**SOERING v UNITED KINGDOM**
(Series A, No 161; Application No 14038/88)

**EUROPEAN COURT OF HUMAN RIGHTS**

(1989) 11 EHRR 439

7 JULY 1989

PANEL: The President, Judge Ryssdal; Judges Cremona, Thor Vilhjalmsson, Golcuklu, Matscher, Pettiti, Walsh, Sir Vincent Evans, Macdonald, Russo, Bernhardt, Spielmann, De Meyer, Carrillo Salcedo, Valticos, Martens, Palm, Foighel

CATCHWORDS: Penalty as inhuman and degrading treatment

**HEADNOTE/SUMMARY**

The applicant, **a West German national, alleged that the decision** by the Secretary of State for the Home Department **to extradite him to the United States of America to face trial in Virginia on a charge of capital murder would, if implemented, give rise to a breach by the United Kingdom of Article 3. If he were sentenced to death he would be exposed to the so-called 'death row phenomenon'. He also complained of a breach of Article 13, in that he had no effective remedy in the United Kingdom in respect of his complaint under Article 3, and of Article 6.** The Commission found a breach of Article 13 but no breach of either Article 3 or Article 6. The case was referred to the Court by the Commission and the Governments of the United Kingdom and of the Federal Republic of Germany.

Held, by the Court, unanimously

(a) that, in the event of the Secretary of State's decision to extradite the applicant to the United States of America being implemented, there would be a violation of Article 3.

(b) that in the same event, there would be no violation of Article 6(3)(c);

(c) that it had no jurisdiction to entertain the complaints under Article 6 concerning the extradition proceedings;

(d) that there had been no violation of Article 13;

(e) that the applicant should be awarded compensation in respect of his legal costs and expenses.

(f) that the remainder of the claim for just satisfaction was rejected.

1. Inhuman and Degrading Treatment: extradition, death penalty, death row phenomenon.

(a) Although extradition is specifically envisaged in Article 5(1)(f), it may have consequences adversely affecting the enjoyment of a Convention right and may consequently engage the responsibility of a Contracting State.

(b) Article 1 sets a territorial limit on the reach of the Convention, which does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other states. However, the provisions of the Convention must be interpreted and applied so as to make its safeguards practical and effective.

(c) The absolute prohibition on torture and on inhuman and degrading treatment or punishment under Articles 3 and 15 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also found in other international instruments and is generally recognised as an internationally accepted standard. It would hardly be compatible with the underlying values of the Convention, were a Contracting Party knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, inhuman or degrading treatment or punishment, however heinous the crime allegedly committed. Extradition in such circumstances would be plainly contrary to the spirit and intent of Article 3.

(d) The serious and irreparable nature of the alleged suffering risked warranted a departure from the rule, usually followed by the Convention institutions, not to pronounce on the existence of potential violations of the Convention.

(e) **In the circumstances of the case it was found that the applicant, if returned to Virginia, ran a real risk of a death sentence and hence of exposure to the death row phenomenon.**

(f) Capital punishment is permitted under certain conditions by Article 2(1). The Convention is a living instrument which must be interpreted in the light of present-day conditions. Some Contracting States retain the death penalty for some peacetime offences. However, death sentences are no longer carried out, while Protocol No 6, which provides for the abolition of the death penalty in time of peace, has been opened for signature without any objection and has been ratified by 13 Contracting States to the Convention. As observed by Amnesty International in their written comments, there exists virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards.

(g) Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contacting States to abrogate the exception provided for under Article 2(1) and hence remove a textual limit on the scope for evolutive interpretation of Article 3. The Contracting States have, however, opted for the normal method of amending the text of the Convention by an optional instrument, Protocol No 7. In these conditions Article 3 cannot be interpreted as generally prohibiting the death penalty.

(h) However, the manner in which the death penalty is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3.

**(i) However well-intentioned and even potentially beneficial is the provision of a complex of post-sentence procedures, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.**

(k) As a general principle the youth of the person concerned is a circumstance which is liable, with others, to put into question the compatibility with Article 3 of measures connected with a death sentence. Mental health has the same effect.

