COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF SOERING v. THE UNITED KINGDOM

(Application no. 14038/88)

JUDGMENT

STRASBOURG

07 July 1989

In the Soering case*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr J.A. CARRILLO SALCEDO,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 27 April and 26 June 1989,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was brought before the Court on 25 January 1989 by the European Commission of Human Rights ("the Commission"), on 30 January 1989 by the Government of the United Kingdom of Great Britain and Northern Ireland and on 3 February 1989 by the Government of the Federal Republic of Germany, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection

* Note by the registry: The case is numbered 1/1989/161/217. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 14038/88) against the United Kingdom lodged with the Commission under Article 25 (art. 25) by a German national, Mr Jens Soering, on 8 July 1988.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request and of the two governmental applications was to obtain a decision from the Court as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3, 6 and 13 (art. 3, art. 6, art. 13) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings pending before the Court and designated the lawyers who would represent him (Rule 30).

3. The Chamber was constituted on 26 January 1989. It included ex officio Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), the Federal Republic of Germany at that stage not being a Party to the case, and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). The names of the other five members, namely Mr J. Cremona, Mrs D. Bindschedler-Robert, Mr R. Bernhardt, Mr N. Valticos and Mrs E. Palm, were drawn by lot by the President in the presence of the Registrar.

On the same day the Chamber relinquished jurisdiction forthwith in favour of the plenary Court (Rule 50).

4. Likewise on the same day, following requests for an interim measure made by the Commission and the applicant, the Court indicated to the United Kingdom Government that it would be advisable not to extradite the applicant to the United States of America pending the outcome of the proceedings before the Court (Rule 36).

5. The President of the Court consulted, through the Registrar, the Agents of the two Government Parties, the Delegate of the Commission and the representative of the applicant on the need for a written procedure (Rules 37 § 1 and 50 § 3). Thereafter, in accordance with the President's Orders and directions, the following documents were lodged at the registry:

- on 28 March 1989, the memorial of the United Kingdom Government and the memorial of the applicant;
- on 31 March 1989, the memorial of the German Government;
- on 17 April 1989, the counter-memorial of the applicant;
- on 18 April 1989, further affidavits submitted by the United Kingdom Government;
- on 20 April 1989, further evidence submitted by the applicant.

On 7 April 1989 the Secretary to the Commission had informed the Registrar that the Delegate did not propose to reply in writing to the memorials.

6. After consulting, through the Registrar, those who would be appearing before the Court, the President directed on 3 February 1989 that the oral proceedings should open on 24 April 1989 (Rule 38).

7. On 17 February 1989, having been asked to do so by the applicant, the President invited the Commission to produce to the Court all the written and oral pleadings submitted before the Commission. The Commission complied with this request on 22 February.

8. By letter received on 28 March 1989, Amnesty International, London, sought leave to submit written comments (Rule 37 § 2). On 30 March the President granted leave subject to certain conditions. The comments were filed at the registry on 13 April.

9. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government of the United Kingdom
  Mr M. WOOD, Legal Counsellor,
  Foreign and Commonwealth Office, *Agent*,
  Sir Patrick MAYHEW, Q.C., M.P., Attorney General,
  Mr M. BAKER, Barrister-at-Law, *Counsel*,
  Miss E. WILMSHURST, Legal Secretariat
  to the Law Officers,
  Mr D. BENTLEY, Home Office,
  Mr T. COBLEY, Home Office, *Advisers*;
- for the Government of the Federal Republic of Germany
  Mr J. MEYER-LADEWIG, Ministerialdirigent,
  Federal Ministry of Justice, *Agent*,
  Mr M. GROTZ, Regierungsdirektor,
  Federal Ministry of Justice,
  Mrs S. WERNER, Richterin am Amtsgericht,
  Federal Ministry of Justice, *Advisers*;
- for the Commission
  Mr E. BUSUTTIL, *Delegate*;
- for the applicant
  Mr Colin NICHOLLS, Q.C., *Counsel*,
  Mr R. SPENCER, Solicitor,
  Mr F. GARDNER, Solicitor, *Advisers*.

The Court heard addresses by Sir Patrick Mayhew for the United Kingdom Government, by Mr Meyer-Ladewig for the German Government, by Mr Busuttil for the Commission and by Mr Nicholls for the applicant.

10. Various documents were filed by the United Kingdom Government, the German Government and the applicant on the day of the public hearing and on dates between 26 April and 15 June 1989.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

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 travelled 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 that 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 (see paragraph 30 below). 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 (see paragraph 32 below). 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 (see paragraph 21 below).

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 (see paragraph 31 below). 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 (see paragraph 32 below) 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 United Kingdom Government 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 they 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". They further indicated that they 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 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.

21. On 16 June 1987 at the Bow Street Magistrates' Court committal proceedings took place before the Chief Stipendiary Magistrate.

The Government of the United States adduced evidence that on the night of 30 March 1985 the applicant killed William and Nancy Haysom at their home in Bedford County, Virginia. In particular, evidence was given of the

applicant's own admissions as recorded in the affidavit of the Bedford County police investigator (see paragraph 13 above).

On behalf of the applicant psychiatric evidence was adduced from a consultant forensic psychiatrist (report dated 15 December 1986 by Dr Henrietta Bullard) that he was immature and inexperienced and had lost his personal identity in a symbiotic relationship with his girlfriend - a powerful, persuasive and disturbed young woman. The psychiatric report concluded:

> "There existed between Miss Haysom and Soering a 'folie à deux', in which the most disturbed partner was Miss Haysom. ...
>
> 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-recognised 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 she 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 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 offences, Soering was suffering from an abnormality of mind which, in this country, would constitute a defence of 'not guilty to murder but guilty of manslaughter'."

Dr Bullard's conclusions were substantially the same as those contained in an earlier psychiatric report (dated 11 December 1986 by Dr John R. Hamilton, Medical Director of Broadmoor Hospital), which was not however put before the Magistrates' Court.

The Chief Magistrate found that the evidence of Dr Bullard was not relevant to any issue that he had to decide and committed the applicant to await the Secretary of State's order for his return to the United States.

22. On 29 June 1987 Mr Soering applied to the Divisional Court for a writ of habeas corpus in respect of his committal and for leave to apply for judicial review. On 11 December both applications were refused by the Divisional Court (Lord Justice Lloyd and Mr Justice Macpherson).

In support of his application for leave to apply for judicial review, Mr Soering had submitted that the assurance received from the United States authorities was so worthless that no reasonable Secretary of State could regard it as satisfactory under Article IV of the Extradition Treaty between the United Kingdom and the United States (see paragraph 36 below). In his judgment Lord Justice Lloyd agreed that "the assurance leaves something to be desired":

> "Article IV of the Treaty contemplates an assurance that the death penalty will not be carried out. That must presumably mean an assurance by or on behalf of the Executive Branch of Government, which in this case would be the Governor of the

> Commonwealth of Virginia. The certificate sworn by Mr Updike, far from being an assurance on behalf of the Executive, is nothing more than an undertaking to make representations on behalf of the United Kingdom to the judge. I cannot believe that this is what was intended when the Treaty was signed. But I can understand that there may well be difficulties in obtaining more by way of assurance in view of the federal nature of the United States Constitution."

