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# CASENOTE

## SOERING'S CASE: WAITING FOR GODOT — CRUEL AND UNUSUAL PUNISHMENT?

James M. Lenihan†

One of the most challenging and controversial topics of criminal justice in the modern era centers around the death penalty. The allegation that the death penalty is cruel and unusual punishment<sup>1</sup> has been raised repeatedly in federal courts<sup>2</sup> as well as state courts.<sup>3</sup> In addition to extensive litigation, extensive scholarship has brought the death penalty to the forefront of social and legal awareness.<sup>4</sup> Authors providing insight or opinion range from Supreme Court justices<sup>5</sup> to law students.<sup>6</sup>

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<sup>1</sup> Cruel and unusual punishment is:

[S]uch punishment as would amount to torture or barbarity, and any cruel and degrading punishment not known to the common law, and also any punishment so disproportionate to the offense as to shock the moral sense of the community. In re Kemmler, 136 U.S. 436. Punishment which is excessive for the crime committed is cruel and unusual. Coker v. Georgia, 433 U.S. 584. . . . The death penalty is not per se cruel and unusual punishment within the prohibition of the 8th Amendment, U.S. Const., but states must follow strict safeguards in the sentencing of one to death. Gregg v. Georgia, 428 U.S. 153.

BLACK'S LAW DICTIONARY 1234 (6th ed. 1990).

<sup>2</sup> As of October 9, 1990, there were 2,454 federal cases recorded in the WESTLAW database where the death penalty itself or the method of execution was alleged to be cruel and unusual punishment.

<sup>3</sup> This issue has been noted in 676 state cases, according to WESTLAW's database.

<sup>4</sup> There are currently more than 125 law review articles that discuss this controversy in varying degrees in the WESTLAW database.

<sup>5</sup> See, e.g., William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313 (Dec. 1986).

<sup>6</sup> See, e.g., Miranda B. Strassmann, Note, *Mills v. Maryland: The Supreme Court Guarantees The Consideration Of Mitigating Circumstances Pursuant To Lockett v. Ohio*, 38 CATH. U. L. REV. 907 (1989).

The scope of the death penalty controversy is not confined to the United States.<sup>7</sup> Rather, the norms of the entire world regarding the death penalty have had an immediate domestic effect in many nations.<sup>8</sup> The effect that international norms may have on the domestic application of the death penalty was demonstrated recently by the European Court of Human Rights (the Court) in *Soering's Case*.<sup>9</sup> In this case, the Court refused to allow the government of Great Britain to extradite Mr. Soering, a German national, to the United States where he was charged with capital murder.<sup>10</sup>

Although this was not the first time that extradition was refused on grounds that a defendant faced cruel and unusual punishment, the Court's rationale in *Soering* was unique. In *Soering*, the Court refused to grant extradition, not because the death penalty was cruel and unusual punishment, but because Soering would be subjected to "death-row phenomenon." The Court determined that death row phenomenon, also known as death row syndrome, was cruel and unusual punishment.<sup>11</sup> Because Mr. Soering would be subjected to "death row phenomenon," the Court determined that the extradition of Mr. Soering would violate Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>12</sup>

Part I of this note provides background information and the facts of the case. Part II examines the procedural history and jurisdictional issues in the case, while Part III explains the legal issues presented to the Court. Part IV of this note discusses the opinion of the Court with an analysis of that opinion following in Part V. This note concludes in Part VI, which examines the ramifications of this decision.

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<sup>7</sup> Joan F. Hartman, 'Unusual Punishment': *The Effects of International Norms Restricting The Application of the Death Penalty*, 52 U. CIN. L. REV. 655 (1983).

<sup>8</sup> *Id.* at 666, 667 n. 44.

<sup>9</sup> 161 Eur. Ct. H.R. (ser. A) (1989).

<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Id.*

<sup>12</sup> Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter the Convention]. Article 3 of the Convention provides that "[n]o one shall be subjected to torture or to inhumane or degrading treatment or punishment."

I. BACKGROUND AND FACTS OF *Soering's Case*

On March 30, 1985, William Reginald Haysom and Nancy Astor Haysom, Canadian nationals, were killed in their Bedford County, Virginia home.<sup>13</sup> Their deaths were the result of massive and multiple stab wounds to the neck, throat, and body.<sup>14</sup> After an intensive investigation, suspicion fell on the victims' daughter, Elizabeth Haysom, a twenty-year-old student at the University of Virginia, and her boyfriend, Jens Soering, an eighteen-year-old German national also studying at the University of Virginia.<sup>15</sup>

In October 1985, the two suspects disappeared from Virginia. In April 1986, they were arrested in England and charged with check fraud. During his incarceration in England, Soering was interviewed by a police investigator from the Bedford County, Virginia Sheriff's Department. In a sworn affidavit dated July 24, 1986 the investigator recorded Soering as having admitted the killings in the presence of two police officers from the United Kingdom and the Virginia investigators.<sup>16</sup> Soering stated that he was in love with Elizabeth Haysom, but that her parents were opposed to their relationship and therefore, he and Elizabeth Haysom had planned to kill Elizabeth's parents.<sup>17</sup> He claimed that he and Elizabeth rented a car in Charlottesville, Virginia, and drove to Washington, D.C. to establish an alibi. Soering then drove to the parents' house where the parents and Soering discussed the relationship. An argument ensued and he subsequently killed them with a knife.<sup>18</sup>

Soering was indicted on both capital and non-capital murder charges, and a warrant was issued for his arrest.<sup>19</sup> The warrant was executed on December 30, 1986, at the Chelmsford (England) prison, where Soering had just completed serving a prison sentence for check fraud.<sup>20</sup> Soering faced a possible death sentence in the United States, however, the death penalty had

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<sup>13</sup> 161 Eur. Ct. H.R. (ser. A) (1989) at 14.

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 12.

<sup>20</sup> *Id.*

been abolished in Great Britain.<sup>21</sup> Therefore, the British sought assurances that the death penalty would not be pursued or would not be carried out.<sup>22</sup>

During his incarceration, Soering was interviewed by a German prosecutor (*Staatsanwalt*) who, in a sworn witness statement, stated that Soering claimed "he had never had the intention of killing Mr. and Mrs. Haysom and . . . he could only remember having inflicted wounds at the neck on Mr. and Mrs. Haysom which must have had something to do with their dying later."<sup>23</sup> Further, Soering stated that in the days immediately preceding the stabbings "there had been no talk whatsoever [between him and Elizabeth Haysom] about killing Elizabeth's parents."<sup>24</sup> Shortly thereafter, the German authorities issued a warrant for Soering's arrest and sought his extradition.<sup>25</sup>

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<sup>21</sup> The death penalty was abolished in the United Kingdom in 1965 with the passage of the 1965 Murder Act in November 1965. Murder (Abolition of Death Penalty Act) 1965, c. 71, 13 & 14 Eliz.2 (1965). Prior to the enactment of the Murder Act, the death penalty could be imposed only for certain crimes specifically delineated by statute. See Homicide Act, c. 11 5 & 6 Eliz. 2, Part II §§ 5, 6 (1957). According to this act, the death penalty could only be imposed for certain murders or repeated murders. Section 5 of the Homicide Act permitted the execution of the death penalty for murders done in the furtherance of theft; by shooting or explosion; for the purpose of resisting a lawful arrest or escape from custody; for the murder of any police officer; or for the murder of any prison officer. Homicide Act, c.11, Part II §5. Where a person was convicted of a previous murder, he would be subject to the death penalty under section 6 of this statute.

