

ATTEMPTING TO RESTORE A RIGHT TO HOPE OF RELEASE: THE PHUONG NGO CASE

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I INTRODUCTION

Mr Phuong Ngo (Ngo) was convicted of the contract murder of John Newman, a member of the NSW Parliament (MP), and sentenced to life imprisonment on 14 November 2001. This was the first and, to date, only political assassination in Australia.

Ngo has exhausted all avenues of appeal against his conviction and sentence in the courts as well as there being an inquiry into his conviction. Ngo has consistently maintained his innocence and further avenues for possible appeal are still being investigated and considered. The final avenue for potential relief from his life sentence, from which there is currently no prospect of release, is a communication to the United Nations Human Rights Committee under the Optional Protocol to the *International Covenant on Civil and Political Rights* (ICCPR).

This paper will provide an overview of Ngo's matter before examining whether life sentences in NSW comply with Australia's obligations under the ICCPR. The focus of this paper is to strongly suggest that the sentence of life imprisonment in NSW violates Articles 7 & 10 ICCPR as a form of inhumane or degrading punishment because it is irreducible and a mechanism is not provided for review. Despite the exercise of the Royal Prerogative of Mercy, it will be argued that this does not offer a reasonable prospect of release. Finally, the paper will provide recommendations on how to remedy these violations of the ICCPR.

II CONTEXT

A *Background of Phuong Ngo*

Ngo was born in Vietnam on 9 July 1958, where his family had a chicken farm. The lives of Ngo and his family changed with the fall of Saigon in 1975 and he came to Australia in 1982 as a refugee with his brother.

Ngo started work employed by a fly screen company in the Sydney suburb of Punchbowl. Ultimately he prospered in business and became the Honorary President of the Mekong Club and Deputy Mayor of the City of Fairfield. He also owned and published a Vietnamese Newspaper.

Prior to his arrest in March 1998, Ngo worked both as a Councillor and Deputy Mayor of Fairfield, building bridges between Asian and other groups in the community and assisting constituents with local issues. He was instrumental in the formation of the Mekong Club which enabled Asian people, especially Vietnamese, to have their own club and support and employ members of their ethnic community. He fostered an Asian language and culture school at weekends and was instrumental in having the Fairfield Drug Intervention Centre established.

B *The Murder of John Newman*

Australia's first and only political assassination occurred on 5 September 1994. The victim was Mr John Newman (Newman), who at the time of his death was a serving Australian Labor Party MP in the NSW State Parliament. The police investigation that followed lasted for over three years with several suspects initially being identified. Over time, rumours began to spread in the community that Ngo had much to gain politically from Newman's death. The local media soon repeated reports that Ngo masterminded and set about arranging to have Newman gunned down in the driveway of his Cabramatta home.

The investigation grew to include over 50 detectives from the NSW homicide, Special Branch, Asian Crime Squad, the Federal Police and the New South Wales Crime Commission.¹ Ngo ultimately became the focus of the investigation and on 13 March 1998, he was arrested and charged with the murder of Newman. The murder case has been exhaustively examined by the New South Wales Crime Commission as well as there being a coronial inquest, a committal hearing and three Supreme Court trials.

C *The Trials and Conviction of Ngo*

Ngo was first arraigned in July 1999 and entered a plea of not guilty to the murder of Newman. Three Supreme Court trials followed with the first being aborted on 3 August 1999, the second resulting in a hung jury in May 2000, and the third where Ngo was found guilty of murder on 29 June 2001. His two co-accused were acquitted by that same jury. Despite the jury accepting that the fatal shots were fired by a person other than Ngo, the verdict established that the killing was organised by Ngo.

D *Socio-legal context of Ngo's Conviction and Sentence*

Ngo was convicted amidst one of the most defining periods in the history of NSW legislative sentencing reform – the 'Truth in Sentencing' reforms. One of the pivotal legislative amendments was the introduction of section 19A *Crimes Act 1900* (NSW), which created a maximum sentence of natural life imprisonment for the crime of murder, required to be for 'the term of the person's natural life'. Since the abolition of the death penalty, this is the most severe penalty in NSW, and 'should only be imposed in extreme circumstances.'² Yet, the process of imposing such a sentence is 'not without complexity,'³ especially given the inherent connection with section 61 *Crimes (Sentencing Procedure) Act 1999* (NSW)⁴, subsection 1 of which provides:

A court is to impose a sentence of imprisonment for life...if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

Thus, in determining if a life sentence is appropriate, the court is required to weigh the level of culpability in the commission of an offence against the community interests in the retributivist, protective and deterrent purposes of punishment. This task is further complicated by the provisions of section 61(3) which provide that 'nothing in subsection (1) affects section 21(1),' allowing the court to 'impose a sentence of imprisonment for a specified term,' and affixing a non-parole period. In contrast, a non-parole period cannot be set for a life sentence in NSW.⁵

¹ Morri, Mark & Thompson, Lachlan, "John Newman murder: Downfall of a merciless crime lord saved soul of Cabramatta" Daily Telegraph, 3 September 2014, cited at www.dailytelegraph.com.au/newslocal/john-newman-murder-downfall-of-a-merciless-crime-lord-saved-soul-of-cabramatta/news-story/39b40934943c2c9033361c9c79863c91

² *R v Farhad Qaumi, Mumtaz Qaumi & Jamil Qaumi* [2017] NSWSC 774, 181 (Hamill J).

³ *Ibid.*

⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW) is hereafter referred to as the 'Sentencing Act'.

⁵ See, *Sentencing Act* s 54D(1)(a). Also see, for example, *R v Harris* (2000) 50 NSWLR 409.

Historically, the question of whether a case is one calling for a life sentence in terms of s 61(1), much depended on whether the killings were sex related, thrill killings, killings involving extended suffering by the victim or extraordinary violence, multiple killings or cases where the prisoner is found to be a continuing danger to the community.

