

# The Threshold of Inhuman and Degrading Treatment or Punishment

*Under which circumstances should extradition, expulsion, or return be refused?*



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## ABBREVIATIONS

CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HR Committee	Human Rights Committee
HRC	Human Rights Council
OHCHR	Office of the High Commissioner on Human Rights
OP2-ICCPR	Second Optional Protocol to the ICCPR
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly

## INTRODUCTION

The right to life is a fundamental human right which is established within international human rights law. This right is seen as ‘the cornerstone of all the other rights.’<sup>1</sup> It is based on the conviction that every human being has the inherent right to life. However, the use of the death penalty, also known as the capital punishment, is an exception to this right. Nonetheless, globally, the death penalty has been abolished in the majority of State Members of the United Nations (UN). In around 160 States the death penalty has been abolished *de jure* or *de facto*.<sup>2</sup> Member States of the Council of Europe (CoE) are taking a progressive role in the trend towards abolishment, as will be described further in chapter 1.<sup>3</sup> Such an abolishment is considered progress in the enjoyment of the right to life.<sup>4</sup> Nonetheless, on the contrary, in some States the scope of the death penalty has been expanded over the last years, for example in Algeria, Brunei Darussalam, Bahrain, Bangladesh, India, Maldives, Nigeria, Papua New Guinea, the Sudan and the United States of America.<sup>5</sup> Thus, there appear to be contradicting presumptions concerning the death penalty, between retentionist States and abolitionist States. Namely, the contradiction about whether the death penalty constitutes as a humane punishment. Considering these contradicting presumptions, an issue is raised when it concerns the extradition or transfer of individuals from an abolitionist State to a retentionist State. Since extradition or transfer could cause such an individual to face a capital punishment, while he or she was in the custody of a State that abolished such a punishment. However, international extradition mechanisms provide important state co-operation by surrendering fugitives accused of a crime within the territory of the requesting state.<sup>6</sup> Moreover, extradition, and other forms of transfer, play an important role to combat terrorism. Such a co-operative effort to combat terrorism has become an urgent task for Western governments.<sup>7</sup>

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<sup>1</sup> Schabas, W. A., 2014. The right to life. In Clapham, A., & Gaeta, P., 2014. The Oxford handbook of international law in armed conflict. Oxford University Press. 365-386, p. 366.

<sup>2</sup> A/HRC/27/26, Human Rights Council 2014, 27<sup>th</sup> session, Summary of the high-level panel discussion on the question of the death penalty - Report of the United Nations High Commissioner for Human Rights, 30 June 2014, p. 3.

<sup>3</sup> Council of Europe. *Chart of signatures and ratifications of Treaty 187. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances.* (2017), [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p\\_auth=usH6SjNw](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=usH6SjNw) [Visited June 6 2017]

<sup>4</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982, Adopted at the Sixteenth Session of the Human Rights Committee. para. 6.

<sup>5</sup> A/HRC/27/23, Human Rights Council 2014, 27<sup>th</sup> session, Question of the death penalty - Report of the Secretary-General, 30 June 2014, p. 5.

<sup>6</sup> Nanda, V. P., 1999. Bases for refusing international extradition requests-capital punishment and torture. *Fordham Int'l LJ*, 23, 1369-1396, p. 1369.

<sup>7</sup> Petersen, A. C., 1992. Extradition and the Political Offense Exception in the Suppression of Terrorism. *Indiana Law Journal*: Vol. 67: Iss. 3, Article 6. 767-796, p. 767.

However, the requested state should, under certain circumstances, refuse transfer. Such a refusal can be based upon the guarantee to protect the basic human rights of fugitives or refugees. Human rights as a ground for refusal is thus a protective measure, to prevent possible human rights violations.<sup>8</sup> More specifically, the European Court of Human Rights (ECtHR) states that possible human rights violations must be safeguarded when extradition is carried out and the death penalty may be imposed. Extradition, or other forms of transfer, may be barred on the grounds of articles 2, 3, 5, 6, and 8 of the European Convention on Human Rights (ECHR).<sup>9</sup> A person about to be extradited, could apply for interim measures under Rule 39 of the Rules of Court. By means of Rule 39, the ECtHR can postpone the extradition, until the Court is satisfied the defendant will not be subjected to any irreparable and serious violations of human rights, mostly concerning article 2 or 3.<sup>10</sup> Article 2 provides the right to life, as mentioned, and article 3 prohibits any human being to be subjected to torture or to inhuman or degrading treatment or punishment. However, due to present terrorist threats, certain Member States of the CoE, such as the United Kingdom, vow to make it easier to deport foreign suspect to gain control of security. UK prime minister Theresa May has stated that: “if human rights laws stop us from doing it [extradite or transfer], we will change those laws so we can do it.”<sup>11</sup> The United Nations Office of the High Commissioner for Human Rights (OHCHR) recognises this arising problem by stating: “the measures adopted by States to counter terrorism have themselves often posed serious challenges to human rights and the rule of law.”<sup>12</sup> The OHCHR acknowledges that States have extradited or transferred persons suspected of terrorist activities to countries where they could be subjected to torture or other human rights abuses. Therefore, such a State violated the international legal obligation of non-refoulement.<sup>13</sup> The principle of non-refoulement is incorporated in the Convention Relating to the Status of Refugees: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>14</sup> However,

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<sup>8</sup> Silvis, J., 2014. *Extradition and Human Rights Diplomatic assurances and Human Rights in the Extradition Context*. Lecture presented 20 May 2014, PC-OC meeting in Strasbourg/F. 1-18, p. 1.

<sup>9</sup> Silvis 2014, p. 1

<sup>10</sup> Silvis 2014, p. 2.

<sup>11</sup> Guardian, The., 2017. *May: I'll rip up human rights laws that impede new terror legislation*. Retrieved from: <https://www.theguardian.com/politics/2017/jun/06/theresa-may-rip-up-human-rights-laws-impede-new-terror-legislation> [Visited June 6 2017].

<sup>12</sup> UN Office of the High Commissioner for Human Rights (OHCHR), 2008, *Fact Sheet No. 32, Human Rights, Terrorism and Counter-terrorism*, July 2008, No. 32, p. 1

<sup>13</sup> UN Office of the High Commissioner for Human Rights (OHCHR), 2008, p. 1.

<sup>14</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, article 33(1).

this principle itself does not take into account other possible human rights violations, such as the provisions prohibited under article 3 of the ECHR.

Considering the serious threat of terrorism, and therefore the need and wish to extradite, expel, or return, but also the importance of safeguarding human rights, an analysis is needed under which circumstances human rights are violated, following extradition, expulsion or return. The contradicting issue about whether the death penalty is a humane punishment is called into question. Therefore, to fully comprehend under which circumstances a refusal of extradition should be upheld, the ECtHR gives guidance in their jurisprudence. By means of the rulings of the Court the following research question will be answered: What is the threshold of inhuman or degrading treatment or punishment and thus grounds for refusal of extradition, expulsion, or return, in cases concerning the death penalty?

