten away with murder by playing one nation against another and trying to avoid extradition and conviction<sup>223</sup> should have been weighed and discussed by the Strasbourg organs in a more convincing way.

#### IV. *The Implicit Rejection of Extradition as a Matter Only Between States*

The applicability of the European Convention on Human Rights in extradition proceedings and the recognition of the responsibility of the extraditing state, in our opinion, implicitly rule out the traditional theory of extradition law. Under that theory, "extradition is considered a relationship between the two states concerned, and the person claimed is considered the object of the dealing between the two states."<sup>224</sup> Generally, such a state-oriented thinking is circumscribed by the term "treaty-theory," according to which both a general agreement for future extraditions and the act of surrender in a particular extradition case are to be regarded as an international law treaty between the requesting and the requested state.<sup>225</sup>

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221. Commission Report, *supra* note 18, at 2, para. 8 (H. Danelius, joined by Mr. G. Jorundsson and Mr. H. Vandenberghe, dissenting).

222. Soering Case, 161 Eur. Court H.R. (ser. A), at 25, 27, paras 86, 89.

223. As long as there is no international world court in an international (or extraterritorial) territory that could keep international criminals in the custody of the court, such conflicts of extradition law cannot be avoided. In the meantime treaties and conventions should include provisions obligating the States to prosecute the fugitive in cases where surrender is refused.

224. Schultz, *The General Framework of Extradition and Asylum*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 309, 323 (Bassiouni & Nanda eds. 1973). For some historic remarks concerning the individual gradually becoming a subject of international law, see Tornaritis, *Individual and Collective Responsibility in International Criminal Law*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 103-55 (Bassiouni & Nanda eds. 1973); Daes, *Promotion, Protection and Restoration of Human Rights at the National, Regional and International Level: The Status of the Individual and Contemporary International Law*, 40 U.N. ESCOR (Provisional Agenda Item 15(a)), U.N. Doc. E/CN. 4/Sub.2/1988/33/Add. 1 (1988); see also Mosler, *Subjects of International Law*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 442 (Bernhardt ed. 1984). For extradition law and its historic evolution, see Stein, *Extradition*, in 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 222 (Bernhardt ed. 1985).

225. T. VOGLER, AUSLIEFERUNGSRECHT UND GRUNDGESETZ 28 (1970); K. SCHWAIGHOFER, *supra* note 7, at 60 (with further references). Also, the German Bundesverfassungsgericht seems to rely to some extent on this concept, 50 BVERFG 244, 1979 NEUE JURISTISCHE WOCHENSCHRIFT 1285; the reliance is not so clear in 75 BVERFG 1, 1987 NEUE JURISTISCHE WOCHENSCHRIFT 2155 (see the index of all cases between 1949-1988 in INTERNATIONALE RECHTSHILFE IN STRAFSACHEN (A. Eser & O. Lagodny eds. 1989)). See the correct

This theory, however, does not provide an answer to two theoretical questions. First, it does not distinguish between the international level of an extradition treaty on the one hand and its implementation and execution by surrender of the fugitive on the municipal level on the other.<sup>226</sup> Second, because of this exclusion of any recognition or relevance of municipal law (particularly of constitutional requirements), the person extradited has no sufficient legal standing with substantive and comprehensive procedural rights to oppose extradition in such state-oriented proceedings.<sup>227</sup> In such a construction of exclusive or predominating state interests, the requesting and requested states alone are "subjects" with mutual rights and duties. The person extradited is an "object" and may only be the beneficiary of state-oriented exceptions or exemptions such as the principle of speciality,<sup>228</sup> double or dual criminality,<sup>229</sup> or the political offense clause.<sup>230</sup> It is commonly

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criticism of this theory by O. LAGODNY, *supra* note 7, at 11, with further references to German doctrine and practice. Lagodny, *Grundrechte als Auslieferungs-Gegenrechte*, 1988 NEUE JURISTISCHE WOCHENSCHRIFT 2146.