**(l) In the circumstances of the case the applicant could expect to spend on death row six to eight years in a stringent custodial regime. At the time of the killings he was 18 years old and of a mental state which impaired his responsibility for his acts. The United Kingdom Government could have removed the danger of a fugitive criminal going unpunished as well as the anguish of intense and protracted suffering on death row by extraditing or deporting the applicant to face trial in the Federal Republic of Germany. In the light of all the above the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3.**

2. Criminal Proceedings: extradition.

(a) 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. The facts of the case did not disclose such a risk.

(b) The Court lacked jurisdiction to entertain the applicant's complaints regarding the fairness of the extradition proceedings as such.

3. Remedies: judicial review, extradition.

The English courts could review the 'reasonableness' of an extradition decision in the light of factors relied on by the applicant before the Convention institutions in the context of Article 3. The applicant had a remedy under Article 13 which he had failed to pursue. The English courts' lack of jurisdiction to grant interim injunctions against the Crown does not detract from the effectiveness of judicial review in extradition cases.

4. Just Satisfaction: enforcement of judgment, costs and expenses.

The Court's finding regarding Article 3 of itself amounted to adequate just satisfaction. The Court was not empowered to make accessory directions as to the enforcement of its judgments. The applicant was awarded full compensation for his costs and expenses.

**DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS**

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11. The applicant, Mr. Jens Soering, was born on 1 August 1966 and is a German national. He is currently detained in prison in England pending extradition to the United States of America to face charges of murder in the Commonwealth of Virginia.

12. The homicides in question were committed in Bedford County, Virginia, in March 1985. The victims, William Reginald Haysom (aged 72) and Nancy Astor Haysom (aged 53), were the parents of the applicant's girlfriend, Elizabeth Haysom, who is a Canadian national. Death in each case was the result of multiple and massive stab and slash wounds to the neck, throat and body. At the time the applicant and Elizabeth Haysom, aged 18 and 20 respectively, were students at the University of Virginia. They disappeared together from Virginia in October 1985, but were arrested in England in April 1986 in connection with cheque fraud.

13. The applicant was interviewed in England between 5 and 8 June 1986 by a police investigator from the Sheriff's Department of Bedford County. In a sworn affidavit dated 24 July 1986 **the investigator recorded the applicant as having admitted the killings in his presence and in that of two United Kingdom police officers**. The applicant had stated that he was in love with Miss Haysom but that her parents were opposed to the relationship. He and Miss Haysom had therefore planned to kill them. They rented a car in Charlottesville and traveled to Washington where they set up an alibi. The applicant then went to the parents' house, discussed the relationship with them and, when they told him they would do anything to prevent it, a row developed during which he killed them with a knife.

On 13 June 1986 a grand jury of the Circuit Court of Bedford County indicted him on charges of murdering the Haysom parents. The charges alleged capital murder of both of them and the separate non-capital murders of each.

14. On 11 August 1986 **the Government of the United States of America requested the applicant's and Miss Haysom's extradition under the terms of the Extradition Treaty of 1972 between the United States and the United Kingdom.** On 12 September a Magistrate at Bow Street Magistrates' Court was required by the Secretary of State for Home Affairs to issue a warrant for the applicant's arrest under the provisions of section 8 of the Extradition Act 1870. The applicant was subsequently arrested on 30 December at HM Prison Chelmsford after serving a prison sentence for cheque fraud.

15. On 29 October 1986 the **British Embassy in Washington addressed a request to the United States'** authorities in the following terms:

> '**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 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.'

16. On 30 December 1986 the **applicant was interviewed in prison by a German prosecutor** (Staatsanwalt) from Bonn. In a sworn witness statement the prosecutor recorded the applicant as having said, inter alia, that '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'; and that in the immediately preceding days 'there had been no talk whatsoever [between him and Elizabeth Haysom] about killing Elizabeth's parents.' The prosecutor also referred to documents which had been put at his disposal, for example the statements made by the applicant to the American police investigator, the autopsy reports and two psychiatric reports on the applicant.