E Sentencing Remarks

On 14 November 2001, Ngo was sentenced to life imprisonment by Dunford J.⁶ His Honour was satisfied that Ngo's motive for the killing of Newman was '*naked political ambition and impatience*'. The killing of an MP for political purposes was characterised as an attack on the State's constitutional system of parliamentary democracy, giving rise to such culpability that 'the community interest in retribution, punishment, community protection and deterrence' can only be met by the imposition of a life sentence. Yet, Dunford J also stated that he was satisfied that Ngo was unlikely to re-offend and went on to make the following comment regarding the restraints of the current sentencing laws:

Where a life sentence is imposed, the Court has no power to set a non-parole period and although I am satisfied that the prisoner should remain under sentence for the remainder of his life, nevertheless this is not a case where I believe he necessarily needs to be kept in custody for the whole of that time, and if I had the power to do so, I would fix a non-parole period, but it would be a very long one."⁷

His Honour went on to refer to (and support) the earlier comments of Wood CJ at CL in *R v Harris*⁸ where the NSW Parliament had been invited to usefully consider whether the court should have power to fix a non-parole period in cases to which s 61(1) applies. No such parliamentary consideration has ever taken place and Ngo continues to serve a life sentence without the possibility of parole in circumstances where he has maintained his innocence.

III REVIEWS

In August 2012, following numerous failed appeals⁹ against his conviction and a subsequent inquiry¹⁰ that ultimately did not disturb his conviction, an application for leave to appeal against his sentence of life imprisonment. was filed by Ngo. This application was ultimately refused¹¹ and a subsequent application for special leave to appeal was refused by the High Court on 12 December 2014. The High Court's status as the final court of appeal means that this refusal leaves Ngo unable to file any further appeal concerning his sentence.

IV OTHER POSSIBLE AVENUES OF REVIEW

The Royal Prerogative of Mercy¹² operates to allow for the review of convictions or sentences. In NSW, this is a broad discretionary power exercisable by the Executive. It is acknowledged, however, that the prerogative of mercy is exercised in favour of offenders only in extraordinary cases.¹³ This includes circumstances in which the petitioner has assisted the authority at their peril (usually relating

⁶ *R v Ngo* [2001] NSWSC 1021.

⁷ *R v Ngo* [2001] NSWSC 1021 [43].

⁸ *R v Harris* (2000) 50 NSWLR 409.

⁹ *R v Ngo* [2003] NSWCCA 82 [Special leave to HCA refused May 2004].

¹⁰ Reference 2009 Patten Inquiry

¹¹ *Ngo v R* [2013] NSWCCA 142

¹² Hereafter referred to as 'the prerogative of mercy'.

¹³ Attorney General Mark Speakman, 'Delivering transparency to mercy decisions' (Press Release, 9 November 2018) <<https://www.justice.nsw.gov.au/Documents/Media%20Releases/2018/delivering-transparency-to-mercy-decisions.pdf>>.

to the commission of another crime) or there are compassionate grounds such as mental illness, terminal illness or developmental disability to warrant release.

Given that the offence for which Ngo has been convicted is labelled ‘the first political assassination in Australian political history’¹⁴ and the fact that the prerogative of mercy is exercised by the executive arm of the NSW government, the legal and political landscape render no reasonable prospect for the exercise of the prerogative in Ngo’s favour.

V COMPLIANCE OF LIFE SENTENCES WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

A *Article 7 – ‘cruel, inhuman and degrading treatment’*

The Australian Government ratified the International Covenant on Civil and Political Rights (ICCPR)¹⁵ on 13 August 1980 and acceded to the Optional Protocol to the Covenant (‘Optional Protocol’) on 25 September 1991.¹⁶ Accordingly, as a signatory Australia has committed to uphold the principles enunciated in the ICCPR. Article 7 ICCPR mandates a fundamental and non-derogable right¹⁷ that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’¹⁸ and it is accepted that there is no comprehensive definition provided as to what constitutes ‘cruel, inhuman or degrading treatment or punishment.’¹⁹ In the absence of this, it is necessary to examine the ‘nature, purpose and severity’²⁰ of the punishment that has been imposed in conjunction with the fact ‘that no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 for any reasons.’²¹

It is important to emphasise that ‘the prohibition in Article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.’²² In light of this, it is contended that it is not the physical fact of imprisonment that deprives individuals of their inherent dignity of the human person, but rather the resulting ‘mental torture’²³ and ‘sheer hopelessness’²⁴ that converts an otherwise “constitutional” sentence to ‘cruel and degrading’ treatment and punishment. This is due to prolonged deprivation of liberty leading to increased social isolation, desocialisation, anxiety, suicide, and dependence, which can hamper efforts at rehabilitation and reintegration into society.²⁵ For those with indeterminate sentences these stressors are further exacerbated due to the lack of review mechanisms in place to provide a hope of release at some time during their sentence. Attention is also drawn to the emerging judicial recognition that a life sentence, without the possibility of parole,

¹⁴ *R v Ngo* [2001] NSWSC 1021.

¹⁵ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁶ *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁷ ICCPR n 14, Art 4.

¹⁸ *Ibid*, Art 7.

¹⁹ *Ibid*.

²⁰ UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992.

²¹ *Ibid*.

²² *Ibid*.

²³ William Anthony Schabas, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World’s Courts* (Northeastern University Press, 1996) 127.

²⁴ Andrew J Novak, ‘Toward a Global Consensus on Life, Imprisonment Without Parole: Transnational Legal Advocates and the Zimbabwe: Constitutional Court’s Decision in *Makoni v Commissioner of Prisons*’ (2018) 62(2) *Journal of African Law* 315, 324.

²⁵ R Stokes, ‘A fate worse than death? The problems with life imprisonment as an alternative to the death penalty’ in Jon Yorke (ed), *Against the Death Penalty: International Initiatives and Implications* (Ashgate, 2008) 289.

has ‘a capacity to crush hope and kill any motivation an offender may have to reform...[which is] inhumane and contrary to human rights.’²⁶

Despite the significance of Article 7 ICCPR there remains limited judicial consideration of it. There is, however, no real jurisprudential debate that Article 3 of the European Convention of Human Rights (ECHR)²⁷ mirrors Article 7 ICCPR.²⁸ The similarity is striking and accordingly the interpretation of Article 7 can (and should) be derived from the meaning that the European Court of Human Rights (ECtHR) has attributed to Article 3 ECHR. In particular, it is suggested that when interpreting Article 7’s application to life imprisonment, significant weight ought to be given to international decisions that have considered that specific topic. Accordingly, relying on the *jus commune* of human rights law, the decisions of the ECtHR will be drawn upon together with the views adopted by United Nations Human Rights Committee (UNHRC) to inform the question of whether Ngo’s indeterminate life sentence remains in breach of Article 7 ICCPR.

