

APPLICATION/REQUÊTE N° 10479/83

E.M. KIRKWOOD v/the UNITED KINGDOM

E.M. KIRKWOOD c/ROYAUME-UNI

DECISION of 12 March 1984 on the admissibility of the application

DÉCISION du 12 mars 1984 sur la recevabilité de la requête

Article 1 of the Convention : *The undertaking given by High Contracting Parties in respect of everyone within their jurisdiction extends, in the Article 3 sphere, to a duty not to expose anyone to an irremediable situation of objective danger, even outside their jurisdiction.*

Articles 2 and 3 of the Convention : *Because Article 2 authorises capital punishment, pursuant to the law and a court sentence, this may create a long period of uncertainty for the convicted person during the appeal proceedings in an elaborate judicial system. However, it cannot be held that this long period of uncertainty (the "death row phenomenon") falls outside the notion of inhuman treatment (Article 3).*

The terms of Article 2 do not support the contention that if a State were to fail to require binding assurances from the State requesting extradition that the death penalty would not be inflicted, this would constitute treatment contrary to Article 3.

Article 3 of the Convention : *Factors to be considered in assessing whether the long period of uncertainty experienced by the person condemned to death, during the appeal procedures (the "death row phenomenon") amounts to inhuman treatment : the importance of the appeal system designed to protect the right to life, delays caused by the backlog of cases before the appeal courts, the possibility of a commutation of sentence by very reason of the duration of detention on "death row".*

Article 6 of the Convention : *This provision does not apply to a court's examination of an extradition request from a foreign State, even if the Court carries out an assessment of whether there is an outline of a criminal case to answer against the applicant.*

Article 25 of the Convention : *A person who is about to be subjected to a violation of the Convention may claim to be a victim.*

Such is the case of a person who finds himself in the hands of a High Contracting Party which has decided to extradite him to a foreign State when extradition is imminent and could expose him, he claims, to treatment contrary to Article 3.

Article 1 de la Convention : *L'engagement pris par les Hautes Parties Contractantes à l'égard de toute personne relevant de leur juridiction s'étend, dans le domaine de l'article 3, à l'obligation de ne pas exposer cette personne à une situation irréversible de danger objectif même en dehors de leur juridiction.*

Articles 2 et 3 de la Convention : *Du fait que l'article 2 autorise la peine capitale si elle est prévue par la loi et infligée par un tribunal, ce qui, dans un système judiciaire élaboré, peut placer le condamné dans une longue incertitude durant les procédures de recours, on ne peut pas déduire que cette longue incertitude (« couloir de la mort ») échappe à la notion de traitement inhumain (article 3).*

Le libellé de l'article 2 ne permet pas de soutenir que l'omission par un Etat d'exiger des assurances formelles que la peine de mort ne sera pas exécutée dans l'Etat requérant l'extradition, constitue un traitement contraire à l'article 3.

Article 3 de la Convention : *Eléments pris en considération pour déterminer si la longue incertitude d'un condamné à mort pendant les procédures de recours (« couloir de la mort ») constitue un traitement inhumain : Importance des recours pour la protection du droit à la vie, retards dus à l'engorgement des instances de recours, perspective d'une commutation de peine en raison même de la durée du « couloir de la mort ».*

Article 6 de la Convention : *Cette disposition ne s'applique pas à l'examen par un tribunal d'une demande d'extradition à un Etat étranger, même si ce tribunal procède à un examen sommaire des accusations dont l'intéressé devra répondre.*

Article 25 de la Convention : *Peut se prétendre victime d'une violation celui qui est sur le point de subir une violation du fait d'une Haute Partie Contractante.*

Tel est le cas de celui qui se trouve aux mains des autorités d'une Haute Partie Contractante, que celle-ci a décidé d'extrader à un Etat étranger, dont l'extradition est imminente et pourrait l'exposer, affirme-t-il, à un traitement contraire à l'article 3.

THE FACTS

(français: voir p. 192)

The facts as they have been submitted on behalf of the applicant, an American national, presently detained in Brixton prison, by his representative, Mr Colin Nicholls, Q.C., and Ms Clare Montgomery of Counsel, and MM. Maxwell and Goldman, solicitors, of London, may be summarised as follows:

On 14 July 1982 three men were shot in San Francisco, two of whom died immediately, and one of whom survived and identified the applicant from a photograph as the man responsible for the shooting, an identification confirmed by an affidavit dated 3 December 1982.

On 28 July 1982 the police officer responsible for enquiring into the murders made a complaint at the Municipal Court in San Francisco, alleging that the applicant had committed two counts of murder, contrary to Section 187 of the California Penal Code, and one count of attempted murder, contrary to Section 664 and 187 of the California Penal Code, and a warrant was issued for the applicant's arrest the following day.

On 20 November 1982 the applicant was arrested on arrival at Heathrow airport, London, and was charged the following day on a warrant issued by a magistrate at Bow Street Magistrate's Court for his extradition to the United States of America. On 30 December 1982 the Government of the United States made a formal request for the applicant's return to the United States in accordance with procedure set out in the Treaty between the two States of 8 June 1972.

On 10 January 1983 the Secretary of State for Home Affairs ordered a magistrate to proceed to hear the evidence in accordance with the provisions of the Extradition Acts 1870-1935 and the Treaty as contained in Order in Council N° 2144 of 1976, the United States of America (Extradition) Order 1976. On 11 May 1983 the Bow Street Magistrates' Court ordered the applicant to be committed to prison to await the order of the Secretary of State for his surrender to the United States in accordance with the provisions of Section 10 of the Extradition Act. In making this order of committal, the Magistrate overruled the applicant's submission that the affidavit of the sole witness to the shootings should not be received in evidence and that if it were so received, it was insufficient to justify committal.

On 16 May 1983 counsel advised the applicant that there were no arguable grounds on which he might apply to the High Court for a writ of habeas corpus and, subject to the Secretary of State exercising his discretion not to order the applicant's surrender, the applicant had exhausted his judicial and administrative remedies.

On 18 and 19 May 1983, the Secretary of State informed the applicant's solicitors that the Government of the United States were unwilling to give any assurances before committal that the death penalty would not be carried out on the applicant if tried and convicted, but that the papers would not be placed before the

Secretary of State for his decision under Section 2 of the Extradition Act 1870 until assurances had been received from the United States Government and any representations had been made by the applicant. On 1 July 1983, the Secretary of State informed the applicant's representatives that he had received from the Government of the United States of America:

"The assurance of the Deputy Attorney General of the State of California (the competent authority) that should the applicant be convicted of either or both counts of murder with which he is charged, and if the death penalty is imposed for either or both these offences, a representation will be made in the name of the United Kingdom that it is the wish of the United Kingdom that the death penalty will not be carried out."

On 12 July 1983 the applicant submitted a petition to the Secretary of State that he should not be ordered to be surrendered to the United States.

It is the applicant's submission that, bearing in mind the probability of the imposition of the death penalty in the event of his return to the United States and trial and conviction, and taking account of the automatic appeal procedure operated in California and the consequent delay in the implementation of any such death penalty, his extradition to the United States would constitute inhuman and degrading treatment contrary to Art. 3 of the Convention. He also invokes Art. 6 in relation to the fairness of the committal proceedings and in particular the opportunity to cross-examine witnesses against him.

On 6 February 1984 the Secretary of State signed the warrant in accordance with Section 11 Extradition Act 1870 for the applicant's surrender to the United States' authorities and removal from the United Kingdom. On 7 February 1984 the applicant applied *ex parte* in the High Court for a stay on his surrender and for leave to challenge the Secretary of State's decision by way of judicial review as one which no reasonable authority would reasonably make. The application was granted the same day.

On 10 February 1984 the Secretary of State applied to discharge the order, staying the applicant's removal, on the grounds that there was no power for the High Court to issue a stay with the effect of an injunction against the Crown by virtue of Section 21 (2) Crown Proceedings Act 1947.¹ It was contended for the Secretary of State that the High Court had no power to control his decision to surrender the applicant and no power to order a stay.

(1) S 21 (2) provides:

"The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown."

On the same day the High Court lifted the stay on the applicant's surrender, granting the Secretary of State's application.

On 13 February 1984 the applicant issued proceedings in the Divisional Court for habeas corpus and an order that it was unreasonable of the Secretary of State to order the applicant's surrender before the Commission had further examined the application or alternative at all, in the light of the severity of the death row phenomenon.

The applicant's petition for habeas corpus was rejected after pleadings before the Divisional Court on 13 and 14 February 1984. The applicant sought a stay in his surrender pending the lodging of an appeal to the House of Lords. Although no stay was possible, the Court indicated that it would not be unreasonable for the Secretary of State to defer surrender by 24 hours if the leave petition was lodged within that period. The petition for leave to appeal was lodged with the House of Lords the following day and the applicant's surrender was not implemented pending the hearing of the application for leave to appeal.

The application's petition for leave to appeal was refused by the House of Lords on 1 March 1984.

Domestic Law and Practice: United Kingdom

The penalty for murder in the United Kingdom is life imprisonment, and the death penalty cannot be imposed.