On 11 February 1987 **the local court in Bonn issued a warrant for the applicant's arrest in respect of the alleged murders.** On 11 March the **Government of the Federal Republic of Germany requested his extradition to the Federal Republic** under the Extradition Treaty of 1872 between the Federal Republic and the United Kingdom. The Secretary of State was then advised by the Director of Public Prosecutions that, although the

German request contained proof that German courts had jurisdiction to try the applicant, the evidence submitted, since it consisted solely of the admissions made by the applicant to the Bonn prosecutor in the absence of a caution, did not amount to a prima facie case against him and that a magistrate would not be able under the Extradition Act 1870 to commit him to await extradition to Germany on the strength of admissions obtained in such circumstances.

17. In a letter dated 20 April 1987 to the Director of the Office of International Affairs, Criminal Division, United States Department of Justice, the Attorney for Bedford County, Virginia (Mr. James W Updike Jr) stated that, **on the assumption that the applicant could not be tried in Germany on the basis of admissions alone, there was no means of compelling witnesses from the United States to appear in a criminal court in Germany.** On 23 April the United States, by diplomatic note, requested the applicant's extradition to the United States in preference to the Federal Republic of Germany.

18. On 8 May 1987 Elizabeth Haysom was surrendered for extradition to the United States. After pleading guilty on 22 August as an accessory to the murder of her parents, she was sentenced on 6 October to 90 years' imprisonment (45 years on each count of murder).

19. On 20 May 1987 the Government of the United Kingdom informed the Federal Republic of Germany that the United States had earlier 'submitted a request, supported by prima facie evidence, for the extradition of Mr. Soering.' The United Kingdom Government notified the Federal Republic that it had 'concluded that, having regard to all the circumstances of the case, the court should continue to consider in the normal way the United States' request.' It further indicated that it had sought an assurance from the United States' authorities on the question of the death penalty and 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.'

20. On 1 June 1987 Mr. Updike **swore an affidavit in his capacity as Attorney for Bedford County**, in which he **certified as follows**:

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

This assurance was transmitted to the United Kingdom Government under cover of a diplomatic note on 8 June. It was repeated in the same terms in a further affidavit from Mr. Updike sworn on 16 February 1988 and forwarded to the United Kingdom by diplomatic note on 17 may 1988. In the same note the Federal Government of the United States undertook to ensure that the commitment of the appropriate authorities of the Commonwealth of Virginia to make representations on behalf of the United Kingdom would be honoured.

During the course of the present proceedings the Virginia authorities have informed the United Kingdom Government that Mr. Updike was not planning to provide any further assurances and intended to seek the death penalty in Mr. Soering's case because the evidence, in his determination, supported such action.

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II. Relevant domestic law and practice in the United Kingdom

A. Criminal law

27. In England murder is defined as the unlawful killing of a human being with malice aforethought. The penalty is life imprisonment. The death penalty cannot be imposed for murder. (Murder (Abolition of the Death Penalty) Act 1965, § 1.) Section 2 of the Homicide Act 1957 provides that where a person kills another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts in doing the killing. A person who but for the section would be liable to be convicted of murder shall be liable to be convicted of manslaughter.

**28. English courts do not exercise criminal jurisdiction in respect of acts of foreigners abroad except in certain cases immaterial to the present proceedings. Consequently, neither the applicant, as a German**

**citizen, nor Elizabeth Haysom, a Canadian citizen, was or is amenable to criminal trial in the United Kingdom.**

. . .

DECISION:I. Alleged breach of Article 3

80. The applicant alleged that the decision by the Secretary of State for the Home Department to surrender him to the authorities of the United States of America would, if implemented, give rise to a breach by the United Kingdom of **Article 3 of the Convention, which provides:**

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

A. Applicability of Article 3 in cases of extradition

81. The alleged breach derives from the applicant's exposure to the so-called 'death row phenomenon.' This phenomenon may be described as consisting in a combination of circumstances to which the applicant would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death.

82. In its report (at paragraph 94) the Commission reaffirmed '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 individual will be subjected, in the receiving State, to treatment contrary to that Article.'

