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VU University Amsterdam

LANDMARKS:

SOERING'S LEGACY

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I. A love that could not last

The story of *Soering* (1989) seemed an unlikely candidate for the seminal case of the Strasbourg Court on *refoulement*.[1] For two decades, the European Commission of Human Rights (a monitoring body whose decisions could be submitted for review to the Court) had held that Article 3 ECHR prohibits *refoulement*, i.e. expulsion if there is a real risk that the expellee will suffer ill-treatment in the country of origin. [2] Many of those cases were lodged by failed asylum seekers which might raise general sympathy more easily than Soering's case - a brutal murderer.

Young students at the University of Virginia, Jens Soering and Elizabeth Hayes fell in love in 1985.[3] But Hayes' parents vehemently opposed the relationship and in an escalated row in March 1986 with the young couple, they were stabbed to death with a knife. Jens Soering and Elizabeth Hayes fled to the United Kingdom, where Soering killed two metropolitan policemen. Upon arrest of the couple in 1987, the United States requested extradition of Soering and Hayes. The UK was willing to oblige. Elizabeth Hayes was surrendered, trialed, and sentenced to two times 45 years of imprisonment. The UK would happily have extradited Soering too, but he invoked Article 3 ECHR.

Soering feared that in Virginia, he would be sentenced to death. The circumstances surrounding the trial, in particular the expected sojourn on "death row" where he would have to wait for the execution possibly for years, would necessarily cause much suffering and anguish. The Court accepted that this would constitute inhuman or degrading treatment as meant in Article 3. It also accepted that this consequence of the extradition could be ascribed to the United Kingdom. Hence, it adopted the *Soering* doctrine:

"the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 […] where substantial grounds have been shown for believing that the person

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1 ECtHR 7 July 1989, no. 14038/88, Ser. A 161(*Soering v the United Kingdom*).

2 Until 1998, the European Commission on Human Rights decided on the admissibility of appeals (cf. P. van Dijk & F. van Hoof et al. (eds.), *Theory and Practice of the European Convention on Human Right*s, Antwerp: Intersentia 2006, p. 32f.). It could examine the merits, but it could also bring the case before the Court – as it did in *Soering*.

3 See for the facts *Soering*, paras. 12-16.

concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country".[4]

After the ruling, the United Kingdom got assurances from the United States that the death sentence would not be imposed. And upon extradition in 1990, Jens Soering was convicted to two life sentences.[5] So in the end, all parties got what they wanted: Soering protection from death row, the UK the extradition and Virginia the trial. Maybe Soering was not such an unlikely candidate for the first judgment on *refoulement*, after all.

The importance of the ruling in *Soering* for migration law in Europe is uncontestable. It has become generally accepted that in case of a real risk of inhuman treatment in the country of origin, Article 3 ECHR forbids expulsion. This holds true not only for extradition of alleged criminals like Soering, but also for expulsion of people seeking asylum in Europe.[6] Recently, the EU Qualification Directive codified the prohibition of refoulement in a definition of persons eligible for asylum.[7] As the first judgment wherein the Court adopted (or confirmed) this prohibition of refoulement coined by the European Commission on Human Rights, *Soering* merits a place in any historical overview on migration law in Europe.

But the judgment provokes more than mere historical interest. It merits re-examination because in no later case, the Court elaborated in such detail *why* Article 3 ECHR applies to expulsion cases. Analysis of its reasoning furthermore reveals an approach to interpretation that, implicitly or explicitly, has extended and limited scope and content of asylum protection under the European Convention ever since.

II. Why Article 3 ECHR does not prohibit *refoulement*

Nowadays, almost twenty years after *Soering*, the applicability of the Convention to migration cases has become so firmly entrenched in European legal thinking that it takes some difficulty to appreciate the interpretation effort faced by the Court. It had to address two major arguments why the UK was fully entitled to extradite Soering. First, the Convention simply does not forbid expulsion. As an exception to the established principle that a state may control entry and residence of aliens on its territory, a prohibition on expulsion should be laid down *expressis verbis*, as for example Article 3 of the United Nations Convention Against Torture, which provides that "no State Party shall expel, return ("refoule") or extradite a person where there are substantial grounds for believing that he would be in danger of being

