



PEACE NEGOTIATIONS
POST-CONFLICT CONSTITUTIONS
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**THE LEGALITY OF LIFE
IMPRISONMENT: COMPARATIVE
ANALYSIS OF INTERNATIONAL,
EUROPEAN, AND DUTCH LAW**

Legal Memorandum

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THE LEGALITY OF LIFE IMPRISONMENT: COMPARATIVE ANALYSIS OF INTERNATIONAL, EUROPEAN, AND DUTCH LAW

Executive Summary

Life imprisonment is permissible under human rights law and many states around the world use it to punish some of the most serious crimes. While each jurisdiction may have its own system of administration of the penalty, international and European human rights law have set applicable limitations. This memorandum provides a general overview of international, European, and Dutch legal standards on life imprisonment. It addresses the limitations on life imprisonment set out under international and European human rights law, including under the International Covenant on Civil and Political Rights, the European Convention on Human Rights (ECHR), the Council of Europe bodies, and national jurisdictions. The third section outlines Dutch domestic law on life imprisonment and assesses the degree to which it adheres to this legal framework.

Under the international and European frameworks, a life sentence in itself does not violate the prohibition of torture, inhuman, and degrading treatment. However, both systems have placed limitations on the practice in order to keep it compliant with human rights standards. The UN Human Rights Committee and the European Court of Human Rights (ECtHR) have emphasized the need for prisoners serving life sentences to have the prospect of release. This should be both a *de jure* and *de facto* possibility. As such, rehabilitative measures need to be available to prisoners. The analysis in this memorandum affirms a general trend towards penitentiary systems aiming to rehabilitate prisoners, rather than being simply retributory. Further, there ought to be a clear and effective mechanism of review of the life sentence. If not, the sentence could be incompatible with the prohibition of torture.

The Netherlands is a party to both the ICCPR and the ECHR. Applying this legal framework to the Dutch system of life imprisonment, it appears that it may not be compliant. This is because there is no system of periodic review of life sentences, and the only prospect of early release for those serving a life sentence is by Royal Pardon. This memorandum has demonstrated that although this is a *de jure* possibility for release, in practice it is hardly ever granted, which potentially renders it *de facto* ineffective. Furthermore, prisoners serving life sentences in the Netherlands are excluded from reintegration activities, thereby further reducing their hope of rehabilitation and release.

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THE LEGALITY OF LIFE IMPRISONMENT: COMPARATIVE ANALYSIS OF INTERNATIONAL, EUROPEAN, AND DUTCH LAW

Statement of Purpose

The purpose of this memorandum is to present comparative analysis of the legal requirements for the criminal punishment of life imprisonment under international, European, and national law. The focus is on the relevant jurisprudence of the European Court of Human Rights (ECtHR), and the Dutch national criminal justice system. Specifically, the purpose of the memorandum is to set out and evaluate the legal requirements applicable to the practice of life imprisonment in the Netherlands and to assess its compatibility.

Introduction

Many legal systems around the world use life imprisonment, or a life sentence, to punish some of the most severe crimes. For the purposes of this memorandum, life imprisonment or a life sentence refers to the situation where an accused is sentenced to spend the rest of her or his life in prison following a conviction for the perpetration of a crime. Despite their widespread use as a form of punishment in many jurisdictions, life sentences remain controversial.¹ Some scholars deem a life sentence as tantamount to the death penalty because it constitutes a death sentence in itself.² Several states introduced life imprisonment to replace the death penalty,³ which has been heavily criticized in international law⁴ and effectively outlawed in the European system by Protocol 13 to the ECHR.⁵ Despite life imprisonment being a common punishment around the world, the various jurisdictions employ different standards and limitations on the sentence. There is

¹ Valeska David & Julie Fraser, *Juvenile Criminal Justice before the Inter-American Court of Human Rights: Aims and Limitations of the Imprisonment of Children*, in THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE, PRESENT AND FUTURE 547, 551 (Yves Haeck, Oswaldo Ruiz-Chiriboga & Clara Burbano Herrera, eds, 1st ed., 2015).

² Gauthier de Beco, *Life sentences and human dignity*, 9(3) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 411, 414 (2005).

³ Gauthier de Beco, *Life sentences and human dignity*, 9(3) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 411, 418 (2005).

⁴ International Bar Association, *The Death Penalty under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty*, 15 (May 2008), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=5482860b-b9bc-4671-a60f-7b236ab9a1a0>; Richard Dieter, *The Death Penalty and Human Rights: US Death Penalty and International Law*, DEATH PENALTY INFORMATION CENTER, 16, available at <http://www.deathpenaltyinfo.org/Oxfordpaper.pdf>.

⁵ Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in all circumstances art 1 (2002), available at http://www.echr.coe.int/Documents/Library_Collection_P13_ETSI187E_ENG.pdf.

ambiguity surrounding the definition of life imprisonment itself, as the term “life sentence” can mean something substantively different depending on the jurisdiction.⁶ Life imprisonment can be mandatory or discretionary, and it can be with or without possibility of parole.⁷ Each penal system has different approaches to the legality of life imprisonment.

The first part of this memorandum explores the legality of life imprisonment at the international level, as evidenced in legal instruments and case law. It then moves to the regional system, analyzing the legality of life imprisonment across Europe. This section includes analysis of life imprisonment at both the European regional and national levels. Particular focus is given to the European Court of Human Rights (ECtHR), which has dealt extensively with the legality of life imprisonment. The second part of this memorandum focuses on the use and application of life imprisonment in the Netherlands. It considers the current laws and practice regarding life sentences, as well as the political and legal debate surrounding the issue. The memorandum concludes with a brief assessment of the international and European legal requirements applicable to the Netherlands and the compatibility of the Dutch system.

International Human Rights Law on Life Imprisonment

Life imprisonment is not prohibited under international human rights law, and is encouraged as an alternative to the death penalty. However, there are limitations on the practice under international law. Article 10(3) of the International Covenant on Civil and Political Rights (ICCPR) provides that “the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”⁸ This provision provides that imprisonment should serve the primary function of rehabilitating the prisoner, rather than having a purely punitive nature. It indicates that the prisoner should have some hope for release, even when she or he is serving a life sentence.⁹ The majority of the discussion on life imprisonment at the international level has focused on the life imprisonment of juvenile offenders, rather than life imprisonment generally.

⁶ Valeska David & Julie Fraser, *Juvenile Criminal Justice before the Inter-American Court of Human Rights: Aims and Limitations of the Imprisonment of Children*, in THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE, PRESENT AND FUTURE 547, 551 (Yves Haeck, Oswaldo Ruiz-Chiriboga & Clara Burbano Herrera, eds, 1st ed., 2015).

⁷ Sebastiaan Verelst, *Life Imprisonment and Human Rights in Belgium*, 3(2) HUMAN RIGHTS LAW REVIEW 279, 279 (2003).

⁸ International Covenant on Civil and Political Rights, art. 10(3), Dec. 19, 1966, 1057 U.N.T.S. 407; 6 I.L.M. 368 (1966).

⁹ Gauthier de Beco, *Life sentences and human dignity*, 9(3) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 411, 414 (2005).

The UN Human Rights Committee, the treaty body that oversees the implementation of the ICCPR, has dealt with individual complaints regarding the legality of life sentences. For example, in the recent case of *Blessington and Elliot v Australia*, two juveniles were sentenced to life imprisonment for the murder and rape of a woman, which the Committee found to violate Articles 7, 10(3), and 24 ICCPR.¹⁰ Although this case related to life imprisonment of juveniles, the Committee made several observations about life sentences generally. Like the ECtHR as seen below, the Human Rights Committee noted that there needs to be a possibility for review of life sentences and some prospect of release.¹¹ The Committee held that release needs to be more than a theoretical possibility and that the review procedure should be a thorough one, allowing the domestic authorities to evaluate the prisoner's progress towards rehabilitation and the justification for her or his continued detention.¹² It was further affirmed that no penitentiary system should be strictly retributory, and that it should essentially seek the prisoner's reformation and social rehabilitation.¹³

The UN Human Rights Committee has also produced two General Comments relevant to life imprisonment. For example, General Comment No. 35 focuses on Article 9 ICCPR, protecting the right to liberty and security of person. It notes that consideration for parole and other forms of early release must be in accordance with the law.¹⁴ Furthermore, such release must not be denied on arbitrary grounds and a prediction of the prisoner's future behavior might be a relevant factor in deciding whether to grant early release.¹⁵ In General Comment No. 21, the Committee also

¹⁰ *Blessington and Elliot v Australia*, Communication No. 1968/2010, CC PR/C/112/D/1968/2010 (Oct. 22, 2014), para 7.12, available at <http://hrlc.org.au/wp-content/uploads/2014/11/CCPR-C-112-D-1968-2010-English.pdf>.

¹¹ *Blessington and Elliot v Australia*, Communication No. 1968/2010, CC PR/C/112/D/1968/2010 (Oct. 22, 2014), para 7.7, available at <http://hrlc.org.au/wp-content/uploads/2014/11/CCPR-C-112-D-1968-2010-English.pdf>.

¹² *Blessington and Elliot v Australia*, Communication No. 1968/2010, CC PR/C/112/D/1968/2010 (Oct. 22, 2014), para 7.7, available at <http://hrlc.org.au/wp-content/uploads/2014/11/CCPR-C-112-D-1968-2010-English.pdf>.

¹³ *Blessington and Elliot v Australia*, Communication No. 1968/2010, CC PR/C/112/D/1968/2010 (Oct. 22, 2014), para 7.8, available at <http://hrlc.org.au/wp-content/uploads/2014/11/CCPR-C-112-D-1968-2010-English.pdf>.

¹⁴ UN Human Rights Committee, General Comment No. 35, Article 9 (Liberty and Security of Person), para 20, U.N. Doc CCPR/C/GC/35 (Dec. 16, 2014), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGC%2F35&Lang=en.

¹⁵ UN Human Rights Committee, General Comment No. 35, Article 9 (Liberty and Security of Person), para 20, U.N. Doc CCPR/C/GC/35 (Dec. 16, 2014), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGC%2F35&Lang=en.

affirmed that no penitentiary system should be retributory; rather it should seek the reformation and social rehabilitation of the prisoner.¹⁶

Finally, the UN Standard Minimum Rules for the Treatment of Prisoners (UN Rules) advocate that prison authorities should use all available resources to ensure the return of offenders to society.¹⁷ The only way to achieve the aim of protecting society from crime is to ensure that the offender is able to lead a law-abiding life should they be released.¹⁸ To achieve this aim, the UN Rules advocate that institutions use all remedial, education, moral, and spiritual forms of assistance available.¹⁹ As can be seen from this overview, while not prohibiting life imprisonment, international human rights law has set limitations on the practice including in relation to periodic review and rehabilitation.

Legality of Life Imprisonment Across Europe

As noted above, given that the death penalty has been prohibited in the Europe system, life imprisonment is the most severe punishment available. Like the international system, limitations have also been imposed on the use and application of life imprisonment in Europe. These have mainly been developed by the ECtHR in its significant jurisprudence on life sentencing. This section of the memorandum considers these limitations on life imprisonment as a criminal punishment at the regional European level. It analyzes the relevant instruments of the Council of Europe - the European Convention on Human Rights – as well as its Committee for the Prevention of Torture and the Committee of Ministers. It also briefly sets out some of the relevant laws from the national level regarding the limits on life imprisonment.