The Government of the Federal Republic of Germany supported the approach of the Commission, pointing to a similar approach in the case law of the German courts.

The applicant likewise submitted that Article 3 not only prohibits the Contracting States from causing inhuman or degrading treatment or punishment to occur within their jurisdiction but also embodies an associated obligation not to put a person in a position where he will or may suffer such treatment or punishment at the hands of other States. For the applicant, at least as far as Article 3 is concerned, an individual may not be surrendered out of the protective zone of the Convention without the certainty that the safeguards which he would enjoy are as effective as the Convention standard.

83. The United kingdom Government, on the other hand, contended that Article 3 should not be interpreted so as to impose responsibility on a Contracting State for acts which occur outside its jurisdiction. In particular, in its submission, extradition does not involve the responsibility of the extraditing State for inhuman or degrading treatment or punishment which the extradited person may suffer outside the State's jurisdiction. To begin with, it maintained, 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. Further arguments advanced against the approach of the Commission were that it interferes with international treaty rights; it leads to a conflict with the norms of international judicial process, in that it in effect involves adjudication on the internal affairs of Foreign States not Parties to the Convention or to the proceedings before the Convention institutions; it entails grave difficulties of evaluation and proof in requiring the examination of alien systems of law and of conditions in foreign States; the practice of national courts and the international community cannot reasonably be invoked to support it; it causes a serious risk of harm in the contracting State which is obliged to harbour the protected person, and leaves criminals untried, at large and unpunished.

In the alternative, the United Kingdom Government submitted that the application of Article 3 in extradition cases should be limited to those occasions in which the treatment or punishment abroad is certain, imminent and serious. In its 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.

84. The Court will approach the matter on the basis of the following considerations.

85. As results from Article 5(1)(f), which permits 'the lawful . . . detention of a person against whom action is being taken with a view to . . . extradition,' no right not to be extradited is as such protected by the Convention.

Nevertheless, in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a contracting State under the relevant Convention guarantee. (See, mutatis mutandis, ABDULAZIZ, CABALES AND BALKANDALI V UNITED KINGDOM (1985) 7 EHRR 471, paras 59-60 -- in relation to rights in the field of immigration.) What is at issue in the present case is whether 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.

86. **Article 1 of the Convention, which provides that 'the High Contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I,'** sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' ('reconnaitre' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction.' Further, the Convention does not govern the actions of States not parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other 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 the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 in particular.

In the instant case it is common ground that **the United Kingdom has no power over the practices and arrangements of the Virginia authorities which are the subject of the applicant's complaints**. It is also true that in other international instruments cited by the United Kingdom Government -- for example the 1951 United Nations Convention relating to the Status of Refugees (Art 33), the 1957 European Convention on Extradition (Art 11) and the 1984 United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Art 3) -- the problems of removing a person to another jurisdiction where unwanted consequences may follow are addressed expressly and specifically.

**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.**

87. **In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms.** (See IRELAND V UNITED KINGDOM 2 EHRR 25, para 239.) **Thus, the object and purpose of the convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.** (See, inter alia ARTICO V ITALY 3 EHRR 1, para 33.) In addition, any interpretation of the rights and freedoms guaranteed has 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.' (See KJELDSEN, BUSK MADSEN AND PEDERSEN V DENMARK 1 EHRR 711, para 53.)

88. Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 in time of war or other national emergency. (See Article 15(2) ECHR) This absolute prohibition on torture and on inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.

The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3. That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that 'no State Party shall . . . extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture.' The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger

of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.

89. What amounts to 'inhuman or degrading treatment or punishment' depends on all the circumstances of the case. Furthermore, inherent in the whole of the convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. 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 harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.

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

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

B. Application of Article 3 in the particular circumstances of the present case

92. The extradition procedure against the applicant in the United Kingdom has been completed, the Secretary of State having signed a warrant ordering his surrender to the United States' authorities, this decision, albeit as yet not implemented, directly affects him. It therefore has to be determined on the above principles whether the foreseeable consequences of Mr. Soering's return to the United States are such as to attract the application of Article 3. This inquiry must concentrate firstly on whether Mr. 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. Only in the event of an affirmative answer to this question need the court examine whether exposure to the 'death row phenomenon' in the circumstances of the applicant's case would involve treatment or punishment incompatible with Article 3.