The ECtHR has consistently held that where the law does not provide a prisoner any mechanism or possibility for review of a whole life sentence, then that law remains incompatible with Article 3. It is the absence of any reducibility of sentence which places the state law in question in breach of Article 3.²⁹ An irreducible life sentence has consistently been held by the ECtHR to constitute inhumane and degrading treatment.³⁰ This is because an irreducible life sentence gives no recognition or consideration to a prisoner’s progress towards rehabilitation. Similarly, it provides no opportunity to consider whether the persons continued detention is justified on legitimate grounds and deprives the prisoner of any guidance as to what the prisoner must do to be considered for release at some later stage. Given the contention that significant weight ought to be given to decisions pertaining to life imprisonment, the leading cases from the ECtHR as they relate to Article 3 ECHR will be summarised, before providing an analysis of how they relate to the current practices in NSW.

1 *Vinter v United Kingdom*³¹

Vinter v United Kingdom is the seminal case in this area, with the Grand Chamber ruling that life-term prisoners must have a meaningful prospect of release and possibility of review. In addition, those sentenced to life imprisonment without parole must be made aware at the beginning of their sentence of the circumstances under which they may be considered for release.

The applicants in *Vinter* were subject to whole life orders, meaning they could not be released other than at the discretion of the Justice Secretary, who would only do so on compassionate grounds, for example, in case of terminal illness or serious incapacitation. The basis of the application was that their imprisonment for life amounted to inhuman and degrading treatment as they had no hope of release. The Grand Chamber held that there had been a violation of Article 3 ECHR. In making this determination, the Court found that for a life sentence to remain compatible with Article 3, it had to be “reducible”, that is, there had to be a prospect of the prisoner’s release and the possibility of a review of the sentence. In this case the domestic law concerning the Secretary’s power to release a person subject to a whole life order was unclear. Also, prior to 2003 a review of a whole life order

²⁶ *R v Farhad Quami, Mumtaz Quami & Jamil Quami (Sentence)* [2017] NSWSC 774 citing the collection of cases in *Vinter and Others v The United Kingdom* (European Court of Human Rights, Grand Chamber, Application Nos 66069/09, 130/10 and 3896/10, 9 July 2013) and note the observations of Bell J in *DPP (Vic) v Hunter* [2013] VSC 440, [110]-[111].

²⁷ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950 (entered into force 3 September 1953). Article 3 provides, “no one shall be subjected to torture or to inhumane or degrading treatment or punishment”.

²⁸ ICCPR n 14; See n 17 as to the terms of Article 7.

²⁹ *Vinter & Others v United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013). [hereafter *Vinter*]

³⁰ *Oclan v Turkey* [2014] ECHR 007.

³¹ *Vinter* n 28.

had automatically been carried out by a Minister 25 years into the sentence. This had been eliminated in 2003 and no alternative review mechanism had been put into place. In these circumstances, the Court was not persuaded that the applicants' whole life sentences were compatible with the Convention.

This is similar to the socio-legal setting of NSW where there is no mechanism for release of those sentenced to natural life imprisonment, including Ngo. Currently, the only avenue available for such offenders to be released is the exercise of the Royal Prerogative of Mercy preserved in s 102 *Sentencing Act*. However, this will only be exercised where compassionate grounds, due to ill health or imminent death, can be substantiated. Accordingly, there remains no viable alternative review mechanism in NSW for those serving a life sentence.

2 *Murray v The Netherlands*³²

In making its determination in this case, the ECtHR acknowledged that under its case-law, States had large scope for manoeuvre³³ in determining what measures were required in order to give a life prisoner the possibility of rehabilitating themselves. Whilst an assessment had taken place prior to the applicant in this case being sentenced to life imprisonment, no further assessments were carried out. Consequently, any request by Murray for a pardon was in practice incapable of resulting in his release. Therefore, the life sentence had not *de facto* been reducible, as required by the Court's case-law under Article 3 ECHR and on this basis the Court held there had been a violation of Article 3.

In the case of Ngo, the operation of the Royal Prerogative of Mercy does not provide a *de facto* means of review due to the requirement of "exceptional circumstances" for a successful petition. Also, given the legal and political landscape where the offence for which Ngo has been convicted is labelled 'the first political assassination in Australian political history'³⁴, the fact that the Royal Prerogative of Mercy is exercised by the executive arm of the NSW government, and the further qualification that it will only be exercised 'where it is necessary in the public interest'³⁵ it is strongly arguable that there is no reasonable prospect for Ngo to ever have the prerogative exercised in his favour.

3 *Hutchinson v the United Kingdom*³⁶

In *Hutchinson*, the Grand Chamber in determining that there had been no violation of Article 3 ECHR, reiterated that the Convention did not prohibit the imposition of a life sentence on those convicted of especially serious crimes, such as murder. However, it was similarly accepted that to be compatible with the Convention, there had to be both a prospect of release for the prisoner and a possibility of review of their sentence. The Grand Chamber considered that the UK courts had dispelled the lack of clarity in the domestic law on the review of life sentences. The discrepancy identified in *Vinter* between the law and the official UK policy had notably been resolved by the UK Court of Appeal in a ruling affirming the statutory duty of the Secretary of State for Justice to exercise the power of release for life prisoners in such a way that it was compatible with the Convention.

The Grand Chamber also highlighted the important role of the *Human Rights Act*,³⁷ pointing out that any criticism of the domestic system on the review of whole life sentences was countered by the *Human Rights Act* as it required that the power of release be exercised, and that the relevant legislation

³² *Murray v The Netherlands* [2016] ECHR 021.

³³ Also referred to as a "margin of appreciation".

³⁴ *R v Ngo* [2001] NSWSC 1021.

³⁵ NSW Department of Communities and Justice, 'Royal Prerogative of Mercy Review: Terms of Reference and fact sheet' (Fact Sheet) <<https://www.justice.nsw.gov.au/justicepolicy/Documents/royal-prerogative-mercy-review-terms-of-reference.pdf>>.

³⁶ *Hutchinson v the United Kingdom* (Application no. 57592/08) [2016] ECHR 021 [*Hutchinson*].

³⁷ *Human Rights Act* 1998 (UK) s 6(1).

be interpreted and applied, in a Convention-compliant way. The Grand Chamber therefore concluded that whole life sentences in the United Kingdom could now be regarded as compatible with Article 3 ECHR.