<sup>22</sup> The terms of the request as cited by the court were:

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

161 Eur. Ct. H.R. (ser. A) (1989) at 12.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> German Criminal Law applies to an act committed abroad by a German national if the act is subject to punishment under the law of the place where the offense was committed. See Strafgesetzbuch (StGB) § 7(2).

StGB § 211(2) defines murder:

He is deemed a murderer who because of murderous lust, to satisfy his sexual instinct, for reasons of covetousness or for otherwise base motives, insidiously or cruelly or by means constituting a public danger or in order to render another crime possible or to conceal another crime kills a person.

Pursuant to an Extradition Treaty,<sup>26</sup> Elizabeth Haysom was returned to the United States in May 1987. The following August she pled guilty as an accessory to the murder of her parents and was sentenced to two forty-five-year prison terms.<sup>27</sup> In June 1987, the attorney general for Bedford County, Virginia signed a sworn affidavit certifying that at Soering's trial a representation would be made in the name of the United Kingdom that the United Kingdom government did not wish the death sentence to be imposed or carried out.<sup>28</sup> During the following months, the Virginia authorities informed the United Kingdom government that Virginia would not assure the death penalty would not be imposed. In fact, Mr. Updike, the attorney for Bedford County, fully intended to seek the death penalty in the case.<sup>29</sup>

A psychiatric examination was conducted on Soering's behalf while awaiting a decision on the extradition order. The results indicated that Soering was suffering from mental abnormalities that, in the United Kingdom, would constitute a defense to the murder charges.<sup>30</sup> The psychiatrist concluded that

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Murder is punishable by life imprisonment. StGB § 211(1).

<sup>26</sup> Extradition Treaty Between The Government Of The United States of America And The Government Of The United Kingdom Of Great Britain and Northern Ireland, June 8, 1972, U.S.-U.K., 28 U.S.T. 227 (1972) [hereinafter Extradition Treaty].

<sup>27</sup> 161 Eur. Ct. H.R. (ser. A) at 13 (1989).

<sup>28</sup> *Id.* The text of the affidavit provides in pertinent part:

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 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.

*Id.*

<sup>29</sup> *Id.* at 13-14.

<sup>30</sup> Specifically, the report provided by forensic psychiatrist Dr. Henrietta Bullard states:

There existed between Miss Haysom and Soering a "*folie à deux*" in which the most disturbed partner was Miss Hayson. . . .

At the time of the offence, it is my opinion that Jens Soering was suffering from [such] an abnormality of mind due to inherent causes as substantially impaired his mental responsibility for his acts. The psychiatric syndrome referred to as "*folie à deux*" is a well-recognized state of mind where one partner is suggestible to the extent that he or she believes in the psychotic delusions of the other. The degree of disturbance of Miss Haysom borders on the psychotic, and, over the course of many months, she was able to persuade Soering that he might have to kill her parents for her and him to survive as a couple. . . . 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 or question the absurdities in

Soering was "immature and inexperienced and had lost his personal identity in a symbiotic relationship with his girlfriend - a powerful, persuasive and disturbed young woman."<sup>31</sup> Soering was transferred to a prison hospital and treated as a suicide-risk prisoner until November 1988. A subsequent psychiatric evaluation disclosed Soering's dread of extreme physical violence and potential homosexual attack from the death row inmates in Virginia.<sup>32</sup> The psychiatrist's report also indicated that Soering exhibited a mounting desperation and posited that he might still try to take his own life.<sup>33</sup>

Notwithstanding these findings, the Chief Magistrate committed Soering to await the Secretary of State's order directing his extradition to the United States.<sup>34</sup> After numerous petitions to the United Kingdom, Soering, seeking to defeat his extradition to the United States, made an application to the European Commission of Human Rights (the Commission) under Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).<sup>35</sup> In his application, Soering alleged that the Secretary of State's decision to surrender him to the United States would cause the United Kingdom to breach Article 3 of the Convention<sup>36</sup> by exposing him to "death

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Miss Haysom's view of her life and the influence of her parents. . . .

In conclusion, it is my opinion that, at the time of the offenses 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."

*Id.* at 14.

These conclusions were equivalent to the conclusions drawn by an earlier report by Dr. John Hamilton, which were not offered into evidence.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter the Convention]. Article 25 provides: The commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

*Id.*

<sup>36</sup> *Id.*, art. 3. "No one shall be subjected to torture or to inhumane or degrading treatment or punishment." *Id.*

row phenomenon."<sup>37</sup> Soering also alleged that because of the "absence of legal aid in Virginia to fund collateral challenges before the Federal courts . . . he would not be able to secure his legal representation as required by the Convention."<sup>38</sup> In addition to these allegations, Soering claimed defect in the extradition proceedings in England<sup>39</sup> and alleged that he had no remedy available to him in the United Kingdom.<sup>40</sup> The President of the Commission recommended that Soering's extradition be stayed during the proceedings before the Commission and the Court. The government of the United Kingdom accepted that recommendation and recommitted Soering to the prison hospital pending these proceedings.<sup>41</sup>

## II. PROCEDURAL HISTORY AND JURISDICTIONAL ISSUES

### A. *Procedural History*

Two weeks after his committal by the Chief Magistrate on June 16, 1987, Soering applied for a writ of habeas corpus as to the committal and for leave to apply for judicial review. Both of these requests were denied by the Divisional Court in December 1987.<sup>42</sup> In June 1988, Soering's petition to the House of Lords, appealing the Divisional Court's decision, was also rejected.

On July 8, 1988, Soering filed an application with the European Commission on Human Rights under Article 25 of the Convention. Soering also petitioned the Secretary of State to exercise his discretionary power not to order Soering's surrender to

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<sup>37</sup> 161 Eur. Ct. H.R. (ser. A) at 32 (1989). "This phenomenon may be described as consisting in a combination of circumstances to which [Soering] would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death." *Id.*

<sup>38</sup> The Convention, *supra* note 31, Art. 6 § 3(c) provides, in pertinent part: "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. . . ."

<sup>39</sup> 161 Eur. Ct. H.R. (ser. A) at 46; *see also, infra* notes 62-69 and accompanying text.

<sup>40</sup> 161 Eur. Ct. H.R. (ser. A) at 46.

<sup>41</sup> *Id.* at 9.

<sup>42</sup> *Id.* at 14-15.



the United States,<sup>43</sup> but the petition was rejected. On August 3, 1988, the Secretary of State signed a warrant ordering Soering's surrender to the United States.<sup>44</sup> On August 11, 1988, the Commission's President indicated that it preferred not to extradite Soering to the United States until the Commission had an opportunity to examine Soering's petition.<sup>45</sup> The Commission admitted Soering's petition on November 10, 1988 and issued its findings on January 19, 1989.