The scope of article 3 has to be analysed thoroughly in order to comprehend to what extent the death penalty constitutes as inhuman or degrading treatment or punishment. In order to fully comprehend the role of the death penalty within international human rights law, the first chapter will provide a legal framework of the death penalty and its legality within human rights law. This chapter will include a short analysis of the meaning of the prohibition of torture or inhuman, or degrading treatment or punishment as well. After the legal framework, a thematic approach to the scope of article 3 of the ECHR will be provided, in order to comprehend under which circumstances extradition should be refused. Chapter 2 will provide whether the death row phenomenon constitutes as inhuman treatment or punishment. Chapter 3 will introduce the importance of a fair trial in cases concerning the death penalty, as well as the significance of the manner in which the death penalty is carried out. Finally, the fourth chapter will clarify how anguish and psychological suffering of a person awaiting the death penalty could constitute as inhuman treatment or punishment. By means of aforementioned findings, the research question will be answered.

## I LEGAL FRAMEWORK

In order to fully comprehend the scope of article 3 of the ECHR, first a descriptive analysis of the use of the death penalty within human rights law will be provided. This legal framework will provide an understanding of the different aspects of extradition cases in which the death penalty could be imposed.

### I.I International Legal Framework

A milestone document in the history of human rights is the Universal Declaration of Human Rights (UDHR), which was proclaimed by the United Nations General Assembly (UNGA) in 1948. According to its preamble, the rights present in the UDHR should be viewed as a common standard of achievement for all peoples and all nations.<sup>15</sup> Article 3 of the UDHR provides the right to life, by prescribing: “everyone has the right to life, liberty and security of person.”<sup>16</sup> Notable is the fact that the UDHR does not give any exceptions to this right. Therefore, the death penalty does not constitute a specific exception to the right to life within this international document. Furthermore, article 5 of the UDHR stipulates that: “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>17</sup> Although this document provides important guidelines concerning fundamental human rights, it is not a legally binding document.

Consequently, one should look at international treaties for legally binding regulations concerning the right to life. Such international regulations focused on the right to life can be found in treaties of the United Nations (UN). More specifically, the International Convention on Civil and Political Rights (ICCPR), which was adopted by the UNGA in 1966. Article 6 of the ICCPR provides the right to life, by prescribing that: “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” This provision does not exclude the death penalty as a legal punishment, considering the death penalty is not an arbitrary deprivation of life. Furthermore, the article also explicitly provides the exception to the right to life, by means of the sentence of death.<sup>18</sup> Therefore, primarily the death penalty is not seen as a human rights violation within international law.

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<sup>15</sup> A/RES/3/217, *Universal Declaration of Human Rights*, Adopted and proclaimed by the UN General Assembly Resolution of 10 December 1948.

<sup>16</sup> A/RES/3/217, *Universal Declaration of Human Rights*, 1948, art. 3.

<sup>17</sup> A/RES/3/217, *Universal Declaration of Human Rights*, 1948, art. 5.

<sup>18</sup> A/RES/21/2200, *International Covenant on Civil and Political Rights*, Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966.

Noteworthy however is that the last paragraph of article 6 of the ICCPR specifically mentions the abolition of the death penalty. This paragraph already gave way for the opportunity for Contracting States to abolish to death penalty in 1966. The incorporation of the possibility to abolish in article 6 of the ICCPR has been viewed as an indication that the abolishment of the death penalty was already desired in 1966.<sup>19</sup> Subsequently, the Second Optional Protocol to ICCPR (OP2-ICCPR) aims at the abolition of the death penalty. This Protocol was adopted by the UNGA in 1989. Article 1 specifically establishes that no one shall be executed.<sup>20</sup> This regulation is binding on every State which has ratified aforementioned Protocol.

Furthermore, the United Nations Human Rights Committee (HR Committee) has given a recommendation concerning the interpretation of this right in general comment No. 6 in 1982. The HR Committee found that although abolition is not mandatory, it is desirable. Consequently, the HR Committee stated: “all measures of abolition should be considered as progress in the enjoyment of the right to life.”<sup>21</sup> Thus, although the death penalty is not a violation of the right to life, the abolishment of the death penalty is seen as a positive trend within the international community.

Subsequently, in 2015, the United Nations Human Rights Council (HRC) explicitly argued that: “all measures aimed at ending the application of the death penalty are steps towards the enjoyment of the right to life”<sup>22</sup> Furthermore, the HRC questions the compatibility of the death penalty, with human rights. In particular, the compatibility with the right to human dignity, the right to life and the prohibition of torture or other cruel, inhuman or degrading treatment or punishment. However, the HRC does not give a legal justification for the absolute abolishment of the death penalty. Therefore, the HRC recommends to States which still incorporate the death penalty, to follow the precise wording of article 6 of the ICCPR.<sup>23</sup>

Moreover, the HRC recalled that Secretary-General Ban Ki-moon had noted on several occasions, that the death penalty has no place in the twenty-first century.<sup>24</sup> Thus, the death penalty is not prescribed as a human rights violation, however, there is a definite trend to abolish the death penalty within the international community.

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<sup>19</sup> Schabas, W.A., 1998. International Law and Abolition of the Death Penalty. *Wash. & Lee L. Rev.*, 55, p.797-846, p. 804.

<sup>20</sup> A/RES/44/128, *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989, art. 1

<sup>21</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982, Adopted at the Sixteenth Session of the Human Rights Committee. para. 6.

<sup>22</sup> A/HRC/30/18, *Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty: Yearly supplement of the Secretary-General to his quinquennial report on capital punishment*, UN Human Rights Council 16 July 2015, para.56.

<sup>23</sup> A/HRC/30/18, UN Human Rights Council 16 July 2015, para. 55.

<sup>24</sup> UN Office of the High Commissioner for Human Rights (OHCHR), *Moving Away from the Death Penalty: Arguments, Trends and Perspectives*, New York 2014, Preface Ban Ki-moon Secretary-General, United Nations.



### I.I.I Issue to Categorise the Death Penalty Illegal

Internationally, the capital punishment receives increasingly more criticism, as it is regarded as an inhuman punishment and should therefore be abolished.<sup>25</sup> The argument is brought forwards that: “the death penalty is inherently dehumanizing and hence a violation of human dignity and human rights.”<sup>26</sup> Nonetheless, there is no international legal justification for an absolute abolishment, as shown. This raises the questions why international human rights bodies are reluctant to categorise the death penalty as a human rights violation.

An important reasoning for retentionist States finds its foundation in societies’ demand for retribution for serious crimes.<sup>27</sup> The capital punishment is seen as the only legitimate punishment for certain horrific crimes. States have the sovereignty to determine whether the death penalty is a legitimate and legal form of punishment. The United States of America is a prominent example of a Western country which still incorporates the death penalty. After the attacks of September 11, 2001, the streamlining of extradition from Europe to the United States was made a priority. Therefore, a retentionist State could request a defendant from a European abolitionist State.<sup>28</sup> Due to such international co-operations as well as the international trend towards abolishment, international NGO’s have claimed that the United States is morally as well as legally obligated to end the practise of the death penalty.<sup>29</sup> However, it is argued that such claims undermine the sovereign authority of a State to determine its own criminal justice system.<sup>30</sup> Considering the United States is not bound to OP2-ICCPR, there is no international legally binding regulation that could force the United States to abolish the death penalty.<sup>31</sup> Therefore, Rothenberg argues that the death penalty is: “an illuminating case study of the importance of maintaining American sovereignty.”<sup>32</sup> Rothenberg explicitly disagrees with scholars, such as Schabas, who argue that the fact that the word abolition is already mentioned in article 6 of the ICCPR, the trend towards abolition is something all States should strive towards.<sup>33</sup>

This discussion about whether the death penalty should be abolished internationally by law coincides with the aforementioned statements of the HRC. Although the abolishment is

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<sup>25</sup> Schabas 1998, p. 845-846.

