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COHERENCE AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE ADJUDICATIVE BACKGROUND TO THE SOERING CASE

Colin Warbrick*

I. INTRODUCTION

On January 1, 1990, the Eighth Protocol\(^1\) to the European Convention on Human Rights\(^2\) came into force. This Protocol makes some amendments to the structure and procedure set out in the Convention itself.\(^3\) The need for reform was created by the increasing workload of the institutions, which had reached such a level that the backlog of applications before the Commission would have continued to increase at a greater rate than the Commission's capacity to dispose of them.\(^4\) There are several reasons for this overwhelming burden. The acceptances by States of the right of individual application under article 25\(^5\) have been increasing. By the end of 1989 all the parties to the Convention had made declarations under article 25. An increasing proportion of applications were being made with legal assistance,\(^6\) with the result that the applicants were better prepared and more likely to raise issues which could not be peremptorily dismissed.\(^7\) In addition, the development of the caselaw of the Convention by the Court was opening possibilities for successful application on a range of questions which covered common, not exceptional, circumstances.\(^8\)

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5. There are currently twenty-two parties to the Convention. The most recent member of the Council of Europe, Finland, has signed the Convention.


7. Id. at 92.

The Commission simply had run out of ways within its own capacity to reorganize its work to keep up with the demands being made upon it.

The principal changes brought about by the Eighth Protocol are that the Commission\(^9\) may now sit in Chambers, each composed of at least seven members of the Commission, and that it may establish committees of at least three members with the power by unanimous vote to declare cases manifestly inadmissible.\(^10\) The Chambers system envisages that the membership of each will be fixed and organized in such a way that on each Chamber there will be representation of the major types of legal systems found within the Council of Europe and that there will be an equitable geographical representation of the Council's members. Ordinarily, the Commissioner elected in respect of the respondent State will have the right to sit on the Chamber which hears an application. The effect of this amendment is to allow a departure from the original position that the Commission was obliged to sit in plenary session. It still may do so. It must do so in three cases: where it is examining an inter-State application, where it is considering whether to bring a case to the Court and where it is drawing up rules of procedure. In addition, the Commission is expected to make provision for consultation with the respondent State before a case is referred to a Chamber.\(^11\)

The Committee system has already started working. The Chambers arrangement will be brought in as the associated adjustments are made within the Secretariat. These structural changes are supplemented by a development which has been going on for some time whereby the part-time nature of the Commission has been transformed into semi-permanent status. Sixteen "session weeks" are planned for 1990, quite apart from the considerable preparation which the Commissioners must do away from Strasbourg.\(^12\) While all these changes will undoubtedly increase the number of applications dealt with by the Commission, the full effects of them are difficult to anticipate. One possible consequence is to diminish the attraction of a Commission appointment to persons holding other jobs, particularly in universities, from which the Commission has hitherto recruited a significant proportion of its more active members. A certain outcome is that more cases will be referred on to the Court.\(^13\) The Convention envisaged

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9. Protocol No. 8, supra note 1, art. 1.
10. Id.
13. There has been a steady growth in the number of cases decided by the Court in each year.
that the Court would normally sit in Chambers of seven judges and surrender jurisdiction to the plenary bench only in exceptional circumstances. In fact, the full Court has determined a third of the cases which have come before the Court. The Eighth Protocol increases the number of judges within a Chamber to hear a case from seven to nine, which will have a marginal impact on the balance between cases decided by a Chamber and those adjudicated by the full Court. The Court does not appear to be under anything like the same pressures as the Commission. It has been able to maintain an average of about 15 months for disposing of cases referred to it. The Court is always to some extent in the hands of the litigants, and the burdens on it in terms of documentation appear to be increasing. Nonetheless, the Court expects to keep delay under control, even with its anticipated increasing load, as it too moves to semi-permanent status.

The Commission is more circumspect about the ultimate efficacy of these recent developments, suggesting that "a more comprehensive reform" may be necessary. It has made reference to the "merger" proposal which enjoyed great favor after the Neuchâtel conference in 1985. The merger proposal envisages the absorption of the Commission into the Court to create a single institution to which individual applicants would have direct access. Some of the considerable head of steam which had been developing behind this proposition appears to have dissipated. There are substantial practical obstacles in the way of its realization, but it has not yet been rejected. The Steering Committee for Human Rights has recently issued a report of the Committee of Experts for the improvement of procedures for the protection of human rights on the principle of merger. Although the report is somewhat equivocal, the Steering Committee has asked the Committee of Experts to draw up a detailed structure for a single court sys-


14. Convention, supra note 2, art. 43.
15. Protocol No. 8, supra note 1, at 11.
16. EUROPEAN COURT OF HUMAN RIGHTS, supra note 13, at 40-43.
17. Speech by Mr. Rolv Ryssdal, President of the European Court of Human Rights, to the Council of Europe (to mark the occasion of the Court's first session of the New Year), Eur. Ct. H.R., Cour (90) 16, at 2 (Jan. 24, 1990).
18. COMMISSION SURVEY OF ACTIVITIES AND STATISTICS, supra note 4, at 2.
While the merger proposal will undoubtedly take some time, even more time would have to elapse before it comes into force because substantial revision of the Convention would be necessary — and that time will allow the effect of the latest reforms to be assessed. The merger proposal is in large measure independent of this process. It is part of a much grander agenda, explained in forthright terms by Professor Trechsel in his introductory address to the Neuchâtel meeting:

I am convinced therefore that the merger of the Convention organs into a permanent Court should be envisaged if the Convention for the protection of Human Rights and Fundamental Freedoms is to continue to be a shining example of the regional protection of human rights.