Subsequent to that decision, this case was brought before the European Court of Human Rights by the Commission on January 25, 1989, by the United Kingdom on January 30, 1989, and by the Federal Republic of Germany on February 3, 1989.<sup>46</sup>

### B. *Jurisdictional Issues*

One of the difficulties faced by the United Kingdom was deciding whether the United States or the Federal Republic of Germany was entitled to the extradition of the defendant. English courts do not exercise jurisdiction over cases involving the acts of foreigners abroad, except under circumstances not amenable to this case. Therefore, neither Soering, a German national, nor Haysom, a Canadian national, was subject to the jurisdiction of the criminal courts in the United Kingdom.<sup>47</sup> On August 11, 1986, the United States requested the extradition of both Haysom and Soering pursuant to the terms of the Extradition Treaty of 1972.<sup>48</sup> On March 11, 1987, the Federal Republic of Germany requested Soering's extradition pursuant to the Ex-

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<sup>43</sup> *Id.* at 15.

<sup>44</sup> *Id.* It is critical to understand these events sequentially. Note that the application to the Commission on July 8, 1988, the petition to the Secretary of State, and the application for judicial review were all commenced prior to August 3, 1988, when the Secretary of State actually signed the warrant.

<sup>45</sup> *Id.* at 31.

<sup>46</sup> *Id.* at 9, 31.

<sup>47</sup> *Id.* at 16.

<sup>48</sup> Extradition Treaty, *supra* note 26, art. 1. This treaty provides that:

[E]ach 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 offence within Article III [of which murder is one], committed within the jurisdiction of the other Party.

*Id.* at 229.

tradition Treaty of 1872.<sup>49</sup> In the United Kingdom, extradition hearings are conducted before a magistrate, who must be convinced that there is enough evidence to put the accused on trial.<sup>50</sup> Therefore, a *prima facie* case must be established before the magistrate will issue a commitment order.<sup>51</sup>

### 1. *Extradition Requested by the Federal Republic of Germany*

The United Kingdom refused to extradite Soering to the Federal Republic of Germany, claiming that the conditions set forth in the 1870 Extradition Act were not met.<sup>52</sup> The United Kingdom determined that the evidence submitted in support of the case, brought against Soering by the German prosecutor, consisted solely of the defendant's statements made to that prosecutor in the absence of a caution.<sup>53</sup> Although the United Kingdom conceded that the German courts had jurisdiction to try the defendant, the evidence produced "did not amount to a *prima facie* case against him . . . ."<sup>54</sup> Due to this failure, the Magistrate "would not be able to commit Soering to await extradition to Germany on the strength of admissions obtained in such circumstances."<sup>55</sup>

### 2. *Extradition Requested by the United States*

The United States requested Soering's extradition claiming that there was no means of compelling witnesses from the United States to appear in a criminal court in Germany.<sup>56</sup> The United States government also explained its understanding that Germany could not try the case on the basis of Soering's admissions alone.<sup>57</sup> On May 20, 1987 the United Kingdom informed

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<sup>49</sup> Treaty Between Germany and Great Britain For The Mutual Surrender of Fugitive Criminals, May 14, 1872, Ger.-Gr.Br., 144 Consol. T.S. 369.

<sup>50</sup> 161 Eur. Ct. H.R. (ser. A) at 17. "A magistrate must be satisfied that there is sufficient evidence to put the accused on trial; before committing him a *prima facie* case must be made out against him." *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 12-13.

<sup>53</sup> *Id.* at 12.

<sup>54</sup> *Id.* at 13.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

Germany that "the United States had earlier 'submitted a request, supported by prima facie evidence, for the extradition of Mr. Soering'."<sup>58</sup> The United Kingdom authorities indicated that they sought assurances from the United States as to the non-imposition of the death penalty, and stated that "in the event that the court commits Mr. Soering, his surrender to the United States authorities would be subject to the receipt of satisfactory assurances on this matter."<sup>59</sup> Article IV of the United Kingdom-United States Extradition Treaty<sup>60</sup> provides:

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.<sup>61</sup>

Where a fugitive requested by the United States faces the possibility of receiving the death penalty, the Secretary of State for the United Kingdom has established the practice of accepting the assurance from the prosecutors that "a representation will be made to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should be neither imposed nor carried out."<sup>62</sup> The mutual understanding as to the effect of these assurances was described by the Minister of State at the Home Office:

The written undertakings about the death penalty that the Secretary of State obtains from the Federal authorities amount to an undertaking that the views of the United Kingdom will be represented to the judge. At the time of sentencing he will be informed that the United Kingdom does not wish the death penalty to be imposed or carried out. That means that the United Kingdom authorities render up a fugitive or are prepared to send a citizen to face an American court on the clear understanding that the death penalty will not be carried out — it has never been carried out in such cases. It would be a fundamental blow to the extradition agreements between our two countries if the death penalty were

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Extradition Treaty, *supra* note 22.

<sup>61</sup> *Id.*, art. IV.

<sup>62</sup> 161 Eur. Ct. H.R. (ser. A) at 19.

carried out on an individual who had been returned under those circumstance.<sup>63</sup>

The standing practice of the Secretary of State has met with cooperation previously, yet no cases actually challenged the effectiveness of the process before the *Soering* case. Hence, the argument was brought by Soering that there were no "assurances" given that would preclude the death sentence.<sup>64</sup>

### III. LEGAL ISSUES

The allegations brought to the Court by Soering alleged numerous violations of the Convention.<sup>65</sup> Specifically, Soering alleged violations of: (1) Article 3,<sup>66</sup> claiming that the decision of the Secretary of State for the Home Department to surrender him to the United States would subject him to cruel and unusual punishment;<sup>67</sup> (2) Article 6 § 3(c),<sup>68</sup> claiming that because of "the absence of legal aid in Virginia to fund collateral challenges before the Federal courts . . . he would not be able to secure his legal representation;"<sup>69</sup> (3) Article 6, §§ 1 and 3(d), claiming that during the extradition proceedings the English magistrate refused to consider evidence of Soering's psychiatric condition;<sup>70</sup> (4) Article 13,<sup>71</sup> claiming "no effective remedy in the

<sup>63</sup> *Id.* at 19, quoting Hansard, 10 March 1987, col. 955.

<sup>64</sup> *Id.* at 30.

<sup>65</sup> The Convention, *supra* note 31.

<sup>66</sup> "No one shall be subjected to torture or to inhumane or degrading treatment or punishment." *Id.*, art. 3.

<sup>67</sup> 161 Eur. Ct. H.R. (ser. A) at 32.

<sup>68</sup> The Convention, *supra* note 31, art. 6 § 3(c).

<sup>69</sup> 161 Eur. Ct. H.R. (ser. A) at 45, quoting article 6 § 3(c) of the Convention. *See, supra* note 34.

<sup>70</sup> The Convention, *supra* note 31, at Article 6 §§ 1 and 3(d) respectively provide:

1. In the determination . . . of any criminal charge against him, everyone is entitled to a fair . . . hearing . . . .

. . . .

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

. . . .