The law relating to extradition between the United Kingdom and the United States is governed by the Extradition Acts 1970-1935 and the Treaty signed between the two States on 8 June 1972. For a request to be successful, the offence charged in the United States warrant must be referred to in the Extradition Acts or another material English statute as an extradition crime. The relevant lists include murder and attempted murder.

Article III of the Treaty provides:

"1. That extradition shall be granted for any act or omission the facts of which disclose an offence within any of the descriptions of the Treaty ... or any other offence if;

- a) the offence is punishable under the laws of both parties by imprisonment or other form of detention for more than one year or the death penalty.
- b) the offence is extraditable under the relevant law, being the law of the United Kingdom.
- c) the offence constitutes a felony under the laws of the United States of America.

2. Extradition shall also be granted for any attempt ... within paragraph (1) of this Article ...".

However, Article IV of the 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 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."

This discretion is vested in the Secretary of State by Section 11 of the Extradition Act 1870, and comes into play after the fugitive has exhausted his legal remedies at committal or by way of habeas corpus.

It is the English practice before surrendering a fugitive who is liable to the death penalty to seek the best assurances from the requesting State that the death penalty will not be carried out, although it is generally impossible for the requesting State to give a binding guarantee as to this. It would appear that the United Kingdom Government may never have refused to surrender a fugitive on these grounds.

"Assurances" of requesting States have been considered by the House of Lords in a different context (Section 10 Fugitive Offenders Act 1881), which provided that the High Court could discharge a fugitive on an application for habeas corpus where it would be unjust or oppressive to return him (e.g. in *R. v. Governor of Brixton Prison ex parte Armah*, (1968) AC 192), where the desirability of undertakings which obtain special treatment for fugitives in the normal application of criminal administration was questioned.

The applicant contrasts this attitude and reluctance with regard to the obtaining of assurances with that of the Government of the Federal Republic of Germany in relation to extradition in cases where the fugitive faces the death penalty, illustrated by the Commission's case-law in Application N° 9539/81.

Domestic Law and Practice : United States of America

For the purposes of extradition, the law of the United States includes the law of any of its States. Section 187 of the California Penal Code defines "murder" as "the unlawful killing of a human being ... with malice aforethought". Section 189 provides that "all murder which is perpetrated by a destructive device or explosive ... or by any other kind of wilful, deliberate and pre-meditated killing ... is murder in the first degree ..." Section 190 provides that every person guilty of murder in the first degree shall suffer death, confinement in a State prison for life without possibility of parole or confinement in a State prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1-5.

Sections 190.1-5 provide that the penalty shall be death or confinement in a State prison for a term of life without parole in any case in which one or more of

the following special circumstances has been charged and specifically found under Section 190.2 to be true :

“... Where (3) the defendant has in the same proceedings been convicted of more than one offence of murder in the first or second degree.”

The existence of absence of these “special circumstances”, and the choice between the death penalty or life imprisonment is determined by a jury in separate penalty proceedings after guilt has been established. In those proceedings, evidence may be presented by both the prosecution and the defendant as to any matter relevant to aggravation, mitigation and sentence. This includes any prior conviction, the existence of any other criminal activity by the defendant which involved the use or attempted use of force, or violence, and the defendant's background, history, and mental and physical condition. The words “criminal activity” as used in Section 190.3 do not require a conviction.

In determining the penalty, the jury shall take into account any of the following factors if relevant :

- a. The circumstances of the crime and any special circumstances ;
- b. The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence ...
- c. The presence or absence of any prior felony or conviction ...
- d. Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.”

The jury shall impose sentence of death if they conclude that the aggravating circumstances outweigh the mitigating circumstances. Otherwise the penalty is life imprisonment.

Where the death penalty is imposed, under Sub-Division 7 of Section 1181 of the California Penal Code, the defendant shall be deemed to have made an application for the modification of such verdict. In ruling on the application, a judge shall review the evidence, consider, take into account and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdict are contrary to law or to the evidence presented. A denial of the modification of the death penalty verdict pursuant to Sub-Division 7 of Section 1181 of the Code shall be reviewed on the defendant's automatic appeal pursuant to Sub-Division (b) of Section 1239 of the Code. The granting of the application shall be reviewed in the event of the prosecution making an appeal pursuant to paragraph (6) of that Section. Section 190.6 requires the decisions of appeal to the State Supreme Court shall be made within 150 days of the completion of the entire record by the sentencing court.

Under Section 1217-9 a statement of conviction and judgment and the complete transcript of all the testimony given at the trial, including any arguments made by

respective counsel, must be sent to the State Governor, who may require the opinion of the justices of the Supreme Court and the Attorney General or any of them upon the statement so furnished.

Implementation of the Death Penalty and the "Death Row" Phenomenon

Up until 1963 the death penalty was regularly carried out in California for murder, but since then it has been carried out only once in 1967 for the murder of a police officer. In February 1972 the California Supreme Court reversed a death sentence on the ground that it was unconstitutional as a "cruel and unusual punishment", but it was re-introduced in late 1972 by an amendment to the State Constitution, and when that amendment was ruled unconstitutional by the Supreme Court, a further amendment to the Constitution was made in 1978. Both amendments reinstating the death penalty resulted from bills introduced by the present Governor in California in his then capacity as Senator.

Following the Supreme Court rulings, a total of 179 persons awaiting execution on "death row" were paroled. The most recent figures relating to the imposition of the death penalty at present (up to March 1983) disclose that 115 people are awaiting execution in California and 1,147 in the United States as a whole. As of the date of the Attorney General's report on murder and the death penalty, published by the California Department of Justice in July 1981, 53 persons have been sentenced to death since the re-introduction of the death penalty in 1978. Of these, 2 had had their sentences affirmed, 2 had had their convictions reversed, 5 had had their sentences reversed, 1 for a technical reason, and 44 were awaiting the result of their appeal. Of those whose sentences were affirmed, 1 waited 9 months, and the other 23 months for the result. Four and a half years later, neither has been executed, although they are both liable for execution. Of those awaiting the result of their appeals, 1 had been waiting 5 years.

Since the publication of the report, according to the information received by the applicant's representatives, 3 of the 44 persons awaiting the result of their appeals have had their sentences reversed.

COMPLAINTS

The Death Penalty and Death Row in the Applicant's Case

The applicant contends that there are a number of facts which are relevant to the likely imposition of the death penalty in the event of his conviction. In particular, he is charged with double murder by shooting and a further attempt to kill, and it is alleged that the shooting arose prior to peddling dangerous drugs. The applicant has previous convictions, including one for armed robbery, and a history of violence during his prison sentences, and is suspected of violent political and racial activity in California as a leader of an ex-convict group called "Tribal Thumb".

The likelihood of a death sentence being imposed on the applicant in view of the above facts is in no way diminished by the nature of the "assurance" received by the Secretary of State, which is, that if the death penalty is imposed upon the applicant, "a representation will be made in the name of the United Kingdom that it is the wish of the United Kingdom that the death penalty will not be carried out".

The applicant contends that this is not an "assurance" within the terms of the Article IV of the Treaty, and furthermore, Section 1219 of the California Penal Code makes it clear that the Attorney General may only express an opinion if called for by the Governor, which opinion is, by implication, not binding on him. Nor is the "assurance" that of the requesting party, since it is the Federal Government of the United States which has made the request for extradition.

Furthermore, the Deputy Attorney General has not indicated what, if any, part he proposes to take in the penalty stage of the trial proceedings and what, if any, effect his failure to call for the death penalty or call evidence in support of it would have on the court. However, if the applicant is executed, neither he nor the United Kingdom will have any effective redress on a matter of utmost finality.

In the light of the personal identity of the Governor, there is a serious risk that the United Kingdom's wishes will not prevail in the applicant's case. In particular, the applicant refers to the Governor's frequently expressed view that the will of the people should not be thwarted and cannot be overestimated, a view forcefully expressed in his report published by the Attorney General's office. In addition, a failure to carry out an execution in the applicant's case might give rise to legal argument in other cases owing to unequal application of the law, invalidating the death penalty in those cases and thereby influence the Governor not to exercise clemency in the present case.

The applicant submits that the facts referred to above indicate that if he is surrendered to the United States there is serious reason to believe that he will be subjected to inhuman and degrading treatment and punishment in contravention of Art. 3 of the Convention. Such treatment and punishment arises from the unexceptional and inordinate delay in carrying out the death penalty in California. It is further submitted that the fact that there have been no executions in California since 1967 cannot detract from the very real fear in those condemned that they will be executed in the light of a resurgence of executions in the United States generally and recent enthusiasm and legislation in favour of the death penalty in California specifically.

The applicant complains in this respect that the 'assurance', that the United Kingdom's wish that he should not be executed will be brought to the Governor's attention, will only operate after he has completed all possible appeals and that in the interval he will be exposed to the rigours of the death row phenomenon.