<sup>26</sup> Johnson, R., 2014. Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House. *Seattle J. Soc. Just.*, 13, 583-598. p. 584.

<sup>27</sup> Maduna, P. M., 1996. The death penalty and human rights. *South African Journal on Human Rights* 12, 193-213. p. 193-194.

<sup>28</sup> Bassiouni, M.C., 2014. International extradition: United States law and practice. Oxford University Press. p. 27.

<sup>29</sup> Rothenberg, L. E., 2004. International Law, US Sovereignty, and the Death Penalty. *Geo. J. Int'l L.*, 35, 547-595. p. 547.

<sup>30</sup> Rothenberg 2004, p. 555.

<sup>31</sup> Rothenberg 2004, p. 555.

<sup>32</sup> Rothenberg 2004, p. 593.

<sup>33</sup> Rothenberg 2004, p. 551; Schabas 1998, p. 804.

desired, the HRC does not categorise the death penalty per se as a violation, probably due to the acknowledgement of the sovereignty of States. Although internationally there is no legal grounds for abolishment, regional systems have implemented different regulations concerning abolishment. To comprehend these regulations, a descriptive analysis of the Council of Europe (CoE) and its regulations concerning abolishment will follow.

## I.II Regional Legal Framework

The CoE is a regional human rights organisation with 47 Member States. The CoE was established in 1949 with among other things the aim to further realise human rights and fundamental freedoms.<sup>34</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR) entered into force in 1953.<sup>35</sup> Every Member State of the CoE has ratified this Convention and is thus bound to the articles present in the ECHR.<sup>36</sup> Article 2 of the ECHR states that everyone has the right to life, however “save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law.” Thus, primarily the ECHR allows the use of the death penalty. However, in 1983 Protocol No. 6 to the ECHR was adopted, concerning the abolition of the death penalty. Although this Protocol gives way for the abolishment of the death penalty, it does include the exception of the use of the death penalty in time of war.<sup>37</sup> Nonetheless, all 47 Member States of the CoE Protocol, with the exception of the Russian Federation, ratified this Protocol, which makes it binding within their jurisdiction.<sup>38</sup> However, this Protocol still allowed exceptions to the use of the death penalty, therefore Protocol No. 13 to the ECHR went into force in 2003. This Protocol explicitly mentions the abolition of the death penalty in all circumstances including the prohibition of derogations and the prohibition

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<sup>34</sup> Bantekas, I., & Oette, L., 2013. International human rights law and practice. Cambridge University Press, p. 221.

<sup>35</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950.

<sup>36</sup> Council of Europe. *Chart of signatures and ratifications of Treaty 005. Convention for the Protection of Human Rights and Fundamental Freedoms*. (2017), [http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p\\_auth=KUPIIP8J](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=KUPIIP8J) [Visited May 22 2017].

<sup>37</sup> Council of Europe, *Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty*, 28 April 1983.

<sup>38</sup> Council of Europe. *Chart of signatures and ratifications of Treaty 114. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty*. (2017), [http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114/signatures?p\\_auth=1inkbnKJ](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114/signatures?p_auth=1inkbnKJ) [Visited May 22 2017].

of reservations.<sup>39</sup> 44 out of the 47 Member States of the CoE ratified this Protocol.<sup>40</sup> Thus, the abolishment of the death penalty is a definite trend within Europe.

### I.II.I European Court of Human Rights

Although 44 Member States of the CoE have ratified Protocol No. 13 to the ECHR which abolishes the death penalty in all circumstances, there are three countries which have not abolished *de jure*.<sup>41</sup> Therefore, the illegality of the death penalty within Europe is not a completely realised fact. However, the ECtHR gave important insights as to the legality of the use of the death penalty within CoE countries in 2005, in the case of *Öcalan v. Turkey*. The defendant, a Syrian national, was apprehended by Turkish police forces and consequently within the jurisdiction of Turkey. Within Turkey, he was brought before a court and subsequently charged, tried and convicted of article 125 of the Turkish Criminal Code which reads prescribed the convicted: “*shall be liable to the death penalty*.”<sup>42</sup>

The accused argued that the imposition and/or execution of the death penalty would violate his right to life. The argument was brought forward that article 2 of the ECHR no longer permitted the death penalty and that the death penalty constituted as an inhuman and degrading punishment – as prohibited by article 3 of the ECHR.<sup>43</sup> However, such a conclusion had not been decided by the Court, considering the specific wording of article 2 § 1.<sup>44</sup> Therefore, the Court assessed that: “if Article 2 is to be read as permitting capital punishment, notwithstanding the almost universal abolition of the death penalty in Europe, Article 3 cannot be interpreted as prohibiting the death penalty since that would nullify the clear wording of Article 2 § 1.”<sup>45</sup> Thus, although the abolishment of the death penalty is almost realised within the CoE, the death penalty primarily does not constitute inhuman or degrading punishment. Consequently, to fully comprehend the scope of article 3 of the ECHR, a descriptive analysis will follow of this article.

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<sup>39</sup> Council of Europe, *Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances*, 3 May 2002.

<sup>40</sup> Council of Europe. *Chart of signatures and ratifications of Treaty 187. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*. (2017), [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p\\_auth=usH6SjNw](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=usH6SjNw) [Visited June 6 2017]

<sup>41</sup> Council of Europe. *Chart of signatures and ratifications of Treaty 187. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*. (2017), [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p\\_auth=usH6SjNw](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=usH6SjNw) [Visited June 6 2017]

<sup>42</sup> *Öcalan v. Turkey*, Application no. 46221/99, Council of Europe: European Court of Human Rights, 12 May 2005, para.54. (*emphasis added*)

<sup>43</sup> *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005, para. 150.

<sup>44</sup> *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005, para. 162.

<sup>45</sup> *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005, para. 162.

### I.III Article 3 of the ECHR

The specific wording of article 3 of the ECHR provide that: “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>46</sup> Dr Palmer states that: “the high threshold requirement [of article 3] has been maintained through the determination of what type of treatment should be classified as torture, or inhuman or degrading treatment.”<sup>47</sup> However, the threshold of article 3 appears to be difficult to establish.

Article 15 of the ECHR provides that no derogation is allowed from article 3 of the ECHR. Article 3 provides absolute protection from inhuman treatment or punishment. Consequently, Contracting States incur a negative as well as a positive obligation. Primarily, Contracting States have a negative obligation to refrain from subjecting a human being to the provision provided by article 3. Thus, States have an absolute duty not to subject any person to torture, or to inhuman treatment or punishment.<sup>48</sup> Furthermore, the ECtHR has provided the positive obligation for States to ensure the prohibitions of article 3 are realised. Considering, article 1 of the ECHR states State Parties are obliged to secure the prohibition of article 3, States are required to take measures to ensure the prohibition of torture or inhuman and degrading treatment or punishment, within their jurisdiction.<sup>49</sup> Thus, States have a positive obligation to take all reasonable steps to ensure no individual is subjected to provision prohibited by article 3. As Palmer states: “without this “positive” aspect of State responsibility, the efficacy of the fundamental rights protection set out in Article 3 would be seriously diluted or even ineffective.”<sup>50</sup>

Furthermore, the ECtHR emphasises that article 3, taken together with article 2: “must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe”<sup>51</sup> Nonetheless, the scope of article 3 is difficult to establish, specifically considering the unclarity of what exactly constitutes as inhuman or degrading treatment or punishment.

