

**Prof. Dr. Robert Esser**

**Romina Milles**



Chair for German, European and International Criminal  
Law, Criminal Procedure Law and White-Collar Crime

Research Center Human Rights in Criminal Proceedings  
(HRCP)

## **"LIFE IMPRISONMENT IN ASIA: LAW AND PRACTICE"**

### **Life Imprisonment in Extradition Cases in the Light of the European Convention on Human Rights (ECHR)**

With the abolition of the death penalty in all European countries except Belarus, the number of cases in which life sentences have been imposed upon offenders have significantly risen whereas death sentences alongside with life imprisonment continue to coexist and to be carried out as possible forms of punishment amongst Asian states.

Life sentences cover a wide range of practices in different states, from the most severe form of life imprisonment without the possibility of parole (LWOP) to formal and “informal” impositions of life sentences. The latter can be regarded as cases in which a person is sentenced to a fixed term of imprisonment, which nonetheless due to duration effectively means imprisonment for life. Drawing a comparison, LWOP is the most severe form of punishment in Europe, whereas one could assume it is hence the milder form of punishment in some parts of Asia.

When dealing with extradition cases it must be borne in mind that most European countries have signed and ratified the ECHR, which provides basic and fundamental rights to each individual and simultaneously poses positive obligations to its contracting states. With the Protocols No. 6 (1983) and No. 13 (2002), the death penalty has been abolished and the European Court of Human Rights (ECtHR) has a well-established case-law on life sentences and their compatibility especially with Article 3 ECHR, prohibiting torture and inhuman or degrading treatment or punishment.

## A. Extradition Case-Law

The ECtHR has ruled on a number of cases concerned with the extradition of a suspect of a crime, in which at least the extraditing state was a signature state of the ECHR. This constellation applies exactly when Asian countries think about requesting the extradition of a presumed offender to their country for prosecution. The extraditing state being bound by the ECHR is obliged to refuse the request, if fundamental human rights of the suspect in the requesting state might be violated. Therefore, it is important to know about the leading principles of the relevant case-law of the ECtHR.

### **Soering v. The United Kingdom (1989)<sup>1</sup>**

Even though *Soering* is not concerned with life imprisonment but the death penalty and the so called “death row syndrome” it is a crucial judgement as it still builds the basis for the following judgements and decisions of the ECtHR dealing with life imprisonment. In 1989 *Soering*, a German national who had been imprisoned for cheque fraud in the United Kingdom, was requested to be extradited to the United States of America as he was a prime suspect in the murder of his ex-girlfriend’s parents which could lead to a death sentence. Without Protocol 13 existing at the time, the Court was not able to conclude, that facing a death sentence *per se* is a severe violation of the ECHR. Nevertheless, the principle was developed, in the concrete case for Article 3 ECHR, that a fundamental right of such high importance and without limitation must be considered in extradition cases, if otherwise a *flagrant denial of justice* would occur. The Court held, that these considerations must be exercised without undermining the fundamentals of extradition law.<sup>2</sup> The ECtHR held, if a death penalty was imposed, the physical and psychological effects of the so-called “death-row-syndrome” would be likely to affect the applicant. This means that the endurance of several years of fearful awaiting one’s own execution can rise to a level that meets the threshold of severity in order to be considered as ill-treatment. The ECtHR held that the extradition would for these reasons breach Article 3 ECHR.

This judgement widens the scope of state responsibility for breaches of the ECHR in the way that the extraditing signatory state must always review the law of the requesting state for its compatibility with the fundamental guarantees of the ECHR.<sup>3</sup>

---

<sup>1</sup> *Soering v. The United Kingdom*, App no 14038/88 (ECHR, 7 July 1989).

<sup>2</sup> *Soering v. The United Kingdom*, App no 14038/88 (ECHR, 7 July 1989), §§ 104, 113.

<sup>3</sup> *Zühlke, S./Pastille, J.*, Extradition and the European Convention – *Soering Revisited*, Heidelberg Journal of International Law (HJIL), 1999 Vol. 59, pp. 749-784.

### **Trabelsi v. Belgium (2014)<sup>4</sup>**

After a series of jurisprudence of the ECtHR concerned with extradition situations in which the Court found no violation of Art. 3 ECHR, the landmark judgement *Trabelsi* can be considered as a turning point in the ECtHR's case-law. After being sentenced to ten years in prison by the Brussels Court of Assizes on 30th September 2003 and already having served five years of the sentence, the United States Department of Justice requested *Trabelsi*'s extradition to the U.S. to face criminal charges of conspiracy to kill U.S. nationals, conspiracy to use weapons of mass destruction and providing material support to al-Qaeda which would subject him only to life imprisonment under the U.S. Criminal Code, and not to the death penalty. The Belgian minister and U.S. authorities believed that this form of life sentence was discretionary and not a mandatory life sentence because the U.S. Constitution provides for executive clemency, which past presidents have used to commute such life sentences. After exhausting all national legal remedies, *Trabelsi* lodged an individual complaint before the ECtHR in which he alleged that he, if extradited, would face ill-treatment contrary to Article 3 ECHR as terrorists would not be granted a prospect of parole or presidential pardon after the attack on the World Trade Centre on 9th September in 2001 and that he therefore would likely face being sentenced to *an irreducible life sentence*. Although an interim measure had been put into place by the ECtHR, Belgium extradited *Trabelsi* to the United States. The Court held that this action violated the applicant in his rights guaranteed in Article 3 ECHR of the Convention, which is linked to the case-law concerning the compatibility of life imprisonment with Article 3 ECHR, as it could amount to degrading treatment or punishment when the imposed sentence is not *de jure* and *de facto* reducible. This means that there needs to be a prospect of release and the possibility of review.