1. Whether the applicant runs a real risk of a death sentence and hence of exposure to the 'death row phenomenon'

93. The United Kingdom Government, contrary to the Government of the Federal Republic of Germany, the Commission and the applicant, did not accept that the risk of a death sentence attains a sufficient level of likelihood to bring Article 3 into play. Their reasons were fourfold.

Firstly, as illustrated by his interview with the German prosecutor where he appeared to deny any intention to kill, the applicant has not acknowledged his guilt of capital murder as such.

Secondly, only a prima facie case has so far been made out against him. In particular, in the United Kingdom Government's view the psychiatric evidence is equivocal as to whether Mr. Soering was suffering from a disease of the mind sufficient to amount to a defence of insanity under Virginia law.

Thirdly, even if Mr. Soering is convicted of capital murder, it cannot be assumed that in the general exercise of their discretion the jury will recommend, the judge will confirm and the Supreme Court of Virginia will uphold the imposition of the death penalty. The United Kingdom Government referred to the presence of important mitigating

factors, such as the applicant's age and mental condition at the time of commission of the offence and his lack of previous criminal activity, which would have to be taken into account by the jury and then by the judge in the separate sentencing proceedings.

Fourthly, the assurance received from the United States must at the very least significantly reduce the risk of a capital sentence either being imposed or carried out.

At the public hearing the Attorney General nevertheless made clear his Government's understanding 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.

94. As the applicant himself pointed out, he has made to American and British police officers and to two psychiatrists admissions of his participation in the killings of the Haysom parents, although he appeared to retract those admissions somewhat when questioned by the German prosecutor. It is not for the European court to usurp the function of the Virginia courts by ruling that a defence of insanity would or would not be available on the psychiatric evidence as it stands. The United Kingdom Government is justified in its assertion that no assumption can be made that Mr. Soering would certainly or even probably be convicted of capital murder as charged. Nevertheless, as the Attorney General conceded on its behalf at the public hearing, there is 'a significant risk' that the applicant would be so convicted.

95. Under Virginia law, before a death sentence can be returned the prosecution must prove beyond reasonable doubt the existence of at least one of the two statutory aggravating circumstances, namely future dangerousness or vileness. In this connection, the horrible and brutal circumstances of the killings would presumably tell against the applicant, regarding being had to the case law on the grounds for establishing the 'vileness' of the crime.

Admittedly, taken on their own the mitigating factors do reduce the likelihood of the death sentence being imposed. No less than four of the five facts in mitigation expressly mentioned in the Code of Virginia could arguably apply to Mr. Soering's case. These are a defendant's lack of any previous criminal history, the fact that the offence was committed while a defendant was under extreme mental or emotional disturbance, the fact that at the time of commission of the offence the capacity of a defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly diminished, and the defendant's age.

96. These various elements arguing for or against the imposition of a death sentence have to be viewed in the light of the attitude of the prosecuting authorities.

97. **The Commonwealth's Attorney for Bedford County, Mr. Updike, who is responsible for conducting the prosecution against the applicant, has certified that 'should Jens Soering be convicted of the offence of capital murder as charged . . . 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'.** The Court notes, like Lloyd LJ in the Divisional Court, that this undertaking is far from reflecting the wording of Article IV of the 1972 Extradition Treaty between the United Kingdom and the United States, which speaks of 'assurances satisfactory to the requested Party that the death penalty will not be carried out'. However, the offence charged, 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.**

This being so, Mr. Updike's undertaking may well have been the best 'assurance' that the United Kingdom could have obtained from the United States Federal Government in the particular circumstances. According to the statement made to Parliament in 1987 by a Home Office Minister, acceptance of undertakings in such terms '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 would be a fundamental blow to the extradition arrangements between our two countries if the death penalty were carried out on an individual who had been returned under those circumstances'. Nonetheless, the effectiveness of such an undertaking has not yet been put to the test.