226. The questions on the international level are whether there is an obligation to extradite and whether human rights or *jus cogens* and international public order are applicable. The question of municipal law is whether the national authorities are allowed under domestic law to extradite an individual, *i.e.*, whether the requested State is entitled to allow a requesting State to do what the Constitution of the requested State does not permit. See *Soering Case*, 161 Eur. Ct. H.R. (ser. A) (De Meyer, J., concurring).

227. Thus, being a part of international law, such a treaty may only be restricted by international law, particularly *jus cogens* and international public order. Kimminich, *Der Schutz politisch Verfolgter im Auslieferungsverfahren*, 12 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 317, 320 (1986); Vogler, in IRG-KOMMENTAR, at 4, § 8 marginal notes 7-9 (Vogler, Walter & Wilkitzki); INTERNATIONALER RECHTSHIFEVERKEHR IN STRAFSACHEN IA 2 (Grutzner & Potz, 2d ed. (1980)). See M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW, A DRAFT INTERNATIONAL CRIMINAL CODE 129 (1980), who suggests in article IX the following rights of the individual:

In all proceedings of extradition and other forms of international cooperation, the individual who is the subject of the said proceedings, shall have the right to appear in person, to oppose the request or contemplate action of the Contracting Party, to be represented by counsel and to be heard before an impartial tribunal under fair procedures in conformity with the laws of the Contracting Party.

228. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 (1986); Bassiouni, *The United States Model*, in INTERNATIONAL CRIMINAL LAW 422 (1987); M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 368 (1974); T. Vogler, *The Principle of Speciality in Extradition Law* (paper presented at the International Seminar on Extradition, December 4-9, 1989, organized by the International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy) (soon to be published). Because of the insufficient assurance in the *Soering* case given by the Commonwealth's Attorney for Bedford County, the points of convergence between the principle of speciality and human rights were narrowed. *Soering Case*, 161 Eur. Court H.R. 28-30, paras. 93-99; Commission Report, *supra* note 18, at 20-21, paras. 114-21.

229. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 476 (1)(C) (1986); G.N. Herman, S.A. Bernholz & M.J. Bernholz, *Double Criminality and Complex Crimes*, in INTERNATIONAL CRIMINAL LAW, A GUIDE TO U.S. PRACTICE AND PROCEDURE 365-391 (Nanda & Bassiouni eds. 1987); M.E. TIGER, *The Extradition Requirement of Double Criminality in Complex Cases: Illustrating the Rationale of Extradition*, paper presented at the International Seminar on Extradition, December 4-9, 1989, organized by the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, soon to be published.

accepted that these traditional principles were basically aimed at the protection of the sovereign power of the requested State.<sup>231</sup> Individual interests may be protected at the same time, but only in an indirect way as a kind of reflex. Only recently has there been a new understanding that such exceptions involve rights of the fugitives, which they can raise even if the requested State did not object to their trial.<sup>232</sup>

The *Soering* case clearly shows that, in extradition proceedings, such state-oriented interests are not of exclusive relevance. Moreover, it is a convincing illustration that the fundamental and human rights of the person extradited must also be considered. The Strasbourg organs considerably strengthened the legal philosophy aiming at the defense, protection, and safeguard of human rights in the field of extradition by granting the fugitive a legal right of his own.

In this sense, the *Soering* case diminishes the relevance of the traditional exceptions and exemptions in extradition law which emerged and developed in the last century. Making such a logical step towards modern concepts of the protection of fundamental and human rights will eventually involve whether the aforementioned traditional principles of extradition law can be abolished and replaced by only two provisions: an individual-oriented clause for the protection of fundamental and human rights of the person to be extradited,<sup>233</sup> and a