Leave to apply for judicial review was refused because the claim was premature. Lord Justice Lloyd stated:

> "The Secretary of State has not yet decided whether to accept the assurance as satisfactory and he has certainly not yet decided whether or not to issue a warrant for Soering's surrender. Other factors may well intervene between now and then. This court will never allow itself to be put in the position of reviewing an administrative decision before the decision has been made."

As a supplementary reason, he added:

> "Secondly, even if a decision to regard the assurance as satisfactory had already been made by the Secretary of State, then on the evidence currently before us I am far from being persuaded that such a decision would have been irrational in the Wednesbury sense." (As to "irrationality" in the Wednesbury sense, see paragraph 35 below.)

23. On 30 June 1988 the House of Lords rejected the applicant's petition for leave to appeal against the decision of the Divisional Court.

24. On 14 July 1988 the applicant petitioned the Secretary of State, requesting him to exercise his discretion not to make an order for the applicant's surrender under section 11 of the Extradition Act 1870 (see paragraph 34 below).

This request was rejected, and on 3 August 1988 the Secretary of State signed a warrant ordering the applicant's surrender to the United States authorities. However, the applicant has not been transferred to the United States by virtue of the interim measures indicated in the present proceedings firstly by the European Commission and then by the European Court (see paragraphs 4 above and 77 below).

25. On 5 August 1988 the applicant was transferred to a prison hospital where he remained until early November 1988 under the special regime applied to suicide-risk prisoners.

According to psychiatric evidence adduced on behalf of the applicant (report dated 16 March 1989 by Dr D. Somekh), the applicant's dread of extreme physical violence and homosexual abuse from other inmates in death row in Virginia is in particular having a profound psychological effect on him. The psychiatrist's report records a mounting desperation in the applicant, together with objective fears that he may seek to take his own life.

26. By a declaration dated 20 March 1989 submitted to this Court, the applicant stated that should the United Kingdom Government require that he be deported to the Federal Republic of Germany he would consent to

such requirement and would present no factual or legal opposition against the making or execution of an order to that effect.

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, section 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.

B. Extradition

29. The relevant general law on extradition is contained in the Extradition Acts 1870-1935.

30. The extradition arrangements between the United Kingdom and the United States of America are governed by the Extradition Treaty signed by the two Governments on 8 June 1972, a Supplementary Treaty signed on 25 June 1982, and an Exchange of Notes dated 19 and 20 August 1986 amending the Supplementary Treaty. These arrangements have been incorporated into the law of the United Kingdom by Orders in Council (the United States of America (Extradition) Order 1976, S.I. 1976/2144 and the United States of America (Extradition) (Amendment) Order 1986, S.I. 1986/2020).

By virtue of Article I of the Extradition Treaty, "each Contracting Party undertakes to extradite to the other, in the circumstances and subject to the conditions specified in this Treaty, any person found in its territory who has been accused or convicted of any offence [specified in the Treaty and including murder], committed within the jurisdiction of the other Party".

31. Extradition between the United Kingdom and the Federal Republic of Germany is governed by the Treaty of 14 May 1872 between the United Kingdom and Germany for the Mutual Surrender of Fugitive Criminals, as reapplied with amendments by an Agreement signed at Bonn on 23 February 1960 and as further amended by an Exchange of Notes dated 25 and 27 September 1978. These agreements have been incorporated into the law of the United Kingdom by Orders in Council (the Federal Republic of Germany (Extradition) Order 1960, S.I. 1960/1375 and the Federal Republic of Germany (Extradition) (Amendment) Order 1978, S.I. 1978/1403).

32. After receipt of an extradition request, the Secretary of State may, by order, require a magistrate to issue a warrant for the arrest of the fugitive criminal (Extradition Act 1870, sections 7 and 8).

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" (Schtraks v. Government of Israel [1964] Appeal Cases 556).

33. Section 11 of the Extradition Act 1870 provides that decisions taken in committal proceedings may be challenged by way of application for habeas corpus. In practice, such application is made to a Divisional Court and, with leave, to the House of Lords. Habeas corpus proceedings are primarily concerned with checking that the magistrate had jurisdiction to hear the case; that there was evidence before him which could justify the committal; that the offence is an extradition crime which is not of a political character; and that there is no bar on other grounds to surrender. Section 12 of the 1870 Act provides for the release of a prisoner, if not surrendered, at the conclusion of such proceedings or within two months of committal unless sufficient cause is shown to the contrary.

34. Furthermore, under section 11 of the 1870 Act the Secretary of State enjoys a discretion not to sign the surrender warrant (Atkinson v. United States [1971] Appeal Cases 197). This discretion may override a decision of the courts that a fugitive should be surrendered, and it is open to every prisoner who has exhausted his remedies by way of application for habeas corpus to petition the Secretary of State for that purpose. In considering whether to order the fugitive's surrender, the Secretary of State is bound to

take account of fresh evidence which was not before the magistrate (Schtraks v. Government of Israel, loc. cit.).

35. In addition, it is open to the prisoner to challenge both the decision of the Secretary of State rejecting his petition and the decision to sign the warrant in judicial review proceedings. In such proceedings the court may review the exercise of the Secretary of State's discretion on the basis that it is tainted with illegality, irrationality or procedural impropriety (Council of Civil Service Unions and Others v. Minister for the Civil Service [1984] 3 All England Law Reports 935).

Irrationality is determined on the basis of the administrative-law principles set out in Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 King's Bench Reports 223 (the so-called "Wednesbury principles" of reasonableness). The test in an extradition case would be that no reasonable Secretary of State could have made an order for return in the circumstances. As the judgment of Lord Justice Lloyd in the Divisional Court in the present case shows (see paragraph 22 above), the reliance placed by the Secretary of State on any assurance given by the requesting State may be tested to determine whether such reliance is within the confines of "reasonableness". According to the United Kingdom Government, on the same principle a court would have jurisdiction to quash a challenged decision to send a fugitive to a country 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.

In R v. Home Secretary, ex parte Bugdaycay [1987] 1 All England Law Reports 940 at 952, a House of Lords case concerning a refusal to grant asylum, Lord Bridge, while acknowledging the limitations of the Wednesbury principles, explained that the courts will apply them extremely strictly against the Secretary of State in a case in which the life of the applicant is at risk:

> "Within those limitations the court must, I think, be entitled to subject an administrative decision to the most rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

Lord Templeman added (at page 956):

> "In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process."

However, the courts will not review any decision of the Secretary of State by reason of the fact only that he failed to consider whether or not

there was a breach of the European Convention on Human Rights (R v. Secretary of State, ex parte Kirkwood [1984] 1 Weekly Law Reports 913).

In addition, the courts have no jurisdiction to issue interim injunctions against the Crown in judicial review proceedings (Kirkwood, ibid., and R v. Secretary of State for Transport, ex parte Factortame Ltd and Others, The Times, 19 May 1989).

36. There is no provision in the Extradition Acts relating to the death penalty, but Article IV of the United Kingdom-United States Treaty 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."

37. In the case of a fugitive requested by the United States who faces a charge carrying the death penalty, it is the Secretary of State's practice, pursuant to Article IV of the United Kingdom-United States Extradition Treaty, to accept an assurance from the prosecuting authorities of the relevant State 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 no carried out. This practice has been described by Mr David Mellor, then Minister of State at the Home Office, in the following terms:

> "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 arrangements between our two countries if the death penalty were carried out on an individual who had been returned under those circumstances." (Hansard, 10 March 1987, col. 955)

There has, however, never been a case in which the effectiveness of such an undertaking has been tested.