In addition, the applicant complains that he has been denied the opportunity to cross-examine the sole witness against him. On the basis of this testimony his extradition is sought. Under Section 10 of the 1970 Extradition Act, under English law, the magistrate is not required to decide upon the merits of the criminal charges against a fugitive as such, but he is required to decide whether the evidence adduced amounts to prima facie evidence of the commission of the offences charged. In these circumstances, it is argued that the right provided under Art. 6 (3)(d) applies to extradition proceedings and the failure of the magistrate to make the witness against the applicant available for cross-examination was in violation of that right.

According to the Commission's case-law, and most recently its decision in *X. v. Ireland* (Application N° 9742/82) it has affirmed that the applicability of Art. 6 to extradition proceedings remains an open question.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 13 July 1983 and registered on the same day. It was examined by the Commission on 14 July 1983, when notice of it was given to the respondent Government pursuant to Rule 42 (2)(b) of the Rules of Procedure, and the respondent Government was invited to submit observations on its admissibility and merits before 2 September 1983. On 10 August 1983 the respondent Government requested an extension for the submission of the observations, which was granted by the President of the Commission until 15 September 1983. The observations were submitted on 21 September 1983. The applicant was invited to submit observations in reply before 5 November 1983. On 2 November 1983 the applicant's representative requested an extension until 14 November 1983 in the time limit for the submission of these observations to enable legal opinions to be sought in the United States. This extension was granted on the same day and the observations were received on 14 November 1983.

On 14 July 1983 the Commission also indicated to the respondent Government, pursuant to Rule 36 of the Rules of Procedure, that it would be desirable in the interests of the parties and the proper conduct of the proceedings before the Commission that the applicant should not be extradited to the United States of America before 14 October 1983. This indication was renewed on 14 October 1983 until 15 November 1983, pending receipt of the applicant's observations in reply to those of the respondent Government. On 14 November 1983 the Commission decided to extend the indication under Rule 36 of the Rules of Procedure until 19 November 1983 to enable the applicant's observations to be considered.

On 12 November 1983 the Commission resumed its examination of the application and decided in accordance with Rule 42 (2)(a) of its Rules of Procedure to request the respondent Government to inform the Commission before 12 December 1983 whether they would be prepared to seek a better assurance from the United

States authorities of the type referred to in the applicant's submissions and extended the indication under Rule 36 of the Rules of Procedure until 17 December 1983.

On 13 December 1983 the respondent Government informed the Commission by telephone that they were informing the United States' authorities of the further points made on the applicant's behalf, but that they did not consider the question of assurances as relevant under the Convention. They indicated that they wished to maintain the momentum of the application and agreed to defer removal of the applicant until 17 December 1983 as requested.

On 15 December 1983 the Commission decided not to renew its indication under Rule 36 and to resume its examination of the admissibility and merits of the application on 5 March 1984.

On 6 February 1984 the applicant's representative informed the Secretary that the Secretary of State had signed the relevant warrant for the applicant's surrender to the United States' authorities. In view of the proximity of the Commission's resumption of its examination of the admissibility of the matter, the applicant's representative requested that the President give an indication under Rule 36 of the Rules of Procedure.

On 7 February 1984 the President declined to give an indication under Rule 36 and the parties were informed accordingly. On 5 March 1984 the applicant again requested an indication under Rule 36 of the Rules of Procedure invoking *inter alia*, Article 13 of the Convention and in the light of the unsuccessful outcome of the proceedings for habeas corpus. The Commission decided not to make an indication under Rule 36 on the same day.

SUBMISSIONS OF THE PARTIES

Submissions of the Respondent Government

1. *The Facts*

The respondent Government does not dispute the facts as submitted by the applicant.

2. *Domestic Law and Practice*: The United Kingdom

The Government first reject the allusion to a "practice" by the Federal Republic of Germany in relation to the extradition of persons facing the death penalty, by reference to merely one case, especially where insufficient is known of the circumstances relevant to that case to assess whether the alleged contrast is well-founded in fact.

In addition, the English courts have no jurisdiction to try the offences in respect of which the applicant's extradition has been sought. Although murder and manslaughter are one of the exceptional cases where the English courts have jurisdiction over offences committed abroad, this jurisdiction is generally limited to cases

where the offender holds a specified citizenship conferred by the United Kingdom. Hence aliens such as the applicant would be immune from prosecution in the United Kingdom and if fugitive offenders discovered in the United Kingdom could not be extradited they would generally have to be set at liberty.

Although immigration laws might provide some powers of removal which might be exercisable in respect of such people, where, as in the present case, the fugitive is a national of the requesting State, it is probable that the requesting State is the only place to which removal could be effected, since it is highly unlikely that any other country would be prepared to receive a fugitive. Hence substantially the same issue as in the present extradition context could be raised in the context of expulsion. The practical effect is therefore that if the applicant cannot be sent to the United States of America he would be effectively irremovable and would have to be released from custody and permitted to remain in the United Kingdom.

Extradition is universally premised on the basic proposition that it is in the interests of all nations that a criminal should be brought to justice and conversely not in the interests of any nation to become a haven for fugitive offenders. The possibility of irremovable fugitives in the United Kingdom would undermine the very foundations of extradition.

Furthermore, the objective of bringing criminals to justice implies that extradition arrangements between States should only be entered into where the standards of justice and penal administration obtaining in those States are acceptable one to the other and such as to secure justice for the fugitive offender. This policy is reflected in the Extradition Treaties entered into the United Kingdom, which must first be ratified, by being laid before Parliament.

A further significant feature of United Kingdom extradition law is the requirement that no extradition may take place unless evidence is furnished by the requesting State in due form which establishes a *prima facie* case against the fugitive. This provision of Section 10 of the Extradition Act 1970 seeks to ensure basic equality of treatment for all persons who come before the courts accused of an offence, wherever the offence in question may have been committed.

3. *Relevant Law and Practice*: United States of America

The respondent Government accept that the description of this law and practice as set out by the applicant, subject to pointing out the reversal of one of the decisions referred to, following the State of California's appeal to the Supreme Court of the United States, which, on 6 July 1983 reinstated a death penalty, which had previously been reversed by the Supreme Court of California.

The respondent Government refer to the prohibition in the Eighth Amendment to the Constitution of the United States of "cruel and unusual punishments", an

almost identical prohibition being contained in the Constitution of the State of California, Article 1, Section 17, which provides that:

"Cruel or unusual punishments may not be inflicted or excessive fines imposed".

The parallel to Art. 3 of the Convention itself is evident, but equally significant is the interpretation given to this provision by the State courts and the United States' Supreme Court. The latter has held in particular that any penalty must accord with "the dignity of man" (*Propp v. Dulles* 356 U.S. 86, 100 (1958)) and the Court has shown itself willing to examine whether the punishment is disproportionate to the crime in respect of which it is imposed.

The California Supreme Court has shown a similarly dynamic approach in examining proportionality and has indicated a preparedness to consider an argument for relief based on the proposition that lengthy incarceration prior to proposed execution might itself constitute "cruel or unusual punishment" (*People v. Anderson* (1972) 6 COL.3d 628, 649-650).

With regard to the time spent pending appeal, the law and practice of California appear to be designed to minimise any period which might contribute to delay, so far as the courts and the prosecuting authorities are concerned. The law of California provides that all death penalty cases on appeal must go direct to the Supreme Court of the State, bypassing the opportunities which would otherwise exist for intermediate appellate court reviews. In addition, as a matter of policy, the Attorney General of California assigns high priority to death penalty cases and whenever possible files the State's brief within 30 days of the filing of the defendant's brief on appeal. To facilitate this, the Attorney handling the case is relieved of all other assignments in order to devote full time to the preparation of the State's brief. In addition, Section 190.6 of the California Penal Code requires that decisions of appeal to the California Supreme Court shall be made within 150 days of the completion of the entire record by the sentencing court.

With regard to the question of the assurances, and the commutation of the death penalty, if imposed on the applicant, the respondent Government point out that it would be improper for the prosecuting authorities to give an assurance prior to extradition, that they would not seek to obtain the death penalty for the offences in question, if the applicant were convicted. This impropriety would be two-fold: first such an assurance would infringe the discretion properly vested in the prosecutor as regards submissions as to sentencing (and would incidentally reward the applicant for his flight to the United Kingdom) and second, such an assurance would be contrary to statute and probably unconstitutional.

The relevant California statutes define specific types of cases to which the death penalty applies, multiple murders being one such case. These specific definitions were prompted by the decisions of the United States' Supreme Court (*Furman v.*

Georgia 1972 408 U.S. 238). An assurance from the prosecuting authorities not to seek the death penalty, which would have the effect of singling out the applicant quite arbitrarily from the ambit of the death penalty provisions, would probably undermine therefore the existing compatibility of the specific statutory provisions with the Constitution.

Equally, for constitutional reasons, it is considered that the Governor could not, with propriety, give an assurance prior to extradition to commute any death sentence which might be imposed in respect of the applicant, since under Art. 5, Section 8 of the Constitution of California the Governor is empowered to grant clemency only "after sentence" and not prior to trial. Such a provision is grounded in common sense: the Governor ought not to be called upon to consider clemency until after all relevant facts have been fully developed during the trial process, sentence imposed and all avenues of judicial relief pursued. In these circumstances, any assurance given by the Governor in the terms referred to by the Commission might well be held to violate the Constitution of the State of California.