98. The applicant contended that representations concerning the wishes of a foreign government would not be admissible as a matter of law under the Virginia Code or, if admissible, of any influence on the sentencing judge.

Whatever the position under Virginia law and practice, and notwithstanding the diplomatic context of the extradition relations between the United Kingdom and the United States, 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.** In the independent exercise of his discretion the Commonwealth's Attorney has himself decided to seek and to persist in seeking the death penalty because the evidence, in his determination, supports such action. 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'.

**99. The Court's conclusion is therefore that the likelihood of the feared exposure of the applicant to the 'death row phenomenon' has been shown to be such as to bring Article 3 into play.**

2. Whether in the circumstances the risk of exposure to the 'death row phenomenon' would make extradition a breach of Article 3

(a) General considerations

100. As is established in the court's case law**, ill-treatment, including punishment, 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 nature and context of the treatment or punishment, the manner and method if its execution, it duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim. (See IRELAND V UNITED KINGDOM 2 EHRR 25, para 162; and TYRER V UNITED KINGDOM 2 EHRR 1, paras 29 and 80.)

**Treatment has been held by the Court to be both 'inhuman' because it was premeditated, was applied for hours at a stretch and 'caused, if not actual bodily injury, at least intense physical and mental suffering.' and also 'degrading' because it was 'such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance'.** (See IRELAND V UNITED KINGDOM, para 167.) In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading,' the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment. (See TYRER V UNITED KINGDOM, loc cit.) In this connection, account is to be taken not only of the physical pain experienced 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 inflicted on him.

**101. Capital punishment is permitted under certain conditions by Article 2(1) of the convention, which reads:**

> **'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.'**

In view of this wording, the applicant did not suggest that the death penalty per se violated Article 3. He, like the two Government Parties, agreed with the Commission that the extradition of a person to a country where he risks the death penalty does not in itself raise an issue under either Article 2 or Article 3. On the other hand. Amnesty International in their written comments argued that the evolving standards in Western Europe regarding the existence and use of the death penalty required that the death penalty should now be considered as an inhuman and degrading punishment within the meaning of Article 3.

102. Certainly, 'the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions'; and, in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3, 'the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field. (See TYRER V UNITED KINGDOM 2 EHRR 1, para 31.) **De facto the death penalty no longer exists in time of peace in the contracting States to the Convention.** In the few Contracting States which retain the death penalty in law for some peacetime offences, death sentences, if ever imposed, are nowadays not carried out. This **'virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with**

**regional standards of justice,'** to use the words of Amnesty International, is reflected in Protocol No 6 to the Convention, which provides for the abolition of the death penalty in time of peace. Protocol No 6 was opened for signature in April 1983, which in the practice of the Council of Europe indicates the absence of objection on the part of any of the Member States of the Organisation; it came into force in March 1985 and to date has been ratified by 13 Contracting States to the Convention, not however including the United Kingdom.

Whether these marked changes have the effect of bringing the death penalty per se within the prohibition of ill-treatment under Article 3 must be determined on the principles governing the interpretation of the Convention.

103. The Convention is to be read as a whole and Article 3 should therefore be construed in harmony with the provisions of Article 2. (See, mutatis mutandis, KLASS V GERMANY 2 EHRR 214, 214, para 68.) On this basis Article 3 evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2(1).

Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2(1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3. However, Protocol No 6, as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, **notwithstanding the special character of the Convention, Article 3 cannot be interpreted as generally prohibiting the death penalty.**

104. **That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3. The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person with the proscription under Article 3.** Present-day attitudes in the contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded.