¹⁶ UN Human Rights Committee, General Comment No. 21, Article 10 (Humane Treatment of Persons Deprived of Their Liberty), para 10, (Apr. 10, 1992), *available at* <http://www.refworld.org/docid/453883fb11.html>.

¹⁷ United Nations Congress on the Prevention of Crime and Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, (Aug. 30, 1955) *available at* https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

¹⁸ United Nations Congress on the Prevention of Crime and Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, (Aug. 30, 1955), Rule 58, *available at* https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

¹⁹ United Nations Congress on the Prevention of Crime and Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, (Aug. 30, 1955), Rule 59 (See also Rules 65 & 66), *available at* https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

Life Imprisonment under the ECHR

The ECtHR has heard numerous cases dealing with the legality of life imprisonment under the ECHR.²⁰ The vast majority of cases have been brought under Article 3 ECHR on the prohibition of torture, inhuman, and degrading treatment.²¹ The ECtHR has analyzed whether life imprisonment is a permissible form of punishment compatible with Article 3 ECHR by looking at the legal framework for its use in the respective jurisdictions.²² This section analyzes the ECtHR's case law in relation to life imprisonment.

Life Imprisonment and the ECtHR: *Kafkaris v Cyprus*

The ECtHR first notably dealt with the legality of life imprisonment in the case of *Kafkaris v Cyprus*.²³ In *Kafkaris*, the Cypriot court had found the applicant guilty of murder and sentenced him to life imprisonment. The applicant challenged this sentence under Article 3 ECHR, claiming it amounted to an irreducible term of imprisonment. The ECtHR held that there was no violation of Article 3 ECHR in this situation as the imposition of a life sentence on an adult offender is not in itself incompatible with the ECHR.²⁴ However, the ECtHR went on to highlight that if the life sentence is irreducible, then it may be incompatible with Article 3 ECHR.²⁵ The ECtHR noted that there ought to be some system for the consideration of release at the domestic level, and it is this factor that will be taken into account in determining whether the life sentence is compatible with Article 3 ECHR.²⁶

The ECtHR highlighted that the applicable test for the purposes of satisfying the requirements under Article 3 ECHR was whether a life sentence is *de jure* and *de facto* reducible.²⁷ In the *Kafkaris* case, the ECtHR held that life sentences in Cyprus were both *de jure* and *de facto* reducible

²⁰ European Court of Human Rights, *Factsheet – Life Imprisonment*, 1 (Oct. 2015), available at http://www.echr.coe.int/Documents/FS_Life_sentences_ENG.pdf.

²¹ Bernadette Rainey, Elizabeth Wicks & Clare Ovey, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 192 (2014).

²² Bernadette Rainey, Elizabeth Wicks & Clare Ovey, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 192 (2014).

²³ *Kafkaris v Cyprus*, Application No. 21906/04, Grand Chamber Judgment of 12 February 2008, available at <http://hudoc.echr.coe.int/eng?i=001-85019>.

²⁴ *Kafkaris v Cyprus*, Application No. 21906/04, Grand Chamber Judgment of 12 February 2008, para 97, available at <http://hudoc.echr.coe.int/eng?i=001-85019>.

²⁵ *Kafkaris v Cyprus*, Application No. 21906/04, Grand Chamber Judgment of 12 February 2008, para 97, available at <http://hudoc.echr.coe.int/eng?i=001-85019>.

²⁶ *Kafkaris v Cyprus*, Application No. 21906/04, Grand Chamber Judgment of 12 February 2008, para 98, available at <http://hudoc.echr.coe.int/eng?i=001-85019>.

²⁷ *Kafkaris v Cyprus*, Application No. 21906/04, Grand Chamber Judgment of 12 February 2008, para 98, available at <http://hudoc.echr.coe.int/eng?i=001-85019>.

through the system of the Presidential pardon.²⁸ Although there was no parole board system in Cyprus, the ECtHR noted that “early release policies including the manner of their implementation” fall within the margin of appreciation afforded to member states.²⁹ This case illustrates that the ECtHR will only look at whether there is a system in place to reduce a life sentence, and whether that grants a practical possibility of early release. The ECtHR will not dictate which form this system of review should take.

The Court’s reasoning in *Kafkaris* has been followed in several other applications to the ECtHR, including *Garagin v Italy*³⁰ and *Streicher v Germany*,³¹ where the applicants sought to challenge life imprisonment under Article 3 ECHR. The ECtHR ruled that both of these applications were inadmissible as manifestly ill-founded. The ECtHR found that life sentences were reducible both *de jure* and *de facto* in Italy and Germany given their systems of parole. The Court specifically noted in *Garagin* that the mere fact of being sentenced to life imprisonment does not attain the necessary level of gravity to bring the case within the scope of Article 3 ECHR.³² In *Iorgov (No.2) v Bulgaria*, the ECtHR held that there was no violation of Article 3 ECHR just because the only way to obtain review of a life sentence was through an application to the Vice President for pardon.³³ In *Iorgov*, the applicant’s appeal to the Vice President had been rejected, but the ECtHR held that there was nothing to prevent him from submitting a new appeal and, as such, there was still a possibility that his sentence could be reviewed.³⁴

Form of Review of Life Sentences: *Vinter v United Kingdom*

In 2013, the ECtHR again considered the legality of life imprisonment in the UK, in the landmark case of *Vinter v United Kingdom*.³⁵ This case focused specifically on the review of life sentences and the possibility of early release

²⁸ *Kafkaris v Cyprus*, Application No. 21906/04, Grand Chamber Judgment of 12 February 2008, para 103, available at <http://hudoc.echr.coe.int/eng?i=001-85019>.

²⁹ *Kafkaris v Cyprus*, Application No. 21906/04, Grand Chamber Judgment of 12 February 2008, paras 104-105, available at <http://hudoc.echr.coe.int/eng?i=001-85019>.

³⁰ *Garagin v Italy*, Application No. 33290/07, Decision of 29 April 2008, available at <http://hudoc.echr.coe.int/eng?i=001-86574>.

³¹ *Streicher v Germany*, Application No. 40384/04, Decision of 10 February 2009, available at <http://hudoc.echr.coe.int/eng?i=001-91620>.

³² “Le fait d’imposer au requérant une peine de réclusion à perpétuité n’a partant pas atteint le niveau de gravité nécessaire pour tomber dans le champ d’application de l’article 3” - *Garagin v Italy*, Application No. 33290/07, Decision of 29 April 2008, available at <http://hudoc.echr.coe.int/eng?i=001-86574>.

³³ *Iorgov (No.2) v Bulgaria*, Application No. 36295/02, Judgment of 2 September 2010, para 60 (see also para 52), available at <http://hudoc.echr.coe.int/eng?i=001-100271>.

³⁴ *Iorgov (No.2) v Bulgaria*, Application No. 36295/02, Judgment of 2 September 2010, para 59, available at <http://hudoc.echr.coe.int/eng?i=001-100271>.

³⁵ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

under the UK system. In *Vinter*, the applicants had been given “whole life orders”, meaning that the only way that they could be released was at the discretion of the UK Justice Secretary of State, who would only do so on compassionate grounds (for example in the case of terminal illness).³⁶ The ECtHR’s Grand Chamber took a stricter line in *Vinter* than it had done in previous cases examining the UK’s review process for life sentences. The Court found the UK in violation of Article 3 ECHR due to the practical irreducibility of the sentences.

In its assessment, the ECtHR reiterated that it was within the UK’s discretion to determine which criminal justice system to use,³⁷ and noted that states have a duty under the ECHR to protect the public from violent crime.³⁸ However, the ECtHR found that life sentences in the UK were in essence irreducible with no prospect of release, and thus were in violation of Article 3 ECHR.³⁹ The Court held that there needed to be a real prospect of release in order for the life sentence to be compatible with Article 3 ECHR, and that in this case the Justice Secretary’s review power was unclear.⁴⁰ The ECtHR provided further guidance as to the form that review procedures for life sentences should take. According to the ECtHR Grand Chamber, there must be:

[A] review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.⁴¹

The ECtHR stressed that it was not its place to prescribe what form the review should take, and emphasized that national courts could determine the form and timing of life sentence reviews.⁴² However, the ECtHR noted increasing support for a “dedicated mechanism guaranteeing a review of no

³⁶ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, para 12, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

³⁷ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, para 104, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

³⁸ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, para 108, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

³⁹ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, para 131, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

⁴⁰ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, para 129, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

⁴¹ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, para 119, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

⁴² *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, para 120, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

later than twenty-five years after the imposition of a life sentence, with further periodic review thereafter.”⁴³

The significance of the ECtHR’s *Vinter* judgment goes beyond mere procedural reform. In her concurring opinion, Judge Ann Power-Forde affirmed that prisoners should retain a “right to hope” and that they should be given an opportunity to rehabilitate themselves while serving their sentences.⁴⁴ Rehabilitation is not possible without the prospect of release, and the ECtHR noted that it would be unreasonable to expect the prisoner to work towards rehabilitation without knowing what she or he must do to be considered for release and under what conditions.⁴⁵ At the core of the *Vinter* decision is the notion of human dignity, and that life imprisonment without any possibility of release takes away any hope that a prisoner might have. This lack of hope can be argued to be inherently degrading and detrimental to the (mental) health of the prisoner, being analogous to a slow form of torture.⁴⁶

In *Vinter*, the ECtHR’s Grand Chamber built on earlier decisions to identify and emphasize the fact that the focus of the penal policies of the Council of Europe member states is now on rehabilitation as opposed to punishment.⁴⁷ Recognizing that there is no incentive for prisoners to reintegrate back into society if they have no prospect of release, the Court acknowledged that lifelong imprisonment effectively means the social death of the prisoner.⁴⁸ This is an important element of the Court’s reasoning regarding periodic review of life sentences.

ECtHR’s Post-*Vinter* Jurisprudence

The ECtHR’s jurisprudence following the 2013 *Vinter* case has taken a strict line in interpreting whether a state’s procedure for review of life sentences is compatible with Article 3 ECHR. The ECtHR has been especially critical of the use of presidential pardons or clemency as the only form of review. Some of the key cases are discussed below.

⁴³ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, para 120, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

⁴⁴ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, Concurring Opinion of Judge Power-Forde, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

⁴⁵ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, para 122, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

⁴⁶ Gauthier de Beco, *Life sentences and human dignity*, 9(3) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 411, 414 (2005).

⁴⁷ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, para 115, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

⁴⁸ Dirk van Zyl Smit, Pete Weatherby & Simon Creighton, *Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What is to Be Done?* 14 HUMAN RIGHTS LAW REVIEW 59, 66 (2014).