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230. The political-offense exception, which excludes political agitators and dissidents from extradition, was long regarded as the only centuries-old human rights provision of international law. This questionable exception can easily be manipulated, so the suspects may be considered by one state as freedom fighters and by another state as terrorists. See Bassiouni, *The Political Offense Exception in Extradition Law and Practice*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 398-447 (Bassiouni ed. 1975); I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 166-93 (1971); Simon, *The Political Offense Exception: Recent Changes in Extradition Law Appertaining to the Northern Ireland Conflict*, ARIZ. J. INT'L & COMP. L. 244-58 (1988); T. STEIN, DIE AUSLIEFERUNGS-AUSNAHME BEI POLITISCHEN DELKTEN (1981) (English summary: *The Political Offence Exception to Extradition*) [hereinafter T. STEIN, AUSLIEFERUNGS-AUSNAHME]; T. Stein, *The Political Offense Exception - Developing Trends at the Multinational Level* (paper presented at the International Seminar on Extradition, December 4-9, 1989 in Siracusa, Italy organized by the International Institute of Higher Studies in Criminal Sciences (soon to be published)); C. VAN DEN WIJNGART, THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION 1-18 (1980).

231. C.L. Blakesley, *International Extradition: An Exercise in Comparative and International Law* (paper presented at the International Seminar on Extradition) December 4-9, 1989 in Siracusa, Italy, organized by the International Institute of Higher Studies in Criminal Sciences; soon to be published; A.H.J. Swart, *Defences, Exceptions and Exemptions, A General Survey* (paper presented at the International Seminar on Extradition), December 4-9, 1989, in Siracusa, Italy, organized by the International Institute of Higher Studies in Criminal Sciences (soon to be published). Also, the classical exceptions that extradition shall not be granted for capital punishment or for offenses punishable with corporal punishment were created because of the same concern given states to the possibility of a denial of extradition.

232. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 476, 477 (1986).

233. Article IV of the Resolution of the Institute of International Law of September 1, 1983 states:

state-oriented clause for the preservation of "essential national interests."<sup>234</sup> If these two clauses were complemented by a provision obliging the States to prosecute the fugitive in cases where surrender is refused, this would also "serve the requirements of international cooperation in preventing and suppressing crime as well as the interests of a fugitive individual."<sup>235</sup> The replacement of the traditional exceptions by these two clauses would have a systematic and a practical advantage. Systematically, these two provisions would take into account the dual nature and function of extradition law as a combination of public

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In cases where there is a well-founded fear of the violation of the fundamental human rights of an accused in the territory of the requesting State, extradition may be refused, whosoever the individual whose extradition is requested and whatever the nature of the offence of which he is accused.

1984 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL LAW 306. See *New Problems of the International Legal System of Extradition With Special Reference to Multilateral Treaties*, 1981 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 79 (Provisional and preliminary reports by Professor Karl Doehring, Draft Resolution and Observations of the members of the Twelfth Commission); See I. FRANGOU, AUSLIEFERUNGSGRUNDSATZHEIM INTERNATIONALEN UND DEUTSCHEN RECHT 163-219 (Eine Vergleichende Untersuchung der Auslieferungsresolution des Institut de Droit International und des deutschen Rechts 1989) (with regard to human rights and article IV of the Resolution).

*Cf. Draft Model Treaty on Extradition of 23 October 1989*, U.N. Doc. E/AC.57/1990 (1990), where article 3 provides *inter alia* the following mandatory grounds for refusal: ". . .(b) If the Requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that the person's position may be prejudiced for any of those reasons; . . .(f) If the person whose extradition is requested would be subjected in the Requesting State to torture or cruel, inhuman or degrading treatment or punishment or if he would not be entitled to the minimum guarantees in criminal proceedings, as contained in Article 14 of the International Covenant on Civil and Political Rights." Regrettably, this Draft Model Treaty on Extradition neither mentions in its introduction and preamble the need to respect human dignity and the constitutional rights of the individual in a sufficient way nor makes the provision of this Treaty Model any distinctions between international human rights and municipal (constitutional) rights.

*Compare* in this context the extradition treaty between the Federal Republic of Germany and Yugoslavia of November 26, 1970, which states in article 6, § 1 as follows: "The requested State shall not extradite persons whose extradition it does not consider permissible under its Constitution." 994 U.N.T.S. 95, 116 (1976).