(b) The particular circumstances

105. **The applicant submitted that the circumstances to which he would be exposed** as a consequence of the implementation of the Secretary of State's decision to return him to the United States, namely the 'death row phenomenon,' **cumulatively constitute such serious treatment that his extradition would be contrary to Article 3.** He cited in particular the **delays in the appeal and review procedures following a death sentence, during which time he would be subject to increasing tension and psychological trauma**; the fact, so he said, that the **judge or jury in determining sentence is not obliged to take into account the defendant's age and mental state** at the time of the offence; **the extreme conditions of his future detention in 'death row' in Mecklenburg Correctional Center, where he expects to be the victim of violence and sexual abuse because of his age, colour and nationality**; and the **constant spectre of the execution itself, including the ritual of execution**. He also relied on the **possibility of extradition or deportation, which he would not oppose, to the Federal Republic of Germany as accentuating the disproportionality of the Secretary of State's decision**.

The Government of the Federal Republic of Germany took the view that, taking all the circumstances together, the treatment awaiting the applicant in Virginia would go so far beyond treatment inevitably connected with the imposition and execution of a death penalty as to be 'inhuman' within the meaning of Article 3.

On the other hand, the conclusion expressed by the Commission was that the degree of severity contemplated by Article 3 would not be attained.

The United Kingdom Government shared this opinion. In particular, it disputed many of the applicant's factual allegations as to the conditions on death row in Mecklenburg and his expected fate there.

(i) Length of detention prior to execution

106**. The period that a condemned prisoner can expect to spend on death row in Virginia before being executed is on average six to eight years. This length of time awaiting death, is, as the commission and the United Kingdom Government noted, in a sense 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.** The automatic appeal to the Supreme Court of Virginia normally takes no more than six months. The remaining time is accounted for by collateral attacks mounted by the prisoner himself in habeas corpus proceedings before both the State and Federal courts and in applications to the Supreme Court of the United States for certiorari review, the prisoner at each stage being able to seek a stay of execution. The remedies available under Virginia law serve the purpose of ensuring that the ultimate sanction of death is not unlawfully or arbitrarily imposed.

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

(ii) Conditions on death row

107. As to conditions in Mecklenburg Correctional Center, where the applicant could expect to be held if sentenced to death, the court bases itself on the facts which were uncontested by the United Kingdom Government, without finding it necessary to determine the reliability of the additional evidence adduced by the applicant, notably as to the risk of homosexual abuse and physical attack undergone by prisoners on death row.

The stringency of the custodial regime in Mecklenburg, as well as the services (medical, legal and social) and the controls (legislative, judicial and administrative) provided for inmates, are described in some detail above. In this connection, the United Kingdom Government drew attention to the necessary requirement of extra security for the safe custody of prisoners condemned to death for murder. Whilst it might thus well be justifiable in principle, the severity of a special regime such as that operated on death row in Micklenburg is compounded by the fact of inmates being subject to it for a protracted period lasting on average six to eight years.

(iii) The applicant's age and mental state

108. At the time of the killings, the applicant was only 18 years old and there is some psychiatric evidence, which was not contested as such, that he 'was suffering from [such] an abnormality of mind . . . as substantially impaired his mental responsibility for his acts'.

Unlike Article 2 of the Convention, Article 6 of the 1966 International Covenant on Civil and Political Rights and Article 4 of the 1969 American Convention on Human Rights expressly prohibit the death penalty from being imposed on persons aged less than 18 at the time of commission of the offence. Whether or not such a prohibition be inherent in the brief and general language of Article 2 of the European Convention, its explicit enunciation in other, later international instruments, the former of which has been ratified by a large number of States parties to the European Convention, at the very least indicates 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.**

It is in line with the Court's case law to treat disturbed mental health as having the same effect for the application of Article 3.

109. Virginia law, as the United Kingdom Government and the Commission emphasised, certainly does not ignore these two factors. Under the Virginia Code account has to be taken of mental disturbance in a defendant, either as an absolute bar to conviction it if is judged to be sufficient to amount to insanity or, like age, as a fact in mitigation at the sentencing stage. Additionally, indigent capital murder defendants are entitled to the appointment of a qualified mental health expert to assist in the preparation of their submissions at the separate sentencing proceedings. These provisions in the Virginia Code undoubtedly serve, as the American courts have stated, to prevent the arbitrary or capricious imposition of the death penalty and narrowly to channel the sentencer's discretion. They do not however remove the relevance of age and mental condition in relation to the acceptability, under Article 3, of the 'death row phenomenon' for a given individual once condemned to death.