In the 2014 case *Ocalan v Turkey (No.2)*, the ECtHR held that the fact that the President was only entitled to order a prisoners release if they were elderly or ill did not correspond to the notion of “prospect of release”, and thus violated Article 3 ECHR.⁴⁹ Similarly, in *László Magyar v Hungary*, the applicant argued that the Presidential Pardon had never been granted to any prisoner serving a life sentence since its introduction, and thus violated Article 3 ECHR.⁵⁰ The ECtHR agreed with the applicant, finding a violation of Article 3 ECHR as the Presidential Pardon did not allow any prisoner to know what she or he must do to be considered for release and under what conditions.⁵¹ The ECtHR noted that there did not seem to be any proper consideration of the changes and the prisoner’s progress towards rehabilitation.⁵² In *Harakchiev and Tolumov v Bulgaria*, the ECtHR found a violation of Article 3 ECHR as the Presidential powers of clemency were opaque, and lacked formal or even informal safeguards.⁵³ The case of *Čačko v Slovakia* is also relevant.⁵⁴ In that case, the applicant alleged that his life sentence without the possibility of release on parole amounted to a violation of Article 3 ECHR because there was no prospect of obtaining a presidential pardon. The ECtHR found no violation of Article 3 ECHR as a judicial review mechanism had been introduced during the course of the proceedings.⁵⁵

At the time of writing, the Grand Chamber is considering the decision by the Chamber of the Fourth Section of the ECtHR in *Hutchinson v United Kingdom*.⁵⁶ This case follows the ECtHR’s decision in *Vinter* and somewhat conflicts with it despite addressing the same issues. In February 2015, the Chamber in *Hutchinson v UK* found that life sentences in the UK no longer violated Article 3 ECHR as the English Court of Appeal had now

⁴⁹ *Ocalan v Turkey (No.2)*, Application Nos. 24069/03, 197/04, 6201/06 & 10464/07, Judgment of 18 March 2014, paras 203-307, available at <http://hudoc.echr.coe.int/eng?i=001-142087>.

⁵⁰ *László Magyar v Hungary*, Application No. 73593/10, Judgment of 20 May 2014, paras 32-33, available at <http://hudoc.echr.coe.int/eng?i=001-144109>.

⁵¹ *László Magyar v Hungary*, Application No. 73593/10, Judgment of 20 May 2014, para 58, available at <http://hudoc.echr.coe.int/eng?i=001-144109>.

⁵² *László Magyar v Hungary*, Application No. 73593/10, Judgment of 20 May 2014, para 58, available at <http://hudoc.echr.coe.int/eng?i=001-144109>.

⁵³ *Harakchiev and Tolumov v Bulgaria*, Application Nos. 15018/11 & 61199/12, Judgment of 8 July 2014, para 262, available at <http://hudoc.echr.coe.int/eng?i=001-145442>.

⁵⁴ *Čačko v Slovakia*, Application No. 49905/08, Judgment of 22 July 2014, available at <http://hudoc.echr.coe.int/eng?i=001-145711>.

⁵⁵ *Čačko v Slovakia*, Application No. 49905/08, Judgment of 22 July 2014, para 80 & 82, available at <http://hudoc.echr.coe.int/eng?i=001-145711>.

⁵⁶ Council of Europe, *United Kingdom: New Grand Chamber hearings to put European human rights law in spotlight*, (June. 4, 2015), available at <http://www.humanrightseurope.org/2015/06/united-kingdom-new-grand-chamber-hearings-to-put-european-human-rights-law-in-spotlight/>.

sufficiently clarified the law in relation to release by the Justice Secretary.⁵⁷ The English Court of Appeal had issued a decision expressing that the Justice Secretary has a duty to exercise his powers in a manner compatible with Article 3 ECHR, which would require the release of a prisoner where his or her continued detention served no legitimate penological purpose.⁵⁸ The ECtHR took the English Court of Appeal's statement of the legal position of life imprisonment in the UK as addressing the issues raised by the Grand Chamber in *Vinter*.⁵⁹ This Chamber decision in *Hutchinson* has been criticized because, despite the substantive law relating to life imprisonment in the UK being unchanged, the Court has now said that it does not violate Article 3 ECHR – contrary to what it held in *Vinter*.⁶⁰ Similarly, it can be argued that the Justice Secretary has always had to exercise his (or her) power of review in accordance with Article 3.⁶¹ In her dissenting opinion, Judge Kalaydjieva noted that this judgment was premature as it pre-empted the effective changes in English law.⁶² As this case is pending before the Grand Chamber, it should be afforded limited weight until the Grand Chamber delivers its judgment on the matter.

In the 2016 Grand Chamber decision in *Murray v the Netherlands*,⁶³ the ECtHR considered the legality of life sentences in the Dutch Antilles and the need to ensure that the “prospect of release” was a *de facto* possibility.⁶⁴ In this case, the applicant, who was serving his life sentence in Curaçao, argued, *inter alia*, that there was a violation of Article 3 ECHR because although there had been a mechanism introduced to review life sentences, he had no *de facto* prospect of being released.⁶⁵ He argued that because he had never been provided with any psychiatric treatment, the risk of his re-offending would

⁵⁷ *Hutchinson v The United Kingdom*, Application No. 57592/08, Judgment of 3 February 2015, para 25, available at <http://hudoc.echr.coe.int/eng?i=001-150778>.

⁵⁸ *Hutchinson v The United Kingdom*, Application No. 57592/08, Judgment of 3 February 2015, para 23, available at <http://hudoc.echr.coe.int/eng?i=001-150778>.

⁵⁹ *Hutchinson v The United Kingdom*, Application No. 57592/08, Judgment of 3 February 2015, para 25, available at <http://hudoc.echr.coe.int/eng?i=001-150778>.

⁶⁰ Natasha Simonsen, *Too Soon for the Right to Hope? Whole Life Sentences and the Strasbourg Court's Decision in Hutchinson v UK*, EJIL TALK, (Feb. 5, 2015), available at <http://www.ejiltalk.org/too-soon-for-the-right-to-hope-whole-life-sentences-and-the-strasbourg-courts-decision-in-hutchinson-v-uk/>.

⁶¹ Natasha Simonsen, *Too Soon for the Right to Hope? Whole Life Sentences and the Strasbourg Court's Decision in Hutchinson v UK*, EJIL TALK, (Feb. 5, 2015), available at <http://www.ejiltalk.org/too-soon-for-the-right-to-hope-whole-life-sentences-and-the-strasbourg-courts-decision-in-hutchinson-v-uk/>.

⁶² *Hutchinson v The United Kingdom*, Application No. 57592/08, Judgment of 3 February 2015, Dissenting Opinion of Judge Kalaydjieva, available at <http://hudoc.echr.coe.int/eng?i=001-150778>.

⁶³ *Murray v The Netherlands*, Application No. 10511/10, Grand Chamber Judgment of 26 April 2016, available at <http://hudoc.echr.coe.int/eng?i=001-162614>.

⁶⁴ *Murray v The Netherlands*, Application No. 10511/10, Grand Chamber Judgment of 26 April 2016, para 102, available at <http://hudoc.echr.coe.int/eng?i=001-162614>.

⁶⁵ *Murray v The Netherlands*, Application No. 10511/10, Grand Chamber Judgment of 26 April 2016, para 87, available at <http://hudoc.echr.coe.int/eng?i=001-162614>.

continue to be considered too high for him to be eligible for release.⁶⁶ In its decision, the Grand Chamber held that a prisoner serving life must be realistically able to make progress towards rehabilitation.⁶⁷ The ECtHR found a violation of Article 3 ECHR because the lack of any kind of treatment measures meant that any request by the prisoner for a pardon would be *de facto* ineffective as he could never demonstrate any significant progress towards rehabilitation.⁶⁸ This case underscores the need for the “prospect of release” to be a *de facto* possibility and indicates that rehabilitative measures should be available to effect this possibility.

Life Imprisonment under the ECHR: Conclusions

In conclusion, analysis of the ECtHR’s case law on life imprisonment demonstrates that a life sentence in itself does not violate Article 3 ECHR.⁶⁹ Member states have a margin of appreciation in determining how long a sentence should be.⁷⁰ However, if there is no prospect of release, or no clear and effective mechanism of review of the life sentence, this will render the sentence incompatible with Article 3 ECHR.⁷¹ The ECtHR has held that the prospect of release must exist *de jure* and *de facto*.⁷² However, states also have a margin of appreciation in determining the form of review of life sentences.⁷³ Similarly, the mere fact that a life sentence could be served in full does not make it contrary to Article 3 ECHR. In essence, review of a life sentence does not have to lead to the prisoner’s release.⁷⁴ The ECtHR has also noted that a finding of a violation of Article 3 ECHR cannot be understood as giving the applicant the prospect of imminent release.⁷⁵ The ECHR simply requires that there be a prospect that the prisoner may be released, and that there be a procedure in place for a clear and effective review of the life sentence. Similarly, the recent decision in *Murray v*

⁶⁶ *Murray v The Netherlands*, Application No. 10511/10, Grand Chamber Judgment of 26 April 2016, para 87, available at <http://hudoc.echr.coe.int/eng?i=001-162614>.

⁶⁷ *Murray v The Netherlands*, Application No. 10511/10, Grand Chamber Judgment of 26 April 2016, para 109, available at <http://hudoc.echr.coe.int/eng?i=001-162614>.

⁶⁸ *Murray v The Netherlands*, Application No. 10511/10, Grand Chamber Judgment of 26 April 2016, para 125, available at <http://hudoc.echr.coe.int/eng?i=001-162614>.

⁶⁹ *Kafkaris v Cyprus*, Application No. 21906/04, Grand Chamber Judgment of 12 February 2008, para 97, available at <http://hudoc.echr.coe.int/eng?i=001-85019>.

⁷⁰ *László Magyar v Hungary*, Application No. 73593/10, Judgment of 20 May 2014, para 46, available at <http://hudoc.echr.coe.int/eng?i=001-144109>.

⁷¹ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, paras 119 & 129, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

⁷² *Kafkaris v Cyprus*, Application No. 21906/04, Grand Chamber Judgment of 12 February 2008, para 98, available at <http://hudoc.echr.coe.int/eng?i=001-85019>.

⁷³ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, para 120, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

⁷⁴ *László Magyar v Hungary*, Application No. 73593/10, Judgment of 20 May 2014, para 72, available at <http://hudoc.echr.coe.int/eng?i=001-144109>.

⁷⁵ *Harakchiev and Tolumov v Bulgaria*, Application Nos. 15018/11 & 61199/12, Judgment of 8 July 2014, para 268, available at <http://hudoc.echr.coe.int/eng?i=001-145442>.