However, is this not taking the Utopian view? I think not. My reason? It lies in the true Utopia which is the back drop to our Convention. What I mean by that is the Utopia of the European Confederation and its Constitutional Court seeing to the observance of human rights. A Court endowed with other powers and whose judgments would become effective immediately. That is really Utopia — the merger of the Commission and the Court quite simply and quite practically constitutes the only true way of enabling the control machinery of the Convention to break out of its present deadlock.

II. THE INTERPRETATION OF THE CONVENTION

To express caution, even skepticism, in the face of such lofty idealism is to risk being accused of timidity and grubby pragmatism (at best) or of defending the obstructive tendencies of the States which, though they dare not speak it too loudly, are finding the Convention obligations just too intrusive into their domestic jurisdictions. The risk is all the greater because I write without practical experience as a litigator at Strasbourg and without inside knowledge of the Strasbourg process. My reservations spring from an academic study of the output of the system, particularly the judgments of the Court. While I recognize the pressing nature of the practical problems which have beset the institutions, I have nothing to offer by way of solution (although I would be prepared for a little while to see how the reforms made by the Eighth Protocol work out in practice). I dare say that my perspective is significantly affected by where I stand: it is a British stand-

21. Id. at 17.
23. Merger of Commission and Court, supra note 19, at 23.
Coherence And The European Court

point and that of an international lawyer rather than a constitutional lawyer, which makes me more sympathetic to pragmatic and positivist traditions of international law.  
My common law background leads me as well to an understanding of the judicial process that is influenced by the workings of the American Supreme Court and constitutional courts of the Commonwealth rather than by their European counterparts or the European Court of Justice in Luxembourg.

I start from two propositions which, though I take them to be self-evident, are seemingly not shared by all those who work about the Strasbourg institutions. The first is that the Convention is a creature of international law, a treaty, and that, accordingly, international law is the "proper law" of the Convention. The other is that it was not the intention of the parties to the Convention to invest the institutions with supra-national authority: on the contrary, the elaborate structure of the Convention and the contingent nature of the principal obligations were dictated by the intention of some States to protect, so far as possible given the innovation that they were about to implement, the international qualities of the Convention regime.

The Institutions have not expressly laid claim to any grander basis for their authority, though enthusiastic hanker after it on their behalf. The Court and Commission have, of course, claimed that their law has distinctive characteristics - that it is part of the "public order of Europe" - but this reflects no more than that, even as international law, human rights law has particular characteristics which distinguish it from the generality of international law: the absence of direct reciprocity as the basis for obligation, the independent weight to be given to the interests of the individuals and, in the European system, the regular possibility of judicial settlement of disputes. In general, the Court has fashioned an approach to the interpretation of the Convention which takes account both of its nature as an international treaty and of the rather particular qualities of this treaty.  

provisions of the Vienna Convention on the Law of Treaties\textsuperscript{30} to provide the basic framework for interpretation, has given special weight to the object and purpose of the Convention, which the Court takes to be the effective protection of the human rights therein enunciated.\textsuperscript{31} It has claimed the right to interpret the text of the Convention in the light of legal and circumstantial developments in the Member States\textsuperscript{32} and it has relied on the language of article 1 — the States "shall secure" the rights and freedoms of the Convention to identify positive obligations for States — to imply obligations for States and to discover State responsibility in circumstances where the material harm results from the activities of another State or a private person or organization.\textsuperscript{33} This is a substantial interpretive achievement, if unremarkable by the standards of domestic constitutional law. It has resulted in some unanticipated and intrusive judgments, but it recognizes some clear limits, most notably the acknowledgment in the preamble that the Convention is an arrangement to protect only some human rights.\textsuperscript{34} It will sometimes be right and necessary for the Court to concede that an interest, however worthy of protection it might be, lies beyond the scope of the Convention. The States of the Council of Europe have, from time to time, added to the list of substantive obligations for States by means of additional protocols to the Convention.\textsuperscript{35}

Given the language and structure of the protected rights in the Convention, the interpretative power of the Court is a wide one. While its performance in general has complied with the standards set out above, there have been deviations from them when the Court has striven to discover a means of protecting an individual without paying much attention to any constraints in the Convention text. The extension of the meaning of "determination of his civil rights" in article 6(1) to cover social insurance claims is a prominent example.\textsuperscript{36} Another is

the explanation of why a State's duties under the Convention extend to not removing a person to the jurisdiction of another State where that State might inflict treatment on him at variance with the Convention standards. 37 The premise in the article 6(1) case was that individuals have a high interest that decisions taken about matters important to them in the national legal system be taken by a fair procedure before an independent and impartial tribunal. 38 Whether the interest was a "civil right" in Convention terms was determined by balancing the "public" characteristics of the individual's interest against its "private" ones, a test not discernible in the Court's previous jurisprudence and one which will lead to great uncertainty. 39 In Soering, a complex problem of State responsibility was decided by declaring a certain outcome "hardly compatible" 40 with the spirit of the Convention and extrapolating from this to cover the facts before the Court. I find the reasoning in both cases unsatisfactory, little more than rationalizations of preferred outcomes, and all the more regrettable because it produces, in the first case, a result which is difficult to sustain in general policy terms, 41 and, in the second, one which could have been reached by a more careful consideration of the principal issue. 42

What these judgments lack is coherence or plausibility, an essential aspect of the legitimacy of constitutional judgments whatever the actual outcomes. 43 For English lawyers coherence has been seen mainly as a technical matter of the interpretation of statutory language and the manipulation of common-law precedents. 44 So long as judgments of the courts spoke largely to fellow professionals, it was to judges and lawyers that they had to appear convincing, and it would suffice for them to do so within professional terms of reference. Even the established approach of the common law to matters of coherence was not restricted solely to the texts, and understandings about values extraneous to them were essential to judicial reasoning. 45 This becomes even more necessary where courts are faced with constitutional instruments.