The central issue in *Hutchinson* was whether having only a theoretical prospect of release and possibility of review was enough to satisfy the requirement that a whole life sentence must be reducible in law and in practice.³⁸ Unexpectedly, the Grand Chamber upheld the life sentence at issue, even though parole rested solely on the discretion of the executive and there appeared to be no instances of parole having been granted in similar circumstances. At the time of the complaint, the sole avenue available to those serving life sentences was to apply for release through the Home Secretary's power of "compassionate release", which allows the minister to commute sentences, including life sentences. The basis of such decisions was largely on medical grounds.

Whilst at first glance this regime seems deficient, the Court accepted that the 'Lifer Manual', the document which set out these narrow grounds, was not exhaustive and that, in reality, the Home Secretary's powers were much more extensive, especially given the minister's abstract obligation to act in a way that is compliant with Article 3 ECHR. Despite a wholesale lack of clarity, a reliance on ill-health as a ground of release, no obvious reference to any penological grounds, and no evidence whatsoever that the state had complied with a positive obligation to secure that conditions for release could be complied with in practice, the Court found the UK's system did not fall foul of Article 3.

This seemed like a significant departure from the case law, especially as the Court had found that the UK's regime did breach Article 3 on similar facts in *Vinter* only a few years earlier. By the time of *Hutchinson*, the ECtHR held that changes made to English law were sufficiently clear in relation to the possible release of a subject by the Secretary of State in exceptional circumstances. The practical effect of *Hutchinson* was to limit the reach of *Vinter*.

4 *Petukhov v Ukraine (no. 2)*³⁹

In *Petukhov*, the ECtHR confirmed that the mere technical existence of a "prospect of release" is not enough in and of itself to render a life-long sentence compliant with Article 3. Rather, that sentence must in practice be both *de jure* and *de facto* reducible – that is, it is not enough that some theoretical prospect of release exists; that prospect must be realistically obtainable.

In reviewing the comparable Article 7 ICCPR, it can certainly be contended that the same interpretation ought to be utilised. This should also include the requirement that the mere existence of proscribed considerations is not enough; those considerations must be of a certain substance.

Commenting directly on decisions relating to clemency there must be sufficient procedural guarantees:⁴⁰

In order to guarantee proper consideration of the changes and the progress towards rehabilitation made by a life prisoner, however significant they might be, the review should entail either the executive giving reasons or a judicial review, so that even the appearance of arbitrariness is avoided.⁴¹

In *Petukhov*, the lack of any state obligation to provide reasons for a decision on clemency was a significant factor in the ECtHR's finding of a breach.⁴²

³⁸ See *Vinter* n 28.

³⁹ *Petukhov v Ukraine (no. 2)* [2019] ECHR 092 [*Petukhov*].

⁴⁰ *Ibid* 179. Clemency can be equated to the exercise of the Royal Prerogative of Mercy in NSW.

⁴¹ *Ibid* 178.

⁴² *Ibid* 177.

There is a jarring disparity between the approaches taken in *Hutchinson* and the subsequent case of *Petukhov*. Despite *Petukhov* being influenced to some degree by *Hutchinson*, particularly relating to the Court's emphasis on the importance of the margin of appreciation, much of the reasoning in *Petukhov* cannot be reconciled with *Hutchinson*. This is particularly true as it relates to 'exceptional cases,' mirroring the language for a successful petition in NSW. In *Petukhov* the Court took a strict approach to the requirement that the conditions of release must be knowable and understandable, finding that the term 'exceptional cases' was simply too vague to be meaningful. Yet no such concerns were addressed by the majority in *Hutchinson*, who were content to accept that 'exceptional grounds' were certain enough.

The ECtHR has also recognised that any prisoners should be able to have "precise cognisance"⁴³ of the conditions determining their release from the outset of their sentence. While it was acknowledged in *Petukhov* that "some guidance" was provided by the rules⁴⁴ the Court was concerned with the vagueness of terms like "exceptional cases" and "extraordinary circumstances", as well as a lack of clarity concerning the applicable tariff period.⁴⁵ This was enough to create a situation where 'prisoners who receive a whole life sentence do not know from the outset what they must do in order to be considered for release and under what conditions.'⁴⁶

Finally, the Court endorsed a principle set out in *Murray v the Netherlands*, establishing that prisoners 'cannot be denied the possibility of rehabilitation' and thus the state has 'a positive obligation to secure prison regimes for life prisoners which are compatible with the aim of rehabilitation and enable such prisoners to make progress towards their rehabilitation'.⁴⁷ Effectively, this means that the state must ensure, whatever conditions it chooses to set for release, these conditions are obtainable in practice and that prisoners retain 'a chance, however remote, to someday regain their freedom.'⁴⁸

Overall, these cases provide a useful synthesis of the considerations that ought to be taken into account when determining if a violation of Article 3 ECHR, and by logical extension Article 7 ICCPR, has occurred in Ngo's case. In NSW, it is acknowledged that access to judicial review is not in dispute. Rather, the criticism is concerned with the rare, unaccountable and vague operation of the prerogative of mercy, to which we now turn for a full analysis in the context of these decisions of the ECtHR.

5 *The Prerogative of Mercy and Compliance with International Obligations*

The prerogative of mercy in NSW is a broad discretionary power exercisable by the Executive. It is acknowledged, however, that this prerogative is exercised in favour of offenders only in 'extraordinary cases'.⁴⁹ As outlined in the 'Royal Prerogative of Mercy Review,' a petitioner must demonstrate 'extraordinary circumstances' to justify interfering with the decision of independent judicial officers. This includes circumstances in which the petitioner has assisted the authority at their peril (usually relating to the commission of another crime) or there are compassionate grounds such as mental illness, terminal illness or developmental disability to warrant release.⁵⁰ Historically, the prerogative of mercy has only been exercised in circumstances where, through terminal illness, a petitioner is in imminent danger of dying or is incapacitated to the extent that they no longer have the physical ability to harm any person.

⁴³ *Trabelsi v Belgium* [2014] ECHR 893, 137.

⁴⁴ *Petukhov* n 38, 173.

⁴⁵ *Ibid* 175-176.

⁴⁶ *Ibid* 174.

⁴⁷ *Ibid* 181.

⁴⁸ *Harakchiev and Tolumov v Bulgaria* [2014] ECHR 903, 264.

⁴⁹ See above n 12.