For the prohibition of torture, a clear definition is provided in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture

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<sup>46</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, article 3.

<sup>47</sup> Palmer, S., 2006. A wrong turning: Article 3 ECHR and proportionality. *The Cambridge Law Journal*, 65(2), 438-452. p. 439.

<sup>48</sup> Palmer 2006, p. 440.

<sup>49</sup> *Pretty v. the United Kingdom*, Application no. 2346/02, Council of Europe: European Court of Human Rights, 29 April 2002, para. 51.

<sup>50</sup> Palmer 2006, p. 440.

<sup>51</sup> *Pretty v. the United Kingdom*, Application no. 2346/02, 29 April 2002, para. 49.

Convention). The Torture Convention is ratified by all Member States of the CoE.<sup>52</sup> Furthermore, the definition provided in the Torture Convention is widely referenced internationally. For those international bodies seeking a definition of torture, the Torture Convention has become de facto “first port of call.”<sup>53</sup> The ECtHR is known for examining provision of the Torture Convention to determine what encompasses torture, as prohibited by article 3.<sup>54</sup> Worth mentioning is the fact that article 3(1) of the Torture Convention states that extradition, expulsion, and return (“refouler”) are all prohibited if there is a substantial ground to believe one could be subjected to torture.

However, this article does not explicitly include the prohibition of inhuman or degrading punishment or treatment. Nor does the Torture Convention include a definition of inhuman or degrading punishment or treatment. Considering an internationally accepted definition is missing, the scope of article 3 of the ECHR has to be investigated further, to comprehend the legality of extradition, expulsion, or return. Noteworthy is that the ECHR is “silent on extradition.”<sup>55</sup> Neither the Convention, nor Protocol No. 6 or Protocol No. 13 mentions that the rights set forward in those documents could be grounds for refusal of extradition. Neither is there mention of a human rights grounds for refusal of transferral or return.<sup>56</sup> Therefore, in the following chapters, judgements of the ECtHR will give important insights as to under which circumstances extradition, expulsion, or return have to be refused in cases concerning the death penalty.

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<sup>52</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, Status of Ratification. Retrieved from: <http://indicators.ohchr.org/> [Visited 21 June 2017].

<sup>53</sup> Weissbrodt, D. and Heilman, C., 2011. Defining torture and cruel, inhuman, and degrading treatment. *Law & Ineq.*, 29, p. 343-394. p. 354.

<sup>54</sup> Orakhelashvili, A., 2003. Restrictive interpretation of human rights treaties in the recent jurisprudence of the European Court of Human Rights. *European Journal of International Law*, 14(3), pp.529-568, p. 553.

<sup>55</sup> Roecks, C.R., 1994. Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a Person Charge with a Capital Crime. *Cal. W. Int'l LJ*, 25, p. 189-234, p. 187-197.

<sup>56</sup> Roecks 1994, p. 187-197.

## II DEATH PENALTY AS GROUNDS FOR REFUSAL OF TRANSFERRAL?

As shown, the ECtHR concluded in the case of *Öcalan v. Turkey* that the ECHR was to be read as a whole and therefore article 3 could not include the death penalty. The fact article 2 permitted the capital punishment ascertained that such a punishment could not be defined as inhuman or degrading.<sup>57</sup> However, article 3 can prohibit extradition in cases concerning the imposition of the death penalty, under certain circumstances. Important insights about the scope of article 3 have been provided by the ECtHR in the case of *Soering v. the United Kingdom* of 1989. This case is of importance to establish to scope of article 3, considering it was the first ruling of the ECtHR where a possibility of a violation of article 3 should prohibit extradition.

### II.I The Case of *Soering v. The United Kingdom*

The case of *Soering v. the United Kingdom* was brought forward to the Court because the defendant, the German national Mr Soering, argued that if extradited to the United States, there was a significant chance the death penalty would be imposed. Mr Soering faced the charges of murder in the Commonwealth of Virginia due to a double homicide committed in 1985.<sup>58</sup> In 1986 the Government of the United States of America requested the extradition of Mr Soering to the United States under the terms of the Extradition Treaty of 1972 between the United States and the United Kingdom.<sup>59</sup> The Secretary of State for the Home Department of the United Kingdom had concluded to surrender Mr Soering to the authorities of the United States of America. Considering this decision, the argument was brought forward that such an extradition, if implemented, would violate his human right not to be subjected to torture or to inhuman or degrading treatment or punishment.<sup>60</sup>

However, the Court did not follow such a reasoning, considering it did not believe the death penalty constituted inhuman or degrading treatment or punishment. The ECtHR ruled that the Convention should be read as a whole, and one could not merely focus on article 3 in relation to a possible violation of human rights if the death penalty were to be carried out.<sup>61</sup>

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<sup>57</sup> *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005, para.162.

<sup>58</sup> *Soering v. the United Kingdom*, Application no. 14038/88, Council of Europe: European Court of Human Rights, 7 July 1989, para. 11-12.

<sup>59</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 14.

<sup>60</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 80.

<sup>61</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 103.

The Court specified that article 3 “should therefore be construed in harmony with the provisions of article 2.”<sup>62</sup> On that basis, the Court argued that it cannot be intended by the drafters that article 3 could provide a prohibition of the death penalty, considering the clear wording of article 2 § 1.<sup>63</sup> Thus, the Court concluded that the prohibition of inhuman and degrading punishment did not include the death penalty.<sup>64</sup> Consequently, extradition cases could not be refused on grounds of such an imposition.

### II.I.I The Death Row Phenomenon

Although the Court ruled that the death penalty was not contrary to article 3, the facts of aforementioned case gave way for another issue under article 3, relating to the death penalty. The imposition of the death penalty could lead to a violation of article 3 by means of the death row phenomenon.<sup>65</sup> The defendant’s exposure to the death row phenomenon was described as: “consisting in a combination of circumstances to which the applicant would be exposed if [...] he were sentenced to death.”<sup>66</sup> Thus, an assessment had to be made on whether the defendant would face a real risk of exposure to article 3, if extradited.

### II.I.II Assessment of the Soering Case

Different factors could contribute to a possible inhuman treatment or punishment. The Court gave examples such as, the personal circumstances of the defendant, the circumstances and conditions on death row, and a disproportionality to the gravity of the crime committed.<sup>67</sup> Consequently, an assessment had to be made whether the acceptable threshold of article 3 would be exceeded.<sup>68</sup> The age of the defendant, his mental state and the duration on death row were also taken into account. As for Mr Soering, he argued that during his time on death row, he would be subject to increasing tension and psychological trauma and he would become the victim of violence and sexual abuse because of his age, colour and nationality.<sup>69</sup> Furthermore, the defendant would expect to spend six to eight years on death row, before being executed.<sup>70</sup> In the Court’s view, considering the long period spent on death row in such extreme conditions, with the anguish of awaiting executing as well as the personal circumstances of the defendant,

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<sup>62</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 103.  
<sup>63</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 103.  
<sup>64</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 103.  
<sup>65</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 80-81.  
<sup>66</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 81.  
<sup>67</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 104.  
<sup>68</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 104.  
<sup>69</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 104.  
<sup>70</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 106.