38. Concurrent requests for extradition in respect of the same crime from two different States are not a common occurrence. If both requests are received at the same time, the Secretary of State decides which request is to be proceeded with, having regard to all the facts of the case, including the nationality of the fugitive and the place of commission of the offence.

In this respect Article X of the Extradition Treaty between the United Kingdom and the United States provides as follows:

> "If the extradition of a person is requested concurrently by one of the Contracting Parties and by another State or States, either for the same offence or for different offences, the requested Party shall make its decision, in so far as its law allows, having

regard to all the circumstances, including the provisions in this regard in any Agreements in force between the requested Party and the requesting States, the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality of the person sought and the possibility of subsequent extradition to another State."

III. RELEVANT DOMESTIC LAW IN THE COMMONWEALTH OF VIRGINIA

A. The law relating to murder

39. The relevant definition and classification of murder and sentencing for murder are governed by the Code of Virginia of 1950, as amended, and the decided cases in the State and Federal courts.

40. Section 18.2-31 of the Virginia Code provides that eight types of homicide constitute capital murder, punishable as a Class 1 felony, including "the wilful, deliberate and premeditated killing of more than one person as a part of the same act or transaction" (sub-section (g)). The punishment for a Class 1 felony is "death or imprisonment for life" (Virginia Code, section 18.2-10(a)). Except in the case of murder for hire, only the "triggerman", that is the actual perpetrator of the killing, may be charged with capital murder (Johnston v. Commonwealth, 220 Virginia Reports (Va.) 146, 255 South Eastern Reporter, Second Series (S.E.2d) 525 (1979)).

Murder other than capital murder is classified as murder in the first degree or murder in the second degree and is punishable by varying terms of imprisonment (Virginia Code, sections 18.2-10(b), (c) and 18.2-32).

41. In most felony trials, including trials for capital murder, the defendant is guaranteed trial by jury. The defendant may waive this right but does not often do so.

B. Sentencing procedure

42. The sentencing procedure in a capital murder case in Virginia is a separate proceeding from the determination of guilt. Following a determination of guilt of capital murder, the same jury, or judge sitting without a jury, will forthwith proceed to hear evidence regarding punishment. All relevant evidence concerning the offence and the defendant is admissible. Evidence in mitigation is subject to almost no limitation, while evidence of aggravation is restricted by statute (Virginia Code, section 19.2-264.4).

43. Unless the prosecution proves beyond a reasonable doubt the existence of at least one of two statutory aggravating circumstances - future dangerousness or vileness - the sentencer may not return a death sentence.

"Future dangerousness" exists where there is a probability that the defendant would commit "criminal acts of violence" in the future such as would constitute a "continuing serious threat to society" (Virginia Code, section 19.2-264.2).

"Vileness" exists when the crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim" (Virginia Code, ibid.). The words "depravity of mind" mean "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation". The words "aggravated battery" mean a battery which, "qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder" (Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), certiorari denied, 441 United States Supreme Court Reports (U.S.) 967 (1979)). Proof of multiple 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 (Edmonds v. Commonwealth, 229 Va. 303, 329 S.E.2d 807, certiorari denied, 106 Supreme Court Reporter (S.Ct.) 339, 88 United States Supreme Court Reports, Lawyers' Edition, Second Series (L.Ed.2d) 324 (1985)).

44. The imposition of the death penalty on a young person who has reached the age of majority - which is 18 years (Virginia Code, section 1.13.42) - is not precluded under Virginia law. Age is a fact to be weighed by the jury (Peterson v. Commonwealth, 225 Va. 289, 302 S.E.2d 520, certiorari denied, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983)).

45. Facts in mitigation are specified by statute as including but not being limited to the following:

> "(i) the defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, or (v) the age of the defendant at the time of the commission of the capital offence" (Virginia Code, section 19.2-264.4B).

46. In a case of trial by jury, the jury in a capital murder case has the duty to consider all evidence relevant to sentencing, both favourable and unfavourable, before fixing punishment. In particular, a jury may sentence a defendant to death only after having considered the evidence in mitigation

of the offence (Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422 (1985), certiorari denied, 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986)). Furthermore, unless the jury is unanimous the sentence cannot be death but must be life imprisonment (Virginia Code, section 19.2-264.4). Even if one or more of the statutory aggravating circumstances are shown, the sentencer still remains at liberty to fix a life sentence instead of death in the light of the mitigating circumstances and even for no reason other than mercy (Smith v. Commonwealth, loc. cit.).

47. Following a sentence of death, the trial judge must order the preparation of an investigative report detailing the defendant's history and "any and all other relevant facts, to the end that the court may be fully advised as to whether the penalty of death is appropriate and just"; after consideration of the report, and upon good cause shown, the judge may set aside the sentence of death and impose a life sentence (Virginia Code, section 19.2-264.5).

48. Following a moratorium consequent upon a decision of the United States Supreme Court (Furman v. Georgia, 92 S.Ct. 2726 (1972)), imposition of the death penalty was resumed in Virginia in 1977, since which date seven persons have been executed. The means of execution used is electrocution.

The Virginia death penalty statutory scheme, including the provision on mandatory review of sentence (see paragraph 52 below), has been judicially determined to be constitutional. It was considered to prevent the arbitrary or capricious imposition of the death penalty and narrowly to channel the sentencer's discretion (Smith v. Commonwealth, loc. cit.; Turnver v. Bass, 753 Federal Reporter, Second Series (F.2d) 342 (4th Circuit, 1985); Briley v. Bass, 750 F.2d 1238 (4th Circuit, 1984)). The death penalty under the Virginia capital murder statute has also been held not to constitute cruel and unusual punishment or to deny a defendant due process or equal protection (Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), certiorari denied, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980)). The Supreme Court of Virginia rejected the submission that death by electrocution would cause "the needless imposition of pain before death and emotional suffering while awaiting execution of sentence" (ibid.).

C. Insanity, mental disorders and diminished responsibility

49. The law of Virginia generally does not recognise a defence of diminished capacity (Stamper v. Commonwealth, 228 Va. 707, 324 S.E.2d 682 (1985)).

50. A plea of insanity at the time of the offence is recognised as a defence in Virginia and, if successful, is a bar to conviction. Such a plea will apply where the defendant knows that the act is wrong but is driven by an irresistible impulse, induced by some mental disease affecting the

volitive powers, to commit it (Thompson v. Commonwealth, 193 Va. 704, 70 S.E.2d 284 (1952) and Godley v. Commonwealth, 2 Virginia Court of Appeals Reports (Va. App.) 249 (1986)) or where he does not understand the nature, character and consequences of his act or is unable to distinguish right from wrong (Price v. Commonwealth, 228 Va. 452, 323 S.E.2d 106 (1984)). Where no insanity defence is interposed, the defendant's mental condition is only relevant at the guilt stage in so far as it might be probative of a fact in issue, for example premeditation at the time of the killing (Le Vasseur v. Commonwealth, 225 Va. 564, 304 S.E.2d 644 (1983), certiorari denied, 464 U.S. 1063, 104 S.Ct 744, 79 L.Ed.2d 202 (1984)).

51. In a capital murder trial, the defendant's mental condition at the time of the offence, including any level of mental illness, may be pleaded as a mitigating factor at the sentencing stage. Evidence on this may include, but is not limited to, showing that the defendant was under the influence of extreme mental or emotional disturbance or that at the time of the offence his capacity to appreciate the criminality of his conduct was significantly impaired (Virginia Code, section 19.2-264.4B - see paragraph 45 above).