4. *Alleged violation of Article 3*

The applicant contends in essence that if extradited, convicted and sentenced to death, there is likely to be an inordinate delay between the time of sentencing, and the final determination of whether or not that sentence is to be implemented. Such a delay, coupled with the uncertainty of the outcome, would act on the applicant's mind in such a way as to subject him to inhuman and degrading treatment or punishment. With regard to the form of assurance obtained by the United Kingdom Government, this has been issued under cover of a diplomatic note from the Ambassador of the United States of America in London, in the form of an affidavit sworn by the Deputy Attorney General for the State of California, which affidavit was forwarded under the certificate of the Governor of California. The Deputy Attorney General swore that he had discussed the matter of the assurance with the authorised representative of the District Attorney of the County of San Francisco and that the latter had concurred in offering the assurance given.

Having regard to the constitutional and practical complexities affecting the nature and extent of any assurance that could properly be given, the Government are satisfied that they have in relation to the commutation of any death sentence in the circumstances obtained the best possible assurances. Furthermore, they are in no doubt that the assurance would be fulfilled. The affidavit was forwarded under the certificate of the Governor and is already part of the latter's file in the applicant's case. The affidavit refers to the prosecutor's concurrence in the assurance and it is understood that prior to joining in that assurance, the prosecutor agreed that in the event that the death penalty would be imposed on the applicant he would write to the Governor reminding him of the assurance and expressing the wishes of the United Kingdom. Finally, as a matter of statutory procedure and practice, whenever the Governor is seised of an application for clemency, the application is referred to

the investigatory branch of the Parole Board, which then reviews the case file in detail and solicits views from, among others, the prosecuting attorney. These views are then included in the report submitted to the Governor.

The respondent Government point out that the terms of Art. IV of the Treaty relied on by the applicant's representative are not mandatory on the United Kingdom, but merely permit the requested State to refuse extradition, whereas this would otherwise be impossible, if they are not satisfied with the assurances provided in the event of a possible imposition of the death penalty. Furthermore, Art. 2 of the Convention expressly allows the judicial imposition of the death penalty and hence, failing to obtain an assurance that the penalty will not be carried out in any particular case can never of itself constitute a violation of the Convention. By analogy, the respondent Government refer to the Commission's decision on the admissibility of Application N° 7994/77, *Kotälla v. the Netherlands* (D.R. 14, p 238).

The Government also refer to the practice of the Commission concerning acts of grace (e.g. pardons, parole, etc.) which have been consistently regarded as outside the scope of the Convention (e.g. *X. v. United Kingdom*, Application N° 4103/69, Coll. 36 p 61), and submit that since the question of commutation of sentence is outside the scope of the Convention, failure to obtain a particular assurance in that respect must also fall outside its scope.

5. *The applicant is not a victim*

With regard to the question whether the applicant's extradition in the face of the possibility of a prolonged period on "death row" in the event of his conviction and sentence to death, raises an issue under Art. 3 of the Convention, the Government refer to the Commission's previous case-law which has established that a person's extradition may exceptionally give rise to such an issue where extradition is contemplated to a particular country in which "due to the very nature of the regime of that country or to a particular situation in that country, basic human rights such as are guaranteed by the Convention might be either grossly violated or entirely suppressed. (*X. v. the Federal Republic of Germany*, Application N° 1802/62, Yearbook VI, p. 462 at 480), a view recently affirmed in *X. v. Switzerland* (D.R. 24 p.205). These decisions appear to be founded upon the principle that:

"Although extradition and the right of asylum are not as such among the matters governed by the Convention ... the contracting States have nevertheless accepted to restrict the free exercise of their powers under general international law, including the power to control the entry and exit of aliens, to the extent and within the limits of the obligations which they have assumed under the Convention". (*Application N° 2143/64*, Yearbook VII, 314 at 328).

The respondent Government submit for the reasons set out below that the Convention does not impose any such obligation and invites the Commission to depart from its previous case-law to this extent.

In order to introduce an application there must be a victim within the meaning of Art. 25 of the Convention. This concept implies the existence of facts which, at the time the application was made, disclose that a violation of the Convention has been or is being perpetrated. Where a breach of Art. 3 is alleged to flow from an expulsion, the facts upon which the alleged violation is ultimately premised have yet to occur: the allegation is based on the expectation that certain events will occur. The respondent Government submit that because such allegation is derived from assumptions rather than fact, and because those assumptions inevitably involve substantial uncertainty, it represents a distortion of the text of the Convention to regard applicants in such cases "as victims".

In this respect the respondent Government point out that only once has the Court held the view that a person could be a "victim" without demonstrating that concrete measures affecting him personally violate the provisions of the Convention, namely in the *Klass* case, where the measures involve secret surveillance which the applicant was therefore unable to demonstrate affected him, although there was no doubt of their existence at the time the application was made. The circumstances of the present case are not analogous. Further, in the case of *Ireland v. the United Kingdom* (para 161 of the Judgment) the Court specifically considered the standard of proof to be adopted when evaluating material which forms the basis of an allegation under Art. 3 and concluded that the correct standard was whether the material evidenced "beyond a reasonable doubt" the violation alleged. That standard cannot be met when the material in question consists of assumptions about future events.

In the present case the Government point out the various assumptions which must be made to lead to circumstances which might give rise to a breach of Art. 3, and submit that these assumptions about the course of future events are so substantial and involve such uncertainties that the applicant cannot be regarded as a victim for the purposes of Art. 25 of the Convention. Nor can the material relied upon to substantiate the allegation of a breach of Art. 3 be regarded as proven "beyond a reasonable doubt" based as it is upon assumption and hypothesis.

In addition, the respondent Government contend that where the alleged violation is ultimately based upon anticipated events taking place in a non-contracting State, the Commission lacks competence *ratione loci* to determine the application. Whereas the Commission has previously justified its assumption of competence on the basis that the contracting State contributes to a breach of Art. 3 of the Convention, the Government invite the Commission to re-examine this position. In reality the "contributory act" in returning an offender is of no significance in Convention terms, unless it is related to the conditions which obtain in the receiving non-contracting State. It is the circumstances or anticipated circumstances which prevail in the latter State which colour and lend significance to the contributory act. It is therefore essentially the behaviour of the non-contracting State which falls to be measured against the guarantees of protection afforded by the Convention. Yet, that State will have no formal standing before the Commission or the Court and will thus

have no opportunity to represent its views fully. Nor can it be expected that either the applicant, the contracting State involved or the Commission or Court will independently have comprehensive access to all relevant information such as will enable a reliable and objective measure to be made. Such a measure is even more approximate where the application is based on allegations and expectation that certain events will occur where their occurrence is far from inevitable. Thus the reality behind the "contributory act" theory is to base the culpability of a contracting State on events outside its jurisdiction over which it has no control and of which it has no first-hand knowledge or experience and which events may never even take place. In the Government's view this situation is fundamentally at odds with that envisaged in Art. 1 of the Convention. By this provision those who framed the Convention clearly contemplated that possibilities would only be engaged by matters over which the State had actual or ostensible control and first-hand knowledge. Such is not the case in allegations of breach of Art. 3 founded upon expulsions and extraditions.

The present case particularly clearly illustrates the unsatisfactory consequences of an assumption of competence, since the acts said to constitute a violation of Art. 3 would all take place outside the jurisdiction of the United Kingdom, if they take place at all. The United Kingdom has no first-hand knowledge of the issues of the United States law and practice alleged and the United States is not a party to the Convention or able to present its views to the Commission. Moreover, the essence of the Art. 3 allegation is mis-conceived since the substance of the allegation is both anticipated and justifiable in terms of Art. 2 of the Convention. Although the applicant complains of the interval and uncertainty occasioned by the imposition of the death sentence, some such interval and uncertainty is necessarily to be tolerated, having regard to the terms of Art. 2, which implicitly sanctions the existence of an interval between the imposition and final determination of such a sentence, which is inevitable. Where such an interval is increased by virtue of the existence and pursuit of a right of appeal, it is also sanctioned, since the opening words of Art. 2 are "Everyone's right to life shall be protected by law", and a right of appeal or petition for clemency will clearly fall within the scope of this provision. Hence mental anguish brought about by the lapse of time during such appeal or clemency plea cannot constitute inhuman and degrading treatment or punishment. In any event it is difficult to see how a period of detention during which an applicant pursues all avenues to challenge a lawful sentence can be held merely for the reason of the uncertainty of the outcome, to constitute inhuman and degrading treatment in the sense in which those terms have been interpreted by the Commission and the Court.

Nevertheless, if the Commission adheres to its previous analysis of the relevance of Art. 3 in such cases, the present application is still manifestly ill-founded. The applicant cannot show that "due to the very nature of the regime" in the United States of America in general or the State of California in particular or

“to a particular situation” in that country or State, the rights guaranteed by Art. 3 of the Convention “might be either grossly violated or entirely suppressed”.