specifically his age and mental state, extradition would expose Mr Soering to a real risk of inhuman treatment going beyond the threshold of article 3 of the ECHR.<sup>71</sup> Thus, the Court concluded that the extradition of the defendant, if implemented, would give rise to a breach of article 3 of the ECHR.<sup>72</sup>

### II.I.III Concluding Remarks Concerning the Death Row Phenomenon

In the case of *Soering v. the United Kingdom* the Court ruled for the first time that it would not be compatible with the underlying values of the of the ECHR to extradite a defendant, if there were substantial grounds to believe he or she would be subjected to inhuman or degrading treatment or punishment.<sup>73</sup> Furthermore, it would be “contrary to the spirit and intendment” of aforementioned article.<sup>74</sup> The Court found that a requested State had an inherent obligation not to extradite, if there was a real risk of exposure to inhuman and degrading treatment or punishment.<sup>75</sup> Specifically the Court prescribed:

“The decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.”<sup>76</sup>

Accordingly, although the Court ruled that the death penalty could not constitute a breach of article 3, the death row phenomenon could however give rise to a breach of article 3. The judgement was the first progressive ruling, where the Court found that a requested State had a responsibility to prevent a possible future human rights violation, if the decision to extradite a defendant who risked being subjected to ill-treatment in the requesting state would be carried out.<sup>77</sup> Thus, States incur obligations to prevent possible human rights violations, by means of a refusal of an extradition request. Accordingly, the scope of article 3 includes the death row phenomenon, as it constitutes as inhuman treatment and punishment.

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<sup>71</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 111.

<sup>72</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 111.

<sup>73</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 88.

<sup>74</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 88.

<sup>75</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 88.

<sup>76</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 90.

<sup>77</sup> Silvis 2014, p. 2



Nonetheless, for the threshold of article 3 to be surpassed by means of the death row phenomenon, the risk of being exposed to a death penalty has to be substantial. If a requesting country has given the assurance not to subject the person in question to the death penalty, the death row phenomenon cannot be an argument for refusal of extradition. The Court emphasised this reasoning in the case of *Einhorn v. France*.<sup>78</sup> The applicant argued that if extradited, he would be subjected to the death row phenomenon and thus a violation of article 3.<sup>79</sup> The Court recalled that to determine whether the applicant would be subjected to the death row phenomenon, “the time spent in extreme conditions, the ever-present and mounting anguish of awaiting execution, and the personal circumstances of the prisoner in question” had to be taken into account.<sup>80</sup> However, the requesting State, the United States, had given an assurance that the applicant would not receive the death penalty.<sup>81</sup> Therefore, the Court found that his awaiting circumstances could not constitute as inhuman or degrading treatment or punishment, by means of the death row phenomenon.<sup>82</sup> Consequently, the Court found the application inadmissible.<sup>83</sup>

## II.II Expulsion Due to a Terrorist Threat

In the judgement of the case of *Chahal v. the United Kingdom*, the Court subsequently added another important element to the reasoning of the case of *Soering v. the United Kingdom*. In the case of *Chahal v. the United Kingdom* the applicant argued that his deportation to India would elicit a violation of article 3, by means of inhuman and degrading treatment and punishment, if not torture.<sup>84</sup> The Court recalled that expulsion could give rise to an issue under article 3 of the ECHR. Therefore, if there were substantial grounds to believe a violation of article 3 would take place, the State had the obligation not to expel.<sup>85</sup> The Court recalls the case of *Soering v. the United Kingdom* and affirms that the prohibition provided by article 3 against inhuman punishment or treatment is “equally absolute” in expulsion cases.<sup>86</sup>

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<sup>78</sup> *Einhorn v. France*, Application no. 71555/01, Council of Europe. European Court of Human Rights, 16 October 2001.

<sup>79</sup> *Einhorn v. France*, Application no. 71555/01, Council of Europe. European Court of Human Rights, 16 October 2001, para. 23.

<sup>80</sup> *Einhorn v. France*, Application no. 71555/01, Council of Europe. European Court of Human Rights, 16 October 2001, para. 26.

<sup>81</sup> *Einhorn v. France*, Application no. 71555/01, Council of Europe. European Court of Human Rights, 16 October 2001, para. 26.

<sup>82</sup> *Einhorn v. France*, Application no. 71555/01, Council of Europe. European Court of Human Rights, 16 October 2001, para. 26.

<sup>83</sup> *Einhorn v. France*, Application no. 71555/01, Council of Europe. European Court of Human Rights, 16 October 2001, para. 35.

<sup>84</sup> *Chahal v. the United Kingdom*, Application no. 70/1995/576/662, Council of Europe: European Court of Human Rights, 11 November 1996, para. 72.

<sup>85</sup> *Chahal v. the United Kingdom*, Application no. 70/1995/576/662, 11 November 1996, para. 74.

<sup>86</sup> *Chahal v. the United Kingdom*, Application no. 70/1995/576/662, 11 November 1996, para. 80.

However, the United Kingdom argued that Mr Chahal had to be deported, for national security reasons, namely the international fight against terrorism.<sup>87</sup> The Court acknowledged the immense difficulties States are faced with, to protect their societies from terrorism.<sup>88</sup> Nonetheless, due to the absolute terms provided by article 3, the Court finds that: “the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.”<sup>89</sup> Thus, although the threat of terrorism could primarily provide a reason for expulsion, substantial grounds for believing the ‘terrorist’ would be subjected to inhuman or degrading treatment or punishment, is an explicit reason not to expel.

## II.III Considerations Concerning Obligation not to Transfer

Considering the progressive ruling of the Court in the case of *Soering v. the United Kingdom*, an obligation not to transfer an individual if there were substantial grounds to believe that person would be subjected to inhuman or degrading treatment or punishment came into existence. Furthermore, the threat of terrorism could not counteract such an obligation, as provided by the Court in the case of *Chahal v. the United Kingdom*. Two points of critique should be touched upon in relation to these two rulings of the Court. Firstly, the fact that the CoE territory could be seen as a safe haven. Secondly, these rulings could undermine the co-operation between States to ensure national and international security.

### II.III.I CoE Territory as a Safe Haven

An important consequence of the aforementioned rulings of the ECtHR is the Member States of the CoE could become a safe haven for fugitives fleeing from other States which still implement the death penalty.<sup>90</sup> The Court also took this into account in its judgement in the *Soering* case. The Court acknowledged the importance of apprehending and extraditing suspected offender who are fleeing to the CoE: “Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition.”<sup>91</sup> The Court explicitly states that these considerations have to be taken into account in extradition cases concerning possible inhuman or degrading treatment or punishment. However, these considerations did not prevent

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<sup>87</sup> *Chahal v. the United Kingdom*, Application no. 70/1995/576/662, 11 November 1996, para. 25.

<sup>88</sup> *Chahal v. the United Kingdom*, Application no. 70/1995/576/662, 11 November 1996, para. 79.

<sup>89</sup> *Chahal v. the United Kingdom*, Application no. 70/1995/576/662, 11 November 1996, para. 80.

<sup>90</sup> Hudson, P., 2000. Does the death row phenomenon violate a prisoner's human rights under international law? *European Journal of International Law*, 11(4), pp.833-856, p. 843.