Although it is not for this Court to prejudge issues of criminal responsibility and appropriate sentence, 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.

(iv) Possibility of extradition to the Federal Republic of Germany

110. For the United Kingdom Government and the majority of the Commission, the possibility of extraditing or deporting the applicant to face trial in the Federal Republic of Germany, where the death penalty has been abolished under the Constitution, is not material for the present purposes. Any other approach, the United Kingdom Government submitted, would lead to a 'dual standard' affording the protection of the Convention to extraditable persons fortunate enough to have such an alternative destination available but refusing it to others not so fortunate.

This argument is not without weight. Furthermore the Court cannot overlook either the horrible nature of the murders with which Mr. Soering is charged or the legitimate and beneficial role of extradition arrangements in combating crime. The purpose for which his removal to the United States was sought, in accordance with the Extradition Treaty between the United Kingdom and the United States, is undoubtedly a legitimate one. However, sending Mr. Soering to be tried in his own country would remove the danger of a fugitive criminal going unpunished as well as the risk of intense and protracted suffering on death row. It is therefore a circumstances of relevance for the overall assessment under Article 3 in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case.

(c) Conclusion

111. For any prisoner condemned to death, some element of delay, between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. **The democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial.** Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services.

However, in the Court's view, **having regard to the very long period of time spent on death row in such extreme conditions, with the ever-present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.** A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.

**Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3.**

This finding in no way puts in question the good faith of the United Kingdom Government, which has from the outset of the present proceedings demonstrated it's desire to abide by its Convention obligations, firstly by staying the applicant's surrender to the United States authorities in accord with the interim measures indicated by the Convention institutions and secondly by itself referring the case to the court for a judicial ruling.

. . .

IV. Application of Article 50

125**. Under the terms of Article 50,**

> **'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 . . . 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.'**

Mr. Soering stated that, since the object of his application was to secure the enjoyment of his rights guaranteed by the Convention, just satisfaction of his claims would be achieved by effective enforcement of the Court's ruling. He

invited the Court to assist the State parties to the case and himself by giving directions in relation to the operation of its judgment.

In addition, he claimed the costs and expenses of his representation in the proceedings arising from the request to the United Kingdom Government by the authorities of the United States of America for his extradition. He quantified these costs and expenses at L1,500 and L21,000 for lawyers' fees in respect of the domestic and Strasbourg proceedings respectively, L2,067 and 4,885.60 FF for his lawyers' travel and accommodation expenses when appearing before the Convention institutions, and L2,185.80 and 145 FF for sundry out-of-pocket expenses, making an overall total of L26,752.80 and 5,030.60 FF.

126. No breach of Article 3 has as yet occurred. Nevertheless, the Court having found that the Secretary of State's decision to extradite to the United States of America would, if implemented, give rise to a breach of Article 3, Article 50 must be taken as applying to the facts of the present case.

127. The Court considers that its finding regarding Article 3 of itself amounts to adequate just satisfaction for the purposes of Article 50. The Court is not empowered under the Convention to make accessory directions of the kind requested by the applicant. (See, mutatis mutandis, DUDGEON V UNITED KINGDOM (1983) 5 EHRR 573, para 15.) By virtue of Article 54, the responsibility for supervising execution of the Court's judgment rests with the Committee of Ministers of the Council of Europe.

128. The United Kingdom Government did not in principle contest the claim for reimbursement of costs and expenses, but suggested that, in the event that the Court should find one or more of the applicant's complaints of violation of the Convention to be unfounded, it would be appropriate for the Court, deciding on an equitable basis as required by Article 50, to reduce the amount awarded accordingly. (See LE COMPTE, VAN LEUVEN AND DE MEYERE V BELGIUM (1983) 5 EHRR 183.)

The applicant's essential concern, and the bulk of the argument on all sides, focused on the complaint under Article 3, and on that issue the applicant has been successful. The Court therefore considers that in equity the applicant should recover his costs and expenses in full.