Netherlands indicates that there may be a need for rehabilitative measures to ensure that the prospect of release is *de facto* possible.⁷⁶

Council of Europe

The rehabilitative objective for prisoners, even those sentenced to life imprisonment, is also apparent from the reports of the Council of Europe's Committee for the Prevention of Torture (CPT) and its analysis of life sentences in Romania and Switzerland.⁷⁷ In these reports, the CPT held that it is "inhuman to imprison a person for life without any realistic hope of release."⁷⁸ The CPT called on Romania and Switzerland to make changes to the law to allow for the relevant prisoners to be considered for release. The Committee also went further and expressed that while imprisoned under a life sentence, prisoners should be able to participate in constructive activities that would allow them to improve themselves.⁷⁹

The Committee of Ministers of the Council of Europe has also issued several Recommendations relating to life imprisonment. Recommendation 2003(23) on the "Management by Prison Administrations of Life Sentence and Other Long-Term Prisoners" further illustrates the emphasis on rehabilitation.⁸⁰ This Recommendation provides that one of the general objectives of the management of those serving life sentences is to increase and improve the possibilities for them to resettle successfully in society.⁸¹ The Recommendation

⁷⁶ *Murray v The Netherlands*, Application No. 10511/10, Grand Chamber Judgment of 26 April 2016, para 125, available at <http://hudoc.echr.coe.int/eng/?i=001-162614>.

⁷⁷ Dirk van Zyl Smit, Pete Weatherby & Simon Creighton, *Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What is to Be Done?* 14 HUMAN RIGHTS LAW REVIEW 59, 67 (2014).

⁷⁸ Committee on the Prevention against Torture, *Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 4 to 10 May 2012*, para 32 (Dec. 4, 2012) available at

<http://www.cpt.coe.int/documents/bgr/2012-32-inf-eng.htm>; Committee on the Prevention of Torture, *Report to the Swiss Federal Government on the visit to Switzerland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 10 to 20 October 2011*, para 26 (Oct. 25, 2012), available at <http://www.cpt.coe.int/documents/che/2012-26-inf-fra.pdf>.

⁷⁹ Committee on the Prevention against Torture, *Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 4 to 10 May 2012*, para 32 (Dec. 4, 2012) available at

<http://www.cpt.coe.int/documents/bgr/2012-32-inf-eng.htm>; Committee on the Prevention of Torture, *Report to the Swiss Federal Government on the visit to Switzerland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 10 to 20 October 2011*, para 26 (Oct. 25, 2012), available at <http://www.cpt.coe.int/documents/che/2012-26-inf-fra.pdf>.

⁸⁰ Committee of Ministers of the Council of Europe, *Recommendation Rec(2003)23 of the Committee of Ministers to member states on the Management by Prison Administrations of Life Sentence and Other Long-Term Prisoners*, (Oct. 9, 2003), available at

[http://www.coe.int/t/dghl/standardsetting/cdpc/\(Rec%20_2003_%2023%20E%20Manag%20PRISON%20ADM%20Life%20Sent%20Pris%20%20REPORT%2015_205\).pdf](http://www.coe.int/t/dghl/standardsetting/cdpc/(Rec%20_2003_%2023%20E%20Manag%20PRISON%20ADM%20Life%20Sent%20Pris%20%20REPORT%2015_205).pdf).

⁸¹ Committee of Ministers of the Council of Europe, *Recommendation Rec(2003)23 of the Committee of Ministers to member states on the Management by Prison Administrations of Life Sentence and Other Long -*

emphasizes that prisoners sentenced to life should benefit from constructive preparation for release, and even highlights that those serving life sentences should have the possibility for conditional release.⁸² It advocates treatments including sentence planning allowing for progressive movement through the prison sentence, and participation in work and training programs.⁸³ These treatments are recommended to avoid the destructive effects of imprisonment, and to increase the possibilities for these prisoners to be reintegrated back into society.⁸⁴ The 2003 Recommendation on Conditional Release (Parole) also provides that parole should be considered for all prisoners.⁸⁵

Finally, in the Council of Europe's legal instruments, the 2006 European Prison Rules convey general standards in European penal policy.⁸⁶ For example, Rule 6 provides that "all detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty."⁸⁷ Similarly, Rule 102.1, which covers the objective of imprisonment,

Term Prisoners, (Oct. 9, 2003), para. 2, available at

[http://www.coe.int/t/dghl/standardsetting/cdpc/\(Rec%20_2003_%2023%20E%20Manag%20PRISON%20ADM%20Life%20Sent%20Pris%20%20REPORT%2015_205\).pdf](http://www.coe.int/t/dghl/standardsetting/cdpc/(Rec%20_2003_%2023%20E%20Manag%20PRISON%20ADM%20Life%20Sent%20Pris%20%20REPORT%2015_205).pdf).

⁸² Committee of Ministers of the Council of Europe, *Recommendation Rec(2003)23 of the Committee of Ministers to member states on the Management by Prison Administrations of Life Sentence and Other Long - Term Prisoners*, (Oct. 9, 2003), para. 34, available at

[http://www.coe.int/t/dghl/standardsetting/cdpc/\(Rec%20_2003_%2023%20E%20Manag%20PRISON%20ADM%20Life%20Sent%20Pris%20%20REPORT%2015_205\).pdf](http://www.coe.int/t/dghl/standardsetting/cdpc/(Rec%20_2003_%2023%20E%20Manag%20PRISON%20ADM%20Life%20Sent%20Pris%20%20REPORT%2015_205).pdf).

⁸³ Committee of Ministers of the Council of Europe, *Recommendation Rec(2003)23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners*, para 10 (Oct. 9, 2003), available at

<https://wcd.coe.int/ViewDoc.jsp?id=75267&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

⁸⁴ Committee of Ministers of the Council of Europe, *Recommendation Rec(2003)23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners*, para 2 (Oct. 9, 2003), available at

<https://wcd.coe.int/ViewDoc.jsp?id=75267&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

⁸⁵ Committee of Ministers of the Council of Europe, *Recommendation Rec(2003)22 of the Committee of Ministers to member states on conditional release (parole)*, para 20, (Sep. 24, 2003), available at

<https://wcd.coe.int/ViewDoc.jsp?id=70103&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

⁸⁶ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, para. 115, available at <http://hudoc.echr.coe.int/eng/?i=001-122664>; Committee of Ministers of the Council of Europe, *Recommendation Rec(2006)2 of the Committee of Ministers to member states on European Prison Rules*, Rule 6, (Jan. 11, 2006), available at

<https://wcd.coe.int/ViewDoc.jsp?id=955747&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

⁸⁷ Committee of Ministers of the Council of Europe, *Recommendation Rec(2006)2 of the Committee of Ministers to member states on European Prison Rules*, Rule 6, (Jan. 11, 2006), available at

<https://wcd.coe.int/ViewDoc.jsp?id=955747&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

highlights that “the regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime free life.”⁸⁸

Life Sentencing Across Europe on the National Level

At the European national level, there is quite a variety of standards regarding life imprisonment. For example, there are some states, like the Netherlands and UK as mentioned above, that intend life sentences to be “lifelong.” Others, such as Germany and Italy, take the position that life sentences are unacceptable. In addition, the Italian and Spanish Constitutions both provide that all prison sentences should aim at the rehabilitation of offenders,⁸⁹ with the Italian Constitutional Court holding that the possibility of parole is the only means by which a life sentence can remain compatible with the Constitution.⁹⁰

Notably, the German Constitutional Court heard an appeal against a life sentence, which was argued as being incompatible with human dignity in Article 1 of the Constitution. The Constitutional Court recognized that a life sentence entails a loss of personal dignity, the loss of hope, and the denial of the right to rehabilitation.⁹¹ The Constitutional Court also argued that respect for human dignity required a procedure that goes beyond a loosely structured pardon process, so as to make life imprisonment tolerable for the sentenced person. As a result, the Court ordered the German legislature to amend the Penal Code to allow for a judicially controlled form of release, combined with proper due process protections. According to the amended German Penal Code, all prisoners sentenced to life imprisonment must now be considered for release after serving 15 years.⁹² At that stage, release shall be granted if the gravity of the prisoner’s guilt does “not necessitate his continuing to serve his sentence.”⁹³

⁸⁸ Committee of Ministers of the Council of Europe, *Recommendation Rec(2006)2 of the Committee of Ministers to member states on European Prison Rules*, Rule 102.1, (Jan. 11, 2006), available at <https://wcd.coe.int/ViewDoc.jsp?id=955747&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

⁸⁹ SPANISH CONST., art. 25(2) (1978), available at http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf; ITALIAN CONST., art. 27(3) (1948), available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

⁹⁰ Italian Constitutional Court, 2-4 June 1997) No.161/1997.

⁹¹ German Federal Constitutional Court, (21 June 1977) 45 BVerfge 187, available in German at <http://www.hrcr.org/safrica/dignity/45bverfge187.html>.

⁹² *German Penal Code* art 38 (Germany, 2013), available in English at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

⁹³ *German Penal Code* art 57a (read with art 57) (Germany, 2013), available in English at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

There is also a variety of standards in Europe at the national level in relation to minimum term of imprisonment that must be served before a prisoner is eligible for parole. It appears that across Europe, legislation sets a typical minimum term as being between 12 and 25 years, before an individual serving a life sentence should be considered for release.⁹⁴ For example, states such as Poland, Slovenia, and Slovakia allow for an individual to be eligible for parole after having served 25 years, compared with Croatia and Romania where it is 20 years.⁹⁵

The jurisprudence of many ECHR member states also demonstrates increasingly commitment to rehabilitating those serving a life sentence.⁹⁶ For example, the issue of rehabilitation has come before the Italian and German constitutional courts. The German Constitutional Court in the case mentioned above also considered the rehabilitation of prisoners.⁹⁷ In this case, the Court looked at the concept of human dignity and stressed that rehabilitation was constitutionally required in any community that established human dignity as its centerpiece.⁹⁸ An offender had to have the chance to re-enter society, and the state was obligated to take all measures necessary to achieve that goal. The Court stressed that prisons have a duty to strive towards the re-socialization of prisoners in order to preserve their ability to cope with life, and to counteract the negative effects of incarceration and the destructive changes in personality that accompanied imprisonment.⁹⁹ Although the Court recognized that some criminals who remained a threat to society might never become rehabilitated, their inability to rehabilitate would be a consequence of their personal circumstances and not the fact that they were not offered rehabilitation

⁹⁴ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, para 68, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

⁹⁵ Polish Criminal Code art 78(3) (Poland, 1997), available in English at https://www.imolin.org/doc/amlid/Poland_Penal_Code1.pdf; Slovenian Criminal Code art 88(3) (Slovenia, 2009), available in English at <http://www.policija.si/eng/images/stories/Legislation/pdf/CriminalCode2009.pdf>; Slovakian Criminal Code art 47(1)(b) (Slovakia, 2006), available at <http://www.legislationline.org/documents/section/criminal-codes>; Romanian Criminal Code art 72 (Romania, 2005), available in English at <http://www.legislationline.org/documents/section/criminal-codes/country/8>.

⁹⁶ *Vinter and Others v The United Kingdom*, Application Nos. 66069/09, 130/10 & 3896/10, Grand Chamber Judgment of 9 July 2013, para. 117, available at <http://hudoc.echr.coe.int/eng?i=001-122664>; Dirk van Zyl Smit, Pete Weatherby & Simon Creighton, *Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What is to Be Done?* 14 HUMAN RIGHTS LAW REVIEW 59, 68 (2014).

⁹⁷ German Federal Constitutional Court, (Jun. 21, 1977) 45 BVerfge 187, available at <http://www.hrcr.org/safrica/dignity/45bverfge187.html>.