38. This is made clearer in the dissenting opinion in Feldbrugge, slip op. at 25.
40. Soering, slip op. at 26.
41. Feldbrugge, slip op. at 21-22 (dissenting opinion of Ryssdal, J. et al.).
42. See infra text accompanying notes 83-112.
44. See N. Maccormick, LEGAL REASONING AND LEGAL THEORY (1978).
expressed in the most general terms and intended to provide for the resolution of some of the contested matters of power and the controversial issues of policy over a long period of time. As the experience of the United States Supreme Court shows, the search for a single theory is as unavailing as it is never-ending. The most realistic accounts of constitutional interpretation accept that it is a continual process of refinement.46 Some explanation may reduce the area of controversy by reducing the opportunities for judicial review of the decisions of other governmental institutions, but they can never make them disappear altogether.47 An additional complication is that constitutional decisions must speak to a much wider audience than lawyers; they must address politicians and the people. The results of ordinary cases will usually be moderated to non-professionals through the medium of a lawyer. My concern is that the European Court has not reached a high degree of coherence for its judgments and that there are obstacles that will make it difficult for it to do so in the future.

If these assessments are right, one should pause before conferring on the Court a supra-national or an internal constitutional role as the merger proposals clearly imply.48 There are two features of the Court's manner of deciding cases which explain the Court's difficulties in the quest for coherence. One is the Court's reluctance to engage in theoretical or conceptual reasoning. The Court has said that it is not necessary to work out general explanations of its doctrines of implied rights and implied limitations on rights,49 of the idea of "civil rights and obligations,"50 of the extent of a State's responsibility for private interference with rights,51 and of the reach of State responsibility for harm inflicted by another State.52 Another aspect of this approach is its reliance on "bright-line" solutions at the expense of more sensitive analysis of the problem. In *Tyrer*, the inclusion of judicial corporal punishment within the "degrading punishment" category of article 3 was expressed so definitively as to practically exclude a different reconsideration of corporal punishment in other circumstances.53 The re-

48. "Supra-nationality" is an elusive category. The understanding of it in Western Europe has been greatly influenced by the development of the European Community. See Weiler, *The Community System: The Dual Character of Supernationalism*, 1 Y.B. EUR. L. 267-306 (1981).
49. Goldner, slip op. at 13.
50. Benthem, slip op. at 10-11.
52. Soering, slip op. at 24.
Coherence And The European Court

result is a rule which some argue is over-inclusive. To the opposite effect are the Court's judgments in Glasenapp and Kosiek. Each case involved the application of "loyalty oaths" to two teachers in the Federal Republic of Germany as a condition of keeping their jobs after each had made controversial statements. There were differences between the two cases as to the level at which the applicants taught and what they had said. The Commission, in close decisions, examined the German government's claims that the interferences with the applicants' rights to expression were justified as being necessary in a democratic society for the protection of national security. The Court, to the contrary, considered that the applicants were seeking to exercise a right of access to the public service, a right not protected by the Convention and, therefore, requiring no justification by the State to restrict it. The result is an over-exclusive test, practically denying the protection of the expression of public servants. The burden of achieving coherence is a heavy one and, since there is no question of the capacity of the judges to perceive the need for it, the reasoning in cases like Feldbrugge, Soering or Glasenapp suggests that there might be institutional impediments in the way of achieving it. If there are, then the role of the Court might properly be limited to the one which it has sometimes claimed for itself, that of a subsidiary mechanism for the protection of human rights to the schemes developed in the national legal systems.

This conception of a restricted role for the Convention is a product of several factors. Some of them are apparent on the face of the Convention. The obligation of States under article 13 to provide an effective national remedy for claims that the Convention has been violated is one example. The duty of applicants to exhaust domestic remedies as a condition of admissibility for applications to the Commission is

54. See Zellick, Corporal Punishment in the Isle of Man, 27 INT'L & COMP. L.Q. 665, 670 (1978), criticizing the Court for its "failure to produce a convincing and well-argued judgment." Although there has never been a definitive judgment of the Court on the question, it was widely accepted that the terms of the Tyrer judgment meant that corporal punishment in schools was contrary to the Convention, and United Kingdom law was eventually amended to take account of this. Tyrer, slip op. at 8-16.
55. Glasenapp, slip op.
57. The Commission distinguished the two cases, finding a violation in Glasenapp by nine votes to eight votes and no violation in Kosiek by ten votes to seven votes.
58. See Drzemczewski & Warbrick, supra note 36, at 437-40.
The Court has only a limited remedial power under article 50 and judgments of the Court do not have automatic effect in the legal systems of the Member States. The Court has often said that it is for the respondent State to decide how it will implement an adverse judgment of the Court to achieve concordance between the position in national law and the State’s duty under the Convention. The Court has declined any role as a “court of fourth instance” to review national court determinations of law or fact. Indeed, the fact-finding capacity of the institutions is modest and cases reach the Court without significant factual discrepancies between the parties being resolved. Also, the institutions cannot but be aware of the conditional nature of the commitment of most parties to the optional obligations under the Convention. So far, there has been a general trend toward expanding acceptance of these obligations, but the terms upon which Turkey has recently agreed to the right of individual application give rise to disquiet, for, if they are not the subject of successful challenge, a device has been found which would allow States to qualify their substantive as well as their procedural obligations through the imposition of such conditions. The British government’s response to the Brogan judgment, which held that certain aspects of the pre-charge detention of terrorist suspects was not in accordance with the Convention, has been to rely on emergency derogation power under article 15, after it had concluded that no solution was available which could preserve the substance of the power compatibly with the requirements of article 5(3).