Additionally, indigent capital murder defendants are entitled by statute to the appointment of a qualified mental health expert to assist in the preparation and presentation of information concerning their history, character and mental condition with a view to establishing factors in mitigation (Virginia Code, section 19.2-264.3:1).

Upon presentation of evidence of the defendant's mental state, the sentencer may elect to impose life imprisonment rather than the death penalty.

D. Appeals in capital cases

52. The Supreme Court of Virginia reviews automatically every case in which a capital sentence has been passed, regardless of the plea entered by the defendant at his trial. In addition to consideration of "any errors in the trial" alleged by the defendant on appeal, the Supreme Court reviews the death sentence to determine whether it was imposed "under the influence of passion, prejudice or any other arbitrary factor" and whether it is excessive or disproportionate "to the penalty imposed in similar cases" (Virginia Code, section 17-110.1).

This automatic direct appeal is governed by the Rules of the Supreme Court of Virginia and encompasses various time-limits for the filing of briefs. In addition, precedence is given to the review of sentences of death before any other case (Rule 5.23; see also Virginia Code, section 17-110.2). Normally the time taken by this appeal does not exceed six months.

After this appeal process is completed, the sentence of death will be executed unless a stay of execution is entered. As a practical matter, a stay will be entered when the prisoner initiates further proceedings.

There has apparently been only one case since 1977 where the Virginia Supreme Court has itself reduced a death sentence to life imprisonment.

53. The prisoner may apply to the United States Supreme Court for certiorari review of the decision of the Supreme Court of Virginia. If unsuccessful, he may begin collateral attacks upon the conviction and sentence in habeas corpus proceedings in both State and Federal courts.

The prisoner may file a habeas corpus petition either in the Supreme Court of Virginia or in the trial court, with appeal to the Supreme Court of Virginia. Thereafter he may once more apply to the United States Supreme Court for certiorari review of the State's habeas corpus decision.

He may then file a petition for a writ of habeas corpus in the Federal District Court. The decision of the District Court may be appealed to the Federal Circuit Court of Appeals, followed, if no relief is obtained, by a petition for certiorari review in the United States Supreme Court.

At each stage of his collateral attacks, the prisoner may seek a stay of execution pending final determination of his applications.

54. The Virginia and Federal statutes and rules of court set time-limits for the presentation of appeals following conviction or appeals against the decisions in habeas corpus proceedings. There are, however, no time-limits for filing the initial State and Federal habeas corpus petitions.

55. The grounds which may be presented and argued on appeal and in habeas corpus proceedings are restricted by the "contemporaneous objections rule" to those which have been raised in the course of the trial (see Rule 5.25 of the Rules of the Supreme Court of Virginia). The rule is based on the principle that the trial itself is the "main event", so that the real issues between the parties should be canvassed and determined at the trial and not on appeal or in any subsequent review proceedings. It was adopted to prevent the setting of traps for trial courts (Keeney v. Commonwealth, 147 Va. 678, 137 South Eastern Reporter (S.E.) 478 (1927)), and so that the trial judge will be given the opportunity to rule upon the issues intelligently and unnecessary appeals, reversals and mistrials will be avoided (Woodson v. Commonwealth, 211 Va. 285, 176 S.E.2d 818 (1970), certiorari denied, 401 U.S. 959 (1971)). The rule applies equally in capital cases and is recognised by the Federal courts (see Briley v. Bass, 584 Federal Supplement (F. Supp.) 807 (Eastern District Virginia), aff'd, 742 F.2d 155 (4th Circuit 1984)).

By way of exception to the rule, errors to which no objections were made at the trial may be objected to on appeal where this is necessary to attain the ends of justice or where good cause is shown. This exception has been applied by the Supreme Court of Virginia to overturn a capital murder conviction (Ball v. Commonwealth, 221 Va. 754, 273 S.E.2d 790 (1981)). In death penalty cases, the proportionality of the sentence and the issue of whether the sentence was imposed under the influence of passion, prejudice

or other arbitrary factor (see paragraph 52 above) is reviewed without regard to whether objection was made at trial (see Briley v. Bass, loc. cit.).

56. The average time between trial and execution in Virginia, calculated on the basis of the seven executions which have taken place since 1977, is six to eight years. The delays are primarily due to a strategy by convicted prisoners to prolong the appeal proceedings as much as possible. The United States Supreme Court has not as yet considered or ruled on the "death row phenomenon" and in particular whether it falls foul of the prohibition of "cruel and unusual punishment" under the Eighth Amendment to the Constitution of the United States.

E. Legal assistance for appeals

57. All prisoners who have been sentenced to death have individual lawyers to represent them, whether privately recruited or court-appointed. On the other hand, there is no statutory provision expressly mandating legal assistance to be made available to the indigent prisoner to file habeas corpus petitions. However, it has recently been affirmed by a United States Court of Appeal that the Commonwealth of Virginia is required to provide indigent prisoners who have been sentenced to death with the assistance of lawyers to pursue challenges to their death sentences in State habeas corpus actions (Giarratano v. Murray, 847 F.2d 1118 (4th Circuit 1988) (en banc) - case currently pending before the United States Supreme Court). In Federal habeas corpus and certiorari proceedings case-law does not impose the same obligation (ibid., p. 1122, column 1), for the reason that the Federal courts would have available the appellate briefs, a transcript and State court opinion (in certiorari proceedings) and the briefs of counsel, a transcript and opinion (in habeas corpus proceedings).

Virginia inmates also have access to legal information and assistance in the form of law libraries and institutional attorneys. The institutional attorneys are available to assist inmates in "any legal matter relating to their incarceration" (Virginia Code, section 53.1-40), including the drafting of habeas corpus petitions and motions for appointment of counsel for the inmates to file.

A prisoner is not obliged to proceed with counsel, and he may litigate in both State and Federal courts pro se. However, no Virginia prisoner under sentence of death in contemporary times has ever been unrepresented during his trial, appeal or habeas corpus proceedings. Nor has any such prisoner faced execution without counsel.

F. Authorities involved in the death penalty procedure

58. A Commonwealth’s Attorney for each county in Virginia is elected every four years (Article VII(4) of the Constitution of Virginia). His

primary duty is the prosecution of all criminal cases within his locality (see Virginia Code, section 15.1-18.1). He has discretion as to what degree of murder to present for indictment, but that discretion is limited by considerations of prosecutorial ethics and his legal duty under the general law and to the public to present the indictment for the crime which is best supported by the evidence. He is independent in the discharge of his duty, not being subject to direction in any relevant way, whether as to charging offences, seeking sentences or giving related assurances, by the Attorney General of Virginia (see Virginia Code, section 2.1-124), the Governor of Virginia or anyone else. It is open to the Commonwealth's Attorney to engage in plea negotiations, but the court is not bound to accept any resultant agreement (Rule 3A.8 of the Rules of the Supreme Court of Virginia).

59. Judges of the district and higher courts of the State of Virginia are not elected but are appointed to the bench. Their conduct is governed by published Canons of Judicial Conduct, which have been adopted by the Supreme Court of Virginia as Rules of the Supreme Court. Observance of high standards of conduct so as to preserve the integrity and independence of the judiciary is included as part of the first Canon.