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[4] *Soering*, para. 91.
[5] R.H. Lawson and H.G. Schermers, *Leading cases of the European Court of Human Rights*, Nijmegen: Ars Aequi 1999, p. 328.
[6] ECtHR 20 March 1993, no. 15576/89, Ser. A 201(*Cruz Varas v. Sweden*).
[7] Albeit in slightly different terms – see Article 2(e) read in conjunction with 15(b) of the *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* (OJ L 304, 30.9.2004).

subjected to torture". Article 3 ECHR merely states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment", making no reference to removal, extradition or *refoulement*. No Convention provision states liability for what might happen after extradition. On the contrary, proposals to add a Protocol stating a right to asylum and a prohibition on expulsion failed.[8] Second, Article 1 ECHR limits responsibility to "acts to persons within the territory" of the UK. Therefore, the Convention could not possibly apply to Soering's treatment in the USA, not even if one tried for some extensive interpretation.

III. The jurisdiction argument

In *Soering* the Court tackles both arguments. It starts from acknowledging that "no right not to be extradited is as such protected by the Convention".[9] So as a matter of principle, the UK's right to control the presence of aliens on its territory is not contested. However,

> "in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee (see, mutatis mutandis, the Abdulaziz, Cabales and Balkandali judgment of 25 May 1985, Series A no. 94, pp. 31-32, §§ 59-60 - in relation to rights in the field of immigration)."[10]

As any other exercise of sovereignty (maintenance of law and order by means of criminal law, for example), it is subject to ECHR requirements, and the mere circumstance that Soering's case happens to concern control of aliens' presence does not alter that. This important step it had already made in *Abdulaziz* two years before Soering. That case concerned a refusal to issue resident permits to the foreign husbands of three foreign women living in the UK. This refusal affected the family life of the women, in the opinion of the Court, and hence fell within the ambit of Article 8 ECHR.

But an analogy with *Abdulaziz* can not answer the question whether Article 3 applies in Soerings case. In *Abdulaziz*, the affected women were within UK jurisdiction, whereas Soering's ill-treatment (death row) would occur outside it. So the Court moves on to address the jurisdiction issue:

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[8] See G. Noll, *Negotiating Asylum*, The Hague/Boston/London: Nijhoff 2000, p. 401 with further references.

[9] *Soering*, para. 85. In *Soering*, the Court deduced this from Article 5, "As results from Article 5 § 1 (f) (art. 5-1-f), which permits "the lawful ... detention of a person against whom action is being taken with a view to ... extradition", no right not to be extradited is as such protected by the Convention." This is not conclusive as Noll has argued (Noll 2000, *supra* note 8 p. 408-409). Indeed, in later judgments the Court states instead that "Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including Article 3, to control the entry, residence and expulsion of aliens" (cf. ECtHR 30 October 1991, no. 13163/87, Ser. A 215 (*Vilvarajah et al. v. UK*) para. 102).

[10] *Ibid.*

"What is at issue in the present case is whether Article 3 can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State.
Article 1 of the Convention, which provides that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I", sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to "securing" ("reconnaître" in the French text) the listed rights and freedoms to persons within its own "jurisdiction". Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. […].
In the instant case it is common ground that the United Kingdom has no power over the practices and arrangements of the Virginia authorities which are the subject of the applicant's complaints. It is also true that in other international instruments cited by the United Kingdom Government - for example the 1951 United Nations Convention relating to the Status of Refugees (Article 33), the 1957 European Convention on Extradition (Article 11) and the 1984 United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Article 3) - the problems of removing a person to another jurisdiction where unwanted consequences may follow are addressed expressly and specifically.
These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction."[11]

There can be no question of UK liability for the actual infliction of inhuman treatment, because it does not control the American authorities. Nor can the UK be held co-responsible for such treatment, because the US are not bound by the Convention and hence not responsible themselves. Still, the UK remains responsible for acts within its jurisdiction: the act of expulsion. So Article 1 limits, but does not completely rule out responsibility under Article 3: it *can* be applicable if the adverse effects of removal are suffered outside the state's jurisdiction. Whether it *is* applicable still remains to be decided.

