confidence, the ECJ has done just that. Furthermore, the ECJ's condemnation of a conclusive presumption of compliance with fundamental rights (typically a list of "safe countries") aligns the CEAS with international refugee law in that respect[41] and may in turn inspire other asylum systems to reject that presumption.

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European Convention on Human Rights—Article 3—inhuman and degrading punishment—life sentences—gross disproportionality

VINTER v. UNITED KINGDOM. Application Nos. 66069/09, 130/10, & 3896/10. *At* http:// www.echr.coe.int.
European Court of Human Rights, January 17, 2012.

The European Court of Human Rights (Court) recently sustained the imposition of life sentences without possibility of parole against challenges that they constitute inhuman or degrading punishment[1] in violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention or ECHR).[2] In so doing, it gave effect to the "gross disproportionality" test frequently found in domestic law, including that of the United States. It also held, however, that the continued detention of a life prisoner once valid penological grounds no longer exist does violate Article 3 when the prisoner has no recourse for seeking a reduction in the life sentence.

The *Vinter* case concerned three applicants who, having been convicted of murder in separate criminal proceedings in England and Wales, were serving mandatory sentences of life imprisonment. All three applicants had been given *whole-life orders*, meaning that under United Kingdom law they were not eligible for conditional release and could be released only at the discretion of the secretary of state on compassionate grounds. In the past that discretion had rarely been exercised, typically when the prisoner was terminally ill or seriously incapacitated.[3]

The applicants claimed that in the case of life sentences Article 3 requires that conditional release (that is, release other than on compassionate grounds) must always be a possibility. As a result, they argued, the "irreducible" life sentences imposed on them without hope of release

[41] *See* UNHCR, *supra* note 5, paras. 13–16; GOODWIN-GILL & MCADAM, *supra* note 5, at 392; Rainer Hofmann & Tillmann Löhr, *Introduction to Chapter V: Requirements for Refugee Determination Procedures, in* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 1081, 1113 (Andreas Zimmermann ed., 2011).

[1] Vinter v. United Kingdom, App. Nos. 66069/09, 130/10, & 3896/10 (Eur. Ct. H.R. Jan. 17, 2012) [hereinafter Judgment]. The Court's judgments and decisions are available online at http://www.echr.coe.int.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, Nov. 4, 1950, ETS No. 5, 213 UNTS 222 [hereinafter Convention]. Article 3 provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[3] Section 30(1) of the Crime (Sentences) Act, 1997, c. 43 (Eng.), provides that the secretary of state may at any time release a life prisoner on license (conditionally on good behavior) if he is satisfied that exceptional circumstances justify the prisoner's release on compassionate grounds. Before the Court of Human Rights the British government admitted that since 2000 no prisoner serving a whole-life term had been released on compassionate grounds. Judgment, para. 37.

violated that article. Separately, the applicants complained that the imposition of whole-life orders without the possibility of regular review by the courts violated Article 5(4).[4]

The Court first examined under what circumstances, if any, a life sentence constitutes a violation of Article 3 at the moment when such a sentence is imposed. Second, it considered at what point in the course of a life or other long sentence the continued execution of that sentence infringes Article 3 (para. 87).

As to the first issue, the Court held that while matters of appropriate sentencing in specific cases largely fall outside the scope of the Convention,[5] a "grossly disproportionate" punishment could amount to ill-treatment contrary to Article 3 at the moment of its imposition. But, the Court emphasized, gross disproportionality is a strict test that will be met only on "rare and unique occasions" (para. 89).[6] As to the second issue, the Court held that in the case of both discretionary and mandatory life sentences an Article 3 issue will arise only when it can be shown: "(i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds (such as punishment, deterrence, public protection or rehabilitation); and (ii) . . . [that] the sentence is irreducible *de facto* and *de iure*" (para. 92).

In the present case, the Court accepted that the life sentences imposed on the applicants were irreducible (para. 94). Yet that fact alone did not mean those sentences had violated Article 3 because the Court considered that they served legitimate penological purposes. The first applicant had been serving his sentence for just three years, though his crime was a particularly brutal and callous murder, committed while he was on parole from a life sentence imposed for a previous murder. Under those circumstances, the Court was satisfied that his incarceration for life served the legitimate penological purposes of punishment and deterrence.

In considering the second and third applicants, the Court did not address the issue of legitimate penological grounds itself but, rather, relied on the assessment of the English High Court, which had effectively resentenced the prisoners when they sought review of their whole-life sentences. The Court saw no indication that the High Court had concluded that either applicant's continued incarceration served no legitimate penological purpose, and accordingly the Court was similarly satisfied that the continued incarceration of them both did serve the legitimate penological purposes of punishment and deterrence (para. 95).