According to article 1 of the Recommendation No. R (80) 9 of the Committee of Ministers of the Council of Europe, adopted on June 27, 1980, extradition shall not be granted "where a request for extradition emanates from a state not party to the European Convention on Human Rights and where there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing the person concerned on account of his race, religion, nationality or political opinion, or that his position may be prejudiced for any of these reasons." Council of Europe, Collection of Recommendations, Resolutions and Declarations of the Committee of Ministers Concerning Human Rights, 1949-87, at 83 (1989).

234. Because of the "politically motivated unwillingness of States to become involved in some other State's (political) problems," Professor Stein suggests this additional exception to the humanitarian clause: "Extradition may be refused if the requested State declares that the surrender of the fugitive would be contrary to essential national interests." T. STEIN, AUSLIEFERUNGS-AUSNAHME, *supra* note 230, at 380, 381. In his opinion, "[r]esort to this clause would amount to suspending the extradition treaty with respect to a specific request, and would therefore be reserved for exceptional circumstances."

235. *Id.* at 381.

international law<sup>236</sup> and municipal (constitutional) law.<sup>237</sup> The practical effects would be that, because of the abolition of the various traditional exceptions, extradition proceedings will become much easier and, therefore, faster and more effective. Thus, strengthening the safeguards of human rights in virtually every case would make sophisticated and complex extradition law considerably less complicated.

#### V. *All Convention Rights as Obstacles to Extradition*

Due to the lack of separation of the question of responsibility under article 1 of the Convention from the examination of the substantive guarantee of article 3, a misunderstanding may arise that not all rights contained in the Convention could be obstacles to extradition.<sup>238</sup> Indeed, the Court states:

Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention.<sup>239</sup>

Again, several arguments can be made to show that this statement does not rule out the possibility that *all* Convention rights can be obstacles to extradition.

First, this statement cannot be read alone and without references to another statement two sentences later in the same paragraph. There, the Court continues:

These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 *for all and any foreseeable consequences of extradition suffered outside their jurisdiction*.<sup>240</sup>

Second, the first statement must be juxtaposed to some cautious remarks by the Court on the territorial limitation of the Convention in general. Reading these remarks, which advise against an extraterritorial application of the Convention in third States, one gets the impression that the Court wanted to create with its first statement a kind of a "placebo," or reassurance, before giving its far-reaching judgment.

Third, in the next paragraph, the Court remembers the evolutive and effective character of the European Convention on Human Rights. Holding that its special character as a treaty for the collective enforce-

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236. With regard to the interrelation between the requesting and requested states as well as to the minimal standards of human rights, *i.e. jus cogens* and international public order.

237. With regard to the interference with constitutional rights of the person extradited by coercive extradition measures.

238. C. VAN DENN WYNGAERT, *supra* note 6, at 6.

239. Soering Case, 161 Eur. Court H.R. (ser. A), at 25, para. 86 (1989).

240. *Id.* at 26, para. 86 (emphasis added).



ment of human rights and fundamental freedoms requires "that *its provisions* be interpreted and applied so as to make *its safeguards* practical and effective,"<sup>241</sup> the Court implicitly says that all provisions and safeguards of the Convention may be obstacles to extradition. Moreover, the Court did not expressly say that only article 3 may be such an obstacle.<sup>242</sup>

Fourth, accepting the view that every coercive measure in an extradition process is *per se* an interference with fundamental rights guaranteed in the constitution of the requested State means that every such right may bar extradition if there is no justification for such a measure or if the principle of proportionality is not respected. Also, this reasoning leads to the conclusion that the minimum standards of the Convention rights can be independent obstacles to extradition even if they are not explicitly mentioned in the applicable extradition treaty or statute.