### **Findikoglu v. Germany (2016)<sup>5</sup>**

In *Findikoglu* the applicant argued that facing a maximum consecutive sentence of 247,5 years in the U.S. would be an *informal* life sentence with no prospect of release. Without excluding consecutive sentences *per se* from the protection of Article 3 ECHR, the Court held that the case was inadmissible since the applicant was not able to argue, that there was a *real risk* of him being subjected to an informal life sentence nor that no possibility of review existed for him. The competent U.S. criminal court according to the law had discretion in its sentencing. Therefore, it was not clear why the judges

---

<sup>4</sup> *Trabelsi v. Belgium*, App no 140/10 (ECtHR, 4 September 2014).

<sup>5</sup> *Findikoglu v. Germany* (dec.), App no 20672/15 (ECtHR, 7 June 2016).

would, in *Findikoglu*'s opinion, necessarily impose the maximum sentence for each offence he was accused of so that all of the sentences would in sum be of such a length that the ECtHR would see them as an informal life sentence. This decision of the ECtHR shows, that if there is no risk of being sentenced to a *formal* life sentence, the applicant has to have a *detailed and reasonable argument* which renders his timely sentence as an informal life sentence for meeting the threshold criteria needed to reach the level of a mistreatment under Article 3 ECHR.

## **B. Life Imprisonment in the Light of Article 3 ECHR**

Article 3 ECHR protects the physical and mental integrity of an individual.<sup>6</sup> Its scope is outlined by the case-law of the ECtHR. Although not being mentioned verbatim as in Article 10 ICCPR,<sup>7</sup> the ECtHR finds, that human dignity in its core content is also protected.<sup>8</sup> As a human right without limitation, it does not allow any interference in principle. A violation is determined based on the scope of protection by requiring a certain intensity of the interference: a certain threshold must be exceeded.<sup>9</sup> On top of that, *procedural* rights are also guaranteed. Even an unintentional accumulation of poor prison conditions may lead to a violation of Article 3 ECHR.<sup>10</sup> Together with Article 8 ECHR the Court handed down judgements that dealt with the protection of human dignity in the execution of sentences. The imposition of a grossly disproportionate sentence is presumed to result in a violation of Article 3 ECHR,<sup>11</sup> although there is no case-law to date in which a sentence itself has been presumed to infringe with these values. Member States have a certain *margin of appreciation* in sentencing, which has not been considered to have been exceeded so far.<sup>12</sup> The ECtHR held, that a life sentence *per se* is not to be regarded as contrary to the Convention.

### **Kafkaris v. Cyprus (2008)<sup>13</sup>**

There has been increased discussion about the compatibility of life imprisonment with Article 3 ECHR since the *Kafkaris* case decided by the Court in 2008. Drawing on

---

<sup>6</sup> Grabenwarter, C./Pabel, K., Europäische Menschenrechtskonvention, Ed. 7, 2021, § 20, p. 199.

<sup>7</sup> Löwe-Rosenberg/Esser, R., Ed. 26, Vol. 11, 2012, Article 3 EMRK/Article 7 IPBPR para 1.; van Zyl Smit, Taking Life Imprisonment Seriously in National and International Law, p. 11f.

<sup>8</sup> Tyrer v. The United Kingdom, App no 5856/72 (ECtHR, 25 April 1978) § 33.

<sup>9</sup> Dörr, O./Grote, R./Marauhn, T (Publ.) /Bank, R., EMRK/GG Konkordanz-Kommentar, Bd. 1, Chap. 11-19, 2. Ed., 2013, paras. 39 ff.

<sup>10</sup> Grabenwarter, C./Pabel, K., Europäische Menschenrechtskonvention, Ed. 7, 2021, § 20, p. 216 f.; Löwe-Rosenberg/Esser, R., Ed. 26, Vol. 11, 2012, Article 3 EMRK/Article 7 IPBPR paras. 72 f.

<sup>11</sup> Meyer-Ladewig, J./Nettesheim, M./von Raumer, S. (Publisher)/ Meyer-Ladewig, J./Lehnert, M., EMRK Europäische Menschenrechtskonvention, 4. Ed. (2017), Article 3 paras. 58-59.

<sup>12</sup> Löwe-Rosenberg/Esser, R., Ed. 26, Vol. 11, 2012, Article 3 EMRK/Article 7 IPBPR paras. 96 f.