Having thus identified no violation of Article 3, the Court proceeded to analyze whether the imposition of whole-life orders without the possibility of regular review by the courts violated Article 5(4). Contrary to the applicants' submissions, the Court held that their detention need not be reviewed regularly for it to conform with the provisions of Article 5. Moreover, the whole-life orders had clearly been imposed to meet valid considerations of punishment and deterrence. As the Court observed, the sentences of these individuals differed from the life sentence considered in its earlier judgment in *Stafford*, which had been divided into a tariff or minimum period (imposed for the purposes of punishment) and the remainder of the sentence, when continued detention was determined by considerations of risk and dangerousness.[7]

[4] Article 5(4) of the Convention, *supra* note 2, provides: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

[5] *See* Léger v. France, App. No. 19324/02, para. 72 (Eur. Ct. H.R. Apr. 11, 2006); Sawoniuk v. United Kingdom, 2001-VI Eur. Ct. H.R. 375, 394–95.

[6] Quoting R v. Latimer, [2001] 1 S.C.R. 3, para. 76 (Can.).

[7] Stafford v. United Kingdom, 2002-IV Eur. Ct. H.R. 115, 141–42, paras. 79–80.

Consequently, the Court was satisfied that the applicants' detention was permissible under Article 5(4) (paras. 101–03).

* * * *

Most European countries do not impose "irreducible" life sentences even for the most serious crimes. Some, including Portugal, Norway, and Spain, do not impose life sentences at all.[8] In others (for example, Austria, Belgium, the Czech Republic, Estonia, Germany, Lithuania, Luxembourg, Poland, Romania, Russia, Slovakia, Slovenia, Switzerland, and Turkey), prisoners sentenced to life imprisonment serve fixed periods after which release is possible (albeit not certain). In Switzerland, indeterminate sentences can be imposed on dangerous offenders, so that release will depend wholly on new scientific evidence that the prisoner is not dangerous. In fact, only the Netherlands and England and Wales have established irreducible life sentences.[9]

Since the abolition of the death penalty in the United Kingdom over forty years ago, the number of life-sentenced prisoners has increased significantly, a trend that gathered pace with the introduction in 1997 of automatic life sentences for a second serious sexual or violent crime, and has continued to rise with the indeterminate sentence of "imprisonment for public protection," enacted in 2003, which is in essence a type of life sentence.[10]

In recent years, life sentences imposed and executed in England and Wales have frequently been challenged as violating the European Convention, and in numerous judgments the Court has found the English practices to be incompatible with the Convention. These judgments have even led to some significant changes in the English legislation, reflected especially in the Criminal Justice Act, 2003.[11]

In various contexts the Court had previously addressed both issues raised by the petitioners in *Vinter*: whether imposition of a life sentence without the possibility of parole contravenes Article 3 and whether Article 5(4) requires periodic review of such a sentence.[12] But none of its prior decisions clearly explored or explained all of the issues, so that one might reasonably have expected that the *Vinter* case would constitute an excellent occasion for further development of the Court's jurisprudence along the lines established in those earlier decisions. From that perspective, the decision was unexpected.

[8] In Norway and Spain, the maximum length of sentence is thirty years. In Portugal, the length of sentence cannot exceed twenty-five years.

[9] Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 FED. SENT'G REP. 39 (2010). Data from the Council of Europe show that in September 2009 England and Wales accounted for more than 60 percent of the total life sentence prison population in all the countries of the Council of Europe. MARCELO F. AEBI & NATALIA DELGRANDE, COUNCIL OF EUROPE ANNUAL PENAL STATISTICS—SPACE I—SURVEY 2009, tbl.8, at 71–72 (Mar. 22, 2011), *at* http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/default_en.asp.

[10] Criminal Justice Act, 2003, c. 44, §230; CATHERINE APPLETON, LIFE AFTER LIFE IMPRISONMENT 10 (2010).

[11] *See supra* note 10.