These structural features of the Convention, which have persuaded the Court that it has a somewhat limited role against the States, are reinforced by functional characteristics of the Court itself. The Court is an exceptionally large body, now twenty-three judges. The practical authority of the judgments of any Court is enhanced if it can reach a

63. See Drzemczewski, Un État en violation de la Convention européenne des Droits de l’Homme: l’exécution interne des décisions des institutions de Strasbourg, in PROTECTING HUMAN RIGHTS, supra note 22, at 149.
single opinion, or at least a single opinion of the majority. Reaching it, though, can have disadvantages: a tendency to arrive only at the lowest common denominator or to disguise differences behind bland, general language. The reluctance of the European Court to engage itself with considerations of general principle and its willingness to resort to the "bright-line" solution to avoid troublesome issues of application might be attributed to this characteristic. Besides, the issues which face the Court, demanding enough within a single legal system, are especially difficult when viewed against a wide variety of national legal backgrounds. Despite the considerable role of the Commission in preparing the groundwork about the applicable national law, States have claimed that some judgments are the result of influences of legal traditions not appropriate to their particular system.69 Finally, because the European Court is, unlike national tribunals, an international court operating under an international treaty, its time can be taken up with matters of international law, such as the reach of State responsibility70 or the validity of reservations to the Convention71 or, most likely of all, the exhaustion of domestic remedies.72 With the increased caseload that will inevitably fall on the Court, one's best guess, and a confident one, would be that the Court will find it difficult to adopt a much different style of judicial reasoning and that the structural and functional barriers to developing a more coherent jurisprudence are unlikely to be removed by any variant of the merger proposal.

None of this is to say that the Court cannot improve the coherence of its reasoning or to deny that there are good reasons for it trying to do so. So long as it is not prepared to defer completely to the final positions taken by the States, and the Court has shown that it is not,73 then it will be put to explaining why the situation in the national legal system is not in tune with the Convention. No reliance on the margin of appreciation, no attempt to reduce its review to procedural matters will avoid the Court having to face hard questions and to explain to the States why it has resolved them as it has. It is true that the Court

69. See, e.g., Brogan v. United Kingdom, where the British government complained that the Commission had been unduly influenced by inquisitional concepts of the criminal process. See Verbatim Record of the Public Hearings Held on May 25, 1988 (Brogan Case), Eur. Ct. H.R., Cour/Misc (88) 162, at 35-36 (argument for the United Kingdom); Lamy v. Belgium, Cour (88) 64, at 11-13 (1988) (Memorial of Belgium), where the Belgian government argued that the Commission had relied on an accusational understanding of criminal procedure.

70. Soering, slip op. at 24-25.


73. See, e.g., Sunday Times, slip op. at 25-26.
has used both devices to do just that. There are indications that the margin of appreciation doctrine is being transformed into a rather more abstentionist device than it originally appeared to be. In the early judgments on freedom of expression, the language of the Court was robust in defending the importance of expression and forthright in setting out the burden on a State hoping to justify its interference with an individual's right to free speech. In *Handyside*, the Court said:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.' This means amongst other things, that every 'formality,' 'condition,' 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.

The most recent judgments on this matter have revealed a more circumspect approach. In *Barfod*, the Court would not countenance a vigorous criticism of the fairness of a judicial proceedings in Greenland, even though the State practically conceded the substance of the observations and never made it clear on what basis it sought to justify the criminal contempt conviction of the author. In *Markt Intern*, even the language of the older judgments was abandoned. The Court had to decide whether a regulation of the Federal Republic of Germany, made under its Unfair Competition Law, which forbade "knocking copy" in commercial dealings could legitimately reach admittedly true allegations published in a magazine having no competitive relationship with the applicant. Rather than requiring the demonstration of a "pressing social need" by the government, the Court said:

It is obvious that opinions may differ as to whether the Federal Court's reaction was appropriate or whether the statements made in the specific case by Markt Intern should be permitted or tolerated. However, the European Court of Human Rights should not substitute its own evaluation for that of the national courts in the instant case, where those courts, on reasonable grounds, had considered the restrictions to be

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74. The Court has been most unwilling to review a State's margin of appreciation in property cases. For the most recent example, see *Mellacher v. Sweden*, slip op., *published as* 116 Eur. Ct. H.R. (ser. A) (1989).

75. *Handyside*, slip op. at 17-18.


necessary. This will have the effect of removing the kind of difference between the Court's and the Commission's view of the application of the *Handyside* test which arose in these cases, but it will do so on the basis of a reduced role for the Court in reviewing national decisions on speech questions. Such an approach requires practically no theory at all.

Another way is to try to limit the role of the Court by concentrating on the procedural remedies that the States must provide rather than on the substantive outcomes. The Court has refined the obligation under article 13, first to give it some effective meaning and then to bring it under practical control. The Court has found further use for this procedural route to confining its role in this way by restricting article 6 determinations to matters of process and by implying procedural rather than substantive obligations in other rights.

In *Chappell*, the Court deferred to the judgment of the national courts that, despite obvious deficiencies in the execution of an order to preserve evidence, there had been no failure to respect the applicant's home and private life.