IV. Interpretation principles

Before addressing this question, the Court first sets out a number of "interpretation principles":

"In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 90, § 239). Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, inter alia, the Artico judgment of 13 May 1980, Series A no. 37, p. 16, § 33). In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society" […]".[12]

A treaty for the "collective enforcement of human rights and fundamental freedoms", that is, a treaty containing *erga omnes* obligations (obligations

[11] *Ibid.*
[12] *Soering*, para. 87.

towards the community as a whole);[13] safeguards that should be "practical and effective"; and a "general spirit" requiring promotion of "ideals and values of a democratic society" – all these principles do not address the question under consideration, except that they suggest a wide, inclusive interpretation of the Convention.

The Court then turns to the characteristics of Article 3 ECHR in particular:

"Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard".[14]

Thus, Article 3 ECHR is "a fundamental value". This fundamentality follows from the ECHR itself – Article 3 ECHR does not allow for "exceptions" or "derogations". What is more, this prohibition is found "in similar terms", hence in non-derogable terms, in other treaties and hence an "internationally accepted standard". Non-derogability and universal acceptance: these are the characteristics of *jus cogens* (although the Court does not label the prohibition on ill-treatment that way).[15] Fundamentality, non-derogability, maybe *jus cogens* – all these characteristics strengthen the call for an inclusive interpretation.

V. A fundamental value prohibits refoulement

Then, the Court finally turns to stating and answering the main question:

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

[13] Lawson 1999, *supra* note 5, pp. 169-170 points out that the consideration in *Ireland v UK* whereto reference is made in *Soering* appears to qualify the whole of the European Convention as *erga omnes* obligations.
[14] *Soering*, para. 88.
[15] See Lawson 1999, *supra* note 5, pp. 175-6 and H. Battjes, 'In search for a fair balance The absolute character of the prohibition of refoulement under Article 3 ECHR reassessed', (forthcoming).

State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article".[16]

What does this lengthy consideration boil down to in strictly positivist terms? Article 3 CAT spells out one implication of the prohibition of torture. This prohibition of torture is a fundamental value, expressed in general terms in Article 3 ECHR. As expulsion resulting in torture would be contrary to this value underlying the Convention, it would be contrary to Article 3. In terms of means of interpretation, the Court hence states that Article 3 read to object and purpose prohibits *refoulement*. This reading finds, partially, support in other sources of international law, notably Article 3 CAT. But only partially, for the latter prohibits expulsion only if there is danger of the expellee being subjected to "torture". "In the Court's view", under Article 3 this obligation extends to "inhuman or degrading treatment" - apparently solely on the basis of the object and purpose of the provision.

Such a summary, however, does not do justice to the core consideration of this landmark case. Noting that the language of this consideration is not devoid of rhetorical effects ("the abhorrence of torture", the Convention as "common heritage of political traditions, ideals, freedom and the rule of law"), we should bear in mind that the Court should not only state how the Convention should be interpreted and why, but also convince and persuade the national authorities that their treaty obligations under the Convention really required so. In this the Court succeeded, because the *Soering* doctrine has been generally accepted. And as regards the strictly legal implications, we should not overlook how the Court here creates the possibility for ever wider application of the provision. The reasoning hinges on the "fundamental value" that "underlies" the provision. This postulate may contain about any implication not expressed in the Convention's text, awaiting identification by the Court.

One such implication the Court identified in *Soering* concerned its own competence to address the case:

"It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article (see paragraph 87 above)".[17]

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[16] *Soering*, para. 88.
[17] *Soering*, para. 90.

Appeals to the Court are (and were in 1989) admissible only if the applicant qualified as a "victim" of a violation of a Convention right.[18] Strict application of this requirement in expulsion cases would render the protection of Article 3 ECHR illusory for true "victims". "Effectiveness" (one of the interpretation principles mentioned by the Court in *Soering*) enables the Court to "depart" from this admissibility criterion, that is, to ignore or adapt the wording of the Convention.