60. The Governor of the Commonwealth of Virginia has an unrestricted power "to commute capital punishment" (Article V, section 12, of the Constitution of Virginia). As a matter of policy, the Governor does not promise, before a conviction and sentence, that he will later exercise his commutation power. Since 1977 there has been no case in which the Governor has commuted a death sentence.

G. Prison conditions in Mecklenburg Correctional Center

61. There are currently 40 people under sentence of death in Virginia. The majority are detained in Mecklenburg Correctional Center, which is a modern maximum-security institution with a total capacity of 335 inmates. Institutional Operating Procedures (IOP 821.1) establish uniform operating procedures for the administration, security, control and delivery of necessary services to death row inmates in Mecklenburg. In addition conditions of confinement are governed by a comprehensive consent decree handed down by the United States District Court in Richmond in the case of Alan Brown et al. v. Allyn R. Sielaff et al. (5 April 1985). Both the Virginia Department of Corrections and the American Civil Liberties Union monitor compliance with the terms of the consent decree. The United States District Court also retains jurisdiction to enforce compliance with the decree.

62. The channels by which grievances may be ventilated and, if well-founded, remedied include (1) the use of a Federal Court approved Inmate Grievance Procedure of the Virginia Department of Corrections, involving the Warden, the Regional Administrator and the Director of Prisons, and the

Regional Ombudsman, (2) formal or informal contact between inmates' counsel and the prison staff, (3) complaint to the courts for breach of the consent decree, and (4) the institution of legal proceedings under Federal or State tort laws.

63. The size of a death row inmate's cell is 3m by 2.2m. Prisoners have an opportunity for approximately 7½ hours' recreation per week in summer and approximately 6 hours' per week, weather permitting, in winter. 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. Inmates are also permitted to leave their cells on other occasions, such as to receive visits, to visit the law library or to attend the prison infirmary. In addition, death row inmates are given one hour out-of-cell time in the morning in a common area. Each death row inmate is eligible for work assignments, such as cleaning duties. When prisoners move around the prison they are handcuffed, with special shackles around the waist.

When not in their cells, death row inmates are housed in a common area called "the pod". The guards are not within this area and remain in a box outside. In the event of disturbance or inter-inmate assault, the guards are not allowed to intervene until instructed to do so by the ranking officer present.

64. The applicant adduced much evidence of extreme stress, psychological deterioration and risk of homosexual abuse and physical attack undergone by prisoners on death row, including Mecklenburg Correctional Center. This evidence was strongly contested by the United Kingdom Government on the basis of affidavits sworn by administrators from the Virginia Department of Corrections.

65. 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. The United States District Court (Eastern District of Virginia) has recently upheld the adequacy of mental health treatment available to death row inmates in Mecklenburg (Stamper et al. v. Blair et al., decision of 14 July 1988).

66. Inmates are allowed non-contact visits in a visiting room on Saturdays, Sundays and holidays between 8.30am and 3.30pm. Attorneys have access to their clients during normal working hours on request as well as during the scheduled visiting hours. Death row inmates who have a record of good behaviour are eligible for contact visits with members of their immediate family two days per week. Outgoing correspondence from inmates is picked up daily and all incoming correspondence is delivered each evening.

67. As a security precaution, pursuant to rules applicable to all institutions in Virginia, routine searches are conducted of the entire

institution on a quarterly basis. These searches may last for approximately a week. During such times, called lockdowns, inmates are confined to their cells; they are showered, receive medical, dental and psychological services outside their cells as deemed necessary by medical staff, and upon request may visit the law library, and are allowed legal visits and legal telephone calls. Other services such as meals are provided to the inmates in their cells. During the lockdown, privileges and out-of-cell time are gradually increased to return to normal operations.

Lockdowns may also be ordered from time to time in relation to death row if information is received indicating that certain of its inmates may be planning a disturbance, hostage situation or escape.

68. 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. Whilst 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. A prisoner who utilises the appeals process can be placed in the death house several times.

H. The giving and effect of assurances in relation to the death penalty

69. Relations between the United Kingdom and the United States of America on matters concerning extradition are conducted by and with the Federal and not the State authorities. However, in respect of offences against State laws the Federal authorities have no legally binding power to provide, in an appropriate extradition case, an assurance that the death penalty will not be imposed or carried out. In such cases the power rests with the State. If a State does decide to give a promise in relation to the death penalty, the United States Government has the power to give an assurance to the extraditing Government that the State's promise will be honoured.

According to evidence from the Virginia authorities, Virginia's capital sentencing procedure and notably the provision on post-sentencing reports (see paragraph 47 above) would allow the sentencing judge to consider the representation to be made on behalf of the United Kingdom Government pursuant to the assurance given by the Attorney for Bedford County (see paragraph 20 above). In addition, it would be open to the Governor to take into account the wishes of the United Kingdom Government in any application for clemency (see paragraph 60 above).

I. Mutual assistance in criminal matters

70. There is no way of compelling American witnesses to give evidence at a trial in the Federal Republic of Germany. However, such witnesses would normally, unless imprisoned, be free to appear voluntarily before a

German court and the German authorities would pay their expenses. Furthermore, a United States Federal court may, pursuant to a letter rogatory or a request from a foreign tribunal, order a person to give testimony or a statement or to produce a document or other thing for use in a proceeding in a foreign tribunal (28 United States Code, section 1782). In addition, public documents, for example the transcript of a criminal trial, are available to foreign prosecuting authorities.

IV. RELEVANT LAW AND PRACTICE OF THE FEDERAL REPUBLIC OF GERMANY

71. German criminal law applies to acts committed abroad by a German national if the act is liable to punishment at the place where the offence is committed (Criminal Code, section 7(2)).

72. Murder is defined as follows in section 211(2) of the Criminal Code:

> "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."

Murder is punishable with life imprisonment (Criminal Code, section 211(1)), the death penalty having been abolished under the Constitution (Article 102 of the Basic Law, 1949).

73. Under the terms of the Juvenile Court Act (1953) as amended, if a young adult - defined as a person who is 18 but not yet 21 years of age at the time of the criminal act (section 1(3)) - commits an offence, the judge will apply the provisions applicable to a juvenile - defined as a person who is at least 14 but not yet 18 years of age (ibid.) - if, inter alia, "the overall assessment of the offender's personality, having regard also to the circumstances of his environment, reveals that, according to his moral and mental development, he was still equal to a juvenile at the time of committing the offence" (section 105(1)). The sentence for young adults who come within this section is youth imprisonment of 6 months to 10 years or, under certain conditions, of indeterminate duration (sections 18, 19 and 105(3)).

Where, on the other hand, the young adult offender's personal development corresponds to his age, the general criminal law applies but the judge may pass a sentence of 10 to 15 years' imprisonment instead of a life sentence (section 106(1)).

74. Where an offender, at the time of commission of the offence, was incapable of appreciating the wrongfulness of the offence or of acting in accordance with such appreciation by reason of a morbid mental or emotional disturbance, by reason of a profound disturbance of consciousness or by reason of mental deficiency or some other serious

mental or emotional abnormality, there can be no culpability on his part and he may not be punished (Criminal Code, section 20). In such a case, however, it is possible for an order to be made placing the offender in a psychiatric hospital indefinitely (Criminal Code, section 63).