⁹⁸ German Federal Constitutional Court, (June. 21, 1977) 45 BVerfge 187, available in German at <http://www.hrcr.org/safrica/dignity/45bverfge187.html>.

⁹⁹ German Federal Constitutional Court, (June. 21, 1977) 45 BVerfge 187, available at <http://www.hrcr.org/safrica/dignity/45bverfge187.html>.

activities.¹⁰⁰ Accordingly, just because an individual is serving a life sentence does not mean that a state should exclude rehabilitation.¹⁰¹ In a 1986 case, the Germany Constitutional Court specifically confirmed that this applied to all prisoners serving life sentences, regardless of the nature of their crimes.¹⁰²

The Italian Constitutional Court reached a similar conclusion in its 1974 judgment in case number (204/1974).¹⁰³ In this case, the prisoner applied for parole to the Minister of Justice, who then referred the case to the Constitutional Court for its opinion on the constitutionality of the relevant law concerning parole.¹⁰⁴ The Italian Constitutional Court held that, on the basis of the Italian Constitution,¹⁰⁵ rehabilitation was the aim of every sentence and the right of every prisoner.¹⁰⁶ Similarly, in a further case, the Italian Constitutional Court has held specifically that the possibility of parole is closely connected with rehabilitation.¹⁰⁷

Legality of Life Imprisonment Across Europe: Conclusions

Across Europe, life imprisonment is the most severe punishment available as, unlike at the international level, the death penalty has been prohibited. However, similarly to the international system, the ECtHR and other actors have imposed limitations on the use and application of life imprisonment in Europe. The ECtHR has developed these restrictions in its significant jurisprudence on life sentencing. The limitations relate to the treatment of prisoners imprisoned for life as well as the periodic review of their sentences. Within Europe, the focus lies on rehabilitating prisoners as opposed to punishing them. It is also necessary to provide prisoners serving life sentences with realistic prospects of release. Despite states' discretion in implementing these standards, if the national criminal justice systems across Europe do not meet them, the ECtHR might find that they violate Article 3 ECHR.

Life Imprisonment in the Netherlands

¹⁰⁰ German Federal Constitutional Court, (June. 21, 1977) 45 BVerfGE 187, *available at* <http://www.hrcr.org/safrica/dignity/45bverfge187.html>.

¹⁰¹ German Federal Constitutional Court, (June. 21, 1977) 45 BVerfGE 187, *available at* <http://www.hrcr.org/safrica/dignity/45bverfge187.html>.

¹⁰² German Federal Constitutional Court, (April. 24, 1986) 72 BVerfGE 105, *available at* <http://www.servat.unibe.ch/dfr/bv072105.html>.

¹⁰³ Italian Constitutional Court, (June. 27, 1974) (204/1974).

¹⁰⁴ Italian Constitutional Court, (June. 27, 1974) (204/1974).

¹⁰⁵ Article 27(3) Italian Constitution provides that punishments may not be inhuman and shall aim at rehabilitating the convicted. ITALIAN CONST., art. 27(3) (1948), *available at* https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

¹⁰⁶ Italian Constitutional Court, (June. 27, 1974) No.204/1974.

¹⁰⁷ Italian Constitutional Court, (June. 2-4, 1997) No.161/1997.

This next section of the memorandum examines the practice of life sentencing in the Netherlands. As a party to the ICCPR and the ECHR, the above standards also relate to the Netherlands. The Netherlands is one of the only European states where lifelong means lifelong¹⁰⁸ - as mentioned by the State Secretary of Security and Justice in a letter dated 16 April 2012.¹⁰⁹ This section explores when a Dutch court may hand down a life sentence, the options for early release and rehabilitation of prisoners, and recent legal and political developments regarding life sentencing reform. The memorandum then concludes with a brief assessment of the compatibility of the Dutch life sentencing system with the ECHR.

Life Imprisonment under Dutch Law

Article 10 of the Dutch Criminal Code (*Wetboek van Strafrecht*) provides the basis for life imprisonment.¹¹⁰ For several crimes, it is possible to sentence the offender to life. These crimes include an attack against the safety of the state (for instance, the intention to kill the King);¹¹¹ setting fire or causing an explosion that endangers someone's life;¹¹² or committing murder.¹¹³ Further, it is possible to impose a life sentence for crimes that are normally punished with a limited prison sentence, such as crimes with a terrorist intention.¹¹⁴ The International Crimes Act 2003 (*Wet Internationale Misdrijven 2003*) further contains certain crimes punishable by a life sentence.¹¹⁵ Children under the age of 18 are excluded from life sentences.¹¹⁶

Reintegration Activities and the Possibility of Parole

¹⁰⁸ Mart de Jong, *Alleen in Nederland is levenslang ook echt levenslang*, DE VOLKSKRANT, August 12, 2015, available in Dutch at <http://www.volkskrant.nl/opinie/alleen-in-nederland-is-levenslang-ook-echt-levenslang~a4119008/>.

¹⁰⁹ State Secretary of Security and Justice, *Modernisering penitentiaire arbeid, Samenplaatsing (levens)langgestraften*, MINISTRY OF SECURITY AND JUSTICE, 4 (April 16, 2012) available in Dutch at <https://www.rijksoverheid.nl/documenten/kamerstukken/2012/04/17/modernisering-penitentiaire-arbeid-samenplaatsing-levens-langgestraften>.

¹¹⁰ *Criminal Code*, art. 10 (The Netherlands, 1881) available in Dutch at <http://wetten.overheid.nl/BWBR0001854/2016-01-01>.

¹¹¹ *Criminal Code*, art. 92-95a (The Netherlands, 1881) available in Dutch at <http://wetten.overheid.nl/BWBR0001854/2016-01-01>.

¹¹² *Criminal Code*, art. 157(3) (The Netherlands, 1881) available in Dutch at <http://wetten.overheid.nl/BWBR0001854/2016-01-01>.

¹¹³ *Criminal Code*, art. 288-9 (The Netherlands, 1881) available in Dutch at <http://wetten.overheid.nl/BWBR0001854/2016-01-01>.

¹¹⁴ *Criminal Code*, art. 282(b) (The Netherlands, 1881) available in Dutch at <http://wetten.overheid.nl/BWBR0001854/2016-01-01>.

¹¹⁵ *International Crimes Act* (The Netherlands, 2003) available in Dutch at <http://wetten.overheid.nl/BWBR0015252/2006-01-01>.

¹¹⁶ *Criminal Code*, art. 77(b) (The Netherlands, 1881) available in Dutch at <http://wetten.overheid.nl/BWBR0001854/2016-01-01>.

This section discusses the possibility of temporary leave as a part of reintegration activities and parole (*voorwaardelijke invrijheidsstelling*) for prisoners serving a life sentence. Under Dutch law, the Regulation of Temporary Leave of the Institution (*Regeling tijdelijk verlaten van de inrichting*) regulates the situation of temporary leave of prisoners.¹¹⁷

Temporary leave refers to the situation where prisoners are allowed to leave the institution for a set time. A distinction is made between general leave and incidental leave. General leave is granted when certain objective conditions are met, and incidental leave refers to situations where a prisoner is allowed leave due to pressing personal issues, such as the death of a family member.¹¹⁸ General leave is not possible for prisoners serving a life sentence, as it requires that a set number of years of the sentence still have to be served.¹¹⁹ In the case of a life sentence, the number of years is indefinite, meaning that there can never be a set amount of remaining years of the sentence. Parole refers to the situation where prisoners are released under certain conditions and do not have to serve their entire sentence.¹²⁰

Rehabilitation Activities

According to the State Secretary, in general it is not anticipated that a prisoner serving a life sentence will return to society, so they do not participate in reintegration activities.¹²¹ Only in the exceptional case of a pardon would a prisoner sentenced to life imprisonment in the Netherlands have the opportunity to reintegrate into society. The exclusion of detainees serving a life sentence from rehabilitation activities aimed at successful reintegration into society can be explained through policy documents and official statements of the Ministry of Security and Justice.¹²²

In a letter from 2009 regarding the pardon procedure and execution of life sentences, the Minister and State Secretary of Security and Justice highlighted that prisoners sentenced to life imprisonment do not participate in rehabilitation

¹¹⁷ Regulation of Temporary Leave of the Institution (the Netherlands, 1998) *available in Dutch at* <http://wetten.overheid.nl/BWBR0010171/2013-01-01>.

¹¹⁸ Willem-Jan van der Wolf and René van der Wolf, *THE DUTCH CRIMINAL JUSTICE SYSTEM* 169-170 (2008).

¹¹⁹ Raad van Strafrechtstoepassing en Jeugdbescherming (May 19, 2015) 14/3242/GV para. 4.4 *available in Dutch at* <http://rsj.nl/actueel/nieuwsberichten/verloflevenslanggestrafte.aspx?cp=60&cs=15850>.

¹²⁰ Willem-Jan van der Wolf and René van der Wolf, *THE DUTCH CRIMINAL JUSTICE SYSTEM* 171 (2008).

¹²¹ State Secretary Security and Justice, *Modernisering penitentiaire arbeid, Samenplaatsing (levens)langgestraften*, MINISTRY OF SECURITY AND JUSTICE 4 (April 16, 2012) *available in Dutch at* <https://www.rijks-overheid.nl/documenten/kamerstukken/2012/04/17/modernisering-penitentiaire-arbeid-samenplaatsing-levens-langgestraften>.

¹²² Wiene van Hattum, *Levenslang Post 'Winter': Over de gevolgen van de uitspraak van 9 juli 2013 van het EHRM voor de Nederlandse levenslange gevangenisstraf*, 88 *NEDERLANDS JURISTENBLAD* 1956, 1961 (2013) *available in Dutch at* <http://njb.nl/Uploads/Magazine/PDF/NJB13-29.pdf>.

activities because, in principle, reintegration into society is not an option.¹²³ Lifelong imprisonment means lifelong, that is, until death.¹²⁴ Similarly, in a 2012 policy document on the modernization of penitentiary labor and the placing together of prisoners serving a (life)long sentence, the State Secretary of Security and Justice reiterated that “lifelong means lifelong”, and that a pardon is only granted in exceptional cases.¹²⁵ Furthermore, in a Court of Appeal case in The Hague, the Dutch state, as a party to the proceedings, explained the policy that applied to prisoners sentenced to life imprisonment and the possibility of temporary leave. In this case, the claimant, who was sentenced to life imprisonment in 1985, held that he should be granted unaccompanied leave.¹²⁶ According to the state, unaccompanied leave does not fit within the framework of leave for prisoners sentenced to life, which since 2007 has been strengthened to the extent that prisoners sentenced to life imprisonment are not granted leave at all.¹²⁷ The fundamental idea behind this is that in principle a pardon is not considered for prisoners sentenced to life imprisonment.¹²⁸ As a result, prisoners sentenced to life are excluded from reintegration activities.¹²⁹

Prisoners serving a life sentence have been excluded from the possibility of temporary leave as well, since the general view is that they are not eligible for reintegration and thus activities preparing for rehabilitation.¹³⁰ The issue of

¹²³ State Secretary Security and Justice, *Gratieprocedure en tenuitvoerlegging levenslange gevangenisstraf*, MINISTRY OF SECURITY AND JUSTICE 3 (Oct. 16, 2009) available in Dutch at <https://www.rijksoverheid.nl/documenten/kamerstukken/2009/10/16/5614834-gratieprocedure-en-tenuitvoerlegging-levenslange-gevangenisstraf>.