The evidence so far adduced has not disclosed a possibility, let alone a probability, of a gross violation or entire suppression of the standards implicit in Art. 3 of the Convention. The matters complained of derive from a complex of procedures designed to protect human life, such protection being the cornerstone of the protection of all other rights. The applicant's allegation would presumably be unsustainable if it were mandatory to carry out the death sentence within 7 days of its imposition. Such wooden inflexibility is in marked contrast to the fundamental emphasis given to the life and dignity of man under American law, where the courts are constantly vigilant to reinforce that emphasis.

Having regard to the dynamic approach taken by the courts in the United States and to the network of constitutional provisions which exist to safeguard the individual to which the courts may refer, it is submitted that the allegation made by the applicant fails to disclose any appearance of a violation of the Convention. That the system may be capable of refinement is a matter for consideration by the national authorities, not the Commission or the Court.

6. *Under Art. 6 of the Convention*

With regard to the applicant's complaint that he was unable to cross-examine the witness against him at his committal, the Government contend that the complaint is manifestly ill-founded.

The specific guarantees of Art. 6(3) of the Convention must be examined in the context of the general entitlement to a fair and public hearing which is protected by Art. 6(1), and must usually be considered by reference to the criminal proceedings as a whole (Application N° 8303/79, D.R. 22, p147). Due to this perspective the committal proceedings for extradition can be seen as a preliminary step in the criminal process and it would be wholly inappropriate to accord the full panoply of rights contemplated in Art. 6 to an accused at committal proceedings.

This view is supported by the underlying principles and object of extradition, to deny fugitive offenders a safe haven and to facilitate their return to a jurisdiction where they may be tried for the offence which prompted their flight. The role of the requested State, without jurisdiction to try the offence, is necessarily limited and the preliminary nature of the committal proceedings is self-evident. Whereas the United Kingdom may be the only member State of the Council of Europe which insists that a *prima facie* case be made against the alleged offender, it is a common limitation on requested States that they are unable to compel the attendance of witnesses who are probably aliens resident abroad.

Article 12 of the European Convention on Extradition makes provision for extradition requests to be supported by documentary evidence only, no mention being

made of the attendance of witnesses, and it must be assumed that that Convention and the Convention on Human Rights must be construed comparatively.

Furthermore, the fugitive offender is protected by the terms of Art. 5(4) of the Convention and is thereby able to challenge the validity of his detention pending extradition. Such proceedings are not intended to be subject to the stricter requirements of Art. 6.

It follows that this aspect of the application is inadmissible.

The applicant's submissions in reply

1. Introduction

The applicant's observations are very substantial and voluminous and include an opinion on the California constitutional position submitted on behalf of the California Attorneys for Criminal Justice and the National Association of Criminal Defence Counsel, together with detailed submissions by Colin Nicholls Q.C. in reply to the Government's observations. They may be summarised as follows:

2. Domestic law and practice: the United Kingdom

The applicant does not dispute that the English courts have no jurisdiction to try him in respect of the offences for which his extradition has been requested and that it is not in the interests of any nation to become a haven for criminals. He points out however that the United Kingdom does not enter into extradition arrangements with states whose standards of justice and penal administration are not acceptable to it, and that in the case of those states with whom it does make arrangements, it reserves a discretion not to extradite. The applicant contends that the United Kingdom Government should provide the Commission with full details of cases where the Secretary of State has refused to surrender fugitives in the exercise of this discretion, and the principles on which such refusals have been based.

The applicant contends that the test applied should be whether, having regard to all the circumstances, it would be unjust or oppressive to return him.

3. Domestic law and practice: the United States of America

The applicant contends:

A. that the prohibition against "cruel and unusual punishment" (under the United States and California constitutions) would not operate to protect him from the treatment of which he complains;

and

B. that no remedy is available in fact in the United States against the inordinate slowness of the automatic appeal proceedings which cause the death row phenomenon;

and

- C. that a binding assurance could be given by the Attorney General of California not to seek the death sentence against the applicant without infringing Californian or United States constitutional principles;

and

- D. that the assurance offered to the United Kingdom Government would in any event not operate to prevent the applicant from being exposed to the death row phenomenon and hence the subject matter of his complaint.

A. The available remedies in the United States

The respondent Government have alleged that constitutional remedies available in the United States would enable the applicant to challenge his detention on "death row". The applicant suggests that it is inconceivable that in the last ten years, when more than a thousand prisoners in the United States have been subject to such treatment, the legal ingenuity of all those prisoners' legal advisers has wholly failed to secure to those prisoners the protection which the respondent Government consider that the applicant could obtain under American law. No "death row" prisoner has successfully challenged the "death row" phenomenon before the American courts on the basis alleged by the respondent Government.

B. The length of time spent awaiting appeal

The respondent Government contend that the law of California provides procedural guarantees to ensure the speedy consideration of appeals in capital cases. Nevertheless the applicant submits that the Commission need only consider the actual delays which have consistently occurred in California to appreciate that the law and practice alleged does not prevent the existence of substantial delays in the judicial process. The appeal procedure in such cases to the California Supreme Court is automatic. Applications by prisoners on death row to waive this right have been expressly refused (*Massie v. Summer*, 101S.Ct. 899). Further opportunities for petition to the United State Supreme Court and for petitions of habeas corpus through the Federal District Courts are subsequently available to applicants if they so wish. The appelland closest to exhaustion of these remedies, one Harris, has been on death row since May 1979 and his appeal, pending before the US Supreme Court, is expected to be decided in mid to late 1984. It was in fact determined in February 1984.

A backlog of cases is arising before the California Supreme Court, notwithstanding the success of a number of these appeals. Eight death sentences entered in 1979 have not yet been reviewed, nor have 21 entered in 1980 and any entered in subsequent years have been reviewed, totalling a further 116. A contributory factor to this delay is the extreme difficulty of finding competent defence counsel prepared to accept briefs of the magnitude involved in capital cases in the light of the comparatively low remuneration of this work. Thus as of 21 October 1983 at least

23 inmates on California death row had not received appointed counsel, although at least five of these had been on death row for more than seven months.

C. The constitutionality of an assurance by the Attorney General not to seek the death penalty

The respondent Government have contended that it might be unconstitutional for an assurance to be given that the death penalty would not be imposed on the applicant prior to his trial and conviction. The applicant submits that the California Attorney General has the authority to make a binding pledge that the death penalty will not be sought by the local District Attorney, thereby assuring that it will not be imposed. In particular this could be achieved by way of analogy to the practice of "plea bargaining", on which no restraints have been imposed either by California or Federal Constitutional decisions. The US Supreme Court has repeatedly upheld the authority of a prosecutor to reduce the charges against an accused in exchange for the accused's agreement to plead guilty (*Corbitt v. New Jersey*, 439 US 212; *Bordenkircher v. Hages*, 434 US 357).

The California Penal Code expressly provides for plea bargaining and a plea bargain once accepted by the accused binds the prosecutor (eg. *Geisser v. the United States*, 513 s.2d 862, and *Santobello v. New York*, 404 US 257). The *Santobello* case related to a bargain where the prosecutor agreed to make no recommendation on sentence, but at the trial a different prosecutor appeared and recommended the maximum sentence. The US Supreme Court held that the plea bargaining required the judgment to be quashed and the case remitted to the trial court to decide whether the agreement should be specifically enforced, or rescinded in which case the appellant's guilty plea should be vacated.

In the present case the California Government through its prosecuting agents could promise not to seek the death penalty in the separate proceedings on sentencing which would follow a finding of guilt against the applicant. At the least the prosecutors could pledge to exert their "best efforts" to see that the death penalty was not imposed against the applicant; such a representation would leave the interpretation of the "plea bargain" to the California Courts, where the issues are best determined. Under California law, if the prosecutor does not seek the death penalty in the sentencing proceedings, such penalty may not be imposed. In such a case, if the jury finds the accused guilty of charges sufficient to warrant the death penalty, a sentence of life imprisonment without possibility of parole would be entered. No automatic appeal to the California Supreme Court would then lie and then the death row phenomenon would not arise.

D. The inadequacy of the assurances obtained by the United Kingdom Government

The applicant contends that the present recommendation of the Attorney General to the Governor of California regarding the exercise of his authority to commute sentences is advisory and does not bind the Governor. The Governor's

energetic and frequent advocacy of the death penalty suggests that the "representation" as to the United Kingdom's wish would not be decisive in the applicant's case; the chances of the applicant being sentenced to death are therefore estimated at 99%. It would be open to the Governor to commute or modify the death sentence subject to Article 5 Section 8 of the California Constitution:

"the Governor may not grant a pardon or commutation to a person twice convicted of a felony except on a recommendation of a Supreme Court, four judges concurring".

It is likely that the California Supreme Court as presently constituted would so concur.