In a case of diminished responsibility, namely where there is substantial impairment of the offender's ability to appreciate the wrongfulness of the offence or to act in accordance with such appreciation at the time of commission of the offence for one of the reasons set out in section 20 (Criminal Code, section 21), punishment may be reduced and, in particular, in homicide cases imprisonment of not less than 3 years shall be substituted for life imprisonment (Criminal Code, section 49(1)(2)). Alternatively, the court may order placement in a psychiatric hospital.

75. Where a death sentence is risked, the Federal Government will grant extradition only if there is an unequivocal assurance by the requesting State that the death penalty will not be imposed or that it will not be carried out. The German-United States Extradition Treaty of 20 June 1978, in force since 29 August 1980, contains a provision (Article 12) corresponding, in its essentials, to Article IV of the United Kingdom/United States Extradition Treaty (see paragraph 36 above). The Government of the Federal Republic of Germany stated in evidence that they would not have deemed an assurance of the kind given by the United States Government in the present case to be adequate and would have refused extradition. In accordance with recent judicial decisions, the question whether an adequate assurance has been given is subject to examination in proceedings before the higher regional court.

PROCEEDINGS BEFORE THE COMMISSION

76. Mr Soering's application (no. 14038/88) was lodged with the Commission on 8 July 1988. In his application Mr Soering stated his belief that, notwithstanding the assurance given to the United Kingdom Government, there was a serious likelihood that he would be sentenced to death if extradited to the United States of America. He maintained that in the circumstances and, in particular, having regard to the "death row phenomenon" he would thereby be subjected to inhuman and degrading treatment and punishment contrary to Article 3 (art. 3) of the Convention. In his further submission his extradition to the United States would constitute a violation of Article 6 § 3 (c) (art. 6-3-c) because of the absence of legal aid in the State of Virginia to pursue various appeals. Finally, he claimed that, in breach of Article 13 (art. 13), he had no effective remedy under United Kingdom law in respect of his complaint under Article 3 (art. 3).

77. On 11 August 1988 the President of the Commission indicated to the United Kingdom Government, in accordance with Rule 36 of the Commission's Rules of Procedure, that it was desirable, in the interests of the parties and the proper conduct of the proceedings, not to extradite the applicant to the United States until the Commission had had an opportunity to examine the application. This indication was subsequently prolonged by the Commission on several occasions until the reference of the case to the Court.

78. The Commission declared the application admissible on 10 November 1988.

In its report adopted on 19 January 1989 (Article 31) (art. 31) the Commission expressed the opinion that there had been a breach of Article 13 (art. 13) (seven votes to four) but no breach of either Article 3 (art. 3) (six votes to five) or Article 6 § 3 (c) (art. 6-3-c) (unanimously).

The full text of the Commission's opinion and of the separate opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT BY THE UNITED KINGDOM GOVERNMENT

79. At the public hearing on 24 April 1989 the United Kingdom Government maintained the concluding submissions set out in their memorial, whereby they requested the Court to hold

> "1. that neither the extradition of the applicant nor any act or decision of the United Kingdom Government in relation thereto constitutes a breach of Article 3 (art. 3) of the Convention;
>
> 2. that neither the extradition of the applicant nor any act or decision of the United Kingdom Government in relation thereto constitutes a breach of Article 6 § 3 (c) (art. 6-3-c) of the Convention;
>
> 3. that there has been no violation of Article 13 (art. 13) of the Convention;
>
> 4. that no issues arise under Article 50 (art. 50) of the Convention which call for consideration by the Court".

They also submitted that further complaints under Article 6 (art. 6) made by the applicant before the Court were not within the scope of the case as declared admissible by the Commission.

---

* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 161 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED BREACH OF ARTICLE 3 (art. 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 (art. 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 (art. 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 (art. 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 (art. 3)".

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 (art. 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 (art. 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 (art. 3) should not be interpreted so as to impose responsibility on a Contracting State for acts which occur outside its jurisdiction. In particular, in their 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, they maintained, it would be straining the

language of Article 3 (art. 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 (art. 3) in extradition cases should be limited to those occasions in which the treatment or punishment abroad is certain, imminent and serious. In their 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) (art. 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, the Abdulaziz, Cabales and Balkandali judgment of 25 May 1985, Series A no. 94, pp. 31-32, §§ 59-60 - in relation to rights in the field of immigration). What is at issue in the present case is whether Article 3 (art. 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 (art. 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" ("reconnaître" 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 (art. 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 (art. 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 (Article 33), the 1957 European Convention on Extradition (Article 11) and the 1984 United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Article 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 (art. 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 the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 90, § 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, the Artico judgment of 13 May 1980, Series A no. 37, p. 16, § 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 the Kjeldsen, Busk Madsen and Pedersen judgment of 7 December 1976, Series A no. 23, p. 27, § 53).

88. Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 (art. 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 (art. 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 (art. 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 (art. 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 (art. 3).

89. What amounts to "inhuman or degrading treatment or punishment" depends on all the circumstances of the case (see paragraph 100 below). 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 (art. 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 (art. 3) (see paragraph 87 above).

91. In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 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 (art. 3) of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.

B. Application of Article 3 (art. 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 (see paragraph 24 above); 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 (art. 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 (art. 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 (art. 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 (see paragraph 16 above), 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 (see paragraph 21 above) 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 (as to which, see paragraph 50 above).

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 (see paragraphs 42-47 and 52 above). 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 (see paragraphs 44-47 and 51 above).

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 (see paragraphs 20, 37 and 69 above).

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 (see paragraphs 13, 16 and 21 above). 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 are justified in their assertion that no assumption can be made that Mr Soering would certainly or even probably be convicted of capital murder as charged (see paragraphs 13 in fine and 40 above). Nevertheless, as the Attorney General conceded on their 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 (see paragraph 43 above). In this connection, the horrible and brutal circumstances of the killings (see paragraph 12 above) would presumably tell against the applicant, regard being had to the case-law on the grounds for establishing the "vileness" of the crime (see paragraph 43 above).

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 a defendant's age (see paragraph 45 above).

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" (see paragraph 20 above). The Court notes, like Lord Justice Lloyd in the Divisional Court (see paragraph 22 above), 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" (see paragraph 36 above). 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 (see paragraphs 58-60 above).

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" (see paragraph 37 above). 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 (as to which, see paragraphs 42, 46, 47 and 69 above), 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 (see paragraph 20 in fine above). 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 (art. 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 (art. 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 (art. 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 of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see the above-mentioned Ireland v. the United Kingdom judgment, Series A no. 25, p. 65,

§ 162; and the Tyrer judgment of 25 April 1978, Series A no. 26, pp. 14-15, §§ 29 and 30).

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 the above-mentioned Ireland v. the United Kingdom judgment, p. 66, § 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 the Tyrer judgment, 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 (art. 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 (art. 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 (art. 2) or Article 3 (art. 3). On the other hand, Amnesty International in their written comments (see paragraph 8 above) 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 (art. 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 (art. 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 the above-mentioned Tyrer judgment, Series A no. 26, pp. 15-16, § 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 (P6) to the Convention, which provides for the abolition of the death penalty in time of peace. Protocol No. 6 (P6) 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 thirteen 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 (art. 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 (art. 3) should therefore be construed in harmony with the provisions of Article 2 (art. 2) (see, mutatis mutandis, the Klass and Others judgment of 6 September 1978, Series A no. 28, p. 31, § 68). On this basis Article 3 (art. 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 (art. 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 (art. 2-1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3 (art. 3). However, Protocol No. 6 (P6), 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 (see paragraph 87 above), Article 3 (art. 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 (art. 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 within the proscription under Article 3 (art. 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 constituted such serious treatment that his extradition would be contrary to Article 3 (art. 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 on "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 (art. 3).