[12] *See* Kafkaris v. Cyprus, App. No. 9644/09, Admissibility (Eur. Ct. H.R. June 21, 2011); Kafkaris v. Cyprus, App. No. 21906/04 (Feb. 12, 2008); Blackstock v. United Kingdom, App. No. 59512/00 (June 21, 2005); Waite v. United Kingdom, App. No. 53236/99 (Dec. 10, 2002); *Stafford*, 2002-IV Eur. Ct. H.R. 115; Einhorn v. France, 2001-XI Eur. Ct. H.R. 245; Hirst v. United Kingdom, App. No. 40787/98 (July 24, 2001); Sawoniuk v. United Kingdom, 2001-VI Eur. Ct. H.R. 375; Oldham v. United Kingdom, 2000-X Eur. Ct. H.R. 1; Hussain v. United Kingdom, 1996-I Eur. Ct. H.R. 252; Wynne v. United Kingdom, 294 Eur. Ct. H.R. (ser. A) 3 (1994); Thynne v. United Kingdom, 190 Eur. Ct. H.R. (ser. A) 3 (1990); Weeks v. United Kingdom (Article 50), 145 Eur. Ct. H.R. (ser. A) 3 (1988).

Among the undeniable novelties introduced by the judgment is the Court's acceptance of the concept of gross disproportionality. Granted, the concept occupies a settled place in the domestic jurisprudence of several states and is commonly treated as a test of assessing whether specific sentences, including life sentences, meet constitutional norms prohibiting inhuman or degrading (or cruel) punishment. Some particularly illustrative examples can be seen in the jurisprudence of the U.S. Supreme Court developed on the basis of the Eighth Amendment to the Constitution. The prohibition of cruel and unusual punishment included in that amendment is interpreted by the Supreme Court as proscribing exactly those extreme sentences that are grossly disproportionate to the crime.[13] The concept of gross disproportionality has also found a place in such jurisdictions as Canada, Mauritius, Namibia, and South Africa.[14]

But before its judgment in *Vinter*, the European Court had not applied the grossly disproportionate concept at all, and was actually rather reluctant to scrutinize the convicting rulings of national courts of the Convention states. It consistently claimed that "matters of appropriate sentencing largely fall outside the scope of [the] Convention" and that its role was not "to decide, for example, what is the appropriate term of detention applicable to a particular offence."[15] True, in some of its prior judgments, the Court had not precluded that, for example, a life sentence without any possibility of release imposed on a child even for murder could raise problems under Article 3 of the ECHR,[16] or that such a sentence imposed on an adult might also fall within the scope of Article 3.[17] Nevertheless, it had not developed any specific test that could assist in making such a determination.

Moreover, the Court had always stated that a life sentence without any possibility of release might merely "raise an issue/a problem under Article 3," instead of clearly declaring that such a sentence might in fact violate Article 3. That formulation might suggest that this kind of sentence opens a possibility for its review by the Court in the light of Article 3, but that the review will not necessarily result in the conclusion that Article 3 has been infringed.

[13] *See, e.g.*, Graham v. Florida, 130 S.Ct. 2011, 2021 (2010); Roper v. Simmons, 543 U.S. 551 (2005); Coker v. Georgia, 433 U.S. 584 (1977). A close analysis of the U.S. Supreme Court's case law supports the following conclusion: either that the Court categorically prejudges that a particular punishment, including life sentence without parole, is always grossly disproportionate to certain crimes or certain classes of offenders (for example, capital punishment is a grossly disproportionate penalty for rape or for juveniles under eighteen; life imprisonment without parole is grossly disproportionate for juveniles who did not commit homicide); or that it applies a case-by-case approach, considering all the circumstances of each case to determine whether the sentence is grossly disproportionate.

[14] *See, e.g.*, R v. Latimer, [2001] 1 S.C.R. (Can.); R v. Luxton, [1990] 2 S.C.R. 711 (Can.); State v. Philibert, [2007] SCJ 274 (Mauritius); State v. Tcoeib, [1996] 1 SACR 390, [1997] 1 LAW REP. COMMONWEALTH [LRC] 90 (S. Ct. Namib.); State v. Likuwa, [2000] 1 LRC 600 (High Ct. Namib.); State v. Vries, [1997] 4 LRC 1 (High Ct. Namib.); Dodo v. State, [2001] ZACC 16 (Const. Ct. S. Afr.); Niemand v. State, [2001] ZACC 11 (Const. Ct. S. Afr.).

[15] Léger v. France, App. No. 19324/02, para. 72 (Eur. Ct. H.R. Apr. 11, 2006); *Sawoniuk*, 2001-VI Eur. Ct. H.R. at 394–95.

[16] V. v. United Kingdom, 1999-IX Eur. Ct. H.R. 111, 151, para. 100; T. v. United Kingdom, App. No. 24724/94, para. 99 (Eur. Ct. H.R. Dec. 16, 1999); *see* Partington v. United Kingdom, App. No. 58853/00, "The Law," para. B(2) (June 26, 2003); Wynne v. United Kingdom, App. No. 67385/01, Admissibility, "The Law," para. 4 (May 22, 2003); Hill v. United Kingdom, App. No. 19365/02, Admissibility, "The Law," para. 2 (Mar. 18, 2003); Stanford v. United Kingdom, App. No. 73299/01, "The Law," para. 1 (Dec. 12, 2002).