In *Gaskin*, the Court held that the obligation of the State to respect the private life of a person brought up as a child in publicly supervised foster-care required that the State establish an independent procedure to decide whether information about the applicant given in confidence could be revealed to him as an adult. Adopting this kind of approach leaves open the possibility that the European institutions might have to decide whether the substantive decision resulting from the national process is in violation of the Convention, but it will be a practical possibility only where a national decision is clearly incompatible with Convention standards, essentially where some "bright line" has been passed.

### III. THE *SOERING* CASE

Many of the difficulties with the Court's manner of deciding cases emerged in the *Soering* case, which was in several ways a special one.

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78. *Markt Intern Verlag GmbH*, slip op. at 16.
79. *See supra* note 60.
82. *Gaskin v. United Kingdom*, slip op., published as 160 Eur. Ct. H.R. (ser. A) (1989). This is an important decision because the Court is generally punctilious to leave the means of giving effect to its judgments to the national states. Here, finding a positive duty, the Court has to give some indication of what such a duty involves.
It was the first in which a State not involved in proceedings before the Commission had brought a case to the Court.84 The case was heard with remarkable expedition, proceedings before the Commission taking about six months after the application was made, the judgment of the plenary Court being delivered five months after the case was referred to it. The case concerned an important matter of interpretation: the extent to which a State party to the Convention could be responsible for a violation when the material conduct of which the applicant complained would be inflicted by another State. The Court was faced also with an investigation into the adequacy under article 13 of the remedies to raise such a claim in United Kingdom law.

The application arose out of a decision of the Home Secretary to order the extradition of Soering, a national of the Federal Republic of Germany, to the United States on a charge of committing two murders in Virginia. This charge would have exposed Soering to the possibility of a capital sentence. Soering was 18 years old at the time of the alleged offenses and claimed to be suffering from an abnormality of the mind then.85 The deceased were the parents of Soering's girlfriend, a United States national, who had consented to extradition from the United Kingdom to the United States and who had been sentenced to a total of ninety years' imprisonment on her conviction, following a guilty plea to being an accessory to her parents' murders. Before it agreed to Soering's extradition (after the English courts had decided that he might be extradited), the British government had requested from the United States government that, if a capital sentence were imposed on Soering, it would not be carried out. Because of constitutional considerations, the Federal government had no power to give guarantees with respect to State criminal proceedings. The Federal and Virginia authorities agreed to bring to the Virginia judge's attention at the time of sentencing that it was the wish of the United Kingdom that a capital sentence not be imposed or, if imposed, not be carried out.86 After the request for extradition had been submitted by the United States but before it had been considered by the English court, Soering was interviewed in jail in England (where he was detained on an unrelated charge) by a representative of the government of the Federal Republic. As a result, the Federal Republic requested Soering's extradition. Because he was an F.R.G. national, the Ger-

86. See Memorial of the Government of the United Kingdom (Soering Case), Cour (89) 72, at 112-24 (Mar. 29, 1989) [hereinafter UK Memorial].
Coherence And The European Court

man courts had jurisdiction over his conduct in the United States. In West Germany, Soering could not have faced a capital sentence. The British government did not proceed with the German extradition request, being advised that it was not accompanied by sufficient evidence to established the *prima facie* case against Soering necessary to achieve his extradition.

It was Soering's complaint that, if he were extradited to the United States, it was likely that he would be convicted and, if convicted, that he would be sentenced to death. If he were sentenced to death, he would inevitably be exposed to the "death row phenomenon," that is to say that he would be detained for a lengthy period between the passing of sentence and its implementation in very trying prison conditions with other convicted murderers who faced similar sentences, a situation of particular gravity in this case because of Soering's young age and fragile mental condition. Soering argued that the "death row phenomenon" constituted a violation of the standards of Article 3 of the Convention and that the Convention imposed an obligation on the British government not to return him to the United States. Soering contended further that there was a breach of Article 13 of the Convention because there was no effective national remedy which could assess his claim that the Secretary of State's decision to remove him to the United States was not in conformity with the United Kingdom's obligations under the Convention. The Commission held by six votes to five that the extradition of Soering to the United States would not constitute a violation of the United Kingdom's obligation under article 3 and unanimously that it would not constitute a breach of article 6(3)(c). The majority found this case difficult to distinguish from *Kirkwood* and, even taking into account Soering's age and mental condition, held that treatment which he could anticipate in Virginia was not such as to amount to a violation of the standards of article 3. Of the dissenting members of the Commission, Professor Frowein was influenced by the possibility of Soering being extradited to West Germany; Professor Trechsel took this into account but found it less significant by comparison with a general review of Soering's situation, which, he decided, would bring Soering within article 3; the remaining dissenting Commissioners (Danelius, Jorundsson and Vandenberghe), also finding that the treatment likely to face Soering would breach article 3, laid emphasis on his age and mental condition and took particular account of developments in human rights law since the

Convention was ratified, such as the provisions in the International Covenant and the Inter-American Convention. By seven votes to four, the Commission decided that there had been a violation of article 13.

From the point of view of the Convention, the most important issue was the interpretation of articles 1 and 3: were they together capable of imposing an obligation on a State not to remove a person from its jurisdiction to another State where it was likely that that person would be subject to treatment not in conformity with the standards of the Convention? The British government had reserved its position on this issue before the Commission. Before the Court, it maintained that the Convention was clearly against any such interpretation, which would result in imposing responsibility on one State for injury inflicted by another, even when the language of article 3 was examined in the context of the whole of the Convention, including the Preamble.90

The government said that the Commission had indicated clearly what a violation in these circumstances would consist of: "the basis upon which the Commission has held that Article 3... imposes responsibility on parties to the Convention for events over which they have no direct control, which occur (if at all) outside their jurisdiction has always been and remains unexplained."91 The government then enunciated a series of considerations of international law and policy as to why the Convention should be interpreted in the way for which it contended. These were:

a) An approach to the contrary was in conflict with the norms of the international judicial process. The position here was that an international court should not determine the obligations of a State not a party to proceedings before it. A decision of the European Court upholding Soering's claim that he would be exposed to Article 3 treatment if he were returned to the United States would be tantamount to finding the United States in violation of international law because the standard in Article 3 was a rule of general international law.