An indication of a willingness to commute or modify death sentence would not introduce an element of arbitrariness into the death penalty process, which might be unconstitutional. The clemency power is not intended to rectify legal errors or disproportionality among sentences which would be the basis of such a constitutional challenge. The clemency authority was granted to the executive precisely to permit the introduction of values not considered in the judicial process and this extend necessarily injects a degree of arbitrariness under the guise of mercy.

The present assurance is furthermore inadequate since, as envisaged, it would operate *after* exhaustion of the automatic appeal procedure before the California Supreme Court, and therefore *after* the applicant had spent a minimum of several years on the California death row. It would therefore not be effective to prevent the treatment about which the applicant complains.

4. The applicant as a victim

The applicant refers to the Klass judgment and recalls that the procedural provisions of the Convention must be applied in a manner which serves to make the system of individual applications efficacious. He invites the Commission to draw the consequences of the respondent Government's submissions if they were applied to the facts of the Amekrane case (Application No. 5961/72) had that application been made before extradition. The applicants contends that he runs a risk of being directly affected by a particular matter, the relevant elements in assessing the severity of this risk must be weighed by the Commission in the light of the submissions made by the applicant and the respondent Government. Specifically the Commission must consider the risk of the applicant being convicted, and sentenced to death, if extradited to California, and the likely duration of the automatic appeal which he would be deemed to have made during which he will be subjected to the psychological strain of death row. The applicant contends that his submissions establish *prima facie* proof of the likelihood of the imposition of the death sentence, and of the duration of any such appeal.

In order to establish the presence of such a risk, the applicant contends that he must show:

- a. that there is a serious risk that the alleged treatment will occur and
- b. should it occur that it will amount to prohibited treatment.

The applicant refers to the test proposed by the Court in *Ireland v. the United Kingdom*:

“Such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or similar un rebutted presumptions of fact. In this context the conduct of the parties when evidence is being obtained has to be taken into account”.

The Commission must therefore consider whether there is *prima facie* evidence of treatment of such severity as to raise an issue under Article 3. There may be difficulties in practice in such an assessment where it involves the likely course of future events, however certain treatment is so severe that it must fall *per se* within Article 3. It is submitted that a delay of five years or more between the imposition of carrying out of a death sentence is *per se* inhuman and degrading treatment and punishment within the meaning of Article 3.

5. Alleged violation of Article 6

The applicant refers to the Commission's decision of admissibility of Application No. 7945/77 (*X. v. Norway*, D.R. 14 p. 228) which recognised that, although examination of proceedings under Article 6 can only be decided by reference to the proceedings as a whole, a particular aspect of this proceeding may be so decisive as to allow the fairness of the procedure to be challenged at an early stage.

The applicant contends that extradition proceedings under English law are criminal proceedings in their own right and have consequences which are decisive for the applicant, the decision of the magistrate determining issues of law and fact which are within the meaning of the term “*bien fondé*” which is recognised in the French text of Article 6. The Court has held in the *Delcourt* case that proceedings in cassation:

“may prove decisive for the accused ... it would therefore be hard to imagine that ... (they) fall outside the scope of Article 6 (1)”.

Similarly in Application No. 8269/78 (*X v. Austria*) the Commission held that, although the decision of an Austrian court in question did not constitute a conviction in a formal sense, it nevertheless:

“could have certain adverse legal effects for the applicant ... in the circumstances the Commission considers that the case raises problems as to the application of Article 6 of the Convention.”

Furthermore, in normal criminal proceedings prior to a normal trial, defects in the committal proceedings may be corrected at the trial. In extradition proceedings this opportunity is not provided within the control exercised by the Convention, where the country of destination is not a party to the Convention. Finally, although Article 12 of the European Convention on extradition does not *require* states to set up courts to determine whether or not there was a prima facie case against an individual before extradition, it is submitted that where such courts are established the provisions of Article 6 should apply (Delcourt case, *mutatis mutandis*). In addition the fact that the guarantees of Article 5 apply to the applicant's detention pending deportation does not of itself exclude the operation of Article 6 in addition.

6. Motion

The applicant contends that he has thereby established a prima facie case warranting further examination by the Commission under Rules 28 and 42 of its Rules of Procedure and/or that the case be declared admissible.

THE LAW

1. The applicant complains that his extradition to California would amount to inhuman and degrading treatment contrary to Article 3 of the Convention since, if extradited, he would be tried for two counts of murder and one of attempt, and would very probably be convicted and sentenced to death. The applicant does not contend that the death penalty as such would constitute inhuman and degrading treatment contrary to Article 3; he argues however that the circumstances surrounding the implementation of such a death penalty, and in particular the "death row" phenomenon, of excessive delay during a prolonged appeal procedure lasting several years, during which he would be gripped with uncertainty as to the outcome of his appeal and therefore his fate, would constitute inhuman and degrading treatment.

The respondent Government contend that the applicant cannot claim to be a victim of a violation of the Convention, first because the matters which might form the basis of an alleged breach of the Convention are too remote and uncertain, and secondly because the Commission lacks competence *ratione loci* to determine the application, since any acts of the respondent Government are insufficiently directly contributory to the circumstances which it is alleged might give rise to a violation of Article 3.

2. The applicant as a victim

The Commission recalls first its case law in relation to the interpretation of the concept of a "victim" under Article 25 (1) of the Convention. In accordance with this case law, an applicant satisfies the requirements of Article 25 (1) of the Convention if he can claim that he will suffer or has suffered a violation "by one of the High Contracting Parties" of the rights set out in the Convention. It is therefore necessary for the applicant to show State responsibility for the matters about which

he complains and that those matters relate to the alleged violation of one of the rights contained in the Convention.

In the present case the applicant contends that his extradition from the United Kingdom to the United States of America would, in the special circumstances of his case, give rise to circumstances which would be contrary to Article 3. The applicant is presently detained under the Extradition Acts 1870-1935, by the respondent Government, and is subject to their authority. His extradition to California has been formally requested by the Government of the United States and his surrender to the authorities of the United States, if it occurs, will be an act of the respondent Government.

Furthermore, the applicant's surrender and extradition is imminent. The Secretary of State has signed the relevant documents authorising the applicant's surrender, although this has been temporarily stayed by the proceedings in the United Kingdom to challenge the exercise of discretion by the Secretary of State as unlawful. In these circumstances the applicant is immediately and directly affected by the risk of his extradition.

He contends that the consequences of this extradition will be to result in inhuman and degrading treatment contrary to Article 3. In these circumstances, faced with an imminent act of the executive the consequences of which for the applicant will allegedly expose him to Article 3 treatment, the Commission finds that the applicant is able to claim to be a victim of an alleged violation of Article 3. It remains for the Commission to consider whether or not the matters alleged by the applicant to constitute treatment contrary to Article 3 are of such seriousness as to fall within the ambit of that provision.

3. The respondent Government's responsibility

The respondent Government nevertheless contend that the application is incompatible *ratione loci*, since the matters complained of by the applicant which would constitute the alleged breach of Article 3 of the Convention would arise in and be the sole responsibility of a non-Contracting Party to the Convention, namely the United States of America. The respondent Government contend that, to the extent that the United Kingdom is involved at all in contributing to the circumstances which would constitute the applicant's complaint, this contribution is insufficiently proximate for it to engage State responsibility.

The Commission has recognised in its previous case law that a person's extradition may, exceptionally, give rise to issues under Article 3 of the Convention where extradition is contemplated to a country in which "due to the very nature of the regime of that country or to a particular situation in that country, basic human rights, such as are guaranteed by the Convention, might be either grossly violated or entirely suppressed" (X. against the Federal Republic of Germany, Application

No. 1802/62, YB 6 p 462 at 480, *Altun v. Federal Republic of Germany*, Application No. 10308/83, D.R. 36 p. 209). The Commission has further recognised that :

“although extradition and the right of asylum are not, as such, among the matters governed by the Convention ... the Contracting States have nevertheless accepted to restrict the free exercise of their powers under general and international law, including the power to control the entry and exit of aliens, to the extent and within the limits of the obligations which they have assumed under the Convention” (Application No. 2143/64, YB7 p 314 at 328).

According to the Commission case-law concerning cases of extradition under Article 3 of the Convention, the only factor which is relevant is the existence of an objective danger for the person extradited. Establishing that such a danger exists does not necessarily imply State responsibility upon the requesting State ; in certain cases the Commission has taken into account dangers which were not due to acts of Government authorities in the country of destination (Applications No. 7216/75, DR 5 p 137, No. 8581/79 unpublished).

If conditions in a country are such that the risk of serious treatment and the severity of that treatment fall within the scope of Article 3 of the Convention, a decision to deport, extradite or expel an individual to face such conditions incurs the responsibility under Article 1 of the Convention of the contracting State which so decides (*Altun v. Federal Republic of Germany*, Application No. 10308/83, The Law paras 5-10, D.R. 36, p. 209 at p. 219-220).

The Commission affirms this interpretation which is based upon the unqualified terms of Article 3 of the Convention, and the requirement which this read in conjunction with Article 1 imposes upon the Contracting Parties to the Convention to protect “everyone within their jurisdiction” from the real risk of such treatment, in the light of its irremediable nature.