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

*Id.*

<sup>71</sup> *Id.* art. 13. "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." *Id.*

United Kingdom existed in respect of his complaint under Article 3."<sup>72</sup>

#### A. *The Article Three Violation*

Soering charged that the decision to surrender him to the United States would constitute a violation of Article 3 of the Convention because he would be exposed to the "death row phenomenon."<sup>73</sup> He contended that Article 3 not only prohibited Contracting States from causing inhumane or degrading treatment or punishment within its own jurisdiction, but also required them to prevent persons from being exposed to such treatment at the hands of other States.<sup>74</sup> Soering charged that "an individual may not be surrendered out of the protective zone of the Convention without certainty that the safeguards" of the Convention would be afforded to him upon that surrender.<sup>75</sup>

The European Human Rights Commission agreed with Soering. The Commission maintained 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 an individual will be subjected, in the receiving State, to treatment contrary to that Article.<sup>76</sup>

Although the Federal Republic of Germany agreed with the Commission in its interpretation, the United Kingdom did not. The United Kingdom argued that Article 3 only applies to acts committed within the jurisdiction of a Contracting State, and that liability does not attach to cases involving extradition.<sup>77</sup> Specifically, the United Kingdom maintained that "it would be straining the language of Article 3 intolerably to hold that by surrendering a fugitive criminal the extraditing State has 'subjected' him to any treatment or punishment that he will receive following conviction and sentence in the receiving State."<sup>78</sup> The

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<sup>72</sup> 161 Eur. Ct. H.R. (ser. A) at 46.

<sup>73</sup> *Id.* at 46.

<sup>74</sup> *Id.* at 32.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* The United Kingdom also suggested that the approach taken by the Commission:

[I]nterferes with international treaty rights, leads to a conflict with norms of in-

United Kingdom also charged that implementation of this principle would create "a serious risk of harm in the Contracting State which is obliged to harbor the protected person, and leaves criminals untried, at large and unpunished."<sup>79</sup> As an alternative, the United Kingdom suggested limiting extradition restrictions under Article 3 to those cases in which the treatment or punishment is certain, imminent and serious.<sup>80</sup>

### B. *Violation of Articles Six and Thirteen*

In his application filed with the Commission, Soering alleged that the United Kingdom violated Article 6, Section 3(c) of the Convention by agreeing to surrender him to the United States.<sup>81</sup> Soering claimed that the absence of legal aid in Virginia to fund collateral challenges in federal court deprived him of the legal representation ensured under Article 6 of the Convention.<sup>82</sup> No other party to this action, including the Commission, found this argument persuasive.

Soering further alleged that during the extradition proceedings the testimony of psychiatric witnesses on his behalf was not considered. He contended that this violated Article 6, Sections 1 and 3(d).<sup>83</sup>

Finally, Soering alleged that because he had no effective remedy as to the Article 3 claim, his rights were violated under Article 13 of the Convention. As a result of this deficiency, he faced the possibility of the death penalty and would likely be subjected to "death row syndrome."<sup>84</sup>

Soering argued that the Secretary of State is not "suffi-

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ternational judicial process because it involves adjudication on internal affairs of States not Parties to the Convention, entails difficulty of evaluation and proof by requiring examination of alien systems of law, and the practice of national courts and the international community cannot be expected to support it.

*Id.*

<sup>79</sup> *Id.* at 33.

<sup>80</sup> *Id.* "In [the United Kingdom's] view, the fact that by definition the matters complained of are only anticipated, together with the common and legitimate interest of all States in bringing fugitive criminals to justice, requires a very high degree of risk, proved beyond reasonable doubt, that ill-treatment will actually occur." *Id.*

<sup>81</sup> *Id.* at 45.

<sup>82</sup> *Id.* at 25, 31.

<sup>83</sup> *Id.* at 46.

<sup>84</sup> *Id.* at 69.

ciently independent and impartial to constitute an effective remedy<sup>85</sup> and that judicial review of the Secretary's decision is limited to whether the Secretary acted reasonably.<sup>86</sup> Both Soering and the Commission asserted that this scope of judicial review was too narrow to consider the subject matter of the complaint.<sup>87</sup> Further, they alleged that even if the Court was able to review the decision of the Secretary of State, the Court's "lack of jurisdiction to issue injunctions against the Crown . . . render[ed] judicial review an ineffective remedy."<sup>88</sup> Hence, in Soering's view, whether the Secretary's decision was in conformity with the Convention remained unanswered.<sup>89</sup>

In response, the United Kingdom contended that Article 13 was inapplicable because the applicant's complaint was not "arguable." It further suggested that Article 13 had no application to potential violations of the Convention, since it would create difficulties in anticipating the nature and likelihood of a breach, as well as the nature of the remedy to be granted.<sup>90</sup>

#### IV. OPINION OF THE COURT

While the allegations brought under Articles 6 and 13 were fairly straightforward, the legal issues pertaining to the Article 3 claim were complex. In order to adequately address this allegation, the Court broke the charge down into two issues: (1) "Whether the applicant runs a real risk of a death sentence and hence of exposure to the 'death row phenomenon'";<sup>91</sup> and (2) "Whether in the circumstances the risk of exposure to the 'death row phenomenon' would make extradition a breach of Article 3."<sup>92</sup>

Because of the complexity of the Article 3 issue and because the thrust of this inquiry pertains to Article 3, the discussion of the Court's decision as to Articles 6 and 13 will be addressed in brief, first.

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 47.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 36.

<sup>92</sup> *Id.* at 39.

### A. *The Article Six Violations*

Soering's Article 6 claim, that the absence of legal aid in Virginia to fund collateral challenges before the federal courts, was rejected by the Court. The Court determined that an extradition decision could generate an issue under Article 6, but that the attendant circumstances would have had to indicate that the applicant actually suffered or risked suffering a flagrant denial of a fair trial in the requesting country. The Court held that the facts in this case did not present such a risk and, accordingly, found that Article 6 Section 3(c) was not violated.<sup>93</sup>

The second alleged violation of Article 6 was disposed of on a jurisdictional basis. The Court determined that Soering's allegation that the extradition proceeding failed to consider psychiatric evidence was not timely presented before the Commission. Therefore, the Court considered these charges to be outside the compass of the case and not within the Court's jurisdiction.<sup>94</sup>

### B. *The Article Thirteen Violations*

The Commission agreed with Soering's allegation that there was no available remedy in the United Kingdom with respect to his Article 13 claims. The Court determined that the extradition proceedings required by the Extradition Act of 1870, provided an effective remedy in relation to the Article 13 complaint. The Court's decision emphasized that the application for judicial re-

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<sup>93</sup> *Id.* at 45. The Court ruled:

The Court does 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. However, the facts of the present case do not disclose such a risk.