¹²⁴ State Secretary Security and Justice, *Gratieprocedure en tenuitvoerlegging levenslange gevangenisstraf*, MINISTRY OF SECURITY AND JUSTICE 3 (Oct. 16, 2009) available in Dutch at <https://www.rijksoverheid.nl/documenten/kamerstukken/2009/10/16/5614834-gratieprocedure-en-tenuitvoerlegging-levenslange-gevangenisstraf>; Willem-Jan van der Wolf and René van der Wolf, *THE DUTCH CRIMINAL JUSTICE SYSTEM* 112 (2008).

¹²⁵ State Secretary Security and Justice, *Modernisering penitentiaire arbeid, Samenplaatsing (levens)langgestraften*, MINISTRY OF SECURITY AND JUSTICE 4 (Apr. 16, 2012) available in Dutch at <https://www.rijksoverheid.nl/documenten/kamerstukken/2012/04/17/modernisering-penitentiaire-arbeid-samenplaatsing-levens-langgestraften>.

¹²⁶ Gerechtshof Den Haag (23 Nov. 23ember 2011) ECLI:NL:GHSGR:2010:BO5022 available in Dutch at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHSGR:2010:BO5022>.

¹²⁷ Gerechtshof Den Haag (23 Nov. 23ember 2011) ECLI:NL:GHSGR:2010:BO5022 para. 3.5 available in Dutch at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHSGR:2010:BO5022>.

¹²⁸ Gerechtshof Den Haag (23 Nov. 23ember 2011) ECLI:NL:GHSGR:2010:BO5022 para. 3.5 available in Dutch at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHSGR:2010:BO5022>.

¹²⁹ State Secretary Security and Justice, *Modernisering penitentiaire arbeid, Samenplaatsing (levens)langgestraften*, MINISTRY OF SECURITY AND JUSTICE 4 (Apr. 16, 2012) available in Dutch at <https://www.rijksoverheid.nl/documenten/kamerstukken/2012/04/17/modernisering-penitentiaire-arbeid-samenplaatsing-levens-langgestraften>.

¹³⁰ State Secretary of Security and Justice, *Modernisering penitentiaire arbeid, Samenplaatsing (levens)langgestraften*, MINISTRY OF SECURITY AND JUSTICE 4 (April 16, 2012) available at <https://www.rijksoverheid.nl/documenten/kamerstukken/2012/04/17/modernisering-penitentiaire-arbeid-samenplaatsing-levens-langgestraften>; State Secretary of Security and Justice, *Gratieprocedure en tenuitvoerlegging levenslange gevangenisstraf*, MINISTRY OF SECURITY AND JUSTICE 2 (Oct. 16, 2009) available

temporary leave in light of rehabilitation activities for prisoners sentenced to life has recently been addressed in the case of a prisoner convicted of multiple murders and imprisoned since 1987. In June 2014, the State Secretary of Security and Justice rejected this prisoner's fifth request for a pardon and, in September 2014, rejected his request for temporary leave.¹³¹ The prisoner appealed the rejection of his request for temporary leave before the Council for the Administration of Criminal Justice and Protection of Juveniles (*Raad voor Strafrechtstoepassing en Jeugdbescherming* or the Council). This Council is an independent body that gives advice in the form of recommendations and functions as a court of appeal for decisions regarding persons serving prison or custodial sentences. The Council's judgments are binding and not subject to appeal.

In the present appeal, the Council held that the goal of preparing a prisoner for reintegration into society plays a significant role in the execution of a prison sentence.¹³² The Royal Pardon procedure reflects the need for prisoners sentenced to life to have a prospect of release and therefore to prepare for reintegration into society.¹³³ One important element to fully prepare a prisoner for reintegration is the possibility for the prisoner to temporarily leave the detention institution.¹³⁴ The Council held that temporary leave is an important and necessary element that in principle has to be part of reintegration.¹³⁵ According to the Council, leave in light of reintegration activities required for a pardon request can fulfil the requirements for occasional parole.¹³⁶ This will eventually contribute to the reintegration of the prisoner in a responsible manner.¹³⁷

Possibility of Parole

Parole is possible for sentences of imprisonment that exceed a period of one year. In the Netherlands, when a prisoner has served two thirds of their

in Dutch at <https://www.rjks-overheid.nl/documenten/kamerstukken/2009/10/16/5614834-gratieprocedure-entenuitvoerlegging-levenslange-gevangenisstraf>.

¹³¹ Raad van Strafrechtstoepassing en Jeugdbescherming (May 19, 2015) 14/3242/GV *available in Dutch at* <http://rsj.nl/actueel/nieuwsberichten/verloflevenslanggestrafte.aspx?cp=60&cs=15850>.

¹³² Raad van Strafrechtstoepassing en Jeugdbescherming (May 19, 2015) 14/3242/GV para. 4.3 *available in Dutch at* <http://rsj.nl/actueel/nieuwsberichten/verloflevenslanggestrafte.aspx?cp=60&cs=15850>.

¹³³ Raad van Strafrechtstoepassing en Jeugdbescherming (May 19, 2015) 14/3242/GV para. 4.3 *available in Dutch at* <http://rsj.nl/actueel/nieuwsberichten/verloflevenslanggestrafte.aspx?cp=60&cs=15850>.

¹³⁴ Raad van Strafrechtstoepassing en Jeugdbescherming (May 19, 2015) 14/3242/GV para. 4.3 *available in Dutch at* <http://rsj.nl/actueel/nieuwsberichten/verloflevenslanggestrafte.aspx?cp=60&cs=15850>.

¹³⁵ Raad van Strafrechtstoepassing en Jeugdbescherming (May 19, 2015) 14/3242/GV para. 4.3 *available in Dutch at* <http://rsj.nl/actueel/nieuwsberichten/verloflevenslanggestrafte.aspx?cp=60&cs=15850>.

¹³⁶ Raad van Strafrechtstoepassing en Jeugdbescherming (May 19, 2015) 14/3242/GV para. 4.3 *available in Dutch at* <http://rsj.nl/actueel/nieuwsberichten/verloflevenslanggestrafte.aspx?cp=60&cs=15850>.

¹³⁷ Raad van Strafrechtstoepassing en Jeugdbescherming (May 19, 2015) 14/3242/GV para. 4.5 *available in Dutch at* <http://rsj.nl/actueel/nieuwsberichten/verloflevenslanggestrafte.aspx?cp=60&cs=15850>.

sentence, she or he may be released under certain conditions. A general condition for the early release of any prisoner is that she or he does not commit a crime during parole.¹³⁸ Special conditions can also be imposed, such as the prohibition of alcohol or drug use.¹³⁹ Additionally, if the violation of one of the special conditions occurs, parole may be revoked. However, in the instance of a life sentence, there is no option for early release under certain conditions or parole.¹⁴⁰ If sentenced to life imprisonment, the only possibility for release is in the exceptional case of a Royal Pardon.¹⁴¹ During a general meeting of the Parliament in 2010, the State Secretary of Security and Justice admitted that the Netherlands has a unique position among its fellow European states in the lack of a periodical review system in place for detainees serving a life sentence or a parole possibility applicable to them.¹⁴²

Royal Pardon Procedure

Article 122 of the Constitution and Article 2 Pardons Act (*Gratiewet*) lay out the Royal Pardon procedure in the Netherlands.¹⁴³ A pardon is possible for prison sentences, but also for a speeding ticket or other (minor) offences. The pardon decision is formally made by a Royal Decree (*Koninklijk Besluit*), involving consultation with the Ministry of Security and Justice and advice from a court. Article 2 of the Pardons Act sets out when a pardon may be granted, outlined below:

1. If there are circumstances that would have led to a lower or no sentence if they were known at the time of the judgment; or
2. If pursuing the life sentence would no longer serve the purpose of the sentence.¹⁴⁴

¹³⁸ Ministry of Security and Justice, *Wet voorwaardelijke invrijheidsstelling*, MINISTRY OF SECURITY AND JUSTICE, 1 (July 2008) available in Dutch at

<https://www.rijksoverheid.nl/documenten/brochures/2010/09/30/wet-voorwaardelijke-invrijheidstelling>.

¹³⁹ Ministry of Security and Justice, *Wet voorwaardelijke invrijheidsstelling*, MINISTRY OF SECURITY AND JUSTICE, 1 (July 2008) available in Dutch at

<https://www.rijksoverheid.nl/documenten/brochures/2010/09/30/wet-voorwaardelijke-invrijheidstelling>.

¹⁴⁰ Willem-Jan van der Wolf and René van der Wolf, *THE DUTCH CRIMINAL JUSTICE SYSTEM* 112 (2008).

¹⁴¹ Willem-Jan van der Wolf and René van der Wolf, *THE DUTCH CRIMINAL JUSTICE SYSTEM* 112 (2008).

¹⁴² Permanent Commission for Justice, *Report of a General Consultation*, House of Representatives, 32 (Mar. 1, 2010) available in Dutch at <https://zoek.officielebekendmakingen.nl/kst-24587-377>.

¹⁴³ The Netherlands Const. art. 122 (1815) available at

<https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008>; *Pardons Act* art. 2 (the Netherlands, 1987) available in Dutch at

<http://wetten.overheid.nl/BWBR0004257/2015-01-01>.

¹⁴⁴ *Pardons Act* art. 2 (The Netherlands, 1987) available in Dutch at

<http://wetten.overheid.nl/BWBR0004257/2015-01-01>.

A prisoner is able to initiate the pardon procedure if one of these conditions applies to their case. In principle, there is no limit to the number of pardon requests that a prisoner may file, however she or he cannot file the same request more than once. If the first request has been rejected, the next one must be based on different grounds or changed circumstances.¹⁴⁵ Therefore, the Pardons Act can be regarded as offering a *de jure* possibility for a pardon to life imprisonment.

However, in light of the ECtHR's case law set out above, the pardon must also be a *de facto* possibility. In 2009, Queen Beatrix granted the most recent pardon,¹⁴⁶ increasing the total number of pardons for prisoners serving life sentences to three since 1970.¹⁴⁷ The effectiveness of the pardon procedure has been the subject of dispute. In 2014, former State Secretary Frederik Teeven of the Ministry of Security and Justice informed the House of Representatives (*Tweede Kamer*) that between 2004 and 2014, at least 14 offenders sentenced to life imprisonment filed requests for pardon, of which one was accepted and three were at that time still under review.¹⁴⁸ No new pardons have been granted since 2014. As such, in the last 46 years, there have only been three pardons for prisoners serving life sentences in the Netherlands.