<sup>91</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para. 89.

the Court from establishing the obligation not to extradite.<sup>92</sup> Nonetheless, the importance to take into account this consideration is emphasised by Kobayashi. Namely, because the ‘safe haven argument’ is based upon the fear that the CoE territory could become a sanctuary for those fleeing capital punishment, specifically from the United States.<sup>93</sup> Therefore, extradition requests should always be analysed with highest scrutiny.

### II.III.II Contradiction between Different Presumptions about the Death Penalty

Another element to consider is that the ECtHR undermined the co-operation between States to ensure national and international security.<sup>94</sup> This could be criticised, due to a possible lacking of objectivity of the ECtHR. Considering the abolishment of the death penalty in nearly all of the CoE Member States, it could be argued that: “the Court was probably driven by a strong antipathy to the death penalty.”<sup>95</sup> This argument would substantiate that the Court undermines the authority of the requesting state, by obliging the requested state not to extradite. However, the Court took this initiative, considering article 3 is to be regarded as one of the most fundamental human rights provisions and it enshrines core values of the democratic society.<sup>96</sup>

This chapter has shown that the scope of article 3 includes the death row phenomenon. Therefore, extradition requests should be refused, if the extradited person could be subjected to the death row phenomenon. The same reasoning applies when it concerns transferral of refugees or other fugitives, even when the aim of transferral is to counteract terrorism. Furthermore, other human rights violations could contribute to a violation of article 3, for example a violation of the right to a fair trial, which will be discussed in the next chapter.

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<sup>92</sup> Kobayashi, A.M., 1996. International and domestic approaches to constitutional protections of individual rights: Reconciling the Soering and Kindler decisions. *Am. Crim. L. Rev.*, 34, p. 225-259, p. 258.

<sup>93</sup> Kobayashi 1996, p. 104;258.

<sup>94</sup> Hudson 2000, p. 843.

<sup>95</sup> Hudson 2000, p. 843.

<sup>96</sup> *Pretty v. the United Kingdom, Application no. 2346/02, 29 April 2002*, para. 49.

## III UNFAIR TRIAL AND THE MANNER IN WHICH THE DEATH PENALTY IS CARRIED OUT

The previous chapter showed that an obligation not to extradite, expel, or return exists for Contracting States of the CoE if there are substantial grounds for believing the person in question will be subjected to inhuman or degrading treatment or punishment, as prescribed in article 3 ECHR. Subsequently, the following chapter will provide two important circumstances which could constitute as inhuman or degrading punishment or treatment. Namely, a death penalty preceded by an unfair trial and the manner in which the death penalty is carried out. These insights will provide a more comprehensive understanding of the scope of article 3 and therefore will contribute to understand which circumstances can prohibit extradition, expulsion, or return.

### III.I Capital Punishment Preceded by an Unfair Trial

The right to a fair trial is prescribed in article 6 of the ECHR. This right provides that: “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” The case of *Öcalan v. Turkey*, which was mentioned in chapter 1, provides important insights about the relation between article 6 and article 3. Furthermore, the case of *Bader and Others v. Sweden* subsequently provides insights about the deportation of fugitives when there is a possibility of an unfair trial followed by a death sentence.

#### III.I.I The Case of *Öcalan v. Turkey*

As shown in the first chapter, the applicant in the case of *Öcalan v. Turkey* argued he would be subjected to inhuman treatment and punishment if the death penalty would be carried out.<sup>97</sup> However, the Court abstained from reaching such a conclusion, due to the circumstances of the case.<sup>98</sup> Namely, the defendant’s right to a fair trial had been violated. Subsequently, the Court found that it would be contrary to the ECHR to implement a death sentence following an unfair trial.<sup>99</sup> The Court emphasised that a trial, at first instance and on appeal, had to meet “the most

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<sup>97</sup> *Öcalan v. Turkey*, Application no. 46221/99, Council of Europe: European Court of Human Rights, 12 May 2005, para. 164-165.

<sup>98</sup> *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005, para. 165.

<sup>99</sup> *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005, para. 165.

rigorous standards of fairness,” whenever the death penalty may be imposed.<sup>100</sup> In connection to article 3, the Court noted that the manner in which the death penalty is carried out, the personal circumstances of the defendant as well as the conditions on death row could constitute as a breach of article 3.<sup>101</sup> Therefore, the Court came to the following conclusion:

“The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention.”<sup>102</sup>

Thus, although the death penalty itself did not give rise to a breach of article 3, the fact an unfair trial proceeded, constituted that consequently the imposition of the death penalty would give rise to a breach of article 3. Therefore, the execution of the death penalty in such a case would be unlawful. However, at the time of this judgement, the unfair trial had already proceeded, while in cases concerning extradition, expulsion, or return that would not be the case. Therefore, the Court would have to assess whether there would be future “risks of suffering a flagrant denial of a fair trial in the requesting country” in order to determine an obligation not to transfer.<sup>103</sup> In order to establish such an obligation, a short analysis of the case of *Bader and Others v. Sweden* will follow.

### III.I.II The Case of *Bader and Others v. Sweden*

In 2005 the Court ruled in the case of *Bader and Others v. Sweden*. The Court held that the applicant would be subjected to a flagrant denial of a fair trial, if deported to Syria to stand trial.<sup>104</sup> Furthermore, the Court held that the applicant had a “justified a well-founded fear” considering the significant possibility the death sentence would be carried out if he were to be deported back to Syria.<sup>105</sup> These circumstances would cause considerable fear and anguish for Mr Bader, which would constitute inhuman.<sup>106</sup> Therefore, the possibility of an unfair trial

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<sup>100</sup> *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005, para. 166.

<sup>101</sup> *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005, para. 168.

<sup>102</sup> *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005, para. 169.

<sup>103</sup> *Bader and Others v. Sweden 2005*, Application no. 13284/04, Council of Europe: European Court of Human Rights, 8 November 2005, para.42.

<sup>104</sup> *Bader and Others v. Sweden 2005*, Application no. 13284/04, 8 November 2005, para.47.

<sup>105</sup> *Bader and Others v. Sweden 2005*, Application no. 13284/04, 8 November 2005, para.46.

<sup>106</sup> *Bader and Others v. Sweden 2005*, Application no. 13284/04, 8 November 2005, para.46.

followed by a death sentence was found to be contrary to the Convention.<sup>107</sup> The Court concluded: “that there are substantial grounds for believing that the first applicant would be exposed to a real risk of being executed and subjected to treatment contrary to Articles 2 and 3 if deported to his home country.”<sup>108</sup>

The findings of the Court show that the scope of article 3, in relation to possible future violations, includes the guarantee of a fair trial. If there are substantial grounds to believe a fair trial will not be realised, the person in question cannot be extradited, expelled, or returned.

### III.II Manner in Which the Death Penalty is Carried Out

In the case of *Öcalan v. Turkey*, the Court already emphasised that the manner in which the death penalty would be carried out could constitute a violation of article 3 of the ECHR.<sup>109</sup> In the case of *Jabari v. Turkey* of 2000 the Court fully assessed this possibility of a violation of article 3, considering the manner in which the death penalty would be carried out. The female applicant argued her right to human treatment and punishment would be violated, if she were to be deported to Iran.<sup>110</sup> The Court recalled that article 3 of the ECHR: “enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment.”<sup>111</sup> The Court concluded that there was a real risk that the applicant would be subjected to treatment contrary to article 3 of the ECHR if she were to be deported, considering she faces the punishment of stoning for adultery.<sup>112</sup> For those reasons, the Court held that if the applicant were to be returned to Iran there would be a violation of the ECHR.<sup>113</sup>

Thus, the possibility of an unfair trial as well as the manner in which the death penalty would be carried out constitute inhuman or degrading treatment or punishment. These two elements show the scope of article 3 of the ECHR, which provides a more comprehensive understanding under which circumstances extradition, expulsion, or return should be refused. However, these elements should also be called into question, considering the principle of sovereignty of States, which will be explained in the following paragraph.