<sup>13</sup> Kafkaris v. Cyprus, App no 21906/04 (ECtHR, 12 February 2008).

international legal sources, the ECtHR held that a life sentence is compatible with the Convention only if it is *de jure* and *de facto* reducible. To meet these requirements, there must be both a *prospect of release* and a *possibility of review*. A sentence does not become irreducible by the mere fact that in practice it is served in full. In this judgement, no violation of Article 3 ECHR was assumed because Cypriot law allowed for early release by means of clemency.

### **Vinter v. The United Kingdom (2013)<sup>14</sup>**

In the landmark judgement *Vinter* in 2013, in which a violation of *whole life orders* against Article 3 ECHR was assumed by the ECtHR for the first time, because English law did not allow a review for early release for *legal* but only for *humanitarian* reasons. Significantly, a violation already existed as soon as the sentence was imposed on the person concerned. This means that the life sentence must be *de jure and de facto* reducible from the very beginning of the sentence. Five principles for life imprisonment being in accordance with Article 3 ECHR emerged out of this judgement:

- (1) A review mechanism must be established as the balance of the penological grounds of the sentence can shift over time of the execution of the sentence
- (2) Rehabilitation demands that also lifers have a chance to atone for their crimes
- (3) Deprivation of liberty without a chance of release is incompatible with the concept of human dignity, as expressed in the Convention, regardless of the severity of the offense (direct link between *resocialization* and human dignity – referral to a judgement of the German Federal Constitutional Court (BVerfG) in 1977<sup>15</sup>)
- (4) European commitment to the idea of resocialization – comparison of international legal instruments, such as the 25<sup>th</sup> CPT General Report<sup>16</sup>
- (5) Periodic review must be exercised no later than 25 years after imposing the sentence

### **Murray v. The Netherlands (2016)<sup>17</sup>**

In *Murray*, the Court not only reaffirmed its *Vinter* jurisprudence, but significantly extended it to the situation of life sentences for mentally ill inmates. The applicant was a mentally ill, but still criminally responsible life prisoner who was not receiving any psychological treatment, although being incarcerated for more than 30 years. Still considered being too dangerous, he was not eligible for parole, which could have only

---

<sup>14</sup> *Vinter and Others v. The United Kingdom*, App nos 66069/09, 123/10 and 3896/10 (ECtHR, 9 July 2013).

<sup>15</sup> German Constitutional Court, BVerfGE 45, 187 (1977).

<sup>16</sup> 25<sup>th</sup> General Report CPT, p. 33, § 68 – <https://rm.coe.int/1680696a9d> – visited on 29.09.2021.

<sup>17</sup> *Murray v. The Netherlands*, App no 10511/10 (ECtHR, 26 April 2016).

been granted if he had developed serious health conditions, i.e. to avoid his death inside the prison. In the Courts opinion, *Murray* did not have any chance to better himself due to the lack of psychological treatment. This rendered his life sentence de facto irreducible. Significant about the case is that prison conditions and the prison sentence itself are viewed together, which *extends the de facto reducibility criteria*. As a result, the review mechanism compliant with Article 3 ECHR must include:

- (1) Not only humanitarian but additional grounds for release
- (2) Pre-established sufficient clear and certain criteria for the prisoner's assessment
- (3) Sufficient procedural safeguards (e.g. a reasoned decision) which provide the lifer with a plan of actually feasible conditions that he or she must meet in order to be eligible for release for parole. These must be suited to the individual situation of the prisoner
- (4) Periodic review must be exercised.<sup>18</sup>

#### **Marcello Viola v. Italy (no. 2) (2019)<sup>19</sup>**

The applicant is a prosecuted member of the mafia who was found guilty of murder, abduction and mafia membership charges and sentenced to life imprisonment. He argued that he had not been considered eligible for parole which violated his rights under Article 3 ECHR. Article 4 of the Italian Prison Administration Act demanded cooperation with the authorities in order to be eligible for parole. The ECtHR held that the Italian law did not offer all lifers an appropriate review mechanism because of this criterion. For an offender, who once has been involved with criminal organizations like the mafia, the Court ruled, it is not an easy enough choice to cooperate as it could risk their own or their family's lives. Individuals of that or a similar background did not have a proper *prospect of release* because Italian law considers non-cooperative behavior as an indicator of continued adherence to criminal belief. Consequently, release is denied because the convict still is a risk for society. For these reasons, the life sentence imposed on *Viola* was considered by the Court as ill-treatment and a violation of Article 3 ECHR.

---

<sup>18</sup> Similar *Bürli, N.*, Grand Chamber clarifies principles for life sentence of prisoner with mental disability, Strasbourg Observers, 02.05.2016 – <https://strasbourgothers.com/2016/05/02/grand-chamber-clarifies-principles-for-life-sentence-of-prisoner-with-mental-disability/?subscribe=success#532> – visited on 29.09.2021.

<sup>19</sup> *Marcello Viola v. Italy (no. 2)*, App no 77633/16 (ECtHR, 13 June 2019).