4. Whether the death row phenomenon is precluded from constituting inhuman treatment by Article 2 (1)

The respondent Government have further contended that the “death row phenomenon”, i.e. the delay that the applicant complains of in the event of his being convicted and sentenced to death, during the appeals proceedings which will inevitably arise from such a conviction and sentence and will inevitably delay its implementation, is not capable of constituting inhuman or degrading treatment of punishment contrary to Article 3 of the Convention in the light of the provisions of Article 2. Article 2 (1) of the Convention provides :

“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.”

The respondent Government point out that the second sentence of Article 2 (1) of the Convention expressly provides for the imposition of the death sentence by a court, following conviction for a crime for which that penalty is provided by law. They submit that the reference to the provisions of "law" in the context of a criminal conviction necessarily implies a judicial system for the application of the death penalty, which contains proper guarantees to ensure compliance with this provision, including in appropriate cases a system of appeals, to ensure that the imposition of the death penalty cannot arise arbitrarily.

They point out that in the United States of America, and specifically in California, such safeguards do indeed exist, and regulate the operation of the death penalty in the context of a criminal conviction with great precision. However, a system which, whilst granting such legal guarantees and appeals did not give those appeals suspensive effect, would fail to take account of the nature of the death penalty as an ultimate sanction. The respondent Government contend that it follows that any delay arising as a result of the opportunities for appeal and legal control of the imposition of a death penalty as a result of a conviction is implicitly foreseen by Article 2 (1) of the Convention, and thus cannot constitute inhuman and degrading treatment contrary to Article 3.

The Commission cannot accept this contention. Whilst it acknowledges that the Convention must be read as one document, its respective provisions must be given appropriate weight where there may be implicit overlap, and the Convention organs must be reluctant to draw inferences from one text which would restrict the express terms of another.

As both the Court and the Commission have recognised, Article 3 is not subject to any qualification. Its terms are bald and absolute. This fundamental aspect of Article 3 reflects its key position in the structure of the rights of the Convention, and is further illustrated by the terms of Article 15 (2), which permit no derogation from it even in time of war or other public emergency threatening the life of the nation.

In these circumstances the Commission considers that notwithstanding the terms of Article 2 (1), it cannot be excluded that the circumstances surrounding the protection of one of the other rights contained in the Convention might give rise to an issue under Article 3.

5. The nature of the treatment

(a) The risk of exposure

The Commission must therefore consider the nature of the treatment which the applicant complains he would be subjected to in the event of his extradition, and the severity of the risk thereby arising, in order to assess whether or not it attains a sufficient degree of seriousness to raise an issue under Article 3 of the Convention.

The Commission must consider first the degree of risk which the applicant runs of being convicted of the offences with which he is charged, and of being sentenced to the death penalty. The respondent Government have contended that it would be improper to prejudge the outcome of either the proceedings to establish criminal liability, or those relating to the penalty, and that this degree of uncertainty has the result that the applicant is not exposed to a real risk of treatment contrary to Article 3. The applicant contends that in the light of the evidence which is available to the prosecution, he is highly likely to be convicted of the offences with which he is charged. As far as the question of sentence is concerned, this is regulated by specific provisions of the Californian Penal Code. The Code specifically identifies "special circumstances" which must be taken into account by a jury in determining the penalty to be imposed, including the balancing assessment of mitigating and aggravating circumstances which the jury must undertake before deciding on sentence. He contends that in the light of the circumstances surrounding his alleged involvement with the offences in question, and his previous criminal record and suspected involvement in the organisation known as "Tribal Thumb", it is extremely likely that he will be convicted and sentenced to death. The opinion submitted by the applicant's representative and prepared by a California criminal lawyer is to the effect that it is 99 per cent certain that the applicant will be convicted and sentenced to death.

On the basis of the information before it, the Commission considers the probability that the applicant, if convicted, will be sentenced to death is high, although it cannot prejudge this issue which will depend upon the outcome of the proceedings. In any case, the Commission finds that the risk is sufficiently real and immediate to justify its examination of other aspects of the seriousness of the treatment to which the applicant contends that he will be subjected.

(b) the length and cause of delays

The applicant's complaint centres upon the inevitable psychological tension and uncertainty which will be generated during the appeal procedure from a decision imposing the death penalty on him. He contends that the length of such proceedings and the vital nature of their outcome will create circumstances which amount to inhuman and degrading treatment or punishment. The Commission notes first that the appeal procedure from a sentence of death in California is automatic. This is provided by sub-division 7 of Section 1181 of the California Penal Code, by virtue of which the defendant is deemed to have made an application for the modification of the verdict where it is a verdict of death. In ruling on such an application, a judge shall review the evidence, taking into account and being guided by the aggravating and mitigating circumstances referred in Section 190.3 California Penal Code and shall decide whether the jury's findings and verdict are contrary to law or to the evidence presented. There is a further automatic appeal by virtue of sub-division (b) of Section 239 of the Code.

It appears from the submissions of the parties that it is not open to the applicant to challenge the making of such an application for a modification of the verdict, which will proceed with or without his consent and it is not disputed that the number of these automatic appeals and their complexity, cause delay. The applicant has further submitted that the absence of qualified counsel who are prepared to undertake the defence of capital offenders in relation to these proceedings causes further delays over and above those which are inherent in the automatic appeal system.

The overall delays are severe. From figures submitted by the applicant, as of March 1983, 115 persons are awaiting execution in California, and 1147 in the United States as a whole. A significant number of offenders have been sentenced to death since the re-introduction of the death penalty in California in 1977. Two of those who had their sentences affirmed by the Supreme Court, had waited respectively nine and 23 months. Four and a half years later neither of them had been executed apparently as a result of Federal appeals, although both were still liable for execution. Of the remaining appellants on "death row", one has been waiting five years for the result of his appeal in California, which has not yet been decided. Since 1981, when 44 people were waiting on death row for the outcome of their appeals in California, which had not yet been determined, decisions have been reached in very few cases, and in one, Ramos, whose sentence was reversed by the California Supreme Court, the death penalty was reimposed on appeal by the State of California to the Supreme Court of the United States, on 6 July 1983. The offences in respect of which Ramos was tried arose in June 1979. According to the applicant's submissions the average amount of time between the entry of a death judgment and its reversal, vacation or affirmation by the Supreme Court of California has up to now been two years, although several cases required four years for their resolution. However in the applicant's contention this period is lengthening, because there is a growing backlog of accumulated cases awaiting judgment from the Supreme Court of California.

6. The assurance obtained

The respondent Government contend that, notwithstanding the length of time which appeals may take to be determined at the "automatic" stage of appeals, before the Supreme Court of California, in the applicant's case he will not be exposed to the psychological anguish of the death row phenomenon, owing to the form of assurance which the United Kingdom Government has obtained from the competent authorities in the United States. The respondent Government contend that the assurance (set out above), will have the effect, that if the applicant is convicted and the death sentence is imposed on him, the assurance would be fulfilled, and he would not be executed.

The affidavit of the Deputy Attorney General of California containing the assurance was forwarded under the certificate of the Governor of the State of California and is already part of the Governor's file in the applicant's case. The affidavit recalls the prosecutor's concurrence in the assurance, and the assurance and

the associated affidavit would form part of the file which would be referred to the Governor if an application for clemency is made. The file would be examined by a parole board which would report to the Governor, whose decision on a reprieve would be final.

The applicant has contended that the assurance that has been obtained does not comply with the requirements of Article IV of the extradition treaty between the United Kingdom and the United States, and would furthermore operate, if at all, after the applicant's appeals had been exhausted. He submits in addition that the value of the assurance given must be interpreted in the light of the fact that it would be open to the prosecuting authorities in California to undertake not to seek the death penalty in respect of the applicant and thereby to remove him from the death row phenomenon, since if the death penalty was not sought in the penalty proceedings, it could not be imposed.

The Commission notes first that the Convention contains no express provisions relating to the obtaining of assurances between states in the implementation of extradition arrangements. It recalls that the Commission's task in these cases, as in all other applications, is to examine whether or not the matters complained of by the applicant constitute the violation which the particular applicant alleges. It is therefore for the individual High Contracting Parties to decide what conditions should govern their extradition arrangements with other states, and the manner in which they are to ensure that they comply with the requirements of the Convention in the exercise of State responsibility in, *inter alia*, extradition matters.

It is clear that the undertaking which has been obtained by the United Kingdom Government will operate after the applicant has exhausted the avenues of appeal open to him at least in California, and possibly in the Federal jurisdiction of the United States as well. As such, the applicant contends that it fails to prevent the treatment about which he complains, *i.e.* the intolerable delay linked with the mental anguish of uncertainty as to the outcome of the appeals, which is the "death row phenomenon".