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

The United Kingdom Government shared this opinion. In particular, they 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 (see paragraph 56 above). 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 (see paragraph 52 above). 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 (see paragraphs 53-54 above). 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 (see paragraph 64 above).

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 (see paragraphs 61-63 and 65-68). 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 Mecklenburg 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" (see paragraphs 11, 12 and 21 above).

Unlike Article 2 (art. 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 (art. 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 (art. 3) of measures connected with a death sentence.

It is in line with the Court's case-law (as summarised above at paragraph 100) to treat disturbed mental health as having the same effect for the application of Article 3 (art. 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 if it is judged to be sufficient to amount to insanity or, like age, as a fact in mitigation at the sentencing stage (see paragraphs 44-47 and 50-51 above). 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 (see paragraph 51 above). 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 (see paragraph 48 above). They do not however remove the relevance of age and mental condition in relation to the acceptability, under Article 3 (art. 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 (art. 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 (see paragraphs 16, 19, 26, 38 and 71-74 above), where the death penalty has been abolished under the Constitution (see paragraph 72 above), 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 circumstance of relevance for the overall assessment under Article 3 (art. 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 (see paragraphs 89 and 104 above).

(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 (see paragraph 65 above).

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 (art. 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 (art. 3).

This finding in no way puts in question the good faith of the United Kingdom Government, who have from the outset of the present proceedings demonstrated their desire to abide by their 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 themselves referring the case to the Court for a judicial ruling (see paragraphs 1, 4, 24 and 77 above).

II. ALLEGED BREACH OF ARTICLE 6 (art. 6)

A. The United States criminal proceedings

112. The applicant submitted that, because of the absence of legal aid in Virginia to fund collateral challenges before the Federal courts (see paragraph 57 above), on his return to the United States he would not be able to secure his legal representation as required by Article 6 § 3 (c) (art. 6-3-c), which reads:

> "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;
>
> ..."

The Commission expressed the opinion that the proposed extradition of the applicant could not give rise to the responsibility of the United Kingdom Government under Article 6 § 3 (c) (art. 6-3-c). The United Kingdom Government concurred with this analysis and, in the alternative, submitted that the applicant's allegations were ill-founded.

113. The right to a fair trial in criminal proceedings, as embodied in Article 6 (art. 6), holds a prominent place in a democratic society (see, inter alia, the Colozza judgment of 12 February 1985, Series A no. 89, p. 16, § 32). The Court does not exclude that an issue might exceptionally be raised under Article 6 (art. 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.

Accordingly, no issue arises under Article 6 § 3 (c) (art. 6-3-c) in this respect.

B. The extradition proceedings in England

114. The applicant further contended that the refusal of the Magistrates' Court in the extradition proceedings to consider evidence as to his psychiatric condition (see paragraph 21 above) violated paragraphs 1 and 3 (d) of Article 6 (art. 6-1, art. 6-3-d), which 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;

..."

115. As the Delegate of the Commission pointed out, this complaint was not pleaded before the Commission. Such claims as the applicant then made of a failure to take proper account of the psychiatric evidence were in relation to Article 3 (art. 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 (art. 6), Article 3 (art. 3) or Article 13 (art. 13), regarding the scope or conduct of the Magistrates' Court proceedings as such. This being so, the new allegation of a breach of Article 6 (art. 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 (see, inter alia, the Schiesser judgment of 4 December 1979, Series A no. 34, p. 17, § 41, and the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 23, § 48).

Accordingly, the Court has no jurisdiction to entertain the matter.

III. ALLEGED BREACH OF ARTICLE 13 (art. 13)

116. Finally, the applicant alleged a breach of Article 13 (art. 13), which provides:

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

In his submission, he had no effective remedy in the United Kingdom in respect of his complaint under Article 3 (art. 3). The majority of the Commission arrived at the same conclusion. The United Kingdom Government however disagreed, arguing that Article 13 (art. 13) had no application in the circumstances of the present case or, in the alternative, that the aggregate of remedies provided for under domestic law was adequate.

117. In view of the Court's finding regarding Article 3 (art. 3) (see paragraph 111 above), the applicant's claim under that Article (art. 3) cannot be regarded either as incompatible with the provisions of the Convention or as not "arguable" on its merits (see, inter alia, the Boyle and Rice judgment of 27 April 1988, Series A no. 131, p. 23, § 52).

The United Kingdom Government contended, however, that Article 13 (art. 13) can have no application in the circumstances of the case, because

the challenge is in effect to the terms of a treaty between the United Kingdom and the United States and also because the alleged violation of the substantive provision is of an anticipatory nature.

The Court does not consider it necessary to rule specifically on these two objections to applicability since it has come to the conclusion that in any event the requirements of Article 13 (art. 13) were not violated.

118. The United Kingdom Government relied on the aggregate of remedies provided by the Magistrates' Court proceedings, an application for habeas corpus and an application for judicial review (see paragraphs 21-23, 32-33 and 35 above).

119. The Court will commence its examination with judicial review proceedings since they constitute the principal means for challenging a decision to extradite once it has been taken.

Both the applicant and the Commission were of the opinion that the scope of judicial review was too narrow to allow the courts to consider the subject matter of the complaint which the applicant has made in the context of Article 3 (art. 3). The applicant further contended that the courts' lack of jurisdiction to issue interim injunctions against the Crown was an additional reason rendering judicial review an ineffective remedy.

120. Article 13 (art. 13) guarantees the availability of a remedy at national level to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order (see the above-mentioned Boyle and Rice judgment, Series A no. 131, p. 23, § 52). The effect of Article 13 (art. 13) 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 (see, inter alia, the Silver and Others judgment of 25 March 1983, Series A no. 61, p. 42, § 113 (a)).

121. In judicial review proceedings the court may rule the exercise of executive discretion unlawful on the ground that it is tainted with illegality, irrationality or procedural impropriety (see paragraph 35 above). In an extradition case the test of "irrationality", on the basis of the so-called "Wednesbury principles", would be that no reasonable Secretary of State could have made an order for surrender in the circumstances (ibid.). According to the United Kingdom Government, a court would have jurisdiction to quash a challenged decision to send a fugitive to a country 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 that no reasonable Secretary of State could take. Although the Convention is not considered to be part of United Kingdom law (ibid.), the Court is satisfied that the English courts can review the "reasonableness" of an extradition decision in the light of the kind of factors relied on by Mr Soering before the Convention institutions in the context of Article 3 (art. 3).

122. Mr Soering did admittedly make an application for judicial review together with his application for habeas corpus and was met with an unfavourable response from Lord Justice Lloyd on the issue of "irrationality" (see paragraph 22 above). 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 (ibid.). Furthermore, the arguments adduced by Mr Soering were by no means the same as those relied on when justifying his complaint under Article 3 (art. 3) before the Convention institutions. His counsel before the Divisional Court limited himself to submitting that the assurance by the United States authorities was so worthless that no reasonable Secretary of State could regard it as satisfactory under the Treaty. This is an argument going to the likelihood of the death penalty being imposed but says nothing about the quality of the treatment awaiting Mr Soering after sentence to death, this being the substance of his allegation of inhuman and degrading treatment.