*Id.*

<sup>94</sup> *Id.* at 46. Specifically, the Court said:

Such claims as the applicant then made of a failure to take proper account of the psychiatric evidence were in relation to Article 3 and limited to the Secretary of State's ultimate decision to extradite him to the United States. He did not formulate any grievances, whether under Article 6, Article 3 or Article 13, regarding the scope or conduct of the Magistrate's Court proceedings as such. This being so, the new allegations of a breach of Article 6 constitutes not merely a further legal submission or argument but a fresh and separate complaint falling outside the compass of the case, which is delimited by the Commission's decision on admissibility

*Id.*



view and the writ of habeas corpus failed only for procedural reasons.<sup>95</sup> The Court identified the untimeliness of the application as the crucial factor in the unfavorable response to the applications.<sup>96</sup> Further, the Court suggested that the application for habeas corpus, regarding the issue of irrationality, failed because judicial review was limited to the reasonableness of the Secretary of State's decision based upon the lack of assurance received from the United States.<sup>97</sup>

The Court went so far as to chide Soering for his untimely application for judicial review.<sup>98</sup> Although the Court would not speculate as to what the decision of the English courts would have been, it did posit that the judicial review issue would have received earnest attention.<sup>99</sup>

### C. *The Article Three Violations: The Applicability of Article 3 in Extradition Cases*

The Court began its Article 3 inquiry by posing the following question: "[W]hether Article 3 can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State."<sup>100</sup> The Court determined that while there is no right preventing extradition under the Convention,<sup>101</sup> where extradi-

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<sup>95</sup> *Id.* at 48. "However, as Lord Justice Lloyd explained, the claim failed because it was premature, the courts only having jurisdiction once the Minister has actually taken his decision." *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* "There was nothing to have stopped Mr. Soering bringing an application for judicial review at the appropriate moment and arguing 'Wednesbury unreasonableness' on the basis of much the same material that he adduced before the Convention institutions in relation to the 'death row phenomenon'." *Id.*

The Court is referring to *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, 1 K.B. 223 (1948) wherein the court announced a standard of judicial review for whether a local administrative authority or tribunal has acted unreasonably in whether the local authority has taken into account any matters that ought not to be considered or disregarded any matters that should have been considered.

<sup>99</sup> *Id.* "Such a claim would have been given 'the most anxious scrutiny' in view of the fundamental nature of the human right at stake." *Id.*

<sup>100</sup> *Id.* at 33.

<sup>101</sup> The Convention, *supra* note 31, art. 5 § 1(f) provides for the "lawful arrest or detention of a person . . . against whom action is being taken with a view to deportation or extradition."

tion has consequences adversely affecting a Convention right, the extradition may attract the obligations of a Contracting State under the guarantees of the Convention.<sup>102</sup>

The Court interpreted Article 1<sup>103</sup> as setting the Convention's territorial limit,<sup>104</sup> and determined that this Article did not justify the refusal to extradite a fugitive based on the lack of assurance by the requesting State that the Convention's safeguards would be complied with.<sup>105</sup> The Court also reiterated the United Kingdom's position that the purpose of extradition was to prevent fugitive offenders from evading justice. The Court recognized that there are specific instruments which directly address the problems of removing a person to a jurisdiction where unwanted consequences may follow.<sup>106</sup> Notwithstanding these considerations, the Court held that contracting parties to the Convention were still responsible, under Article 3, for any and all foreseeable consequences of extradition suffered outside their jurisdiction.<sup>107</sup> Therefore, the Court ruled, a decision by a contracting State to extradite a fugitive may give rise to an Article 3 issue where there are substantial grounds to believe that, if extradited, the fugitive faces a real risk of being subjected to torture or inhuman or degrading treatment at the hands of the authorities in the requesting country.<sup>108</sup>

The Court admitted that it needed to assess the potential treatment of the fugitive in the requesting country against the standards established by Article 3.<sup>109</sup> The Court emphasized,

<sup>102</sup> 161 Eur. Ct. H.R. (ser. A) at 33.

<sup>103</sup> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

<sup>104</sup> 161 Eur. Ct. H.R. (ser. A) at 33. "In particular, the engagement undertaken by a Contracting State is confined to 'securing' . . . the listed rights and freedoms to persons within its own 'jurisdiction.'" *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 34.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 35. The Court specifically held:

[T]he decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or inhumane or degrading treatment or punishment in the requesting country.

*Id.*

<sup>109</sup> *Id.* at 36.

however, that the extraditing State may incur liability due to action which exposes the individual to proscribed treatment.<sup>110</sup> "Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article . . . ."<sup>111</sup> Therefore, the Court concluded, an "inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article."<sup>112</sup>

#### IV. ANALYSIS<sup>113</sup>

##### A. *The Decision of The Court as to Article Thirteen*

The Court ruled that there was no violation of Article 13 in the *Soering* case, and emphasized that Article 13 guarantees the availability of a remedy at the national level to enforce substantive rights and freedoms protected by the Convention.<sup>114</sup> The effectiveness of the remedy was not, however, dependant upon the certainty of a favorable outcome.<sup>115</sup> The effect of this Article, it explained, "is thus to require the provision of a domestic remedy allowing the competent 'national authority' both to deal with the substance of the relevant Convention complaint and to grant appropriate relief . . . ."<sup>116</sup>

In finding that there was no violation of Article 13, the Court explained in great depth the extradition procedure pursuant to the Extradition Act of 1870.<sup>117</sup> The Court stated:

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<sup>110</sup> *Id.* at 36. "In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment." *Id.*

<sup>111</sup> *Id.* at 35.

<sup>112</sup> *Id.*

<sup>113</sup> Due to the nature of the claims under Article 6, the brevity of their treatment by the Court, and the decision of the Court in respect to their disposition, these issues will not be discussed in this section. For the discussion of these issues, see *supra* notes 73-74 and accompanying text.

<sup>114</sup> 161 Eur. Ct. H.R. (ser. A) at 47.

<sup>115</sup> *Id.* at 48.

<sup>116</sup> *Id.* at 47.

<sup>117</sup> Extradition Act, 1870, 33 & 34 Vict. (1870).

Extradition proceedings in the United Kingdom consist in an extradition hearing before a magistrate. Section 10 of the Extradition Act 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 but otherwise he shall order him to be discharged". A magistrate must be satisfied that there is sufficient evidence to put the accused on trial; before committing him a prima facie case must be made out against him. "The test is whether, if the evidence before the Magistrate stood alone at the trial, a reasonable jury properly directed could accept it and find a verdict of guilty" (*Schtracks v. Government of Israel* [1964] Appeal Cases 556).<sup>118</sup>

This Act also provides that decisions in extradition proceedings may be challenged by application for a writ of habeas corpus.<sup>119</sup> A habeas corpus application is made to the Divisional Court and, upon leave, to the House of Lords. The principal concerns of Habeas corpus proceedings are whether: (1) the Magistrate had jurisdiction to hear the case; (2) there was enough evidence before him to justify committal; (3) the offense was not political; and, (4) there was no bar on other grounds to surrender.<sup>120</sup>

In addition, the Act provides that every prisoner who has exhausted his habeas corpus remedies may petition the Secretary of State to override the court decision to surrender him.<sup>121</sup> Additionally, the Secretary of State's decision to reject a prisoner's petition and to sign the surrender warrant is subject to judicial review.<sup>122</sup>

As to Soering's claim in particular, the Court determined that the extradition proceedings required by the Extradition Act of 1870 provided an effective remedy in relation to the Article 3 complaint.<sup>123</sup> In deciding this, the Court emphasized that this particular application for judicial review and writ of habeas

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<sup>118</sup> 161 Eur. Ct. H.R. (ser. A) at 17.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 18.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 17 and 47 referring to the availability of judicial review under the Extradition Act of 1870; see *supra* note 114.

corpus failed only for procedural reasons. The Court held:

[T]he claim failed because it was premature, the courts only having jurisdiction once the Minister has actually taken his decision . . . There was nothing to have stopped Mr. Soering [from] bringing an application for judicial review at the appropriate moment and arguing “*Wednesbury* unreasonableness”<sup>124</sup> on the basis of much the same material that he adduced before the Convention institutions in relation to the “death row phenomenon”. Such a claim would have been given “the most anxious scrutiny” in view of the fundamental nature of the human right at stake.<sup>125</sup>

The Court agreed that an English court would have had jurisdiction to quash the decision to extradite where it was established that there was a “serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one which no reasonable Secretary of State could take [sic].”<sup>126</sup>

Finally, the Court addressed the allegation that the English courts lacked jurisdiction to grant an interim injunction against the Crown. The Court determined that this did not detract from the effectiveness of judicial review because there was no suggestion that Soering would be surrendered before his application and appeal had been finally determined.<sup>127</sup>

### B. *The Article Three Violations*

The Court characterized the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms. As such, it determined that any interpretation of those rights and freedoms which it guaranteed had to be consistent with “the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.”<sup>128</sup> The Court suggested that it would be incompatible with the principles of the Convention to allow a

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<sup>124</sup> The Court is referring to *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, 1 K.B. 223 (1948), where the court held that the test in an extradition case is that no reasonable Secretary of State could have made an order for the return in the circumstances.

<sup>125</sup> 161 Eur. Ct. H.R. (ser. A) at 48.

<sup>126</sup> *Id.* at 18.

<sup>127</sup> *Id.* at 48.

<sup>128</sup> *Id.* at 34.

“Contracting State [to] knowingly . . . surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed.”<sup>129</sup>

Having established that the principles of the Convention apply to extradition cases, the Court directed its attention to the question of whether the foreseeable consequences of Soering's return to the United States were applicable to Article 3.<sup>130</sup> To determine this, the Court decided that the first point of inquiry must be whether “Soering runs a real risk of being sentenced to death in Virginia, since the source of the alleged inhuman and degrading treatment or punishment, namely the ‘death row phenomenon’, lies in the imposition of the death penalty.”<sup>131</sup> The Court maintained that only in the event of an affirmative answer to this question, was it necessary to examine whether exposure to “death row phenomenon” in Soering's case would involve treatment or punishment incompatible with Article 3.<sup>132</sup>

### 1. *The Risk Of A Death Sentence*

The Court considered many factors in evaluating whether Soering actually risked receiving the death penalty. The United Kingdom Government maintained that the real risk was insufficient to invoke Article 3, and stated numerous factors to support its contention. Soering's denial of the intent to kill the Haysoms, as told to the German prosecutor, placed his actual intent in question. The burden of proving that intent was placed upon the American prosecutor.<sup>133</sup> In addition, only a prima facie case was made out during the extradition proceedings. Issues regarding Soering's mental capacity and the possibility of an insanity defense under Virginia law<sup>134</sup> were also relevant. The evidence de-

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<sup>129</sup> *Id.* at 35.

<sup>130</sup> *Id.* at 36.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* This is significant because the American investigator's evidence of Soering's admitted intent would have virtually eliminated this burden.

<sup>134</sup> *Id.* at 22-23. Although Virginia generally does not recognize the defense of diminished capacity (*Stamper v. Commonwealth*, 324 S.E.2d 682 (1985)), a plea of insanity at the time of the offense is a defense which, if successful, bars conviction. This will apply in cases where the defendant knows that the act is wrong, but is driven by a mental

rived from Soering's mental examinations would have been important as a mitigating factor<sup>135</sup> in the sentencing stage of trial to show that the defendant suffered from extreme mental or emotional disturbance, or that at the time of the offense his ability to understand the nature of his conduct was significantly impaired.<sup>136</sup> Additionally, Soering's age, prior record, or the lack thereof, and mental condition would all have been considered by a jury even if Soering was convicted. Finally, the United Kingdom proposed that "the assurance received from the United States must at the very least significantly reduce the risk of capital sentence either being imposed or carried out."<sup>137</sup>

Soering argued the contrary position, that there were arguments supporting not only the possibility but the probability of Soering's death sentence. The principle argument was that the relations between the United States and the United Kingdom pertaining to extradition were conducted by federal and not state authorities.<sup>138</sup> The federal authorities have no power to give assurances regarding the death penalty, where the offense is a state and not a federal violation.<sup>139</sup> If the State does give assurances, however, the Government of the United States is empowered to ensure that the State's promise is honored.<sup>140</sup> The only enforceable assurance given by the Virginia authorities was

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disease, affecting the volition, to commit the offense (*See, e.g.,* Thompson v. Commonwealth, 70 S.E.2d 284 (1952), Godley v. Commonwealth, 2 Va. App. 249 (1986)), or where the defendant does not understand the nature, character and consequence of his act or cannot distinguish right from wrong (Price v. Commonwealth, 228 Va. 564, 323 S.E.2d 106 (1984)).

<sup>135</sup> *Id.* at 21. Va. Code Ann. § 19.2-264.4B (Michie 1990) delineates mitigating factors including, but not limited to:

- (i) the defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (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, (v) the age of the defendant at the time of the commission of the capital offense, or (vi) mental retardation of the defendant.

*Id.*

<sup>136</sup> Va. Code Ann. § 19.2-264.3:1 (Michie 1990).

<sup>137</sup> Soering's Case, 161 Eur. Ct. H.R. (ser. A) at 37 (1989).

<sup>138</sup> *Id.* at 28.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

that "a representation [would] be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out."<sup>141</sup> This assurance was diminished by the public announcement that the District Attorney was actively seeking the death penalty,<sup>142</sup> and the Attorney General's statement 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."<sup>143</sup>

Finally, the Court examined the crime itself, recognizing that under Virginia law, a death sentence can only be imposed where the prosecution proves, beyond a reasonable doubt, the existence of at least one of the statutory aggravating circumstances,<sup>144</sup> for example, future dangerousness<sup>145</sup> or vileness.<sup>146</sup> Although there was no reason to suspect that a Virginia court would find that Soering presented a serious and continuing threat to the community, the Court was concerned with the "vileness" test. It referred to a similar Virginia case, *Edmonds v. Commonwealth*,<sup>147</sup> where proof of multiple stab wounds sustained by the victim, particularly a neck wound, which even considered alone, constituted an aggravated battery in the light of the savage, methodical manner in which it was inflicted, leaving the victim to suffer an interval of agony awaiting death, has been held to satisfy the test of 'vileness' under this section.<sup>148</sup>

In considering *Soering's* case, the Court found "the horrible and brutal circumstances of the killing would presumably tell against the applicant, regard being had to the case-law on the grounds for establishing the vileness of the crime."<sup>149</sup>

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<sup>141</sup> *Id.* at 13.

<sup>142</sup> *Id.* at 14.

<sup>143</sup> *Id.* at 37.

<sup>144</sup> 161 Eur. Ct. H.R. (ser. A) at 37 (1989).

<sup>145</sup> See Va. Code Ann. § 19.2-264.2 (Michie 1990). This aggravating circumstance exists where there is a probability that the defendant will commit criminal acts of violence that would constitute a continuing and serious threat to society.