⁵⁰ <https://www.justice.nsw.gov.au/justicepolicy/Documents/royal-prerogative-mercy-review-terms-of-reference.pdf>

(a) *The United Nations Human Rights Council*

The United Nations Human Rights Council (UNHRC) is an international body with the mission to address alleged State human rights violations. Aggrieved non-government subjects are able to forward a complaint⁵¹ to the UNHRC in circumstances where a violation of human rights is said to have occurred or be occurring. In time, authors of submitted complaints have their communication considered and a decision is ultimately provided. Where the result is favourable to a complainant, the UNHRC will often move to encourage co-operation and compliance by the State concerned.

Past decisions of the UNHRC provide meaningful insight into the question of whether a remedy offers a reasonable prospect of release,⁵² or where there is no reasonable expectation that the remedy would be effective.⁵³ This requires an examination of the availability of the remedy in practice with consideration of the factors in the individual case, including the legal and political landscape and the personal circumstances of the petitioner.⁵⁴

It is argued that the existence in Australian domestic law for the release of a prisoner on compassionate grounds under the prerogative of mercy due to ill health or greatly advanced age sometime immediately prior to their impending death does not amount to a ‘chance’ or ‘prospect’ of later release. In order for there to be any genuine prospect of release, a prisoner must be given a legitimate opportunity to rehabilitate themselves and have those rehabilitative efforts count in the sense of there being a clear mechanism in place to review the prisoner’s ongoing incarceration. The ECtHR has consistently found that release under these exceptional circumstances on humanitarian grounds is not enough to classify the sentence as one which is reducible as these state mechanisms often lack a history of implementation, clarity and adequate procedural guarantees against abuse.⁵⁵

In NSW, the prerogative of mercy remains an unchallengeable discretionary power exercisable by the Governor acting on the advice of the Executive Council. There is no ‘Lifer Manual’ that guides the Governor and no legislation requiring that the power be exercised in a manner consistent with Article 7 ICCPR. For these reasons, it is argued that operation of the prerogative of mercy in NSW remains incompatible with the principles enunciated by the ECtHR in both *Vinter* and *Hutchinson*, as it continues to deprive prisoners of any real hope of release. Successful petitions for a pardon are very rarely granted, as extraordinary circumstances must be demonstrated. Available information reveals that the power to grant mercy has never been exercised in relation to a person who has been sentenced to life imprisonment. Accordingly, it is strongly arguable that the mere remote technical prospect of discretionary release under the prerogative renders it an inadequate process to reclassify what is otherwise an irreducible sentence to a reducible sentence.

Based on the (limited) information provided by the NSW Government in relation to the prerogative of mercy, it would appear that ‘extraordinary circumstances’ must operate for exercise of the prerogative. “Extraordinary circumstances” appear to be limited to the provision of post-sentence assistance to law enforcement authorities, new methods of adducing forensic evidence cast doubt over the petitioner’s guilt or a third party confession(s) to the crime of which the petitioner has been convicted. The combined effect of this, when read in light of the UNHRC’s directions that the availability of the remedy in practice needs to be considered, it is argued that the prerogative of mercy does not offer a reasonable prospect of release nor is there a reasonable expectation that the remedy

⁵¹ Officially termed a ‘communication’.

⁵² *Patiño v Panama*, UNHRC, Views of 21 October 1994, CCPR/C/52/D/437/1990, para. 5.2.

⁵³ *Ramirez v Uruguay*, UNHRC, Views of 8 April 1980, CCPR/C/10/D/4/1977, para. 5; *Monika v. Cameroon*, UNHRC, Views of 19 January 2015, CCPR/C/112/D/1965/2010, para 11.4.

⁵⁴ *Akdivar and Others v Turkey*, ECtHR [GC], Grand Chamber Judgment of 30 August 1996, para. 68–69; *Khashiyev and Akayeva v Russia*, ECtHR, Judgment of 24 February 2005, para. 116–17.

⁵⁵ *Petukhov* n 38.

would be effective. In the context of the decisions of the ECtHR and previous decisions of the UNHRC, the fact that “extraordinary circumstances” are needed for a successful petition means that there is no *de jure* or *de facto* means of review and accordingly the prerogative of mercy does nothing to address the violation of Article 7.

(b) The Case of Blessington and Elliot

This position is directly supported by the UNHRC’s previous decision in relation to Bronson Blessington and Matthew Elliot⁵⁶, who successfully argued that their sentences of life imprisonment remained a violation of Article 7 ICCPR. In argument in that matter, the State party acknowledged that the prerogative of mercy, as it operates in NSW, is an unfettered discretionary power that the Governor may exercise and is usually exercised in cases involving non-violent offences.⁵⁷ Despite this fact, the State submitted that the availability of the prerogative of mercy rendered Blessington and Elliot’s claim in relation to article 7 unmeritorious.⁵⁸ In response, Blessington and Elliot argued that while the possibility of release pursuant to the prerogative exists, the power to grant mercy has only ever been exercised once in respect of a person convicted of murder⁵⁹ and this occurred where the petitioner concerned was a woman who murdered her husband after suffering protracted domestic violence.⁶⁰ Blessington and Elliot further argued that the mere technical prospect of having the prerogative exercised in one’s favour is not sufficient to convert what would otherwise be cruel, inhuman or degrading treatment into treatment that is compliant with Article 7.⁶¹ The UNHRC agreed and in determining the outcome of the matter, concluded that despite the availability of the prerogative of mercy, a means of release should not be a mere theoretical possibility.⁶²

The NSW Government has acknowledged that ‘successful petitions for pardons are *rare*, and pardons are only granted in the most extraordinary of circumstances.’⁶³ This in and of itself represents a clear departure from the international standards, particularly given the ECtHR decision in *Petukhov* finding that ‘exceptional cases’ was simply too vague to be meaningful. Accordingly, it is apparent that despite the operation of the prerogative of mercy in NSW, it does not provide a *de jure* or *de facto* means of review due to the requirement that “exceptional circumstances” are required for a successful petition. On this basis, it is contended that the ongoing treatment of Ngo amounts to cruel, inhumane or degrading treatment or punishment within the definition of Article 7 ICCPR.