[17] *Partington*, "The Law," para. B(2); *Wynne*, Admissibility, "The Law," para. 4; *Einhorn*, 2001-XI Eur. Ct. H.R. at 296, para. 27.

In *Vinter,* the Court expressly acknowledged that a grossly disproportionate sentence could amount, at the moment of its imposition, to ill-treatment contrary to Article 3. It emphasized, however, that the gross disproportionality test is strict (para. 89), and that even a mandatory sentence of life imprisonment without the possibility of parole, issued after disregarding all the mitigating factors generally understood as indicating a significantly lower level of culpability on the part of the defendant, is not per se grossly disproportionate and is not incompatible with the Convention (para. 93).

It seems that life sentences will be held impermissible (because grossly disproportionate) only where an enormous discrepancy in degree is found between the value of the remainder of the offender's life and the severity or cruelty of the offense and the offender's culpability. Such a discrepancy may lead to the qualification of that sentence as grossly disproportionate if it shocks the sense of justice and decency of average citizens and is hardly acceptable to society as retaliation for the offense.

The explanation for adopting such a high standard undoubtedly lies in the Court's respect for the judicial power of the Convention states. Matters of criminal sentencing are inherently linked to the sovereign powers of those states and are politically sensitive, so it is not surprising that the Court would hesitate to interfere with their national judicial decisions. The preferred method for eliminating certain types of punishment in the Convention states, in particular life sentences without parole, is through legislative acts of the Council of Europe or the adoption of protocols to the Convention, rather than through judgments of the Court.

The execution of such sentences, however, raises different issues. Reviewing the phase of execution of criminal sentences is a legitimate judicial function, and under Article 3 the Court should be more willing to examine and question that phase, including the continued detention of life prisoners.

Therefore, of greater long-term significance is the Court's conclusion that Article 3 can be violated when the applicant's continued imprisonment cannot be justified on legitimate penological grounds and the sentence cannot be reduced in fact or in law (paras. 92–93). The Court properly emphasized that the absence of any persisting penological grounds can render the continued detention of a life prisoner incompatible with Article 3 (at least when the life sentence is irreducible). But the Court left open the important question whether the domestic court or the European Court should conduct the inquiry into the persistence of valid penological grounds for a life prisoner's incarceration that is independent of the national court's assessment in imposing a life sentence in the first place.

In the present author's view, it is entirely appropriate for either the Court or the relevant national body (the penitentiary, sentencing court, or parole board) to take an active role in verifying the persistence of penological grounds for continued incarceration, and to do so independently of the original convicting court. Obviously, public protection and rehabilitation as the grounds for justifying incarceration are based on factors that are "likely to change in time" (para. 102),[18] and neither court can confine its analysis to the factors considered when the sentence was originally handed down. The goals of punishment and deterrence are also based on factors susceptible to change over time, and the grounds to those ends that were weighed when the sentence was imposed will not necessarily continue to exist and be valid at the later stages of a life prisoner's incarceration.

[18] Citing Stafford v. United Kingdom, 2002-IV Eur. Ct. H.R. 115, 144, para. 87.

This author suggests that the time that prisoners have already spent serving life sentences should have a direct influence on whether that punishment remains proportional to the severity of the offense and the level of their culpability. Even if, at the moment of its imposition, the life sentence was fully proportional to the gravity of the crime and the blameworthiness of the offender, the years (or even decades) of imprisonment might at some point justify concluding that further punishment will no longer be proportional and that the ground of punishment therefore no longer justifies continued incarceration. Disproportionality in this latter sense might also be due to changes in society's attitude toward the offender, as well as evolution in the community's shared intuitions of justice, resulting in diminished social demand for harsh retribution.

In addition, at some point the relevance of deterrence as a justification for life imprisonment may completely cease to exist. Interestingly, some serious and reliable research indicates that deterrence has little or no impact, so that the claim should not be made that deterrence justifies life sentences without parole since it does not work in practice.[19] Finally, one cannot ignore that many life sentences are not strictly proportional to the severity of the crimes of the offenders and do not correctly reflect the level of the latter's blameworthiness.[20] Even if these sentences are not grossly disproportionate and cannot be challenged under Article 3 at the moment of their imposition, they could be questioned later, in the course of their execution, when the European Court (or the national court) determines that the offender's continued detention is no longer justified and therefore no longer proportionate. A precondition for such challenges, however, is that we regard the Court (and the national court) as fully competent under Article 3 to scrutinize the persistence of the penological grounds for imprisonment and that it is not prejudged once and for all by the original sentence.