Fifth, this view is further supported by the Court's remarks concerning article 6. Whereas the Commission denied any responsibility of the British Government for "a matter entirely within the responsibility of the United States of America,"<sup>243</sup> the Court did "not exclude that an issue might exceptionally be raised under article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country."<sup>244</sup> Since the predominant doctrine and practice do not consider extradition proceedings as a criminal trial, but as an act of mutual judicial assistance,<sup>245</sup> this non-exclusion of article 6 in the *Soering* case can only be understood to say that every coercive measure in extradition proceedings is an interference by the extraditing State with fundamental human rights which must be both justified and proportional.

Finally, this conclusion may be confirmed by the jurisprudence of the Strasbourg organs itself. Whereas, in the *Soering* case, the Commission held that there was a violation of article 13, the Court based

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241. *Id.* at para. 87 (emphasis added).

242. The references to its case law indicate to the contrary: besides *Ireland v. The United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 90 (1978), the Court also cited the *Artico Case*, 37 Eur. Ct. H.R. (ser. A) 16 (1980), and the *Case of Kjeldsen, Busk Madsen and Pedersen*, 23 Eur. Ct. H.R. (ser. A) 27 (1976). *Cf. supra* note 208.

243. Commission Report, *supra* note 18, at 28, para. 156.

244. *Soering Case*, 161 Eur. Ct. H.R. (ser. A), at 36, para. 113. See Professor Trechsel's dissenting opinion in the Commission Report, *supra* note 18, where he states that "[i]f the requested State knowingly concurs in unfair proceedings, it also bears some responsibility for the violation of human rights of the person concerned."

245. See the definition by Tenth Congress of International Criminal Law, reported by Schultz, *Aktuelle Probleme der Auslieferung*, in 81 ZETSCHRIFT FÜR DIE GESAMTE STRAFRECHT-SWISSENSCHAFT 199, 202 (1969).

its decision on article 3. Therefore, it was not necessary for it to express an opinion on the other rights claimed by the applicant.

#### D. CONCLUSION AND OUTLOOK

*De lege lata* the Strasbourg organs could not say that the death penalty itself would violate the applicant's right to life. Soering himself did not claim such an interpretation, nor does such an understanding exist today in all Western European States. Article 2, section 1 of the European Convention on Human Rights, as well as the lack of an *opinio juris sive necessitatis*, still advise against such an approach. These two reasons will, however, diminish and lose their weight. Thus, an increasing number of countries have abolished capital punishment *de jure* or *de facto*<sup>246</sup> and grant extradition only after having received explicit assurances that the death penalty will not be imposed or carried out. In his concurring opinion, Judge De Meyer outlined the probable direction of an evolutive Strasbourg jurisprudence.<sup>247</sup>

Indeed, two smoke signals have already passed in the air. First, Protocol No. 6 to the European Convention on Human Rights Concerning the Abolition of the Death Penalty is the first instrument in international law obligating the signatories to abolish this punishment in peacetime<sup>248</sup> and to recognize the subjective right of the individual to be neither condemned to death nor executed. The Sixth Protocol was adopted on April 28, 1983 and has been ratified by fourteen States of the Council of Europe.<sup>249</sup>

Second, besides this growing movement towards the abolition of the death penalty among the European states, the United Nations also opened for signature and ratification a new human rights instrument aimed at the abolition of capital punishment. On December 15, 1989, the General Assembly adopted this new instrument, which is contained in a Second Optional Protocol to the International Covenant on Civil and Political Rights, by a recorded vote of fifty-nine in favour to

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246. In fact, none of the member states of the Council of Europe carries out the death penalty. See the citation of the written comments of Amnesty International by the Court, according to which there is a "virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice." Soering Case, 161 Eur. Ct. H.R. (ser. A), at 31, para. 102.