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<sup>107</sup> *Bader and Others v. Sweden* 2005, Application no. 13284/04, 8 November 2005, para.47.

<sup>108</sup> *Bader and Others v. Sweden* 2005, Application no. 13284/04, 8 November 2005, para.48.

<sup>109</sup> *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005, para.168.

<sup>110</sup> *Jabari v. Turkey*, Application no. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000, para. 33.

<sup>111</sup> *Jabari v. Turkey*, Application no. 40035/98, 11 July 2000, para. 39.

<sup>112</sup> *Jabari v. Turkey*, Application no. 40035/98, 11 July 2000, para. 41-42-.

<sup>113</sup> *Jabari v. Turkey*, Application no. 40035/98, 11 July 2000, para. 41-42.

### III.III Question of Sovereignty of Requesting State

Aforementioned rulings of the ECtHR could be criticised, considering the assumption that a receiving state will not guarantee a fair trial to the person in question. Courts have long applied a rule of non-inquiry.<sup>114</sup> This rule contains that the: “court will not inquire into the legality of the proceedings that can be anticipated in the requesting state.”<sup>115</sup> This rule of non-inquiry also regards the standards of criminal justice of the requesting State.<sup>116</sup> As put forward within the US Court of Appeals, it would be contrary to good believe for a court to: “assume the responsibility for supervising the integrity of the judicial system of another sovereign nation,”<sup>117</sup> Whereas the ECtHR found substantial grounds to believe the applicant would risks suffering a flagrant denial of a fair trial, the ECtHR did inquire into the legality of the proceedings in the requesting State.<sup>118</sup> Furthermore, the manner in which the death penalty is carried out is regulated by the criminal system of the receiving state. By constituting it contrary to human rights, the autonomy of the receiving state is undermined.

However, the ECtHR ruled that the possibility of an unfair trial, as well as the manner in which the death would be carried out, constitute as an inhuman and degrading form of punishment or treatment. Thus, aforementioned judgements of the ECtHR have contributed to a more comprehensive understanding of the reach of article 3 of the ECHR. However, article 2 § 1 of the ECHR remained intact; no derogation of the legal use of the death penalty was provided. Therefore, the following chapter will examine a more recent final judgement of the ECtHR, namely the case of *Al-Saadoon and Mufdhi v. the United Kingdom*.

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<sup>114</sup> Quigley, J., 1990. The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law. *NCJ Int'l L. & Com. Reg.*, 15, p. 401-439, p. 403.

<sup>115</sup> Quigley 1990, p. 403.

<sup>116</sup> Cryer, R., 2010. *An introduction to international criminal law and procedure*. Cambridge University Press, p. 96.

<sup>117</sup> *Jhirad v. Ferrandina* US Court of Appeals April 12 1976 para. 22 536 F.2d 478

<sup>118</sup> *Bader and Others v. Sweden 2005, Application no. 13284/04*, Council of Europe: European Court of Human Rights, 8 November 2005, para.42.

## IV ANGUISH OF AWAITING THE DEATH PENALTY

As shown, the scope of article 3 includes a variety of circumstances related to the death penalty. On grounds of such circumstances, transfer has to be refused according to the ECtHR. In the following chapter, the case of *Al-Saadoon and Mufdhi v. the United Kingdom* of 2010 will be analysed, considering the ruling in this case provides an even more progressive analysis of the scope of article 3 of the ECHR.

### IV.I *Al-Saadoon and Mufdhi v. the United Kingdom*

In 2010 the ECtHR brought its final judgement in the case of *Al-Saadoon and Mufdhi v. the United Kingdom*. On December 22<sup>nd</sup> 2008, the application was lodged with the Court against the United Kingdom.<sup>119</sup> The two applicants, Iraqi nationals, were to be transferred into the custody of the Iraqi authorities, to be prosecuted for the killing of two British soldiers in 2003 in Iraq.<sup>120</sup> The Iraqi nationals claimed that if transferred, they would face a real risk to be subjected to the death penalty. The applicants argued that such an imposition would be in breach of article 3 of the ECHR. Therefore, they should not be transferred to the custody of the Iraqi authorities.<sup>121</sup>

#### IV.I.I Conflicting Obligations under International Law

The applicants lodged an urgent application to the ECHR under Rule 39 for interim measures, to postpone their transfer<sup>122</sup>. Consequently, the Court gave an order under Rule 39, informing the United Kingdom that the applicants should not be transferred from their custody.<sup>123</sup> However, the applicants were transferred into the physical custody of the Iraqi authorities the following day.<sup>124</sup> The Government argued before the Court that the United Kingdom was under an international law obligation to surrender the applicants.<sup>125</sup> This question of jurisdiction raises a conflict in international obligations. The Government argued that a refusal of extradition based on the possible imposition of the death penalty would not justify a refusal to comply with the obligation under international law to surrender the apprehended fugitives. The

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<sup>119</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, Council of Europe: European Court of Human Rights, 2 March 2010, para.1.

<sup>120</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para. 40.

<sup>121</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para. 100.

<sup>122</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para. 78.

<sup>123</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para. 79.

<sup>124</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para. 80.

<sup>125</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para. 110.



argument was brought forward that: “the Convention had to be interpreted in the light of and in harmony with other principles of international law and the relevant international law principles.”<sup>126</sup> This argument was based on article 30 of the Vienna Convention on the Law of Treaties of 1969, which provides information on the application of successive treaties relating to the same subject-matter.<sup>127</sup> However, aforementioned international obligations contradict each other, which causes a conflict within international law. Thus, in such a situation: “the State must breach either its obligation to transfer the individual or its obligation to protect that individual from the consequences of transfer.”<sup>128</sup>

However, the Government argued that the threshold of article 3 would not be exceeded, considering there was no substantial grounds to believe the applicants would face an unfair trial.<sup>129</sup> Another element which could give rise to a breach of article 3 would be the manner in which the death penalty would be carried out. However, the Government argued that executing by hanging would not result in additional suffering as to raise an issue under article 3.<sup>130</sup> These arguments of the Government are based upon the earlier described judgements of the ECtHR.

#### IV.I.II Assessment of the Al-Saadoon Case

The Court had to assess to what extent the circumstances of the case could constitute as a human rights violation under article 3 of the ECHR. The Court took the nature of the right not to be subjected to the death penalty as its starting point. The Court recalled: “judicial execution involves the deliberate and premeditated destruction of a human being by the State authorities.”<sup>131</sup> This meant that the death penalty would always involve some physical pain and that the foreknowledge would inevitably cause psychological suffering. Furthermore, the Court acknowledged that such suffering had been recognised as a negation of fundamental human rights by the Member States of the CoE, considering the preamble of Protocol No.13 to the ECHR.<sup>132</sup> The preamble recognises that the Contracting States are: “convinced that everyone’s right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of

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<sup>126</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para.110.