B Article 10 – deprivation of liberty

General Comment 21 of the UNHRC has universal application to ‘anyone deprived of liberty under the law and authority of the State who is held in prisons...’⁶⁴ – a category of person into which Ngo falls. General Comment 21 highlights the interconnected nature of Articles 7 and 10 of the ICCPR, reminding States that per Article 10, paragraph 1, there is an inherent ‘positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in Article 7 of the Covenant.’⁶⁵ In addition, respect for the dignity of such

⁵⁶ *Blessington and Elliot v Australia*, UNHRC, View of 22 October 2014, CCPR/C/112/D/1968/2010

⁵⁷ *Ibid* [4.12].

⁵⁸ *Ibid*

⁵⁹ *Ibid*

⁶⁰ *Ibid* [5.3].

⁶¹ *Ibid*

⁶² *Ibid* [7.7].

⁶³ NSW Department of Communities and Justice, ‘Royal Prerogative of Mercy Review: Terms of Reference and fact sheet’ (Fact Sheet) <<https://www.justice.nsw.gov.au/justicepolicy/Documents/royal-prerogative-mercy-review-terms-of-reference.pdf>>.

⁶⁴ UN Human Rights Committee, *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992.

⁶⁵ *Ibid*.

persons must be guaranteed under the same conditions as for that of free persons⁶⁶ and no penitentiary system should be only retributory; rather it should seek the reformation and social rehabilitation of the prisoner. Moreover, ‘treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule.’⁶⁷

In light of these matters, it is re-iterated that it is the resulting ‘mental torture’⁶⁸ and ‘sheer hopelessness’⁶⁹ of long term indeterminate imprisonment that converts an otherwise “constitutional” sentence to ‘cruel and degrading’ treatment and deprives individuals of their inherent dignity as a human being. The prolonged deprivation of liberty leads to increased social isolation, desocialisation, anxiety, suicide, and dependence, which can hamper efforts at rehabilitation and reintegration into society.⁷⁰ Ngo is serving a life sentence without the possibility of parole and his treatment in this regard deprives him of any real hope of release, thus denying him the right to be treated with humanity, respect, and dignity. In a similar context to that which was considered in the case of Blessington and Elliot, the review procedures in the case of Ngo are also subject to the same restrictive conditions where the prospect of release seems extremely remote. Furthermore, the release, if it ever took place, would be based on the impending death or physical incapacitation of Ngo, rather than on the principles of reformation and social rehabilitation contained in Article 10, paragraph 3 ICCPR.

VI REMEDIES

Turning to potential remedies for the violation by NSW of Articles 7 and 10 ICCPR in relation to the sentence of life imprisonment, two options will be analysed and evaluated.

First, a scheme along the lines of the extant judicial re-determination of life sentences in the *Sentencing Act* for offenders sentenced to life imprisonment prior to 1990 when the life sentence did not have the literal meaning of the term of the prisoner’s natural life⁷¹ will be considered. It is contended that it would be appropriate to have a scheme of judicial redetermination for all convicted murderers sentenced to life imprisonment. While the imposition of such a burdensome penalty may be an adequate outcome at first instance if a murder falls into the ‘worst case’ category, the acknowledged principles within the penal system that reformation and rehabilitation must be possible necessitates the introduction of a mechanism whereby an offender’s natural life sentence can be subject to review at some future time. The implementation of a judicial re-determination scheme would mean that the natural life sentence continues to serve as public denunciation and condemnation for serious offending,⁷² but at the same time making such sentences reviewable after an appropriate punitive period humanitarian considerations are included to ensure all prisoners have the right to hope and the possible opportunity for a fresh start; thus affirming compliance with Articles 7 and 10 ICCPR.

A *Re-determination Scheme*

⁶⁶ Ibid.

⁶⁷ Ibid. Note particularly Article 10, paragraph 3 ICCPR.

⁶⁸ Schabas, n 22.

⁶⁹ Novak, n 23.

⁷⁰ Stokes, n 24.

⁷¹ *Sentencing Act* Schedule 1. Also, see John L Anderson, ‘Indefinite, Inhumane and Inequitable – The Principle of Equal Application of the Law and the Natural Life Sentence for Murder: A Reform Agenda’ (2006) 29(3) *UNSW Law Journal* 139, 155-158.

⁷² John L Anderson, ‘The Label of Life Imprisonment in Australia: A Principled or Populist Approach to An Ultimate Sentence’, (2012) *UNSW Law Journal* 35(3) 747, 767.

Ultimately, reform is required to the sentencing framework to ensure that, in the assessment of the gravity of the murder and subjective circumstances of the convicted individual, consistency and proportionality are achieved whilst placing humanitarian considerations at the heart of the sentencing process, as all persons should have the right to hope and the opportunity to start anew.⁷³ Our principal recommendation in that regard is to implement a sentencing scheme where natural life sentences would remain subject to possible redetermination after 30 years imprisonment has been served.⁷⁴ The suggested recommendation would allow such offenders an opportunity to bring an application before a judicial officer for redetermination of their life sentence. Whilst life is the maximum sentence that can be imposed for murder, there is the ability for the judiciary to impose a determinate sentence, to which a non-parole period is affixed.⁷⁵ In cases where this is applied a study of sentences to 2001 found that the median head sentence for murder was 18 years, with a non-parole period of 13½ years.⁷⁶ Since then the available data shows that the median head sentence has increased to 19.8 years.⁷⁷ The standard non-parole periods for murder offences are currently set at 20 and 25 years depending on the status of the victim.⁷⁸ Therefore, by imposing an initial incarceration period of 30 years that must be served in full time custody before a redetermination application can be made, the period of time served significantly exceeds the current maximum period attaching to a sentence for murder where a non-parole period applies. In addition, the ECtHR noted in *Vinter* that there was clear support for European and international jurisdictions to provide a review of life sentences after a set period, usually after 25 years imprisonment. Accordingly, the seriousness of the offending conduct is proportionately reflected in the proposed 30-year timeframe and there is reasonable alignment to international benchmarks.

Such a scheme also arguably provides an incentive for those sentenced to life imprisonment without parole to engage with programs offered by Corrective Services through education, vocational training and employment opportunities; psychology, disability, personality and behavioural disorders services and intensive drug and alcohol treatment where required.⁷⁹ The creation of a realistic incentive to rehabilitate, provides the offender with a goal to work towards and moves away from the notion that those sentenced to ‘life imprisonment without the possibility of parole’ are beyond rehabilitation. Additionally, this scheme removes hypotheses about an offender’s future dangerousness,⁸⁰ allowing for a full review of an offenders ‘dangerousness’ at the time of redetermination rather than notoriously unreliable predictions made at the time of sentencing that an offender will forever remain dangerous.