Life Sentencing and Challenges before Dutch Courts

In 2009, the Dutch Supreme Court faced the question of whether life imprisonment is a violation of Article 3 European Convention on Human Rights (ECHR). The claimant in the case argued that there is no *de facto* possibility for early release, as a pardon is never granted and no periodical review is available. The Supreme Court first held that sentencing a person to life imprisonment as such is not a violation of the ECHR.¹⁴⁹ With regard to the claim that there is no *de facto* possibility of early release, in the Netherlands, the Supreme Court held that it is not its task to investigate factual statements that a life sentence is never shortened in practice. The Court further ruled that it is not its task to decide whether there should be a legislated possibility for review of

¹⁴⁵ Ministry of Security and Justice, *Gratie. Veelgestelde Vragen*. JUSTIS available in Dutch at <https://www.justis.nl/producten/gratie/veelgestelde-vragen/>.

¹⁴⁶ NRC, *Na 23 jaar weer gratie voor een moordenaar*, NRC, July 7, 2009, available in Dutch at http://vorige.nrc.nl/binnenland/article2293404.ece/Na_23_jaar_weer_gratie_voor_een_moordenaar.

¹⁴⁷ Thomas Rueb, *Deze 33 mensen kregen levenslang*, NRC, (Nov. 26, 2015), available in Dutch at <http://www.nrc.nl/next/2015/11/26/33-keer-levenslang-is-dat-humaan-1559780>.

¹⁴⁸ State Secretary of Security and Justice, *Beantwoording Kamervragen over de tenuitvoerlegging van de levenslange gevangenisstraf*, MINISTRY OF SECURITY AND JUSTICE (March 14, 2014) available in Dutch at <https://www.rijksoverheid.nl/documenten/kamersstukken/2014/03/05/antwoorden-kamervragen-over-de-tenuitvoerlegging-van-de-levenslange-gevangenisstraf>.

¹⁴⁹ Hoge Raad (June 16, 2009) ECLI:NL:HR:2009:BF3741 2.8 available in Dutch at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2009:BF3741>.

life sentences, which is up to the legislature.¹⁵⁰ The Supreme Court did hold that if in practice a life sentence is never shortened, that would be relevant to assessing the question of whether a life sentence under the Dutch criminal system is in line with Article 3 ECHR.¹⁵¹

The abovementioned claimant, who appealed his rejected request for temporary leave before the Council, also brought an injunction (*Kort Geding*) against the Dutch state before the District Court of The Hague. The claimant primarily argued that the state had to immediately discontinue the enforcement of his life sentence as it constituted a breach of Article 3 ECHR.¹⁵² Also, according to the claimant, the rejection of his pardon request was unjust as it was taken without prior advice of the competent court, as required by Article 4 Pardons Act.¹⁵³ The District Court set aside the question of whether the rejection of the pardon request was unjust because the appellant would gain no benefit if the Court addressed that question.¹⁵⁴ Even if the rejection of the pardon request were unjust, that decision would not lead to the release of the prisoner. However, the Court did hold that the assessment of a pardon request has to correspond with both the Dutch Pardons Act and the jurisprudence of the ECHR.¹⁵⁵ One element from the ECHR jurisprudence is that of reintegration in society, meaning that the State Secretary may need to offer activities to promote reintegration of the prisoner, as the extent to which a prisoner is rehabilitated is a relevant factor in assessing pardon requests.¹⁵⁶

Most recently, on 24 November 2015, a District Court dealt with a case where the prosecutor requested a life sentence for an accused facing charges for the robbery and murder of an elderly couple.¹⁵⁷ However, the judge denied that request, finding that a life sentence would be at odds with Article 3 ECHR.¹⁵⁸ This finding was because, as the practice in the Netherlands showed, there is no

¹⁵⁰ Hoge Raad (Jun. 16, 2009) ECLI:NL:HR:2009:BF3741 2.9 *available in Dutch at* <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2009:BF3741>.

¹⁵¹ Hoge Raad (June 16, 2009) ECLI:NL:HR:2009:BF3741 2.12 *available in Dutch at* <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2009:BF3741>.

¹⁵² Rechtbank Den Haag (Sep. 18, 2014) ECLI:RBDHA:2014:11541 2.1 *available in Dutch at* <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:11541>.

¹⁵³ *Pardons Act* art. 4 (The Netherlands, 1987) *available in Dutch at* <http://wetten.overheid.nl/BWBR0004257/2015-01-01>.

¹⁵⁴ Rechtbank Den Haag (Sep. 18, 2014) ECLI:RBDHA:2014:11541 para. 3.2 *available in Dutch at* <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:11541>.

¹⁵⁵ Rechtbank Den Haag (Sep. 18, 2014) ECLI:RBDHA:2014:11541 para. 3.4 *available in Dutch at* <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:11541>.

¹⁵⁶ Rechtbank Den Haag (Sep. 18, 2014) ECLI:RBDHA:2014:11541 para. 3.7 - 3.10 *available in Dutch at* <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:11541>.

¹⁵⁷ Rechtbank Noord-Nederland, (Nov. 24, 2015) ECLI:NL:RBNNE:2015:5389 *available in Dutch at* <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBNNE:2015:5389>.

¹⁵⁸ Rechtbank Noord-Nederland, (Nov. 24, 2015) ECLI:NL:RBNNE:2015:5389 *available in Dutch at* <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBNNE:2015:5389>.

de facto prospect for early release.¹⁵⁹ The District Court judge referred to the only time a pardon was granted after the pardon of 1986, which was in 2009. In that case the prisoner received a pardon on compassionate grounds due to his terminal illness. According to the Court, such a reason for a pardon does not fall within the meaning of “prospect of release” as required by the ECtHR.¹⁶⁰ Based on the fact that besides this compassionate pardon in 2009, since 1970 only one pardon had been granted in 1986, the Court concluded that there is no *de facto* “prospect of release” for prisoners serving a life sentence in the Netherlands, and refrained from imposing a life sentence on the accused.¹⁶¹

Recent Legal and Political Developments regarding Life Sentences

The legal system regarding life sentences in the Netherlands has seen several amendments in recent decades. While changes have been discussed and some passed into law, there continue to be political debates regarding the administration of life sentences. This section briefly sets out the recent changes to the law and contemporary political developments regarding the practice of life sentencing in the Netherlands.¹⁶²

Until 2000, there was a monitoring procedure in place for prisoners serving a particularly long sentence (*Volgprocedure Langgestrafte*). This procedure applied to persons serving a sentence longer than six years, including those sentenced to life imprisonment. This procedure provided for the review of sentences when a prisoner had served one third of their sentence.¹⁶³ Under this procedure, a life sentence would be reviewed for its continuing effectiveness and whether it was still pursuing the intended goal. The monitoring procedure could lead to the transformation of a life sentence into a temporary sentence with a possibility for (conditional) early release.¹⁶⁴ In the monitoring procedure, a specific institution (*Penitentiair Selectie Centrum*)

¹⁵⁹ Rechtbank Noord-Nederland, (Nov. 24, 2015) ECLI:NL:RBNNE:2015:5389 available in Dutch at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBNNE:2015:5389>.

¹⁶⁰ Rechtbank Noord-Nederland, (Nov. 24, 2015) ECLI:NL:RBNNE:2015:5389 available in Dutch at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBNNE:2015:5389>.

¹⁶¹ Rechtbank Noord-Nederland, (Nov. 24, 2015) ECLI:NL:RBNNE:2015:5389 available in Dutch at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBNNE:2015:5389>.

¹⁶² For more detail see PILPG-NL's separate memorandum entitled “Analysis of the Dutch Government’s Proposal to Reform Life Sentences in the Netherlands” dated May 2016.

¹⁶³ State Secretary Security and Justice, *Gratieprocedure en tenuitvoerlegging levenslange gevangenisstraf*, MINISTRY OF SECURITY AND JUSTICE 3 (Oct. 16, 2009) available in Dutch at <https://www.rijksoverheid.nl/documenten/kamerstukken/2009/10/16/5614834-gratieprocedure-en-tenuitvoerlegging-levenslange-gevangenisstraf>.

¹⁶⁴ State Secretary Security and Justice, *Gratieprocedure en tenuitvoerlegging levenslange gevangenisstraf*, MINISTRY OF SECURITY AND JUSTICE 3 (Oct. 16, 2009) available in Dutch at <https://www.rijksoverheid.nl/documenten/kamerstukken/2009/10/16/5614834-gratieprocedure-en-tenuitvoerlegging-levenslange-gevangenisstraf>.

would admit every prisoner who had served one third of their sentence in order to assess possible reintegration.¹⁶⁵ The legislature later changed this into a written test procedure due to an increase of prisoners serving long sentences.¹⁶⁶ In 2000, the legislature decided to withdraw the entire procedure, revoking the possibility of periodic review of a life sentence.¹⁶⁷

In 2009, the Minister and State Secretary of Security and Justice informed the House of Representatives of their intention to reintroduce a monitoring procedure whereby life sentences would be reviewed every five years.¹⁶⁸ At the core of this proposal was the idea that serving a life sentence has consequences for the physical and psychological health of a prisoner.¹⁶⁹ In 2012, the State Secretary expressed a different view, saying that the purpose of a life sentence is that it lasts for a lifetime. The State Secretary specified several initiatives to create more appropriate conditions for prisoners sentenced to life, such as placing them together with prisoners serving a long sentence and separate from prisoners serving a short sentence, but did not express the intention to reintroduce the review procedure.¹⁷⁰

In 2015, after the case in November where the judge refrained from imposing a life sentence on the accused discussed above, Mr Jeroen Recourt, member of the House of Representatives, filed a motion in which he requested that the House prepare a bill allowing for a periodic and independent review of

¹⁶⁵ State Secretary Security and Justice, *Gratieprocedure en tenuitvoerlegging levenslange gevangenisstraf*, MINISTRY OF SECURITY AND JUSTICE 3 (Oct. 16, 2009) available in Dutch at <https://www.rijksoverheid.nl/documenten/kamerstukken/2009/10/16/5614834-gratieprocedure-en-tenuitvoerlegging-levenslange-gevangenisstraf>.

¹⁶⁶ State Secretary Security and Justice, *Gratieprocedure en tenuitvoerlegging levenslange gevangenisstraf*, MINISTRY OF SECURITY AND JUSTICE 3 (Oct. 16, 2009) available in Dutch at <https://www.rijksoverheid.nl/documenten/kamerstukken/2009/10/16/5614834-gratieprocedure-en-tenuitvoerlegging-levenslange-gevangenisstraf>.

¹⁶⁷ State Secretary Security and Justice, *Gratieprocedure en tenuitvoerlegging levenslange gevangenisstraf*, MINISTRY OF SECURITY AND JUSTICE 3 (Oct. 16, 2009) available in Dutch at <https://www.rijksoverheid.nl/documenten/kamerstukken/2009/10/16/5614834-gratieprocedure-en-tenuitvoerlegging-levenslange-gevangenisstraf>.

¹⁶⁸ State Secretary Security and Justice, *Gratieprocedure en tenuitvoerlegging levenslange gevangenisstraf*, MINISTRY OF SECURITY AND JUSTICE 3 (Oct. 16, 2009) available in Dutch at <https://www.rijksoverheid.nl/documenten/kamerstukken/2009/10/16/5614834-gratieprocedure-en-tenuitvoerlegging-levenslange-gevangenisstraf>.