<sup>127</sup> Vienna Convention on the Law of Treaties 1969, art. 30; *Al-Saadoon and Mufdhi v the United Kingdom* 2010, para. 126.

<sup>128</sup> Cross, M. E., & Williams, S., 2009. Between the Devil and the Deep Blue Sea: Conflicted Thinking in the Al-Saadoon Affair. *The International and Comparative Law Quarterly*, 58(3), 689-702, p. 701.

<sup>129</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para.103.

<sup>130</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para.110.

<sup>131</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para.115.

<sup>132</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para.115.

all human beings.”<sup>133</sup> Furthermore, the Court assessed that, although sixty years ago, the ECHR was drafted without the recognition that the death penalty could violate human rights, there had subsequently been an evolution towards abolition of the death penalty within the CoE territory.<sup>134</sup> The Court emphasised the status of ratification of Protocol No. 13 to the ECHR: “At the date of adoption of the present judgment, Protocol No. 13 has been ratified by forty-two Member States and signed but not ratified by a further three.”<sup>135</sup> Against that background, the Court found that the wording of the article 2 § 1 no longer continued to act as a bar to interpret the words “inhuman or degrading treatment or punishment” as including the death penalty.<sup>136</sup> The Court reiterated that extradition could give rise to a breach of article 3, which causes the requested State to incur an obligation not to extradite.<sup>137</sup>

#### IV.I.III Conclusion of the Al-Saadoon Case

Considering aforementioned, the Court believed that the well-founded fear of being executed must have caused a significant degree of mental suffering. Such suffering constituted as inhuman treatment, as prohibited by article 3 of the ECHR.<sup>138</sup> Thus, by physically transferring the applicants toward the Iraqi authorities, the United Kingdom subjected the applicants to such suffering. The Court held that: “causing the applicants psychological suffering of this nature and degree constituted inhuman treatment. It follows that there had been a violation of Article 3 of the Convention.”<sup>139</sup> By coming to this conclusion, the Court ruled for the first time that the scope of article 3 included the death penalty, due to the anguish awaiting execution.<sup>140</sup>

Thus, whether the State had to breach its obligation to extradite or its obligation to protect the applicants from the consequences of extradition, as put forward by Cross and Williams, is answered by the Court by stating the obligation not to transfer had to be upheld.

#### IV.II Anguish Instead of the Death Penalty Itself

Aforementioned judgement of the ECtHR found that the death penalty indeed constitutes as a human rights violation. Therefore, article 2 § 1 has been made redundant, whereas article 3

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<sup>133</sup> Council of Europe, *Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances*, 3 May 2002, preamble.

<sup>134</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para.116.

<sup>135</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para.117.

<sup>136</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para.120.

<sup>137</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para.123-137.

<sup>138</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para.137.

<sup>139</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para.144.

<sup>140</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para.144.

overrides such a punishment. More specifically, the degree of mental suffering awaiting capital punishment overrides the threshold of article 3, thus consequently the death penalty should not be imposed. However, the fact that the reasoning of the Court relied on the anguish awaiting the death penalty and not the death penalty itself, has received criticism.

The reasoning of the Court could raise questions about the legality of punishments other than the death penalty. The fact the Court found the use of the death penalty contrary to the Convention, due to the degree of mental suffering awaiting a capital punishment, calls into question other punishments which could cause the same affect. The question is raised whether perhaps the death penalty itself should have been declared inhuman treatment, instead of focusing on the psychological suffering of the accused. Considering the reasoning of the Court to base its ruling on the anguish awaiting capital punishment, an accused person awaiting the death penalty without such anguish would primarily not fall within the scope of article 3.<sup>141</sup> Moreover, the anguish and psychological suffering described by the Court could also occur to a person charged with another penalty.<sup>142</sup> This raises the question whether such circumstances would also constitute as a violation of article 3 of the ECHR.

However, the Court has stated on multiple occasions that the ECHR is to be seen as: “a living instrument which ... must be interpreted in the light of present-day conditions.”<sup>143</sup> Therefore, in assessing whether the threshold of article 3 has been exceeded, development within international law will always have to be taken into account. Thus, it is up to the competence of the Court to determine the scope of article 3 further, to evaluate when extradition, expulsion, or return could be contrary to the prohibition of inhuman or degrading treatment or punishment. Although extradition is an important tool to combat terrorism, one should safeguard possible human rights violations simultaneously.

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<sup>141</sup> Schabas, W., 2010. *European Court of Human Rights Death Penalty Decision Raises Difficult Issues*. Retrieved from: <http://humanrightsdoctorate.blogspot.nl/2010/04/european-court-of-human-rights-death.html> [Visited June 1 2017]

<sup>142</sup> Schabas, W., 2010. *European Court of Human Rights Death Penalty Decision Raises Difficult Issues*.

<sup>143</sup> *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, para 102; *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005, para.163; *Al-Saadoon and Mufidhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para.119,

## CONCLUSION

This research has shown the difficulty to establish the threshold of inhuman or degrading treatment or punishment. Whereas there is no internationally accepted definition of such ill-treatment, it is up to the competence of a court to establish its threshold. In this research the focus was on the CoE and under which circumstances extradition, expulsion, or return had to be refused by its Member States, if the death penalty could be imposed. The ECtHR gave important insights as to what constitutes as inhuman or degrading treatment or punishment.

The ECtHR required that requested States did not extradite, expel, or return if there were substantial grounds for believing the threshold of article 3 would be surpassed.<sup>144</sup> Primarily, the death row phenomenon, a death penalty proceeded by an unfair trial and the manner in which the death penalty would be carried out constituted as inhuman and degrading treatment or punishment and thus grounds for refusal.<sup>145</sup> However, in 2010 the Court ruled that the death penalty itself would lead to a violation of article 3 of the ECHR. Considering the anguish and psychological suffering of the defendant, he or she was not to be extradited, expelled, or returned, as it would give rise to a violation of article 3.<sup>146</sup> Thus, the threshold of inhuman or degrading treatment or punishment and thus grounds for refusal of extradition, expulsion, or return, is exceeded in every case where there are substantial grounds for believing the death penalty will be imposed.

Due to this conclusion of the Court, Member States of the CoE are obliged to refuse extradition requests from requesting States, if the requesting State in question aims to subject the individual to the death penalty. However, the threat of terrorism provides an incentive for States to extradite as quickly as possible. Nonetheless, it is of the utmost importance to take into account the possible violation of article 3 of the ECHR, which absolutely prohibits torture, inhuman or degrading treatment or punishment. When States seek to extradite despite the possibility of inhuman treatment or punishment, that would be contrary to the ECHR. A remaining solution would be to “rip up those human rights laws”<sup>147</sup> However, that cannot be desirable in a democratic society which aims to safeguard human rights for all individuals.

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<sup>144</sup> Silvis 2014, p. 2

<sup>145</sup> See *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989; *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005; *Bader and Others v. Sweden* 2005, Application no. 13284/04, 8 November 2005; *Jabari v. Turkey*, Application no. 40035/98, 11 July 2000.

<sup>146</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010, para.144.

<sup>147</sup> Guardian, The., 2017. *May: I'll rip up human rights laws that impede new terror legislation*. Retrieved from: <https://www.theguardian.com/politics/2017/jun/06/theresa-may-rip-up-human-rights-laws-impede-new-terror-legislation> [Visited June 6 2017].

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