<sup>146</sup> *Id.* Vileness exists when the crime was "outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind or an aggravated battery to the victim." *Id.*

<sup>147</sup> 329 S.E.2d 807, 814, *cert. denied*, 474 U.S. 975 (1985).

<sup>148</sup> 161 Eur. Ct. H.R. (ser. A) at 21 (1989).

<sup>149</sup> *Id.* at 37.



The Court determined that the likelihood of Soering's exposure to the "death row phenomenon" was sufficient to invoke Article 3 of the Convention.<sup>160</sup> In its decision, the Court gave great weight to the arguments that the charge was a state and not a federal offense and that there was no way to ensure that the death sentence would not be given.<sup>161</sup> The Court gave this reliance because it determined that the representations made by the District Attorney did not eliminate the risk of the death penalty being imposed, especially in the light of the attorney's remarks, that he "decided to seek and to persist in seeking the death penalty because the evidence, in his determination, supports such action."<sup>162</sup> The court reasoned:

If the national authority with responsibility for prosecuting the offence takes such a firm stance, it is hardly open to the Court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the "death row phenomenon."<sup>163</sup>

Because the Court found that there was a real risk of the exposure to the death sentence, it was necessary to determine if the risk of exposure to "death row phenomenon" would make extradition a breach of Article 3.

## 2. Does "Death Row Phenomenon" Breach Article Three ?

At the outset, the Court recognized that the death penalty is a form of punishment which is accepted not only by various legal systems but also by the Convention itself.<sup>164</sup> Although the

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<sup>160</sup> *Id.* at 39.

<sup>161</sup> *Id.* at 38.

However, the charge, being a State and not a federal offence, comes within the jurisdiction of the Commonwealth of Virginia; it appears as a consequence that no direction could or can be given to the Commonwealth's Attorney by any State or Federal authority to promise more; the Virginia courts as judicial bodies cannot bind themselves in advance as to what decisions they may arrive at on the evidence; and the Governor of Virginia does not, as a matter of policy, promise that he will later exercise his executive power to commute a death penalty.

*Id.*

<sup>162</sup> *Id.* at 38-39.

<sup>163</sup> *Id.* at 39.

<sup>164</sup> The Convention, *supra* note 31, Article 2 § 1 provides that "[e]veryone'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

Convention provides for the death penalty, there must be a standard by which to measure treatment or punishment proscribed by Article 3.

The Court maintained that it was a well settled point in the Court's case-law that ill-treatment and punishment must exist at a minimum level of severity in order to fall within Article 3.<sup>155</sup> The factors to be assessed in this determination include: (1) the circumstances of the case, (2) the nature and context of the punishment or treatment, (3) the manner and method of executing the punishment or treatment, (4) the duration of punishment or treatment, and (5) the mental and/or physical effects of the treatment.<sup>156</sup> Age, sex and health of the victim may also be considered in some cases.<sup>157</sup>

The Court referred to its ruling in *Tryer's Case*,<sup>158</sup> wherein it established the prerequisites for characterizing punishment or treatment associated with punishment, as inhuman or degrading.<sup>159</sup> The precedent set in *Tryer's Case* was the formulation that the suffering from the humiliation involved must exceed that inevitable element of suffering or humiliation connected with a given form of legitimate punishment.<sup>160</sup> The Court decided that this included taking into account not only the physical pain inflicted, but also, "where there is a considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have in-

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penalty is provided by law."

<sup>155</sup> 161 Eur. Ct. H.R. (ser. A) at 39 (1989).

<sup>156</sup> See, e.g., *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978). In *Ireland v. United Kingdom*, the Court was called upon to decide whether or not the Convention precluded the systematic arrest, detention, interment and ill-treatment of Northern Irish ("terrorist") prisoners, was a violation of Article 3. The actions taken by the United Kingdom were done under the authority of several legislative enactments. In *Ireland v. United Kingdom*, the Court determined that hooding (putting a dark colored bag over the detainee's head and keeping it there all the time except for interrogation), sleep, food and drink deprivation, and subjection to cruel and unusual punishment.

<sup>157</sup> *Tryer's Case*, 26 Eur. Ct. H.R. (ser. A) at 65 (1978).

<sup>158</sup> 26 Eur. Ct. H.R. (ser. A) (1978). In this case, the Court determined that the "caning" (spanking) of a 15 year-old schoolboy who pled guilty to assault and was punished in accordance with a corporal punishment statute, was degrading punishment within the intendment of Article 3.

<sup>159</sup> *Id.* at 14-15.

<sup>160</sup> *Id.* at 14.

flicted on him.”<sup>161</sup> Therefore, to render a decision in this case, the Court required an examination of the specific circumstances of the case, namely, the length of detention that Soering would face prior to execution, the actual conditions in the detention facility, and Soering’s age and mental state.

#### A. *Length of Detention Prior to Execution*

The Court cited the length of time that “a prisoner can expect to spend on death row, on average six to eight years,”<sup>162</sup> as a significant factor in making its decision,<sup>163</sup> recognizing that these delays could be the prisoner’s own making.<sup>164</sup> While the Court lauded the “democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures,”<sup>165</sup> it ruled that these positive features result in the “consequence . . . that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.”<sup>166</sup> This ruling was made despite the Court’s own analysis that “[t]he remedies available under Virginia law serve the purpose of ensuring that the ultimate sanction of death is not unlawfully or arbitrarily imposed.”<sup>167</sup>

The Court recognized that the length of time on death row was substantially accounted for by collateral attacks on the judgment brought by the prisoner in habeas corpus proceedings before state and federal courts, as well as in applications for *certiorari* to the Supreme Court of the United States.<sup>168</sup> These are the collateral attacks that, in his Article 6 §3(c) allegation, Soering challenged as being not sufficiently available to him.<sup>169</sup> These collateral attacks are not mandated, but, rather, a “part of

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<sup>161</sup> 161 Eur. Ct. H.R. (ser. A) at 39 (1989).

<sup>162</sup> *Id.* at 42.

<sup>163</sup> *Id.*

<sup>164</sup> “This length of time awaiting death is . . . largely of the prisoner’s own making in that he takes advantage of all avenues of appeal which are offered to him by Virginia law.” *Id.*

<sup>165</sup> *Id.* at 44.

<sup>166</sup> *Id.* at 42.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> See *supra* notes 55 and 73 and accompanying text.

human nature that the person will cling to life by exploiting those safeguards to the full."<sup>170</sup>

### B. *Conditions on Death Row*

The Court ruled that "the severity of the special regime such as that operated on death row in Mecklenburg is compounded by the fact of inmates being subject to it for a protracted period lasting on average six to eight years."<sup>171</sup> In reviewing the conditions of the Mecklenburg Correctional Center, the Court limited itself to "the facts which were uncontested by the United Kingdom" stating that it did not consider the evidence brought by Soering regarding the risk of homosexual abuse and physical attack undergone by prisoners on death row.<sup>172</sup>

The specific conditions evaluated included the physical facilities,<sup>173</sup> the daily routine,<sup>174</sup> the services available to the inmates,<sup>175</sup> and the process of preparing for execution.<sup>176</sup> It is significant that, during this period of incarceration, the death row inmates are allowed non-contact visits in a visiting room on weekends and holidays, and access to their attorney during normal working hours, on request as well as during visiting hours. Inmates with records of good behavior are allowed contact vis-

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<sup>170</sup> 161 Eur. Ct. H.R. (ser. A) at 42 (1989).