¹⁶⁹ State Secretary Security and Justice, *Gratieprocedure en tenuitvoerlegging levenslange gevangenisstraf*, MINISTRY OF SECURITY AND JUSTICE 3 (Oct. 16, 2009) available in Dutch at <https://www.rijksoverheid.nl/documenten/kamerstukken/2009/10/16/5614834-gratieprocedure-en-tenuitvoerlegging-levenslange-gevangenisstraf>.

¹⁷⁰ State Secretary of Security and Justice, *Modernisering penitentiaire arbeid, Samenplaatsing (levens)langgestraften*, MINISTRY OF SECURITY AND JUSTICE, 4-6 (Apr. 16, 2012) available in Dutch at <https://www.rijksoverheid.nl/documenten/kamerstukken/2012/04/17/modernisering-penitentiaire-arbeid-samenplaatsing-levens-langgestraften>.

every life sentence.¹⁷¹ The motion argued that life sentences in the Netherlands connoted no real prospect of release, since there is no parole available to those sentenced to life and a pardon is *de facto* never given. This lack of “prospect of release” renders life imprisonment in the Netherlands incompatible with Article 3 ECHR.¹⁷² Due to a lack of support in the House of Representatives, Mr Recourt withdrew the proposal.¹⁷³

The foundation *Forum Levenslang* sent a letter on 16 February 2016 to the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT) to draw attention to life sentences in the Netherlands.¹⁷⁴ In this letter, the foundation argued that the detention conditions of those serving a life sentence in the Netherlands violate Article 3 ECHR.¹⁷⁵ The letter addressed the lack of a release prospect, the abolition of the monitoring procedure, and the lack of reintegration programs.¹⁷⁶ The letter asked the Committee to investigate the pardon policy and circumstances surrounding serving a life sentence in the Netherlands. At the time of writing, the CPT has not reacted to this letter. The Netherlands, however, is among the 10 states the CPT will visit in 2016.¹⁷⁷ The CPT will assess the conditions of detention of those deprived of their liberty and draft a confidential report with conclusions and recommendations.¹⁷⁸

¹⁷¹ J. Recourt et al, *Motie van het Lid Recourt C.S.*, MINISTRY OF SECURITY AND JUSTICE (Nov. 26, 2015) available in Dutch at <https://zoek.officielebekendmakingen.nl/dossier/34251/kst-34300-VI-39.html>.

¹⁷² J. Recourt et al, *Motie van het Lid Recourt C.S.*, MINISTRY OF SECURITY AND JUSTICE (Nov. 26, 2015) available in Dutch at <https://zoek.officielebekendmakingen.nl/dossier/34251/kst-34300-VI-39.html>.

¹⁷³ Nicole Besselink, *Tussentijdse toets bij levenslang verdwijnt in de la*, TROUW, Dec. 2, 2015 available at <http://www.trouw.nl/tr/nl/4500/Politiek/article/detail/4199881/2015/12/02/Tussentijdse-toets-bij-levenslang-verdwijnt-in-de-la.dhtml>.

¹⁷⁴ W.F. van Hattum, *Letter to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, STICHTING FORUM LEVENSLANG (Feb. 16, 2016) available at <http://www.forumlevenslang.nl/nieuws/forum-levenslang-verzoekt-het-cpt-eeen-onderzoek-in-te-stellen-naar-de-detentieomstandigheden-van-levenslanggestraften/>.

¹⁷⁵ W.F. van Hattum, *Letter to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, STICHTING FORUM LEVENSLANG 3 (Feb. 16, 2016) available at <http://www.forumlevenslang.nl/nieuws/forum-levenslang-verzoekt-het-cpt-eeen-onderzoek-in-te-stellen-naar-de-detentieomstandigheden-van-levenslanggestraften/>.

¹⁷⁶ W.F. van Hattum, *Letter to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, STICHTING FORUM LEVENSLANG 2-3 (Feb. 16, 2016) available at <http://www.forumlevenslang.nl/nieuws/forum-levenslang-verzoekt-het-cpt-eeen-onderzoek-in-te-stellen-naar-de-detentieomstandigheden-van-levenslanggestraften/>.

¹⁷⁷ European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment, *Council of Europe anti-torture Committee announces visits to ten states in 2016*, EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMANE OR DEGRADING TREATMENT OR PUNISHMENT (Mar. 30, 2015) available at <http://www.cpt.coe.int/en/visits/2015-03-30-eng.htm>.

¹⁷⁸ European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment, *Council of Europe anti-torture Committee announces visits to ten states in 2016*, EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMANE OR DEGRADING TREATMENT OR PUNISHMENT (Mar. 30, 2015) available at <http://www.cpt.coe.int/en/visits/2015-03-30-eng.htm>.

Recently, the Dutch Parliament has expressed its intention to change the administration of life sentences. The State Secretary of Security and Justice, Mr Klaas Dijkhoff, expressed the desire to introduce review procedures to assess the eligibility of the prisoners serving a life sentence for early release.¹⁷⁹ The People's Party for Freedom and Democracy (*Volkspartij voor Vrijheid en Democratie*) (VVD), one of the political parties that governs in coalition with the Labor Party (*Partij van de Arbeid*) (PvdA), is in favor of the change because of the view that the current system hinders judges from imposing life sentences. The PvdA believes the current system needs reform based on humanitarian grounds. Therefore, there appears to be consensus that the system in its current form is no longer tenable.¹⁸⁰ The current reform proposal is to introduce review after the prisoner is approximately 25 years into the sentence.¹⁸¹ While it is not yet clear what this proposal will look like in detail, it does seem that a majority in the Parliament would be willing to introduce reforms.

Life Imprisonment in the Netherlands: Conclusions

Both international and European human rights law permit the Netherlands to impose life sentences on convicted criminals. As the death penalty is not permitted in the Netherlands, this is the most severe form of punishment available. This section of the memorandum explored when a Dutch court may hand down a life sentence, the options for early release and rehabilitation of prisoners, and recent political developments regarding life sentencing law reform. It found that prisoners serving a life sentence in the Netherlands are not eligible for temporary or general leave, for early release under certain conditions, or parole. As there is no periodic review of life sentences, the only option for early release is via a Royal Pardon. In the last 46 years, there have only been three such pardons for prisoners serving life sentences. As such, only in the exceptional case of a pardon would a prisoner sentenced to life have the opportunity to reintegrate into society. As it is not anticipated that a prisoner serving a life sentence will return to society, they are excluded from participating in reintegration activities.

¹⁷⁹ Dion Mebius and Vincent Sondermeijer, *Dijkhoff komt met plan om levenslang gestraften perspectief te bieden*, DE VOLKSKRANT, (Apr. 1, 2016), available at <http://www.volkskrant.nl/binnenland/dijkhoff-komt-met-plan-om-levenslang-gestraften-perspectief-te-bieden~a4273839/>.

¹⁸⁰ Liza van Lonkhuyzen and Pim van den Dool, *VVD en PvdA eens over toetsmoment bij levenslang*, NRC, Apr. 1, 2016, available at <http://www.nrc.nl/nieuws/2016/04/01/vvd-en-pvda-willen-zicht-op-vrijheid-bij-levenslang>.

¹⁸¹ Liza van Lonkhuyzen and Pim van den Dool, *VVD en PvdA eens over toetsmoment bij levenslang*, NRC, Apr. 1, 2016, available at <http://www.nrc.nl/nieuws/2016/04/01/vvd-en-pvda-willen-zicht-op-vrijheid-bij-levenslang>.

This system of life imprisonment in the Netherlands has been criticized and challenged before Dutch courts and the ECtHR. On the basis of the ECtHR's jurisprudence, issues exist regarding the form of review of life sentences (the Royal Pardon) and also the lack of rehabilitation for prisoners sentenced to life in the Netherlands. While the ECtHR has not held that pardon systems are *per se* incompatible, they have indicated a preference for judicial systems of review with clear, set criteria for release. However, the case law is not definitive, and it is also open to the ECtHR to conclude that the pardon process, while involving political decision-makers, also involves advice from the courts, and provides a rare, but nonetheless, possible prospect of release. In addition, the lack of rehabilitation appears to be incompatible with international and European law, which stress this as a key aspect of imprisonment. The fact that the Dutch system does not comply with the ECHR has been upheld in the recent Grand Chamber case of *Murray*. While this case turned on specific facts, it established that prisoners must realistically be able to make progress towards rehabilitation.

There has also been debate in Dutch Parliament regarding reforming the administration of life sentences. It appears that there is a growing consensus around the need to reform the system in order to ensure compatibility with the Netherlands' obligations under the ECHR. As yet, it remains unclear which precise aspects would be reformed. In the interim, legitimate questions remain regarding the legality of the Dutch system of life imprisonment that denies prisoners rehabilitation activities and therefore a realistic prospect of release.

Conclusion

Despite life imprisonment being a common punishment around the world, the various jurisdictions employ different standards and limitations on the sentence. This memorandum presented comparative analysis of the legal requirements for the criminal punishment of life imprisonment under international, European, and national law. The focus was on the relevant jurisprudence of the ECtHR, and the Dutch national criminal justice system. As a party to the ICCPR and the ECHR, those standards apply to the Netherlands. Specifically, the memorandum set out and evaluated the legal requirements applicable to the practice of life imprisonment in the Netherlands, and the compatibility of the Dutch system.

Under the international and European frameworks, a life sentence in itself does not violate the prohibition of torture, inhuman, and degrading treatment. However, as demonstrated, international human rights law has set limitations on the practice including in relation to periodic review and rehabilitation. Similarly, while life imprisonment is not *prima facie* contrary to European

human rights law, the ECtHR has imposed limitations on its use and application. The limitations relate to the treatment of prisoners who have been imprisoned for life as well as the periodic review of their sentences. At both the international and European level, the general trend is towards penitentiary systems aiming to rehabilitate prisoners, rather than being simply punitive. As such, prisoners serving a life sentence must have a realistic prospect of release and the ability to work towards reintegration with society. If the national systems subject to international and European law do not meet these standards regarding life imprisonment, despite their discretion regarding the specific implementation, they may be in violation of the ICCPR and/or ECHR.

The Netherlands is a party to both the ICCPR and the ECHR. Applying this legal framework to the Netherlands, it appears that its system of life imprisonment may not be compliant. This is because there is no system of periodic review of life sentences, and the only prospect of release for those serving a life sentence is by Royal Pardon. This memorandum has illustrated that although this is a *de jure* possibility for release, in practice it is hardly ever granted, which potentially renders it *de facto* ineffective. This is further compounded by the fact that prisoners serving life sentences in the Netherlands do not participate in rehabilitation activities, as it is not anticipated that they will return to society. Their limited chances of early release are therefore even further reduced by not being prepared for reintegration in society via rehabilitation activities. As the human rights jurisprudence in this memorandum demonstrates, the dignity of a prisoner serving a life sentence requires that they are able to retain some hope of rehabilitation and release. On this basis, and given the ECtHR's recent decision in *Murray*, it appears that the administration of life sentencing in the Netherlands may not meet the requirements set out under international and European human rights law.

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- **Peace Negotiations**
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