We propose that the re-determination provisions would be as follows:

- (1) Upon judicial re-determination, the matters that the court has regard to on the question of any re-determination application are:
 - (a) The safety of the community;

⁷³ Pope Francis, ‘Address of his holiness Pope Francis to penitentiary police and to staff of the penitentiary and justice administration for minors and the community,’ (Speech, 14 September 2019) <http://www.vatican.va/content/francesco/en/speeches/2019/september/documents/papa-francesco_20190914_polizia-penitenziaria.html>.

⁷⁴ See prior work completed in University of Newcastle Legal Centre, Submission No MU26 to NSW Sentencing Council, *Review of sentencing for murder and manslaughter*.

⁷⁵ See above p 3 in the paragraph containing n 5.

⁷⁶ Jason Keane and Patrizia Poletti *Sentenced homicides in New South Wales 1994–2001* (Judicial Commission of New South Wales, 2004) 22.

⁷⁷ Tom Gotsis and Matthew Dobson, *A statistical snapshot of crime and justice in New South Wales* (Statistical Indicators 5/18, September 2018) 55.

⁷⁸ *Sentencing Act* Table following s 54D, Item Nos 1, 1A and 1B.

⁷⁹ Department of Communities and Justice, *Programs for offenders* (Webpage) <<https://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/programs/offender-services-and-programs/offender-services-and-programs.aspx>>.

⁸⁰ Andrew Dyer, ‘Irreducible Life Sentences: What Difference Have the European Convention on Human Rights and the UK Human Rights Act Made?’ (Legal Studies Research Paper No. 15/99, Sydney University Law School, December 2015) 17.

- (b) The circumstances surrounding the offence for which the life sentence was imposed;
 - (c) All offences of which the person has been convicted at any time;
 - (d) Any report on the person made by the Serious Offenders Review Council and any other relevant reports prepared after sentence (including, for example, reports on the person's rehabilitation and psychological condition);
 - (e) The age of the person at the time the person committed the offence and at the time of the re-determination application.
 - (f) The measures in place (if any) supporting the applicant's re-integration into society;
 - (g) The possible impact of a re-determination order on the victim's family.
- (2) The orders able to be made by the court on any application for re-determination are:
- (a) Reject the application for re-determination; or
 - (b) Grant the application for re-determination and apply a non-parole period.⁸¹
- (3) Should (a) above apply, the applicant may not reapply for any further redetermination within a period 2-5 years (as ordered by the re-determination authority) from the date of the re-determination decision.⁸²

The question of the release of an offender will ultimately remain an executive function, determined by the relevant parole authorities under the *Crimes (Administration of Sentences) Act 1999* (NSW).

In addition, the legislation should provide the following further directions to the re-determination authority:

- (4) On any re-determination outcome, the court is to provide reasons for the order(s) made.
- (5) Where a re-determination application is rejected, the re-determination board must not order that an applicant never make a further future application.
- (6) The *Criminal Appeal Act 1912* applies to determinations in the same way as the Act applies to an appeal against an original sentence.

The single question to be decided on re-determination would be limited to the question of whether, in the circumstances, a non-parole period should now be affixed to the life sentence. Accordingly, irrespective of the outcome on re-determination, the offender's head sentence remains a life sentence, subject to any appeal or application for inquiry that may be lodged regarding the original sentence or conviction. In this way, if an offender is subsequently released on parole under the provisions of the *Crimes (Administration of Sentences) Act*, these conditions will remain with the individual for the 'term of their natural life,' though subject to periodic review.

Further, it is contended that these legislative changes be made retrospective, allowing all persons currently serving a life sentence the opportunity to bring such an application for re-determination upon the expiration of the initial fixed period of 30 years in full time custody. An important consideration supporting retrospectivity are the findings from more recent studies as to recidivism amongst those convicted for murder.⁸³ In Australia, studies have revealed such offenders rarely commit another murder or homicide offence upon release and only a very small proportion re-offend

⁸¹ In keeping with current sentencing considerations outlined in s 24 *Sentencing Act*, 'any time for which the offender has been held in custody in relation to the offence' will count towards the non-parole period as ordered at a re-determination hearing.

⁸² The period of between 2 and 5 years provides the judiciary sufficient scope to determine an appropriate period of time to pass before any particular applicant may re-apply, providing the offender with sufficient time to make greater and more meaningful steps towards rehabilitation thereby further reducing the risk they pose (if any) to the community. Therefore, the greater the rehabilitation, the more likely an offender is to be successful in a subsequent re-determination application.

⁸³ John L Anderson, 'Recidivism of paroled murderers as a factor in the utility of life imprisonment' (2019) 31(2) *Current Issues in Criminal Justice* 255.

in a serious or violent way.⁸⁴ These low rates of violent recidivism and even lower rates of analogous or homologous homicide amongst this distinct group of offenders is also reflected internationally.⁸⁵

Accordingly, while it is conceded that some risk of re-offending exists, the fact is that the large majority of convicted murderers upon release go on to lead meaningful and largely law-abiding lives.⁸⁶ Such studies alone demonstrate that rehabilitation is not simply possible, but probable amongst convicted murderers.

At the same time, it is acknowledged that providing such persons the ability to apply for re-determination may potentially undermine the settled expectations of the family of any victim/s. The certainty that is given to victims' families is in the minimum period of 30 years that must be served before an application can be made along with the ability for them to give voice to any concerns in accordance with their legislative rights.⁸⁷ Even if a re-determination of sentence is made and parole is subsequently granted, the parole conditions will apply to the offender for 'the remainder of their natural life'.

B *The Prerogative of Mercy*

The second remedy and reform option considers the nature and purpose of the prerogative of mercy. The purpose of this broad discretionary power is to temper the rigidity of the law by dispensing clemency in appropriate circumstances. To some extent, however, this power has been displaced by section 76 *Crimes (Appeal and Review) Act 2001* (NSW), described as 'an extraordinary avenue of appeal.'⁸⁸ Section 76 provides that 'a petition for a review of a conviction or sentence or the exercise of the Governor's pardoning power may be made to the Governor by the convicted person or by another person on behalf of the convicted person.'⁸⁹ Prima facie, this appears to be an executive mechanism for review of release, however, an analysis the operative provisions in s 77, highlights that after consideration the possible outcomes include that an inquiry be conducted by a judicial officer into the conviction or sentence;⁹⁰ the whole case be referred to the Court of Criminal Appeal to be dealt with as an appeal under the *Criminal Appeal Act 1912*;⁹¹ or request the Court of Criminal Appeal to give an opinion on any point arising in the case.⁹² Accordingly, what emerges in practice is a form of judicial review, as opposed to the exercise of an executive pardoning power, rendering the reference to the 'Governor's pardoning power' in section 76 seemingly anomalous as the effect of the pardoning power in exercising the prerogative of mercy is to relieve the effects of a conviction without displacing the conviction itself.