VI. The search for a fair balance

The fundamentality of Article 3, combined with the effectiveness requirement, secures huge freedom for the Court to extend protection in the realm of asylum. But in *Soering*, it identified also a principle that creates freedom to mitigate the implications of the prohibition on expulsion, even despite the wording of the Convention:

"What amounts to "inhuman or degrading treatment or punishment" depends on all the circumstances of the case. Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases."[19]

It turns out that another principle is "inherent to the whole of the Convention" - the search for a fair balance. This comes as a surprise after the Court's firm statement that Article 3 ECHR is "absolute", allows for no "interferences" or "derogations", just a few lines before. As regards Jens Soering, this balancing worked as follows. Next to the USA, Germany had requested an extradition request to the UK – for Soering was a German national. As the death sentence did not exist in Germany, death row and ill-treatment would not threaten him there. The Court concluded that

"the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration."[20]

Put otherwise, the UK would not strike a fair balance when extraditing Soering to the United States, because it had an alternative – extradition to Germany – that would satisfy the general interest just as well.

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[18] Article 35 (new), Article 25 (old) ECHR.
[19] *Soering*, para. 89.
[20] *Soering*, para. 111.

True, the Court retraced from this particular application of the "fair balance" approach in *Chahal*[21] where it ruled that Chahal's terrorist activities are irrelevant in view of the danger of ill-treatment awaiting him upon removal. But it can be seen at work in many more.

VII. Allaying the burden

How both approaches interact is nicely illustrated in cases on expulsion of very ill people, who receive good medical and social support in the expelling State which they risk to lack upon expulsion. According to the Court, these cases are different from the type addressed in *Soering*, because the suffering will not be caused by an intentionally inflicted act of ill-treatment, but be due to socio-economic circumstances such as poverty and bad health systems outside Europe. So these cases fall outside the scope of the *Soering* doctrine.[22] Nevertheless, "given the fundamental importance of Article 3 in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts",[23] such as medical cases. Here "the threshold should remain high", because

> "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights […]. Article 3 does not place an obligation on the Contracting State to [provide for] free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States".[24]

The fundamentality of Article 3 once more calls for an inclusive interpretation, but unwanted consequences – overbearing costs - are checked by the working of the fair balance principle.

This interaction applies to "classic" asylum cases as well, although the Court does not explicitly refer to the search for a fair balance. As to the examination of appeal to Article 3 in expulsion cases, the Court ruled in *Vilvarajah* that its own scrutiny should be a "rigorous" one, in view of the "fundamental character" of the prohibition.[25] The same is expected, for the same reason, from the States party to the Convention.[26] But it falls upon the applicant to "show" the grounds why he runs a real risk of ill-treatment: ex officio scrutiny of the risk is not required. Hence, its effect is limited – the search for a fair balance does apply.

VIII. Prohibitions of refoulement under Articles 6 and 9 ECHR?

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[21] ECtHR 15 November 1996, no. 70/1995/576/602, Rep. 1996-V (*Chahal v. UK*).
[22] Here I will not address whether this distinction between socio-economic and other obligations is a sound one in this context; see H. Battjes, 'In search for a fair balance The absolute character of the prohibition of refoulement under Article 3 ECHR reassessed', (forthcoming).
[23] ECtHR 2 May 1997, 146/1996/767/964 (*D. v. UK*), para. 49.
[24] ECtHR *N. v. UK*, para. 45.
[25] ECtHR 30 October 1991, 13163/87 (*Vilvarajah*), para. 108.
[26] ECtHR 11 July 2007, 40035/98, Rep. 2000-VIII (*Jabari v. Turkey*).

Emphasis on the importance of human rights provisions calling for inclusive interpretation, balanced by concern for the burdens of the States party – this pattern can also be discerned in the Court's cautious approach to prohibitions of *refoulement* under other Convention provisions than Article 3. *Soering* had stated that in American criminal proceedings, he would not be able to secure legal representation as required by Article 6(3)(c) ECHR. Did Article 6 indeed prohibit extradition in case of risk of denial of fair trial in the country of destination? The Court reasoned that

"The right to a fair trial in criminal proceedings, as embodied in Article 6 (art. 6), holds a prominent place in a democratic society (see, inter alia, the Colozza judgment of 12 February 1985, Series A no. 89, p. 16, § 32). The Court does not exclude that an issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk".[27]

Although not "fundamental", Article 6 ECHR is "prominent"; hence, it can prohibit expulsion. But the threshold is high: it does so only "exceptionally", in case of a "flagrant denial of fair trial". In contrast, degrading treatment or punishment, the least severe form of ill-treatment prohibited by Article 3 ECHR, is sufficient to attract the protection of that Article.[28]