This interpretation of Article 3 implies the availability of the necessary judicial procedures to permit reliable verification of whether the continued detention of a life prisoner still serves legitimate penological purposes. Undoubtedly, this view strongly reinforces the rights of life prisoners and is consistent with recent international and national developments concerning life sentences.

Thus, the Rome Statute of the International Criminal Court allows for life terms when justified by the gravity of the crime and the circumstances of the convicted person, but such sentences must be reviewed after twenty-five years to determine whether they should be reduced.[21] For its part, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has stated its serious reservations about the very concept according to which "actual lifers," once they are sentenced, are considered permanent threats to the community and deprived of any hope of being granted a conditional release.[22] Significantly, the committee recommends that "[n]o category of prisoners should be 'stamped' as likely to

[19] Paul H. Robinson, *'Life Without Parole' Under Modern Theories of Punishment* 5–6 (U. of Penn. Law School Public Law Research Paper No. 10-34, 2010), *available at* http://ssrn.com/abstract=1695542; *see also* Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004).

[20] For more on this phenomenon, see Robinson, *supra* note 19, at 13–15.

[21] Rome Statute of the International Criminal Court, Arts. 77, 110, July 17, 1998, 2187 UNTS 3.

[22] The committee was founded on the basis of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 20, 100th Cong. (1988), 1465 UNTS 85.

spend their natural life in prison," no denial of release should ever be final, and not even recalled prisoners should be deprived of hope of release.[23]

In *Vinter*, the Court decided that the continued detention of a life prisoner without legitimate penological grounds violates Article 3 only when the sentence is irreducible. The Court might do well to abandon "irreducibility" as a condition for finding a violation of Article 3 since its concept of irreducibility is far from clear (paras. 69, 94).[24] The distinction between irreducible and reducible life sentences is often blurred, and the minimum institutional or procedural prerequisites that must be fulfilled to qualify a life sentence as reducible are not apparent. In particular, it remains unclear whether a life sentence without the possibility of conditional release can be deemed reducible simply because a sovereign or head of state is authorized to grant a pardon. One may reasonably ask whether it should not suffice, to consider a life sentence as an inhuman punishment within the meaning of Article 3, that the continued detention of life prisoners (who may have spent many years or even decades in prison) is no longer justified on any penological grounds, even if their sentences are formally reducible. In the present author's view, the answer should definitely be affirmative. For now, however, the Court assumes that execution of a reducible life sentence cannot infringe Article 3.

In sum, by outlawing, in light of Article 3 of the Convention, irreducible life sentences whose execution no longer serves any legitimate penological purpose, the Court has made it necessary to conduct a judicial review of the lawfulness of the continuing incarceration of life prisoners. While persons serving life sentences without parole still have no enforceable right to conditional release, it can be argued after *Vinter* that at least they are entitled to have their (irreducible) life sentence reconsidered, if only to determine whether there are valid grounds for continuing their incarceration. In this sense, it can be said that a free life after life imprisonment has become a more realistic option.

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Piracy—South Korea—prosecution in national courts—passive personality principle—universal jurisdiction

"REPUBLIC OF KOREA v. ARAYE." No. 2011 Do 12927.
Supreme Court of Republic of Korea, December 22, 2011.

A recent decision of the Supreme Court of the Republic of Korea (Daebeobwon) upheld the exercise of universal criminal jurisdiction over Somali pirates convicted of hijacking a Korean vessel in the Indian Ocean.[1] This was the first Korean piracy prosecution and it revealed various procedural issues related to the prosecution of such crimes that remain to be resolved.

[23] Jørgen Worsaae Rasmussen, *Actual/Real Life Sentences*, Doc. CPT (2007) 55, at 10 (June 27, 2007), *at* http://www.cpt.coe.int/en/workingdocs.htm.

[24] Kafkaris v. Cyprus, App. No. 21906/04, paras. 100–08 (Eur. Ct. H.R. Feb. 12, 2008).

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[1] Supreme Court [S. Ct.], No. 2011 Do 12927, Dec. 22, 2011 ("Republic of Korea v. Araye") [hereinafter Judgment]. The Judgment is summarized in English online at http://eng.scourt.go.kr/eng/decisions/guide.jsp. The Korean courts' spelling of the first defendant's surname is used here, but it is often rendered as "Arai" in English-language sources. Translations from the Korean below are by the authors unless otherwise noted.