The demarcation between a review pursuant to section 76 and the prerogative of mercy retained by s 114 *Crimes (Appeal and Review) Act 2001* has not been aided by section 114A which provides for the publication of information about mercy petitions.⁹³ A 'mercy petition' is defined as a petition for a review of a conviction or sentence, or for the exercise of the Governor's pardoning power, referred to in Division 2 of Part 7 (namely, s 76) and any other petition for the exercise of the prerogative of mercy. This confusing intersection of legislative provisions lead the NSW Government to issue a document 'relating to applications for the exercise of the Royal Prerogative of Mercy and petitions submitted under section 76 of the *Crimes (Appeal and Review) Act 2001*' in 2017 in an effort to

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ *Victims Rights and Support Act 2013* (NSW) s 6.

⁸⁸ Joseph Azize, 'The Prerogative of Mercy in NSW' (2007) 1(6), *The Journal of Law and Social Justice*.

⁸⁹ *Crimes (Appeal and Review) Act 2001* (NSW) s 76.

⁹⁰ *Crimes (Appeal and Review) Act 2001* (NSW) s 76(1)(a).

⁹¹ *Crimes (Appeal and Review) Act 2001* (NSW) s 76(1)(b).

⁹² *Crimes (Appeal and Review) Act 2001* (NSW) s 76(1)(c).

⁹³ *Crimes (Appeal and Review) Act 2001* (NSW) s 114A.

provide transparency as to the operation of the prerogative of mercy. Within these documents, both applications are referred to as ‘petitions’ with no indication as to which initiating application was utilised. Between 30 January 2017 and 20 December 2017, ten petitions for pardon were considered with the executive power exercised in one instance.⁹⁴ In 2018, 19 petitions for pardon were considered and of these, executive power was exercised in one instance.⁹⁵ Finally, in 2019, seven petitions for pardon were considered and of these, executive power was exercised in two cases.⁹⁶ On the face of it, this would appear to be a mechanism that provides both a possibility and prospect of review. However, this simply distorts when the prerogative of mercy is exercised. Accordingly, despite this attempt at transparency to the pardoning process, what has resulted is greater uncertainty as to the actual utilisation of the prerogative of mercy and whether it provides both a possibility and prospect of review.⁹⁷

Overall, it is contended that the power to grant a pardon should be an entirely separate process with no extraordinary avenue of appeal or review as in the terms of section 76. This is of particular significance given the explicit reference to the ‘Governor’s pardoning power’ and the false impression that section 76 provides the circumstances in which the prerogative of mercy may be invoked and exercised. In NSW it is acknowledged that “successful petitions for pardons are rare, and pardons are only granted in the most extraordinary of circumstances”⁹⁸ representing a clear departure from the relevant international standards. Of most importance is the decision in *Hutchinson*, which was concerned with the availability of a ‘Lifer Manual’ – a document outlining the UK Home Secretary’s powers as they relate to the pardoning power. The practical effect of this was to effectively extend the grounds for release under the pardoning power whilst mandating an obligation to act in a way that is compliant with the ECHR. Applying this to the position in NSW, there is no such ‘Lifer Manual’ that guides the Governor. The closest ‘guidance’ is a “Terms of Reference” document (which was created for the purpose of ‘conduct(ing) a transparent, fully informed, and comprehensive review’ of the prerogative of mercy) which stipulates that ‘the power is only exercised in exceptional or special circumstances, where it is necessary in the public interest.’⁹⁹ In addition, there is no legislation requiring that the power be exercised in a manner consistent with Article 7 ICCPR. In light of this, at a minimum, what is required for compliance with the ICCPR is a publicly available document (akin to the Lifer Manual) which provides specific criteria as to the circumstances that will result in release.

One of the fundamental notions underpinning the operation of the justice system is that ‘not only must Justice be done; it must also be seen to be done.’¹⁰⁰ What is currently evidenced in the operation of the prerogative of mercy is an attempt to blindfold justice, shrouding its application and utilisation in a veil of mystery and ambiguity. This must be remedied.

VII CONCLUSION

For there to be any genuine prospect of release, a life sentence prisoner must be given a legitimate opportunity to rehabilitate themselves and have those rehabilitative efforts count. There must be a clear mechanism in place to review the prisoner’s ongoing incarceration. The ECtHR has consistently found that release under exceptional circumstances on mere humanitarian grounds is not enough to

⁹⁴ NSW Department of Communities and Justice, n 62.

⁹⁵ NSW Department of Communities and Justice, ‘Petition summary document 2018’ (30 October 2018) <<https://www.justice.nsw.gov.au/Documents/LSB/petition-summary-document.docx>>.

⁹⁶ NSW Department of Communities and Justice, ‘Petition summary document 2019’ <<https://www.justice.nsw.gov.au/Documents/LSB/petition-summary-document-31-Oct-2018-to-31-Dec-2019.docx>>.

⁹⁷ *Petukhov* n 38 179, quoting *Murray v The Netherlands* n 32 100.

⁹⁸ NSW Department of Communities and Justice n 62.

⁹⁹ *Ibid.*

¹⁰⁰ *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256.

classify the sentence as one which is reducible.¹⁰¹ The analysis and recommendations made in this paper aim to address the systemic lack of compliance by NSW with international obligations. The aim is to restore the right to hope and the opportunity to start anew,¹⁰² whilst placing humanitarian considerations at the heart of the post-sentencing process and ensuring compliance with international obligations.

Ultimately, Ngo's ongoing journey highlights that the natural life sentence in NSW precludes the attainment of important sentencing principles of proportionality and human dignity and that an international benchmark should be determined to ensure human rights obligations are fulfilled.

¹⁰¹ *Vinter* n 28; *Hutchinson* n 35.

¹⁰² Pope Francis n 72.