The Court further elaborated on the issue in *Z and T v UK*, on Article 9 (freedom of religion).[29] The Court opposed Article 9 to the "fundamental" character of Article 3 (and Article 2).[30] It furthermore remarked that

"*On a purely pragmatic basis*, it cannot be required that an expelling Contracting State only return an alien to a country where the conditions are in full and effective accord with each of the safeguards of the rights and freedoms set out in the Convention."[31]

Finally, it suggested that Z and T's case would also fall outside the scope of the Refuge Convention:

"The Contracting States nonetheless have obligations towards those from other jurisdictions, imposed variously under the 1951 United Nations Convention on the Status of Refugees and under the above-mentioned Articles 2 and 3 of the Convention. As a result, protection is offered to those who have a substantiated claim that they will either suffer persecution for, *inter alia*, religious reasons or will be at real risk of death or serious ill-treatment, and possibly flagrant denial of a fair trial or arbitrary detention, because of their religious affiliation (as for any other reason). Where however an individual claims that on return to his own country he would be impeded in his religious worship in a manner which falls short of those proscribed levels, the Court considers that very limited assistance, if any, can be derived from Article 9 by itself".

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[27] *Soering*, para. 113.
[28] *Soering*, para. 88, last clause.
[29] ECtHR 28 February 2006, no. 27034/05 (*Z. and T. v. UK*) (decision).
[30] The Court found a violation of the prohibition of *refoulement* under Article 2 in ECtHR 8 November 2005, no. 13284/04 (*Bader v. Sweden*).
[31] Emphasis added.

Here, the Court takes the same approach to interpretation of Article 9 as it does in *Soering* as regards Article 3, albeit to the opposite effect: a reading to object and purpose (informed by an *a contrario* reasoning to the object and purpose of Article 3) in the light of relevant international law reveals that Article 9 will normally not prohibit expulsion if there is a real risk that the expellee will suffer violation of his freedom of religion in the country of origin. The stress on international law – the CCPR and the CAT in *Soering*; the Refugee Convention in *Z and T v UK* – is telling. Together, these cases express the Court's anxiety both to include refugees into the scope of Convention protection, and not to expand this scope too far beyond protection obligations the States assumed under other treaties.

IX. The European Court monitoring the Refugee Convention

Slightly exaggerating, one may summarize the legacy of *Soering* as a prohibition of *refoulement* in cases where, for the most part, other treaties also prohibit *refoulement*. Even so, this legacy has much enriched asylum law in Europe.

The Refugee Convention lacks a monitoring mechanism that can oblige states to adopt a certain application. As a consequence, the refugee definition is open to ever more restrictive interpretation by the States party. The Court's case-law on Article 3 since *Soering* fixed a standard for a number of issues that came up in asylum law. One example is the issue of agents of persecution. In the 1990's, a number of European states held the view that the refugee definition applies only if the protection seeker will be victim of persecution acts by a (pseudo) state, not, if he is victim in a situation of general unrest and disorder. In this way some of the major refugee crises were defined out of the scope of refugee protection – such as Somalia. The European Court of Human Rights in a series of ruling stated that absence of a state does not preclude application of Article 3 ECHR. This standard now also applies, for most European states, to the Refugee Convention application too: it has been laid down in the EU Qualification Directive.[32] The dynamic interpretation provided for by the Court on this and other issues has made Article 3 ECHR a primary form of protection in Europe. Soering's lasting legacy is adjudication of refugee law by the European Court of Human Rights.

X. Balancing an absolute prohibition

What to think of that other legacy, the identification of interpretation principles or approaches that give the Court so much freedom to widen or narrow the scope of protection under the prohibition of *refoulement*? One obvious lesson to draw is that a trumpeted extension of protection is unlikely to come without a silent escape. This may be deplored by those who view human rights in general, and Article 3 ECHR in particular, as the expression of human dignity, and balancing in this context as something close to betrayal of that dignity. It may be applauded by those with a realist view on

[32] Article 6.

international law who appreciate balancing as a wise limitation on Convention obligations to the extent the States party are willing to accept them. In either case, one must accept that concepts like absoluteness or balancing are unreliable.