247. See Blumenwitz, 16 *EUROPAISCHE GRUNDRICHTE ZEITSCHRIFT* 326-28 (1989); Suder, *supra* note 188, at 115.

248. Protocol No. 6 to the European Convention on Human Rights Concerning the Abolition of the Death Penalty, Apr. 28, 1983, Europ. T.S. No. 114, allows derogations from its prohibition of the death penalty only in time of war or of imminent threat of war. Article 1 of the Protocol stipulates: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

249. Europ. T.S. No. 114, Chart of Signatures and Ratifications (Jan. 9, 1989).

twenty-six against, with forty-eight abstentions.<sup>250</sup> The Special Rapporteur produced exhaustive comparative analysis together with a draft optional protocol in his comprehensive and well-documented report. He stated that the implementation of an international instrument devoted specifically to the abolition of the death penalty follows *logically* from the "right to life" contained in article 6 of the International Covenant on Civil and Political Rights.<sup>251</sup>

Looking at these new trends, as well as the jurisprudence of the Commission in extradition cases since the early 1960s,<sup>252</sup> it cannot be said that the verdict in the *Soering* case "comes from a most perverse reading of the Convention which the Court interprets" or that "this judgment lacks all common sense."<sup>253</sup>

250. United Nations Database of December 15, 1989; U.N. Press Release GA/7977, Jan. 22, 1990; U.N. Doc. A/RES/44/128 (1990).

251. Bossuyt, *Elaboration of a second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, U.N. Doc. E/CN. 4/Sub. 2/1987/20 (1987). Cf. *Report of the Secretary-General containing views expressed by Governments pursuant to Commission and Human Rights Resolution 1989/25 of March 6, 1989*, U.N. Doc. A/44/592 (1989).

252. Its practice since that time shows that "the deportation of a foreigner to a particular country might in exceptional circumstances give rise to the question whether there had been 'inhuman treatment' within the meaning of Article 3 of the Convention," and that "similar considerations might apply to cases where a person is extradited to a particular country in which, due to the very nature of the régime of that country or to a particular situation in that country, basic human rights, such as are guaranteed by the Convention, might be either grossly violated or entirely suppressed"; No. 1802/63, *X v. the Federal Republic of Germany*, 10 Eur. Comm'n H.R. 26, 36 (1963); No. 4763/71, *X v. Belgium*, 37 Eur. Comm'n H.R. 157 (1971); No. 10308/83, *Altun v. Federal Republic of Germany*, 36 Eur. Comm'n H.R. 209, 236 (1983); No. 10,479/83 *Kirkwood v. United Kingdom*, 37 Eur. Comm'n H.R. 158 (1984); No. 15658/89 *Mansi v. Sweden*, — Eur. Comm'n H.R. — (1989), Press Communiqué of the Council of Europe C (89) 151 (Expulsion to Jordan notwithstanding the indication of the President of the Commission not to expell the applicant before a further examination of the application was in breach of article 3); Frowein & Peukert, *supra* note 198, art. 3; Rosenmayr, *Article 3 MRK*, in 19 DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION 139 (Ermacora, Nowak, Tretter eds. 1983); G.E. Wilms, *The Recent Case Law on Art. 3 of the European Convention on Human Rights and Fundamental Freedoms - With Special Regard to Definition Problems and State Obligations* (1988) (unpublished master's thesis). With regard to Article 4, see No. 4314/69, *X v. the Federal Republic of Germany*, 32 Eur. Comm'n H.R. 96 (1970) (an expulsion to a country where a duty to military service exists is not inhuman); No. 7334/76, *X v. Federal Republic of Germany*, 5 Eur. Comm'n H.R. 154 (1976) (a criminal prosecution for desertion from the army is not an inhuman treatment and, therefore, an expulsion to such a country not a violation of Article 3). With regard to article 5, see *Sanchez Reisse Case*, 107 Eur. Ct. H.R. (ser. A) (1986) (provisional arrest in extradition proceedings is a serious infringement upon personal liberty), and *Bozano Case*, 121 and 153 Eur. Ct. H.R. (ser. A) (disguised extradition is a violation of Article 5); cf. *Berger*, *supra* note 188 at 334-36, 347-51.

253. *A Courtroom Phenomenon*, *The Times* (London), July 8, 1989, at 11, col. 1. The same commentary ends with the following and also not quite accurate, cf. note 250, observation: "It is also entirely out of character with the previous, generally cautious interpretations of Article 3 which have been handed down over the years".