<sup>171</sup> *Id.* at 42-43.

<sup>172</sup> *Id.* at 42.

<sup>173</sup> "A death row inmate's cell is 3m x 2.2m . . . The death row area has two recreation yards, both of which are equipped with basketball courts and one of which is equipped with weights and weight benches." *Id.* at 27.

<sup>174</sup> *Id.* "[D]eath row inmates are given one hour out-of-cell time in the morning in the common area. Each death row inmate is eligible for work assignment, such as cleaning duties." *Id.*

<sup>175</sup> *Id.* "Death row inmates receive the same medical service as inmates in the general population. An infirmary equipped with adequate supplies, equipment and staff provides for 24-hour in-patient care, and emergency facilities are provided in each building. Mecklenburg also provides psychological and psychiatric services to death row inmates." *Id.*

<sup>176</sup> *Id.* at 28.

"A death row prisoner is moved to the death house 15 days before he is due to be executed. The death house is next to the death chamber where the electric chair is situated. While a prisoner is in the death house he is watched 24 hours a day. He is isolated and has no light in his cell. The lights outside are permanently lit."

*Id.*

its.<sup>177</sup> Additionally, all outgoing mail is picked up daily, and all incoming mail is delivered each morning.<sup>178</sup> The Court considered these conditions a stringent custodial regime, the cumulative effect of which invokes Article 3.<sup>179</sup> It is difficult to envision any correctional facility responsible for the detention of death row inmates which would be any different.

### C. *Soering's Age and Mental State*

The final factor considered by the Court was Soering's age and mental state at the time the murders were committed. The Court noted that neither Virginia law nor the Convention prohibited the imposition of a death sentence on a person less than eighteen years old at the time of the crime.<sup>180</sup> It concluded, however, that subsequent international instruments, which explicitly prohibit imposing the death penalty on persons under eighteen years old, indicate "that as a general principle, the youth of the person concerned is a circumstance which is liable, with others, to put in question the compatibility with Article 3 of measures connected with a death sentence."<sup>181</sup>

The Court concluded that "the applicant's youth at the time of the offence and his then mental state, on the psychiatric evidence as it stands, are therefore to be taken into consideration as contributory factors tending, in his case, to bring the treatment on death row within the terms of Article 3."<sup>182</sup>

## VI. CONCLUSION

The decision of this Court will have long-standing repercussions. The Court has precluded any fact finding by the Virginia authorities and made its decision on speculation. While there were no guarantees given to the United Kingdom as to the treatment of Soering's case, none were required since the treaty<sup>183</sup> between the United Kingdom and the United States only pro-

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<sup>177</sup> *Id.* at 27-28.

<sup>178</sup> *Id.* at 28.

<sup>179</sup> *Id.* at 42-43.

<sup>180</sup> *Id.* at 43.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> The U.S.-U.K. Extradition Treaty, *supra* note 26.

vides for "assurance satisfactory to the requested party."<sup>184</sup> It is uncontroversial that the Court has no authority to assess the character of the assurances given to the United Kingdom, which has deemed them satisfactory. In effect, the Court has judged unacceptable a course of practice between two Contracting States to a treaty where the practice of the parties was entirely within the scope of the treaty. The United Kingdom's view of the assurances given by the United States was explained by the Minister of State:

At the time of sentencing [the judge] will be informed that the United Kingdom does not wish the death penalty to be imposed or carried out. . . . It would be a fundamental blow to the extradition agreements between our two countries if the death penalty were carried out on an individual who had been returned under those circumstances.<sup>185</sup>

This interference with a bilateral treaty might have been acceptable in a case where the Virginia courts had already found the defendant guilty and had sentenced him to the death penalty. At that point in time, there can be no speculation as to the outcome of the trial or to the sentence to be imposed. In this case, the defendant had not yet been tried. Therefore, it is anomalous that the Court could uphold the dismissal of judicial review of the Secretary of State's decision to sign the extradition warrant on the grounds of untimeliness,<sup>186</sup> yet decide the applicability of the death row phenomenon where the applicant had yet to be tried, let alone sentenced. For this reason, it appears that any decision rendered on the effect of death row syndrome on the applicant is speculation.

Even if the assurances given by the prosecutor were *de facto* insufficient, there is little reason to justify the claim that there was a real risk that Soering would face the death penalty.

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<sup>184</sup> *Id.* art. IV:

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 that the death penalty will not be carried out. *Id.* (emphasis added).

<sup>185</sup> For a more detailed explanation of the customary practice on this issue, see *supra*, II. Procedural History and Jurisdictional Issues.

<sup>186</sup> See *supra* notes 98-100 and accompanying text.

Notwithstanding the prosecutor's publicly announced intention to seek the death penalty,<sup>187</sup> the Virginia code provides strict guidelines for its application and execution.<sup>188</sup> By finding that Soering faced a real risk of receiving a death sentence, the Court gave great weight to the prosecution's stated intention to seek the death penalty, and virtually dismissed the litany of controlling case law and legislation in Virginia.

Equally troubling was the Court's conclusion that death row conditions were sufficient to invoke Article 3. In effect, the Court said that death row conditions are inhuman and degrading treatment where the duration of stay is protracted. Thus, the question arises as to what effect those conditions would have on the prisoner who had been sentenced to life imprisonment without parole. Having read the uncontroverted evidence as to the nature of the facilities, the services available to inmates, and the daily regime,<sup>189</sup> one must wonder what conditions the Court would consider acceptable for prisoners sentenced to death.

The undercurrent of this decision, taken in light of all the facts presented, is that the Court is predisposed to find that the death penalty is no longer an acceptable form of punishment, despite its recognition by this Convention. The Court appears to preclude extradition without a guarantee from the requesting state to not impose the death penalty by determining that waiting for execution of a death sentence triggers "death row phenomenon," and by ruling that this creates an Article 3 violation.

What is Soering's fate? He can be extradited neither to the United States, nor to the Federal Republic of Germany. The Federal Republic of Germany government has not made out the prima facie case against him required by the 1870 Extradition Act, because it used an uncautioned confession.<sup>190</sup> Finally, the United Kingdom has no jurisdiction.<sup>191</sup> The result has been to defeat the purpose of extradition treaties. In the words of the Court:

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<sup>187</sup> 161 Eur. Ct. H.R. (ser. A) at 14 (1989).

<sup>188</sup> Va. Code Ann. §§ 19.2-264.2 *et seq.* (Michie 1990). See also *supra* notes 109-110 and accompanying text.

<sup>189</sup> See *supra* notes 173-76 and accompanying text.

<sup>190</sup> See *supra* notes 40-42 and accompanying text.

<sup>191</sup> See *supra*, B. Jurisdictional Issues.

As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbor the protected person but also tend to undermine the foundations of extradition.<sup>192</sup>

It would appear that the Court has allowed Soering to become a protected person. The greatest harm, however, is that he has not even been called to task for crimes he has admitted committing.

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<sup>192</sup> 161 Eur. Ct. H.R. (ser. A) at 35 (1989).