Even if there were the power to determine this question, the court should exercise its discretion not to hear it, given the non participation of a State closely affected by any judgment.92

b) An approach to the contrary was not supported by the practice of national courts and the international community.

It had been argued that the practice of national laws and national courts was to limit and control decisions to remove persons to jurisdictions

90. See UK Memorial, supra note 86, at 50-65.
91. Id. at 54.
where they might suffer Article 3 treatment. The government denied that this practice was sufficiently widespread and uniform to constitute a general rule.

As for international treaty practice, the government maintained that the obligation in the U.N. Convention against Torture not to return a person to a jurisdiction where he might be subject to torture had been specifically limited to "torture," as compared with the original suggestion that it cover "cruel, inhuman or degrading treatment or punishment;" thus it would not apply to Soering's case, it not being suggested that his potential treatment in Virginia would amount to torture. Similarly, Article 33(1) of the Refugee Convention expresssly provided protection against removal in very specific circumstances. Indeed, to impose a necessarily unqualified duty on a State under Article 3 not to return a person to another State where he faced ill-treatment would deprive the exception in Article 33(2) of the Refugee Convention of any practical content.

c) An approach to the contrary would impose unacceptable costs on a State.

Article 33(2) of the Refugee Convention protected a State against the presence of persons who would present a danger to the community, even if they did face the prospect of ill-treatment if removed. An interpretation which excluded this protection for a State placed an unjustified burden upon it. In particular, if a State could not extradite a fugitive to a jurisdiction where he could be tried, such persons would escape punishment and the co-operative arrangements between States for the extradition of wanted persons would be put under stress.

d) That there would be formidable problems of proof about the conditions likely to be experienced in a State not a party to the Convention.

The arguments made by the government may not have been conclusive, but they certainly carried some weight and required answers. Some answers were supplied by the applicant in a counter-memorial largely directed to these issues. They focused on the implication in article 1 of the words "shall secure," which imposed some positive obligations on a State party to the convention. Those positive obligations could include a duty not to return a person to a jurisdiction where the substantive content of his Convention rights would be de-

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95. It is to be noted that in Amekrane v. United Kingdom, 1973 Y.B. EUR. CONV. ON HUMAN RIGHTS (Eur. Comm'n of Hum. Rts.) 356, where there was a friendly settlement, the mistreatment in the foreign State had already happened and in Altun v. Federal Republic of Germany, 36 Eur. Comm'n H.R. 209 (1984) (where the applicant complained of likely ill-treatment if he were removed to Turkey), the Commission had its own source of information about conditions in Turkey as a result of the investigations it had made in France v. Turkey, 44 Eur. Comm'n H.R. 31 (1985).

nied. Put this way, any judgment of the European Court would pass only on the obligations of a State party to the Convention and so the considerations of the position of the third State which the British government had referred to were irrelevant. The adverse consequences for a State in complying with a Convention obligation could not be an excuse and were no reason for interpreting the Convention in a way designed to avoid inconvenience for States at the expense of the effective enjoyment of individual rights.

It might perhaps be observed that the applicant and the government never quite joined direct issue. The government was concerned with the question of whether there was a duty at all of the kind argued for. The applicant explained what the nature and consequences of the duty were — on the assumption that there was one. In the circumstances, it might have been anticipated that the Court would have brought this matter under close scrutiny. Indeed, the government had specifically asked that the juridical basis for any judgement against it be stated clearly so that it and other States could know precisely what was required of them. Such anticipations were gravely disappointed. The Court’s conclusion on this much controverted matter was simply one of assertion. It said:

It would hardly be compatible with the underlying values of the Convention, that “common heritage of political traditions, ideals, freedom and the rule of law” to which the Preamble refers, were a contracting State knowingly to surrender a fugitive to another state where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court’s view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.

The Court did not say that any treatment which might be incompatible with Convention standards would be an obstacle to removal, but it did concede that treatment not in conformity with provisions other than article 3 could raise the same risk of violation when it said, “[A]n issue might exceptionally be raised under article 6 by an extradition decision in circumstances or risks suffering a flagrant denial of a fair trial in the requesting country.”

Far from providing the clear juridical basis requested by the Brit-

97. UK Memorial, supra note 86, at 54-55.
98. Soering v. United Kingdom, slip op. at 26-27.
99. Id. at para. 86.
100. Id. at para 113.
lish government, the Court's judgment is obscure. It is obscure first of all because it says that the content of "inhuman or degrading treatment or punishment" depends on all the circumstances of the case and that these factors include the question of whether an individual is sought by extradition. The notion of what article 3 covers is relative enough as it is, looking only at the treatment applied or to be applied to the applicant. Widening the context of the inquiry in this way undermines the human rights quality of the protection given by article 3 by making it susceptible to public interest derogations and further increases the uncertainty as to what treatment falls within its ambit. If the foreign treatment would fall foul of article 3 standards anyway, there seems little point in inquiring further into the reason for the applicant's removal. If the fact that he is being extradited makes a difference, then it follows that removal to where some Article 3 treatment can be anticipated may be justified because of the public interest in extradition. In the alternative, where extradition is available to a third State and that is a relevant consideration, the threshold, it would appear, might be lowered, so that a State might be in violation of its obligation under article 3 if it extradited the applicant to state A where he would suffer nearly article 3 treatment, when it could have extradited him to State B where he would not. The inquiries could be complicated even further if it were to be conceded that different considerations should apply where the individual is being deported rather than extradited. From the practical point of view, the desirability of a settled test indicates the superiority of the approach of the majority in the Commission:

ITS task under Article 3 is to assess the existence of an objective danger that the person extradited would be subject to treatment contrary to this provision . the assessment of the risk that a person might be subject to inhuman treatment contrary to Article 3 depends on an objective assessment of conditions in the country concerned and is independent of the nationality of the applicant or the possibility of extraditing him to his own country.