At the same time, the assurance which has been obtained has apparently been given in good faith, and originates from the Deputy Attorney General of California, having been certified by the Office of the Governor. The assurance forms part of the file relating to the applicant's case and must be considered in the event of a request for clemency by him. The Commission concludes that, although the full extent and value of the assurance must remain uncertain, part of this uncertainty derives from the fact that it is unknown at present whether or not the assurance will have to be relied upon, since the applicant has not yet been convicted or sentenced for the offences of which he is accused. The Commission must also recognise that the United Kingdom Government have sought and obtained these assurance in full consciousness of their obligations imposed under the terms of the Convention, which require the Government to seek such assurances (if any) as will ensure the avoidance of treatment contrary to Article 3 in the event of extradition.

The Commission cannot find that the assurances obtained have removed the risk of the applicant being exposed to the death row phenomenon. The assurances do not amount to a legal guarantee that the applicant, if sentenced to death, will have the death sentence commuted. However, in the light of the provisions of Article 2 (1) of the Convention, which expressly recognises the ending of life through the death penalty following appropriate criminal conviction, such an assurance cannot be expressly or implicitly required by the terms of Article 3. Just as the terms of Article 2 (1) of the Convention do not per se exclude the possibility that the death row phenomenon may constitute inhuman and degrading treatment, they have the further effect that the failure to seek a legally binding assurance that a death sentence, if imposed, will definitely be commuted, would not itself constitute treatment contrary to Article 3.

7. Assessment of seriousness

It therefore remains for the Commission to assess the effect of the anxiety to which the applicant will remain subject during his appeal proceedings, and the risk of his conviction, and thus whether the "death row phenomenon" does, on the facts of the present case, attain a degree of seriousness such as to involve treatment contrary to Article 3 of the Convention.

For the following reasons the Commission considers that, grave though the risk and the treatment which the applicant is likely to endure are, they do not attain the degree of seriousness envisaged by Article 3 of the Convention.

First the Commission notes the existence of complex and detailed measures to accelerate the appeal system in capital cases in California. This is reflected both in the priority assigned to capital cases in the District Attorney's Office, where counsel responsible for a capital case on appeal are relieved of all other responsibilities to be able to concentrate exclusively on the preparation of that appeal, and also in the formal time limit imposed on the Supreme Court by Section 190.6 of the Penal Code, requiring it to decide appeals within 150 days of the complete trial record being referred to it.

It is true that delays subsist in dealing with appeals under the automatic appeal procedure in California, but the Commission cannot lose sight of the momentous significance of these appeals for the particular appellant in each case, whose life depends upon the outcome. In these circumstances the tradition of the rule of law which underlies the principles of the Convention requires painstaking thoroughness in the examination of any case the effects of which will be so irremediably decisive for the appellant in question. Part of the delay about which the applicant inherently complains derives from a complex of procedures which are designed to protect human life, such protection providing the cornerstone for all other rights.

The Commission must also recognise a product of this emphasis on the protection of life and the dignity of man shown by the American courts, in that although the death penalty exists as a real possibility in California, the courts are constantly

vigilant to reinforce the emphasis of the protection of these basic values. The California Supreme Court indicated in the *People against Anderson* (493 P.2d 880) that it was willing to consider an argument to the effect that the delay in carrying out a death sentence might constitute a basis for relief from that sentence and that the death row phenomenon, if not the death penalty itself, might therefore be found to be cruel or unusual punishment contrary to the Californian or United States Constitutions. The applicant has pointed out that such an argument has not yet been successful in putting an end to the death row phenomenon. Nevertheless the Commission is conscious of the rapid developments in case law which are possible in a common law system. It notes that it is established that the death row phenomenon is now an arguable basis for alleging cruel or unusual punishment in the United States, and it cannot ignore the similarity between this concept and that of inhuman and degrading treatment under Article 3 of the Convention.

Furthermore it is significant that the applicant contends that the death row phenomenon is becoming worse, owing to the backlog of cases currently faced by the California Supreme Court. It appears from the statistics submitted by the applicant that no cases where a death penalty was imposed at the penalty stage of proceedings in 1981 or subsequently have yet had their automatic appeals determined by the Supreme Court of California. This suggests that there is a growing backlog of cases, and that the average period of time which will be spent by death row inmates in awaiting the outcome of their automatic appeals in California is likely to be extended, unless measures are taken to accelerate these proceedings further. However this very submission suggests that, if these circumstances arise in a particular case, that appellant will have better grounds than hitherto for arguing before the Californian courts that the death row phenomenon constitutes cruel or unusual punishment.

This illustrates a further element in the assessment of the seriousness of the death row phenomenon in the context of Article 3, namely the uncertainty of whether the applicant will or will not be exposed to the death row at all. The Commission finds from the evidence which has been submitted to it that it must be regarded as likely, if convicted, that the applicant will be exposed to the death row phenomenon. However this cannot be presupposed as a fact, and it is significant that the applicant will have a fair trial conforming with guarantees equivalent to those contained in the Convention before any decision is reached which would result in his being on death row.

It is not the Commission's task in the present case to assess as a mathematical probability the likelihood of the applicant being exposed to the treatment about which he complains, but to examine the machinery of justice to which he will be subjected and to establish whether there are any aggravating factors which might indicate arbitrariness or unreasonableness in its operation. The Commission finds however from the material which has been submitted by the applicant, that capital cases are dealt with with particular vigilance to ensure their compliance with the standards of protection afforded by the Californian and United States Constitutions, in order to prevent arbitrariness. In these circumstances the Commission does not find that the

delays in the operation of the death penalty in California as they may apply to the applicant constitute a "particular situation" of the kind envisaged in Application No. 1802/62 (supra).

Finally the applicant has also alleged that the actual conditions of detention in which he will be placed, in the event of his conviction and sentence to death raise an issue under Article 3. The applicant has submitted reports in this connection, which reveals that the conditions of detention in death row in California may be severe.

It appears that death row inmates in California are detained in a separate section of the high security prison system. Nevertheless, despite the security provisions which apply, inmates appear to be allowed exercise outside their cells and the cells themselves are in certain cases better equipped and larger than those of long-term prisoners. Furthermore inmates have various recreational facilities and are provided with medical treatment, as well as having access to publications and periodicals. It follows that there is nothing to show that the conditions of detention of death row prisoners are so severe as to constitute a gravely aggravating aspect in assessing the seriousness of the applicant's complaints.

8. Conclusion

The Commission notes that one may see a certain disharmony between Articles 2 and 3 of the Convention. Whereas Article 3 prohibits all forms of inhuman and degrading treatment and punishment without qualification of any kind, the right to life is not protected in an absolute manner. Article 2 (1) expressly envisages the possibility of imposing the death penalty "in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".

Against this background the death row phenomenon presents a dilemma. On the one hand a prolonged appeal system generates acute anxiety over long periods owing to the uncertain, but possibly favourable, outcome of each successive appeal. On the other hand an acceleration of the system would result in earlier executions in cases where appeals were unsuccessful.

The essential purpose of the California appeal system is to ensure protection for the right to life and to prevent arbitrariness. Although the system is subject to severe delays, these delays themselves are subject to the controlling jurisdiction of the courts. In the present case the applicant has not been tried or convicted and his risk of exposure to death row is uncertain.

In the light of these reasons which have been developed above, the Commission finds that it has not been established that the treatment to which the applicant will be exposed, and the risk of his exposure to it, is so serious as to constitute inhuman or degrading treatment or punishment contrary to Article 3 of the Convention. It follows that this aspect of the application is manifestly ill-founded within the meaning of Article 27 (2) of the Convention.

9. Article 6

The applicant invokes Article 6 in relation to the proceedings concerning his extradition from the United Kingdom and contends that he has not been afforded the guarantees of Article 6 (3) (d) and specifically the opportunity to cross-examine the prosecution witness against him at the committal stage of the extradition proceedings. He points out that, whereas in normal trial proceedings in the United Kingdom, any mistake occurring at the committal stage could be rectified during the trial itself, in the present case the committal stage takes on an unique significance, since the applicant's trial will take place out of the jurisdiction of the United Kingdom.

The Commission recalls its decision on the admissibility of application No. 10227/82, H against Spain (1), where it considered whether extradition proceedings involved the "determination" of a criminal charge. It recognised that the word "determination" involve the full process of the examination of an individual's guilt or innocence of an offence. Since the proceedings in Spain did not involve an examination of the question of the applicant's guilt, but merely whether formal extradition requirements had been fulfilled, that application was declared inadmissible.

The present case also concerns extradition, but the Commission notes that the tasks of the Magistrates' Court included the assessment of whether or not there was, on the basis of the evidence, the outline of a case to answer against the applicant. This necessarily involved a certain, limited, examination of the issues which would be decisive in the applicant's ultime trial. Nevertheless, the Commission concludes that these proceedings did not in themselves form part of the determination of the applicant's guilt or innocence, which will be the subject of separate proceedings in the United States which may be expected to conform to standards of fairness equivalent to the requirements of Article 6, including the presumption of innocence, notwithstanding the committal proceedings. In these circumstances the Commission concludes that the committal proceedings did not form part of or constitute the determination of a criminal charge within the meaning of Article 6 of the Convention. This aspect of the applicant's complaint is accordingly incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 27 (2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

(1) See p. 93.