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". Such a claim would have been given "the most anxious scrutiny" in view of the fundamental nature of the human right at stake (see paragraph 35 above). The effectiveness of the remedy, for the purposes of Article 13 (art. 13), does not depend on the certainty of a favourable outcome for Mr Soering (see the Swedish Engine Drivers' Union judgment of 6 February 1976, Series A no. 20, p. 18, § 50), and in any event it is not for this Court to speculate as to what would have been the decision of the English courts.

123. The English courts' lack of jurisdiction to grant interim injunctions against the Crown (see paragraph 35 in fine above) does not, in the Court's opinion, detract from the effectiveness of judicial review in the present connection, since there is no suggestion that in practice a fugitive would ever be surrendered before his application to the Divisional Court and any eventual appeal therefrom had been determined.

124. The Court concludes that Mr Soering did have available to him under English law an effective remedy in relation to his complaint under Article 3 (art. 3). This being so, there is no need to inquire into the other two remedies referred to by the United Kingdom Government.

There is accordingly no breach of Article 13 (art. 13).

IV. APPLICATION OF ARTICLE 50 (art. 50)

125. Under the terms of Article 50 (art. 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 States 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 £1,500 and £21,000 for lawyers' fees in respect of the domestic and Strasbourg proceedings respectively, £2,067 and 4,885.60 FF for his lawyers' travel and accommodation expenses when appearing before the Convention institutions, and £2,185.80 and 145 FF for sundry out-of-pocket expenses, making an overall total of £26,752.80 and 5,030.60 FF.

126. No breach of Article 3 (art. 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 (art. 3), Article 50 (art. 50) must be taken as applying to the facts of the present case.

127. The Court considers that its finding regarding Article 3 (art. 3) of itself amounts to adequate just satisfaction for the purposes of Article 50 (art. 50). The Court is not empowered under the Convention to make accessory directions of the kind requested by the applicant (see, mutatis mutandis, the Dudgeon judgment of 24 February 1983, Series A no. 59, p. 8, § 15). By virtue of Article 54 (art. 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 (art. 50), to reduce the amount awarded accordingly (see the Le Compte, Van Leuven and De Meyere judgment of 18 October 1982, Series A no. 54, p. 10, § 21).

The applicant's essential concern, and the bulk of the argument on all sides, focused on the complaint under Article 3 (art. 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.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds 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 (art. 3);

2. Holds that, in the same event, there would be no violation of Article 6 § 3 (c) (art. 6-3-c);

3. Holds that it has no jurisdiction to entertain the complaint under Article 6 §§ 1 and 3 (d) (art. 6-1, art. 6-3-d);

4. Holds that there is no violation of Article 13 (art. 13);

5. Holds that the United Kingdom is to pay to the applicant, in respect of legal costs and expenses, the sum of £26,752.80 (twenty-six thousand seven hundred and fifty-two pounds sterling and eighty pence) and 5,030.60 FF (five thousand and thirty French francs and sixty centimes), together with any value-added tax that may be chargeable;

6. Rejects the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 July 1989.

Rolv RYSSDAL
President

For the Registrar
Herbert PETZOLD
Deputy Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the separate opinion of Judge De Meyer is annexed to the present judgment.

R.R.
H.P.

CONCURRING OPINION OF JUDGE DE MEYER

The applicant's extradition to the United States of America would not only expose him to inhuman or degrading treatment or punishment. It would also, and above all, violate his right to life.

Indeed, the most important issue in this case is not "the likelihood of the feared exposure of the applicant to the 'death row phenomenon'"[1], but the very simple fact that his life would be put in jeopardy by the said extradition.

The second sentence of Article 2 § 1 (art. 2-1) of the Convention, as it was drafted in 1950, states that "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 the circumstances of the present case, the applicant's extradition to the United States would subject him to the risk of being sentenced to death, and executed, in Virginia[2] for a crime for which that penalty is not provided by the law of the United Kingdom[3].

When a person's right to life is involved, no requested State can be entitled to allow a requesting State to do what the requested State is not itself allowed to do.

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

That consideration may already suffice to preclude the United Kingdom from surrendering the applicant to the United States.

There is also something more fundamental.

The second sentence of Article 2 § 1 (art. 2-1) of the Convention was adopted, nearly forty years ago, in particular historical circumstances, shortly after the Second World War. In so far as it still may seem to permit, under certain conditions, capital punishment in time of peace, it does not reflect the contemporary situation, and is now overridden by the development of legal conscience and practice[4].

---

[1] § 99 of the judgment.
[2] § 40 of the judgment.
[3] § 27 of the judgment.
[4] See also Article 6 §§ 2 and 6 of the International Covenant on Civil and Political Rights and Article 4 §§ 2 and 3 of the American Convention on Human Rights. The very wording of each of these provisions, adopted respectively in 1966 and in 1969, clearly reflects the evolution of legal conscience and practice towards the universal abolition of the death penalty.

Such punishment is not consistent with the present state of European civilisation.

De facto, it no longer exists in any State Party to the Convention[5].

Its unlawfulness was recognised by the Committee of Ministers of the Council of Europe when it adopted in December 1982, and opened for signature in April 1983, the Sixth Protocol (P6) to the Convention, which to date has been signed by sixteen, and ratified by thirteen, Contracting States.

No State Party to the Convention can in that context, even if it has not yet ratified the Sixth Protocol, be allowed to extradite any person if that person thereby incurs the risk of being put to death in the requesting State.

Extraditing somebody in such circumstances would be repugnant to European standards of justice, and contrary to the public order of Europe[6].

The applicant's surrender by the United Kingdom to the United States could only be lawful if the United States were to give absolute assurances that he will not be put to death if convicted of the crime he is charged with[7].

No such assurances were, or can be, obtained.

The Federal Government of the United States is unable to give any undertaking as to what may or may not be decided, or done, by the judicial and other authorities of the Commonwealth of Virginia[8].

In fact, the Commonwealth's Attorney dealing with the case intends to seek the death penalty[9] and the Commonwealth's Governor has never commuted a death sentence since the imposition of the death penalty was resumed in 1977[10].

In these circumstances there can be no doubt whatsoever that the applicant's extradition to the United States would violate his right to life[11].

---

[5] § 102 of the judgment.

[6] See, mutatis mutandis, the judgment of 27 February 1987 by the French Conseil d'État in the Fidan case, Recueil Dalloz Sirey, 1987, pp. 305-310.

[7] See the French Fidan judgment referred to above.

[8] § 97 of the judgment.

[9] § 20 of the judgment.

[10] § 60 of the judgment.

[11] This opinion deals only with what I consider to be the essential points. I would just like to add briefly that (a) I cannot agree with the first sub-paragraph of § 86, or with § 89, since these parts of the Court's reasoning leave too much room for unacceptable infringements of the fundamental rights of persons whose extradition is sought, and (b) with due respect for the Court's case-law, I wish to maintain my earlier reservations concerning the matters at issue in § 115, the first sub-paragraph of § 117 and § 127 (see the W v. the United Kingdom judgment of 8 July 1987, Series A no. 121-A, p. 42, the Boyle and Rice judgment of 27 April 1988, Series A no. 131, p. 35, and the W v. the United Kingdom judgment of 9 June 1988 (Article 50) (art. 50), Series A no. 136-C, p. 26).