From the point of view of principle, neither individuals nor States deserve to have their legal positions determined by adventitious and uncertain contingencies such as those admitted by the Court.

In this connection, the British government's observation should be remembered that there would be grave difficulties of proof if the Court were to inquire into the situation in a non-Convention State and to speculate on the likelihood of the excluded treatment befalling an applicant there. This is a pragmatic objection, suggesting that an actual

101. Id. at para. 89.
jurisdiction ought not to be exercised if the uncertainty about events in the non-Convention State cannot be removed. Paradoxically, perhaps this argument for abstention will favor those States about whose conditions the least could be proved. In the Soering case, there was no difficulty in obtaining information about the position in Virginia.

The best approach to the dilemma presented by the Soering case is to look at a State's obligation under article 1 of the Convention. This first of all makes it clear that the inquiry is into the obligation of a State party to the Convention, the only proper jurisdiction for the Court. Nothing is directly decided about the international legal ramifications of any conclusions about the situation in the non-Convention State, and its non-participation is not, therefore, an obstacle to the exercise of jurisdiction over the Convention State. Second, it is well established that the import of the words "shall secure" in article 1 is that a State has some positive obligations under the Convention. Among those positive obligations are ones to take action where the substantive harm will be visited on the applicant by a private party, for example, to take action against "private" threats to life and security or against "private" drowning out of protected speech. The content of positive duties is not uniform and is seldom absolute, but it can include obligations to prevent harm. A positive duty on a State to prevent the infliction of damage on an individual currently within its jurisdiction by removing him to another State where the damage will occur raises no great difficulties of principle under the Convention. On the other hand, what is required of a State in a case like Soering is not what is usually required of a State faced with a positive obligation: ordinarily the State will be required to do something; here it is required not to do something, viz. not remove the applicant. On the face of it, this seems like the orthodox negative duty, the performance of which is always within the practical power of the State. Negative duties are hard to imagine as qualified duties. There is, though, a difference here, because the duty is contingent upon the assessment of the likelihood of damage resulting from the State's action. The qualified nature of a State's duty in situations like Soering's arises in this way. A State has a duty to assess the likelihood of damage in the foreign State and to measure that against its specific duty to protect against the actual damage in question. For articles 2, 3, 4 and 7, the damage

need only be likely, but if it is, the duty not to return is strict. For articles 5 and 6, a higher likelihood of damage might be required (but not, as the Court seems to suggest, a likelihood of higher damage — "flagrant denial of fair trial"). Where only technical violations of articles 5 and 6 can be strongly anticipated, in principle, there should be a duty not to return, but it may be that the Court would make a de minimis exception to cover, for example, concern about periodic reviews of detention under article 5(3) or (4) or the provision of free interpretation under article 6(3)(e). In other cases arising under articles 8-11, the State would still have an obligation to inquire into treatment in the receiving jurisdiction but would be able to justify action which led to an interference with a protected right by reference to the qualifications on its duties in articles 8(2)-11(2). For instance, a refusal by the foreign State to allow the spouse of a person extradited to follow the applicant to that jurisdiction might find its justification, if any, as being necessary in a democratic society for the prevention of crime.

Alternative explanations of the duty under the Convention are usually too narrow and involve further uncertainties. Professor Vogler's suggestion that the obligation not to return with regard to article 3 treatment on the basis that there is a rule of ius cogens requiring this result is an example. While the idea of ius cogens is widely accepted, its actual content is a matter of dispute. Even if an obligation not to torture falls within ius cogens and that obligation extends to not returning people to jurisdictions where they might be tortured, it is far from clear that the same characterization can be applied to "inhuman treatment etc.," particularly as refined by the decisions of the European Convention institutions. Regional ius cogens is not an adequate explanation either, where the requesting State is out of the region.

It has to be conceded that the conclusion that the Convention requires, in some circumstances at least, a Convention State not to honor its treaty obligation to extradite a person to another State may involve a clash of treaty obligations. If the Convention State does not return the fugitive, it puts at risk its extradition arrangements with the requesting State. If it does return him, it will be liable for a breach of the Convention, which will probably include article 50 satisfaction. But there may be no treaty incompatibility. In the Soering case, the British government might have expressed itself as unsatisfied by the guarantees offered by the United States that Soering would not be sub-

jected to article 3 treatment. It had said before the commencement of the application to Strasbourg that it was satisfied. Soering, of course, was not. The situation shows clearly the difference between State rights under treaty and individual rights under human rights treaties: the former touched Soering's interests; the second protected his rights. While it might be wise for a government to wait on the outcome of any Strasbourg proceedings before committing itself, one would estimate that non-Convention States would not regard Convention obligations of States in the same way as they might take notice of constitutional limitations on the power of a State to discharge its treaty obligations.

On the application of the law to the facts of the Soering case, the Court proceeded in the following way. Soering faced a real risk of the "death row phenomenon." Although it was not certain that he would do so, even the British government concluded that there was a "significant risk" that he would. While the State of Virginia had to show that the circumstances of the homicides indicated future dangerousness of the offender or particular vileness, the horrible facts of Soering's alleged offenses pointed firmly in the latter direction. It was true that there were mitigating factors in Soering's favor, but against those was the vehemence with which the State prosecutor was pursuing a capital sentence. Accordingly, the likelihood of Soering being convicted, sentenced to death and facing the "death row phenomenon" was sufficiently high.

Nevertheless, it was argued by the British government that nothing that awaited Soering in Virginia, unpleasant though it might be, amounted to conduct in violation of article 3. It was, of course, not sufficient by itself that Soering faced the death penalty, because article 2 of the Convention allowed capital punishment in some circumstances. The Court noted that attitudes in the European States were becoming more hostile to the death penalty. While there could be circumstances in which return to a foreign State to face the likelihood of capital punishment would raise an issue under the Convention, the development of the aversion to execution had not ruled it out altogether. In the circumstances of this case, the Court noted that the

107. Ultimately the British government did seek assurances that no capital charges would be brought against Soering in Virginia. See In re Soering's Application, November 21, 1989 (LEXIS, Enggen library, Cases file).

108. Soering, slip op. at 28.

109. In his concurring opinion, Judge De Meyer did think, for a variety of reasons, that the United Kingdom was precluded from returning Soering to the United States because of the threat to his right to life. Soering slip op. at 41. See also comments submitted by Amnesty International in the Soering case, Eur. Ct. H.R., Cour (89)93 (Apr. 13, 1989). Amnesty was allowed to make a submission under Rule 37.
length of time prior to execution, the stringency of the prison regime for death row prisoners, Soering’s age and his alleged mental condition at the time of the offenses, and the possibility that he might be extradited to the Federal Republic rather than the United States, all contributed to the Court’s finding that the “death row phenomenon” constituted treatment which, if Soering were returned to face it, would constitute a violation of the United Kingdom’s obligations under article 3. The court recognized that the length of time between the imposition and the application of the sentence would, in some large measure, be due to avenues of appeal afforded to a condemned prisoner. Although some delay would thus be due to the conduct of the applicant, the seriousness of the sentence demanded such safeguards and the applicant was not to be disadvantaged for using them.

The outcome of the case on this point is indicative of the singular position of some States of the United States with respect to routine capital punishment as compared with other industrial countries. The need to reconcile the legislative inclination to authorize capital punishment with the demands of appropriate safeguards against wrongful conviction or inapposite sentence has caused a dilemma for the United States which makes it difficult to achieve capital punishment by due process without introducing the collateral evil of the “death row phenomenon.” It is a difficulty which has not been eased by Supreme Court decisions which have found constitutional obstacles to the execution of the young or the insane. The Court’s judgment was of considerable disadvantage to the British governments, which regards the effective functioning of extradition with the United States as particularly important to its campaign against terrorism connected with Northern Ireland. Any weakening of the obligation by the United States to return fugitives to the United Kingdom would be much deprecated.

Ultimately, the Virginia prosecutor filed two charges against Soering, alleging separately the killing of each victim. Neither charge exposed him to a risk of a capital sentence and he was extradited to the United States on those charges.


112. Ironically, the United Kingdom has been confronted with refusals to extradite fugitives by the Irish Republic on the basis of analogies with the “Soering principle”: Ryan (no guarantee of fair trial in England); Finucane (danger of ill-treatment by prison staff in Northern Ireland). For further details, see Zander, Extradition of Terrorists from Ireland: A Major Judicial Setback, 140 NEW L.J. 474 (1990).
IV. CONCLUSION

Those with supra-national aspirations for the Court do neither the Court nor the cause of the protection of human rights in Europe any service. To imagine the Court as a supra-national body is to conceive a constitutional anomaly because the other organs of supra-national authority, a legislature and an executive, are missing. The Court might be justifiably bolder in filing gaps in the Convention and keeping its interpretation abreast of developments precisely because there is no European legislative organ to supplement its work. When it does this, though, it is incumbent upon it to give a coherent justification for the steps it has taken: States need to know where they stand, and so do potential applicants. But this is not, or not necessarily, to claim a supra-national role. The danger for the Court as I see it is that it will become embroiled in the details of individual cases and, because of its aversion to theory, because of its spare form of constructing its judgments and because of the demand of its case-load, not be able to provide judgments which enable national decision-makers and applicants to know where they stand. The result will be more cases off to Strasbourg to test the limits and to seek to exploit the ambiguities of the judgments. The coherence of judgments properly demanded of a national constitutional court does not appear to be attainable by the European Court. The need to achieve plausibility for its reasoning may result in the diminution of the protection of European human rights if the court seeks to attain this by deferring more to the decision of national authorities, as it has done in the free expression cases.

The implementation of the Eighth Protocol will provide a breathing space to see if the new arrangement can cope with the increasing demands placed upon the Convention system. Those burdens seem in no way set to diminish as the States of eastern Europe consider participation in the Council of Europe. The organization already has dealings with Czechoslovakia, Poland and Yugoslavia. Depending upon the mechanics of German unity, the people of East Germany may be brought within the system under the umbrella of the Federal Republic’s participation. If the revised Convention does prove adequate, the merger proposals will lose some of their attractiveness — and they need to be attractive to all the States to be brought to fruition. There is an opportunity for the development of the court’s role in protecting human rights. There is no need for a revolution.